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

In the Matter of	)	
	)	
Monthly Registry Access	)	Project No. R411001

COMMENTS OF THE
NATIONAL ASSOCIATION OF
STATE UTILITY CONSUMER ADVOCATES

I. INTRODUCTION

1. The National Association of State Utility Consumer Advocates ("NASUCA")[1] submits these Comments to the *Notice of Proposed Rulemaking* issued by the Federal Trade Commission ("Commission" or "FTC") in the above-captioned proceeding on February 11, 2004.[2] The Commission seeks comment on how it should implement Congress's directive that the Commission require telemarketers to access the National Do Not Call Registry ("Registry") once a month,[3] rather than quarterly as currently found in the "safe harbor" portion of the Commission's rules for the Registry.[4]

2. NASUCA has long advocated that telemarketers should scrub their calling lists at least once a month.[5] Monthly scrubbing of calling lists not only makes the Registry more effective, it is consistent with the requirement of the Federal

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[1] NASUCA is an association of 44 consumer advocates in 42 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.

[2] 69 Fed. Reg. 7330 (February 13, 2004).

[3] Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 188 Stat. 3 ("Appropriations Act"), Division B, Title V.

[4] 16 C.F.R. § 310.4(b)(3)(iv).

[5] See NASUCA's User Fee Comments, FTC File No. R411001, filed June 28, 2002, at 6.

Communications Commission ("FCC") that consumers' requests to be placed on sellers' internal do-not-call lists be honored within 30 days.[6]

3. The Commission has presented for comment nine issues concerning the operation, cost and regulatory aspects of requiring telemarketers to access the Registry once a month.[7] The first four issues deal with whether the Commission should use the term "30 days" rather than "once a month," as found in the Appropriations Act. The next four issues address how much time would be needed for telemarketers to make the necessary changes to access the Registry monthly and the costs involved in monthly access. In the ninth issue, the Commission asks commenters to identify other laws and regulations that may duplicate, overlap or conflict with the Commission's proposed rule. NASUCA will comment on issues one through four and nine. In addition, NASUCA presents another threshold issue raised by the language of the Appropriations Act.

II. MONTHLY ACCESS TO THE REGISTRY SHOULD BE REQUIRED BY THE COMMISSION'S RULES.

4. The plain language of the Appropriations Act shows that Congress intends that the Commission's rules require telemarketers to access the Registry on a monthly basis. The Appropriations Act states,

> [N]ot later than 60 days after the date of enactment of this Act, the Federal Trade Commission shall amend the Telemarketing Sales Rule to require telemarketers subject to the Telemarketing Sales Rule to obtain from the Federal Trade Commission the list of telephone numbers on the 'do-not-call' registry once a month.[8]

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[6] 47 C.F.R. § 64.1200(d)(3).

[7] 69 Fed. Reg. 7332-7333. Whether the Commission should require monthly access at all is not an issue. See *id.* at 7331.

[8] See note 3, *supra.*

5. The Commission's rules, however, do not specifically require telemarketers to access the Registry. Instead, the rules only provide an incentive for telemarketers to access the Registry by making access part of the "safe harbor" from liability for a telemarketer that makes a nonexempt call to a number that is listed on the Registry.[9] If the telemarketer can show that it has set up the process described in the Commission's rules, including accessing the Registry at the required interval, then the telemarketer is not liable for the violation.[10] A telemarketer that fails to access the Registry does not have this "safe harbor." In such an instance, however, the telemarketer faces penalties only for making calls to numbers on the Registry – if there are complaints against the telemarketer. Failure to access the Registry is not a separate offense.

6. The Appropriations Act makes clear that a telemarketer's failure to access the Registry once a month should itself be a violation of the Commission's rules. The Commission should adopt a rule explicitly requiring telemarketers to access the Registry at least once a month. In addition, in order to maximize consistency between the Commission's rules and the FCC's rules as required by the Do-Not-Call Implementation Act ("Implementation Act"),[11] and to help make monthly access to the Registry applicable to those entities not under the Commission's jurisdiction, the FCC should also adopt a rule requiring telemarketers to access the Registry on a monthly basis.[12]

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[9] The prohibition against calling numbers listed on the Registry and the exemptions to that prohibition are found at 16 C.F.R. § 310.4(b)(1)(iii)(B).

[10] 16 C.F.R. § 310.4(b)(3). The FCC has a similar rule. 47 C.F.R. § 64.1200(b)(2)(i)(D).

[11] Pub. L. No. 108-10, 117 Stat. 357 (2003).

[12] As discussed *infra*, it will be necessary for the FCC to make at least one other change to its rules to make them consistent with the amendment to the Commission's rules mandated by the Appropriations Act.

7. Moreover, in order to prevent the type of "gaming" noted by the Commission,[13] the Commission and the FCC should require that telemarketers access the Registry each month within a specified time frame, e.g., by the 10th day of each month. This would provide the Commission and consumers with assurance that telemarketers are accessing the Registry frequently enough to achieve the greatest effectiveness for the Registry, while giving telemarketers flexibility as to when they access the Registry.

III. THE "SAFE HARBOR" PROVISION MAY CONTAIN LANGUAGE THAT IS EQUIVALENT TO THE "ONCE A MONTH" STANDARD.

8. The Commission proposes to amend 16 C.F.R. § 310.4(b)(3)(iv) in order to give telemarketers a "safe harbor" from violations of the Registry's rules if, among other things, the telemarketers use a version of the Registry "obtained from the Commission no more than thirty (30) days prior to the date any call is made...."[14] The Commission believes that the proposed revision would remove an ambiguity in the language of the Appropriations Act, thus making it easier for telemarketers to comply with the new access requirement.[15] The Commission also believes that the change is necessary in order to prevent any efforts by telemarketers to subvert the monthly access requirement by, for example, accessing the Registry on the last day of one month and the first day of the next month, thus effectively scrubbing their telemarketing lists bi-monthly.[16]

9. Thus, the Commission seeks comment on whether the term "thirty days":

- is more precise than the term "once a month" and provides more meaningful guidance for telemarketers to comply with the "safe harbor" provision;

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[13] 69 Fed. Reg. at 7330-7331.

[14] *Id.* at 7333.

[15] *Id.* at 7330.

[16] *Id.* at 7330-7331.

- will prevent telemarketers from attempting to subvert the intent of the Registry by "gaming" the system when scrubbing their lists; and
- makes clear the requisite interval at which data must be obtained from the Registry.[17]

In addition, the Commission asks commenters to identify any differences in compliance burdens on the telemarketing industry and any differences in consumer benefits that result from using the term "thirty days" instead of "once a month."[18]

10. The phrase "no more than thirty days" is a practical equivalent for the term "once a month." Like a monthly interval, a 30-day interval requires telemarketers to access the Registry approximately 12 times per year. The Commission's proposal would also help prevent "gaming" of the system by ensuring that a telemarketer has accessed the Registry no more than 30 days before calling an individual.

11. The 30-day interval, however, may be problematic for those telemarketers that would prefer to access the Registry on the same day every month (e.g., the first of every month). Because seven months have 31 days,[19] such telemarketers would be in technical violation of the rule seven times per year, even though they meet the Appropriations Act's "once a month" standard and are not "gaming" the system. The Commission should consider amending the proposed rule as follows:

> ...employing a version of the "do-not-call" registry obtained from the Commission ***using a process that accesses the registry on the same day each month or*** no more than 30 days prior to the date any call is made, and maintains records documenting this process.

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[17] *Id.* at 7332.

[18] *Id.*

[19] January, March, May, July, August, October and December.

This amendment would provide telemarketers with reasonable flexibility in the process they use for scrubbing their lists.

12. This amendment would also be consistent with the specified time frame proposal NASUCA put forth in the previous section. A telemarketer would have a "safe harbor" from making a call to a number listed on the Registry so long as the telemarketer had accessed the Registry during the specified time frame (e.g., by the 10th day of the month) and either on its regular day for accessing the Registry or no longer than 30 days since it previously accessed the Registry.

13. Consumers would see little difference between a "once a month" standard and either the Commission's proposed 30-day interval or NASUCA's suggested amendment. In all instances, consumers would be assured that they would stop receiving nonexempt calls from telemarketers within approximately 30 days.

IV. THE INCONSISTENCY BETWEEN THE PROPOSED RULE AND THE FCC'S "SAFE HARBOR" RULES RUNS COUNTER TO THE IMPLEMENTATION ACT, AND WOULD UNDERMINE THE EFFECTIVENESS OF THE REGISTRY BY CAUSING CONFUSION AMONG CONSUMERS AND TELEMARKETERS.

14. The Commission asks commenters to "identify any relevant Federal, State, or local statutes or rules that may duplicate, overlap or conflict with the proposed rule."[20] The Commission has identified an inconsistency with its proposed rule and the FCC's similar "safe harbor" rule. Like the Commission's current rule, the FCC's rule provides entities under FCC jurisdiction a "safe harbor" from liability for making calls to numbers

[20] 69 Fed. Reg. at 7333.

on the Registry if they, among other things, access the Registry every 90 days.[21] The Commission, however, does not consider the FCC rule to be in conflict:

> Rather, entities subject only to the FCC's telemarketing rules would be required to obtain information from the National Registry every three (3) months, while those entities subject to the FTC's rules would have to do so every thirty (30) days.[22]

15. This situation directly conflicts, however, with the mandate of the Implementation Act. Instead of all telemarketers being required to access the Registry monthly, some would not. This does not maximize the consistency between the Commission's rules and the FCC's rules, as required by the Implementation Act.

16. Furthermore, this inconsistency would cause confusion among consumers. Consumers who place their number on the National Registry would not know which telemarketers would have to cease making nonexempt telemarketing calls 30 days after the number is registered and which could continue making such calls for 90 days. This may cause some consumers to file erroneous complaints or become disenchanted with the Registry. The effectiveness of the Registry would be undermined.

17. Telemarketers also may be confused, because they must determine which sellers are subject to the Commission's 30-day rule and which are subject to the FCC's 90-day rule. This, in turn, may cause some telemarketers to inadvertently call numbers that are on the Registry in violation of the Commission's rules. This would also undermine the effectiveness of the Registry.

18. The Commission and the FCC are under an ongoing obligation to maintain maximum consistency in their rules governing the Registry. The Commission should,

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[21] 47 C.F.R. § 64.1200(b)(2)(i)(D).

[22] 69 Fed. Reg. at 7332.

therefore, work with the FCC to incorporate in its rules the monthly access mandated by the Appropriations Act.

V. CONCLUSION

19. NASUCA's two proposals – requiring that telemarketers access the Registry during a specified time frame each month and amending the Commission's proposed rule to include a "safe harbor" for telemarketers that access the Registry on the same day each month – help further the mandate of the Appropriations Act. The Commission should adopt NASUCA's proposals, and work with the FCC to incorporate in its rules the monthly access mandated by the Appropriations Act.

Respectfully submitted,

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