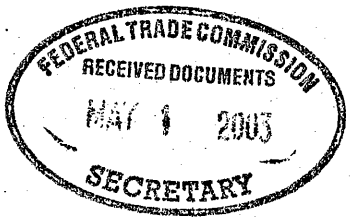
Before the
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

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| In the Matter of | ) | |
| | ) | |
| Telemarketing Rulemaking – | ) | FTC File No. R411001 |
| Revised Fee NPRM | ) | |
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**COMMENTS OF THE AMERICAN TELESERVICES ASSOCIATION**

The American Teleservices Association ("ATA"), by counsel and on behalf of its members, hereby submits comments on the Revised Notice of Proposed Rulemaking seeking input regarding new provisions of the Commission's Telemarketing Sales Rule ("TSR") that will impose fees on entities accessing the national do-not-call registry. 1/

## I. INTRODUCTION

ATA respectfully submits that there are significant problems with the structure of the fee collection scheme proposed in the *Revised Fee NPRM*. Though the Commission has acknowledged the need to "approach[ ] with extreme care the issue of tailoring 'do-not-call' requirements" to "minimize the impact on First Amendment rights" generally, and to satisfy constitutional norms when regulating telemarketing as

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1/ *Telemarketing Sales Rule Fees; 16 C.F.R. Part 310*, 68 Fed. Reg. 16238 (April 3, 2003) ("*Revised Fee NPRM*").

protected speech, 2/ the proposed regime does not comport with the requirements applicable to fees assessed on expressive activity.

Both the Commission's new "do-not-call" registry itself and the requirement that sellers pay fees to purchase the list as a precondition to engaging in telemarketing serve as prior restraints on protected speech. Moreover, in view of FTC jurisdictional limitations and Commission decisions to provide still other exceptions, the national "do-not-call" regime is also content-based regulation in that the exemptions are based on the identity of speakers and/or the content of their telemarketing. These problems alone raise significant First Amendment issues.

The proposed fee structure for the national "do-not-call" registry only exacerbates these problems. When an agency imposes regulatory fees on entities within its jurisdiction to recoup the costs of regulating, those fees must be limited to no more than the "expense incident to the administration of the [regulation]." *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941). As demonstrated below, any plan that charges some companies multiple times, other companies once, and still others not at all to comply with the national "do-not-call" rules, inherently precludes the fee structure – for every entity that must pay – from being limited to the administrative costs incurred in compiling, maintaining and operating the registry.

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2/ *Telemarketing Sales Rule; 16 C.F.R. Part 310*, 68 Fed. Reg. 4585, 4635-36 (January 29, 2003) ("*Amended TSR Order*").

## II. THE COMMISSION'S PROPOSED FEE STRUCTURE FOR ACCESS TO THE NATIONAL "DO-NOT-CALL" REGISTRY IS INEQUITABLE AND UNCONSTITUTIONAL

The rules proposed in the *Revised Fee NPRM* fail to establish the tight fit required for regulations that both serve as a prior restraint on protected speech and impose a regulatory fee on burdened speakers. In adopting a national "do-not-call" registry that must be supported by user fees imposed on speakers, the FTC has set out a tightrope for itself to walk. By making purchase of the list a precondition for engaging in telemarketing, the Commission has structured the list as a prior restraint on protected speech. As such, the FTC's national "do-not-call" registry "bear[s] a heavy presumption against its constitutional validity" at the outset. *American Target Advertising, Inc., v. Giani*, 199 F.3d 1241, 1250 (10th Cir. 2000) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 225 (1990)). On top of this, the national "do-not-call" list faces the additional burden of ensuring that any fee for the registry is limited to "meet[ing] the expense incident to [its] administration." *Cox*, 312 U.S. at 577. Because the fee structure set forth in the *Revised Fee NPRM* does not satisfy this standard, the FTC "do-not-call" fee regime suffers from fatal constitutional infirmities.

### A. Prior Restraint

The national "do-not-call" registry and its associated fee structure constitute a prior restraint in that the rules operate in "advance of actual expression" to either completely cut off telemarketer speech or to deprive them of the right to speak until certain regulatory requirements are met. *See Giani*, 199 F.3d at 1250 (quoting *South-*

*eastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)). *Cf. Murdock v. Pennsylvania*, 319 U.S. 105, 114 (1943) (invaliding fee that "restrains in advance ... constitutional liberties ... and inevitably tends to suppress their exercise"). Even apart from fees, the national "do-not-call" registry rules act as a prior restraint by preemptively blocking calls to telephone numbers in the database by business subject to the TSR. *See* 16 C.F.R. § 310.4(b)(1)(iii)(B). Meanwhile, entities that are exempt from the FTC's jurisdictional reach, and those that the FTC has chosen to exempt from the TSR, are free to call anyone they wish, even persons on the FTC's "do-not-call" registry. *See, e.g., Amended TSR Order*, 68 Fed. Reg. at 4581 & n.16, 4587, 4591; 16 C.F.R. § 310.6. These exemptions bear no relationship to consumer preferences or the success or failure of any business or industry to comply with the FTC's company-specific "do-not-call" requirements, 16 C.F.R. § 310(b)(1)(iii)(A), or any other telemarketing regulation. *See, e.g.*, 47 U.S.C. § 227; 47 C.F.R. § 64.1200. Consequently, the preemptive effect of the national "do-not-call" registry is determined solely by government fiat.

The national "do-not-call" rules deny business subject to the TSR from making even an initial telemarketing call to persuade prospective customers on the registry to listen to the business's message. While there are exceptions for calls to individuals on the national registry based on prior written permission or existing business relationships, 16 C.F.R. § 301.4(b)(1)(3)(B), businesses must satisfy these regulatory prerequisites to telemarketing by making contact in other ways. The national registry thus differs from the company-specific "do-not-call" rules, which at

least allows an initial call to talk with the consumer before he or she makes a "do-not-call" request. *See id.* § 310.4(b)(1)(B)(iv).

The proposed fee structure adds another layer of prior restraint on top of what the national "do-not-call" registry already inherently presents. Proposed Sections 310.8(a) and (b) make it a violation of the TSR for any seller, or a telemarketer working on the seller's behalf, to initiate outbound telephone calls to anyone within a given area code unless the seller has first paid the annual fee to access the national registry for that area code. *See Revised Fee NPRM* at 16247. This means that a seller is barred from engaging in any speech that qualifies as telemarketing in a given area code unless and until the seller pays the registry fee for that area code. This is true *even if the national "do-not-call" registry rules otherwise pose no bar* to the call, as in the case of consumers from whom the seller has obtained written consent or with whom the seller has an established business relationship. 3/ National "do-not-call" registry fees thus serve as a

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3/ This is possible because proposed Sections 310.8(a) and (b) make it a violation of the TSR to initiate any outbound telephone call by or on behalf of a seller to an area code for which the seller has not paid the annual registry fee, while existing Section 310.4(b)(1)(iii)(B) allows calls to persons on the registry if the seller has express written agreement from them or an established business relationship with them. 16 C.F.R. § 310.4(b)(1)(iii)(B). The interaction of these rules could force sellers into a position of unnecessarily having to pay for a national registry for which they have no use – or risk liability for their failure to do so – where a seller (or a telemarketer working on its behalf) telemarkets solely to persons from whom they have secured consent or with whom they have an established business relationship. In such a case, the seller would have no reason to access the registry and/or scrub its contact list against it, because the seller may place its calls regardless of whether the person is listed, but Sections 310.8(a) and (b) would make it a violation to place calls without "first pa[ying] the annual fee."

prior restraint generally, and as a particularly invidious prior restraint where they force telemarketers to pay a fee even where they have no use for information in the registry.

The national "do-not-call" registry and its associated fees are also particularly invidious for another reason – they comprise content-based regulation of protected speech. This is so because the exemptions discussed above are based on the identity of speakers and/or the content of their telemarketing. Unsolicited calls by or on behalf of political and charitable organizations, and in-house telemarketing by certain industries receive preferred treatment in that they are not required to comply with the national "do-not-call" registry or pay the fees associated with it. *Amended TSR Order*, 68 Fed. Reg. at 4586; *Revised Fee NPRM*, 68 Fed. Reg. at 16239-40 n.16, 16242 n.37. Such "content-based regulation is subject to exacting First Amendment scrutiny," *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 798 (1988), but the proposed fee structure for the national "do-not-call" registry is riddled with problems, as shown below.

**B. Unlawful Fees**

There is no doubt that, as a fee imposed on expressive activity, the cost of obtaining the national "do-not-call" registry may not exceed "a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." *Murdock*, 319 U.S. at 113-14. The fee may cover no more than the "expense incident to the administration of the [regulation]." *Cox*, 312 U.S. at 577. The necessity of restricting the fee to no more than the actual administrative cost incurred in operating the registry

rests on the notion that sellers "cannot be compelled to purchase, through a license fee or a license tax, the privilege freely granted by the constitution." *Murdock*, 319 U.S. at 114 (internal quotation deleted).

The proposed structure for national registry fees that sellers must pay before conducting telemarketing does not satisfy these criteria. The Commission proposes to charge $29 per area code per year for access to the registry, based on a total annual registry cost of $18.1 million and various assumptions and calculations that purportedly reflect actual telemarketing activity. *Revised Fee NPRM*, 68 Fed. Reg. at 16244. If a seller makes even one call into an area code, it must pay the full $29 for the area code that year. *Id.* However, there are exceptions where a seller accesses the registry for five or fewer area codes per year, in which case it pays nothing, and a proposed $7250 cap on the amount any seller pays, based on the cost of accessing 250 area codes, such that the 251st area code and every area code thereafter is also available at no cost. *Id.* In addition, the Commission would have corporate entities with multiple subsidiaries, divisions and/or affiliates that make telemarketing calls pay the fee for each separate subsidiary, division or affiliate. *Id.* at 16241. All told, the fees for accessing the national registry, which telemarketers must pay before making calls to a given area code, is essentially "a flat license tax, the payment of which is a condition of the exercise of [the] constitutional privilege[ ]" of engaging in commercial speech. *Murdock*, 319 U.S. at 112.

While ATA believes there are signficant problems with the assumptions and extrapolations the Commission uses in developing the fee of $29 per area code for

access to the national registry, for present purposes it is clear, even accepting all aspects of the calculations as accurate, that the proposed fee structure does not comport with constitutional requirements. The proposed structure results in wide disparities that prevent the fees from being limited, as they must, to the administrative cost of compiling, maintaining and operating the registry.

For example, corporate entities that, for tax, securities, or other business reasons have multiple subsidiaries, divisions or affiliates that engage in telemarketing are charged multiple times to acquire the same information over and over again. The same would be true for marketing and sales efforts in such organizations that are under common management and, indeed, may be part of integrated campaigns as to which the organizational structure is not relevant for purposes advancing the national "do-not-call" registry's objectives. Some companies – those that access only five area codes or fewer per year – pay nothing for use of the registry; at the other end of the spectrum, all area codes in excess of 250 likewise are provided without charge. Meanwhile, all sellers requiring between six and 250 area codes bear the full cost of the registry. Similarly, sellers that make a relatively small number of calls into many area codes, *i.e.*, more than five, must pay for all those area codes, while a seller that makes the same number or many, many more calls, but to five area codes or fewer, pays absolutely nothing. In much the same vein, a seller that makes calls to six area codes must pay for all six, but a seller making calls to one fewer area code pays nothing.

Charging some companies multiple times, other companies once, and still others not at all to comply with the Commission's national "do-not-call" rules bears no rational relation to the administrative costs of the registry. Indeed, the *Revised Fee NPRM* acknowledges that the multiple charges a corporation's subsidiaries, divisions and/or affiliates bears no relationship to the administrative cost of the list in that the Commission requires multiple payments, but does not even require the subsidiaries, divisions or affiliates to individually download or access the list. Rather, it specifies "[t]hey need only pay for the requisite access." *Revised Fee NPRM*, 68 Fed. Reg. at 16241.

The proposed fee structure is divorced from the actual administrative cost of the registry in other ways as well. For example, there is clearly an administrative cost associated with the first five area codes a seller accesses – indeed, the cost of the first area code is likely substantial, with successive area codes imposing incremental increases over it – yet the Commission charges nothing for up to five area codes. Similarly, there is, at least, an incremental cost for each area code in excess of 250, yet there is no charge for them. Moreover, the Commission offers no explanation for the lack of fit between allowing access to five or fewer area codes without charge and its intent to limit the burden on small businesses, *id.* at 16241, 16243-34, where in some cases even large businesses may have telemarketing activities limited to five or fewer

area codes, while other businesses might be small but nonetheless engage in limited yet far-flung telemarketing activities across many area codes. 4/

This lack of a fit between the proposed national "do-not-call" registry fee scheme and the actual administrative cost of the regulation imposed is fatal. As a threshold matter, "special problems created by differential treatment," such as those described above, "impose [a heavy] burden" on the government to justify them. *Minneapolis Star and Trib. Co. v. Minnesota*, 460 U.S. 575, 583 (1983). "Even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment," and singling out one medium, as the national "do-not-call" registry does with telemarketing, or "target[ing] individual [speakers] within the [medium] places a heavy burden on the state to justify its action." *Id.* at 592. To the extent the Commission selects "winners" and "losers" with regard to who has to pay national registry fees, and/or how much different sellers have to pay, it contemplates exactly the kind of "targeting" that renders a regulatory fee scheme highly suspect.

Improperly calculated and irrationally differentiated regulatory fees imposed on speech activities have long been ripe for invalidation. It is well-settled that:

> If a fee is calculated in a proper manner, it should be a reasonable approximation of the attributable costs [ ]

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4/ The disparity between the fee the Commission proposes to charge and the actual administrative cost of the list is compounded the more widespread a telemarketer's activities become, in that, as a seller moves its calls "throughout a state or from state to state," it "would feel immediately the cumulative effect" of having to pay for more and more area codes at the inflated rate. *Murdock*, 319 U.S. at 115.

> the [agency] identifies as being expended to benefit the recipient. A 'fee' is a payment for a special privilege or service rendered, and not a revenue measure. If the 'fee' unreasonably exceeds the value of the specific services for which it is charged it [is] invalid.

*National Cable Television Ass'n v. FCC*, 554 F.2d 1094, 1106 (D.C. Cir. 1976) (citations omitted). In the case of the proposed national "do-not-call" registry fees, there is no link between how much different sellers have to pay and the purported benefit the registry confers. 5/ To the extent the registry allows sellers to comply with the TSR, those that do not pay their fair share, such as those who access five or fewer area codes, clearly "benefit" from the registry without paying for it. A necessary corollary of this outcome is also that the remaining sellers who do pay bear the costs for sellers who do not, thereby forcing paying sellers to incur fees in excess of the benefits they receive. This kind of burden-shifting violates that maxim that "the fact that the Commission may assess a class of recipients with a fee is no justification for imposing a tax upon some of the members of that class to produce the total cost of the service." *NCTA v.*

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5/ ATA recognizes that the Do Not Call Implementation Act authorizes, and in fact compels, the FTC to collect fees necessary to compile, maintain, and operate the registry from telemarketers rather than consumers whose interests the Commission found the registry would serve. *Amended TSR Order*, 68 Fed. Reg. at 4583; *Revised Fee NPRM*, 68 Fed. Reg. at 16238 & n.2. Nevertheless, ATA submits that telemarketers do not "benefit" from the registry at all. Rather, as explained above, the national "do-not-call" registry rules completely cut off some telemarketers' rights to speak to consumers, and in other cases makes doing so extremely burdensome or expensive, to the extent that some telemarketers may close their doors rather than incur the registry fees on top of the other regulatory costs of complying with the TSR. *Cf. Gianni*, 199 F.3d at 1250 n.2 (noting that overly costly regulatory fees can evolve from a minor restraint to "operate as a full restraint where [regulatees] cannot muster the required" administrative fee).

*FCC*, 554 F.2d at 1108-09. It also violates that rule that "[w]hatever standard the Commission uses as a basis for its rate it should not have the potentiality in any substantial number of individual instances to produce fees that are not reasonably related to the cost of the services that benefit the individual recipients who are being charged." *Id.* at 1108.

The only justification the Commission offers for adopting a burden-shifting fee structure, that by definition does not limit the amount paying sellers must remit to the actual administrative cost of applying the national "do-not-call" program to them, is a desire to avoid "potentially increas[ing] the fees required to be paid by smaller, less complex" telemarketers. *Revised Fee NPRM*, 68 Fed. Reg. at 16241. *See also id.* at 16243-34 (regarding "Small Business Access"). In other words, the Commission would "in effect adopt[ ] a fee justified largely by the gross revenue" of the paying sellers, a regulatory endeavor that has not survived judicial review in the past. *NCTA v. FCC*, 554 F.2d at 1108. Even where it may be possible to "reasonably justify a minimum fee for small" payers, based on "demonstra[ble] increases in the cost of regulating" large companies, an agency "must also ... recognize[ ] that economies of scale might result" with respect to larger companies, such that the agency would have to correspondingly reduce the disproportionate burden on them. *Id.* at 1108. The Commission's only effort to do this, however, is its arbitrary decision to cut off fee payment obligations at 250 area codes, an accommodation that, as noted above, has nothing to do with the actual cost or benefit associated with the need to access that many area codes.

The bottom line is that "[a]bility to pay is frequently used as a justification for levying a tax but is of very limited value in assessing a fee which is supposedly related as closely as possible to the cost of servicing each individual recipient." *Id.* at 1108-09. Nevertheless, by charging larger, more complex companies more for the same "benefit" of accessing the registry than other companies, the Commission deviates significantly from recovering only the actual cost those companies cause with respect to the registry.

The lack of fit between the actual cost of compiling, maintaining and operating the registry with respect to each individual seller and what each seller is required to pay has other consequences as well. It has been noted that "fee schedule[s] should be reasonably related to the total costs for the particular segments of recipients ... so that the 'fee' does not become a 'tax.'" *Id.* Moreover, "a fee, in order to not be a tax, cannot be justified by revenues received or the profits which [regulatees] have made from [the regulated activity]," as the Commission has proposes here, "but rather must be reasonably related to those attributable and direct costs which the agency actually incurs in regulating (servicing) the industry." *Id.* at 1107. This the Commission has not achieved with the rules proposed in the *Revised Fee NPRM.*

The need to avoid transforming a regulatory fee into a tax is not just a policy issue or a matter of nomenclature, but rather is an issue of constitutional significance. As noted, the Commission, through exclusions from its jurisdictional authority, discretionary exclusions adopted in the *Amended TSR Order*, and its decision to allow some sellers to avoid paying registry fees, has adopted a national "do-not-call" rule that

applies quite differently to various types of entities. The Supreme Court has held that the "power to tax differentially," as would be the case for the national "do-not-call" rule and its proposed fee structure, "as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected." *Minnesota Star*, 460 U.S. at 585. Courts staunchly guard against efforts to wield this kind of selective power, both for taxes and for fees.

Here, the Commission has adopted an impediment to contacting customers that applies solely to telemarketers, and it has targeted larger, more complex sellers to bear more than their fair share of the cost of being so regulated. Such a regulation that levies costs on only one medium "violates the First Amendment not only because it singles out" that medium, "but also [when] it targets a small group" of participants in that medium. *Minnesota Star*, 460 U.S. at 591. Indeed, "recognizing a power in the State not only to single out [one medium] but also to tailor the tax so that it singles out a few members ... presents such potential for abuse that no interest ... can justify the scheme." *Id.* Even in the name of equitably distributing the burden of the fee, "when the exemption selects ... a narrowly defined group to bear the full burden ... [it] begins to resemble more a penalty for a few of the largest ... than an attempt to favor struggling enterprises." *Id.* In short, the Commission has essentially proposed a fee structure that will not survive constitutional review no matter what interest it puts forth as a justification.

This is consistent with the recognition that, where the fit between the administrative cost incurred in enforcing a regulation and the fee charged for doing so is lacking, it is no answer that the regulation advances the interests of those it is intended to benefit – here, consumers wishing to avoid telemarketing. As the Supreme Court stated long ago in *Murdock*, the government "may not suppress, or the state tax" expressive activity merely because it is "unpopular, annoying or distasteful." 319 U.S. at 116. Nor is it an answer that, in the context of broadscale telemarketing, both the $29 per area code and maximum $7250 charges may be relatively small in the scope of some sellers' telemarketing business. The Supreme Court has made clear that its jurisprudence in this area "does not mean that an invalid fee can be saved if it is nominal." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 137 (1992) (construing *Murdock*, 319 U.S. at 116, *Cox*, 312 U.S. 569). *Cf. Gianni*, 199 F.3d at 1250 n.2 (regulatory fees on expressive activity can be high enough for some regulatees that it fully cuts off their right to speak).

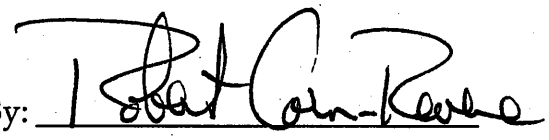
In sum, it would be unconstitutional for the Commission to adopt a fee structure for the national "do-not-call" registry that "imposes a sizeable price tag upon the enjoyment of a guaranteed freedom." *Gianni*, 199 F.3d at 1249. This is particularly true where, as with national "do-not-call" rules whose wholesale exemptions cause it to only "peripherally promote [the government's] interest in regulatory oversight," the same "goal is sufficiently served by measures less destructive of First Amendment interests." *Id.* (citing *Village of Schaumburg*, 444 U.S. at 636). For the national registry,

that means a fee structure that truly reflects only the actual administrative cost each seller causes with respect to the registry.

## III. CONCLUSION

For the foregoing reasons, ATA submits that the FTC must rethink its approach to the national "do-not-call" registry to ensure that the fee charged accurately captures – and does not exceed – the actual administrative cost to each entity that must access the registry.

Respectfully submitted,

By: 

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