Before the
Federal Trade Commission
Washington, D.C. 20580

Telemarketing Rulemaking-Comment FTC File No. R411001

Comments of the Tennessee Regulatory Authority

The Tennessee Regulatory Authority ("Authority" or "TRA") files these comments with the Federal Trade Commission ("FTC") in response to the Notice of Proposed Rulemaking to amend the FTC's Telemarketing Sales Rule, 16 CFR Part 310.

The TRA applauds the past efforts of Congress and the FTC in the passage and implementation of legislation including the Telemarketing Consumer Fraud and Abuse Prevention Act ("Telemarketing Act" or "the Act") 15 USCA § 6101 *et seq.* to protect consumers against telemarketing fraud. The TRA also understands and acknowledges the necessity to modify the original Rule to effectuate and meet the policy objectives set forth in the **U**niting and **S**trengthening **A**merica by **P**roviding **A**ppropriate **T**ools **R**equired to **I**ntercept and **O**bstruct **T**errorism Act ("**USA Patriot Act**") Pub. L. No. 107-56, 115 Stat. 272 (2001). The TRA further acknowledges the FTC's stated objective in the proposed rulemaking to prohibit specific deceptive and abusive telemarketing actions and the establishment of a national Do-Not-Call registry for a trial two-year period.

The Authority wishes to focus its comments on the FTC's proposal to establish a national Do-Not-Call registry. The Authority bases its comments upon the two-year experience it has obtained through the implementation, operation and enforcement of its Do-Not-Call Program ("Program"). Since 1999, over 695,422 Tennessee residents have registered with Tennessee's Program and the Authority has investigated approximately

1,296 consumer complaints alleging violations of state law. The Program has been a success from all indications. The implementation of customer-friendly registration and complaint procedures, continuous consumer education efforts, and vigorous enforcement actions has paid great dividends in reducing the problem of unwanted telephone solicitations in Tennessee. We would like to share with the FTC, information and recommendations based upon what is working in Tennessee. We also express a concern that the establishment of a national Do-Not-Call registry should enhance not diminish the effectiveness of Tennessee's Program. Regarding this concern, the Authority recommends that a long-term partnership between the FTC and the states that have implemented a Do-Not-Call program be established to ensure an ongoing cooperation to combat telemarketing abuses. The Authority also urges the FTC to "tread lightly" on the exercise of federal preemption of existing state programs. For those successful state programs the saying, "if it is not broken do not attempt to fix it" appears to be the appropriate federal policy direction. The Authority hopes this information will be considered by the FTC in its deliberative process to reach the right decisions regarding the establishment and operation of a national Do-Not-Call registry.

Problem and History

The information age has created the opportunity for a new method of sales solicitation. The door-to-door solicitation of the past has been replaced with the phone-to-phone telemarketing solicitation often from large call centers. The personal sales approach has been replaced by an impersonal approach. Evidence is strong that a large segment of the public is opposed to the intrusive practices of telemarketing. In reaction to this mounting public opinion, Congress enacted several pieces of legislation during the

1990s to restrict certain practices of telemarketers. In enacting the legislation, the federal government elected an industry self-policing approach with the establishment of a national Do-Not-Call registry maintained by Direct Marketing Association ("DMA").[1] After many years of existence, the DMA Do-Not-Call registry has only grown to four (4) million subscribers. From our discussions with the public, it appears that many Tennesseans were not aware of the DMA registry. Without question, this approach for whatever reason has not been successful. Despite these well-intended actions, consumer frustrations regarding unwanted telephone solicitations continued. A new approach was required. The voice of the public found its way into the halls of state legislatures.

Being closer to the situation and in response to public pressure, twenty (20) state legislatures have passed Do-Not-Call statutes as of January 2002, and similar legislation is pending in other states. States, like Tennessee, are making progress toward halting unwanted solicitations. A review of the number of subscribers enrolled in the state programs, the number of telemarketing complaints registered with each state and the numerous enforcement actions commenced in the states indicate that the state programs are popular with the public and are doing an effective job in addressing unwanted solicitations over the telephone.

Tennessee's Do Not Call Program

The Tennessee General Assembly passed the Telephone Solicitations Act ("Act") Tenn. Code Ann. § 65-4-405 *et seq.* in 1999. The Act gave jurisdiction to the TRA to establish a Do-Not-Call Program applicable to residential subscribers and the authority to levy fines up to $2,000 per violation. A $500 annual registration fee collected from

[1] Direct Marketing Association is an industry organization of telemarketers. However, not all businesses engaged in telemarketing belong to this Association.

telephone solicitation companies funds the cost of the Program. For this fee, telemarketing companies are provided an electronic copy of the Tennessee Do-Not-Call registry each month. The monthly distribution of the registry ensures a quick turnaround for consumers desiring to be included on the registry. There is no fee charged to consumers for being included on the Program registry.

One of the central reasons why the Tennessee Program is successful in reducing unwanted telephone solicitation calls is the tight language of the governing state statute. Refusing to bend to interest group pressures during the deliberative process, the Tennessee General Assembly limited the exceptions in the Do-Not-Call statute to three (3). The exceptions are as follows:

1. The telemarketer has the prior express permission of the person called;
2. The telemarketer is a not-for-profit organization exempt from paying taxes under the Internal Revenue Code § 501(c) as long as certain conditions are met; and
3. The person solicited has had a business relation over the past twelve (12) months with the company causing the solicitation to be made.

The Tennessee Do-Not-Call statute also prohibits telemarketers from circumventing operations of the customer's caller identification service (Tenn. Code Ann. § 65-4-403). This statute is identical to the FTC proposed rule regarding this service.

Based upon the lack of effectiveness of the DMA registry, the Authority decided to not contract out the operations of the Program. The Authority has gone to great financial expense in the implementation, operation and enforcement of the Program since the effective date of June 1, 2000. As of December 31, 2001, total expenditures for the Program in Tennessee were $630,154. The number of solicitors that are registered with

the Authority is 567. Registration fees of $500 per year collected from solicitors and fines have funded the Program. This funding source is vital to the operation of Tennessee's Program. Any national action that would have the effect of reducing the need for solicitors to register with the Authority would jeopardize Tennessee's Program.

Consumers' desire to be enrolled with the Tennessee Program has continued to grow. As of March 21, 2002, 695,422 Tennessee consumers have registered with the Program out of the 1,990,000 residential telephone numbers in the state. This number represents thirty-five percent (35%) participation rate of residential telephone users in Tennessee. This participation rate is much higher than the DMA national rate.

Enforcement actions by the Authority have shown results. In Tennessee, 1296 consumer complaints have been investigated since August 2000 by the TRA. Twelve (12) settlements have been reached since enforcement began in August 2000, which has resulted in $73,000 in settlements.

The Authority has recently conducted an Internet-based survey of consumers registered with the Tennessee Program. Seven hundred and fifty-five (755) surveys were successfully emailed via the Internet to registrants of the Program. Thirty-four percent (34%) responded. All respondents replied that the Tennessee Program was either extremely easy (52%) or easy (48%) to register. Ninety-six percent (96%) of the respondents indicated that unwanted solicitation calls had either significantly or moderately dropped since being on the Tennessee Program. Ninety-eight percent (98%) of the respondents indicated that they would recommend to other Tennesseans to sign up

for the Program. Only three percent (3%) of the respondents replied that they had needed to file a complaint with the Authority since being included on the Tennessee Program. [2]

Elements of a Successful Do Not Call Program

There are many different components that are required to make a Do-Not-Call Program effective. The registry is actually only one component of any Do-Not-Call Program. In the simplest of terms, the stated goals and objectives must be well defined through the statute and the promulgated rules and regulations so that the desired goals are attainable. The establishment of an effective Do-Not-Call program is not inexpensive. In terms of staffing and financial resources, an agency must be ready to support the program less it will surely fail. The State of Tennessee has made these tough decisions to properly fund the Tennessee Program. The Authority has determined that there are five (5) basic components that are essential for a successful Do-Not-Call program:

- Registration Processes: dealing with how consumers sign up for the program;
- Solicitor Certification: requirement that all solicitors register with the government.
- Complaint Procedures: investigative resources to determine validity of complaints.
- Enforcement Mechanisms: procedures to enforce the regulations.
- Public Awareness Efforts: activities to promote awareness of the program.

The Authority would be pleased to share with the FTC, as we have with other states, what we believe are important parts of each component. It is the Authority's position, nevertheless, that the states are the best place to maintain and enforce Do-Not-Call programs. Such a federal program would be massive and expensive to the point of being difficult to manage. In addition, the implementation of a national registry would likely

[2] Additional information on the survey is available from the Consumer Services Division of the TRA.

generate tens of thousands of new consumer complaints to the FTC. Once consumers are included on the registry, they expect the solicitation calls to stop. When they do not cease, they will call to complain. How is the FTC planning to deal with this large number of new consumer complaints?

Implications of a National List

A constant policy question in a federal form of government is what jurisdictional level a government program is most effectively and efficiently implemented. It is the debate that has existed since the days of Hamilton and Jefferson. With these thoughts in mind, the Authority requests the FTC to consider the potential nationwide impact of a national Do-Not-Call Program.

Notwithstanding the significant additional cost the FTC would incur if it elected to establish a national list and preempt State authority over telemarketing solicitations, there are other factors that should be considered. What would the impact of a national registry be on businesses and consumers?

The implementation of a national list could have a devastating effect on small telemarketing businesses depending on the rules and guidelines set forth in the implementation of such a program. If the FTC follows the Tennessee model, each month telemarketing companies would obtain a copy of the registry from the FTC. A national registry could contain 100 million names and telephone numbers. Sending this massive database to small businesses that telemarket could overwhelm their resources. A small telemarketing business in Chattanooga, Tennessee, for example, may not be interested in a national list of 100 million names, but only want a list of Tennesseans who do not wish to be called. The Authority recognizes and meets the various specific geographical needs

of telephone solicitors. The establishment of a national registry that has to be implemented by small businesses could create a burden as well as a potential financial hardship.

Working with state programs allow small businesses that occasional solicit business by telephone to operate more efficiently by working with data in the thousands of records from each respective state in comparison to having to deal with millions of records likely in a national registry. Dealing with a national registry would likely require small businesses to purchase expensive computer systems necessary to handle the large volume of data.

Through what jurisdictional level will Tennessee consumers be better protected from unwanted telephone solicitations? The Authority has concluded that the protections of the Tennessee Do-Not-Call statutes are more inclusive than the FTC could afford. The Authority is concerned about the Do-Not-Call Safe Harbor provisions. The provisions of 16 C.F.R. § 310.4(b)(2) provide sellers and telemarketers with a "safe harbor" from liability for violating the Do-Not-Call provision found in proposed 16 C.F.R. § 310.4(b)(iii). This provision restricts enforcement for those companies that violate the rules and regulations as long as they have: (1) established and implemented written procedures to comply with the do-not-call provisions; (2) train personnel in proper procedures; (3) maintain and record lists of persons who may not be contacted; and (4) excuse any call that may be the result of error. This provision could make enforcement difficult. Without active and effective enforcement, Do-Not-Call programs will fail. Furthermore, the Authority is concerned that the FTC reach is insufficient to permit full implementation of an effective federal Do-Not-Call program. It is our understanding that

the FTC cannot reach telephone solicitations, in whole or in part, conducted by banks, telephone companies, airlines, insurance companies, credit unions, charities and political fund raisers. Many Do-Not-Call complaints the Authority has received concern these entities. Would federal preemption of state authority mean that consumer complaints against these entities would be dismissed? Tennessee statutes do not limit the Authority's jurisdiction over these entities.

A Partnership Approach

Cooperation and sharing jurisdiction can resolve the pitfalls of this issue. Congress has recognized the important role the states have to play on such regulatory issues and has in the past encouraged partnerships. The Authority is committed to working with the FTC in satisfying the will of Congress on this subject and meeting the expectations of the public. In this spirit we propose the following model.

Since almost half of the states have taken the initiative and established a Do-Not-Call program, the FTC should distinguish between the states that have and for those that have not established their own Do-Not-Call program. The FTC's goal should be to not disrupt existing state Do-Not-Call programs, but build upon their success.

For those states desiring jurisdiction, the initial layer of government protection, maintenance of a Do-Not-Call state list, and enforcement for Do-Not-Call violations would be recognized as being within the state's jurisdiction. The FTC would not preempt state jurisdiction but rather establish minimum regulations and maintain a default national Do-Not-Call registry that companies could obtain from the FTC when telemarketing in states that have no Do-Not-Call program (referred to as opt-out states). The default national registry will not include the names of consumers from the states that have

informed the FTC that will operate a state Do-Not-Call program (referred to as opt-in states). The FTC would instruct the telemarketers that they must contact those opt-in states for their Do-Not-Call registry. Opt-in states would have the ability to enact more stringent Do-Not-Call regulations as long as such regulations do not conflict with federal law.

On enforcement issues, the opt-in states would conduct investigations of Do Not Call violations within their states and enforce state law. Tennessee Do Not Call statutes permit us to enforce all solicitation calls coming into Tennessee. However, there may be situations where some opt-in states need the FTC enforcement assistance on some interstate and international telemarketing complaints. Joint investigations could be conducted in these situations.

Finally, the effective sharing of jurisdiction over unwanted solicitations requires avenues of communications between the FTC and the states. The Authority recommends that a joint Federal-State Board be established by the FTC to further refine how the partnership will work. The Authority plans to attend the FTC's public forum scheduled for June on this subject and will be willing to further discuss the idea of the partnership approach.

This model is similar to the partnership that exists between the Federal Communications Commission and the states in the enforcement of slamming complaints. The latest statistics on slamming complaints reveal a drop in the number of complaints. The Authority asserts that a similar approach may be as effective here.

Other Issues

There are some telemarketing issues that cry for a national solution. One such issue is the unlawful use of automated dialers and messaging equipment. Many of these devices are still being used in Tennessee. Consideration should be given to the prohibition of the manufacturing of this equipment except for the lawful purposes as outlined by law with a sales registration requirement for both the manufacturer and all entities using these devices.

The FTC has accurately surmised the linkage of caller ID service to limiting telemarketing abuses. Caller ID service gives consumers the power to fight unwanted telephone solicitation calls. This may be a reason why some telemarketers use every trick to block call ID service from working properly on the consumer's telephone. Caller ID information provided by consumers have been vital to the successful enforcement efforts by the TRA and any impediments to its proper function should be addressed. Technical excuses offered by some telemarketers for not providing calling information over caller ID service should be addressed one-by-one until solutions are found. The FTC and the Federal Communications Commission may be in a stronger position to address these technical issues. The Authority suggests that there should be a prohibition on the manufacturing of PBX equipment or stations that allow for the caller ID block capability. The Authority further recommends that caller ID information such as a telephone number should be shown for a main PBX number that can be reached during normal business hours for the party originating the call regardless of on whose behalf the call is being made. The FTC along with other federal agencies should further investigate the establishment of a minimum standard for a T-1 grade telephone line which would

require some line identification of the designated trunk with a given phone number that would show up on the consumer's caller identification equipment. Regulations should be passed making attempts to alter or falsify caller ID information a federal violation with severe consequences.

Thank you for your favorable consideration of these filed comments to the Telemarketing Rulemaking, FTC File No. R411001.

Respectfully Submitted,

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