

PREPARED STATEMENT OF
THE FEDERAL TRADE COMMISSION OF
THE UNITED STATES OF AMERICA ON
THE DO NOT CALL PROVISIONS OF THE
TELEMARKETING SALES RULE

Before the
COMMITTEE ON INDUSTRY, NATURAL RESOURCES, SCIENCE, AND
TECHNOLOGY
of the
CANADIAN PARLIAMENT
Ottawa, Ontario, Canada

May 4, 2005

Mr. Chairman, I am Lois Greisman, Associate Director of the Division of Planning and Information, within the Bureau of Consumer Protection of the U.S. Federal Trade Commission ("FTC" or "Commission").¹ I am pleased to appear today, at your request, on behalf of the Commission, to provide this Committee with information about the FTC's National Do Not Call Registry ("DNC Registry" or "Registry") and the Telemarketing Sales Rule ("TSR" or "Rule"). Our statement provides an overview of the TSR and DNC Registry provisions, an overview of the operation and design of the DNC Registry, an examination of the fees and costs associated with the DNC Registry, and a review of compliance and law enforcement. The DNC Registry is an important aspect of the Commission's ongoing efforts to protect consumers' privacy, and we hope that the FTC's experience will prove helpful in your work.

As the federal government's principal consumer protection agency, the FTC's mission is to promote the efficient functioning of the marketplace by acting against unfair or deceptive acts or practices and increasing consumer choice by promoting vigorous competition. To fulfill this mission, the Commission enforces the Federal Trade Commission Act, which prohibits unfair

¹The written statement represents the views of the Federal Trade Commission. My oral presentation and responses are my own and do not necessarily reflect the views of the Commission.

methods of competition and unfair or deceptive acts or practices in or affecting commerce.² In this regard, the Commission greatly values the cooperative working relationship which has developed over the years between the FTC and our counterparts in Canada, particularly in combating telemarketing fraud.

I. Review of the TSR and Do Not Call Rules

The FTC promulgated the DNC Registry and other substantial amendments to the TSR under the express authority granted to the Commission by the Telemarketing and Consumer Fraud and Abuse Prevention Act ("the Telemarketing Act" or "the Act").³ In accordance with the Telemarketing Act, the Commission adopted the original Telemarketing Sales Rule on August 23, 1995, which, inter alia, defined and prohibited certain deceptive telemarketing practices,⁴ including provisions prohibiting telemarketers or sellers from calling consumers who had previously requested not to receive such calls from a particular seller (the "company-specific do-not-call" provision).⁵

The Telemarketing Act also directed the Commission to undertake a review of the TSR within five years of its promulgation.⁶ Accordingly, the Commission began its review of the TSR on November 24, 1999. During the TSR Rule Review, the Commission received many comments questioning the effectiveness of the Rule's provisions dealing with the company-specific do-not-call provision. In particular, commenters noted that the company-specific do-not-call provision was extremely burdensome to consumers, often violated, and difficult to enforce. In addition, the company-specific do-not-call provision did not address the invasive and abusive potential of each company's initial call, which had become more problematic as the volume of telemarketing had vastly increased since promulgation of the original TSR.⁷

²The FTC has limited or no jurisdiction over specified types of entities and activities. These include banks, savings associations, and federal credit unions; regulated common carriers; air carriers; non-retail sales of livestock and meat products under the Packers and Stockyards Act; certain activities of nonprofit corporations; and the business of insurance. *See, e.g.*, 15 U.S.C. §§ 44, 45, 46 (FTC Act); 15 U.S.C. § 21 (Clayton Act); 7 U.S.C. § 227 (Packers and Stockyards Act); 15 U.S.C. §§ 1011 et seq. (McCarran-Ferguson Act).

³15 U.S.C. §§ 6101-08.

⁴16 C.F.R. § 310.3. *See also* 60 Fed. Reg. 43842 (Aug. 23, 1995).

⁵16 C.F.R. § 310.4(b)(1)(ii). *See also* 60 Fed. Reg. 43842 (Aug. 23, 1995).

⁶15 U.S.C. § 6108.

⁷These public comments may be found on the FTC's website at the following address: <http://www.ftc.gov/bcp/rulemaking/tsr/comments/index.html>.

In January 2002, having completed the TSR Rule Review, the Commission issued a Notice of Proposed Rulemaking ("NPR") to amend the TSR to create a new National Do Not Call Registry that would provide consumers with an effective mechanism to choose not to receive telemarketing calls.⁸ In response to the NPR, the Commission received over 64,000 written comments. The overwhelming majority of these comments expressed concern about unwanted telemarketing calls, and supported the DNC Registry proposal.⁹ The Commission concluded that the rulemaking record showed that a national DNC Registry was necessary to protect consumers' privacy from an abusive pattern of calls placed by a seller or telemarketer, and formally announced its adoption of the DNC Registry amendments on December 18, 2002.¹⁰

In establishing the DNC Registry, the Commission attempted to maximize consumer protection without imposing unnecessary burdens on the telemarketing industry.¹¹ In this regard, the DNC Registry provides those consumers who choose not to receive telemarketing calls, with a mechanism to register their telephone number. However, the DNC Registry contains certain exceptions that allow businesses to call consumers with whom they have an established business relationship.¹² In addition, even if consumers are registered with the DNC Registry, they may

⁸67 Fed. Reg. 4492 (Jan. 30, 2002). The NPR also included other proposed changes to the TSR. For example, the NPR included provisions prohibiting telemarketers from blocking the transmission of caller identification information on outbound telephone calls. The NPR also proposed restrictions on the use of "predictive dialer" software which, the rule review record showed, resulted in consumers experiencing hang-ups or "dead air" when telemarketers placed more outbound calls than they had agents to handle in an effort to maximize productivity by decreasing "down time."

⁹These comments may be found on the FTC's website at the following address:
<http://www.ftc.gov/bcp/rulemaking/tsr/tsr-review.htm>.

¹⁰See <http://www.ftc.gov/opa/2002/12/donotcall.htm>. See also 68 Fed. Reg. 4580 (January 29, 2003). In addition, the Federal Communications Commission ("FCC"), which has complementary jurisdiction to that of the FTC, issued parallel do-not-call rules shortly thereafter (see http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-153A1.pdf and http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-28A1.pdf for rules implementing the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. §227).

¹¹68 Fed. Reg. 4580, 4583 (Jan. 29, 2003).

¹²See 16 C.F.R. § 310.4(b)(1)(iii)(B)(i) and (ii). Sellers and telemarketers may call a consumer with whom a seller has an established business relationship, provided the consumer has not asked to be on the seller's entity-specific do-not-call list. The Rule states that there are two kinds of established business relationships. One is based on the consumer's purchase, rental, or lease of the seller's goods or services, or a financial transaction between the consumer and seller, within 18 months preceding a telemarketing call. The 18-month period runs from the date

provide a business with written permission to call. The Commission believes that the DNC Registry provides consumers with meaningful choice, while at the same time providing ample opportunity for companies to conduct legitimate telemarketing activities. Moreover, the DNC Registry provides telemarketers, sellers, and service providers with the ability to eliminate consumers from their lists who do not wish to be called, thus increasing the efficiency and effectiveness of their marketing initiatives.¹³

II. Design and Operation of the Registry

The DNC Registry is a comprehensive, automated system used by consumers; telemarketers, sellers, and service providers; and law enforcement agencies. The DNC Registry contains four separate functions: consumer registration, telemarketer access, receipt of consumer complaints, and law enforcement access, all in a single integrated system.¹⁴

The DNC Registry enables consumers to register their telephone numbers via either a toll-free telephone number or a dedicated website.¹⁵ Both methods of registration use

of the last payment, transaction, or shipment between the consumer and the seller. The other is based on a consumer's inquiry or application regarding a seller's goods or services, and exists for three months starting from the date the consumer makes the inquiry or application. This enables sellers to return calls to interested prospects even if their telephone numbers are on the DNC Registry.

¹³The Rules apply to telemarketers, sellers, and service providers. Telemarketers are organizations that typically place calls on behalf of others. Sellers are organizations that provide the goods or services sold. Sellers typically hire telemarketers to place calls on their behalf, though they may place calls directly, which means a "seller" can also be a "telemarketer" under the TSR. Service providers are organizations such as list brokers which provide services to those engaged in telemarketing activities. *See* 68 Fed. Reg. 45134 (July 31, 2003). In general, this statement uses the more familiar term "telemarketer" or "telemarketing organization" for all organizations accessing the Registry, unless the specific context requires a distinction. Although the DNC Registry does not apply to certain entities, these "exempt" entities may access the Registry to "scrub" their lists. Examples of "exempt" organizations include entities that engage in outbound telephone calls to consumers to induce charitable contributions, for political fund raising, or to conduct surveys. They also include entities engaged solely in calls to persons with whom they have an established business relationship or from whom they have obtained express written agreement to call, pursuant to 16 C.F.R. § 310.4(b)(1)(iii)(B)(i) or (ii), and who do not access the Registry for any other purpose.

¹⁴For a further discussion of these functions *see* 68 Fed. Reg. 4580, 4637-4640 (Jan. 29, 2003).

¹⁵The Commission currently receives consumer registrations and DNC Registry complaints through its toll-free number, 888-382-1222 or online at <http://www.donotcall.gov/>.

technologies that provide reasonable assurance that the person registering is authorized to do so, and retain only the telephone numbers of the registrant.¹⁶ To complement this process, the DNC Registry has also permitted states to transfer their telephone registration data into the Registry.¹⁷

In addition to consumer registration, the DNC Registry is designed to handle complaints from consumers who believe they have received telemarketing calls in violation of the TSR. Consumers are able to lodge such complaints either by the toll-free telephone call or dedicated website. Moreover, the DNC Registry automatically checks each complaint as it is filed, to ensure that the consumer's telephone number is indeed in the Registry and has been registered for a sufficient time for telemarketers to have accessed it.¹⁸

Further, the DNC Registry allows telemarketing organizations regular access to the information in the Registry. Telemarketer access to the Registry is provided through a secure website, and is granted based upon area codes selected by the telemarketer, following payment of the requisite fees.¹⁹

The DNC Registry also permits access by law enforcement agencies to appropriate information. For example, law enforcers are able to determine when a consumer registered, which area codes a telemarketer accessed, and when a consumer filed a complaint. Access by law enforcement agencies to the DNC Registry is provided through the Commission's existing Consumer Sentinel system, a secure Internet website through which over one-thousand domestic and international law enforcers can access consumer fraud complaints and law enforcement tools.²⁰

¹⁶Consumers who use the online registration mechanism also provide their email address. However, email addresses are stored securely, and are kept separate from consumer telephone numbers.

¹⁷As of December 2004, 17 states transferred telephone numbers on their state list and adopted the DNC Registry as the state registry. Eight states do not now share their lists with the FTC, but the FTC continues to work with these states to coordinate the lists with the National Do Not Call Registry.

¹⁸Currently, telemarketers must access the Registry at least once every thirty-one days (*see* 69 Fed. Reg. 16368). The original Amended TSR required that telemarketers access the Registry at least once every three months (*see* 68 Fed. Reg. 4580).

¹⁹Currently, the fees charged to telemarketers for accessing the DNC Registry are \$40 per area code, up to a maximum of \$11,000, with the first five area codes offered at no charge. *See* 16 C.F.R. § 310.8.

²⁰As you know, Consumer Sentinel is accessible by more than twenty Canadian law enforcement organizations: Alberta Government Services; Alberta Securities Commission; British Columbia Gaming, Audit & Investigation Office; British Columbia Ministry of Attorney

In addition to these functional design elements, the DNC Registry is designed to process large volumes of data and requests. During the first full month of operation (July 2003), the Registry processed more than 28 million consumer registration requests. By the end of the first full year of operation the system handled more than 61 million registration requests, with a current total of over 91 million registration requests since inception. Since October 2003, the Registry has also received a consistent volume of consumer complaints, averaging between 1,000 and 2,000 complaints per day, with a current total of over 900,000. The Registry has received more than 60,000 subscription requests from telemarketers. Further, since October 2003, law enforcement agencies have performed thousands of queries on the DNC Registry portions of Consumer Sentinel.

In sum, the scope of the DNC Registry is considerable. It has the capacity to register and verify millions of telephone numbers, hundreds of thousands of consumer complaints, tens of thousands of telemarketer access requests, and thousands of law enforcement queries.²¹

In addition to the “operational” successes of the DNC Registry, a 2004 Harris Interactive survey indicated that more than half the U.S. adult population - 57 percent - said they had registered a telephone number, and 92 percent of those reported receiving fewer telemarketing calls. Twenty-five percent of the consumers surveyed said they had stopped receiving telemarketing calls altogether.²²

III. Fees and Costs

The agency funds the operation of the DNC Registry and its related functions through Congressional appropriations and offsetting fee collections. Costs fall primarily in three broad

General; British Columbia Securities Commission; Calgary, Alberta Police Service; Competition Bureau, Industry Canada; Edmonton, Alberta Police Service; LaCombe, Alberta Police Department; Lethbridge, Alberta Police Department; Manitoba Securities Commission; New Brunswick Attorney General; North West Territory Community Operations; Ontario Ministry of Consumer & Commercial Relations; Ontario Provincial Police, Anti-Rackets Section; Ontario Toronto Crown Attorney's Office; Ontario Waterloo Regional Police; Quebec, Office de la protection du consommateur; Royal Canadian Mounted Police (RCMP); Saskatchewan Justice, Consumer Protection Branch; Toronto Police Department; and Vancouver, British Columbia Police Department.

²¹See <http://www.ftc.gov/opa/2005/02/2004dncstats.pdf> for registration and complaint statistics as of December 31, 2004, included in Appendix A.

²²Harris Interactive® conducted its on-line poll within the United States between January 19 and 28, 2004, of 3,378 adults nationwide. In addition, Customer Care Alliance, a consortium of companies that provides, among other things, services for clients to assess consumer satisfaction with their products, conducted a DNC Registry telephone survey of 851 people from February through April 2004 and obtained similar results. *See also* “FTC’s Do-not-call Team Receives Service to America Medal” at <http://www.ftc.gov/opa/2004/09/dncamericanmedal.htm>.

categories: (1) costs of development and operation of the DNC Registry, including the handling of complaints; (2) enforcement costs, which include consumer and business education and international coordination; and (3) agency infrastructure and administration costs, including information technology support.

The first category relates to the development and operation of the DNC Registry. As described above, the development and ongoing operation of the DNC Registry involves significant resources and effort.

The second cost category consists of various expenditures to enforce the DNC Registry and related TSR provisions. As with all TSR enforcement, we coordinate with our state partners and the U.S. Department of Justice, thereby leveraging resources and maximizing the deterrent impact. Further, given the fact that various telemarketing operations are moving offshore, international coordination is especially important. As such, it is a vital part of our enforcement plan.

We consider consumer and business education important complements to enforcement in securing compliance with the TSR. Experience has shown that one key to compliance is education. Because the amendments to the TSR were substantial, and the DNC Registry was an entirely new feature, educating consumers and businesses helped to reduce confusion, enhance consumers' privacy, and ensure the overall effectiveness of the system. Based on our experience, this substantial outreach effort was necessary, constructive, and effective in ensuring the success of the program.

The last category of costs consists of expenditures for related agency infrastructure and administration, including necessary enhancements to the FTC's information technology support. In this regard, the FTC has made significant investments in technology and infrastructure in response to the increased capacity required by the DNC Registry. For example, the Sentinel system and attendant infrastructure is in the midst of an upgrade to enable it to handle the increased volume of consumer complaints and the attendant demand from federal and state law enforcers for access to the DNC Registry data. Currently, DNC Registry complaints comprise a large number of consumer complaints in the Sentinel system. As noted above, through the Sentinel system such complaints are accessible to over one thousand individual law enforcers accessing the system from around the world. The Sentinel system allows these law enforcers to identify targets, categorize trends, and buttress existing investigations.

To offset such costs, Congress directs the Commission to collect fees from those engaging in telemarketing activities.²³ In each fiscal year the Commission determines the

²³See the Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003). The fee amounts that the Commission collects are based on anticipated costs, the anticipated number of entities who access the Registry, and the number of area codes the entities are expected to access. For Fiscal Years 2003, 2004, and 2005, Congress appropriated \$18.1 million,

appropriate fees through a rulemaking proceeding. Such a proceeding allows interested industry members and the general public to comment on, and provide information about the actual fee structure. As a result of these rulemakings, the Commission based the fees on the number of different area codes of data that an entity wished to access annually.²⁴ The fee structure currently provides those accessing the Registry with access to five area codes at no cost. Currently, the fees charged to telemarketers for accessing the DNC Registry are \$40 per area code, up to a maximum of \$11,000, with the first five area codes offered at no charge.²⁵ These fee amounts and the related fee structure are currently being reviewed, by the Commission.²⁶

IV. Compliance and Law Enforcement

Although compliance with the National Do Not Call Registry has been high, the FTC actively investigates and prosecutes violators. DNC Registry enforcement protects the success of the Registry in safeguarding consumer privacy. The FTC also works with our enforcement partners at the U.S. Department of Justice, the FCC, and the states to enforce the DNC Registry rules.

\$23.1 million, and \$21.9 million, respectively, and directed the FTC to collect offsetting fees. *See* the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11 (2003); the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3 (2004); and the Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809 (2004).

²⁴*See* 68 Fed. Reg. 45134 (July 31, 2003), and 69 Fed. Reg. 45,580 (July 30, 2004).

²⁵The Commission's decision to provide telemarketers with access to five area codes at no cost is, in large part, influenced by the Regulatory Flexibility Act (*see* 5 U.S.C. 604(a)), which requires that agencies consider the impact of regulations on small business entities. Because the implementation and enforcement costs are borne by a small percentage of entities that access the Registry, the Commission stated in its most recent rulemaking proposal that it "is particularly interested in comments addressing the propriety of changing or eliminating the number of area codes for which there is no charge, and the impact, if any, on entities that access the Registry, including small businesses." *see* 70 Fed. Reg. 20848, 20850 (April 22, 2005). In this regard, it is important to note that there are more than 280 active area codes available to telemarketers in the United States, while, in Canada, there are a little over 20. In addition, the TSR states that "there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the National Do Not Call Registry without being required to under this Rule, 47 C.F.R. § 64.1200, or any other federal law." 16 C.F.R. § 310.8(c). *See* note 13 for a discussion of "exempt" and other organizations which may access the Registry.

²⁶In its recent rulemaking proposal, the Commission is seeking comment on raising the per area code fee to \$56, raising the maximum to \$15,400, and whether to continue to provide telemarketers with the first five area codes at no charge (*see* 70 Fed. Reg. 20848 (April 22, 2005)).

Violating the National Do Not Call Registry subjects telemarketers to civil penalties of up to \$11,000 per violation. Civil penalty actions are filed by the Department of Justice on behalf of the FTC. Some violators of the DNC Registry also engage in fraud or other law violations. Indeed, a few fraudsters have attempted to profit from the popularity of the Registry by purporting to register consumers for do-not-call services for a fee. In these cases, the Commission seeks equitable relief in federal court, such as injunctions against future violations, consumer redress, and disgorgement of profits.

As of April 21, 2005, the FTC had initiated seven DNC Registry cases and obtained four settlements. (Two of those cases were filed by the Department of Justice on the FTC's behalf.) In addition, the FTC had filed four cases against do-not-call scams. The following is a list of all eleven cases in the FTC's DNC Registry Enforcement Program.

Registry enforcement by FTC referral to DOJ for civil penalties

- *U.S. v. Braglia Marketing Group, LLC et. al* – The FTC/DOJ charged the corporate defendant and its principals, telemarketers of timeshare vacation properties, with violating the Registry, abandoning calls, and failing to pay the Registry's fees for some area codes to which they had telemarketed. Defendants stipulated to a civil penalty of \$526,939, of which all but \$3,500 was suspended due to an inability to pay. If the defendants misrepresented their financial situation, the government can return to court to collect the full penalty. In addition, the settlement bans the principals from ever again owning more than five percent of, or directing, a telemarketing operation.
- *U.S. v. Flagship Resort Development Corporation et. al* - The FTC/DOJ charged the defendants, as the sellers who hired the Braglia Marketing Group, with liability for Braglia's violations as their telemarketer. The complaint further charged that the Flagship defendants themselves engaged in telemarketing that violated the Registry, abandoned calls, and failed to pay Registry fees for some area codes. Defendants agreed to a settlement which includes payment of a \$500,000 civil penalty.

Registry enforcement by FTC action for equitable relief

- *FTC. v. National Consumer Council, et. al* – The FTC alleged that the defendants, who claimed to be a non-profit debt negotiation organization, engaged in fraud. The do-not-call related charges were for violating the Registry and failing to pay any of the required fees for accessing the Registry. The FTC negotiated a settlement with the defendants which included injunctive relief and \$5 million in redress.
- *FTC v. Debt Management Foundation Services, et. al* – The FTC alleged that the defendants, who claimed to be a non-profit debt management organization, engaged in fraud. The do-not-call related charges were for violating the Registry and failing to pay any of the required fees for accessing the Registry. The FTC negotiated a settlement with

the defendants which included injunctive relief, an \$11 million suspended judgement, and payment of all existing assets.

- *FTC v. FGH International, Inc., et. al* – The FTC charged the defendants, operating an alleged scam against Hispanic consumers, with various law violations. The FTC subsequently amended the complaint to add counts for violating the Registry and failing to pay required Registry fees. The FTC has obtained a preliminary injunction and is continuing to litigate this matter.
- *FTC v. Internet Marketing Group, Inc., et. al* – The FTC charged the defendants, operating an alleged business opportunity scam, with various law violations, including violating the Registry. The FTC has obtained a preliminary injunction and is continuing to litigate this matter.
- *FTC v. 3R Bancorp, et. al* – The FTC charged the defendants, operating an alleged advance fee credit card scam, with numerous law violations including violating the Registry and failing to pay required Registry fees. The FTC has obtained preliminary injunctions and is continuing to litigate this matter.

Do-Not-Call scam enforcement

- *FTC v. Telephone Protection Agency, Inc., et. al* – The FTC charged the defendants with falsely claiming that they would register consumers with the FCC’s national registry, when, in fact, the FCC had no such list at the time. The FTC is continuing to litigate this matter.
- *FTC v. 4086465 Canada, Inc., a corporation dba International Protection Center, et al.* – The FTC charged the defendants with falsely claiming to provide consumers with do-not-call related services. The FTC is continuing to litigate this matter.
- *FTC v. Vector Direct Marketing, LLC, et. al* – The FTC charged the defendants with unauthorized billing for purported do-not-call protection services and falsely claiming to remove consumers’ personal information from telemarketers’ lists. The FTC negotiated a settlement with the defendants which included injunctive relief and a suspended judgment.
- *FTC v. Chase dba FreeDoNotCallList.org* – The FTC charged the defendant with falsely claiming that for a fee it would arrange for consumers’ telephone numbers to be placed on the Registry. The FTC negotiated a settlement with the defendant that includes a permanent injunction and refunds to the consumers.

As of December 31, 2004, the FCC, which, as noted earlier, issued DNC Registry requirements for entities under its complementary jurisdiction, had issued sixteen citations for

violations of the Registry and had entered into two consent decrees.²⁷ The states have brought additional actions in federal and state courts.

The Commission continues to commit significant resources to ensuring compliance, both through law enforcement and educational initiatives.

V. Conclusion

The Commission believes that the DNC Registry provisions of the TSR benefit American consumers by allowing them to curtail certain unwanted commercial intrusions into the privacy of their homes. Given the millions of consumers who have decided to register, and the significant decreases reported in the receipt of unwanted telemarketing calls, the Commission believes the National Do Not Call Registry has been enormously successful.

The Commission appreciates the opportunity to describe its experience with the DNC Registry and the Telemarketing Sales Rule. We look forward to working with the Committee as you move forward.

²⁷See United States Government Accountability Office, Report to Congressional Committees, “TELEMARKETING Implementation of The National Do-not-call Registry” (<http://www.gao.gov/new.items/d05113.pdf>).

APPENDIX A