

multi-unit seller should cover all of the affiliates, subsidiaries and divisions of that multi-unit seller as long as consumers would reasonably perceive the multi-unit seller to be a single seller.

Moreover, by requiring the seller to pay the access fee to obtain the national DNC list, we believe that the Commission's Revised User Fee NPRM is likely to inadvertently and unduly hinder existing DNC list compliance processes. Sellers and telemarketers are currently subject to various state DNC list requirements, and these companies have already created business processes to comply with those requirements. In some cases, the sellers obtains the applicable DNC lists and manages the compliance process. In other cases, the telemarketer or a third party "scrubbing" service performs this service on behalf of the seller. Rather than requiring the seller to pay the national DNC list access fee, we believe it would be much more workable if the access fee were paid on a "per-seller" basis. In this manner, sellers, telemarketers, and third party service providers would be free to determine amongst themselves the most efficient mechanism by which to pay the fee and manage the national DNC list compliance process on behalf of each seller.

Finally, we are extremely concerned about the assumptions underlying the Commission's estimated cost for the implementation of the national DNC list as well as the basis for its proposed national DNC list access fee. The Commission's current cost estimate for the creation and implementation of the national DNC list in fiscal year 2003 is \$18.1 million. However, the Commission's original cost estimate, from May of 2002,

¹ 68 F.R. 16238 (April 3, 2003).

was \$5 million.² Although the estimated DNC list implementation cost has increased by more than \$13 million in less than 10 months, the Commission has not explained the reasons for this three-fold increase. In addition, the Commission's estimates of the number of entities that will be required to access the national DNC list appear to be arbitrary in nature. Given that any estimates regarding usage of the national DNC list would be highly speculative at this time, we would suggest that the Commission implement an initial user fee structure that is significantly less onerous and expensive for industry. We would also continue to urge the Commission to consider the imposition of a nominal registration fee for consumers.

1. Companies, Including Multi-Unit Sellers, Should Not be Charged Multiple Times for Access to the National Registry.

In the Revised User Fee NPRM, the Commission has expressly stated that it “does not intend to charge the same company multiple times for access to the national registry.”³ We believe this reasoning should extend to multi-unit businesses because multi-unit businesses will be unduly penalized by a requirement that each division, affiliate or subsidiary pay a separate DNC list access fee.

On this issue, the Commission's approach to the scope of the prior business relationship exemption for multi-unit businesses provides useful guidance. In particular, the Commission's Statement of Basis and Purpose (the “SBP”) for the TSR⁴ applies a “consumer expectation” standard to the scope of the established business relationship exemption for corporations and their affiliates. In that context, the Commission made it clear that affiliates of a particular seller would fall within that entity's established

² 67 F.R. 37362 (May 29, 2002).

³ 68 F.R. at 16239.

business relationship exemption as long as consumers would reasonably have expected such affiliates to be included.

We believe the Commission should apply a similar “consumer expectation” approach to the payment of national DNC list access fees by multi-unit businesses. An access fee paid by a particular entity should encompass all corporate divisions, affiliates and subsidiaries of that entity as long as consumers would reasonably perceive the entity as a single “seller” or corporate organization given the nature and type of goods or services offered and the identity of the division, affiliate or subsidiary. For the reasons discussed in this Section (1) as well as below in Section (3) of this Comment, we believe that it would be feasible both to allow multi-unit sellers to pay one access fee where the “consumer expectation” standard is met and to reduce the amount of the access fee.

2. Sellers, Telemarketers and Third Party Service Providers Should be Allowed to Pay the National DNC Access Fee on a Per-Seller Basis.

The Commission’s Revised User Fee NPRM would require the seller to pay the DNC list access fee. In imposing this requirement, we believe that the Commission’s current proposal is likely to interfere with many existing DNC list compliance processes. Currently, a seller will often require either its telemarketer or a third party service provider to manage compliance with state DNC lists on behalf of the seller. We would urge the Commission not to specifically require the seller to pay the national DNC access fee, but instead to allow businesses to decide amongst themselves how to pay the DNC list access fee on a per-seller basis.

On this issue, we believe that the approach taken by the Commission to the recordkeeping requirements of the TSR provides useful guidance. In particular, Section

⁴ 68 F.R. 4580, 4594 (January 29, 2003).

310.5(c) of the TSR allows sellers and telemarketers to allocate responsibilities amongst themselves for compliance with the recordkeeping requirements of the Rule. We believe that the Commission should use a similar rationale to allow sellers, telemarketers, and third party service providers to allocate responsibility amongst themselves for obtaining access to the national DNC registry on a per-seller basis.

Whether a seller pays the fee directly or its service provider or telemarketer does so on its behalf, a unique account number could be assigned for each seller. In this manner, the seller would be able to switch telemarketers or use multiple telemarketers as long as the access fee has been paid on its behalf. We believe that this approach would allow sellers, telemarketers, and third party service providers to determine the most efficient mechanism by which to pay the fee and manage the national DNC list compliance process.

3. The Commission's DNC List Implementation Cost Estimate and DNC List Usage Assumptions are Highly Speculative and Should be Revised.

We are extremely concerned about the assumptions underlying the Commission's estimated cost for the implementation of the national DNC list as well as the basis for its proposed DNC list access fee. In particular, the Commission's current cost estimate for the creation and implementation of the national DNC list in fiscal year 2003 is \$18.1 million. This estimate represents a three-fold increase from the Commission's original estimate of \$5 million published in May of 2002.⁵ To date, however, the Commission has not explained why its national DNC list cost estimate has soared so much in such a short time period. We understand from published reports that AT&T has been awarded a contract to develop and implement the national DNC list, but the contract appears to

⁵ 67 F.R. 37362 (May 29, 2002).

require a payment to AT&T of only \$3.5 million for fiscal year 2003.⁶ We do not understand, nor does the Commission explain, the basis for the additional \$14.6 million in estimated costs over and above the amount to be paid to AT&T.

In addition, the Revised User Fee NPRM appears to contain many significant assumptions, estimates, and projections regarding key facts such as the number of sellers who will access the national DNC list and the number of area codes those sellers will access on average. Some significant assumptions appear to be based on data provided by one very large telemarketing call center. We question whether data from one large call center can properly be deemed to be typical or representative of the industry's overall performance. We are also not aware of the factual basis for certain other assumptions, including assumptions that sellers use an average of three different telemarketers for outbound campaigns in a year and that sellers conducting outbound telemarketing campaigns in-house are likely to spend five times as much on telemarketing as sellers who use third party telemarketers. Our overall concern is that the Commission's current DNC list user and usage estimates (7,500 sellers, each accessing an average of 83 area codes) appear to be highly speculative.

Given the speculative nature of the estimates, we would suggest that a more balanced approach would be to avoid placing the entire cost on the telemarketing industry at this time. Indeed, the Commission's original cost estimate of \$5 million appeared to require the telemarketing industry to pay only \$3 million⁷ of the DNC list implementation cost. We continue to believe that it is not appropriate to require the telemarketing

⁶ See AT&T News Release at www.att.com/news/item/0,1847,11387,00.html.

⁷ 3,000 telemarketers multiplied by \$12 per area code multiplied by an average of 83 area codes equals approximately \$3 million.

industry alone to pay for the creation and implementation of the national DNC list. To that end, we would urge the Commission to reconsider the imposition of a nominal registration fee for the consumers who sign up for the national DNC list. Further, we recommend that the Commission set initial fee levels consistent with the costs of the DNC list implementation contract with AT&T. If such lower fees prove to be insufficient, the Commission could revisit fee levels once actual utilization data is available.

If you have any questions or concerns regarding these comments or any other comments filed by the MPA in the Commission's Telemarketing Sales Rule review proceeding, please feel free to contact us.

Respectfully submitted,

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