

**BEFORE THE
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580**

In the Matter of)	
)	
Telemarketing Rulemaking - Comment)	FTC File No. 411001
)	
Proposed Privacy Act System, Do-Not-Call Registry – FTC)	FTC File No. 411011
)	
)	

**COMMENTS OF THE
NEWSPAPER ASSOCIATION OF AMERICA**

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April 15, 2002

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I. INTRODUCTION

The Newspaper Association of America (“NAA”) hereby submits its comments in response to the Federal Trade Commission’s (“Commission” or “FTC”) *Notice of Proposed Rulemaking* (“NPRM”)¹ and *Notice of Proposed New Privacy Act System of Records*.² NAA is a non-profit organization representing more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily U.S. newspapers.

The Commission’s proposed changes to the *Telemarketing Sales Rule* (“TSR”)³ will directly affect NAA’s member newspapers that engage in interstate telemarketing, which include newspapers of all sizes that are located near state borders, newspapers that utilize out-of-state, third-party telemarketing services, and newspapers with broad regional or national circulation.

We support the FTC’s re-examination of the TSR in light of current marketing practices and technological developments. Most telemarketers work hard at insuring compliance with state and federal laws and regulations. We offer these comments to help the Commission

¹ Telemarketing Sales Rule; Proposed Rule, 67 Fed. Reg. 4492 (January 30, 2002).

² Proposed New Privacy Act System of Records to Facilitate Compliance with the Do -Not-Call Provisions of the Commission’s Telemarketing Sales Rule, available at www.ftc.gov/os/2002/03/frnprivacyactdonot.htm (last visited 3/21/02).

³ 16 C.F.R. § 310.1 *et seq.*

develop effective rules that will not unnecessarily interfere with good marketing practices. Most importantly, we believe the Commission should exempt newspapers from the proposed rule that would bar companies under the FTC's jurisdiction from telemarketing to persons registered on a national "Do-Not-Call" ("DNC") list. For sixty years, newspapers have used telemarketing fairly and in compliance with the law. History shows that newspapers are highly unlikely to engage in the "coercive or abusive" invasions of consumers' privacy that the Commission's DNC list is intended to curb.⁴ Consequently, the proposed DNC rule as applied to newspapers is overbroad and would produce unfair outcomes, severely impacting well-established – and demonstrably inoffensive – newspaper marketing practices in an errant effort to stamp out unsavory practices committed by others.

If, nonetheless, the DNC rule were to be applied to newspapers, the Commission must allow telemarketing to consumers with whom a company has an existing business relationship. Indeed, by not doing so, the agency will create significant conflicts with rules already promulgated by the Federal Communications Commission ("FCC"). In addition, the FTC must collect sufficient information from DNC list registrants to ensure the accuracy that would enable marketing to willing consumers.

Moreover, the FTC's interpretation of the TSR as applied to predictive dialers is overbroad and creates a compliance standard that cannot be practically achieved. If the agency restricts the use of predictive dialers, it must interpret the TSR only to prohibit practices that are clearly abusive.

While NAA has chosen to focus on the foregoing issues, it also has concerns whether the national DNC proposal would infringe on constitutionally protected commercial free speech, and whether the Commission has the statutory authority to establish a national DNC list.⁵ NAA believes that the FTC's authority is limited to addressing "abusive" and "deceptive" telemarketing.⁶

⁴ Telemarketing Sales Rule; Proposed Rule, 67 Fed. Reg. at 4518.

⁵ For example, in previous comments to the Commission, NAA stated that a national DNC would run counter to the intent of the *Telemarketing Fraud & Abuse Act* and the *Telephone Consumer Protection Act* because it would not combat the fraud and deceptive telemarketing practices that these statutes were designed to curb. See Comments of the Newspaper Association of America, *In the Matter of Telemarketing Review – Comment*, FTC File No. P994414 (May 30, 2000).

⁶ See the *Telemarketing Consumer Fraud and Abuse Prevention Act*, 15 U.S.C. § 6102 (a)(1).

II. THE COMMISSION SHOULD EXEMPT NEWSPAPERS FROM PROPOSED NATIONAL “DO NOT CALL” OBLIGATIONS.

A. Newspapers provide unique services and use telemarketing in a responsible manner.

Newspapers are deeply-rooted corporate citizens in the communities in which they publish and circulate, and have compelling business incentives not to offend current or prospective customers – facts distinguishing them from telemarketers whose abuses trigger FTC oversight.

The vast majority of newspapers are local businesses that market to the community where they have a physical presence. Even national newspapers like *The Wall Street Journal* and *The New York Times* have a base of subscribers in the local area of their publication and provide news coverage and services specific to their resident communities. These close ties between a newspaper and the local community provide a strong check on telemarketing practices. Clearly, a newspaper bearing a community’s name and reporting its news must follow responsible marketing practices, or risk displeasing subscribers or prospective subscribers. Newspapers must respect local consumers. Indeed, newspapers’ most important asset is their reputation for integrity and civic responsibility. These market forces and industry culture distinguish newspapers from those telemarketers that do not invest in forming long-term relationships with consumers.

Newspapers are good corporate citizens in their use of telemarketing, in contrast with other telemarketing companies whose practices the Commission’s DNC proposal aims to restrict. Newspaper subscription sales provide the consumer with great value on a product – news and information – for which there is almost universal demand. Moreover, consumers purchasing a newspaper subscription in response to a marketing call receive substantial savings over buying a daily paper at a newsstand. In the sale of newspapers, there are no “small print” contracts, long-term commitments or hidden costs. Further, newspapers honor consumer requests to cancel subscriptions.

Moreover, newspapers, unlike many other telemarketers, provide valuable public benefits. Newspapers serve communities by providing local news coverage; often, a newspaper is the only media outlet that covers city council and school board meetings, community sporting events, obituaries, birth announcements, and so on. And more than any other medium,

newspapers facilitate local political discourse by publishing news, legal notices, editorials on local, regional and national issues and many other types of information of keen interest to their communities. Further, many newspapers are recognized by local and state governments as the official journal of record in which public notices are published.

Indeed, the general experience in the newspaper industry is that recipients of newspaper telemarketing are generally not offended by, and often appreciate the calls. For example, people who have recently moved into a community often appreciate the convenient opportunity to subscribe to a local newspaper through a telemarketing call from that newspaper. Others welcome the calls as reminders to renew a subscription.

Of course, newspapers respect customer requests to opt-out from telemarketing through placement on a newspaper's internal "do-not-call" list, as required by the FCC's telemarketing DNC rule.⁷ But, in fact, one newspaper group reports that only approximately one percent of individuals who receive a telemarketing call opt-out from further telemarketing.⁸ A firm specializing in providing telemarketing services to newspapers reports that from January to March 2002, only 1.4 percent of consumers contacted requested placement on newspapers' internal DNC lists.⁹ Also, *The Washington Post* reports that only 0.57 percent of non-subscribers contacted by their telemarketing campaigns request to be placed on the company's internal DNC list. Notably, almost none of *The Washington Post*'s current subscribers also appear on its DNC list.¹⁰

B. Newspapers rely on responsible telemarketing in order to maintain subscribership.

For over sixty years, newspapers have relied on responsible telemarketing. Today, marketing subscriptions by phone has become more crucial than ever to newspapers' fiscal

⁷ See 47 C.F.R. § 64.1200; 47 U.S.C. § 227.

⁸ Based on an informal survey of a significant percentage of Advance Publications newspapers, which indicated that about one percent of consumers contacted by telemarketers requested to be placed on the newspaper's internal DNC list.

⁹ Based on a random selection of ten newspaper telemarketing campaigns executed by Circulation Services between January and March 2002. Of the 1,871,246 consumers contacted by Circulation Services in these campaigns, 26,848 (1.4 percent) made requests to be placed on the relevant newspapers' internal DNC list.

¹⁰ Based on information provided by *The Washington Post* in March 2002 for January-December 2001.

health. Newspapers face an ever-increasing “churn” rate¹¹ in their subscribership while customer-initiated subscription starts have declined. The typical newspaper must sell 60 percent of its total circulation each year to maintain its current circulation level.¹² At the same time, the rate of customer-initiated subscription starts has declined from roughly 30 percent in 1996-98 to less than 25 percent of all new starts in 2000.¹³ These market conditions require newspapers affirmatively to reach out to the community and sell more subscriptions than ever before in order to maintain, much less increase, subscriber levels.

Telemarketing is the most efficient means of acquiring new subscribers, for all sizes of newspapers.¹⁴ In 2000, 57.8 percent of new subscriptions due to marketing came from telemarketing – by far the single largest source of new subscribers.¹⁵ Telemarketing also is crucial in order to renew subscriptions. Over 88 percent of all NAA members engage in telemarketing. Of newspapers with circulation over 25,000, nearly all engage in marketing by phone; the rate of telemarketing use in newspapers with circulation less than 25,000 is over 80 percent.¹⁶

C. Newspapers should be exempt from proposed national “Do Not Call” obligations.

In promulgating a final rule, the Commission should exempt telemarketing by a newspaper to a person who has registered on the national DNC list maintained by the Commission, even if the newspaper has not received the express, verifiable authorization of the person to place such a call.¹⁷

¹¹ The “churn” rate is defined as a newspaper’s total subscription sales during a period of time divided by its home delivery circulation during that period.

¹² Newspaper Association of America, *2001 Circulation Facts, Figures & Logic* 109 (2001).

¹³ *Id.* at 43.

¹⁴ *Id.* at 47.

¹⁵ *Id.* at 10, 44.

¹⁶ *Id.* at 47.

¹⁷ See the Commission’s proposed rule, 16 C.F.R. § 310.4(b)(1)(iii), Telemarketing Sales Rule; Proposed Rule, 67 Fed. Reg. at 4543.

1. Exempting newspapers from national “Do-Not-Call” obligations would pose no significant risk to consumers, and indeed, would help maintain the benefits consumers receive from newspapers.

The Commission has stated that a national DNC registry is necessary because existing telemarketing restrictions are “inadequate to fulfill the mandate in the [*Telemarketing Consumer Fraud and Abuse Prevention Act*] that the Commission should prohibit telemarketers from undertaking ‘a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy.’”¹⁸

NAA disagrees strongly with the Commission’s approach of subjecting newspaper telemarketers to onerous DNC restrictions due to the misdeeds of a few. Further, NAA does not agree that newspapers must be so restricted to protect consumer privacy. Newspapers’ sixty years of responsible telemarketing demonstrate that existing restrictions are plainly adequate with respect to newspapers. Clearly, exempting newspapers from national DNC obligations poses no significant risk to the consumer privacy interests that the Commission seeks to protect.¹⁹

The experience of eight states that already have exempted newspapers helps demonstrate the point. These states exempt newspapers from telemarketing regulations generally or from restrictions on calling state residents appearing on DNC lists managed by the state.²⁰ If the FTC followed the lead of these states and exempted newspapers from DNC obligations, consumers would retain their ability to decline all telemarketing from a newspaper after an initial call under existing FCC rules. All newspapers that engage in telemarketing are subject to these FCC rules, which apply to both interstate and intrastate marketing calls.

As discussed above, sound policy reasons justify a newspaper exemption. In particular, newspapers’ ties to their communities distinguish them from other telemarketers. In the class of companies engaged in telemarketing, newspapers are among the least likely to engage in abusive practices, offer questionable products or ignore consumer opt-outs from telemarketing. The low

¹⁸ Telemarketing Sales Rule; Proposed Rule, 67 Fed. Reg. at 4518.

¹⁹ See Telemarketing Sales Rule; Proposed Rule, 67 Fed. Reg. at 4517.

²⁰ Arkansas, Florida, Idaho and Oklahoma have exempted newspapers from DNC restrictions. Indiana exempts newspapers from DNC obligations if they use their own employees or volunteers to make calls. In Nevada and Washington, newspapers are exempt from telemarketing regulations generally. The Louisiana Public Service Commission has exempted newspapers from the state’s DNC program.

rate of do-not-call requests made to newspapers demonstrates that consumers gain value from, and are not offended by, these marketing calls.

In addition, exempting newspapers from national DNC obligations would further the policy goals of the current exemption in the TSR for political calls. That exemption rests on federal policy that political information and debate should be supported. Newspapers are unique among commercial telemarketers in their role of providing for an informed citizenry. Indeed, newspapers are the primary source of information about local government, and often serve as a forum for the publication of legal notices and reports of actions of the city council, county board, or state legislature. NAA submits that the Commission should recognize that important role in our democracy by granting newspapers a full exemption from the do-not-call registry requirements that would ultimately reduce the number of citizens receiving notice about their governments' activities.²¹

2. National “Do-Not-Call” restrictions would pose serious and unfair burdens on newspapers, creating uneconomic incentives for purely intrastate activity.

NAA respectfully requests the Commission to consider more fully the existing marketplace. For example, a national DNC restriction could restrict the ability of many newspapers to reach their local reader base and undermine their financial viability. For newspapers, marketing by phone is an established way of doing business, and higher subscriber “churn” rates have recently made telemarketing essential for newspapers even to keep subscriber levels constant.²² Some markets now have more than 15 percent of total telephone numbers on state and internal company DNC lists that make consumers unreachable.²³

²¹ Newspaper exemptions are hardly unprecedented; not only have a number of states chosen to exempt newspapers from telemarketing DNC lists, but Congress itself has already recognized the valuable role of newspapers by providing for reduced postage rates for newspapers and other periodicals. *See* 39 U.S.C. § 3622(b)(8) and 39 U.S.C. § 3626 (a)(1) (referencing former 39 U.S.C. § 4358) (concerning in-country newspaper postage rates.).

²² Newspapers had to sell more subscriptions in 2000 than ever before just to break even. Many newspapers are experiencing higher subscriber churn and receiving fewer reader-initiated subscription starts. Newspaper Association of America, *supra* note 12, at 9.

²³ *Id.* at 49. This statistic is not specific to newspapers' internal DNC lists and is a general telemarketing industry measure.

In addition, many newspapers would face arbitrary burdens under the proposed rule because their telemarketing happens to cross state lines. Newspapers that telemarket only to an in-state reader base would not fall under the federal TSR. But many newspapers are “border” newspapers that draw readers from more than one state; NAA provides a sample list of such newspapers below. Unless the Commission exempts newspapers from the proposed DNC rules, these newspapers would be subject to the DNC obligations even if they only make one out-of-state call to a potential subscriber. In contrast, newspapers in nearby communities may be spared simply because their potential readership is purely in-state.

Table 1. “Border” newspapers of all sizes would be subject to the proposed national DNC rule due to subscribership in more than one state. This table reports only a subset of newspapers that engage in interstate telemarketing.

Circulation over 100,000	Circulation between 50,000-100,000	Circulation under 50,000
<i>The Cincinnati Enquirer</i> : Ohio and Kentucky	<i>The Augusta Chronicle</i> : Georgia and South Carolina	<i>The Dispatch</i> (East Moline): Illinois and Iowa.
<i>The Philadelphia Inquirer</i> : Pennsylvania, Delaware and New Jersey	<i>The Columbus Ledger-Enquirer</i> : Georgia and Alabama	<i>Vincennes Sun-Commercial</i> : Indiana and Illinois
<i>The Washington Post</i> : Washington, D.C., Virginia and Maryland	<i>The Tallahassee Democrat</i> : Florida and Georgia	<i>The Leaf-Chronicle</i> (Clarksville): Tennessee and Kentucky
<i>The Chicago Tribune</i> : Illinois, Indiana and Wisconsin.	<i>The Journal Gazette</i> (Fort Wayne): Indiana and Ohio	<i>The Herald Dispatch</i> (Huntington): West Virginia and Ohio
<i>The Oregonian</i> : Oregon and Washington	<i>The Chattanooga Times Free Press</i> : Tennessee, Georgia and Alabama	<i>The Intelligencier</i> (Wheeling): West Virginia and Ohio
<i>The Courier-Journal</i> (Louisville): Kentucky and Indiana	<i>The Quad-City Times</i> (Davenport): Iowa and Illinois	<i>Grand Forks Herald</i> : North Dakota and Minnesota
<i>The Spokesman-Review</i> (Spokane): Washington and Idaho	<i>Forum</i> (Fargo): North Dakota and Minnesota	<i>Walla Walla Union-Bulletin</i> : Washington and Oregon

In addition, newspapers of all sizes find it cost-effective to employ out-of-state, third-party telemarketers, regardless of the interstate or intrastate character of their readership.²⁴ Consequentially, these outsourced newspaper operations fall under the FTC’s interstate jurisdiction and would have to comply with proposed national DNC obligations.

²⁴ *Id.* at 47. Newspapers of all sizes blend “in-house” telemarketing operations and use of outside contractors, based on skill sets and capacity needed for particular marketing campaigns. Over 64 percent of all newspapers use a combination of in-house and outsourced telemarketing or exclusively employ outside firms for telemarketing services. Of newspapers with less than 25,000 subscribers, over 64 percent employ third-party telemarketers.

Some newspapers would have to comply with the Commission's proposed DNC rule while others would not merely because their reader base crosses a border or because they employ an out-of state telemarketing firm. Requiring a border newspaper with a state or local readership to "scrub" its contact list with the national DNC list is disproportionately burdensome. In addition, the Commission's DNC list would set up strong, uneconomic incentives for newspapers to seek in-state telemarketing firms or set up their own telemarketing shop, forfeiting the efficiencies out-of-state telemarketing firms now provide. To avoid these unfair and uneconomic outcomes, the FTC should exempt newspapers from its proposed DNC rule.

III. IF NEWSPAPERS ARE NOT EXEMPT FROM DNC OBLIGATIONS, THE COMMISSION MUST CLARIFY THAT CUSTOMER AUTHORIZATION WILL SUPERCEDE ALL GLOBAL OPT-OUTS, ALLOW NEWSPAPERS TO CONTACT INDIVIDUALS WITH WHOM THEY HAVE EXISTING BUSINESS RELATIONSHIPS, AND ENSURE THE ACCURACY OF THE DNC LIST.

A. If the FTC applies the DNC rule to newspapers, it must clarify that newspapers may telemarket to consumers who have given their opt-in consent or with whom a newspaper has an existing business relationship.

Newspapers and other businesses must be exempt from the Commission's proposed DNC rule where they have an explicit opt-in from a consumer or an existing business relationship with a consumer. By proposing a national DNC list, the FTC is entering a field presently occupied by state and private-sector "do not call" lists. A consumer who gives a company verifiable consent to telemarketing, as prescribed under the Commission's proposed rule, may have already placed his or her name on a company's internal DNC list, a state DNC list or the Direct Marketing Association's DNC list. The Commission's final rule should uphold the principle of consumer choice by explicitly stating that an individual's authorization of telemarketing given to a specific company not only supersedes the individual's registration on the national DNC list, but also nullifies that individual's opt-out on all other "do not call" lists. Without an explicit statement, telemarketers will face considerable uncertainty and be forced to avoid many willing consumers.

In addition, the FTC's proposal conflicts directly with telemarketing regulations adopted by the FCC concerning calls to existing customers. FCC rules allow companies to make marketing calls to consumers with whom they have an existing business relationship, such as the

relationship between a newspaper and its subscribers.²⁵ Under these rules, if a subscriber requests to be placed on a newspaper's internal DNC list, the newspaper is prohibited from telemarketing to that subscriber.²⁶ In contrast, the FTC's proposed rule would automatically bar a newspaper from telemarketing to a subscriber who has registered on the national DNC list despite the existing business relationship – even if he or she has not requested placement on the newspaper's internal DNC list as provided for under the FCC rules.

The Commission's desire to create a national DNC list must be balanced against the need for businesses to contact individuals with whom they have an established or preexisting business relationship. A newspaper has an established business relationship with a consumer if, in the preceding two years, it has delivered a product or service to the consumer or the consumer has initiated contact with the newspaper. This definition encompasses current and prior business relationships and is consistent with the FCC's definition of an "established business relationship."²⁷ This approach is also consistent with steps taken in twelve states to exempt in some form existing business relationships.²⁸ A more restrictive definition of an existing business relationship would severely impact the marketing ability of newspapers and possibly result in a decrease in subscribership.

In promulgating telemarketing regulations, NAA urges the FTC to avoid conflicts with FCC rules.²⁹ The Commission can simplify the national opt-out framework by following the FCC's lead and creating an exemption for existing business relationships. NAA believes that newspapers should be free to contact their subscribers, even if they have registered on the federal

²⁵ See 47 C.F.R. § 64.1200(e)(2)(iii, vi).

²⁶ Note that FTC's existing rules concerning consumer opt-out from a company's telemarketing are consistent with FCC rules; see 16 C.F.R. § 310.4(b)(1)(ii).

²⁷ The FCC defines the term "established business relationship" to mean "a prior or existing relationship formed by a voluntary two-way communication between a person and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party." 47 C.F.R. § 64.1200(f)(4).

²⁸ Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Louisiana, Missouri, New York, Tennessee, Texas and Wyoming have established exceptions from state DNC lists for existing business relationships.

²⁹ The FTC states in the NPRM that it is loathe to create inconsistencies with FCC telemarketing rules. With respect to the length of time a company may take before placing an opting-out consumer on an internal company DNC list, the Commission declined to "second-guess the FCC ruling" and implied that a higher standard of evidence is necessary "to justify [action] that would introduce the specter of inconsistency between two sets of regulations." Telemarketing Sales Rule; Proposed Rule, 67 Fed. Reg. at 4520.

DNC list. If subscribers do not wish to receive further telemarketing calls from newspapers, existing FCC rules allow them to request placement on internal DNC lists that newspapers are required to maintain. But the very low levels of subscribers who request to be placed on a newspaper's internal DNC list, as discussed above, demonstrates that readers find these calls to be a convenient method for renewing subscriptions.

B. If the FTC applies the DNC rule to newspapers, it must ensure the accuracy of opt-out lists and enable efficient industry compliance.

The Commission has requested comment on how much personal information is necessary for the maintenance of the Do-Not-Call Registry System and the length of time that such records should be retained before they are deleted.³⁰ In the NPRM, the FTC contemplates collecting the “names *and/or* telephone numbers” of persons registering on the proposed national DNC list.³¹ The Commission's stated objective in creating a national DNC list is to provide consumers an effective opt-out from telemarketing. This goal cannot be achieved unless the DNC registry contains the names, addresses and telephone numbers of national DNC registrants and the Commission requires consumers to renew their opt-out status at least every two years.³²

If consumers can register merely by submitting a name *or* a phone number, false positives and false negatives will occur. A false positive would occur when an individual is removed from telemarketing lists even though he or she did not register on the national DNC list. For example, individuals who do not desire to opt-out globally from telemarketing calls will be assigned telephone numbers previously belonging to national DNC registrants who registered using only their phone number; such individuals will not know that an opt-out status has carried over to them. A false negative would occur when an individual registers on the national DNC list but nonetheless receives telemarketing calls covered by the TSR, though telemarketing companies have complied with their obligations. For example, many individuals have common

³⁰ Telemarketing Sales Rule; Proposed Rule, 67 Fed. Reg. at 4538-39.

³¹ *Id.* at 4520 (emphasis added).

³² In response to a prior request by the Commission for comment regarding do-not-call regulations, NAA stated that registrations on internal company do-not-call lists should have a three-year duration. Comments of the Newspaper Association of America, *In the Matter of Telemarketing Review—Comment*, FTC File No. P994414, at 4 (May 30, 2000). A shorter duration for registrations on a national DNC list is appropriate due to a national list's greater impact than an internal company list, and thus, the greater need for accuracy.

names, variably-spelled names or name changes (*e.g.*, J. Doe, Jane Doe, Jane M. Doe, Jane Murphy Doe, J.M. Doe, Jane Murphy, *etc.*). An individual may neglect to register all possible name combinations on the national DNC list, and thus, telemarketing may still occur under one of the unregistered names.

Many false positives and false negatives can be avoided if consumers are required to update their opt-out selections after a reasonable time. An estimated 20 percent of Americans move every year, and a substantial number change their residential phone number. Without an expiration date on a DNC registration, the list will quickly become obsolete.

False positives – where a consumer who has not registered on the national DNC list is nonetheless removed from telemarketing lists – would not serve the Commission’s asserted policy objective of giving consumers greater choice. Indeed, a presumption of opt-out would deprive consumers of the choice to receive telemarketing calls. It also would limit newspapers’ and other businesses’ efficient and lawful access to potential customers.

In sum, the Commission must collect the name, address *and* telephone number of each individual opting out from telemarketing if the DNC list is to achieve a reasonable degree of accuracy and actually promote consumer choice. In addition, to maintain the accuracy of the DNC list despite rapid turnover in addresses and telephone numbers, NAA recommends that a consumer’s registration expire after two years. If the Commission elects to collect only the telephone number or the name of registrants to the national DNC list and not the name, telephone number *and* address of each registrant, then registrations must expire every year.

IV. THE COMMISSION SHOULD SUBSTANTIALLY MODIFY ITS VIEW THAT ABANDONED CALLS CONSTITUTE AN ABUSIVE PRACTICE.

The Commission proposed a novel interpretation of the TSR with respect to the use of predictive dialers. Under this interpretation, after a consumer has answered the telephone, a telemarketer violates the TSR if it disconnects the call without providing certain required disclosures.³³ This interpretation creates an unnecessary, unrealistic and overbroad standard that newspapers, as well as other businesses, will be unable to meet.

³³ See Telemarketing Sales Rule; Proposed Rule, 67 Fed. Reg. at 4524.

A. Newspapers gain significant efficiencies from predictive dialers and use them responsibly.

The Commission's interpretation of the TSR would erode the significant efficiencies that predictive dialers provide to newspapers.³⁴ With this interpretation, the FTC is denying newspapers the most efficient and effective means for complying with the TSR. For example, predictive dialers help newspapers comply with various DNC obligations because databases used by predictive dialers are easier to "scrub."³⁵ Two-thirds of newspapers that engage in telemarketing use predictive dialers, including 40 percent of newspapers with less than 25,000 readers and 96 percent of those with more than 100,000 readers.³⁶

In addition, predictive dialers reduce newspaper costs by accurately performing all the automatic tasks associated with telemarketing, freeing up operators (the high-cost input) to spend their time engaged in person-to-person contact. If the Commission's interpretation effectively bars newspapers from using predictive dialers, they will face higher marketing costs to achieve the same number of sales, costs that will be passed on to readers and advertisers.

Newspapers that use predictive dialers already have strong incentives to minimize abandonment rates. As noted above, newspapers have vested interests in their communities and avoid telemarketing practices that would lead to consumer dissatisfaction. Moreover, newspapers pay toll charges to telephone companies whenever a consumer answers an interstate telemarketing call, even an abandoned call. Thus, higher abandonment rates generally translate into higher telephone bills without a greater number of sales. Newspapers attempt to balance abandonment rates with the number of operators on staff in order to maximize their investment in telemarketing. NAA firmly contends that newspapers use predictive dialers responsibly, and FTC regulations should not be so restrictive as to prevent or severely limit their use.

The Commission seeks recommendations whether it should mandate a maximum setting for abandoned calls.³⁷ NAA believes that no mandatory maximum rate is required with respect to newspapers because they adequately self-regulate in their use of predictive dialers. But if the

³⁴ Newspaper Association of America, *supra* note 12, at 48 (2001).

³⁵ *Id.* (use of predictive dialer technology has become critical for newspapers' management of various "do-not-call" lists.).

³⁶ *Id.*

³⁷ Telemarketing Sales Rule; Proposed Rule, 67 Fed. Reg. at 4524.

Commission does set an abandonment rate, it should be no lower than five percent per telemarketing campaign. Standard industry abandonment rates vary between five and ten percent based on a variety of factors such as the time of year, the type of offer and the telemarketing campaign plan.

B. Newspapers cannot strictly comply with the Commission’s interpretation of the TSR regarding predictive dialers.

The Commission’s novel approach to equate telemarketing calls that do not include the prescribed disclosures with an “abusive practice” places an unreasonable burden on legitimate telemarketing. This standard cannot be met whether telemarketers are using predictive dialers or any other method. Some telemarketing calls will inevitably be abandoned, no matter the technology deployed or safeguards in place. Even telemarketers using predictive dialers that set abandonment rates at zero will occasionally terminate calls just as a consumer picks up. In such cases, telemarketers will not know that the call was received, triggering the disclosure obligations, and the TSR would be violated inadvertently.

C. On its face, the Commission’s interpretation of the TSR applies to manual as well as predictive dialers.

Both the proposed TSR and the Commission’s NPRM state generally that telemarketers who abandon calls without providing the required disclosures are engaged in an abusive practice.³⁸ These statements are not limited to predictive dialers, and by their terms, cover manual dialing as well. This interpretation of the TSR is overbroad and must be reviewed, in that it will apply to manual as well as predictive dialers.

Abandoned calls cannot be equated to violations of the TSR without unfair consequences for newspapers that employ manual dialers. Approximately 33 percent of newspapers engaged in telemarketing use only manual dialers; the figure rises to nearly 55 percent when considering only newspapers with less than 25,000 subscribers.³⁹ Manual dialers are just as likely as predictive dialers to fail inadvertently to make the disclosures required by the TSR, as an operator disconnecting a marketing call could easily be unaware that a caller has picked up.

³⁸ *Id.*

³⁹ Newspaper Association of America, *supra* note 12, at 107.

Moreover, in the manual dialing context, measuring the rate of abandoned calls or providing recorded disclosures is wholly unrealistic.

VI. THE FTC SHOULD TAKE ADDITIONAL STEPS TO MAINTAIN EFFICIENT AND FAIR TELEMARKETING.

A. The Commission should continue to permit written confirmation for consumer billing authorization.

In the NPRM, the Commission proposes to delete the provision in the TSR which allows a telemarketer to obtain a consumer's express verifiable authorization to a sale by sending written confirmation of the transaction to the consumer.⁴⁰ Under the proposed change, verification methods would be limited to obtaining the customer's signature or recording their oral authorization.⁴¹ NAA recognizes that the FTC means to prevent abuse of the written confirmation method in proposing this change.

Nonetheless, the Commission must recognize that the written confirmation method for obtaining customer authorization provides significant convenience to consumers and an efficient verification method for newspapers. Many consumers prefer to use debit cards and other forms of payment that may not carry a limitation on liability. Under its new interpretation of the TSR, the Commission would require a signature or a recorded authorization whenever consumers use such payment methods when accepting telemarketing offers. Consequently, in order to complete such transactions, the consumer would have to sign an authorization form and return it to a telemarketer, or a newspaper would have to invest in recording equipment. Either alternative would impose significant costs on newspapers that have traditionally relied on the written confirmation method. Thus, some newspapers will not be able to offer readers certain payment options like debit cards, despite their significant efficiencies for consumers and newspapers over alternatives such as handling checks. Such newspapers will likely include those with small circulations and limited budgets that have used the written confirmation method responsibly.

⁴⁰ Telemarketing Sales Rule; Proposed Rule, 67 Fed. Reg. at 4496.

⁴¹ *Id.* at 4542.

The FTC should not dispose of the written confirmation method merely because it is “subject to abuse” and is allegedly used infrequently.⁴² Many newspapers regularly and legitimately employ this method and should not be penalized if it is abused by other businesses. In fact, one major newspaper group solely employs the written confirmation method in its subscription processing. Moreover, the relatively small cost of a newspaper subscription removes any potential threat of consumer harm associated with newspapers’ use of the written confirmation method.

B. NAA supports the Commission’s proposed restrictions on telemarketers’ efforts to block caller-ID.

NAA supports limiting the blocking of caller-ID services, so long as the Commission does not affirmatively require telemarketers to display caller-ID information. Newspapers intentionally provide caller-ID information when the capability exists because it is consistent with good telemarketing practice. However, limitations associated with T-1 lines, outdated telecommunications switching equipment and other technologies make it impossible for newspapers affirmatively to provide caller-ID information in many cases. Also, some telephone companies offer consumers services for blocking calls that lack caller-ID information, such as a service that conditions connection of a call to a consumer on the caller providing caller-ID information either automatically or by entering the calling number. In light of the technological limitations on universal provision of caller-ID information and alternatives available to consumers for blocking calls failing to provide such information, NAA urges the Commission not to require that telemarketers affirmatively provide caller-ID information.

C. Existing regulations concerning calling hours are sufficient.

Existing restrictions on hours in which telemarketing calls can be placed are sufficient, and no new regulations are needed. Customer-specified calling hours are simply unworkable.

⁴² *Id.* at 4508.

VII. CONCLUSION

For the foregoing reasons, NAA believes that newspapers should be exempted from the Commission's proposed DNC regulations, and NAA requests that the Commission adopt this measure. The vast majority of newspapers are local businesses that engage in responsible telemarketing and fall under the TSR only because their circulation happens to reach across state lines or because they gain efficiencies from utilizing out-of-state, third party vendors. If the FTC nonetheless imposes federal DNC restrictions on newspapers, the agency must ensure that the new DNC list is workable and consistent with existing DNC lists. In particular, the Commission must allow telemarketers to call their existing customers. Otherwise, the FTC rule will directly conflict with FCC regulations. Finally, restrictions on the use of predictive dialers should apply only to telemarketers clearly engaged in abusive practices, as this technology significantly increases the accuracy, efficiency and cost effectiveness of telemarketing.

Respectfully submitted,



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April 15, 2002