Before The
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

In the Matter of	)	
	)	
Telemarketing Rulemaking – Comment	)	FTC File No. R411001
	)	
Proposed Privacy Act System,	)	
Do-Not-Call Registry–FTC	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

1. On January 22, 2002, the Federal Trade Commission ("FTC" or "Commission") issued a *Notice of Proposed Rulemaking* ("*Notice*") in this proceeding. The *Notice* proposes changes to the FTC's Telemarketing Sales Rule, 16 C.F.R. Part 310, that would establish a national registry for consumers who do not wish to receive telemarketing telephone calls ("national do-not-call registry"), require certain disclosures be made by telemarketers during sales calls, prohibit several additional sales practices as abusive telemarketing practices, expand the reach of the telemarketing rules to solicitations for charitable contributions and narrow the exceptions to the telemarketing sales rule.[1] The Commission seeks comment on a series of questions concerning the proposed rule.[2]

2. In addition, on March 1, 2002, the Commission issued a *Notice of Proposed New Privacy Act System of Records* ("*Privacy Act Notice*") that outlined the proposed process for the gathering of information from consumers for the national do-not-call registry and the

[1] See *Notice* at 12-13.

[2] *Id*. at 116-28.

dissemination of do-not-call lists to telemarketers.[3] The Commission proposes to use an automated system for answering incoming calls from individuals who desire to be placed on the national do-not-call registry and to process requests from individuals seeking access to their records.[4] The Commission seeks comment on the proposed process.[5]

3. The National Association of State Utility Consumer Advocates ("NASUCA"),[6] hereby submits comments on the Commission's proposals. NASUCA urges the Commission to establish a comprehensive, consumer-friendly national do-not-call registry, which provides consumers with multiple methods – including telephone, Internet and regular mail – for registering their telephone numbers. In this regard, NASUCA has concerns about the automated process for verification discussed in the *Privacy Act Notice*, as the process relates to consumers with unlisted numbers.

4. The Commission should also prohibit telemarketers from blocking consumers' Caller ID and restrict telemarketers' use of predictive dialers. In addition, the Commission should clarify that all telemarketers involved in multiple purpose sales calls must make the disclosures proposed by the Commission.

---

[3] *Privacy Act Notice* at 2.

[4] *Id.*

[5] *Id.*

[6] NASUCA is an association of 42 consumer advocates in 40 states and the District of Columbia. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

I. THE BENEFIT OF A NATIONAL DO-NOT-CALL REGISTRY TO CONSUMERS OUTWEIGHS THE COSTS OF COMPLIANCE THAT MAY BE INCURRED BY TELEMARKETERS AND SELLERS.

5. The Commission seeks comment on several aspects of the national do-not-call registry that may result in additional costs to telemarketers and sellers, and how those costs could be reduced.[7] NASUCA urges the Commission to refrain from letting the costs to the industry be the overriding factor in establishing the national do-not-call registry; the operation of a national do-not-call registry must focus on the benefits that will accrue to consumers.

6. Any telemarketer claims of overly burdensome costs should be viewed with the size of the industry in mind. Telemarketing is a $660 billion industry.[8] An industry of such magnitude has considerable ability to absorb the costs that may result from the implementation of an effective national do-not-call registry.

7. In that regard, the need for a comprehensive, consumer-friendly national do-not-call registry outweigh most of the additional costs that telemarketers and sellers might incur. State efforts at addressing the problem of unwanted telemarketing calls have not been comprehensive or consistent. As the Commission noted, only 20 states have some sort of process by which consumers may invoke a blanket prohibition on telemarketing calls to their homes.[9] Consumers in the remaining 30 states have no such protection.[10] Moreover, state laws may be ineffective because out-of-state telemarketers that may not be aware of, or in some cases may choose to ignore, an individual state's do-not-call law. Another disincentive to compliance with individual

---

[7] See *Notice* at 122-23.

[8] See Direct Marketing Association ("DMA"), "The Power of Partnership, Direct Marketing Association Annual Report 2001" ("DMA 2001 Annual Report"), http://www.the-dma.org/aboutdma/annualreport.pdf (accessed March 18, 2002) at 5.

[9] *Notice* at 67, note 239.

[10] As discussed below, DMA's national "do-not-call" list is inadequate because, among other things, it does not guarantee that telemarketers who are not DMA members will not call consumers.

states' do-not-call laws is that the vast majority of telemarketers make calls to many states. Thus, they may decide not to expend the cost and effort involved in obtaining do-not-call information from each individual state.

8. Many states also require consumers to pay a fee to be placed on the list. Even though the fee is often nominal, it can deter the poor and the elderly – two groups who are particularly susceptible to telemarketers' sales pitches – from using the service.

9. The Commission's proposal to create a national do-not-call registry can fill the gaps in the states' efforts. A national registry operated by the Commission will apply to almost all interstate telemarketers,[11] and thus have a much greater effect than current state laws. Consumers also will benefit by being able to go to one agency, the FTC, in order to shut off calls from these telemarketers.

10. In addition, the Commission's proposed national do-not-call registry can make up for the inadequacies of the only operative national do-not-call registry – DMA's Telephone Preference Service ("TPS"), which was begun in 1985.[12] Data provided by DMA shows that as of June 2000, after 15 years of existence, the TPS do-not-call list contained only three million names.[13] The list added another one million names – a 33% increase – from June 2000 to June 2001.[14] Since DMA has not actively advertised the existence of the TPS,[15] one can only assume that the 33% increase is due largely to publicity generated by state and federal legislative efforts to create do-not-call lists.[16]

---

[11] As discussed below, entities that are not subject to the FTC Act would be exempt from the proposed rule.

[12] See *Notice* at 68-69, note 241.

[13] *Id.* at 68.

[14] *Id.*

[15] *Id.* at 68-69, note 241

[16] See *id.* at 67-69, notes 239, 240 and 242.

11. Moreover, the TSP has numerous flaws. For example, the TSP do-not-call file is updated monthly, but is distributed only quarterly.[17] Thus, a consumer's do-not-call request could take up to three months to be distributed to telemarketers. This is considerably longer than the Federal Communications Commission's ("FCC's") requirement that telemarketers immediately place on their do-not-call lists the name and telephone number of any residential subscriber making a do-not-call request,[18] and presumably immediately cease calls to the subscriber. The Commission should consider updating its national do-not-call registry on a monthly or more frequent basis in order to ensure that consumers' requests become effective in a more timely manner.

12. Another flaw in the TSP is that names remain on file for only five years.[19] This is half the time that the FCC requires telemarketers to maintain subscriber names and telephone numbers on their individual do-not-call lists.[20] The Commission's do-not-call registry should be in line with the FCC's requirement.

13. In addition, DMA does not guarantee that consumers will stop receiving unsolicited calls from telemarketers who are not DMA members.[21] Thus, the TPS is ineffective for stopping calls from that portion of the telemarketing industry that does not belong to the DMA. DMA also charges a five-dollar fee to consumers who register with the TPS online, although mail-in registration is free.[22] The fee for online registration seems illogical, because DMA could transfer

---

[17] See DMA, "Getting off telephone call lists," http://www.the-dma.org/cgi/offtelephonedave (accessed March 18, 2002) ("DMA Factsheet").

[18] 47 C.F.R. § 64.1200(e)(2)(iii).

[19] See DMA Factsheet.

[20] 47 C.F.R. § 64.1200(e)(2)(vi).

[21] See DMA Factsheet.

[22] *Id.*

the online information onto the list electronically while mail-in information would have reprocessed manually.

14. The greatest flaw in the TSP is that those who maintain it – the telemarketing industry itself – have the greatest interest in making it ineffective. Indeed, DMA has lobbied against and helped to weaken state telemarketing legislation. As DMA stated in its 2001 Annual Report, "In states that passed do-not-call bills, the Association successfully helped craft legislative language that, in effect, exempts many DMA members from state registration."[23] In addition, DMA is working to take over operation of do-not-call lists in states that have passed do-not-call legislation, with at least three states – Connecticut, Maine and Wyoming – already committed to do so.[24] Thus, the current national do-not-call registry and the registries for several states are operated by an entity that is less than enthusiastic about their existence. The fox is guarding the henhouse.

15. An effective national do-not-call registry is needed. The costs to the telemarketing industry should not deter the Commission from establishing a comprehensive, consumer-friendly national do-not-call registry that benefits all consumers.

II. THE DO-NOT-CALL REGISTRY MUST BE CONSUMER-FRIENDLY.

A. It Should Be Easy for Consumers to Be Placed on the National Do-Not-Call Registry.

16. Administration of the registry should be easy and convenient for consumers. Consumers should not be charged a fee to be placed on the list. Telemarketers are similar to door-to-door salespeople. They both intrude upon consumers at their residences in an effort to

[23] DMA Annual Report 2001 at 5.

[24] *Id.*

sell them something that they may or may not want or need. Consumers do not have to pay a fee to keep door-to-door salespeople from ringing the doorbell; a homemade "no soliciting" sign usually suffices. Similarly, consumers should not have to pay a fee to keep telemarketers from calling. The national "do-not-call" registry should serve as the "no soliciting" sign for telemarketers. In addition, free placement on the registry would help deter scams that charge consumers to stop telemarketing calls, but do not deliver.

17. Consumers should have numerous avenues for placing themselves on the registry. The Commission has suggested using an interactive voice response ("IVR") system for receiving telephone calls from individuals who desire to be placed on the registry.[25] While this method is accessible to all telephone consumers, many consumers are reluctant to use an IVR system, particularly if it requires a computerized menu for access. In addition, once the national registry is in operation and is promoted to the public, the Commission may experience overloaded telephone systems, similar to the experience in Kentucky, Tennessee and Georgia when their "no-call" lists were implemented.[26]

18. NASUCA, therefore, recommends that Commission provide additional means for consumers to be placed on the registry. The Commission should consider developing a scannable postcard or similar form, which consumers may request, that contains all the information necessary to place a consumer on the registry. Consumers should also be allowed to register online. Additional registration methods would increase the effectiveness of the national registry.

---

[25] *Privacy Act Notice* at 2.

[26] See *Notice* at 69, note 242.

19. Anyone in the subscriber's immediate family should be allowed to request that the number be placed on the registry. This would help effectuate the subscriber's placement on the registry, especially for the elderly or the infirm. Social service agencies should also be allowed to assist their clients. However, in an effort to deter scams, the Commission should identify which non-family third parties may be appropriately authorized to collect and forward requests to be placed on the registry.

20. Placement of a consumer on the registry should establish a blanket prohibition on telemarketers calling the consumer, unless the consumer makes a positive act to authorize calls from the entity on whose behalf the telemarketer is calling. Authorization by negative option can be confusing to consumers and would be ineffective in reducing unwanted telemarketing calls. It should not be allowed.

21. Authorizations should be company-specific and purpose-specific. Entities should not be allowed to trade authorizations among affiliates and subsidiaries, or to sell authorizations to other companies. The latter situation has been a particular problem. Consumers who make on-line or telephone purchases with a company, or even respond to a company's survey, often find themselves on telemarketing lists for other purposes or for other companies. Consumers should be able to deal with the entities of their choice without being subjected to unwanted telemarketing calls.

B. The Commission Should Improve Its Proposed Verification Procedure.

22. The Commission has proposed an automated procedure to verify whether an individual has actually sought to have his or her telephone number placed on the national do-not-

call registry.[27] The Commission suggests the use of automatic number identification ("ANI") – Caller ID – technology "to verify the number from which an individual is dialing before adding that number to the registry.[28]

23. This process has many inherent problems. Consumers apparently would have to call from their own telephone in order to register. This would unnecessarily deter consumers from registering, since many may be at a friend's or family member's house when they learn of the national registry and would like to register immediately. In addition, using ANI technology to verify the number would make it more difficult for family members, social service agencies or other approved third parties to place a consumer's telephone number on the registry. It would also be difficult for consumers with multiple residential lines to place more than one on the registry, since they would be required to call the Commission from each line. Moreover, as discussed below, consumers have a number of legitimate reasons for blocking Caller ID. Using ANI technology alone to verify the number would prevent individuals who block Caller ID from registering. It would also be impossible to use online or postcard registration.

24. Instead of using only ANI technology for verification, the Commission should develop a system that contacts the registered number for verification. For example, a call-back system could be used that notifies the consumer that his/her number has been placed on the Commission's national do-not-call registry and provides information on how to remove the number from the registry if the number was placed there in error. Consumers could be notified when registering that they would be receiving such a call for verification purposes.

---

[27] *Privacy Act Notice* at 2.

[28] *Id.*

25. The use of ANI technology alone for verification has the effect of limiting the methods by which consumers may register for the national do-not-call list and could actually prevent some consumers from registering. The Commission should examine alternatives to using only ANI technology.

C. The Commission Should Not Preempt State "Do-Not-Call" Requirements That Provide Consumers with Greater Protection Against Telemarketers Than the Commission's Proposed Rules Do.

26. The Commission seeks comments on the interplay between its proposed rules and states' "do-not-call" requirements.[29] Specifically, the Commission asks whether its rules should preempt state requirements.[30]

27. State "do-not-call" requirements that provide consumers with greater protection against telemarketers should not be preempted by the Commission's requirements. One purpose behind the Telemarketing Consumer Fraud and Abuse Prevention Act, and the Telemarketing Sales Rule upon which it is based, is to give consumers new protections.[31] It would be illogical, therefore, for the Commission's proposed rule to *reduce* the protections afforded consumers in those states whose do-not-call laws are more beneficial to consumers.

28. Moreover, the Commission has noted that the reach of its rule is limited to those entities that are subject to the Commission's jurisdiction.[32] Entities that are beyond the Commission's jurisdiction include banks, savings and loans, Federal credit unions, common carriers, air carriers and persons, partnerships and corporations subject to the Packers and

---

[29] *Notice* at 124.

[30] *Id.*

[31] *Id.* at 2-3.

[32] *Id.* at 16.

Stockyards Act of 1921.[33] States should not be precluded from broadening the applicability of their laws.

III. TELEMARKETERS SHOULD NOT BE ALLOWED TO BLOCK CONSUMERS' CALLER ID.

29. Caller ID blocking is a privacy feature designed to protect the telephone number of the caller from being disclosed to the party being called. Consumers use it for many legitimate purposes, such as protecting the whereabouts of abused spouses, keeping unlisted numbers from being disclosed, etc. Consumers have the personal right to prevent their telephone numbers from being displayed. Telemarketers, who impose their presence into consumers' homes, should not have these rights.

30. Telemarketers have no valid reason to prevent their numbers from being displayed by Caller ID. Just as consumers have a right to know who is knocking on their door before they decide to open it, consumers have a right to know who is calling before they answer the phone. That is why consumers spend millions of dollars each year on Caller ID – to have the ability to ask, "Who's there?" before answering the phone.

31. On the other hand, telemarketers spend millions of dollars each year to thwart consumers' right to know. Local service providers charge extra for per-line Caller ID blocking. Removing telemarketers' Caller ID block could actually reduce their costs.

32. Prohibiting telemarketers from blocking Caller ID would especially aid consumers who receive telemarketing calls placed with a predictive dialer. As the Commission noted, "when the predictive dialer disconnects the call, the consumer often has no effective way to determine from whom the call originated and thus to whom he or she should direct a 'do-not-

[33] 45 U.S.C.§ 45(a).

call' request…."[34] If telemarketers are prohibited from blocking Caller ID, consumers with Caller ID would have a greater ability to get on do-not-call lists and monitor telemarketers who make use of predictive dialers.[35]

33. The Commission has asked parties to comment on the information that should be displayed on the consumer's Caller ID screen when telemarketers call.[36] The Caller ID should show at least the name of the telemarketer, since that is the entity actually calling. Having the name of the seller or the charitable organization appear on the screen might mislead consumers into believing that they being called by a local store or a charity itself.

34. Entities often use different telemarketing companies for different purposes. A consumer who receives misinformation from a telemarketer or has some other problem with the call should be able to identify the telemarketer in attempting to rectify the problem. The consumer would not be able to do that if only the name of the seller or charitable organization appears on the screen.

IV. TELEMARKETERS' USE OF PREDICTIVE DIALERS SHOULD BE RESTRICTED.

35. Predictive dialers are software programs that call numerous telephone numbers simultaneously, but disconnect all but those that are answered when a telemarketer is free to take the call.[37] Thus, consumers often answer a ringing phone, only to hear "dead air" or a hang-up

[34] *Notice* at 82.

[35] As discussed below, there should be additional protections to assist customers who do not have Caller ID.

[36] *Notice* at 122.

[37] *Id.* at 81.

on the other end.[38] The Commission has noted the increase in consumer complaints, and the industry's acknowledgement of consumer objections, concerning this practice.[39]

36. To address the predictive dialer problem, the Commission proposes in § 310.4(d) to require telemarketers to make certain disclosures – including the identity of the seller, that the purpose of the call is to sell goods or services, the nature of the goods and services and that no purchase or payment is necessary to win a prize if a prize is being offered – to the person receiving the call. Failure to make the disclosures would be considered an abusive telemarketing act or practice. A person would "receive a call" upon answering the phone; thus, "[o]nce the consumer has answered the telephone, the telemarketer violates § 310.4(d) if the telemarketer disconnects the call without providing the required disclosures."[40] Therefore, a telemarketer who uses a predictive dialer would commit an abusive act or practice if the telemarketer does not make the required disclosures on any call in which the consumer answers the phone. The Commission has asked whether § 310.4(d) is sufficient to curtail abuses of the predictive dialer technology.[41]

37. Although application of the rule would tend to reduce hang-ups and dead air calls by predictive dialers to near zero for the short term, the rule's application might not address the problem noted by the Commission – the inability of consumers to get on the do-not-call lists of telemarketers that use predictive dialers.[42] For example, instead of hanging up, the predictive dialer could trigger a recorded message giving the four disclosures listed in § 310.4(d). Even

---

[38] *Id.*

[39] *Id.* at 82-83.

[40] *Id.* at 84-85.

[41] *Id.* at 125.

[42] See *id.* at 82.

after those disclosures, consumers – especially those without Caller ID (even assuming that telemarketers could not block Caller ID) – would not know whom to contact to get on the telemarketer's do-not-call list.

38. Moreover, if a telemarketer uses a recorded message as suggested above, the proposed application of the rule could actually *increase* the number of abandoned calls. By using a recorded message, a telemarketer could make repeated predictive dialer calls to the same consumer monthly or daily and abandon every one, since with each call the required disclosures would be made.

39. DMA has attempted to address the issue of excessive abandoned calls by establishing guidelines under which a telemarketer should have no more than five percent abandoned calls and cannot abandon the same caller more than twice in a month.[43] These guidelines are inadequate to prevent large numbers of complaints concerning hang-ups and dead air on telemarketing calls. For one thing, a five percent abandonment rate per telemarketer with up to two abandoned calls per month could still subject consumers to numerous abandoned calls each month, depending on the number of telemarketers calling. In addition, these guidelines are totally voluntary, even for DMA members. Telemarketers may follow them at their own discretion, and indeed some telemarketers have an abandonment rate as high as forty percent.[44] The only "punishment" for telemarketers that fail to follow the guidelines is possible expulsion from DMA.[45]

40. Stronger enforcement is needed. The Commission should adopt rules that effectively bring abandoned predictive dialer calls to zero.

---

[43] See *id*. at 83.

[44] See *id*. at 83, note 301.

[45] See *id*. at 69, note 241.

41. The Commission should address the problem in § 310.4(b), which concerns pattern of calls. Under proposed § 310.4(b)(1)(i), it would be an abusive telemarketing practice to "caus[e] any telephone to ring, or engag[e] any person in telephone conversation, repeatedly or continuously with the intent to annoy, abuse or harass any person at the called number…." Most telemarketers probably do not have the intent required to violate this provision; nevertheless hang-ups from calls placed with predictive dialers have the same annoying, abusive or harassing effect as those that are intended to do so.

42. The real problem associated with abandoned calls is the number of such calls that each consumer may receive during a given month, rather than the overall percentage of a telemarketer's calls that are abandoned. After all, a consumer is annoyed by the abandoned calls that he or she receives, not the calls that others may receive. Thus, the proposed rules should focus on the individual. The Commission should therefore modify § 310.4(b)(1) to limit the number of abandoned calls that a consumer can receive from a telemarketer. We suggest renumbering §§ 310.4(b)(1)(ii) and (iii) as §§ 310.4(b)(1)(iii) and (iv), respectively, and inserting the following language as new § 310.4(b)(1)(ii):

> Using an automated dialing system that allows an abandoned call to the same telephone number more than once every 180 days;

43. In addition, the Commission should include among the required disclosures in § 310.4(d) information on how the consumer can get on the telemarketer's do-not-call list. That information should include a toll-free telephone number to contact, as well as the telemarketer's address.

V. THE COMMISSION SHOULD CLARIFY THE APPLICATION OF PORTIONS OF PROPOSED § 310.4(d).

44. The Commission seeks comment on whether the timing of disclosures in multiple purpose sales calls is sufficiently clear.[46] Multiple purpose calls are those that contain a sales and non-sales element, such as a call to inquire about a customer's satisfaction with a product or service which becomes a call to offer additional products or services.[47] The Commission has addressed multiple purpose calls in proposed § 310.4(d).[48]

45. Proposed § 310(d) requires four disclosures to be made "promptly" during "an outbound telephone call to induce the purchase of goods or services…."[49] However, "promptly" is a vague term that is open to much interpretation. On the other hand, § 310.4(d) contains a much clearer disclosure requirement only for disclosure of prize information; the "disclosure must be made before or in conjunction with the description of the prize to the person called."[50]

46. Clear disclosure requirements are necessary for multiple purpose calls, where it may not be clear whether the caller is inquiring about customer satisfaction or attempting to sell more products or services. Thus, the proposed rule needs a clearer disclosure requirement. In multiple purpose calls, disclosure should be made when the purpose of the call changes to a sales call.

47. In addition, it is unclear whether § 310.4(d) applies at all to up-selling, the use of multiple telemarketers on the same call.[51] Clearly, the disclosure requirement would apply to the first telemarketer, who uses an outbound call to sell a product or service to a consumer.

---

[46] *Id*. at 125.

[47] *Id*. at 35.

[48] *Id.*

[49] *Id*. at 139.

[50] *Id.*

[51] See *id*. at 11, note 45.

However, if that telemarketer transfers the call to a second telemarketer to sell the same consumer a different product or service, the second telemarketer could argue that it did not make an outbound call, and therefore need not make the required disclosures. The Commission should make clear that the disclosure requirements in § 310.4(d) apply to all telemarketers involved in an up-selling situation.

VI. CONCLUSION.

48. The national do-not-call registry proposed by the Commission will provide considerable benefits to consumers that outweigh the costs of compliance that will be incurred by the $660 billion telemarketing industry. The Commission has provided a sound framework for administration of the national registry. In order to make the national registry as effective and comprehensive as possible, however, the Commission should make it easier for consumers to register. The Commission also should not preempt state laws that are more beneficial to consumers. Therefore, NASUCA urges the Commission to make changes to its proposed rule as described herein.

Respectfully submitted,

ROBERT S. TONGREN
CONSUMERS' COUNSEL

_____

Terry L. Etter
Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574
etter@occ.state.oh.us

Michael J. Travieso
Maryland People's Counsel
Chair, NASUCA Telecommunications Committee
On Behalf of NASUCA
Suite 2102
6 St. Paul St.
Baltimore, MD 21202

NASUCA
8300 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

April 15, 2002