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

COMMENTS

OF THE

DIRECT MARKETING ASSOCIATION, INC.

TELEMARKETING RULEMAKING—USER FEE COMMENT
FTC File No. R411001

(Proposed Telemarketing Sales Rule User Fees)

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I. Introduction

The proposals of the Federal Trade Commission (the "Commission" or "FTC") to impose user fees on telemarketers to fund a national Do-Not-Call List (the "DNC List") in its May 29, 2002 Notice of Proposed Rulemaking governing 16 C.F.R. Part 310 (67 Fed. Reg. 37362) (the "NPRM") suffer from largely the same deficiencies as the Commission's proposal to amend the Telemarketing Sales Rule ("TSR" or the "Rule") articulated in a separate NPRM. 67 Fed. Reg. 4492 (Jan. 30, 2002) (the "Rule NPRM"). As well as underscoring the statutory, constitutional, and policy problems with the DNC List itself pointed out by numerous parties filing comments in response to the Rule NPRM,[1] the Commission's plan to collect user fees from telemarketers for administration of the DNC List is not consistent with OMB Circular A-25 or the applicable federal statutory law, including the Independent Offices Appropriations Act and the Paperwork Reduction Act, and impinges on the First Amendment rights of telemarketers. These questions surrounding the Commission's proposal to collect fees for the DNC List only highlight the many reasons why the FTC lacks the authority to, and should not, on policy grounds, adopt a DNC List.

II. The Commission Has No Authority to Impose Fees on Telemarketers for Operation of the DNC List under the Independent Offices Appropriations Act.

In the NPRM, the Commission cites as its authority to collect from telemarketers $3 million of its estimated $5 million first-year cost to develop and operate a DNC List the Independent Offices Appropriations Act, 31 U.S.C. § 9701 (the "IOAA"), which permits government agencies to establish regulations to collect charges for providing users with a "service" or "thing of value," and Office of Management and Budget Circular No. A-25

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[1] The Direct Marketing Association ("The DMA") filed joint comments to the Rule NPRM on April 15, 2002. These are referred to herein as the "DMA/Chamber Comments."

("Circular A-25"). 67 Fed. Reg. at 37362-63. Under the Commission's strained reasoning, access to the DNC List—which the FTC itself concedes is a burden for industry, which appears nowhere in the Telemarketing and Consumer Fraud and Abuse Prevention Act (the "Telemarketing Act")[2] or its legislative history,[3] which is duplicative of The DMA's existing national do-not-call list, and which is vociferously opposed by the majority of telemarketers[4]—constitutes a "thing of value" for telemarketers because "access to such a list will permit telemarketers to focus their telemarketing sales on those consumers who have no objection to receiving such solicitations." Id. According to the Commission, this ability to solicit those not on the DNC List qualifies as a "thing of value" because it "[u]ltimately . . . may prove more profitable" for telemarketers. Id.

A. Text of IOAA and Circular A-25

Under the text of the IOAA and Circular A-25, the DNC List does not constitute the sort of "benefit" for which agencies may collect user fees. While the text of the IOAA provides little insight into the scope of the "services" and "things of value" for which fees may be recovered, Circular A-25's three categories of when "special benefits" are deemed to exist illustrate how far removed the DNC List is from the kinds of government benefits contemplated by the IOAA.

First, it is entirely unclear how access to the DNC List could be interpreted to grant telemarketers "more immediate or substantial gains or values than those that accrue to the general public," such as the grant of a patent, insurance, or a government license. Circular A-25, at 6(a)(1)(a). Even the FTC does not state definitively that access to the DNC List would confer

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[2] Pub. L. No. 103-297, 108 Stat. 1724 (codified at 15 U.S.C. §§ 6101 *et seq*.).

[3] H.R. Rep. No. 103-20 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1626.

[4] See, e.g., DMA/Chamber Comments; Comments of Magazine Publisher's Association; Comments of Reed Elsevier, Inc.; Comments of the Promotion Marketing Association; Comments of DialAmerica Marketing, Inc.; Comments of the Electronic Retailing Association filed in response to the Rule NPRM.

"immediate" or "substantial" gains; indeed, in the Rule NPRM, the Commission presented the DNC List as a two-year trial, *after* which the Commission will assess the registry's costs and benefits.[5] Rather, the FTC offers the unsupported hypothesis that access to such list *may* facilitate more profitable telemarketing. 67 Fed. Reg. at 37363. There is no evidence that the IOAA was intended to recover costs for some potential future, speculative benefit.

The second category of benefits cited in Circular A-25—those that provide "business stability" or contribute to "public confidence," such as federal deposit insurance—is a similar ill fit with industry access to the DNC List. Circular A-25, at 6(a)(1)(b). This is obviously intended to cover situations where the government backs the financial soundness of the industry, not where the "thing of value" theoretically helps the regulated entity marginally market its product better.

The third category of benefits cited in the Circular A-25—services "performed at the request of or for the convenience of the recipient," and "beyond the services regularly received by other members of the same industry or group or by the general public"—is, on its face, inapplicable to telemarketers asked to pay for the DNC List. Circular A-25, at 6(a)(1)(c). The DNC List is neither at industry's benefit nor for its convenience. It is a far stretch indeed to think that this category of services, which, according to Circular A-25, was intended to collect fees for such services as receiving a passport or a Customs inspection after regular duty hours, could have any applicability to the Commission's providing access to the DNC List to telemarketers.

Not only are there no data to support the Commission's assertion that telemarketer access to the DNC List confers any "benefit" or "thing of value" on telemarketers, but this assumption is replete with illogical bases. Consumers not on the DNC List would not necessarily be more

[5] 67 Fed. Reg. 4517.

receptive to telemarketing, as the FTC assumes; some consumers would not sign up simply because they would not be aware of the existence of the DNC List. As a result, the pool of non-DNC List individuals would not necessarily represent a valuable list of uniformly receptive consumers. In addition, most consumers who do not sign up would only be interested in offers about certain activities or product lines; for example, the phone number of a sports enthusiast who does not sign up for the DNC List because he would like to receive sports-related offers is of no "special benefit" to a telemarketer of knitting supplies. More generally, the purported "benefit" obscures the great cost to telemarketers of the over-inclusive opt-out of the DNC List. Some consumers who sign up for the DNC List because of one isolated incident of aggressive or fraudulent telemarketing by a particular firm are barricaded from offers they may be interested in, except if the consumer takes the extraordinary and unlikely step of the company-specific opt-in, which benefits only those handful companies with which the customer already is familiar.

B. Precedent Interpreting the IOAA Does Not Support the FTC's Proposal.

The FTC's statement that "courts have long recognized that agencies may charge regulated companies for the cost of administering their regulations, since the companies receive a specialized value from the agencies by complying with the regulations and gaining the ability to remain in business," 67 Fed. Reg. at 37363 n.1, misrepresents the limited scope of activities for which the courts have upheld the imposition of user fees. User fees under the IOAA have been upheld in two limited contexts: (1) where a separate grant of governmental authority, such as a license, is needed by the regulated entity as a precondition for operation; and (2) where the services or benefits for which fees are sought from regulated entities are found in the statute. Neither of these contexts is present in the Commission's proposal to extract fees for administration of the DNC List.

The Commission's argument essentially is that the existence of the DNC List "may" create a more efficient, favorable economic climate for telemarketers, because they will be able

to (indeed, they would have to, if the TSR is amended as proposed) focus their efforts only on those who have not opted in to the DNC List. 67 Fed. Reg. at 37363. The U.S. Supreme Court *specifically rejected* this justification when, in "greatly narrow[ing]" the interpretation of the IOAA urged by the Federal Power Commission, the Court ruled that fees collected for administration of the Federal Power Act were not appropriate merely because they arguably created an economic climate for greater use of power services. FPC v. New England Power Company, 415 U.S. 345, 351 (1974).

First, fees imposed pursuant to the IOAA have been upheld where regulated entities needed a separate grant of authority in order to operate (such as a license), and such authority had been independently upheld by the courts. For example, in upholding the FCC's authority to collect fees for the costs of license application processing activities in NCTA v. FCC, 554 F.2d 1094 (D.C. Cir. 1976) (cited by the Commission, 67 Fed. Reg. at 37363 n.1), the D.C. Circuit noted that under FCC rules, and separate case law affirming the FCC's jurisdiction over cable, no cable operator could commence operations until it received a certificate of compliance from the FCC. 554 F.2d at 1100-1101. Critical to the D.C. Circuit's finding that fees could be collected was the FCC's general authority to regulate the cable industry, and the fact that a "certificate of compliance [for cable operators] has become a necessary and therefore valuable license." Id. at 1102, n.31. Nevertheless, in remanding to the FCC the issue of the specifics of the costs for which fees were sought, the court also stated that the FCC could not "include those expenses independently required to protect the public." Id. at 1101. Fees in this line of cases also were upheld because they conferred other quantifiable benefits, including limitations on liability and inspections that could uncover hazardous operations. 601 F.2d at 229.[6]

[6] See, e.g., Mississippi Power and Light, 601 F.2d 223 (5th Cir. 1979) (fees could be collected from nuclear power companies where regulated entities needed a permit to operate nuclear facilities).

Second, collection of fees has been upheld where the activities for which such fees are sought are found in the statute giving the agency regulatory authority. See, e.g., Electronics Industries Association v. FCC, 554 F.2d 1109 (D.C. Cir. 1976) (companion case to NCTA v. FCC) (authority for equipment approval and tariff filings required by the Communications Act); Central & Southern Motor Freight Tariff Assoc. v. U.S., 777 F.2d 722 (D.C. Cir. 1985) (federal law required motor carrier associations to file tariffs, which protected associations from antitrust claims and charges for the review of which were recouped from industry); Capital Cities Communications, Inc. v. FCC 180 U.S. App. D.C. 276, 554 F.2d 1135 (D.C. Cir. 1976) (involving fees for agency to process license transfer and assignment applications over which FCC is granted explicit authority in text of Section 310 of the Communications Act).

By contrast, neither of these contexts is present in the FTC's proposal to collect fees for administration of the DNC List. Telemarketers have never needed licenses from the Commission simply to operate.[7] In addition, as set forth more fully in The DMA's comments, the Telemarketing Act confers authority to regulate deceptive and abusive trade practices only, leaving the majority of telemarketing practices beyond the scope of activities Congress granted authority to the FTC to oversee.[8] The DNC List appears nowhere in the Telemarketing Act's text or legislative history. In fact, Congress specifically instructed the FTC that the Telemarketing Act was not to burden legitimate telemarketing.[9] Accordingly, the Commission's proposed imposition of user fees (indeed, the very regulation of non-deceptive, non-abusive telemarketing) is barred by existing law. If the Commission wants to collect user fees from firms

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[7] Indeed, such a requirement is an unconstitutional abridgement of telemarketers' speech rights. See V, infra; see also DMA/Chamber Comments, at 24-32.

[8] DMA/Chamber Comments, at 16-18.

[9] DMA/Chamber Comments at 18, citing H.R. Rep. No. 103-20, at 9 (1993) ("The Committee does not intend to limit legitimate telemarketing practices.").

for its DNC List, it must submit proposed legislation to Congress, as contemplated in Circular A-25.[10] Indeed, as pointed out in Circular A-25, at 7(g), there is an entirely different OMB Circular (A-19) that must be submitted where an agency is making a legislative proposal to charge user fees in contravention of statutory law. If the FTC wants to collect fees for its regulation of non-deceptive and non-abusive telemarketing, it must obtain approval from Congress to do so.

III. The Commission's Proposal to Restrict Redissemination of Public Information on the DNC List May Violate Federal Law.

These comments encompass responses to the questions in Section VIII of the NPRM. The DMA does address specifically the Commission's proposal to restrict access to the public information in the DNC List, including access by telemarketing firms who work on behalf of multiple clients, as an example of the legal insufficiency of the Commission's plan.

The Commission's proposal to charge each company a fee, irrespective of whether the information comes from the FTC or is provided through a list broker, violates Circular A-25's instruction that "charges will be made to the direct recipient of the special benefit even though all or part of the special benefits may be passed to others." Circular A-25, at 6(b).[11] Further, this restriction on dissemination of information may violate the Paperwork Reduction Act (the "PRA"), which prohibits federal agencies from "restrict[ing] or regulat[ing] the use, resale, or redissemination of public information by the public." 44 U.S.C. § 3506 et seq. Specifically, the PRA prohibits all agencies from "charg[ing] fees or royalties for resale or redissemination of

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[10] "When the imposition of user charges is prohibited or restricted by existing law, agencies will review activities periodically and recommend legislative changes when appropriate." Circular A-25, at 7(b).

[11] The DMA does not endorse a proposal under which intermediaries would be assessed a fee for each of their telemarketing clients, but makes this argument to provide an example of the legal impediments to the Commission's proposal.

public information." 44 U.S.C. § 3506(d)(4)(C). As a result, "[p]ublic information may be used, sold or redisseminated whether or not the person paid any fees to the government to obtain the information." H.R. Rep. No. 37, 104th Cong. 1st Sess. 47 (1995).

In essence, the Commission's proposal to restrict redissemination of the DNC List without compensation would impose a copyright-like regime. Section 105 of the Copyright Act expressly bars the federal government from copyrighting its works. See 17 U.S.C. § 105 (1988). In addition, it is widely recognized that the First Amendment and the Copyright Clause of the U.S. Constitution prohibit anyone from asserting a copyright on public information. See, generally, 1 NIMMER ON COPYRIGHT § 5.06[B] (1985); Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991) (telephone company not entitled to copyright protection of its white pages directory's alphabetical listing of subscriber names, addresses and telephone numbers because such a listing is an "unoriginal" collection of uncopyrightable facts).

IV. Even If The FTC Has Authority To Impose Fees For The DNC List, The FTC's Proposal Violates The Manner In Which Courts Have Instructed Agencies To Apply The IOAA.

Even if the IOAA confers authority to the Commission to collect fees from telemarketing firms for administration of the DNC List, the FTC's proposal in the NPRM is impermissible because it fails adequately to exclude expenses for what the FTC considers to be the independent public interest benefits. The courts, in no uncertain terms, have stated that agencies must exclude from the costs imposed on regulated entities whatever proportion of the benefits are in the public interest. See, e.g., Electronics Industries Association, 554 F.2d at 1117 (articulating "major requirements" of IOAA, including "exclusion of any expenses incurred to serve an independent public interest").

In the NPRM, the Commission proposes to obtain the majority of the expected cost ($3 million of the $5 million estimate) from telemarketers, even though it is (supposedly) consumers that are the primary beneficiaries.[12] The FTC must allocate the cost according to the percentage of the benefits of the DNC List that would inure to consumers and how much the "benefits" (if any) for telemarketing firms would be. The FTC has made no attempt to explain its parceling of the cost according to the respective benefits for consumers and telemarketers in accordance with the IOAA and Circular A-25. That the Administration's budget only allocated $2 million of the $5 million estimated cost, 67 Fed. Reg. at 37363, is plainly inadequate as a rationale. The Commission implicitly justifies its allocation of costs on its assessment that it would be impractical to collect user fees from consumers. 67 Fed. Reg. at 37363 n.3. However, that does not mean that the Commission may disregard the IOAA and its precedent and force industry to assume costs for benefits that inure to the general public.[13] In fact, based on Circular A-25's instruction that no fee *at all* should be imposed where the beneficiary is obscure and "the service can be considered primarily as benefiting broadly the general public," Circular A-25, at 6(a)(4), the most logical conclusion is that a DNC List should be funded *entirely* from federal appropriations.

Further, the Commission does not specify who will bear the burden of the additional costs in the probable event that the $5 million estimated for administration of the DNC List proves inadequate.[14] Instead, the Commission vaguely portends that the costs may be higher and

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[12] *FTC Proposes National Do-Not-Call Registry*, January 22, 2002, available at http://www.ftc.gov/opa/2002/01/donotcall.htm ("The proposed amendments to the TSR are designed to enable consumers to exert greater control over when and whether to receive telemarketing calls in their homes."). See also Rule NPRM, 67 Fed. Reg. 4516.

[13] See, e.g., NCTA v. US, 415 U.S. 336, 343 (1974) (remanding fee based on total costs to FCC imposed on cable operators because "certainly some of the costs inured to the benefit of the public.").

[14] As The DMA asserted in its comments, the Commission has made scant attempt to reconcile the vast divergence between its $5 million estimate and the FCC's estimate of $20-$80 million for a DNC List in the first year alone.

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that any methodology for recouping costs of the DNC List is subject to further and additional recalculations, presumably with telemarketing firms bearing the increased costs.[15] If a higher number of consumers signs up for the list than the Commission estimates, the Commission may not impose additional fees on industry to recoup these costs, as consumers would be the primary beneficiaries of the expanded list.[16] Indeed, The DMA submits that any reasonably accurate list must include name and address, as well as phone number, and must be renewed regularly, all of which would significantly increase the costs of the DNC List.[17]

Other analyses of the cost of administering a DNC list indicate that the Commission's cost estimate is woefully low. For example, Experian's $1.28 per person estimate would render a single year cost of $80 million if 64 million names were enrolled.[18] Such a figure would require each of the 3,000 telemarketers the Commission expects to access the list to pay an average of over $26,000 per year for the "benefit" of accessing the DNC List. The Commission's estimated cost of up to $3,000 per company for the DNC List and the strong probability that such fees would be revised substantially upwards only underscores the attractiveness of the 4.5 million name DMA Telephone Preference Service ("TPS"), which costs

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See DMA/Chamber Comments, at 11-14. In addition to raising questions about the accuracy of the Commission's methodology, this discrepancy and the lack of explanation in the NPRM raises doubts as to whether the Commission has provided a reasoned decisionmaking for this revised estimate under the Administrative Procedure Act. See, e.g., Greater Boston Television Corp. v. FCC, 143 U.S. App. D.C. 383, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923, 91 S. Ct. 2233, 29 L. Ed. 2d 701 (1971).

[15] 67 Fed. Reg. at 37364. ("Whatever fees may be adopted would be reexamined periodically and would likely need to be readjusted.").

[16] As noted in Section I, above, The DMA submits that the "benefits" to industry of access to the DNC List are largely illusory. To the extent that any incremental benefits accrue to industry from a higher number of consumers, they are marginal indeed. Accordingly, under the IOAA and applicable precedent, costs associated with a larger DNC List must be supported mostly, if not entirely, from consumers, either directly or through federal appropriations.

[17] See DMA/Chamber Comments, at 11-14.

[18] DMA/Chamber Comments, at 13.

only $465 per company annually and which covers more industries than the DNC List could reach.[19]

V. The Commission's Proposal Emphasizes that the DNC List Violates the First Amendment.

Under the tests for restrictions on commercial and fully protected speech, the proposed fees underscore the Commission's difficulty in sustaining the DNC List under First Amendment scrutiny. In its comments, The DMA explained that the Commission's proposed DNC List itself satisfied neither the Supreme Court's test for restrictions on commercial speech nor the more rigorous standards for fully protected expression applicable to for-profit firms soliciting on behalf of charities.[20] In specifying the substantial costs to industry in the NPRM, the Commission further highlights the constitutional infirmities of the DNC List.

Under the Supreme Court's analysis for restrictions on commercial speech set forth in Central Hudson Gas and Elec. Corp. v. Public Serv. Commission of N.Y., 447 U.S. 557 (1980), the government must show a substantial interest it intends to achieve through the regulation; the regulation must directly advance the asserted interest; and the regulation must be no more extensive than necessary to serve the government's substantial interest. 447 U.S. at 556. As The DMA indicated in its comments, the inadequacies of the DNC List are most evident in the calculation of costs and benefits and the requirement that restrictions on commercial speech be narrowly tailored.[21]

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[19] See DMA/Chamber Comments, at 7-8.

[20] See DMA/Chamber Comments, at 24-37.

[21] DMA/Chamber Comments, at 26.

First, the annual fees of up to $3,000 (or more) must be factored into the "careful calculation of costs and benefits that our commercial speech jurisprudence justifies." US West v. FCC, 182 F.2d 1224, 1239 (10th Cir. 1999), cert. denied 120 S. Ct. 2215 (2000). See also City of Cincinnati v. Discovery Network, 507 U.S. 410, 417 n.13 (1993). This "careful calculation" is conspicuously absent from the NPRM. Rather, the Commission has contrived an ostensible "benefit" for industry of access to the DNC List that "may" prove to make marketing efforts marginally more profitable in order to justify what amounts to an impermissible tax on industry. Whatever the consumer benefits to the DNC List may be, they are insufficient to balance the substantial costs of restricting firms' protected speech under the First Amendment. Further, in light of the existence of The DMA's TPS, and the sufficiency of disclosures and the existing company-specific opt-out to serve the government interest in combating abusive and deceptive telemarketing, the Commission's proposal is not narrowly tailored under Central Hudson to burden no more speech than necessary. The substantial costs and lack of tailoring outlined in the NPRM emphasize the lack of fit under Central Hudson.

Further, because the DNC List is limited to telemarketing activities by industries within the Commission's jurisdiction, the fee proposal acts as a selective tax on commercial speech. Telemarketing by common carriers, for example, would be subject to no fee, because the Commission lacks jurisdiction over them. Accordingly, the fee proposal resembles a selective tax on commercial speech that is not permissible under established Supreme Court jurisprudence. See, e.g., Minnesota Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) (invalidating special use tax falling on "a small group of newspapers"); Arkansas Writers' Project v. Ragland, Commission of Revenue of Arkansas, 481 U.S. 221, 228 (1987) (invalidating selective tax on general interest magazines).

The constitutional deficiencies of the DNC List are even more evident when assessing the burdens of the proposed fees applicable to charitable institutions that rely on for-profit firms to conduct solicitation. Charitable solicitation, whether conducted by the charitable institutions themselves or through the use of professional fundraisers, is fully protected speech under the First Amendment, intertwined as such solicitation is with the charitable mission of the organization for which contributions are sought. Riley v. National Federation For the Blind, 487 U.S. 781, 796 (1988). Restrictions on such speech are subject to "exacting" scrutiny. Riley, 487 U.S. at 798.

Under the Commission's proposed amendments to the Rule, the professional fundraisers for charities would have to pay fees for administration of the DNC List, and such fees undoubtedly would be passed through to the charitable institutions themselves. It is highly improbable that the Commission's fees could be sustained under such withering scrutiny. After all, in Riley and its predecessors, the Supreme Court struck down state laws requiring certain disclosures and limiting the fees of professional fundraisers.[22] It follows that a government mandate that charities using professional fundraisers *pay* in order to be able to engage in their fully protected speech would be struck down.

VI. Conclusion

For the aforementioned reasons, the Commission's proposal to collect fees from telemarketers for administration of the DNC List is not the sort of benefit for which agencies may collect user fees under the IOAA. Indeed, the entire proposal is built around a logically

[22] For an analysis of the First Amendment implications of the DNC List's restrictions on charitable solicitation, see Comments of the DMA Nonprofit Federation, filed in this proceeding.

suspect and speculative "benefit" to industry access to the DNC List. In the event the Commission does collect fees from industry, it must allocate costs in proportion to the respective benefits to consumers and to industry. Finally, the Commission's proposal emphasizes the Commission's difficulty in justifying restrictions on commercial and fully protected speech resulting from the DNC List under the First Amendment. Therefore, The DMA respectfully submits that the Commission must fund its DNC List entirely from federal appropriation or consumer fees. More generally, these legal and policy problems provide the Commission with all the more reason not to adopt the DNC List.

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