

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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In the Matter of Notice of Proposed : Telemarketing Rulemaking  
Rulemaking on : Revised Fee NPRM Comment  
Telemarketing Sales Rule Fees : FTC File No. R411001  
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**COMMENTS OF THE ELECTRONIC RETAILING  
ASSOCIATION ON THE COMMISSION'S REVISED NOTICE OF PROPOSED  
RULEMAKING ON TELEMARKETING SALES RULE FEES**

The Electronic Retailing Association (“ERA”) is the leading trade association representing the electronic retailing industry. Its mission is to foster the use of various forms of electronic media – television, Internet, telephone, radio – to promote goods and services to consumers. The ERA has over 450 member organizations encompassing a wide range of entities, such as advertising agencies, direct response marketers, telemarketers, Internet and “brick and mortar” retailers, fulfillment service providers and television shopping channels. The ERA is submitting these comments in response to the Commission’s Revised Notice of Proposed Rulemaking relating to Telemarketing Sales Rule fees (the “Revised NPRM”), 68 F.R. 16238 (April 3, 2003).

The ERA continues to believe that the national Do Not Call (“DNC”) list called for in the Commission’s amended Telemarketing Sales Rule (“Amended TSR”), 16 C.F.R. §§ 310.1 - 310.9, is unnecessary and, further, that it is inequitable to impose the entire cost of implementing and enforcing such a national DNC list on sellers engaged in outbound telemarketing. As noted in our earlier comments, we believe that such costs

should be shared by the consumers who directly benefit from such a list in the form of a modest registration or sign up fee.

Now that a national DNC list has been implemented, however, and fees designed to cover the costs of implementing and enforcing this list authorized by Congress, the ERA agrees with the Commission's stated position that the burden of such fees should be fairly divided amongst the businesses engaged or involved in the conducting of outbound telemarketing campaigns. Nevertheless, the ERA believes that it is burdensome and unnecessarily duplicative for the Commission to require sellers, rather than the telemarketers acting on their behalf, to obtain the national DNC list. The ERA also believes that it is inequitable to require each division, affiliate or subsidiary of a particular seller to pay a separate registration fee.

Finally, the ERA does not believe that the Commission has provided any support or rational basis for its current cost estimate of \$18.1 million to implement and operate the national DNC list in fiscal year 2003. This estimate has increased from only \$5 million at the time of the Commission's initial user fee NPRM, 67 F.R. 37362 (May 29, 2002), to the current \$18.1 million level without any discussion by the Commission as to how these cost projections were reached. We also believe that the Commission's projections regarding the number of entities that will be required to access the list (now 7,500, as opposed to 3,000 in its earlier user fee NPRM), and the average number of area codes to be accessed by such entities, are speculative and based upon arbitrary and unsupported assertions and estimates designed to produce the \$18.1 million in user fees authorized in the Do-Not-Call Implementation Act, PL 108-10 (March 11, 2003).

**1. Sellers and Telemarketers Should be Free to Allocate Responsibility for Obtaining Access to the National DNC List**

In its Statement of Basis and Purpose relating to the Amended TSR (the “SBP”), the Commission stated an intention to work with those states maintaining their own DNC lists, and the FCC, to transition toward a single “harmonized” DNC registry system with a single set of compliance obligations in an effort to minimize duplication and maximize efficiency for consumers and business. 68 F.R. 4580, 4638 (January 29, 2003). The ERA is concerned, however, that rather than maximizing efficiency for industry members, the Commission’s current proposal would, in fact, be burdensome to sellers and unnecessarily duplicative of the efforts currently engaged in by sellers and the telemarketers acting on their behalf to ensure compliance with the various state DNC lists. It would be an unwarranted replication of effort for sellers to obtain the national DNC list directly while, at the same time, relying on telemarketers or other third parties acting on their behalf to access the various state lists.

As the Commission is aware, approximately thirty (30) states have now enacted DNC legislation, each with varying requirements regarding how and when their lists must be accessed, and by which entities. Many of these states prohibit telephone solicitations to the consumers appearing on their DNC lists without indicating which entity, the seller or the telemarketer, is responsible for actually obtaining and scrubbing against the DNC list.<sup>1</sup> Other states expressly require the telemarketer, rather than the seller, to obtain the DNC list.<sup>2</sup> In light of this state DNC scheme, it is common industry practice for sellers retaining third party telemarketers to engage in outbound telemarketing solicitations on

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<sup>1</sup> E.g., Alabama, Connecticut, Florida, Georgia, Idaho, Indiana, Kentucky, Massachusetts, Minnesota, Vermont, Wisconsin, Wyoming.

their behalf to rely upon these telemarketers to obtain, and scrub their calling lists against, the relevant state DNC lists.<sup>3</sup>

Indeed, the ERA believes that the DNC list acquisition and scrubbing function is more appropriately and efficiently handled by the telemarketer – which actually places the outbound call and maintains the lists of consumers to be called – than the seller on whose behalf it places such calls. As such, in the same way that Section 310.5(c) of the Amended TSR allows sellers and telemarketers to allocate responsibilities amongst themselves for compliance with the recordkeeping requirements of the Rule, we believe that the Commission should allow sellers and their telemarketers to allocate responsibility for obtaining access to the national DNC registry on behalf of the seller.

In particular, we believe sellers should have the option of directly enrolling on the Commission’s secure website to access the DNC registry or having a telemarketer or other third party service provider enroll on the site and obtain access to the DNC list on its behalf. The required access fee could either be charged to the seller directly or to the telemarketer/service provider on a “per seller basis.” In either event, a unique account number could be assigned for each seller, thereby allowing it the flexibility to change telemarketers/service providers, or use multiple telemarketers, once an access fee had been paid on its behalf.<sup>4</sup>

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<sup>2</sup> Arkansas, Colorado, Oklahoma, Pennsylvania.

<sup>3</sup> Sellers also frequently rely on third party “list suppression” service providers to manage the state DNC list compliance function for them by obtaining and scrubbing against these state lists on their behalf.

<sup>4</sup> The ERA agrees with the Commission’s assertion that sellers that engage multiple telemarketers should not be required to pay multiple access fees. Revised NPRM, 68 F.R. at 16240. Once an annual access fee is paid by a telemarketer/service provider on behalf of a particular seller, that seller should be able to transfer its account number to other telemarketers or service providers, and allow such parties to access the national DNC registry on its behalf, without being required to pay any additional access fees.

Such a system would comply with the Commission's stated goal of fairly dividing the implementation and enforcement costs of the national DNC list amongst the businesses engaged or involved in the conducting of outbound telemarketing campaigns, while allowing sellers the flexibility of accessing the list in the most efficient manner possible.

**2. Separate Access Fees for Each Corporate Division, Subsidiary or Affiliate are Inappropriate**

The ERA supports the Commission's conclusion that companies should only be charged a single time in order to access the national DNC registry. However, the ERA believes that this position is undermined by the Commission's proposal to treat each division, subsidiary or affiliate of a corporation as a separate seller for purposes of paying fees to access the national DNC registry. In our view, this proposal unfairly penalizes sellers with several divisions and/or affiliated entities by requiring them to pay multiple charges to access the national DNC registry.

In its SBP, the Commission addressed the issue of corporate affiliates and subsidiaries and the national DNC list with regard to the scope and applicability of the Amended TSR's established business relationship exemption. In that context, the Commission indicated that the issue of whether corporate affiliates or subsidiaries should be encompassed within an established business relationship exemption was dependent upon consumer expectations – "if consumers received a call from a company that is an affiliate or subsidiary of a company with whom they have a relationship, would consumers likely be surprised by that call and find it inconsistent with having placed their telephone number on the national [DNC] registry?" 68 F.R. at 4594. Thus, in adopting the Amended TSR, the Commission took the position that the affiliates of a particular

seller would fall within that entity's established business relationship exemption provided the consumer would reasonably expect these affiliates to be included within the exemption given the nature and type of goods offered and the identity of the affiliate.

The ERA believes that a similar rationale should be applied to the payment of access fees for the national DNC registry. Rather than treating each corporate division, subsidiary or affiliate as a separate "seller" for purposes of accessing the DNC registry, the access fee paid by a particular entity should encompass all corporate divisions, affiliates and subsidiaries thereof which the consumer would reasonably perceive as constituting a single "seller" or corporate organization given the nature and type of goods or services offered and the identity of the division, affiliate or subsidiary.

**3. The Commission's Implementation Cost and DNC List Usage Assumptions are Unsupported and Arbitrary**

In its initial user fee NPRM, the Commission estimated the cost of developing and implementing a national DNC list to be approximately \$5 million in the first year, with \$3 million of this amount collected from user fees. See 67 F.R. 37362. In January 2003, when Chairman Muris testified before the House Committee on Energy and Commerce the estimated first year costs had risen to approximately \$16 million. See Commission News Release at [www.ftc.gov/opa/2003/01/tsrhousebrief.htm](http://www.ftc.gov/opa/2003/01/tsrhousebrief.htm). By March 2003, when Congress passed its 2003 Consolidated Appropriations Resolution, PL 108-07, the estimated cost of implementing and enforcing the national DNC registry had increased to \$18.1 million for fiscal year 2003 alone. Thus, in the past ten (10) months, the Commission's cost estimate for fiscal year 2003 has increased roughly two hundred sixty two percent (262%).

At the same time, however, the Commission has not provided industry with any information regarding how these cost projections were made or why they have increased so dramatically since the publication of the Commission's initial user fee NPRM. In particular, the Commission has offered no evidence or basis for its current assertion that its DNC list implementation and enforcement costs will, in fact, reach \$18.1 million in fiscal year 2003. According to published reports, the vendor contract awarded to AT&T Government Solutions for aiding the Commission in development, deployment and operation of the DNC registry calls for payment to AT&T of only \$3.5 million for fiscal year 2003. See AT&T News Release at [www.att.com/news/item/0,1847,11387,00.html](http://www.att.com/news/item/0,1847,11387,00.html) The Commission has given no indication as to how it projects an additional \$14.6 million in costs beyond that amount.

Moreover, many of the assumptions and projections contained within the Revised NPRM regarding the number of sellers required to access the national DNC list, and the extent to which these sellers will use the list (in terms of the number of area codes accessed), appear to be speculative and largely unsupported. For example, there is no evidence to suggest that the revenues per client achieved by a single telemarketing call center, DialAmerica, are indicative of the entire industry. Likewise, the Commission has not provided any empirical support for several of the assumptions it now relies upon to calculate the number of sellers projected to obtain the national DNC list, including its assumptions that: (i) the average seller uses three (3) different telemarketers for outbound campaigns over the course of a year; (ii) sellers conducting outbound telemarketing campaigns in-house are likely to spend five (5) times as much on telemarketing as sellers that use third party telemarketers; and (iii) forty percent (40%) of sellers retaining third

party telemarketers and twenty five percent (25%) of sellers conducting in-house telemarketing campaigns are exempt from coverage under the Amended TSR.

The Commission's projections regarding the number of sellers retaining telemarketers and the number conducting in-house telemarketing campaigns are further called into question by the fact that the Commission appears to have failed to take into account the fact that these groups are not mutually exclusive. In reality, many sellers are "hybrids" that conduct a certain percentage of telemarketing campaigns in-house while outsourcing other campaigns to third party telemarketers. Finally, the Commission has provided no rational basis for its assertion that sellers will, on average, pay to obtain information from eighty three (83) area codes in the national DNC registry. In sum, the Commission's current DNC list user and usage projections – 7,500 sellers paying to access 83 area codes – appear to be completely arbitrary.

Indeed, these DNC list user and usage projections appear to be contrived for the sole purpose of producing an anticipated user fee amount that matches the Commission's estimated, and equally unsubstantiated, \$18.1 million implementation and enforcement cost figure. Even assuming, arguendo, that the projections are accurate, however, the Commission's current proposal unfairly seeks to shift the entire burden of implementing and maintaining the national DNC list onto the telemarketing industry, which, as noted in our earlier comments, obtains no benefit from the DNC registry. The Commission's initial user fee proposal called for industry to bear sixty percent (60%) of the then-estimated \$5 million cost of implementing the national DNC list.<sup>5</sup> The current proposal, however, appears to place the entire cost of the DNC registry on the telemarketing

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<sup>5</sup> 3,000 telemarketers paying \$12/area code for an average of 83 area codes equals approximately \$3 million in user fees.



industry, as the Commission's proposed fees and estimated user and usage projections call for the payment of over \$18 million in user fees.<sup>6</sup> While, as noted above, it is not at all clear that the cost of implementing the national DNC list will actually equal \$18.1 million this fiscal year, the ERA believes that it is clear that the entire cost should not be borne by the telemarketing industry.

In light of the foregoing, the ERA does not believe that the Commission's current user fee proposal of \$29/area code up to an annual maximum of \$7,250 is justified.

#### **4. Conclusion**

Rather than requiring sellers to obtain the DNC list directly, we believe that the Commission should allow sellers and their telemarketers to allocate responsibility for obtaining access to the national DNC registry on behalf of the seller. The access fee paid by the seller should encompass all corporate divisions, affiliates and subsidiaries of the seller which the consumer would reasonably perceive as constituting a single "seller" given the nature and type of goods or services offered and the identity of the division, affiliate or subsidiary. Having said that, the ERA does not believe that the Commission's current user fee proposal is appropriate. There is no evidence to suggest that the cost of implementing the DNC list will actually meet or exceed \$18 million this year and the Commission's assertions that 7,500 sellers will pay to access 83 area codes in the national DNC registry are completely speculative. As such, the ERA would urge the Commission to implement a user fee structure that is less costly and burdensome to industry until such time as it can evaluate the true cost and actual usage of the list.

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<sup>6</sup> 7,500 sellers paying \$29/area code for an average of 83 area codes equals approximately \$18 million in user fees.

Respectfully Submitted:

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