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23,087-TG

Office of the Secretary
Federal Trade Commission
Room 159
600 Pennsylvania Avenue, N.W.
Washington D.C. 20580

Re: Telemarketing Sales Rule User Fees

Ladies and Gentlemen:

We represent Hudson Bay Company of Illinois, Inc. ("HBC"). We have filed a comment dated May 20, 2002, in FTC File No. R4111001 with respect to the proposed amendments to the FTC's telemarketing sales rule ("TSR"). In addition, as you know, we participated in the FTC Forum about those changes.

This letter is intended to serve as a comment on the proposed addition of a new Section 310.9 to impose "user fees" for access to the National Do-Not-Call Registry if one is implemented.

As mentioned in our earlier comment, HBC maintains a calling center in Lincoln, Nebraska which exclusively serves non-profits who engage in non-commercial advocacy. They promote environmental, consumer, civic, political, and social causes. HBC's clients include the American Civil Liberties of Ohio, the Sierra Club, Dakota Chapter, Florida National Organization for Women, Clean Water Action, U.S. Senator Paul Wellstone, U.S. Congressman Mark Udahl, New York Citizens Campaign for the Environment and a great many others. (The founder of HBC was also the founder of Citizens For a Better Environment.)

HBC's clients request voter identification surveys, get-out-the-vote-drives; membership renewal; public education on client issues; and urging members to contact legislators, govern-

ment officials, or corporations on issues important to the clients. The calling often, but not always, includes fundraising, the lifeblood of such grassroots activities.

In our opinion the proposed user fees are entirely unworkable with respect to HBC's clients. But even if workable, the proposed method of paying for the registry is unconstitutional. We explain the basis for our opinion below. Our opinion takes into account the specifics of HBC's clients as well as the constitutionality of the proposed system of user fees, including the impact of the Supreme Court's recent opinion in *Watchtower Bible and Track Society of New York, Inc., et al v. Village of Straton*, decided a few days ago, on June 17, 2002, by the U.S. Supreme Court.

The User Fee Is Unworkable With Respect to Non-Commercial Speech

HBC's clients have members and donors located variously throughout the country. Unfortunately, members do not cluster themselves conveniently into just a few area codes. Rather, members are distributed throughout the nation, especially in the case of those organizations that deal with national issues. Even in the case of local organizations, the geographic distribution of members is spread thinly throughout scores of area codes with some area codes containing only a single member.

By way of example, attached is a list of the actual membership distribution of one of HBC's clients, Michigan Clean Water Action. The list is sorted by state legislative district and by area code. For the Michigan House of Representatives the list includes 26,992 people distributed over 11 area codes. Some area codes have as few as three members in them, for example, area code 906. We use Michigan Clean Water Action because this is the largest of HBC's clients with the most highly concentrated membership to illustrate this point. Many other clients have less than half this many members, spread not throughout one state, but in as many as 30 states.

When Michigan Clean Water Action wants to reach all its members – say to alert them about pending water quality legislation in the House of Representatives – the proposed rule would require the organization to pay $12 for each area code, including area codes such as 906 where there are very few members. This computes to $4 per member in area code 906. The $4 for each name is not for *access* to those names; Michigan Clean Water Action already has the three names of its members in area code 906. The $4 per name fee is only for the privilege of discovering whether any of those three members has placed any of his or her telephone numbers on the do-not-call registry.

Please remember that all of HBC's clients already gladly remove any names or numbers upon request. No non-profit organization wants to waste time or money by calling someone who it already knows does not want to be a member or donor.

More than likely, the $12 user fee for the 906 area code would just about consume the entire net contribution of the three members in that area code. In a get-out-the-vote drive, the

three votes of the members in 906 would be insignificant, especially considering the hassle involved in buying, matching, sorting, and scrubbing the extra area code. In effect, the proposed rule would force Michigan Clean Water Action to drop the members in the 906 area code – whether or not those members were on the do-not-call registry and whether or not those members would actually intend to preclude calls from their organization.

Michigan Clean Water Action often calls members in only certain legislative districts – for example, to ask its members to lobby a particularly key legislator. A fast look at the list shows that in each legislative district although only a few area codes account for most of the organization's members in that district, there are also many area codes accounting for very few members. So, when trying to call members in a legislative district, the pressure to prune members and supporters based on the arbitrary "density" of their area codes becomes nearly irresistible. Abandoned members may never know what actually happened. No one would call to tell them that they just got marginalized by the FTC.

Many of HBC's client organizations would have to give up contacting more than half their membership. The fee will be disastrous for them. (Remember, for advocacy calling, where spreading the word is the whole point, breaking even financially is considered a success.)

Every HBC client faces this problem. The proposed rule forces organizations to drop members in certain "thin" area codes, even though they are *not* on the do-not-call registry, only because the fee becomes confiscatory in those area codes.

The funds for the area code "user fees" would come directly from the pockets of members and donors, the same as a telephone rate hike. But the FTC fee is not for use of the phones or for any other service.

The FTC would be charging politically active Americans to pay for inaccurate lists of people they are not permitted to talk to.

The FTC's proposed user fee system is based on a for-profit, commercial model. With commercial telemarketing any random sales call is similar to any other, no matter the area code. The calling is to sell something. Dropping a marginal area code does no real harm. The same item can be sold to a randomly called number elsewhere. The FTC model may be fine for that purpose. But the user fee system fails when the calling is non-commercial advocacy and is targeted to specific pre-existing and widely distributed members based on their political activism. Such non-profits have no practical way to comply with the proposed "user fee" – at least not without some *ad hoc*, arbitrary, and unwarranted pruning of their membership lists.

The User Fee Is Unconstitutional

The FTC explicitly bases the proposed fee for access to the do-not-call registry on the statutory authority it has, as an agency, to charge a user fee for a "service or a thing of value" it

provides.[1] Thus, the FTC explicitly assumes that the user fee is to be paid by the industry benefited – like a fee charged to an airline for use of an airport or a fee for a license to run a broadcast station. But that is the wrong way to look at it. It is backwards.

Political canvassers already have a well-defined First Amendment right to call the public. The FTC is not providing new access. Instead, the registry is a list of numbers they are *precluded* from calling. The FTC is not giving access, they are taking it away. The true beneficiaries of the registry are the people who have put their telephone numbers on it. The people "using" the registry are those asking for and taking advantage of it.

As currently proposed, the fee would be a "reverse" user fee in which the government would be charging not those benefiting from the governmental service but those burdened by it. Under the new proposal people who are members of non-commercial organizations and who do not use the do-not-call list would, in effect, be paying the costs for people who do use the service. This is upside down.

With remarkably circular reasoning the FTC is now explicitly claiming that it is fair to charge political groups for the "benefit" merely of avoiding the FTC's newly proposed penalties. What benefit is this? Where is the "service", the "thing of value"? The benefit the FTC is using for its justification is merely the same general benefit that everyone gets from simply obeying the law. This "benefit" accompanies any regulation that is backed by penalties for violation. What is legally required is a separate, special benefit.[2]

If the FTC were maintaining a list of names that were useful and available for calling, rather than one that was *unavailable* for calling, then telephone canvassers would receive a benefit from access to the list. A fee might be justified for such access. This special benefit is what distinguishes a "fee" on the one hand from a tax (not authorized here) or mere confiscation (never authorized except in criminal cases) on the other hand.[3]

But that justification is impossible with the do-not-call registry user fee. When advocacy organizations call to reach their pre-existing members and previous donors, it can safely be assumed that most of any corresponding numbers on the do-not-call registry are there by mistake. These numbers would belong either to people who did not realize they were cutting themselves off from their organization or to people whose telephone number made it on the registry without their intentionally putting it there – by, say, another household member. In fact, at HBC the overwhelming majority of previous members or donors renew their memberships or donate a second, third or even 20th time. So, as to the majority of the numbers that would appear simultaneously on an advocacy organization's member or donor list and on the federal do-not-call registry, the government is simply getting in the way.

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[1] User Fee Statute, 31 U.S.C. §9701
[2] Office of Management and Budget Circular No. A-25. See *U.S. v. Sperry Corp*, *infra*.
[3] *United States v. Sperry Corp*., 493 U.S. 52, 54-59 (1989).

In short, when calling its own members and previous donors, advocacy organizations receive no benefit from the registry. There is no rational underpinning for a "user fee".

The need for a rational justification is not just a public policy concern and a requirement of the User Fee Statute. It is a constitutional requirement. There are Constitutional limits to governmental user fees. To prevent a violation of due process, equal protection, and confiscation under the Fifth and Fourteenth Amendments, there must be a direct and demonstrable relationship between the public purpose sought to be achieved and the exaction of the fee. Moreover, the fee must be properly proportioned to compensate the government for no more than what is necessary to accomplish its public purpose and limited by the benefit furnished.[4]

In *Massachusetts v. United States*, the Court held that a "user fee" must be a "fair approximation of the cost of benefits supplied."[5] So, what is a fair approximation of the benefits supplied to HBC's clients for access to a list of numbers that they may *not* call? That is, after all, the Constitutional (and statutory) limit of the user fee. The FTC makes no estimate of this value probably because such a list is worth absolutely nothing to an advocacy organization. Instead, the FTC simply calculates how much the do-not-call system would cost and divides that number by those who have to use it – without any regard to the limit of the fee, the individual benefit received by those who must pay it. This approach is a mistake which will void the user fee if enacted.

The recent case of *Watchtower Bible and Track Society of New York, Inc., et al. v. Village of Stranton*,[6] makes it abundantly clear that the U.S. Supreme Court has not retreated from its firm and consistent protection of non-commercial canvassing under the First Amendment. Burdening the canvassing of small advocacy organizations with thousands of dollars of additional expense, without any showing of actual benefit to those organizations, would not survive the *Watchtower* type "strict scrutiny" and "least restrictive means" constitutional challenges sure to follow such an attempt.

In *Watchtower* the Supreme Court found Constitutionally flawed a simple pre-registration prior to canvassing. In that case registration before canvassing was "offensive…to the very notion of a free society – that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so."

But the proposed FTC rule requires much more than the mere pre-registration in *Watchtower*. As in *Watchtower*, the proposed rule requires informing the government of an intention to canvass. But it also requires an application for lists in the area codes where the canvassing will occur, the payment of a fee for the lists, a wait during any period required to apply for and

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[4] ***American Trucking Ass'ns, Inc. v. Scheiner***, 483 U.S. 266, 268-69 (1987); ***Northwest Airlines, Inc. v. County of Kent***, 510 U.S. 355, 369 (1994) (citing ***Evansville***, 405 U.S. at 716-17); ***United States v. United States Shoe Corp.***, 523 U.S. 360, 369 (1998)

[5] ***Massachusetts v. United States***, 435 U.S. 444, 463 (1978).

[6] ***Watchtower Bible and Track Society of New York, Inc., et al. v. Village of Stranton***, 122 S. Ct. 2080 (2002).

receive these lists from the government, then complicated access to and use of expensive computer hardware and software (which must be compatible with the government supplied lists and which must be capable of algorithms to match, sort, select and scrub the lists), knowledge on how to use the list equipment and software, personnel immediately available who already possess such knowledge, and whatever delay is involved in all that scrubbing. Now add the fact that certain favored commercial organizations and religious groups (but only if they are already established) hold blanket exemptions from compliance and permanent waivers from the "user fee", no matter their actual message on the telephones.

It is quite easy to guess what the *Watchtower* Court would say about this. It is not a close case. We again urge the FTC to include the Constitutionally required exception to its rules for the case of non-commercial speech.

Very truly yours,

SIEGEL, BRILL, GREUPNER, DUFFY & FOSTER, P.A.

By: _____
Thomas H. Goodman

THG/pd