

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

**COMMENTS
OF THE
DIRECT MARKETING ASSOCIATION, INC.**

**TELEMARKETING SALES RULE FEES
TSR Fee Rule, Project No. P034305**

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

Jerry Cerasale
Senior Vice President, Government Affairs
Direct Marketing Association
1111 19th Street, N.W.
Washington, D.C. 20036
202/861-2423

Stuart Ingis
Michael Signorelli
DLA Piper Rudnick Gray Cary US LLP
1200 19th Street, N.W.
Washington, D.C. 20036
202/861-3900

June 1, 2006

The Direct Marketing Association (“DMA”) appreciates the opportunity to submit these comments on the Federal Trade Commission’s (“Commission”) notice of proposed rulemaking to revise the fees charged to entities that access the federal Do Not Call Registry.

In this notice of proposed rulemaking (“NPRM”),¹ the Commission proposes, for the fourth time in less than three years, to raise fees imposed on telemarketers to fund the national do-not-call registry. While the Commission has obtained authority from Congress to collect fees up to \$23 million, DMA does not believe that such continued rapid escalation of fees passed on to telemarketers are justified at this time.

DMA would like to make the following points, set forth in more detail below, in response to the Commission’s request for comments:

- An increase in fees is unwarranted at this time. The Commission’s current fees are sufficient to administer the do-not-call registry.
- The Commission should not use fees collected from telemarketers for enforcement or other purposes.
- Costs associated with wireless numbers placed on the registry should not be passed on to telemarketers through this fee.
- The Commission should continue to allow entities to access the registry for five area codes or fewer at no charge.
- The Commission should not adopt any of the proposed significant alternatives for determining fees.
- The significant delay that exists before a reassigned number is removed from the registry must be reduced.

¹ *Telemarketing Sales Rule Fees, Notice of Proposed Rulemaking*, 71 Fed. Reg. 25512 (May 1, 2006).

A. *A Further Increase in Fees Imposed on Telemarketers to Access the Do-Not-Call Registry is Unwarranted*

The Commission should not adopt the proposed increase in fees. Such a fee increase is unjustified at this time and is unnecessary for continued operation of the registry. While the Commission has the authority to collect up to \$23 million, the Commission is not required to collect fees up to this amount, which was authorized by Congress. The Commission should continue to pay for the registry at the \$21.9 million cost from last year. DMA believes that \$21.9 million is more than sufficient funding for the Commission to operate the registry.

The Commission initially indicated its belief that it would cost a few thousand dollars per telemarketer to obtain access to the national registry. By the time the Commission made the registry available, the cost for access had already increased to \$7,250. Less than a year later, the Commission increased fees 68% to \$11,000. The following year, the Commission increased fees by 40% to \$15,400. Now, yet again, the Commission proposes an 11% increase to \$17,050.

The current fees collected from entities for access to the do-not-call registry provide more than sufficient resources for the Commission to administer the registry. The Commission proposes to raise fees for access to the national registry by \$1,650, and derives this number by estimating the number of telemarketers likely to pay for access to the registry and how much each entity would have to pay to total the \$23 million authorized by Congress. Other than reflecting the increase in the annual congressional authorization from \$21.9 million to \$23 million, the Commission provides no justification for any increase in these fees.

As stated in prior comments responding to proposed fee increases, DMA is experienced in running its own list, the Telephone Preference Service (“TPS”), as well as in administering the state lists of Pennsylvania, Maine, and Wyoming. This experience indicates a much less costly

means of running a registry. DMA's entire list is available for entities to purchase for \$700 per year. While the Commission's registry contains many more numbers than does the TPS, the \$17,050 fee proposed by the Commission—more than 24 times the cost of the TPS—is not justified by the incremental costs that correspond to the increased amount of numbers on the registry.

B. The Commission Should Not Use Additional Resources to Enforce the TSR

An analysis of the costs to run the registry and the amount proposed to be collected by the Commission indicates that the majority of the money spent will be on enforcement and other costs. The FTC's contract with AT&T in 2003 to establish and administer the database was \$3.5 million. It has never been clear why costs beyond those charged by AT&T should be passed on to telemarketers. Even if there were some amount incurred in administrative costs for Commission staff to run the registry, it is unclear why those costs would need to be almost seven times the amount paid to AT&T.

The Commission uses the money received beyond the AT&T costs to "implement and enforce the TSR." DMA is concerned that fees are being used for telemarketing enforcement based on fraud or other violations of the TSR, where there may also be an incidental violation of the registry. The Commission acknowledges that "law enforcement efforts are a significant component of the total costs, given the large number of ongoing investigations currently being conducted by the agency, and the substantial effort necessary to complete such investigations."² Such enforcement actions should not be funded by registry fees when they otherwise would have been funded from other enforcement budgets prior to the existence of the registry. Fees collected for access to the registry provide the Commission with a means of reallocating its enforcement

² 71 Fed. Reg. at 25514.

budget previously used for telemarketing enforcement to other areas. For example, the Commission is increasing its enforcement in spyware, spam, and other areas. DMA strongly supports increased enforcement efforts in these and other areas. However, DMA believes that such costs should be borne by all taxpayers, not only by those taxpayers who are complying with the TSR.

The Commission has noted the significant compliance rate of telemarketers with the registry. DMA believes it is inappropriate for entities that comply with the law to bear the enforcement costs of the FTC. If the do-not-call registry is as successful as the FTC indicates, the FTC itself or Congress should provide any additional necessary funding increases over the current fee structure. Imposing the \$17,050 fee for access to the national registry on industry to engage in telemarketing is not what Congress intended when it passed the initial telemarketing legislation in 1993, indicating that the Commission should strike an “equitable balance between the interest of stopping deceptive...and abusive telemarketing activities and not unduly burdening legitimate businesses.”³

C. Telemarketers Should Not Pay the Portion of Running the Do-Not-Call Registry Resulting From Wireless Numbers Being Placed on the Registry

Increased costs to administer the registry that result from the inclusion of wireless numbers on the registry should not be passed on to telemarketers; such costs should be borne by the Commission. The Commission and the Federal Communications Commission (“FCC”) had encouraged and now allow individuals to place their wireless numbers on the do-not-call registry. Telemarketing calls to wireless numbers without consent are prohibited under the FCC’s rules implementing the Telephone Consumer Protection Act of 1991 (“TCPA”), 47 U.S.C. §§ 227 *et seq.* Thus, as a legal matter, consumers receive no fewer telemarketing calls by

³ H.R. Rep. No. 103-20, at 2 (1993).

placing their wireless numbers on the registry. Because such calls already are prohibited in the first instance, there is no basis for allowing such numbers to be placed on the registry.

D. Entities Should Have Continued Access to Up to Five Area Codes at No Cost

The ability for telemarketers to obtain the first five area codes from the registry at no cost should be kept in place. The large number of entities that access the registry at no cost are small businesses that telemarket their services to those in the community. These companies, which have been able to survive the reduced calling base created by the do-not-call registry, should not be forced to pay fees for the Commission to use in bringing enforcement actions against bad actors. Additionally, the fact that small businesses are able to access up to five area codes at no cost encourages their compliance.

Especially hard hit by this fee increase will be the smaller businesses that access more than five area codes; these companies may not have the financial resources to purchase the list. The entrepreneurial spirit of these companies should be encouraged rather than impeded. The proposed increased costs associated with conducting telemarketing as a result of these additional registry fees will reduce the number of businesses that telemarket and, correspondingly, the number of entities that pay for the registry. If consistent with the Commission's logic for increasing fees, this will result in a need to raise subscription fees again.

E. Significant Alternatives for Determining Fees Should not be Adopted

DMA agrees with the Commission that the alternatives to the proposed revised fee structure should not be adopted. Charging a flat fee to all entities that access the registry, regardless of the number of area codes accessed, would not serve the public interest. Specifically, it would frustrate the Commission's policy goal of assisting small businesses by increasing marketing costs and reducing business opportunities for small businesses. Also, a flat

fee would likely discourage compliance, which would raise administrative and enforcement costs. DMA also does not support adopting a mechanism by which small businesses would be required to file financial information to qualify for a small business exemption. The cost of compliance would be burdensome on small businesses and would result in increased program administration costs, which would eventually be passed through to all entities accessing the registry.

F. The Commission Should Remove Telephone Numbers from the Registry as Soon as They are Dropped or Abandoned

The Commission should remove telephone numbers from the Registry as soon as they are dropped or abandoned by a subscriber; there is too much of a time lag to wait for the numbers to be reassigned. Currently, numbers are not removed from the Registry when they are reassigned, which is not in the best interest of a subscriber or marketer. When a number is dropped or abandoned, it should be removed from the registry promptly so that the new subscriber may receive telemarketing calls. Generally, reassigned numbers are given to subscribers who recently have moved to new areas and are in the most need of legitimate marketing calls. This is the time when new subscribers are most interested in receiving calls regarding, for example, home alarm systems, home insurance, lawn care, and newspaper delivery. If the new subscriber wishes to register the new telephone number, he or she may do so at any time and cease receiving calls.

* * *

For these reasons, DMA respectfully requests the Commission to reconsider its proposal to significantly raise the user fees for the Do Not Call Registry.