

STAMP & RETURN

Before the
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

In the Matter of)
)
Telemarketing Rulemaking -) Project No. R411001
Monthly Registry Access)
)

FEDERAL TRADE COMMISSION
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COMMENTS OF THE AMERICAN
TELESERVICES ASSOCIATION

The American Teleservices Association ("ATA"), by counsel and on behalf of its members, hereby comments on the Notice of Proposed Rulemaking seeking input regarding amendment of the Telemarketing Sales Rule ("TSR") to require that entities subject to it obtain the list of telephone numbers enrolled on the National Do-Not-Call Registry ("DNCR") once a month rather than once every three months. 1/

There is no escaping the irony of the fact that, on the same day Chairman Muris extolled telemarketers for their "exceptional compliance" with the DNCR, 2/ the Commission issued an NPRM seeking comment on how to further tighten rules that have been in effect but a few months and to which the industry is dutifully adhering. Though ATA acknowledges the Appropriations Act essentially forces the FTC's hand

1/ *Telemarketing Sales Rule*, 69 Fed. Reg. 7330 (Feb. 13, 2004) ("NPRM") (implementing Consolidated Appropriations Act of 2004, Pub. L. 108-199 ("Appropriations Act") by proposing amendment to 16 C.F.R. § 310.4(b)(3)(iv)).

2/ *Compliance with Do Not Call Registry Exceptional*, News Release, Feb. 13, 2004, available at <http://www.ftc.gov/opa/2004/02/dncstats0204.htm>.

with respect to the proposed TSR amendment, ^{3/} we cannot help but note the new requirement was adopted without factfinding, debate, hearing, or any other legislative process exploring the need for, or the efficacy or costs of, the mandated change. This is particularly notable in that this Commission originally proposed the 30-day rule the Appropriations Act now requires, but after thoroughly considering the issue modified the proposal to provide for quarterly DNCR downloads in the final rule. ^{4/}

In rejecting a 30-day rule, the Commission noted that “[i]ndustry commenters were unanimous ... that a 30-day requirement would be extremely burdensome,” and that such a “requirement would be virtually impossible to meet without shutting down operations for a day to scrub their lists.” *Id.* at 4646. This latter impact, the Commission found, would be “particularly burdensome for small businesses with few employees or those that do not use sophisticated technology.” *Id.* These factors “persuaded [the Commission] that the costs of requiring monthly updating outweigh any additional benefits ... to consumers from such a provision.” *Id.* at 4647. The Appropriations Act obliterates this careful deliberation on the appropriate frequency for DNCR updates after only a few months’ experience with the rules, and with no discernible concern for the economic harm the new requirement will impose.

^{3/} Cf. NPRM at 7331 (“the Appropriations Act provides no discretion ... whether to amend the TSR” with respect to frequency of updating DNCR downloads).

^{4/} See *Telemarketing Sales Rule; Final Rule*, 68 Fed Reg. 4580, 4645-47 (Jan. 29, 2003) (*Amended TSR Order*“).

The Commission accordingly should exercise the discretion left to it under the Appropriations Act in a manner that mitigates as much as possible the economic harm teleservices providers face from the rule change, particularly that likely to befall small businesses. Requiring entities subject to the TSR to transition from quarterly to monthly updates of their DNCR downloads effectively trebles the administrative cost of the update process. In some cases, this will transform the process from one accomplished in the ordinary flow of business into one that entails monthly losses of a full day's productivity as operations are shut down, as noted above, to facilitate the updates. Amendment of the rule also will require revision of budgets and forecasts, only recently put in place to accommodate the advent of the DNCR just four months ago, to account for lost operating time and the additional manpower the new rule portends.

ATA thus respectfully submits that, whether the Commission adopts a 30-day or monthly DNCR update requirement to implement the Appropriations Act, 5/ it must moderate the impact of the rule change by allowing substantial lead time for businesses to come into compliance with the new rule, and by granting additional DNCR fee relief

5/ See NPRM at 7330 & 7332 ¶¶ 1-4. ATA takes no position whether a monthly or 30-day requirement is preferable, other than to note that both are substantially more restrictive and more costly than the current quarterly requirement. However, should the Commission adopt a 30-day update requirement, the final rule should specify that if the thirtieth day falls on a weekend or holiday, the update need not be implemented until the following business day. There is no reason the amended updating requirement should, in addition to tripling administrative costs, necessitate overtime or similar extra costs simply because the thirtieth day falls on a weekend or holiday. This next-business-day approach conforms to that found elsewhere in the Commission's rules. See, e.g., 16 C.F.R. §§ 1.14(c), 4.3(a).

for small businesses. First, the Commission should establish January 1, 2005, as the effective date for the amended rule. When the Commission announced adoption of the DNCR, it afforded the teleservices industry approximately nine months before the rules took effect to modify their systems and practices, including those necessary to update DNCR downloads on a quarterly basis. ^{6/} The Commission must adopt the amendment required by the Appropriations Act by March 23, 2004. ^{7/} Given the February 26, 2004, comment date specified here, NPRM at 7330-31, and the need to properly consider all submissions, the Commission likely will not promulgate the new rule until close to the Appropriation Act's deadline. A January 1, 2005, effective date thus would provide approximately the same nine months previously afforded to come into compliance with TSR amendments involving new rules that required revised systems and practices. ^{8/}

Alternatively, the Commission must at a minimum give entities subject to the new monthly DNCR updating requirement until October 1, 2004, to comply with the

^{6/} See *FTC Announces Final Amendments to Telemarketing Sales Rule, Including National "Do Not Call" Registry*, News Release, Dec. 18, 2002 (announcing adoption of DNCR); *Telemarketing Sales Rule Fees*, 68 Fed. Reg. 16238 (Apr. 3, 2003) (establishing October 1, 2003, as effective date for DNCR compliance).

^{7/} See Appropriations Act, Division B, Title V ("not later than 60 days after the date of enactment ... the [FTC] shall amend the [TSR] to require [downloading] the registry once a month").

^{8/} It is notable in this regard that, when the Commission adopted new abandoned call rules, see 16 C.F.R. §§ 310.4(b)(1)(iv), 310.4(b)(4), it intended them to take effect sixty (60) days after promulgation, but later found it necessary to extend the lead time for compliance with the recorded message provision of the rule, then later the entire rule, for an additional six months due to industry's need to acquire new equipment and/or update their practices. See *Notice Concerning Telemarketing Sales Rule*, 68 Fed. Reg. 14659 (Mar. 26, 2003); *Telemarketing Sales Rule*, 68 Fed. Reg. 16414 (Apr. 4, 2003).

amended rule. This will allow forecasts and budgets adopted in anticipation of the first year of DNCR compliance to run their course, and for entities subject to the rules to account for any new requirement in their year-two DNCR business plans rather than altering those already in place. This is especially vital for small businesses affected by the rule change, which the Commission has noted will find the new requirement “particularly burdensome” from an economic perspective. *See supra* at 2 (citing *Amended TSR Order*, 68 Fed. Reg. at 4646).

The Commission also should help offset the economic losses small business will incur from the monthly DNCR download requirement by providing additional small business relief from DNCR fees. The TSR currently allows companies to obtain access to five area codes of data from the DNCR at no charge. 16 C.F.R. § 310.8(c). The Commission adopted this accommodation solely to ease the cost of DNCR compliance for small businesses. ^{9/} Now that the FTC has been forced to treble the administrative cost to small businesses to comply with the DNCR, it should lighten that additional

^{9/} *Telemarketing Sales Rule Fees; Final Rule*, 68 Fed. Reg. 45134, 45140-41 (July 31, 2003) (“*Amended TSR Fee Order*”). In its comments on the DNCR fees, ATA addressed the substantial constitutional and equitable problems with the differential treatment of entities that is built into the overall fee structure, and the manner in which this shifts burdens among those required to access the DNCR to engage in protected speech. *See id.* at 45140. However, so long as the Commission continues to offer an initial level of access to the DNCR at no cost in the name of aiding small businesses, and that and other aspects of the fee structure avoid being deemed unconstitutional, *cf. Mainstream Mktg. Servs., Inc. v. FTC*, 2004 WL 296980 (10th Cir. Feb. 17, 2004), further small business relief in the wake of the Appropriations Act may be considered. ATA does not, in suggesting such relief, waive or concede any constitutional or administrative procedure arguments it has made or may have regarding the DNCR fee rules.

burden by correspondingly decreasing DNCR access fees for small businesses. Specifically, the Commission should revise Section 310.8(c) to allow access to the first twenty-five (25) area codes of data, rather than the first five area codes, at no cost.

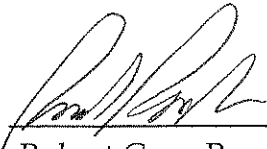
Amending the TSR to increase the number of area codes of DNCR data available at no charge will not result in a shortfall of DNCR fees necessary to operate the registry, as it appears the Commission vastly underestimated the number of entities that pay for DNCR data. The Commission based adoption of the existing fee structure on an “estimate that 10,000 entities will be required to access the ... registry” and thus pay DNCR fees. *Amended TSR Fee Order*, 68 Fed. Reg. at 45140. *See also id.* at 45140-41. Since the DNCR has become operational, however, ATA has learned from FTC staff that approximately 48,000 entities are accessing it. Assuming the Commission was even close to correct in its estimate that each entity accessing the DNCR will purchase an average of 73 area codes of data, *id.* at 45141 n.5, it is now collecting DNCR fees from *four to five* times as many entities as expected. A minor change in how many area codes of DNCR data may be accessed at no charge, in order to prevent undue economic harm to small business from congressionally mandated rule changes, clearly is in order.

CONCLUSION

For the foregoing reasons, ATA respectfully requests that the FTC implement the TSR amendment required by the Appropriations Act’s mandate to increase the frequency of DNCR downloads from quarterly to monthly by adopting an effective date of January 1, 2005, for the rule revision, and by amending 16 C.F.R. 310.8(c) to specify

“there shall be no charge for the first twenty-five area codes of data accessed by any person” from the registry.

Respectfully submitted,

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