

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991) CG Docket No. 02-278

**FURTHER COMMENTS
OF THE DIRECT MARKETING ASSOCIATION**

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SUMMARY OF COMMENTS

The Direct Marketing Association submits these comments to respond to the Commission's Further Notice of Proposed Rulemaking to address issues raised by the Do-Not-Call Implementation Act. We believe that in seeking to promote consistency, the Federal Communications Commission must nonetheless recognize that there are some issues with respect to which inconsistency between its regulations and those adopted by the Federal Trade Commission is unavoidable, either because of statutory differences or the need to assure that the rules that emerge serve the purposes underlying the statutes. This Commission can craft a more workable and effective set of rules that will better serve the interests of both consumers and businesses than those that the FTC has promulgated or is considering. We also propose that the Commission act promptly after the anticipated late spring release of its initial set of proposed rules to conduct one or more public forums or workshops to initiate a dialogue with affected businesses and other interested parties to narrow the scope of differences between the FTC's and FCC's rules and facilitate reconciliation of the two regulatory programs.

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I. INTRODUCTION

The Federal Communications Commission (“FCC” or “Commission”) has the opportunity and the obligation to promulgate a workable set of telemarketing regulations that balance the interests of both consumers and the regulated community. Pursuant to the Do-Not-Call Implementation Act (“DNC Act”),¹ the Commission is also obliged to ensure that it works to maximize consistency between its rules and the regulations that the Federal Trade Commission (“FTC”) adopted in December 2002.² The Direct Marketing Association believes that with respect to certain issues, the agencies’ rules can be readily harmonized. Yet, in “maximizing consistency” with the FTC regulations, the FCC need not, and in some instances may not, adopt rules that are identical to those that the FTC adopted. The Commission should minimize conflict where it is *permissible by law and reasonable in practice* to do so. The Direct Marketing Association (“The DMA”) submits that this ultimately requires that the FCC adopt independent rules.

The DMA submits these comments to respond to the Commission’s Further Notice of Proposed Rulemaking in this docket to address the issues raised by the DNC Act. We begin by summarizing the points on which inconsistency is unavoidable

¹ Pub. L. No. 108-10, 117 Stat. 557 (2003).

² 68 Fed. Reg. 4580 (2003).

because of statutory differences or the need to assure that the rules that emerge serve the purposes underlying the statutes. We then outline the steps this agency should take, and the mistakes it should avoid, to assure that its proposed rules better serve the interests of both consumers and businesses than those that the FTC has promulgated or is considering. Finally, we propose that the Commission move swiftly, immediately after the anticipated late spring release of its initial set of proposed rules, to conduct one or more public forums or workshops to initiate a dialogue with affected businesses and other interested parties to narrow the scope of differences between the FTC's and FCC's rules and facilitate reconciliation of the two regulatory programs.

II. ASSESSING THE REGULATORY DIFFERENCES

A. Different Rules are Unavoidable

In seeking to “maximize consistency” with the FTC’s rule as directed by the DNC Act, the Commission must bear in mind that consistent does not mean identical. In fact, having a different rule can mean having a better rule. Congress recognized this when it passed the DNC Act, and quite plainly did not instruct or intend that the FCC merely copy the FTC’s approach, or defer to FTC judgments. Instead, Congress directed both Commissions to report back on how their respective regulations are different.

Most importantly, the rules must be somewhat different because the agencies’ powers and statutory authority are different. The FTC purported to adopt its DNC registry, call abandonment/predictive dialer standards, and caller ID rules pursuant to the Telephone Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”)³ and section 5 of the Federal Trade Commission Act,⁴ and issues concerning the legality and

³ 15 U.S.C. § 6101 *et seq.*

⁴ 15 U.S.C. § 45(a).

constitutionality of some of the FTC's rules are pending in court. By contrast, this Commission is unquestionably empowered to adopt governing standards in these areas, under the Communications Act of 1934 as amended, which codifies the TCPA.⁵ As we have detailed in our prior comments and reply comments, these two statutes make it impossible for the FCC simply to adopt the FTC's rules or delegate its powers under the TCPA to the FTC. In addition, we have shown that the FCC can and must promulgate rules that better serve the goals that Congress sought to achieve by enacting both the TCPA and the Telemarketing Act. We highlight below just four examples of areas where a different approach is required, "inconsistency" cannot be avoided, but better results are achievable.

- A Single National DNC List: The TCPA requires this Commission to adopt a single, national list if it determines to adopt a DNC database. The FTC did not and cannot preempt states' DNC laws. States' DNC registries may be incorporated, and states may enforce the TCPA rules, but their individual and disparate rules must yield to the FCC's national list. There is no persuasive evidence to indicate that a majority of states will stand down voluntarily. Moreover, the FTC plainly does not have jurisdiction over some industries that are major users of the telephone as a marketing medium. The FCC is subject to no such constraint. Thus, this is a case in which the FCC's adoption of a DNC regime which "differs" from that of the FTC will actually promote consistent, even-handed, and nationwide application of the rules.

⁵ 47 U.S.C. § 227.

- Rational Call Abandonment/Predictive Dialer Standards: The Communications Act and the TCPA authorize this agency to adopt standards governing predictive dialers as customer premises equipment (“CPE”). Thus, the FCC is in a position to create a rational and workable rule. The FTC has not done so. Its rule, and safe harbor requirements, would prohibit marketers from making prerecorded calls – by treating all such calls as abandoned – in circumstances where the TCPA expressly permits such calls. At the same time, the safe harbor requirements would compel marketers to leave prerecorded messages that may be impermissible under the TCPA and the FCC’s decade-long interpretation of that statute. Thus, in this case, the FTC’s position is in direct conflict with the requirements of the TCPA and this Commission really has no choice but to adopt a different and better rule. Fortunately, the FTC seems to be beginning to recognize the shortcomings of its treatment of call abandonment and predictive dialers standards and it has stayed the effective date of those aspects of its rule until October 1, 2003.
- Consistent, Preemptive Rules for Call Abandonment/Predictive Dialers: The inter- and intra-state uses of predictive dialers cannot be separated. The FTC did not preempt state laws or regulations, because it has no legal authority to do so. The FCC may and should preempt state standards seeking to regulate the use of predictive dialer CPE. Thus, this, too, is a case in which the rules may differ but the FCC is able to create a better, and more workable, national standard.
- Established Business Relationships: The TCPA does not support imposing time limits on an established business relationship. The FTC adopted temporal limits,

without statutory authority and with no empirical evidence that its one-size-fits-all approach will work. This, then, is also a case in which the FCC can better effectuate the congressional objectives of balancing consumer and business interests even though its rule will differ from that of the FTC.

B. A Different Rule Can and Should Be A Better Rule

By adopting regulations that reflect a well-reasoned and factually-supported approach to reflect these and other issues on which the agencies' regulations should differ, the Commission can improve the likelihood that a DNC registry, standards for call abandonment/predictive dialers, and rules governing caller ID, successfully achieve the goals behind them.

There is nothing in the DNC Act that precludes this Commission from making independent decisions with respect issues that are common to both sets of rules. The Commission should not assume that either Congress or the FTC have foreclosed the possibility of the FTC further revising its rules to reflect more rational and reasonable standards adopted by this agency. Indeed, as we have noted, the FTC itself is beginning to see the shortcomings in at least some of its standards, and recently stayed the effective date of its call abandonment/predictive dialer provisions until October 1, 2003. Similarly, its decision to defer implementation of its caller id requirements until early 2004 may be indicative of a realization that on matters that do not relate to content, the FCC is in a better position to fashion rules regulating the use of the telephone as a marketing medium.

Thus, the FCC's broader authority and greater expertise in matters of communications technologies and their uses can and should be brought to bear to produce

a set of rules that address the inconsistencies we have summarized in Part A of these further comments in ways that satisfy legitimate consumer interests without unduly or unfairly burdening equally legitimate business interests. The differences in the agencies' basic jurisdiction is a prime example of an area where the FCC's authority can lead to a more rational outcome and a better set of regulations. The FTC does not have jurisdiction over common carriers subject to the acts to regulate commerce, or over banks, credit unions, or savings associations. The FTC also does not have jurisdiction over certain non-profit organizations or the business of insurance that is regulated by state law.⁶ The FTC purports to have the authority to regulate the activity of service bureaus placing calls on behalf of at least some of these exempt entities, on grounds that these exemptions are based on status, and that a service bureau itself lacks such status. Even if this back door regulatory approach is legally defensible (and we do not think it is), it would leave untouched those exempt entities that do not use service bureaus, and there is absolutely no evidence in any of these proceedings about the number of calls made by telephone companies, banks, or other exempt entities on their own behalf.

These jurisdictional gaps create competitive imbalances. For instance:

- ◆ A credit card issuer that is a bank can call anyone, but its non-bank competitor may not call consumers on the DNC registry.
- ◆ A long distance carrier that places calls on its own behalf may call anyone, but a competitor that hires a service bureau to make such calls must, in effect, avoid calling anyone on the DNC registry because its service bureau must comply with the TSR.

⁶ 15 U.S.C. §§ 44, 45, and 1012.

This Commission should – and must – avoid these competitive imbalances and adopt a more effective rule. Businesses and consumers are better served by a rule that applies even handedly. Businesses and consumers are also better served by a single national list that provides a consistent set of standards. A list that only applies to interstate calls simply is not “national.” Under a FCC rule, states could still protect their citizens from abuse by enforcing the TCPA standards. Some state representatives have expressed concern about loss of revenue derived for fees paid to obtain states’ lists. Yet, states’ budgetary concerns are irrelevant. States will incur no expense to operate a list that becomes defunct. And general revenue production is *not* a legitimate government objective for implementing or maintaining a DNC call list.

Businesses and consumers are also better served by national limits on call abandonment/predictive dialers that marketers can actually achieve while retaining the core efficiencies this equipment is designed to provide. And businesses and consumers are better served by a mandatory caller id rule if it reflects the current state of technology, including its limitation and its costs.

C. Implementing Rules Concerning Access to a National DNC Need to be Rational and Consistent.

There are also a number of issues that have been and will be raised in connection with the day-to-day operation of a DNC registry that this agency must address more carefully and thoughtfully than appears to be the case at the FTC. On March 28, 2003, the FTC released a revised Notice of Proposed Rulemaking to refine its proposals for the operation of its DNC registry, and reached tentative conclusions regarding the fees it will charge for obtaining DNC data, who will have to pay those fees, who will be permitted to access the registry, and how those entities will gain such access.

Many of the FTC's proposals are deeply flawed. The DMA has submitted detailed on comments to the FTC on these issues, but they also have significant implications for this agency's rulemaking generally, as well as reasons for the Commission's request for comments in connect with the DNC Act. (The DMA's most recent comments to the FTC are attached hereto as Attachment A). We note concerns in four primary areas:

First, the FTC's proposed fee is unreasonably high and empirically unsupported.

Second, the FTC's "seller pays" approach will make it more difficult – and in some cases impossible – for marketers to use the list. And that will mean more consumers will get calls they do not want. "Telemarketers" as well as list brokers and other entities that want to obtain the list would be permitted to obtain it based solely on the access granted to their client-sellers who have paid the required fee(s). The FTC is proposing to require telemarketers to ensure that their seller-clients have paid the requisite fee before making any calls on their behalf; the FTC expects telemarketers to obtain such assurances by using the database access code provided to such client-sellers by the FTC when those sellers pay their fee to obtain the data. Telemarketers would be required to identify the client(s) on whose behalf they are downloading the data and supply the seller access code(s); the extent of their access would be limited to that paid for by their seller-clients. The FTC also proposes to require everyone to download the DNC data within 30 days before the rule takes effect. And it is not at all clear how often telemarketers with multiple clients would have to go back and "refresh" their data under the "seller pays" approach. Instead of using an approach limited and tied to seller access,

the Commission should allow telemarketing service bureaus to pay one fee and access the DNC data for use on behalf of seller-clients.

The FTC's jurisdictional gaps make rational operation of its rules impossible. The FTC has never explained how it expects a telemarketer that is calling on behalf of an entity that is exempt from the TSR to get the DNC data, even though the FTC has repeatedly claimed it can require a telemarketer to comply with the TSR even when calling on behalf of an exempt entity. A telemarketer also should not be required to download the data separately for each client, or on multiple days, as long as the data it obtained previously is current. The "seller pays" approach could also result in system malfunction when a telemarketer accesses the data for more than one client at a time, but those seller-clients paid for different levels of access (*i.e.*, different area codes or numbers of area codes). Furthermore, the number of entities that the FTC is proposing to require to access the database, combined with the frequency with which they could be expected to download the data and the short window of time within which they may do so, could lead to massive system overload. In short, too many companies will have to get into the database too often, in too short a span of time. Furthermore, there is simply no justifiable reason to require telemarketers to provide company-confidential and proprietary data by identifying their client/customers.

Third, separate subsidiaries, divisions, and affiliates should not be required to pay a separate fee for the DNC data. At a minimum, the total fees paid by entities under common ownership or control should not have to exceed the cap on the fees paid by a single entity.

Fourth, the FTC has failed to provide adequate protections against abuse of the registry in connection with Internet-based DNC request submissions, such as third-party submissions or other unauthorized requests. In particular, the database may be subject to competitive abuses, such as where a company submits DNC requests purporting to be from all of its own customers. That company would be permitted to continue calling those individuals, under the established business relationship exception. But other marketers, including direct competitors, would not have the same opportunity. By contrast, this Commission's staff has made clear that marketers are not required to honor third-party, company-specific DNC requests for these and other reasons that can cast doubt on the validity of such requests.⁷ For telephone-based submissions, we support the use of ANI to ensure that registrants are calling from the telephone lines they wish to include in the database as a protection against unauthorized submissions. An equivalent procedure should be employed for Internet-based submissions; simply sending a return email or asking for a phone number are not sufficient.

This whole area – the terms and conditions of sellers' and marketers' access to a national DNC – is one in which conflict or inconsistency between the FCC's rules and the FTC's rules is not unavoidable. Certainly, there is nothing in the statutes under which the FTC is acting that compels the kinds of problems that its proposed rules regarding the DNC list create. The DMA remains hopeful that the FTC will rectify these problems in the course of its pending rulemaking. At all events, this Commission can and must independently establish procedures regarding access to a national DNC database and the

⁷ Letter to James T. Bruce, III, from Geraldine A. Matisse, Chief, Network Services Division, Common Carrier Bureau, FCC (August 19, 1998).

costs to be recovered by the administrator of that list.⁸ The DNC Act does not obligate the FCC to repeat the mistakes embedded in the FTC's user fee proposal; it should not do so even in the name of maximizing consistency.

III. PROCESSES LOOKING FORWARD

The DNC Act requires the FCC to issue a final ruling by September 7, 2003, and both the FTC and FCC to submit their first reports to Congress within 45 days thereafter, to address regulatory differences and other matters as required under the DNC Act. The Commission's senior management has stated that the Commission is likely to issue a decision – presumably a tentative or partly tentative one – in this docket in “late spring.”⁹

The DMA proposes that the Commission hold at least one, and perhaps several public forums to address the interplay between the FCC and FTC regulations, as well as other matters that the Commission is required to address in its reports to Congress.

We recognize that once the FCC decides whether to establish a national do-not-call registry, further comments on implementation procedures will be required and that, with respect to those details, a final rule cannot be issued by late June. Yet, the Commission can, and we hope will, lay out the basic framework of its do-not-call regime in that first Report and Order, and definitively set forth its position on the other issues that are common to this and the FTC proceeding. Thus, we urge the Commission to convene a one- to two-day public forum promptly after issuing the initial ruling expected later this spring. It is plainly important to hold the forum before September 7; July or early August 2003 may be most reasonable. The forum would enable interested parties to offer their views and engage in a dialogue with each other and the Commission or its

⁸ 47 U.S.C. 227(c)(3)(G)-(J).

staff to discuss implementation of national list, including how best to reconcile the FTC and FCC approaches and to maximize not only the consistency but also the efficacy of the Commission's DNC program. Of course, it would also afford an opportunity for the Commission or its staff to raise and discuss issues or questions of special significance to the Commission.

It would be equally useful to hold a forum on the issue of call abandonment/predictive dialer regulation and the relationship between the FTC's standards and the requirements of the TCPA and predictive dialer regulations adopted by this Commission. Although these topics could also be addressed as part of an initial forum, The DMA believes it might merit a separate half- or full-day meeting.¹⁰

The dialogues and information shared during the forums would help inform the Commission not only for purposes of finalizing its DNC regulations, but also for purposes of preparing its report to Congress. Public forums would provide an opportunity for participants and the Commission or its staff to engage in a dialogue, which is likely to be more illuminating and effective in helping identify and resolve potential inconsistencies, as well as areas of consensus and alternatives for cooperative efforts to achieve the goals underlying the regulations.

⁹ Statement by K. Dane Snowden, Chief, Consumer & Governmental Affairs Bureau, FCC, on the Commission's Review of its Telemarketing Rules (January 31, 2003).

¹⁰ As outlined in our previous comments, we also recommend that the Commission conduct further study of the feasibility of mandatory caller ID. A public forum to address this topic would also be useful. We do not, however, believe this is as urgent, in part because even the FTC's rule is not scheduled to take effect until January 29, 2004. Since the impact of potential conflicts and inconsistencies in the agencies' approaches are comparatively less immediate, further comments and a public forum on these issues could be deferred until later in the Fall 2003.

Respectfully submitted,

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May 5, 2003

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COMMENTS
OF THE
DIRECT MARKETING ASSOCIATION, INC.

Attachment A

**Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580**

**COMMENTS
OF THE
DIRECT MARKETING ASSOCIATION, INC.**

**TELEMARKETING RULEMAKING—REVISED FEE NPRM COMMENT
FTC File No. R411001**

**(Revised Notice of Proposed Rulemaking on Collection of
User Fees for Telemarketing Sales Rule)**

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I. Introduction and Summary.

In its revised notice of proposed rulemaking, issued March 31, 2003, 68 Fed. Reg. 16238 (April 3, 2003) (the "Revised NPRM"), the Federal Trade Commission (the "Commission" or the "FTC") proposes certain modifications to its initial proposal¹ to collect fees to fund its national Do-Not-Call List (the "DNC List"), promulgated as part of the Commission's amendments to its Telemarketing Sales Rule, 68 Fed Reg. 4580 (January 29, 2003) (the "TSR" or the "Final Rule"). While the Commission has obtained authority from Congress to collect fees for the DNC List in the Do-Not-Call Implementation Act, Pub L. No. 108-10 (2003) (the "DNC Implementation Act") and in the Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7 (2003) (the "Appropriations Act"),² its proposals in the Revised NPRM raise numerous policy and legal questions about the empirical bases for and logical soundness of the Commission's assumptions and analyses.

First, The DMA urges the Commission to lower substantially the absolute sum to be collected from user fees and the per-company cap. The FTC has not explained why the cost of its DNC List should be several times more than that of The DMA's existing national do-not-call list. The FTC also has misread Congress' intent in assuming that the FTC should recoup from industry all \$18.1 million that Congress has authorized it to collect as user fees. A much lower fee also is needed to conform with Supreme Court First Amendment jurisprudence on monetary

¹ Notice of Proposed Rulemaking, 67 Fed. Reg. 37362 (May 29, 2002) (the "User Fee NPRM"). The Direct Marketing Association ("The DMA") filed comments to the User Fee NPRM on June 28, 2003.

² The DMA does not concede for purposes of this rulemaking or its pending judicial challenge to the DNC List, *see U.S. Security, et al. v. FTC*, Case No. W 03-122 (W.D. Ok., filed January 29, 2003) the FTC's authority to promulgate the DNC List under the Telemarketing Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 *et seq.* (the "Telemarketing Act"). As explained in its comments on the FTC's NPRM, 67 Fed. Reg. 4492 (the "Rule NPRM") proposing amendments to the TSR, filed April 15, 2002 (the "DMA/Chamber Comments") and in its pleadings in Federal District Court, The DMA believes that the FTC lacks statutory authority to promulgate a national do-not-call registry under the Telemarketing Act and that the DNC List is unconstitutional. Nothing herein should be construed as an admission by The DMA of the legality of the DNC List.

restrictions on speech. Second, rather than mandating that sellers individually pay to access the DNC List, the FTC should allow service bureaus to pay one fee to access the DNC List and not regulate or collect information on how the service bureau uses the information on behalf of its seller clients. Third, the FTC should not charge divisions, subsidiaries and affiliates separately for access to the DNC List. Fourth, the FTC should reconsider its decision to allow consumers to sign up for the DNC List via the Internet because neither method under consideration allows for effective verification, leaving the DNC List prey to abuse and incongruity with consumer preferences. The FTC's plan to allow Internet sign-up jeopardizes the credibility of the DNC List and is inconsistent with the FTC's position in the implementation of the Children's Online Privacy Protection Act that reliable electronic methods of verification do not yet exist and the expected progress in available technology has not occurred sufficiently to permit the collection and external distribution of information about children based on e-mail confirmation. Moreover, the decision to allow Internet sign-up was never issued for comment, suggesting lack of adherence to the notice and comment requirements of the Administrative Procedure Act. Fifth, the FTC should not impose liability on both sellers and service bureaus for the same act of improper access to the DNC List; the Commission's proposal distorts contractual provisions and makes sellers and service bureaus insurers of each other. Finally, the Commission should clarify that nonprofit organizations engaged in charitable solicitation and, where applicable, their professional fundraisers, may access the DNC List, and these entities should not be charged for such access.

II. The Commission Should Substantially Lower the Total Amount To Be Collected From User Fees and the Per-Seller Cap.

A. Amount to be Raised and Spent.

The Commission proceeds from the wrong premise that the sum authorized by Congress to be collected is necessarily the amount that should be collected and spent. In effect, the FTC

has started at the end, by assuming that it must raise and spend the entire amount it is authorized to raise, and then proposing a mechanism to collect that sum, almost wholly divorced from empirical data on the costs of telemarketing and the necessary costs of operating a national database. Contrary to the Commission's assertion in the Revised NPRM, Congress did not "estimate the costs for fiscal year 2003 at \$18.1 million." 68 Fed. Reg. at 16238. Rather, Congress authorized the FTC to collect fees *up to* \$18.1 million.³

As the Commission is aware, The DMA has substantial experience with running a national do-not-call list, as its Telephone Preference Service ("TPS") has been in effect for 18 years. The DMA is the contractor in administering the lists in Connecticut, Maine, Wyoming, Vermont and Pennsylvania. Any person or entity (whether or not a DMA member) may purchase the entire list of eight million names for \$700 per year. Those who need only names on the state lists for which The DMA is a contractor pay \$465 to obtain state-specific names. Currently, about 1,100 entities pay for the TPS list, including requests for state-specific lists. A very small percentage of the funds to operate the TPS come from the \$5 fee from consumers who choose to sign up online.⁴ Service bureaus only pay once to obtain the list, irrespective of the number of their clients affected by it. In addition, a company may post the TPS list on its intranet site (without additional fee) so that its subsidiaries and affiliates may access it.

The Commission proposes charging sellers a cap of \$7,250—more than 10 times what The DMA's current list costs—without a reasoned explanation for the reason for such a disparity. Even considering the increased scale of the DNC List and increased anticipated enforcement efforts, the dramatic difference between the cost of the TPS and the FTC's estimate

³ DNC Implementation Act at Section 2 ("The Federal Trade Commission may promulgate regulations sufficient to implement and enforce the provisions relating to the 'do-not-call' registry . . .").

⁴ Consumers may sign up for the TPS for free, by registering online and then mailing in a signed form or by writing The DMA and requesting to be placed on the TPS. See <http://www.dmaconsumers.org/cgi/offtelephonedave>.

suggests that the FTC has not considered less costly alternatives that minimize burdens on the industry. In any event, the fact that the DNC List may contain more names than the TPS does not justify the dramatic difference in the costs of the databases. The incremental cost of adding names to a national database is small and does not support the enormous cost disparity between the TPS and the proposed DNC List.

The FTC's contract with AT&T Government Solutions ("AT&T") to establish and administer the database is \$3.5 million.⁵ In spite of the existence of the TPS as a model for a national do-not-call list, the FTC states in the Revised NPRM that it will need the entire \$18.1 million to implement and enforce the database. 68 Fed. Reg. at 16244. It is not clear how the Commission plans to spend \$14.5 million not committed to the AT&T contract on enforcement and "agency infrastructure" costs (the categories of costs listed in the Revised NPRM other than contract costs) and, more importantly, it is highly questionable whether such costs are necessary.

For instance, the Commission has substantial resources for enforcement of its regulations already in place. How many more workers does the Commission estimate hiring in order to work solely on the DNC List? What exactly are the "agency infrastructure" costs associated with the DNC List that will demand millions of dollars? How many more computers beyond those provided by AT&T does the Commission need to purchase in order to adequately oversee its contractor's operation of the registry? Given that states and private parties play a key role in enforcing violations of the TSR,⁶ how many additional enforcement personnel does the FTC need to enforce the DNC List? If, say, half of the non-contract funds are earmarked for enforcement, is this estimate of \$7 million for DNC List enforcement commensurate with other

⁵ *AT&T Government Solutions Awarded \$3.5 Million Contract by FTC To Develop and Implement "Do Not Call" Registry*, February 26, 2003, available at <http://www.att.com/news/item/0,1847,11387,00.html>.

⁶ 15 U.S.C. §§ 6103, 6104 (empowering states and private parties to bring civil actions for violations of the TSR).

agency enforcement budgets? These unanswered questions suggest that the Commission should reevaluate its cost estimates (not just its fee estimates), lower the budget and fees for the DNC List substantially, and subject a revised proposal to public scrutiny and comment.

Further, the Commission's proposal reflects no consideration of the pending rulemaking of the Federal Communications Commission (the "FCC") on its rules adopted pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA"), which includes consideration of a national do-not-call list. If the FCC imposes a separate do-not-call list, it could impose user fees for its list on industry.⁷ Thus, The DMA is understandably concerned that the \$18.1 million proposed in the Revised NPRM will not even be the total sum collected from industry to reduce unwanted telemarketing. Given that the FCC's jurisdiction is far broader than that of the FTC, it is theoretically possible that the FCC could propose collecting even *more* from industry than the \$18.1 million that the FTC says it needs for the DNC List.

Of course, two do-not-call lists would contradict the legislative intent of the DNC Implementation Act that the FTC and the FCC "consult and coordinate" to minimize inconsistent and duplicative telemarketing regulations, including costs on industry. DNC Implementation Act at Section 3. Congress also required the FTC and the FCC each to issue regular reports on, *inter alia*, the "number of persons paying fees for access to the registry and the amount of such fees." *Id.* at Section 3(b)(3). The FTC has said that it expects there to be an FCC do-not-call list and that it is already working with the FCC to develop one.⁸ However, in spite of congressional

⁷ 47 U.S.C. § 227(c)(3)(H).

⁸ See CCH Telemarketing Law Guide (March 31, 2003) (reporting statement of Eileen Harrington, FTC Associate Director for Marketing Practices, that the FTC, the FCC and state agencies need to work together to create a uniform do-not-call list and predicting that the FCC will allow telemarketers to register with the FTC's list). See also, e.g., *House Poised to Move on FTC Do-Not-Call List*, Communications Daily, January 9, 2003 ("[FTC Chairman] Muris said there was communications between the FTC and the FCC on their do-not-call list proposals and added: 'I believe the FCC is moving forward on adopting a rule that looks like ours.'").

intent and indicia of cooperation between the two agencies, the Revised NPRM reflects no consideration of the FCC's proceeding and associated costs on industry.

Even if the FTC were to justify its cost estimates beyond the cursory overview it provides in the Revised NPRM, The DMA suggests that it is hardly equitable for industry to bear the *entire* cost of a program that will severely hamper the industry's ability to do business. If the Commission wants a program that is substantially beyond what is necessary to protect consumers, the Commission itself—not the industry whose legitimate commercial activities will be significantly curtailed—should provide these additional funds, either through the FTC's own appropriations or by requesting additional funds from Congress. Imposing an \$18.1 million annual surcharge on industry to engage in telemarketing can hardly be what Congress had in mind when it instructed the Commission to strike an “equitable balance between the interest of stopping deceptive . . . and abusive telemarketing activities and not unduly burdening legitimate businesses.”⁹

The proposed fees also violate the First Amendment rights of sellers. Under U.S. Supreme Court precedent, a nominal fee unrelated to the content of the speech¹⁰ may be permissible under certain circumstances. *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 116 (1943) (striking down a \$1.50 fee on door-to-door solicitors and stating that the fee in question was “not a nominal one, imposed as a regulatory measure”). *Murdock* and its progeny

⁹ H.R. Rep. No. 103-20, at 2 (1993).

¹⁰ *Forsyth County v. Nationalist Movement*, 112 S.Ct. 2395, 2405 (1992) (striking down a county ordinance which allowed a government administrator to vary the fee (up to a \$1,000 cap) imposed on assembling or parading and holding that “[*Murdock*] does not mean that an invalid fee can be saved if it is nominal, or that only nominal charges are constitutionally permissible.”). As discussed in the DMA/Chamber comments and in The DMA's filings in Federal District Court, the DNC List is a content-based restriction on speech because it exempts categories of speech (*e.g.*, political speech, nonprofit solicitation) based on content. In the case of political telemarketing, the distinction bears no relationship to the governmental interest in protecting privacy, as the financial incentives of political telemarketers and commercial telemarketers with respect to calling customers are essentially the same.

suggest that a \$7,250 annual fee on the ability to engage in constitutionally protected speech is not “nominal.”¹¹ The amount of the fee imposed by the FTC directly correlates to the number of area codes in which a speaker may engage in constitutionally protected speech. This fee will present a significant impediment to telemarketing to a larger audience, particularly for smaller businesses. The DMA also notes that, in light of the much less expensive TPS, the new estimate of a \$7,250 per-seller fee places an even heavier burden on the FTC to “careful[ly] calculat[e] [the] costs and benefits” of the Commission’s restriction on speech. *U.S. West v. FCC*, 182 F.2d 1224, 1239 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (2000). *See also City of Cincinnati v. Discovery Network*, 507 U.S. 410, 417, n.13 (1993). Mandating the DMA list would present a much less restrictive means of serving the governmental interest.

B. Who Must Pay and How Access to the List is Controlled.

The DMA opposes the Commission’s proposal to require that all sellers, even those who conduct telemarketing through service bureaus, pay to access the DNC List. 68 Fed. Reg. at 16239-16240. The Commission should not force each seller to pay for the List but should leave the issue of who pays for the List to the contractual provisions between service bureaus and sellers. The proposed requirement that each seller necessarily must pay the FTC directly would require that service bureaus (who may only access the List using their seller-client’s account number) reveal to the FTC who their clients are. These contractual relationships are proprietary information and bear no relationship to consumer privacy.

¹¹ In *Murdock* and subsequent cases, the Court took a dim view of permits to engage in constitutionally protected speech whose issuance depended on the payment of a license tax because it acted a prior restraint on speech. 319 U.S. at 113-114; *see also, e.g., Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 387 (1990); *Follett v McCormick*, 321 U.S. 573, 577 (1944) (“The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint.”).

Further, the proposal is inefficient. Even if a service bureau has a current version of the DNC List, it apparently would have to access the registry separately in the event it signed up a new client. If the Commission requires any information on service bureaus and their clients, it should permit service bureaus simply to identify the number of sellers for whom it is paying a fee and accessing the List. To the extent that there is a complaint or enforcement matter against a specific seller, the service bureau could then reveal whether it was working on behalf of a particular seller in order for the Commission to evaluate compliance with the DNC List.

C. Methodology in Calculating Fees Due.

As to the substance of the FTC's calculations and assumptions, The DMA respectfully submits that more solid grounding in fact is warranted than is found in the revised proposal. In the Revised NPRM, the Commission states that only one of the 34 comments received in the User Fee NPRM provided "any information relevant to this inquiry." 68 Fed. Reg. at 16241. Undeterred by the lack of record, the Commission proposes a single methodology for all companies in a \$275 billion industry¹² based on *one* comment from *one* service bureau (DialAmerica). The resultant assumptions and calculations are largely without empirical foundation, based at times on total conjecture by the Commission. A representative sampling follows:

- The Commission's assumption that DialAmerica's \$328,000 annual revenues per client is representative of third-party providers of outbound calls to consumers (68 Fed. Reg. at 16242) assumes, without any empirical data, that all service bureaus produce a similar call volume for a similar line of products generating a similar amount of revenues. It is implausible that one service bureau is representative of third-party providers in a \$275 billion industry. Extrapolating from the revenues of one service bureau is equivalent to attempting to derive meaningful data from one

¹² DMA/Chamber Comments at 5, citing WEFA Group study, *Economic Impact, U.S. Direct and Interactive Marketing Today, 2002 Forecast*.

year of Sony Music's annual revenues about sellers of all digital content and intellectual property (also a \$275 billion industry).¹³

- The FTC offers no basis for its estimate that the average firm that uses third-party telemarketers uses three different providers for different campaigns over the course of a year. 68 Fed. Reg. at 16242. Commenters are left to assume that this is the unsubstantiated estimate of Commission staff.
- The FTC has no basis other than pure conjecture for its assumption that firms that do their telemarketing in-house are "probably" larger and spend five times as much as those that use service bureaus. *Id.*
- The Commission appears to derive wholly from speculation its estimate that 40 percent of firms that use service bureaus and 25 percent of firms that do their own telemarketing are exempt from FTC jurisdiction. *Id.*

These examples of the lack of foundation for the Commission's assumptions call into question all of its calculations in the Revised NPRM. Given the dearth of record evidence, it is likely that the proposal in the Revised NPRM will undergo substantial revision, presumably without an opportunity for parties to comment on the Commission's revisions.

To develop what the FTC itself admits is a paltry record for its proposal, the FTC should conduct a comprehensive study of the telemarketing industry in order to determine the economic model for a DNC list that allows consumers to avoid unwanted telemarketing calls and imposes the lowest possible costs on industry. Surely, a \$275 billion industry is deserving of more rigorous research and economic modeling than the FTC's proposal to divide a total sum (whose elements are not specifically identified) among an estimated number of firms extrapolated from one service bureau's annual revenues to determine each seller's fee. To comply with the

¹³ J.P. Morgan forecast, referenced at <http://www.elisar.com/news/nmbwkly12-04-00.html>.

Administrative Procedure Act, 5 U.S.C. § 553 (the “APA”),¹⁴ the Commission should develop its methodology and issue it for comment only *after* this study is completed.

The DMA also is concerned about the Commission’s statement that it anticipates reexamining and adjusting the fees “periodically” to reflect actual experience with operating the registry. 68 Fed. Reg. at 16244. Between the User Fee NPRM and the Revised NPRM, the Commission more than doubled the per-seller cap for access to the DNC List (from \$3,000 to \$7,250) and for the per area code cost (from \$12 to \$29). By its own admission, its current proposal is based on the comments of *one* service bureau. Industry is rightly skeptical in wondering whether the FTC will again raise the per-company fee in its amendments to Section 310.8 of the TSR, perhaps within a few months of its adoption, notwithstanding that The DMA’s TPS suggests that a much *less* expensive list is achievable.

The possibility of an increase in fees is heightened by the probability that the increased costs associated with conducting telemarketing as a result of the imposition of the DNC List will reduce the pool of payers. Some firms examining a \$7,250 yearly cost increase and a host of new regulatory requirements will likely abandon selling via telemarketing entirely, leaving a smaller number of firms to absorb the cost of the DNC List.¹⁵ If the FTC raises its fees on the remaining sellers to cover the shortfall, more sellers will drop out, further increasing the fees. There is nothing in the Revised NPRM to indicate that the Commission has considered this

¹⁴ See, generally, Richard J. Pierce, Jr., *Administrative Law Treatise* (4th ed. 2002) at § 7.3 (describing the “demanding test” of the U.S. Court of Appeals for the District of Columbia Circuit of whether an agency rule was a “logical outgrowth” of the proposal in the NPRM). See also, e.g., *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991).

¹⁵ See, e.g., Larry Riggs, *Abandoned Calls*, Direct Marketing Business Intelligence (March 1, 2003) (estimating training and administration costs for the DNC List at \$50,000 per employee and \$120,000 for equipment associated with the List).

possibility, which only emphasizes the need for much more rigorous economic modeling and analysis.

The telemarketing industry needs and deserves regulatory certainty that the fees it pays to access the DNC List will not be raised by any amount and at any time interval that the FTC determines is proper. In the Rule NPRM, the FTC presented the DNC List as a trial program, to be evaluated after two years. 67 Fed. Reg. at 4517. The Commission should adhere to this promise in its cost estimates as well as its operational review of the DNC List by committing to not raise its fees on industry for at least two years. Industry needs to be able to evaluate its regulatory compliance costs in advance and should not bear the risk of cost overruns by the FTC or its contractor or a diminishing pool of payers. Accordingly, in the event that the Commission determines that it needs additional funds to administer the DNC List, the Commission should use money from its own budget or seek additional funding from Congress.

D. Divisions, Subsidiaries and Affiliates.

The DMA opposes the Commission's proposal to treat each division, subsidiary and affiliate of a corporation as a separate seller for purposes of the TSR. 68 Fed. Reg. at 16241. Unlike the Commission's proposal in the User Fee NPRM, under which the operational structure and similarity of product lines were factors in whether to treat divisions as separate sellers, 67 Fed. Reg. at 37365,¹⁶ the rationale in the Revised NPRM¹⁷ bears no relation to customer privacy, which is the Commission's justification for the DNC List.

¹⁶ The DMA does not endorse this original proposal, but cites to it only to illustrate that it at least bore some relation to the government interest of protecting subscriber privacy and adhering to consumer expectations.

¹⁷ The Commission's justification is to increase the number of firms subject to the fee, 68 Fed. Reg. at 16241, but this concern would be mitigated by the substantial reduction in the costs of the DNC List suggested in Section II(A), *supra*.

Further, the Commission's proposal would be inconsistent with consumer expectations and would distort business decisions. Under the current proposal, a tennis magazine seller and its sister division with the same or similar name that sells tennis rackets are treated as two sellers for purposes of the fee payment, even though a subscriber logically would consider them to be the same seller. The current proposal therefore penalizes companies that, for whatever business reason and whatever their size, conduct their telemarketing through separate divisions. Regulatory fiat, rather than corporate efficiency, would drive organizational structure among sellers under the FTC's proposal.

In addition, the proposal is unclear; what constitutes a separate "division" within a company, or whether a related entity (say, a joint venture) is an "affiliate" is not at all clear from the Revised NPRM. These terms have substantially varying definitions in corporate and regulatory contexts, but the FTC offers no guidance on how firms are to know whether their different organizations constitute separate sellers for purposes of the TSR. The FTC should allow each seller to share its DNC list within its corporate organizational structure and ownership chain, including divisions, subsidiaries and any company that controls, is controlled by, or under common control with the payer.

III. Administration of the DNC List.

A. Manner of Registration and Company-Specific Opt-In

The Commission has failed to specify how it will ensure verification of the phone numbers registered on the DNC List via the Internet and those numbers provided by the states for inclusion on the DNC List. In the Statement of Basis and Purpose (the "SBP") to the Final Rule, the Commission indicated that it was considering two methods for verification of phone numbers submitted via the FTC's Web site: (1) certain address information, such as zip code or numeric

portion of street address, and (2) an e-mail address, with which the consumer would confirm placement of his or her number on the DNC List. 68 Fed. Reg. at 4638-4639. The Commission has not indicated which of these alternatives it proposes to adopt, and presumably will not seek comment on either option, but will merely adopt an option in the instant rulemaking.

Because verification is essential to the integrity of the DNC List, The DMA addresses it herein. As an initial matter, the FTC apparently has violated the APA in its adoption of Internet registration in the Final Rule without every having submitted this issue for comment. The APA requires an agency to provide interested parties with notice and an opportunity to comment on substantive changes in its rules. 5 U.S.C. § 553(b), (c). *See, generally*, Richard J. Pierce, Jr., *Administrative Law Treatise* (4th ed. 2002) at § 7.3. Only phone registration was discussed in the Rule NPRM. 67 Fed. Reg. at 4519 (“[I]t is anticipated that enrollment on the national registry will be required to be made by the individual consumer from the consumer’s home telephone.”).

Further, either of the Commission’s discussed alternatives in the SBP will jeopardize the integrity of the DNC List. Under the first alternative, individuals need do no more than look through a phone book to match up phone numbers with zip codes and/or street addresses. Similarly, providing an e-mail address guarantees nothing but ensuring that *someone* will get an e-mail after a phone number is entered on the DNC List; there is no guarantee that the e-mail address will be associated with anyone in the household associated with the phone number. The lack of verification creates an immediate and powerful incentive for anti-competitive conduct. A seller wishing to prevent its competitors from telemarketing to the seller’s customers could simply sign all of its customers up for the DNC List, confident that it could continue to contact the customers under the established business relationship exception to the TSR. Indeed, The DMA has encountered efforts by firms to enroll numbers on TPS for anti-competitive reasons; only effective verification prevented such behavior. The FTC’s current proposal has no

mechanism for countering such behavior, because the FTC would have no way to determine who is enrolling numbers on the DNC List over the Internet.

At least with the Commission's proposal for consumers to register by phone, the automatic number information transmitted with the consumer's call ensures that the person is calling from the number sought to be registered;¹⁸ even this minimal level of verification is absent in the Commission's Internet sign-up plan. Indeed, in its rulemakings to implement the verifiable parental consent requirements of the Children's Online Privacy Protection Act (COPPA), the Commission has twice concluded that reliable electronic methods of verification do not yet exist and the expected progress in available technology has not occurred sufficiently to permit the collection and external distribution of information about children based on e-mail confirmation. However, the Commission has implemented a "sliding scale" tied to the use of personally identifiable information that permits an "e-mail plus" mechanism only for the internal use of such information. For external uses of personally identifiable information (e.g., disclosing personally identifiable information to third parties), the Commission requires more reliable means of verification of information submitted electronically, such as a valid credit number in connection with a transaction. *See* 64 Fed. Reg. 59899, 59900 (1999) and 67 Fed. Reg. 18819 (2002). Accordingly, The DMA urges the Commission to reconsider Internet sign-up, because its alternatives provide no assurance of adequate verification. As the DNC List will be widely used, its contents should be based on the same verification requirements as those that the Commission requires for external use of children's information in the COPPA context.

With respect to the company-specific opt-in, firms should have flexibility in obtaining consent from consumers to contact them, even if they are on the DNC List. Section

¹⁸ The DMA notes that this method does not mean that the person requesting that the number be included on the List lives in the residence associated with the phone number or that the request necessarily reflects the preference of the person responsible for the phone account or even a majority of those residing in the household.

310.5(b)(iii)(B)(i) of the TSR states that sellers must obtain the express written and signed agreement of a person (on the DNC List) who is willing to accept calls from specific sellers. The Commission should take the opportunity to clarify in the instant rulemaking that sellers may obtain this consent at any point in the relationship with the customer and through any method, so long as the requirements of 310.5(b)(iii)(B)(i) (express, written and signed consent) are satisfied.

B. Liability Concerns.

The FTC proposes to make a seller directly liable for violations of the TSR if its service bureau initiates an outbound call without the seller paying the requisite fee. 68 Fed. Reg. at 16240. Service bureaus would be liable for TSR violations if they did not “ensure” that their seller-clients have paid for up-to-date access to the DNC List. *Id.* This proposal is unnecessary to further compliance with the DNC List and makes sellers and service bureaus insurers of each other. Where a seller has contracted with and acted reasonably in relying on a service bureau for compliance with the TSR, including payment of fees to access the DNC List, the seller should not face liability for the service bureau’s failure to comply. Similarly, where a service bureau has reasonably relied on evidence that its seller clients have paid for access, the service bureau should not be held liable for the seller’s lack of compliance. The Commission’s proposal would distort the marketplace by harming the ability of sellers and service bureaus to find the most efficient way to comply with the DNC List and would impair contracts between sellers and service bureaus. Further, the Commission’s expansive liability proposal subjects different entities to liability for the same violation, giving plaintiff’s lawyers and states even greater incentives than currently exist to bring actions that are not commensurate with the scope of the violations.

IV. Nonprofit Organizations Soliciting Donations Should Be Able to Access the DNC List Without Charge.

The Commission should clarify in proposed Section 310.8(e) of the TSR the range of entities who may access the DNC List. In the Revised NPRM, the Commission states that access to the List will be limited to “telemarketers, sellers, others engaged in or causing others to engage in telephone calls for commercial purposes, service providers acting on behalf of such persons” and government agencies with power to enforce the List. 68 Fed. Reg. at 16239. While “telemarketers” are defined in the TSR to include those soliciting charitable contributions, 16 C.F.R. § 310.2(bb), (cc), it is ambiguous in proposed Section 310.8 whether the phrase “others engaged in or causing others to engage in telephone calls for commercial purposes” excludes nonprofit organizations and their for-profit agents. It appears from the FTC’s statement that “broader access to the national do-not-call list may be necessary to effectuate the purposes of the do-not-call regulations” that the Commission supports nonprofit access to the List. The FTC should simply confirm this point by stating that any person or entity may access the list, so long as such information is used solely to comply with the TSR or otherwise prevent calls to phone numbers on the DNC List.

At the same time, the Commission should not require nonprofit organizations—whether soliciting themselves or through professional fundraising organizations—to pay to access the DNC List. These entities are exempt from the national registry, by the limits of the FTC’s jurisdiction, in the case of nonprofit organizations soliciting in-house, and by FTC rule in the case of professional fundraisers soliciting on behalf of noncommercial organizations, in part because of the financial impact on charities.¹⁹ It would be contradictory for the FTC to impose

¹⁹ 68 Fed. Reg. at 4637. As stated in the DMA/Chamber Comments and the Comments of the DMA Nonprofit Federation, The DMA does not accept the legal ability of the Commission to subject for-profit firms soliciting on behalf of charities to the DNC List requirements.

an up to \$7,250 annual fee (or more, if the estimates are revised) on charities or firms soliciting on their behalf (who undoubtedly would pass such a cost on to the charities) who are simply accessing the List in order to prevent calls to potentially unreceptive donors. Certification by non-profits and their solicitors that they will use the List only to prevent calls to phone numbers on the List will guard against improper use of this information.

V. Conclusion

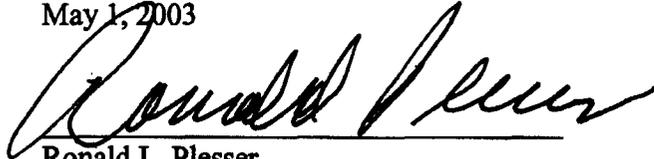
As The DMA has stated in its comments to the Rule NPRM and in its judicial filings, the Commission's haste to establish the DNC List without adequate contemplation and consideration has caused confusion and uncertainty. The Commission should not allow the urgency to assemble the DNC List similarly to distort the amount of fees and the manner by which they are collected. While "time" may be "of the essence," 68 Fed. Reg. at 16238, it is equally important, if not more so, for the Commission to develop a system to collect fees that imposes the lowest fee necessary for administration of the DNC List, that builds off the example of The DMA's TPS, that has been subject to adequate notice and comment to satisfy the APA, that is based on sound, verifiable assumptions, and that satisfies the government's burden under First Amendment analysis.

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THE DIRECT MARKETING ASSOCIATION, INC.

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President & CEO
Gerald Cerasale
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May 1, 2003

A handwritten signature in black ink, appearing to read "Ronald L. Plesser", written over a horizontal line.

Ronald L. Plesser
Stuart P. Ingis
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Its Attorneys