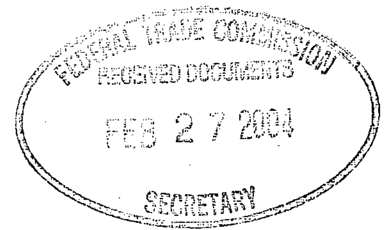

Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

COMMENTS OF THE NATIONAL RETAIL FEDERATION

TELEMARKETING RULEMAKING—COMMENT
FTC Project No. R411001
(Monthly Registry Access)

Mallory B. Duncan
Senior Vice President
General Counsel

Elizabeth Treanor
Senior Director
Government Relations Counsel

National Retail Federation
325 7th Street, N.W.
Suite 1100
Washington, D.C. 20004
(202) 783–7971

February 26, 2004

Amendment to the Telemarketing Sales Rule
Comments of the National Retail Federation

On behalf of the retail industry, the National Retail Federation ("NRF") submits the following comments regarding the implementation of the amendment contained in the Appropriations Act of 2004 to the Federal Trade Commission's ("FTC's" or "Commission's") Telemarketing Sales Rule. Telemarketing, both inbound and outbound, is among the tools many retailers use to communicate with their customers. NRF has worked with its members (and with the Commission) to ensure that retailers observe the existing TSR. Any change to those rules potentially has great effects on our members' operations.

By way of background, The National Retail Federation is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet and independent stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.4 million U.S. retail establishments, more than 20 million employees - about one in five American workers - and 2003 sales of $3.8 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations. Both NRF's larger and smaller members will be very much affected by the amendment to the rule.

Impact on Small Retailers

Unlike some other industries, retailers, whether large or small, operate under extremely tight margins. For that reason, analysis of the costs and benefits of the proposed rule will require extraordinary sensitivity on behalf of the Commission if it is not to unduly burden small retailers. Based on the notice provided by the FTC, it appears that the cost of the proposed regulation is, in fact, much more burdensome than the original rule, especially for smaller retail operations.

Primarily, the change in the law will involve the immediate trebling of marginal costs of compliance by requiring the retailer to purge its customer lists on a monthly, rather than

quarterly, basis. The FTC has stated that the proposed rule will cost each business that engages in telemarketing an additional $800 per year (from $400 to $1,200) beyond the access charges for the National Do Not Call Registry to purge the numbers it contains from a company's calling list. These new charges would be in addition to as much as $7,373 in annual fees currently paid to obtain the list that contains tens of millions of names.

However, those are just the direct costs of procuring the lists. Especially for smaller entities without extensive back office operations, there are systems and personnel costs involved in updating their list three times as often that are not adequately reflected in these numbers. Furthermore, these additional cost are a disproportionately higher portion of their base expenses. Unfortunately, due to the extremely short time frame available to submit public comment, it is difficult for NRF to specifically identify or quantify all of the additional costs to retailers in terms of the professional skills needed to implement the proposed rule, the actual costs and expenditures of more frequent scrubbing, and the full extent to which these costs may differ for small entities.

Nevertheless, one should consider that for many small businesses, the cost to the retailer is measured not only in money, but more importantly, in time. For smaller businesses in particular, the extra hours they may be forced to spend each month in order to prepare to contact their customers is subtracted from the time they could spend serving those customers. The practical effect of the amendment in question for such businesses may be that they simply will not be able to afford to contact customers they have served in the past which puts them at an unnecessary competitive disadvantage.

The Proposed Amendment Should Not Become Effective for Ten Months to a Year

In addition to increased costs, there also are also substantial logistical problems that have to be addressed by retailers in order to comply with the new law. First, there is the problem of efficiently and quickly downloading a list that contains tens of millions of phone numbers each and every month – especially for those involved in national sales and ongoing campaigns. It is our understanding that, depending on methodology, it can take many hours or even a full day or more to actually download the current list. It is unclear whether, for

example, instead of tying up operations one day out of every three months, the new rule will tie up operations three days out of every three months.

Futhermore, the current practice of many retailers involved in telemarketing campaigns is to "pull" the list of customers that they intend to contact several weeks in advance of a calling campaign that may itself last for several weeks. Consequently, a consumer who adds his or her telephone number to the list may receive a phone call within a six to eight week period after adding their name to the list. This lag time is acceptable under the current rule, but, as a result of this new amendment, the rule might be interpreted to require retailers to completely change the logistics of their larger campaigns.

The FTC Should Interpret the Monthly Purging Requirement Flexibly

The rulemaking proposal raises a valid concern that a flat "once a month" requirement is potentially subject to misapplication by bad actors. We believe the rulemaking record could clarify the legislative intent. On the other hand, a "once every 30 days" standard, while closer to the professed intent of the language, could create inadvertent problems for businesses. For example, a strict 30-day requirement could, based on the calendar, necessitate updated lists being downloaded on weekends or holidays or days when the business was shut down for other purposes. This problem is particularly acute for smaller businesses but could affect larger operations as well. The rule should not be devised so as to encourage technical violations.

It is our belief that the Commission should interpret the term "monthly" in a way that takes in to consideration the number of business days in a month, including national holidays. For instance, companies could be required to update their lists every 22 business days (to take into account the average number of business days each month)[1]. Alternatively, companies could be required to update their lists no more frequently than every 28 calendar days, but no less frequently than every 31 calendar days, to take into consideration the different number of days in each month.

[1] To cover seasonal businesses this might be phrased as "every 22 days of business operation."

Conclusion

We should note that NRF's members strongly believe the Congressionally mandated changes to the Telemarketing Sales Rule are a decided step backward from the carefully considered decisions of the Commission in developing the current rule. The change increases the differences between the Federal Trade Commission rule and that of the Federal Communications Commission, causing different industries to be treated even more differently at a time when Congress had been urging the agencies to make the rules more similar, rather than less. It makes the FTC rule more inconsistent with existing state rules and thus further complicates efforts to harmonize potentially duplicative state rules with those of the federal government. It also substantially increases the cost of compliance with the federal Do Not Call regime with minimal compensating benefit.

Once a consumer's name is on the Do Not Call list he or she is protected from unwanted calls going forward. Therefore the only issue addressed by the proposed rule change is how long a consumer must wait for his or her name to be placed on the list in the first instance. Under the Commission's current approach the "average" new Do Not Call participant is approximately 45 days away from inclusion on a company's list: the median "wait time" for consumers with quarterly updating. The 30-day proposal reduces the median wait time to 15 days. Thus, for initial implementation, the rule change reduces the average wait time by 30 days. But the cost of that one time thirty-day reduction is a perpetual trebling of the cost of compliance. Since nearly sixty million consumers are already on the list and will receive little or no effective benefit from the changed rule, one must ask whether it makes sense to increase everyone's cost of compliance so dramatically for so little effective benefit. This point should be considered forcefully at all stages of regulatory review.

NRF appreciates the Commission's consideration of these views.