

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

TELEMARKETING RULEMAKING USER FEE COMMENT

FTC FILE NO. R411001

**COMMENTS OF THE NOT-FOR-PROFIT AND CHARITABLE COALITION
IN RESPONSE TO THE FEDERAL TRADE COMMISSION S PROPOSED
TELEMARKETING SALES RULE PROPOSED USER FEES**

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TELEMARKETING RULEMAKING USER FEE COMMENT
FTC FILE NO. R411001

On behalf of the Not-For-Profit and Charitable Coalition (Coalition) a Coalition of 277 not-for-profit (nonprofit) and charitable organizations the following comments are submitted in response to the Federal Trade Commission s (Commission) request for comments on the proposed rulemaking to amend the Telemarketing Sales Rule, 16 C.F.R. § 310 *et seq.* (TSR). See Notice of Proposed Rulemaking, 67 FED. REG. 37362 (May 29, 2002) (Notice). As requested by the Commission, the Coalition has filed with the Office of the Secretary six copies of these comments and a computer disk containing a copy saved in electronic form.

The Coalition is composed of 277 national, state, and local nonprofit and charitable organizations with tax-exempt status under the United States Internal Revenue Code, 26 U.S.C. § 501(c), that oppose the Commission s proposed rule.¹ The Coalition directly represents more than 1,000,000 people who will be harmed irreparably by the FTC s imposition of illegal user fees on professional fundraisers that communicate with donors on behalf of nonprofit and charitable organizations in order to convey charitable messages and seek donations. The Coalition strongly objects to the proposed collection of user fees from

1

The Coalition incorporates by reference its comments filed in response to the FTC s request for comments on the proposed rulemaking to amend the Telemarketing Sales Rule, 16 C.F.R. § 310 *et seq.* See Notice of Proposed Rulemaking, 67 FED. REG. 4492 (Jan. 30, 2002). A copy of the Coalition s Comments are available on the FTC s Website. See <http://www.ftc.gov/os/comments/dncpapercomments/04/notforprofit.pdf> (accessed June 26, 2002) (hereinafter Coalition s Comments).

TELEMARKETING RULEMAKING USER FEE COMMENT
FTC FILE NO. R411001

professional fundraisers where the FTC conditions compliance with the TSR based on mandatory access to the registry and the compulsory payment of illegal fees to the government. *See* Notice, 67 FED. REG at 37363 (telemarketers will be required to access the national registry to remain in compliance with the TSR and to engage in telemarketing lawfully).

The proposed user fees not only are incompatible with the stated objectives of the Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 *et seq.* (Telemarketing Act), in regulating deceptive and abusive telemarketing practices, but represent an unconstitutional financial restriction or tax on the exercise of fully protected free speech in violation of the First Amendment. *See* Coalition s Comments, at 32-44 (discussing unconstitutionality of the proposed TSR amendments); 67 FED. REG. 4492, 4497 n.51 (Jan. 30, 2002) (acknowledging that the First Amendment protection for charities extend to their for-profit solicitors and citing *Riley v. Nat l Fed. of the Blind*, 487 U.S. 781 (1988)). This especially is true where the effect of the proposed user fees is to require professional fundraisers acting on behalf of nonprofit and charitable organizations to compensate the Federal government simply to exercise their First Amendment right to free speech a protected right not disputed by the FTC.

TELEMARKETING RULEMAKING USER FEE COMMENT
FTC FILE NO. R411001

The unconstitutionality of the proposed TSR amendments is compounded because the FTC would be empowered to impose severe civil penalties² and criminal contempt sanctions³ on professional fundraisers exercising protected First Amendment rights but who are accused of TSR violations for failing to comply with the registry, that is, failing to pay the government prior to communicating charitable messages to current and prospective donors. Indeed, based on the fencing-in relief reflected in injunctive provisions of current FTC consent orders under the TSR, the FTC's proposed amendments would authorize it potentially to impose permanent occupational bans⁴ on professional fundraisers engaged in

2

According to the FTC, [o]nce the Commission has promulgated a rule, anyone who violates the rule with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule is liable for civil penalties of up to \$11,000 per violation. The Commission obtains such penalties by filing a suit in district court under Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. §§ 45(m)(1)(A). In addition, any person who violates a rule (irrespective of the state of knowledge) is liable for injury caused to consumers by the rule violation. The Commission may pursue such recovery in a suit for consumer redress under Section 19 of the FTC Act, 15 U.S.C. §§ 57b. See Federal Trade Commission, *Brief Overview of The Federal Trade Commission's Investigative and Law Enforcement Authority* (Apr. 1998).

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The Telemarketing Act authorizes the FTC to bring a criminal contempt action for violations of orders of the Commission obtained in cases brought under section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 6107(a).

4

Permanent occupational bans for alleged violations of the Telemarketing Act and the TSR have been imposed by the FTC with increasing frequency. For example, in February 2002, the FTC obtained stipulated judgments against respondents Consumer Repair Services, Inc. and Manhattan West Marketing in which the Manhattan West Marketing was permanently banned from all telemarketing activities or assisting others in engaging in telemarketing in

TELEMARKETING RULEMAKING USER FEE COMMENT
FTC FILE NO. R411001

communications which the United States Supreme Court repeatedly has held to be fully protected free speech. *See Riley v. Nat l Fed. of the Blind*, 487 U.S. 781 (1988); *Secretary of the State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Env t*, 444 U.S. 620 (1980). Finally, the user fee is an illegal tax on professional fundraisers exercising First Amendment rights that is facially impermissible under the Independent Offices Appropriations Act of 1952, 31 U.S.C. § 9701 (User Fee Statute) and the Office of Management and Budget Circular No. A-25 (OMB Circular).

I. Summary of the Proposed User Fees

Under the proposed do-not-call registry, professional fundraisers acting on behalf of nonprofit and charitable organizations would be prohibited from calling consumers who have placed their telephone numbers on this registry. *See Notice*, 67 FED. REG at 37362. Professional fundraisers will be required to access the national registry to remain in compliance with the TSR and to engage in telemarketing lawfully. *Thus, access to the registry will enable telemarketers to engage in their chosen business. See Notice*, 67 FED. REG at 37363 (emphasis added).

The FTC proposes to collect user fees from professional fundraisers that access or obtain data from the national do-not-call registry. *Id.* In order to comply with the

the future. In January 2001, the FTC imposed a permanent occupational ban on respondent American Consumer Membership Services similarly prohibiting future telemarketing.

TELEMARKETING RULEMAKING USER FEE COMMENT
FTC FILE NO. R411001

proposed TSR amendments, all professional fundraisers must access the registry and scrub their call lists before they contact consumers on behalf of nonprofit and charitable organizations. Access would require a \$12 per area code user fee paid by professional fundraisers to the FTC, with a maximum annual user fee of \$3,000.⁵ *Id.* As discussed, *infra* Part III, the FTC seeks to justify imposing the fees pursuant to the User Fee Statute and the OMB Circular neither which permit the proposed fees.⁶

5

The amount of the user fees per area code was determined by the FTC based on the need to raise \$3,000,000 in total fees in Fiscal Year 2003. *See* Notice, 67 FED. REG at 37368 (The proposed annual user fee of \$12 per area code of data accessed is based on the assumption that, on average, the Commission must raise \$1,000 from each of the 3,000 entities that pay to gain access to the registry data). But there no attempt by the FTC to correlate the amount of the proposed user fees with the alleged benefit to professional fundraisers based on the use of the registry an approach inconsistent with the OMB Circular. Instead, the FTC proposes a fee structure that would ensure sufficient funds are collected to cover the costs of a national registry. *See* Notice, 67 FED. REG at 37364. Such an approach has been rejected by the Courts. *See, e.g., National Cable Television Ass n v. United States*, 415 U.S. 336 (1974) (FCC assessment of 30 cents per subscriber was a tax that the agency had no power to levy since it was calculated to reimburse the total cost to the agency without regard to whether there was a special benefit).

6

The Coalition disputes the FTC s thinly-veiled attempt to increase the amount of the illegal user fees by rejecting, without support, its previous assertion that there are 40,000 telemarketers that would have to comply with the proposed TSR amendments. *See* 67 FED. REG. at 4634. Indeed, the FTC s Paper Work Reduction Act submission to the OMB in this proceeding entirely was based on the FTC s estimate that there are 40,000 telemarketers in the United States, and that [s]taff estimates that approximately 2,500 telemarketers are solely engaged in the solicitation of charitable contributions, and that no more that 2% of telemarketers of goods or services also engage in such activities. *Id.* Now, however, the FTC asserts that only 3,000 telemarketers or sellers may pay for access to the information in the national registry not because of the Paper Work Reduction Act submission, but because of individual state experience. *See* Notice, 67 FED. REG at 37364.

TELEMARKETING RULEMAKING USER FEE COMMENT
FTC FILE NO. R411001

Several unsubstantiated and unfounded assumptions influenced the FTC's decision to impose the illegal user fees on professional fundraisers. First, it asserts that the do-not-call registry, if implemented, would be a "thing of value" to professional fundraisers because it may be more profitable for telemarketers to call only consumers who are receptive to being called. *See* Notice, 67 FED. REG at 37363. There is no support for this assumption. The Coalition disputes the contention that there is any value in a regulatory regime that compels the payment of money to the government as the price for exercising First Amendment rights.

Second, the FTC claims that the registry would allow professional fundraisers to engage in their chosen business by accessing the registry and, therefore, complying with the proposed TSR amendments. *Id.* This statement confirms the Coalition's belief that the proposed TSR amendments would be used by the FTC to impose penalties, criminal contempt sanctions, and permanent occupational bans on professional fundraisers and, in effect, no longer permit them to engage in their chosen business merely because they seek to exercise fully protected free speech rights unencumbered by excessive government intrusion.

And finally, the FTC summarily rejects imposing the proposed user fees on

In effect, by rejecting its previous 40,000 projection and underestimating the number of telemarketers that would be required to pay the user fees, the FTC creates the likelihood that the amount of funds raised by the agency will exceed greatly the \$3,000,000 need in FY 2003 in order to operate the registry resulting in a windfall for the agency.

TELEMARKETING RULEMAKING USER FEE COMMENT
FTC FILE NO. R411001

consumers because doing so allegedly would be inconsistent with the protections of the Telemarketing Act. It also cites the User Fee Statute as supporting the conclusion that it is less preferable economically to collect a small fee from the many consumers that would benefit from the registry⁷ as opposed to collecting a large fee from the comparatively few businesses with future compliance obligations.⁸ It reaches this conclusion notwithstanding the fact, as reflected in numerous statements on the record, that consumers would enjoy considerable economic and noneconomic benefits if the do-not-call registry is implemented and, historically, consumers have paid over a billion dollars each year to telephone companies and vendors in order to minimize telemarketing calls. *See, e.g.*, Comments of the Electronic Privacy Information Center *et al.* (Apr. 10, 2002) (citing Private Citizen Inc. estimate that consumers spend \$1.4 billion annually on caller identification services to avoid telemarketing); Comment of Consumer Privacy Guide (Mar. 28, 2002); Comment of Ken Underwood (Apr. 15, 2002).

II. The User Fees Are Unconstitutional As Applied to Professional

7

The FTC estimates that user fees from consumers would not justify the collection cost because it might be as small as \$0.05 per consumer. *See* Notice, 67 FED. REG at 37363 n.3. This \$0.05 per consumer projection appears to be based on the FTC's assumption that a national registry may ultimately include over 60 million telephone numbers. *Id.*

8

The FTC estimates that 3,000 business will be required to pay user fees in order to lawfully comply with the amended TSR and assumes that, on average, the Commission must raise \$1,000 from each of the 3,000 entities that pay to gain access to the registry data). *See* Notice, 67 FED. REG at 37368.

**Fundraisers Acting on Behalf of Nonprofit and Charitable
Organizations**

The Coalition incorporates by reference the discussion of the unconstitutionality of the proposed TSR amendments as set forth in the Coalition's Comments. In addition, the Coalition states that the illegal user fees proposed by FTC are unconstitutional because they violate the freedom of speech rights of nonprofit and charitable organizations and professional fundraisers acting on their behalf. The illegal fees are not narrowly tailored to further a strong governmental interest that the FTC is entitled to protect without interfering with the First Amendment protections of members of the Coalition. *See Munson*, 467 U.S. at 959-61; *Schaumburg*, 444 U.S. at 636-37. Indeed, the FTC makes no effort to discuss, much less to minimize, the effect of the illegal user fees on professional fundraisers as opposed to purely commercial telemarketers engaged in transactions solely to induce the purchase of goods or services. As the Supreme Court recently stated in *Watchtower Bible & Tract Soc. of New York, Inc. v. Village of Stratton, Ohio, Co.*, No. 00-1737, 2002 WL 1305851 (June 17, 2002), a government imposed regulatory scheme is offensive to the First Amendment and unconstitutional where, a citizen must first inform the government of her desire to speak to her neighbors[,] . . . obtain a permit to do so and, we add, compensate the government in order to engage in a Constitutional freedom. *Id.* (stating that the Village's administration of its ordinance unquestionably demonstrates that the provisions apply to a significant number of non-commercial canvassers promoting a wide variety of

TELEMARKETING RULEMAKING USER FEE COMMENT
FTC FILE NO. R411001

causes. . . . The mere fact that the ordinance covers so much speech raises constitutional concerns. *It is offensive not only to the values protected by the First Amendment, but to the very notion of a free society that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so*).

For the reasons articulated in the Coalition s Comments, the Coalition also contends that the proposed TSR amendments to collect illegal user fees are facially discriminatory violations of equal protection, unconstitutional prior restraints on free speech because they require payment of fees to the Federal government *in advance* of exercising First Amendment rights, and unconstitutional content based regulations.

III. The User Fees are Illegal Taxes Not Permitted under the User Fee Statute Nor the OMB Circular

The User Fee Statute and the OMB Circular do not authorize the FTC to collect user fees from professional fundraisers acting on behalf of nonprofit and charitable organizations. Indeed, the statute and OMB guidelines make clear that the proposed user fees are illegal taxes.⁹

9

The FTC intends to utilize a private entity to administer the registry. Since a private entity will provide the service, the Coalition notes that the User Fee Statute may not apply. Private entities are not subject to the User Fee Statute. As originally enacted, the User Fee Statute contained at least one provision requiring to be deposited into the United States Treasury all fees derived from services or things or value. This strongly suggests that the User Fee Statute was not intended to apply to fees collected by private entities for services

TELEMARKETING RULEMAKING USER FEE COMMENT
FTC FILE NO. R411001

The FTC cites the User Fee Statute as support for imposing the fees. The statute states:

- (a) It is the sense of Congress that each service or thing of value provided by an agency . . . to a person . . . is to be self-sustaining to the extent possible.
- (b) The head of each agency . . . may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be (1) fair; and (2) based on (A) the costs to the Government; (B) the value of the thing to the recipient; (C) public policy or interest served; and (D) other relevant facts.

31 U.S.C. § 9701. The OMB Circular also guided the FTC's decision because it establishes Federal policy regarding fees assessed for Government services. OMB Circular, at ¶ 1. The OMB Circular establishes a general policy that [a] user charge, as described below, will be assessed against *each identifiable recipient for special benefits* derived from Federal activities beyond those received by the general public. OMB Circular, at ¶ 6 (emphasis added). A special benefit accrues to a recipient where a government service (1) enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those that accrue to the general public (e.g., receiving a patent, insurance, or guarantee provision, or a license to carry on a specific activity or business or various kinds of public land use); (2)

they provide on behalf of the government.

TELEMARKETING RULEMAKING USER FEE COMMENT
FTC FILE NO. R411001

provides business stability; or (3) is performed at the request of or for the convenience of the recipient. OMB Circular, at ¶ 6(a)(1). The OMB Circular also clarifies that [e]xcise taxes are another means of charging specific beneficiaries for the Government services they receive. . . . Agencies may consider proposing a new excise tax when it would be significantly cheaper to administer than fees, and the burden of the excise tax would rest almost entirely on the user population (e.g., gasoline tax to finance highway construction). *Excise taxes cannot be imposed through administrative action but rather require legislation.* OMB Circular, at ¶ 6(a)(1) (emphasis added).

The proposed user fees are illegal under the statute and OMB's guidance. First, there is no specialized benefit or thing of value realized by professional fundraisers as a consequence of paying fees to the government in order to communicate a charitable message and solicit a donation from current and prospective donors. The only thing of value identified by the FTC is equivocal, unsubstantiated and conflicts with other record evidence: that is, the FTC asserts that it may be more profitable for telemarketers to call only consumers who are receptive to being called. *See Notice, 67 FED. REG at 37363.* This assertion is unsupported. It is equally likely that it will be less profitable. Indeed, the FTC estimates a 40 percent reduction in the donor pool based on the proposed TSR amendments. *See Federal Trade Commission, Fiscal Year 2003 Congressional Justification Budget Summary*, at 6 (The FTC estimates that up to 40 percent of all households in the United States would opt to be included on the Do-Not-Call list). Thus,

TELEMARKETING RULEMAKING USER FEE COMMENT
FTC FILE NO. R411001

it is without merit to suggest that the registry and the illegal user fees actually will make professional fundraisers *more profitable*, at the same time that the FTC itself projects vast reductions in telephone calls to donors translating into massive reductions in donations. Suffice it to say that the Coalition disputes the contention that there is any value in a regulatory regime that compels the payment of money to the government as the price for exercising First Amendment rights.

Second, it cannot be disputed seriously that the primary beneficiaries of the proposed TSR amendments are consumers, for if it were otherwise, there would be no basis for the FTC to propose the amendments. The FTC admits as much. *See* 67 FED. REG. at 4519 (*These consumers would benefit from a national registry they could contact to request to receive no telemarketing calls from or on behalf of any seller, or on behalf of any charitable organization, whatsoever. . . . A national registry would eliminate many of the burdens to consumers of the company-specific approach*) (emphasis added).

The OMB Circular advises that the FTC should assess user fees, if at all, on *each identifiable recipient for special benefits* derived from Federal activities beyond those received by the general public. OMB Circular, at ¶ 6 (emphasis added). Still, the FTC refuses to collect the user fees from the greatest beneficiaries of the proposed TSR amendments because doing so would be inconsistent with permitting consumers to avail themselves of the protections of the Telemarketing Act. The Coalition respectfully submits that it is no less of a legal inconsistency for the FTC to collect a nominal fee from

TELEMARKETING RULEMAKING USER FEE COMMENT
FTC FILE NO. R411001

consumers who benefit the greatest from the registry than the inconsistency of compelling a professional fundraiser to compensate the government before lawfully exercising First Amendment rights by communicating charitable messages with consumers and seeking contributions.

And finally, the proposed fees are illegal taxes that cannot be imposed administratively, but can only be levied by Congress. The cases cited by the FTC are distinguishable because they involve clear benefits to the recipients of the services that paid the fees, such as receiving a license. *See Mississippi Power & Light Co. v. United States Nuclear Reg. Comm n*, 601 F.2d 223, 229 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980) (imposing fees for renewal of license by the Nuclear Regulatory Commission and recovering costs for other administrative services). Indeed, the Supreme Court has stated [a] fee . . . is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. . . . It would be . . . a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power. . . . *National Cable*, 415 U.S. at 340-41. Similarly, the Court has made it abundantly clear that a federal agency may not assess fees allegedly in the interest of consumers to recover the general costs created by a regulatory scheme: the fee *presupposes an application whether by a single company or by a group of companies*. *Federal Power Commission v. New England Power Co.*, 415 U.S. 345 (1974) (emphasis added).

TELEMARKETING RULEMAKING USER FEE COMMENT
FTC FILE NO. R411001

In contrast, there is no application contemplated by the proposed TSR amendments, and the fees are not incident to a voluntary act. Instead, the fees are incident to a compulsory act that professional fundraisers subscribe to the FTC's registry prior to communicating charitable messages to current and prospective donors or face civil penalties, permanent occupational bans, and even criminal sanctions for contempt. Under these circumstances, the Coalition respectfully submits that the fees are an improper excise taxes, not user fees permitted by the User Fee Statute. *See* BLACK'S LAW DICTIONARY 257 (2nd Pocket ed. 2001) (defining excise tax as a tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee) .

CONCLUSION

For the foregoing reasons, the Coalition objects to the proposed imposition of the unconstitutional and illegal user fees which find no support in the User Fee Statute nor the OMB Circular.

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TELEMARKETING RULEMAKING USER FEE COMMENT
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