UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In The Matter Of Telemarketing Rulemaking -

FTC File No. R411001

COMMENTS OF THE AMERICAN TELESERVICES ASSOCIATION ON THE PROPOSED TELEMARKETING SALES RULE USER FEES

INTRODUCTION

The American Teleservices Association (the "ATA"), respectfully submits these comments to the Federal Trade Commission's (the "Commission") proposed Telemarketing Sales Rule User Fees. These comments are submitted pursuant to the Notice of Proposed Rulemaking ("NPRM" or "proposed Rule") issued by the Commission on May 29, 2002 at 67 Fed. Reg. 37362.

The ATA is the trade association dedicated to the teleservices industry, representing the providers and users of teleservices in the United States and around the globe. The ATA was founded in 1983 to provide leadership and education in the legal, professional and ethical use of the telephone, to increase service effectiveness, enhance customer satisfaction and improve decision making. Today, the ATA has more than 2,500 members representing all segments of the industry, including telemarketing service

agencies, consultants, customer service trainers, providers of telephone and Internet systems, and the users of teleservices, such as advertisers, non-profit organizations, retailers, catalogers, manufacturers, financial service providers, and others. The Association is dedicated to promoting a positive image of telephone marketing through the highest standards of ethical practices throughout the industry.

A primary mission of the ATA is to educate its members on the laws that govern teleservices through its annual law/legislative conferences and other educational seminars and conferences, and through its legal bulletins detailing trends in legislation affecting the industry. The ATA also serves as a resource to state legislatures, state attorneys general and federal regulatory agencies in drafting appropriate and focused legislation and rules to combat deceptive practices.

The ATA's commitment to encouraging and conducting legitimate and honest telemarketing programs is without question. It is with that background that we submit the following comments regarding the proposed Telemarketing Sales Rule User Fees.

I. *EXECUTIVE SUMMARY*

The proposed User Fee schedule must be drastically modified. The proposed schedule: (1) unfairly burdens business with the cost of the $3M user fee program; (2) adds another level of fees on top of those already levied by similar state programs for repetitive and duplicative purposes; (3) erroneously contrives to create a formula for user fees inconsistent with the Independent Offices Appropriations Act (the User Fee Statute); (4) attempts to require multiple purchases of the list by service providers in contradiction of Office of Management and Budget (OMB) Circular A-25; and (5) imposes another regulatory burden on small business despite a Presidential mandate to lessen that burden. In its proposed form, the schedule imposes costs on business that are punitive in nature

and yield little or no benefit to consumers beyond that already provided by the individual state programs.

II. *THE PROPOSED SCHEDULE UNFAIRLY BURDENS BUSINESS WITH THE COST OF THE $3M USER FEE PROGRAM*

The user fee schedule proposed by the Commission calls for $3M to be raised through imposition of user fees to defray costs of developing and maintaining a National Do-Not-Call Registry beginning in Fiscal Year 2003. Business will be compelled to sustain the entire $3M cost; consumers will be required to provide no contribution to funding the program for which they are the primary beneficiaries.

As justification for its actions, the Commission states that it "…does not wish to charge consumers to protect their privacy from unwanted and abusive telemarketing calls." NPRM 67 Fed. Reg. 37362, Supplementary Information, I. Background. It then takes the position that, even if the consumer were charged a fee, the cost of collection would outweigh the revenue received. It further reasons that business is the primary beneficiary of the National Do-Not-Call Registry and therefore should bear the cost of developing and maintaining the program.

We believe the Commission has failed to make its case in all three instances. First, the concept that consumers should not have to bear a share of the cost of privacy is without foundation. It is, in fact, a well-established principle that consumers should and do sustain a share of the costs of benefits they derive from government. The decision to place curtains in one's home or a fence around one's property to protect one's privacy is a personal one; the consumer bears that cost, not the government. The decision to have an unlisted telephone number for privacy purposes is a personal decision; the consumer pays that cost, not the government. The decision to subscribe to a Caller ID service is a personal one; the service is not provided free of charge and is borne by the consumer, not

government. The Office of Management and Budget notes that "the average American household pays about $6,000 out of its annual budget because of Federal regulations." Overview of the U.S. Regulatory System, Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs, U.S. Office of Management and Budget, Executive Office of the President, January 15, 2002. It is readily apparent that the cost of the "benefits" that accrue to consumers as a result of these regulations is significant and is a cost all bear for the common good. To now propose that expansive additional benefits be afforded to the consumer "free of charge" is inconsistent with longstanding government policy.

Secondly, to assert that the cost of collecting any consumer fee would cost more than the revenue collected has not been demonstrated. In fact, we note the ingenious and innovative methods government has devised to separate Americans from their income, including small or "nominal" fees. Indeed, these are often justified on the basis that they are so negligible that the consumer won't even notice. The sheer volume of these negligible fees compensates for their nominal amount and the cost of collection, rendering them valuable revenue producers. It is not the amount of the fee but rather the number of people paying it that is the deciding factor. The Virginia Department of Transportation, for example, imposes a system of tolls for certain highways averaging as low as 15¢ to as high as $2 for most passenger vehicles. These rather nominal fees generated $60,000,000 for Fiscal Year 2002. Virginia Department of Transportation, Annual Budget, Fiscal Year 2002-2003, June 2002. By the Commission's own estimate, as many as 40 to 60 million households could sign up for a National Do-Not-Call Registry. Even charging a nominal $1 registration fee to consumers, as the California state DNC program calls for, would generate $40,000,000 to $60,000,000 in revenue.

Other states have registration fees averaging $3 to $5, a level that would produce revenues of $120,000,000 to $300,000,000. We suspect that even the Federal government could devise a collection mechanism that would not exceed these levels in cost.

Thirdly, the Commission has not produced any evidence, nor is there any available data to support the premise that business is the primary beneficiary of this Do-Not-Call "service". This position appears to be predicated on the following statement in the rulemaking proposal that:

> "…the Commission will be providing a "thing of value" to telemarketers; namely, a list of all United States consumers who have indicated a preference not to receive certain telemarketing calls. Access to such a list will permit telemarketers to focus their telemarketing sales on those consumers who have no objection to receiving such solicitations. Ultimately, it may be more profitable for telemarketers to call only those consumers who are receptive to being called."

NPRM, 67 Fed. Reg. 37362, Supplementary Information, I, Background. This is clearly an attempt to qualify imposition of the fees solely on business under OMB Circular No. A-25 which allows assessment of user charges to those recipients who receive "special benefits" from the government, the "special benefit" in the instant case being the DNC Registry.

This premise is flawed on several counts. The telemarketing industry has long maintained that they do not want to call people who don't want to be called. The Commission erroneously concludes this will be achieved through implementation of the proposed National Do-Not-Call Registry. It will not. In fact, industry already has the means to achieve this objective through the existing National Company Specific Do-Not-Call program established by the Telephone Consumer Protection Act (TCPA) of 1991. The proposed National DNC Registry therefore does not constitute a "thing of value" for

industry and provides no benefit to business that it does not already have through existing Federal legislation.

It is clear that the only beneficiary of the proposed National DNC Registry would be the consumer who actually desires to have his/her telephone number placed on the list. Indeed, in press release after press release the Commission has touted the National DNC Registry as being in the consumer's best interest. Only when it comes to paying for the program do we see the proposal suddenly transformed into a benefit for business.

Applying the Commission's rationale, it is clearly the obligation of the consumer, as the primary beneficiary, to pay any user fee imposed by the government. No reasonable person can deny that the proposed program is established for the benefit of certain consumers. To argue otherwise is to deny that the Registry holds any value for the consumer. If business is not the primary beneficiary, and the Commission denies that the consumer is, then who reaps the benefits of the Commission plan? This is a threshold question for the Commission, as OMB Circular No. A-25 states:

> "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."

OMB Circular No. A-25, 6(a)(4). By no stretch can business be seen to be the primary beneficiary. For the Commission to simply state that it is so does not, in fact, make it so. Therefore, unless it is acknowledged that the consumer is the primary beneficiary of the list, the proposed rule change would create a program with no clear beneficiary and the proposed user fee structure would be considered invalid.

III. *THE PROPOSED SCHEDULE LAYERS ADDITIONAL FEES AND BUREAUCRACY TO DUPLICATE EXISTING STATE PROGRAMS*

Industry already purchases DNC lists in the 25 states that enacted such programs. Although a few of these states have not yet established a fee schedule, purchase prices in

those that have range from $100 to $800 per state. The Commission proposal provides nothing beyond what is already provided by these states lists, but adds a layer of Federal bureaucracy and Federal fees to duplicate the state programs. Since the Federal program as proposed does not preempt the state programs, business will be compelled to purchase both the Federal and the state lists. Because the Federal and state programs will have different exempted categories, state lists will still exist for those businesses doing intrastate calling only. The layering of fees upon fees to duplicate existing state programs places an unnecessary, unwarranted and unjustifiable burden on legitimate commerce.

IV. *CONTRIVED FORMULA TO CREATE USER FEES IS INCONSISTENT WITH THE INDEPENDENT OFFICES APPROPRIATIONS ACT (THE USER FEE STATUTE)*

The Commission hinges its proposed user fee schedule on a faulty interpretation of the Independent Offices Appropriations Act. The Act authorizes federal agencies to establish a charge "for a service or thing of value provided by the agency." Among the criteria the charge shall be based on is "the value of the service or thing to the recipient." The Commission opines that the "thing of value" is the proposed National DNC Registry and that the telemarketing industry is the recipient and primary beneficiary. As we have noted earlier in these comments, neither conclusion is accurate. The proposed National Registry does not constitute a "thing of value" to the industry and is clearly intended for the primary benefit of the public.

In a previous ruling, the Supreme Court overturned a similar attempt to impose a user fee on business. In NCTA v. U.S., the Federal Communications Commission sought to institute a user fee on the cable television industry. The FCC contrived an intricate formula designed to produce exactly the amount specified in its budget request to cover

the direct and indirect costs of regulating the cable industry, concluding that the amount of the user fee would approximate the "value to the recipient." The Supreme Court overturned the fee stating:

> "While those who operate CATV's may receive special benefits, we cannot be sure that the Commission used the correct standard in setting the fee. It is not enough to figure the total cost (direct and indirect) to the Commission for operating a 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, which we refuse to assume."

National Cable Television Association v. U.S. (415 U.S. 336). The Court emphasized this latter point again, "…some of such costs certainly inured to the public's benefit and should not have been included in the fee imposed upon the CATVs."

In its rulemaking proposal, the Commission would require each user to pay a fee based on the number of area codes called with an annual cap of $3,000. Thus a business engaged in a national campaign would be assured that its subscription costs would not exceed this amount. For independent call centers with a variety of clients, however, the Commission would require the purchase of the same list multiple times.

> "For telemarketers who work on behalf of multiple clients, the telemarketer would pay to access a separate list of area codes of data for each client."

NPRM, 67 Fed. Reg. 37362, Supplemental Information, II, User Fee Calculation. Thus a service provider with dozens of clients would be required to purchase the identical list dozens of times. This construction runs counter to OMB Circular No. A-25 which states that:

> "Charges will be made to the direct recipient of the special benefit even though all or part of the special benefits may be passed to others."

OMB Circular No. A-25 6(b).

V. *IMPOSES NEW REGULATORY BURDEN ON SMALL BUSINESS*

Finally, the Commission asks for comments regarding the impact of the Rule and its amendments on Small Businesses. The Small Business Administration, using North American Industry Classification System (NAICS) codes, defines telemarketing bureaus as those with annual receipts of $5M or less. Businesses in this category are eligible for government programs and preferences reserved for small business concerns.

The imposition of the proposed rule on small businesses is unduly burdensome and inconsistent with the Administration's stated objective of creating an environment where small businesses can flourish. The President has stated that:

> "The complex, confusing, and cumbersome maze of federal regulations costs small businesses 60 percent more per employee than it costs large businesses. Entrepreneurs cannot operate effectively in an environment of uncertainty and confusion. Such an environment makes entrepreneurs spend more time with their lawyers and accountants and less time with their customers. And compliance with these regulations can be very costly – averaging $7,000 per employee by one estimate."

President George W. Bush, The President's Small Business Agenda, The White House. The President has also emphasized enforcement of the Regulatory Flexibility Act, stating:

> "This Act requires agencies to prepare an analysis of the impact of new regulations on small businesses before they are put in place. OMB will send back to agencies any proposed rules that have not taken the impact on small businesses into serious consideration, as is required."

President George W. Bush, The President's Small Business Agenda, The White House.

Conclusion

While these comments highlight significant concerns of the ATA and the problems with the proposed Rule, the ATA does believe that the proposed Rule can be amended to reach a satisfactory balance by including the primary beneficiary, the consumer, in any user fee program to be developed. The ATA, its Board of Directors and many of its individual members have a long standing commitment of cooperation with the

Commission, and the ATA looks forward to continuing this relationship and working with the Commission to remedy these problems.

Respectfully Submitted:

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