April 30, 2003

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

Re: Telemarketing Rulemaking—Revised Fee NPRM Comment. FTC File No. R411001

Ladies and Gentlemen:

This letter is in response to the Commission's request for public comments regarding its review of the Telemarketing Sales Rule ("TSR"), particularly the imposition of user fees as set forth in the Revised Notice of Proposed Rulemaking ("Revised Fee NPRM") dated March 28, 2003.

The American Resort Development Association ("ARDA") has been pleased to participate in the entire review of the proposed revisions to the TSR. In addition to filing other comments and participating in the Commission's Forum in June 2002, ARDA previously submitted comments to the Commission's May 29, 2002, Notice of Proposed Rulemaking on the User Fee issue ("User Fee NPRM"). ARDA adopts its previous comments for this submission and incorporates those comments by reference herein.

I. Summary

In providing its comments, ARDA highlights the following main points of concern:

- The Commission and not telemarketers should be required to ensure that sellers have paid for access to the registry and are in compliance with the Rule.

- Given the current state of the economy, corporate divisions, subsidiaries, and affiliates sharing operational systems should be permitted to pay only one access fee per area code.

- The first five area codes accessed by a seller should be free without regard to the number of total area codes accessed by that seller.

- Sellers and consumers should share the cost of the registry.

ARDA expands upon these and other matters in response to selected sections of the Revised Fee NPRM.

II. Access to the Do-Not-Call Registry

A. Entities Allowed Access

The Commission broadens access from just telemarketers to include sellers, others engaged in or causing others to engage in telephone calls for commercial purposes, and service providers acting on behalf of such persons. Prior to gaining such access, a person would be required to certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent calls to telephone numbers on the registry.

ARDA agrees with this expansion as a logical necessity. As sellers are expected to obtain the list, pay for obtaining the list, and scrub their databases against the list, then sellers should have direct access to the numbers in the registry.

ARDA members do not take issue with certifying use of the list for the stated purposes. However, ARDA suggests that the Commission provide for a safe harbor for inadvertent or unintentional use or release of the list, similar to that allowed for calls inadvertently made to numbers on the registry (i.e., a policy, training, etc.).

B. Entities Required to Pay Fee

ARDA agrees that a one-time, annual payment is sufficient and practical. The Commission's proposal in the User Fee NPRM that telemarketers pay not only for themselves but also for each seller and that sellers pay a fee for each telemarketer they use would have resulted in higher, unnecessary costs to sellers. The Commission's current proposal appears to strike a more equitable balance.

ARDA disagrees with placing a duty on telemarketers to ensure payment for the list by sellers for which a telemarketer may provide services. First, it is the Commission's duty to police compliance with and enforce the Rule, not that of a non-governmental third party. The Commission proposes that each seller will be assigned an account number. A telemarketer must provide the seller's account number to the Commission in order to obtain the list for the seller. It should be incumbent upon the Commission to block access to the list if the seller's account is not up to date. This would, in effect, act like a denial of a credit card charge if an accountholder is over his or her credit limit. With this process, a telemarketer would be less likely to circumvent or assist a seller in circumventing the payment requirement.

Second, if partial onus for enforcing compliance is placed on a telemarketer, a telemarketer should only be required to include in its agreement with the seller a provision that the seller has paid its account up to date and will not use the list for any other purpose, similar to the contractual provisions required for maintaining privacy of personally identifiable information under Gramm-Leach-Bliley. As a telemarketer as well as a seller could perpetrate misuse of the information from the registry, any mandatory contractual provision would need to be mutual.

C. Corporate Divisions, Subsidiaries, and Affiliates

The Commission proposes to treat each separate division, subsidiary, or affiliate of a corporation as a separate seller for purposes of Section 310.8. As it states in the Revised Fee NPRM, the Commission is concerned that combined treatment of these entities would "greatly diminish" the number of entities available to pay for access to the registry.

The Commission should use factors proposed in the User Fee NPRM, i.e. whether there is substantial diversity between operational structures and whether the goods or services sold by the divisions are substantially different from each other, in determining whether an entity is a separate seller. In fact, the Commission should include a definition encompassing these factors in the Rule for clarity. Allowing divisions that offer similar products and utilize common operational systems to pay one access fee for each area code promotes shared economies of scale. Further, there is greater opportunity for assuring compliance where one system is used rather than attempting to use duplicative systems.

The same can be said for divisions, subsidiaries, and affiliates that may not offer products or services which are substantially similar, but share operational systems out of fiscal necessity. Given current downturns in the economy and further restrictions in the available consumer audience likely to result from a national registry, companies are looking for ways to cut costs and not to pass additional costs on to consumers. ARDA suggests that the Commission consider a balancing of economic burdens by permitting leeway in the structuring of the definition of "seller" as it applies to divisions, subsidiaries, and affiliates of a single corporation.

III. Calculation of Fees

A. Number of Entities Accessing the National Registry

In the User Fee NPRM, the Commission estimated that 3,000 entities would pay for access to the national registry. Through various calculations, the Commission revised its estimate to 7,500 firms that would access the registry.

Unfortunately, ARDA is unable to provide much assistance in determining the estimated number of sellers that may access the registry. While ARDA counts approximately 1,000 members, not all conduct outbound telemarketing. Many provide business-to-business services and would not fall under the requirements of the Rule for purposes of accessing the registry. However, given that the Commission intends to treat subsidiaries, divisions, and affiliates as separate sellers, ARDA postulates that the Commission's estimates may be too low. Further, given the possibility that firms currently exempt from Commission regulations may be added by changes considered by the Federal Communications Commission (FCC) in an effort to harmonize the directives of the two agencies (as required in the "Do-Not-Call Implementation Act", Pub. L. 108-10), the Commission may have to increase the estimated number of sellers in its calculation and decrease the cost per seller. ARDA hopes that other members of the telemarketing industry are able to provide more meaningful information and that the Commission will consider such information in determining the access fee to charge each seller.

B. Small Business Access and C. Fees for Access

While the proposed Rule appears to be clear, the Commission's examples of charges for more than five area codes of data are confusing. Proposed section 310.8(c) states in relevant part:

(c) The annual fee . . . is $29 per area code of data accessed . . . provided, however, that if a seller obtains no more than five (5) area codes of data annually, there shall be no charge for this information . . . To obtain access to additional area codes of data during the first six months of the annual period, the seller must first pay $29 for each additional area code of data not initially selected.

ARDA reads this provision to mean that the first five area codes are free no matter how many area codes a seller accesses. In the Supplementary Information section of the Revised Fee NPRM, the Commission uses the following examples:

> As a result of the revised fee schedule, there would be no charge for obtaining only five area codes of data; six area codes of data would cost $174; twenty-five area codes would cost $725; two hundred area codes would cost $5,800; and access to the data from all area codes would be capped at $7,250 annually.

The examples would appear to indicate that once a seller has accessed five area codes, the sixth area code would cost $174. This would be inconsistent with the clear language of the proposed Rule. Under proposed section 310.8(c), a seller accessing six area codes in total should only be required to pay $29. Similarly, a seller accessing 200 area codes would only pay $5,655. ARDA assumes that the Commission actually meant to say that up to five area codes may be accessed for free without regard to total number of area codes accessed and that access to any additional area code will be $29 each. If, however, the Commission meant otherwise, ARDA does have some concerns.

While ARDA appreciates the Commission's deference to small business by allowing up to five free area codes, as some ARDA members fall into this category, the Commission should make access to the first five area codes free for all sellers. The small business that purchases that sixth area code is punished by having to pay for the first five. The small-to-medium business would be less inclined to circumvent the fee requirement if it were only required to pay an incremental cost ($29) for the sixth and seventh and so forth area codes rather than $174 for one additional area code. While the charge for one division may not be significant, a corporation with many divisions of various sizes could be paying significant funds in order to access the same information, which may ultimately be scrubbed through one central data collection point. For each division to receive five area codes at no cost would assist the Commission in its charge to spread the burden of access fees in an equitable manner.

With regard to imposing fees, ARDA reiterates its contention that consumers, along with sellers, should pay for the benefits offered them by the DNC registry. ARDA does not intend to belabor a point that the Commission appears to have already decided and has in fact clearly announced recently on its Web site. However, since the Commission again has raised the issue of the funding of the national registry, it is appropriate at this time to again raise ARDA's concerns of equity in charging only sellers to financially support the registry.

As ARDA stated in its comments to the User Fee NPRM, consumers will receive equal if not greater benefit from the implementation of the national Do-Not-Call registry. The Commission accurately noted in the User Fee NPRM that the real cost of the registry would be tied to the incremental cost of each consumer who signs up for the list. Accordingly, consumers should pay some portion of the costs of implementation, maintenance, and enforcement of compliance with the registry. Further, by requiring that consumers pay even a minimal amount, the Commission would work toward balancing the equities between privacy and commercial speech.

IV. Conclusion

Once again, ARDA thanks the Commission for allowing it to participate in this very important rulemaking process. ARDA hopes that the Commission finds its comments helpful. Where ARDA has not been able to comment, ARDA asks that the Commission consider the specific data and relevant experience of other industry associations. We hope the Commission will consider these positions on the various issues as it integrates changes into the current Rule and permit further comment as necessary.

Sincerely,

Sandra Yartin DePoy
Vice President
Federal & Regulatory Affairs