

May 31, 2005

Office of the Secretary
Federal Trade Commission
Room H-159 (Annex K)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: TSR Fee Rule, Project No. P034305

Ladies and Gentlemen:

This letter is in response to the Commission's request for public comments regarding its proposed increase of user fees to access the National Do-Not-Call Registry (the "Registry") as set forth in the Notice of Proposed Rulemaking ("NPRM") dated April 18, 2005.

The American Resort Development Association ("ARDA") has been pleased to participate in the review of various proposed revisions to the Telemarketing Sales Rule ("TSR"). With regard to the user fee issue, ARDA previously submitted comments to the Commission's May 29, 2002, Notice of Proposed Rulemaking ("User Fee NPRM") and to the Commission's April 3, 2003, Revised Notice of Proposed Rulemaking to increase the user fee ("Revised User Fee NPRM"). ARDA adopts its previous comments for this submission and incorporates those comments by reference herein.

While there are several alternatives to imposing a blanket fee increase, the most viable and equitable option is elimination of free access to the first five area codes. ARDA proposes this and several other alternatives to the proposed blanket increase of the user fee, but is most supportive of imposing at least a minimal fee on access to the first five area codes to more equitably distribute the administrative cost of the Registry.

Equitable Distribution of Costs

As the Commission is aware, this is the second fee increase by the Commission since the Registry was established less than two years ago. This latest proposed increase represents a 112% increase over the fees initially imposed at the outset of the Registry.

The Commission contends that the fee increase is necessary to offset the costs of implementation and enforcement of the Amended TSR's requirements. To date, the Commission has repeatedly complimented industry on its compliance with the do-not-call requirements (?). As proof of industry's compliance, the Commission has initiated only a handful of enforcement proceedings since implementation of the Registry. Thus, it appears that the Commission should look to sources other than the Registry fee to fund enforcement of non-do-not-call violations.

Further, the Commission is in effect taxing those entities, in an ever-increasing manner, which are the MOST compliant with the do-not-call requirements. By availing themselves of the Registry, these companies also provide the Commission with the information it needs to quickly launch an investigation and enforce the rules (thus reducing investigative and enforcement costs). Meanwhile, those entities that do not pay for access are violating the rules and are more difficult to track down and sanction. These entities that are not accessing the Registry should be the primary focus of the Commission's enforcement efforts and should be accountable for funding the Registry.

As the user fee increases, it is inevitable that compliant sellers will be motivated to 1) reduce or stop outbound telemarketing; or 2) avoid paying the fees in violation of the rules. Either event will reduce the number of sellers (and/or area codes accessed by the sellers), which will result in lower fees, and in turn result in more fee increases in the future to be paid by only the most profitable businesses.

Alternatives to Blanket Fee Increase

There are several ways the Commission can resolve the disparity between those using the Registry and those funding it. These alternatives are not mutually exclusive and the Commission should consider adopting more than one in order to meet its funding goals without having to increase the overall fee.

First, the Commission must remove the fee exemption for the first five area codes. This is the alternative that is most likely to satisfy the Commission's need for administrative funds for the Registry. The Commission notes in the NPRM that the majority of entities accessing the registry are accessing five or fewer area codes. By the Commission's own statistics, approximately eighty-seven percent (87%) of the entities accessing the Registry are not paying anything for that access. That has to impose an extreme administrative burden upon the Commission. However, the Commission stresses its concern with imposing a substantial burden on small businesses if the Commission imposed such fees.

Any fee increase places some financial burden on any business, particularly small businesses. However, the scope of a company's calling operation may bear little to no relation to the size of the company. Thus, the fee impacts many small companies in a disproportionate manner. At the same time, there are likely many larger companies that simply need five or fewer area codes that pay nothing for the list. Since all entities accessing the Registry are accessing some area codes for free, the imposition of at least a reduced fee, if not the normal fee (which would be reduced from the proposed increase based on the Commission's calculations), for up to the first five area codes would be a more equitable alternative.

Second, as noted throughout this comment, the Commission should use revenue from enforcement proceedings to subsidize the national DNC program. If there are limitations in place that make this impossible, then Congress should be informed that the rules need to be changed.

Third, the Commission should revisit its decision to make the list available for free to "exempt" entities. This exemption not only unnecessarily restricts the potential number of entities paying for the list, but also makes it easy for "bad actors" to gain access to the list free of charge. While it is encouraging that some otherwise exempt entities freely decide to avail themselves of the Registry, if an exempt entity chooses to use the Registry, it should pay at least a nominal "administrative" fee for access. Even though the number of entities this impacts is quite small, if the Commission does not adopt some other alternative, this option may be necessary to adequately fund the Registry.

Finally, the Commission should increase efforts to identify those entities that are not accessing the Registry as required. Fines against those entities not accessing the Registry and subsequent payment of the user fee will obviate the need to increase the fee for those who are meeting the TSR's and the Commission's mandate.

It is important that funds generated from the user fees and from enforcement of compliance with the TSR's requirements specifically related to the Registry should only be used to fund enforcement and administrative costs directly associated with the Registry. We would surmise that this is the current process, which would be consistent with the Implementation Act and subsequent Appropriations acts. However, we wanted to confirm this understanding so that any future need for fee increases could be obviated to the extent possible.

The Commission 's approach to the national registry fees will have (and arguably already has had) a chilling effect on the commercial free speech rights of sellers. The higher the fees, the greater the chilling effect. Further, as fees increase, only the most profitable and compliance-oriented entities will continue to pay the fees. The Commission must take this chilling effect and other unintended consequences into account in its deliberations over the fee increase and seek to implement other, more equitable methods (discussed above) to avoid further increases.

Once again, ARDA thanks the Commission for this opportunity to voice its concerns with this proposed rule.

Sincerely,

Sandra Yartin DePoy
Vice President
Federal & Regulatory Affairs