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

Re: Telemarketing Sales Rule User Fees
Notice of proposed rulemaking

The American Bankers Association ("ABA") appreciates the opportunity to submit our comments to the Federal Trade Commission's ("FTC") Notice of Proposed Rulemaking ('Proposal") published in the May 29, 2002 *Federal Register* regarding user fees to fund the development and operation of its proposed "Do Not Call List." ("DNC list"), published in the *Federal Register* on 30 January 2002. ABA appreciates the FTC's efforts, but we must respectfully challenge the FTC's authority to impose a user fee based on the Independent Offices Appropriations Act of 1952 ("IOAA") and the Office of Management and Budget" Circular No. A-25, (Circular") on which the FTC relies for its authority to assess user fees.

In addition, we are concerned that the FTC's rush to meet budgetary timing and funding constraints may compromise the quality of comments, review, and ultimate rule. For example, absent details of the rules and options surrounding any ultimate federal DNA List, it is difficult to measure the cost of providing the list, to estimate the number of users, or to calculate the appropriate cost.

In the event the FTC chooses to proceed, we suggest that it simplify the proposed system to minimize the cost of the program and encourage compliance. In any event, the FTC should not assign fees against each client of a seller using a telemarketer's list. Rather, telemarketers subscribing to the list should be able to obtain a single subscription that may be used by clients as well as subsidiaries and affiliates.

The ABA brings together all elements of the banking community to represent the interests of this rapidly changing industry. Its membership – which includes community, regional, and money center banks and holding companies, as well as savings associations, trust companies, and savings banks – makes ABA the largest banking trade association in the country.

FTC lacks authority to impose a user fee for the DNC list.

There is a strong argument based on IOAA, the Circular, and case law, that the FTC lacks authority to impose a fee for access to the list. In any case,

the FTC is limited to imposing a fee based on the nominal cost of providing the list.

The FTC cites the IOAA and the related Circular as authority for imposing a DNC list user fee. The IOAA governs fees the government may charge for services. The Circular explains the scope and type of activities subject to user charges and the basis upon which user charges are to be set.

According to the Circular, user charges may be assessed against each identifiable recipient "for special benefits" beyond those received by the general public. In determining whether a "special benefit " exists, the Circular explains, "[A] special benefit will be considered to accrue. . . when a government service enables the beneficiary to obtain more immediate or substantial gains or values than those that accrue to the general public." It further informs, "No charge should be made for a service when the identification of the specific beneficiary is obscure, and the service can be considered primarily as benefiting broadly the general public."

Case law further explains a federal agency's limits in imposing fees. For example, in *Federal Power Commission v. New England Power Co.*,[1] the Supreme Court held that a general benefit to an industry, such as public confidence inspired by the regulation, is insufficient to justify a fee under IOAA.

Similarly, in *National Cable Television Association v. United States* the Supreme Court compared a fee authorized by statute and a tax. It stated:

If assessments are made by the Commission against members of the industry which are sufficient to recoup costs to the Commission for its oversight, the CATV's and other broadcasters would be paying not only for benefits they received but for the protective services rendered the public by the Commission. The fixing of such assessments, it is argued, is the levying of taxes.[2]

The Court continued by noting that under the Constitution, Congress alone has the authority to levy taxes and it may not delegate that authority.

To calculate the allowable fee, the Court stated:

It is not enough to figure the total cost (direct and indirect) to the Commission for operating the CATV unit of supervision and then to contrive a formula that reimburses the Commission for that amount. Certainly, some of the costs inured to the benefit of the public, unless the entire regulatory scheme is a failure. . . [3]

In addition, in *Engine Manufacturers Association v. Environmental Protection Agency,* the United States Court of Appeals for the District of Columbia Circuit found:

An agency may not charge more than the reasonable cost it incurs to provide service, or value of service to the recipient, whichever is less. If the service provides both a specific benefit to an identifiable beneficiary and an

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[1] *Federal Power Commission v. New England Power Co.* 415 U.S. 345 (1974).
[2] *National Cable Television Association,* 415 U.S. (1074) at 341-342.
[3] *Id.* At 343.

independent benefit to the public, then the agency must prorate its costs, lest the specific beneficiary be charge for agency costs attributable to the public benefit.[4]

We do not believe that the FTC's proposed user fee scheme has met the tests outlined in the OIAA, the Circular, and the case law. As noted, the Circular provides that the prerequisite special benefit accrues when the service "enables the beneficiary to obtain more immediate or substantial gains or values. . . than those that accrue to the general public." The case law reinforces that when the service renders a benefit greater than the benefit to those paying the fee, the fee is suspect.

Applying this standard to the DNC list proposal, any argument that scrubbing telemarketing lists with the proposed DNC list provides a greater benefit to the telemarketers than to the general public is dubious at best. Certainly, the FTC's own analysis does not support such an argument.

The FTC in its 22 January 2002 proposal, emphasized that the primary purpose of the proposed DNC lists it to benefit consumers. For example:

[E]nhanced data collection and target marketing also have led to increasing public concern about what is perceived to be increasing encroachment on consumers' privacy Z. (page 10)

The proposed modification of the Rule's treatment of the "do-not-call" issue would enable consumers to contact one centralized registry to effectuate their desire not to receive telemarketing calls. (page 68)

The proposed Rule will provide consumers with a wider range of choices than the current Rule provides. (page 68)

Indeed, as the FTC notes, the purpose of the Telemarketing Act, on which the proposed DNC list is based, is to **protect consumers** against telemarketing fraud.

The FTC claims in the supplementary information to the proposal that the DNC list will provide a "thing of value" to telemarketers. [N]amely, a list of all United States consumers who have indicated a preference to focus their marketing sales on those consumers who have no objection to receiving such solicitations."

We seriously question the weight of this stated value to telemarketers. Consumers today already have the right to request that they be removed from a telemarketer's list at the time a telemarketer first calls. Existing customers can often indicate their preference at the time they contract for the service. Thus, under the current system, consumers can select which institutions they wish to hear from and those they do not wish to hear from. In this fashion, telemarketers can refine their lists in a manner superior to the proposed scheme. Thus, from the telemarketers' view, the proposed DNC list adds little, if anything, of value to the current system. Moreover, if the final rule prohibits institutions from calling their own customers whose names are included in the list, as proposed, the proposed "service" is indeed a negative one.

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[4] *Engine Manufacturers Association v. Environmental Protection Agency* 20 F.3d 1177, 1180 (1974).

The fact that telemarketers would be required by law to scrub their lists against the DNC list argues against any assertion that the proposal benefits telemarketers. If the benefits were substantial, then surely use of the DNC would, and arguably, should be optional and voluntary.

In any case, the fee should be limited to the value of the service to the user as described in *Engine Manufacturers Association*, the fee should be limited to the value of the service to the user. As discussed earlier, the value of the proposed service is nominal, given the current system which allows consumers to request deletion of their names from the users' own list. Moreover, the prohibition against calling the telemarketers' own customers would be a negative value. That use of the proposed DNC list would be mandatory supports the argument that the service provides nominal value to users.

For these reasons, we do not believe that the FTC can rely on the IOAA to justify imposing a fee on users of the proposed DNC list. In any case, only a nominal fee is justified.

If the FTC proceeds to adopt the DNC list proposal, notwithstanding questions of its authority, it should simplify the payment schedule.

Section 310.9 of the proposal establishes the fee schedules for the proposed DNC list. Generally, fees are imposed annually. Fees are $12 per area code. However, those using five or fewer areas codes pay no fee and the maximum fee is $3,000. Telemarketers telemarketing on behalf of other sellers or telemarketers must pay the fee for each seller or telemarketer.

While ABA appreciates the FTC's efforts to accommodate various players involved in telemarketing and to offer a fair and flexible plan, we encourage simplicity. Simplicity will help to ensure the lowest cost and promote compliance. Accordingly, we suggest a flat fee for all users, regardless of geographic scope of use and regardless of the fact that the telemarketer may share the list with clients or subsidiaries or affiliate. For example, the proposed annual fee avoids the administrative cost of monthly invoices and payments for both the FTC and DNC list users. We support the annual fee approach.

To further promote simplicity, we suggest that the FTC impose a flat fee for all users and eliminate the proposed fee schedule that is based on the number of area codes used. A flat fee will eliminate unnecessary administrative and other complications associated with determining, tracking, and adjusting the number of area codes. As the supplementary information illustrates, computing the fees can quickly become complex, changing depending on when the user subscribes and which area codes the users is using at a given time. In addition, while we recognize that providing the first five area codes for free is intended to assist small businesses marketing in a local area, we would expect few will be able to take advantage of this option. Many small businesses today market nationwide.

We also strongly object to a fee schedule that imposes a fee on each client (or subsidiary or affiliate) as proposed. This also unnecessarily complicates the schedule and administrative burdens. Subscribers and the FTC will be compelled to adjust bills as clients are added and deleted.

More importantly, the single fee schedule will discourage clients from subscribing individually, which will enhance the privacy and security of the DNC list: the fewer number of entities with actual access to the DNC list, the less opportunity for misuse of the list, both deliberate and inadvertent.

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ABA appreciates the opportunity to comment on this important proposal. ABA does not believe the FTC has the necessary authority to impose a DNC list user fee, or in any case, is limited to imposing a nominal fee. If the FTC proceeds in imposing a user fee, it should adopt a schedule based on simplicity to minimize costs and inadvertent noncompliance.

Sincerely,

Nessa Eileen Feddis