



## SUMMARY

The Direct Marketing Association acknowledges that in order to make the rules regarding abandoned calls and those regarding the national Do-Not-Call list work, some recordkeeping requirements must be imposed. However, it is our position that both the FCC and FTC recordkeeping rules associated with these substantive requirements are unlawful and unsound under the Paperwork Reduction Act and of the Do-Not-Call Implementation Act. We show in these Comments that:

(a) The recordkeeping requirements associated with the abandoned call rules are unlawful because: neither of the two agencies has spelled out precisely what sort of records will be required to be kept; substantive differences in the two agencies' abandoned call rules, and the jurisdictional overlap creates duplicative burdens; and neither agency has provided an accurate estimate of the recordkeeping burden associated with that rule.

(b) The FCC has substantially underestimated the time and cost of recordkeeping associated with the national Do-Not-Call list because it has failed to consider and quantify entire categories of burden that its proposal would impose on the industries affected by it.

In the case of the abandoned call rule, the DMA contends that, unless both agencies agree to voluntarily withdraw their (unspecified) recordkeeping requirements, OMB should disapprove the FCC's submission and, as it has the power to do, revoke the FTC's authorization. This recordkeeping requirement should not be permitted to go into effect until a clear, consistent and coherent standard has been fashioned. In the case of

the recordkeeping requirements associated with the abandoned call rule, the DMA recognizes that the imminent implementation of the Do-Not-Call registry requires some recordkeeping rule for the protection of the marketers. We contend, however, that both agencies should be given only conditional approval for a period of 90 days so that, a recordkeeping requirement can be fashioned that is consistent and of practical utility for enforcement purposes without unnecessarily and irrationally burdening marketers.



calls and with accessing the national do-not-call list.<sup>4</sup> DMA does not deny that to make the rules work, some recordkeeping requirements must be imposed. However, DMA submits that both the FCC and the FTC recordkeeping rules are unlawful and unsound under the Paperwork Reduction Act and the explicit requirement of the "Do-Not-Call" Implementation Act.<sup>5</sup>

The recordkeeping requirements associated with the abandoned call rules are unlawful because (i) the substantive differences in the two agencies' abandoned call rules and the jurisdictional overlap creates a duplicative burden, (ii) neither of the two agencies has spelled out precisely what sort of records will be required to be kept, and (iii) the FCC had profoundly underestimated -- and the FTC has made no estimate of -- the recordkeeping burden associated with the abandoned call rule. DMA therefore believes the FCC's information collection request under the abandoned call rule should be withdrawn and revised to eliminate these inconsistencies. If the request is not withdrawn, DMA believes OMB must withhold its approval of the FCC information collection requirements under the PWRA (and withdraw its approval of the FTC requirements) until the substantive inconsistencies between the rules have been resolved and a common, clear, and reasonable standard of recordkeeping is established.

With respect to the recordkeeping requirements associated with the national Do-Not-Call list, the FCC has substantially underestimated the time and cost of recordkeeping associated with this rule by failing to consider and quantify entire categories of burdens that its proposal would impose on the regulated industry, in violation of the PWRA. DMA recognizes, however, that some form of recordkeeping must be in place to make the enforcement

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<sup>4</sup> See 68 Fed. Reg. 46,632 (Aug. 6, 2003)

<sup>5</sup> 15 U.S.C. § 6101.

provisions of the TCPA operational. Accordingly, DMA submits that the FCC should revise its submission to OMB to seek only provisional authority to implement some form of recordkeeping requirement for the Do-Not-Call rule for a period of no more than 90 days, during which time, once again, the two agencies must adopt a common, consistent and reasonable recordkeeping standard for this important information collection requirement.

**I. The Recordkeeping Requirements Are Unlawful Under The Abandoned Call Standards.**

The FCC and FTC recordkeeping requirements associated with the abandoned call rule overlap and conflict. This is, in part, due to the fact that the FCC and the FTC have very different substantive abandoned call rules. The Commission's revised TCPA rules require telemarketers to abandon no more than three percent of calls answered by a live person, measured over a 30 day period.<sup>6</sup> The FTC's version of the rule applies the 3% test on a daily basis.<sup>7</sup> The FTC also treats all pre-recorded messages as abandoned, but the FCC rule permits such calls to the extent permitted by the TCPA and excludes them from the call abandonment rate. Moreover, the two agencies do not have a consistent or coherent view of the extent of their respective jurisdictions. The FCC undeniably has jurisdiction over all entities that are subject to its abandoned call rule. The FTC does not have jurisdiction over not-for-profit organizations, telephone companies, banks and certain other entities; nonetheless, it claims that its rules apply to them when the calls are made by a service bureau on behalf of the exempt entity.

This unsatisfactory state of affairs is made worse by the fact that neither agency has provided any requirements in its rules as to what records are to be kept. The FCC proposal states that the marketers must be able to provide "clear and convincing" evidence of

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<sup>6</sup> See 47 C.F.R. § 64.1200(a)(6).

compliance.<sup>8</sup> What that means is not explained in the FCC Supporting Statement to OMB or the TCPA Order. The FTC has no standard of proof whatsoever.

This regulatory and recordkeeping chaos creates an intolerable dilemma for entities that are subject to one, the other, or – if the FTC's expansive notions of its jurisdiction are ultimately upheld – both sets of substantive and recordkeeping rules. It is virtually impossible for marketers to determine what sort of records they need to keep to show that they are compliant with whichever of the rules happens to apply to them. In some cases, they may be required to maintain duplicate sets of records or, given the different standards involved, different computations of the same data.

For this reason alone, OMB cannot responsibly discharge its duties to determine whether either of these recordkeeping requirements "is of practical utility" or the extent to which these undefined requirements will impose unnecessary and unreasonable burdens on affected entities.

Moreover, neither the FTC nor the FCC has made an accurate estimate of the effort and cost that would be required to comply with its requirement, even assuming that its recordkeeping standard was clear and reasonable. At least the FCC made some attempt to estimate the burden of the its abandoned call recordkeeping requirement. The FTC, by contrast, merely stated that its revised TSR did not include "any new reporting or recordkeeping requirement that impose any significant burden on industry."<sup>9</sup>

Both of these "estimates" are palpably unsound and fail to comply with the agencies' obligations under the PWRA. The FCC submission asserts that predictive

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<sup>7</sup> 16 C.F.R. § 310.4(b)(4)(i).

<sup>8</sup> TCPA Order at ¶150.

<sup>9</sup> See FTC Supporting Statement for Information Collection Provisions of The Telemarketing Sales Rule at 8 (FTC Supporting Statement).

dialers already capture the recordkeeping information as a matter of routine.<sup>10</sup> There is no basis for this assumption since, among other things, it assumes that all predictive dialers used by a particular marketer are, in some fashion, linked so that a single 30-day result can automatically be generated. Moreover, the FCC itself admits that the abandoned call rule applies even when no dialer is used – which is likely to be the case for many small marketers – and when, therefore, automated data capture is impossible.<sup>11</sup> While an agency can exclude reporting or recordkeeping activities from a burden calculation if it can demonstrate that such activities are “usual and customary,”<sup>12</sup> that showing has not and cannot be made here.

In fact, the FCC does not – because it cannot – rely on automated data capture as the basis of its estimate. As the Commission itself has noted, some telemarketers will need to purchase additional hardware or software to comply with the new rules.<sup>13</sup> These “adjustments” must be factored into the burden estimate.<sup>14</sup> For example, WorldCom, Inc., d/b/a MCI (“MCI”) recently explained to the Commission that even though it has existing hardware and software to track and manage abandoned calls, “the process of gathering, manipulating, and presenting the data is manual and *ad hoc*.”<sup>15</sup> MCI has undertaken a tremendous effort to purchase, install, and integrate new hardware and software that will allow it “to collect data regarding abandoned calls into a single repository, formalize the data, and present this data in a report format.”<sup>16</sup> While MCI's

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<sup>10</sup> FCC Supporting Statement at 11-12.

<sup>11</sup> *Id.* At 11.

<sup>12</sup> *See* 5 C.F.R. § 1320.3(b)(2).

<sup>13</sup> FCC Supporting Statement at 11.

<sup>14</sup> 44 U.S.C. § 3502(2); *See* Office of Management and Budget, Information Collection Budget of the United States Government, Fiscal Year 1999, at 31 (1999 Information Collection Budget).

<sup>15</sup> Petition for Temporary, Limited Waiver of Section 64.1200(a)(6) of the Commission's Rules, Affidavit of Randy Hicks on Behalf of MCI, at 3 (Aug. 27, 2003).

<sup>16</sup> *Id.* at 4.

situation may not be representative of the industry as a whole, it is a clear example, already on the public record, of the difficulties and costs that a large company faces in meeting its recordkeeping responsibilities. The recordkeeping burden on smaller companies will be even more severe because the hardware and software "adjustments" these companies must make will be no less complex and these marketers have fewer resources to make these changes.

Thus, the FCC's estimate is both incorrect and incomplete. Hardware and software upgrades, programming, processing, training, and completing and reviewing the collection of information all carry costs and are part of the "burden" to be considered under the PWRA.<sup>17</sup> The FCC's estimate ignores these costs entirely.

In sum, DMA submits that the recordkeeping requirement under the FCC version of the abandoned call rule cannot be permitted to go into effect, as a matter of law under the Paperwork Reduction Act and Section 3 of the Do-Not-Call Implementation Act, and as a matter of sound policy. Due to these inconsistencies in the substantive standards, the FCC has failed to show that its proposed information collection requirement would have "practical utility" under the PWRA. Before OMB may approve any FCC request, the inconsistencies must be worked out, the jurisdictional differences resolved, and, most importantly, a rational, simple, clear and consistent recordkeeping requirement must be established.

It is DMA's understanding that the FCC and the FTC will soon submit to Congress their mandatory reports (now overdue) under the Do Not Call Implementation Act discussing the inconsistencies in their implementing rules and their effects. At some point, hopefully also in the very near future, the announced, but as yet undisclosed,

Memorandum of Understanding regarding enforcement between the two agencies may issue. It is DMA's hope that these reports and the Memorandum of Understanding will at least shed light on the inconsistencies and their adverse effects on regulated entities, and thereby advance a coherent resolution of these recordkeeping issues. In the meantime, however, DMA believes that both agencies' recordkeeping requirements are contrary to the PWRA and the Do-Not-Call Implementation Act and should be withdrawn, pending submission of the reports and an inter-agency resolution of the inconsistencies.

In these circumstances, the appropriate course of action would be for OMB to reject the FCC proposal and simultaneously to revoke the approval it has granted to the FTC. There is utterly no doubt that the FTC's estimation of burden was "materially in error."<sup>18</sup> The FCC's estimation of burden is profoundly incomplete or understated. For these reasons, unless the agencies voluntarily withdraw their request for the Paperwork Reduction Act approval, OMB should disapprove both agencies' recordkeeping requirements in application to abandoned call rates.

## **II. The Commission Has Materially Underestimated the Burden for Recordkeeping Requirements Connected With the National Do-Not-Call Registry**

The problems of duplicative or inconsistent recordkeeping requirements with respect to the Do-Not-Call registry are, fortunately, less acute than those involving the abandoned call rule but are nonetheless substandard. The FCC proposal violates the PWRA because of a lack of clarity as to what sort of records marketers are expected to

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<sup>17</sup> See 44 U.S.C. § 3502(2); 5 C.F.R. § 1320.3(b)(1).

<sup>18</sup> 5 C.F.R. § 1320.12(i).

keep and on underestimation of the amount of time, difficulty and cost that will be entailed.<sup>19</sup>

First, neither agency has clearly stated what sort of records demonstrating compliance with the Do-Not-Call rules will suffice. The FCC has largely endorsed the system established by the FTC under which marketers are expected to access the national list. Both agencies have established rules – that differ in some respects – requiring marketers to establish written procedures and training in the use of the national list. If this is all that is required, the paperwork part of the burden may well be manageable. But, neither agency has made this finding.

Second, the FCC has grossly underestimated the burdens that would be imposed by the actual use of the registry. It estimated that the annual burden for recordkeeping requirements connected with the Do-Not-Call registry will average one hour per year per telemarketer.<sup>20</sup> The Commission's analysis of this one-hour burden principally covers accessing the Do-Not-Call registry to obtain the national Do-Not-Call list.<sup>21</sup> This, itself, is odd: there simply is no need to require marketers to keep records of the fact that they have accessed the national Do-Not-Call Registry. The system established by the FTC requires each marketer to "enroll" with the registry. If, therefore, either – or both – of the agencies want to know who has accessed the registry, and how often, the agencies can

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<sup>19</sup> There is a the substantive conflict between the FTC and FCC positions on the National Do Not Call list, which is profoundly important to an important subset of the industry. The FTC takes the position that calls made on behalf of a not-for-profit organization by a for-profit service bureau is subject to national DNC requirements. The FCC has stated categorically that such calls are exempt. This has put not-for-profit organizations and their independent service bureaus in an impossible dilemma: if the service bureau is in fact subject to the registry requirement, then it is presumably equally subject to the Do Not Call recordkeeping requirements. That makes voluntary compliance on the part of not-for-profits and their service bureaus impossible.

<sup>20</sup> FCC Supporting Statement at 11.

obtain that information directly from the system administrator and do not need to require the marketers to provide it. Under the PWRA, there is no justification for imposing the burden on the regulated industry to provide data the agency already has.<sup>22</sup>

In any event, the FCC's estimate is incomplete and inaccurate. The Commission simply has not computed the “total time, effort, or financial resources” to generate, maintain, retain, or disclose or provide information to or for the Commission.<sup>23</sup> Under the PWRA and the OMB guidelines, “burden” includes the time, effort, and financial resources expended for acquiring, installing, and using technology to collect, validate, and verify information, and for processing and maintaining information; adjusting existing practices to comply with new requirements; searching data sources; training personnel; completing and reviewing the collection of information; and transmitting or otherwise disclosing the information.<sup>24</sup>

The apparent assumption by both agencies that the national list is complete, accurate and self-executing and that the only burden involved is access is utterly baseless. On the contrary, for each call campaign, a telemarketer will need to download the national Do-Not-Call list for appropriate area codes; merge the list with its own company-specific Do-Not-Call list and any applicable state list; purge duplicates; manage erroneous numbers; identify numbers subscribed to by customers; and, create, store, maintain, and possibly disclose complete records of these steps.

Moreover, telemarketers will need to train personnel to follow very specific merge and purge instructions regarding these steps. Even a telemarketing campaign of

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<sup>21</sup> Id.

<sup>22</sup> See 44 U.S.C. § 3506(c)(3)(B).

<sup>23</sup> 5 C.F.R. § 1320.3(b)(1); 44 U.S.C. § 3502(2).

<sup>24</sup> Id.; see also 1999 Information Collection Budget at 31.

the smallest scale (e.g., one telemarketer covering only one area code of mostly rural telephone subscribers in one year) would expend vastly more than a single hour's effort to prepare a compliant calling list. Telemarketers that conduct larger call campaigns or multiple call-campaigns within the same year will require additional manpower to create and maintain complete and accurate Do-Not-Call records on a quarterly basis.

The process of downloading numbers from the national Do-Not-Call database alone will take more time per year than the one hour that the Commission has budgeted. According to the FTC, it will take nearly 31 minutes to download the XML Tagged File of 40 million numbers in the national Do-Not-Call database at a connection speed of 1.5 Mbps; 1.60 hours to download that file at a rate of 500 Kbps; and, 7.91 hours using a 56 Kbps modem.<sup>25</sup> When the database reaches 60 million numbers or more, as the FTC expects, these numbers could increase by at least 50%. Download times will be significantly slower when download activity is heaviest, as when the database is first made available or updated, and quarterly thereafter.

Even if the download for select states or area codes or for the numbers-only Flat Text File takes less time, telemarketers will need to uncompress or unzip downloaded files (and possibly install necessary software to do so), re-name and store the files in their own systems, and re-try failed downloads, a process that will require the telemarketer to contact the FTC's Help Desk.<sup>26</sup> Additionally, telemarketers will incur costs for equipment, line charges, set-up, and manpower. All of these factors must be figured into the burden calculation as time, effort, and financial resources needed to install and utilize

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<sup>25</sup> Federal Trade Commission, National Do Not Call Registry Telemarketer Access Information, available at <http://www.ftc.gov/opa/2003/08/tmkraccessinfo.htm>.

<sup>26</sup> Id.

technology for the purposes of collecting, processing, and maintaining information.<sup>27</sup>

Since the entire process must be repeated quarterly, we are not able to fathom how the Commission arrived at its estimate.

The Commission has also downplayed the time telemarketers will need to reconcile their own Do-Not-Call lists with the national list. According to the Commission, because many telemarketers must already reconcile their own list with state lists, the additional burden created by the national Do-Not-Call list is minimal.<sup>28</sup> The FTC expects the national Do-Not-Call list to have nearly 60 million telephone numbers, which telemarketers will need to work into their existing lists. To the extent that some states insist on maintaining their own state-wide lists, some marketers may need repeatedly to “de-duplicate” the federal, state, and company-specific lists every three months. Even telemarketers that use only one or a few area codes will face a significant task, not to mention telemarketers whose campaigns cover regional or national ground. Furthermore, not every state has a Do-Not-Call list, so some telemarketers will be facing list integration issues for the first time.<sup>29</sup>

Ultimately, under the PWRA, OMB must determine whether the collection of information proposed by an agency rule has “practical utility” before it approves or disapproves a request for the collection of information.<sup>30</sup> “Practical utility” means the actual usefulness of information to or for an agency, “taking into account its accuracy, validity, adequacy, and reliability, and the agency’s ability to process the information it

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<sup>27</sup> See 5 C.F.R. § 1320.3(b)(1).

<sup>28</sup> FCC Supporting Statement at 11.

<sup>29</sup> For a list of states with do-not-call lists, see <http://www.the-dma.org/government/donotcalllists.shtml>.

<sup>30</sup> 5 C.F.R. § 1320.5(d)(1)(iii).

collects ... in a useful and timely fashion.”<sup>31</sup> Given the inadequacy of the FCC's estimation of the amount of time that accessing the National Do-Not-Call registry will take and its understatement of the complexity of the merge/purge process that marketers will need to undertake to actually use the Do-Not-Call data, the Commission has failed to satisfy its statutory obligation to show that the proposed information collection requirement satisfies the PWRA. Under these circumstances, it is plain that this as yet undefined recordkeeping requirement cannot be unconditionally approved by OMB.

Nonetheless, in this instance, the DMA does not ask that the recordkeeping requirement be withdrawn by the FCC or wholly disapproved by OMB. Rather, DMA believes that the FCC should revise its submission and request that OMB approve its request only for a period of 90 days. There are two practical realities that lead us to urge that a 90-day approval is appropriate and should be granted. First, the National Do-Not-Call registry will become operational on October 1. There simply is not time to resolve conclusively the recordkeeping issues that we have raised in these comments.

Second, marketers have begun to access the national registry and are prepared and are preparing to use the national list – and to merge and purge it as required – in their marketing campaigns. Given the absolute lack of guidance that has been afforded by either the FCC or the FTC, marketers have had no choice but to simply fashion their own recordkeeping standards in order to protect themselves against claims that they have or have not properly used the Do-Not-Call registry. This is decidedly an imperfect solution: it leaves the marketers at risk to claims from either (or both) of the agencies that their recordkeeping standards are inadequate and that, therefore, they are not able to

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<sup>31</sup> 5 C.F.R. § 1320.3(l).

demonstrate compliance with the new rules. Accordingly, in the short run, there is no alternative to some sort of interim approval of the FCC proposal, despite its many flaws.

At the same time, DMA submits that on a long-term basis, the FCC cannot lawfully seek, and OMB cannot consistent with its responsibilities under the Paperwork Reduction Act authorize the agencies to develop their Do-Not-Call recordkeeping requirements on an ad hoc or case-by-case basis. By approving the recordkeeping requirement for a period of 90 days, OMB can assist both the FCC and the FTC in doing what Congress has directed that they should have done long since -- develop a recordkeeping standard associated with the national Do-Not-Call registry that is consistent, to the maximum extent possible, is of practical utility to enforcement, and that is rational in that it does not extravagantly burden marketers with the collection and retention of vast amounts of data at unreasonable cost.

### **CONCLUSION**

For the reasons set forth, the DMA urges that the recordkeeping requirements associated with the abandoned call rate rule should be withdrawn by the FCC, and should be disapproved by OMB if the agency does not withdraw and redesign it to eliminate inconsistencies, and that the FCC should revise its request so that recordkeeping requirements associated with the national Do-Not-Call registry be conditionally approved for a period of not more than 90 days.

Respectfully submitted

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