

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

FTC File No. R411001

**CONVERGYS CORPORATION COMMENTS REGARDING
TELEMARKETING RULEMAKING – REVISED FEE NPRM**

I. Introduction

Convergys Corporation (“Convergys”) submits these comments in response to the Federal Trade Commission’s (“Commission” or “FTC”) revised Notice of Proposed Rulemaking (NPRM), released March 28, 2003, regarding its proposed fees to fund the national Do Not Call registry, and related implementation issues. Convergys provides award-winning billing and customer care products and services to leading companies across a broad range of industries, including telecommunications, cable and broadband, technology, financial services, and next-generation services. The majority of our telephone-based service offerings involve inbound telephone calls, but we also offer comprehensive outbound telephone marketing services to businesses seeking to outsource these activities.

The FTC’s revised NPRM reflects a significant change in approach. Instead of requiring “telemarketers” – as defined in the Telemarketing Sales Rule (“TSR”) – to purchase the Do-Not-Call (“DNC”) list data, the FTC is now proposing to require individual “sellers” to pay for such access. Convergys appreciates the FTC’s effort to distribute fees as equitably as possible among the industry. Nonetheless, some of the Commission’s related proposals raise a number of practical problems. We focus on three issues:

1. Optional Independent Access by Telemarketers: The Commission should permit telemarketers to pay for and obtain independent access to the DNC registry data,

and use the data for marketing campaigns on behalf of multiple clients. First, the Commission must not subject telemarketers to the risks of non-compliance unless it gives them the tools to ensure they can comply. The revised NPRM does not address how a telemarketer will be able to obtain access to the DNC registry when acting on behalf of an entity that is exempt from the FTC's jurisdiction and elects not to subscribe the FTC's registry voluntarily. Similar issues could arise in the event a covered seller does not obtain all the DNC data that it needs, or does not subscribe to it in a timely manner. Second, allowing telemarketers the option to purchase the data independent of sellers will facilitate voluntary adherence to these DNC requests.

2. Seller Identification: Telemarketers should not be required to identify their clients in order to obtain access to the DNC registry. The requirement may violate common contractual provisions governing privacy and confidentiality and there is no basis for requiring telemarketers to provide this information.
3. Data Management and Access: The FTC's proposal to tie telemarketers' access to that paid for by their clients may lead to unnecessary and repeated DNC data downloads, and will unquestionably place enormous administrative burdens on telemarketers that serve multiple clients that pay for varied levels of access. The proposed approach is also dramatically different from virtually every state-run DNC program and would require implementation of new and costly institutional controls to manage the list. Ultimately, the Commission's proposals will increase potential for confusion and inadvertent errors; we propose a more streamlined approach.

II. Optional Independent Access by Telemarketers

The Commission should permit, but not require, telemarketers to pay for and

obtain direct, independent access to the DNC registry, and use the suppression data for marketing campaigns for multiple clients.

We are particularly concerned that the Commission's proposal to limit telemarketers' access to the DNC registry to the level of access paid for by sellers who purchase the data does not take into account telemarketers acting on behalf of sellers who are not subject to FTC regulation and, therefore, not required to purchase the list. Thus, for example, a telemarketer placing calls on behalf of a bank or common carrier that elects not to subscribe to the FTC's list voluntarily apparently would not be able to obtain a code to access the DNC registry. At the same time, the FTC has repeatedly stressed that it expects telemarketers acting on behalf of these exempt entities to comply with the TSR. Apart from the broader question of whether the Commission's expansive view of its jurisdiction is correct, the Commission must not subject telemarketers to the DNC registry requirements yet deprive them of a reasonable means to comply.

Similar issues may arise when sellers do pay for access, but do not want to provide their access code. There is a risk that some sellers may purchase only a fraction of the area codes necessary for a particular campaign, or will not obtain or maintain current data.

Restricting telemarketers' access to the DNC database so that they may *only* do so when access has been provided for by an underlying seller would place telemarketers in the untenable position of being both "responsible" for clients' compliance, yet dependent on them to ensure the telemarketers' own compliance. Certainly some telemarketers in some instances may elect to rely in large measure on their clients. In other cases, sellers and telemarketers may prefer to allocate all or most of the responsibility to the telemarketer. We submit that these are decisions best left to sellers and telemarketers. A DNC program that *compels* telemarketers to rely on other parties to guard against risk of DNC violations imposes an unreasonable burden and legal risks

on telemarketers even when a seller is subject to the TSR; it may be an impossible task when a business is not legally required to incur increased expenses and administrative burdens to purchase and implement the list and does not choose to subscribe voluntarily.

Adopting a rule that attempts to prohibit telemarketers from making such calls unless they can persuade clients to pay for appropriate access to the DNC registry does not solve the problem. That approach would simply put telemarketers that offer outsourcing services at an even greater competitive disadvantage relative to in-house marketing efforts or even offshore service providers.

At the same time, there are some circumstances when Convergys or other telemarketers may want to subscribe to the DNC registry although the client is not required to do so, or even when a client has already purchased the data. For instance, Convergys might seek access to the registry so it can “scrub” a marketing list against the DNC data for calls on behalf of an exempt entity or to consumers with whom a client has an established business relationship. This kind of “best practice” can promote consumer confidence and goodwill, and is a valued service Convergys can support. Sellers, however, may be reluctant to subscribe to the registry when not legally required if they must go through the process themselves.

In addition, Convergys might in some cases elect to purchase the list independently even if a client has already obtained it, to help guard against errors or omissions. This sort of duplication certainly should not be required, but the Commission’s DNC registry should facilitate efforts to re-verify the accuracy of the list.

We recognize and appreciate that the Commission’s revised approach is designed to distribute the costs of obtaining DNC data more evenly, while trying to ensure that the fees collected will cover anticipated costs. Our proposal, however, will not undermine the goals of the fee structure or materially reduce the overall level of fees collected. First, many, if not most, large sellers conduct at least some telemarketing in-

house and, therefore, will obtain the DNC data even if they also outsource some of their marketing campaigns. Thus, permitting telemarketers to access the registry independently – even for use on behalf of multiple sellers – will likely *increase* the number of marketing entities that register and pay for it. Second, as noted above, providing direct access to telemarketers should promote voluntary use of the data, which will also indirectly generate more total user fees. As a result, we believe the Commission should also revise downward its proposed per-area code fee and per-user cap. We also suggest that the Commission establish corresponding fees for independent, direct access by telemarketers, which would contemplate and allow for unlimited use on behalf of multiple clients.

In designing its DNC program, the Commission’s primary consideration should be how best to ensure that consumers who register with the national DNC list do not get calls they do not want. The easier it is to use the DNC registry, the more likely it is to be used. The Commission’s rules should be flexible enough to accommodate a variety of business models. Thus, we urge the Commission to revisit its proposal to limit telemarketers’ access to the DNC list to the access paid for by sellers, and afford telemarketers the option to obtain access independently if they wish to do so. At a minimum, the Commission must either clarify that it will not require telemarketers to honor the DNC registry provisions of the TSR when making calls on behalf of an exempt entity, or provide a mechanism for telemarketers to gain access to the DNC registry independent of their exempt clients.

III. Seller Identification

The FTC has proposed that in order to access the national do not call list on behalf of seller-clients, outsourcers would have to utilize a seller-specific code and identify the sellers on whose behalf it accessing the database. In many cases, however,

telemarketers are required by contract to preserve the confidentiality of this business relationship. Preserving this confidence and a seamless identity between seller and telemarketer is crucial to the success of businesses that need assistance in areas that are not necessarily among their core competencies while still maintaining strong brand recognition and positive relationships with their own customers. For any business, customer identity is inherently sensitive, proprietary data and there is no basis in the record for requiring telemarketers to disclose it routinely and in the absence of substantial complaints or other evidence to suggest there have been violations. This is particularly true where a telemarketer seeks access to the registry on a voluntary basis. And sellers and telemarketers may be more reticent to use the data voluntarily if they are required to identify the underlying seller.

IV. Data Management and Access

Convergys has several concerns related to the feasibility, efficiency, and manageability of acquiring the list on behalf of several sellers, most of which relate to the proposed “seller-pays” model. For example, our present systems to handle states’ DNC data are generally designed based on our ability to obtain the information directly and use it for more than one client. Limiting our access to the varying levels of access paid for by clients could require substantial modifications and administrative burdens, and six-figure costs, to manage, incorporate and monitor numerous clients’ DNC data. In effect, we might have to maintain as many lists as we have clients or perhaps marketing campaigns. The Commission’s DNC registry should enable marketers to continue using compliance models they have in place.

In addition, the Commission’s proposal does not indicate how often the FTC would expect a telemarketer to obtain the DNC registry data when making calls on behalf of more than one client. A single seller engaged in telemarketing nationwide

throughout the year would be expected to purchase the national do not call list annually and obtain updates no less frequently than every three months. Thus, a single seller would be permitted to obtain the data just four times per year. The Commission has not, however, made clear whether a telemarketer serving even a relatively small number of clients, for example ten, could follow the same approach or if it would be forced to access the list up to forty times a year. The latter process is clearly inefficient and would create an unnecessarily uneven playing field between in-house and outsourced telemarketing activities.

In addition, the Commission's proposal does not address how the FTC would expect telemarketers to handle a new client acquired after an initial download of the list. For example, if an outsourcer obtains the list on September 30 but then acquires a new client on October 15, it is not clear whether the Commission expects the telemarketer to go back to the database to update its registration or re-acquire the information or, if so, when that would have to be done. We submit that it is unreasonable to require telemarketers to update any previous certifications or re-acquire the DNC data before commencing work for each new client as long as the data a telemarketer previously obtained is still applicable and current.

In order to address these issues, Convergys suggests that the Commission establish four specific dates throughout the year by which a new seller must purchase the list and by which it will issue quarterly updates. We believe it may be useful to provide the option of more frequent access (*e.g.*, even daily, as the Commission seems to contemplate) for those who would find it useful and cost-effective. Yet, utilizing a system of preset quarterly dates would streamline the system for sellers and telemarketers and, importantly for both consumers and companies, reduce confusion that may ultimately lead to unintentional errors and unwanted calls. With regard to new clients, the issue can be resolved if the Commission adopts our proposal to allow telemarketers themselves to pay for unlimited use of and access to the DNC data.

Failing that, however, the FTC should permit telemarketers to utilize data they previously downloaded applicable to a new client until the next preset quarterly update, at which time the telemarketer could update its registration. This would prevent unnecessarily duplicative database access, and allow sufficient time for a new seller to purchase the list, if necessary, while preventing inadvertent calls to those consumers who have signed up for the list.

V. Conclusion

Convergys prides itself on being a leader in the outsourcing industry and places client satisfaction and the satisfaction of their customers as a top priority. It is as a result of these key relationships that we have expressed the aforementioned concerns related to the FTC's proposed rules for national do not call fees, structure and access. We urge the Commission to provide added flexibility to enable sellers and telemarketers to allocate responsibility for subscribing to the DNC registry according to their business needs. The Commission should also revisit its proposal to require telemarketers to identify their clients. Equally important, the proposed access system may make the DNC registry difficult to use effectively as a result of a cumbersome and inefficient process. At the very least, the Commission must clarify telemarketers' obligations when placing calls on behalf of entities, such as banks and common carriers, that are exempt from the TSR.

Respectfully Submitted:

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