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

COMMENTS

OF THE

AMERICAN TELESERVICES ASSOCIATION

TELEMARKETING SALES RULE FEES

TSR Fee Rule, Project No. P034305

(Notice of Proposed Rulemaking on User Fees for the Do Not Call Registry)

Mitchell N. Roth
WILLIAMS MULLEN
8270 Greensboro Drive
Suite 700
McLean, Virginia 22102
(703) 760-5201

A. Introduction.

The American Teleservices Association ("ATA") submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") to amend the Telemarketing Sales Rule ("TSR") to revise the fees charged to entities required to pay for access to the National Do-Not-Call Registry ("DNCR"). For the reasons detailed herein, ATA contends that the Commission must not increase the fees charged to all entities required to pay for access to the DNCR; instead, the Commission may generate an enormous amount of new revenue by merely charging all entities a modest flat fee for the first five area codes of data.

ATA is the only national trade association dedicated *exclusively* to the teleservices industry. ATA's membership produces over $500 billion in annual sales and represents all facets of the industry. The membership is comprised of Fortune 500 companies and small and minority-owned businesses that operate call centers or contract for their services, as well as entities that provide compliance, training and equipment solutions.

For the third consecutive year, the Commission seeks to raise the fees charged for some, but importantly not all, of the entities that subscribe to the DNCR.[1] The Commission cites the Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006 ("the 2006 Appropriations Act")[2] in support of its effort to collect $23 million this Fiscal Year to implement and enforce the TSR.[3] The Commission seeks to generate this revenue by exclusively raising the per area code charge to $62 for DNCR subscribers, while continuing to permit exempt entities and small businesses to access the DNCR at no cost.[4]

[1] 71 Fed. Reg. 25512, 25516 (May 1, 2006) (to be codified at 16 C.F.R. pt. 310).
[2] Pub. L. No. 109-108, 119 Stat. 2290 (2005).
[3] *Id.* at 2330.
[4] 71 Fed. Reg. at 25514.

ATA strongly contends that the proposed revised fee structure will only further exacerbate the gross disparities and inherent unfairness in the manner that fees are currently paid by the different entities accessing the DNCR.

B. Allowing entities to obtain the first five area codes of data from the DNCR for free is inequitable, as it unfairly benefits those who place the greatest burden on the DNCR.

1. The Commission's current fee structure is unworkable.

The NPRM seeks to perpetuate the Commission's policy of allowing companies to access data associated with five or fewer area codes at no charge.

This policy must finally come to an end. The Commission defends this policy by citing the Regulatory Flexibility Act,[5] which requires that "to the extent, if any, a rule is expected to have a *significant economic impact* on a substantial number of small entities, agencies should consider regulatory alternatives to *minimize* such impact." (emphasis added).[6]

The number of entities that have accessed the DNCR over the past two years has increased:

Time Period	Approximate Number # of Entities Accessing DNCR
3/1/2004 – 2/28/2005	60,800[7]
3/1/2005 – 2/28/2006	66,200[8]

However, the number of entities required to pay for access to the DNCR over the same time period has *decreased*. For example, although 58,300 entities accessed the DNCR at no charge from March 1, 2005 through February 28, 2006, a mere 6,500 entities were required to

[5] 5 U.S.C. § 601.
[6] 71 Fed. Reg. at 25515.
[7] 71 Fed. Reg. at 25514.

pay for their access.[9] The following table summarizes the steady decline in the number of entities subsidizing the cost of the DNCR:

Time Period	**Paid Subscribers**
As of 6/1/2004[10]	7,100[11]
3/1/2004 – 2/28/2005	6,700[12]
3/1/2005 – 2/28/2006	6,500[13]

Simultaneously, the number of entities that have accessed five or fewer area codes over the past two years has increased:

Time Period	**Entities Accessing Fewer than 5 Area Codes**
3/1/2004 – 2/28/2005	52,700[14]
3/1/2005 – 2/28/2006	58,300[15]

Clearly, the total number of entities accessing the DNCR is increasing along with the total number of entities accessing five or fewer area codes, while the number of entities required to pay for access to the DNCR is decreasing at an alarming rate.

The NPRM fails to state the obvious: The number of entities paying for access to the DNCR has declined steadily, presumably in response to the increased costs that the Commission

[8] *Id.*
[9] *Id.*
[10] *Id.* The NPRM does not indicate when the measuring period commenced.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*.
[15] *Id.*

has imposed on the industry over the past two years through annual fee increases.[16] Yet the Commission's proposal will result in a staggering 11% fee hike for paying entities – An increased cost that will be borne entirely by a very small percentage of the entities accessing the DNCR, thereby effectively subsidizing the DNCR for "free riders."

ATA encourages the Commission to implement a new fee structure, as continuing down this failed path of systematic cost increases exacerbates the financial burden on paying entities, and will cause even less entities to pay for access to the DNCR in future years, thereby likely compelling the Commission to raise fees yet again.

2. ATA's proposed alternative fee structure.

ATA contends that the expenses associated with the administration of the DNCR be borne by all entities that are required to access it.[17] This will reduce the inequitable and disproportionately burdensome effect on a small percentage of subscribers to the DNCR.

The Commission should impose a modest $200 flat fee on all entities that subscribe to five or fewer area codes in lieu of increasing the fees on all entities that access the DNCR. This structure permits entities subscribing to five area codes to save $80 versus the $280 fee they would incur if they paid $56 per area code, thereby *minimizing* the effect of the regulation per the Regulatory Flexibility Act's mandate.[18] Most importantly, these entities will finally contribute to the significant costs they impose on the DNCR. ATA also recommends that all entities pay $200 for the first five area codes of data that they access.[19]

---

[16] *See id.* In Fiscal Year 2004, the per area code charge was $25. In Fiscal Year 2005, the per area code charge was $40. The per area code charge in Fiscal Year 2006 is currently $56.

[17] ATA acknowledges the Commission's reluctance to impose access charges on exempt entities. Without commenting on the substance of this policy, ATA's proposal similarly avoids charging these entities for access to the DNCR. However, future circumstances may dictate that these entities be charged at some point in time.

[18] *See* 5 U.S.C. § 601; *see also* 71 Fed. Reg. at 25515.

[19] The Commission's current rules do not require entities to pay for access to the first five area codes, regardless of the total number of area codes they access. *See* 71 Fed. Reg. at 25514.

In the NPRM, the Commission indicated that 58,300 entities accessed five or fewer area codes at no cost in Fiscal Year 2006.[20] Assuming the same number of entities access five or fewer area codes under ATA's proposed fee structure in Fiscal Year 2007, the Commission will generate an additional $11,660,000 of revenue.[21] Furthermore, the Commission may generate an additional $1,300,000 of revenue by charging all entities $200 for the first five area codes they access.[22] In sum, ATA's proposed fee structure will thereby likely result in nearly $13,000,000 of additional revenue for the Commission. This significant windfall should also result in the lowering of the per area code charges in future years for all entities.

C. Defining Small Businesses In Terms of the Number of Area Codes of Data They Access is Arbitrary and Inappropriate.

In the event the Commission chooses not to accept ATA's proposal, ATA suggests that the Commission nevertheless change the manner in which it defines a *small business*. In its effort to comply with the mandate of the Regulatory Flexibility Act, the Commission defines a *small business* as any entity that accesses data in the DNCR for five or fewer area codes: ". . . [A]ccess to five area codes of data for free is an appropriate compromise between the goals of equitably and adequately funding the national registry, on one hand, and providing appropriate relief for small businesses, on the other."[23]

ATA contends that there is no objective measurement of whether small businesses benefit from the proposed fee structure or whether it merely consolidates the costs of the program upon a small percentage of entities. Even the Commission concedes that "not all of [the exempt entities

---

[20] 71 Fed. Reg. at 25514.
[21] This number is based on the Commission's data that 58,300 entities accessed five or fewer area codes in Fiscal Year 2006.
[22] This number is based on the Commission's data that 6,500 entities paid for access to the DNCR in Fiscal Year 2006.
[23] 68 Fed. Reg. 45134, 45141 (July 31, 2003); 69 Fed. Reg. 45580, 45584 (July 30, 2004); and 70 Fed. Reg. 43273, 43275-6 (July 27, 2005).

accessing five or fewer area codes] may qualify as small businesses, and some small businesses may be required to purchase access to more than five area codes of data . . . ."[24]

The Commission's measuring standard does not indicate the size of an entity. Thirteen states, including the District of Columbia, have less than five area codes assigned to them.[25] In fact, any business, regardless of the size, may access, at no charge, all of the DNCR data associated with Idaho, Montana, Wyoming, North Dakota and South Dakota -- states with only one area code, yet a collective population of approximately 3,860,294.[26] Furthermore, a large home product retailer in Colorado whose stock is publicly traded may access the DNCR's data for the entire state of Colorado in preparation for a telemarketing campaign at no charge, while a truly *small business* operating in New York City may incur charges to access the fourteen area codes that comprise the State of New York, and this does not include the vicinal area codes of neighboring New Jersey and Connecticut.[27]

The Commission recently addressed the inequities associated with its current standard regarding TSR fees when it recognized that some small businesses located in large metropolitan areas may need to make calls to more than five area codes.[28] However, according to the Commission, increasing the number of area codes provided at no charge would only decrease the pool of paying entities and further increase the fees paid by those entities.[29]

ATA agrees that increasing the number of area codes provided at no charge will only increase the burden on those entities currently required to pay for access to the DNCR. For this

---

[24] 71 Fed. Reg. at 25515.
[25] *See* North American Numbering Plan Administration's Area Code Map, http://www.nanpa.com/area_code_maps/ac_map_static.html.
[26] *See* United States Census Bureau Population Estimates, http://www.census.gov/popest/national/files/NST_EST2005_ALLDATA.csv. These are population estimates based on the year 2000 census conducted by the United States Census Bureau. The latest national population estimates by demographic characteristics for 2005 were released May 10, 2006.
[27] *See* http://www.nanpa.com/area_code_maps/ac_map_static.html; http://www.whitepages.com/maps/NYC.
[28] *See* 69 Fed. Reg. 45580, 45584-85 (July 30, 2004).

reason, ATA suggests that the Commission charge *all* entities for access to the DNCR, even those that access five or fewer area codes.

D. Conclusion.

For the reasons explained herein, ATA recommends that the Commission not increase the per area code cost for access to the DNCR as proposed in its NPRM. The Commission can raise nearly $13,000,000 by requiring all nonexempt entities obtaining access to the DNCR to share in the costs associated with its maintenance. Even if the Commission continues to accommodate *small businesses,* defining *small business* in terms of the number of area codes of data they access is arbitrary and inaccurate, as this standard does not justly depict the size of a business and leads to geographic disparities.

Mitchell N. Roth, Esq.
WILLIAMS MULLEN
8270 Greensboro Drive, Suite 700
McLean, Virginia 22102
(703) 760-5201
mroth@williamsmullen.com
Counsel for American Teleservices Association

1288771v7

[29] *See* 69 Fed. Reg. at 45584.