



NATIONAL AUTOMOBILE DEALERS ASSOCIATION
8400 Westpark Drive • McLean, Virginia 22102
703/821-7040 • 703/821-7041

Legal & Regulatory Group

April 14, 2004

Via ECFS

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, D.C. 205554

Re: CG Docket No. 02-278

Dear Secretary Dortch:

The National Automobile Dealers Association (“NADA”) submits the following comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking (“NPR”) requesting comment on its proposal to amend its rules implementing the Telephone Consumer Protection Act (“TCPA”) to require sellers and telemarketers “to use a version of the national do-not-call registry obtained from the administrator of the registry no more than thirty (30) days prior to the date any call is made.” 69 Fed. Reg. 16,880 (Mar. 31, 2004).¹

NADA represents approximately 20,000 franchised automobile and truck dealers who sell new and used vehicles and engage in service, repair and parts sales. Our members employ more than 1.1 million people nationwide. A significant number of our members are small businesses as defined by the Small Business Administration. Accordingly, NADA is particularly focused on regulatory changes that may increase the regulatory burden that exists for small businesses.

As explained below, we submit these comments to: (i) urge the FCC *not* to adopt the proposed amendment due to the additional burden it will impose on small businesses, (ii) request a clarification adopted by the FTC and another related clarification that NADA believes will

NADA Comments to FCC

¹ Although the FCC has proposed the same 30-day period the Federal Trade Commission (“FTC”) proposed in its NPR to amend the Telemarketing Sales Rule (“TSR”), 69 Fed. Reg. 7,330 (Feb. 13, 2004), the FCC’s NPR states that it “proposes to modify the Commission’s rules to parallel any changes to the FTC’s rules.” 69 Fed. Reg. 16,881 (Mar. 31, 2004). On March 29, 2004, the FTC adopted a 31-day download period. Accordingly, our comments will refer to the FCC’s proposal as requiring sellers and telemarketers to use a version of the National Do Not Call Registry that is no more than 31 days old at the time a telephone solicitation is made.

partially reduce the impact of the download requirement, and (iii) request an effective date for the proposed amendment that is no earlier than January 1, 2005 or six months from the date the final amendment is published in the *Federal Register*, whichever is later.

Additional Burden Associated with Proposed Amendment

We urge the Commission to forego adopting a monthly download requirement. Unlike Congress's directive in the Consolidated Appropriations Act of 2004 to the FTC to include this requirement in its National Do-Not-Call ("DNC") rules, Congress has issued no such directive to the FCC. The Commission's legitimate concerns about maintaining consistency between its rules and the FTC's recently-amended TSR are outweighed by the burden the 31-day download requirement will impose on small businesses that initiate all or most of their telephone solicitations to consumers located in their own state.

In Section II.B of the Synopsis of the NPR, the Commission seeks comment on the impact the proposed amendment will have on small entities. In the limited response period provided in this rulemaking, we are unable to provide specific data concerning the impact. Nevertheless, we offer the following general information based on our daily interaction with members who have diligently been attempting to comply with the FCC's and the FTC's National DNC rules.

Our members often contact their customers by telephone to discuss the products and services they offer and to ensure their customers are satisfied with their purchases. Over the years, this has been critically important to their ability to maintain contact with customers in their local communities. These calls typically are not part of a formal calling campaign, but rather stem from individual salespersons and service department personnel who attempt to contact past customers or referrals they receive. Whereas many of these calls fit within the established business relationship exemption to the National DNC rules, others do not. Because most customers retain their purchased or leased automobiles for a period that exceeds 18 months, these dealership employees must now check many of their outgoing calls against the portion of the National DNC Registry for which their business has registered.

Because an automobile dealership's customer base centers around its local community, many dealerships do *not* engage in telephone solicitations to consumers over state lines. These dealerships are not affected by the TSR's new 31-day download requirement and will derive no benefit from a decision by the FCC to establish a standard that is consistent with the TSR. The only impact such a decision will have will be to increase their compliance burden. Other dealerships, which are located in proximity to neighboring states and thus are more likely to initiate telephone solicitations over state lines, also will be adversely impacted by the Commission's proposed amendment since the TSR's 31-day download requirement now will be extended to their *intrastate* telephone solicitations to consumers. The proposed amendment thus will adversely impact both categories of dealerships since it will triple the frequency with which each must download registered telephone numbers from area codes within their own state.

The Commission assumes this burden “would be minimal for most telemarketers.” 69 Fed. Reg. 16,875. Whereas this assumption may be correct for national telemarketers that place most of their telephone solicitations to consumers located in different states, it is not correct for sellers that place all of their telephone solicitations to consumers in their own state. Even for sellers that initiate a limited number of telephone solicitations to neighboring states, the additional compliance burden produced by the change will significantly outweigh the minimal benefit that a consistent standard will produce. For example, assume an automobile dealership located near a border state initiates telephone solicitations to three area codes in its own state and one area code in a neighboring state. The Commission’s extension of the 31-day download requirement to intrastate telephone solicitations will triple the frequency of the download requirement for three of the four area codes for which that business has registered on the National DNC Registry.² For this and other similarly situated businesses, it is erroneous to assume that “it is easier and less burdensome for small businesses if the two agencies have consistent requirements.” 69 Fed. Reg. 16,886.

The extent of this additional burden should not be overlooked. The need to “scrub” the telephone numbers of consumers against those contained in an initial download and subsequent quarterly downloads has imposed a significant compliance burden on our members. Unlike larger businesses that market to a nationwide consumer base, most dealerships do not have the in-house resources to easily download and store tens or hundreds of thousands of telephone numbers to which they can, on an ongoing basis, scrub their outbound, nonexempt telephone solicitations. Part of this burden includes having to conduct the quarterly download. If the FCC decides to triple the frequency of this requirement, it can expect dealerships and other small businesses to experience a corresponding increase in the personnel costs necessary to download the data and perform the scrub. Because small businesses may lack available personnel to perform this additional function, they may need to outsource it to a vendor (which many already have done since the National DNC rules took effect). If this occurs, as it often does with small business managers who already must handle multiple responsibilities, their costs can be expected to rise further. Such a result should be avoided where it is not mandated by Congress. Accordingly, we urge the Commission to forego imposing this additional burden on these businesses.

Clarifications to Reduce Impact of Download Requirement

First Requested Clarification

Whether the FCC decides to adopt or forego its proposed amendment, we urge it to join the FTC in clarifying that sellers that have registered on the National DNC Registry and paid the appropriate annual fee, if any, are not required to conduct either an initial or a subsequent

NADA Comments to FCC

April 14, 2004

Page Four

² It also will triple the frequency of the download requirement for the area code in the neighboring state, but this already is required by the TSR.

download if they use the single number lookup feature to screen their outgoing, nonexempt telephone solicitations.

The FTC adopted our proposed clarification in the following statement in Section VI of the Statement of Basis and Purpose contained in its final rule implementing the 31-day download requirement:

NADA requested that the Commission clarify that a small seller or telemarketer would be deemed to be in compliance if it registered and paid the annual fee (as may be required), even though it only obtains numbers by use of the single-number lookup feature in the National Do Not Call Registry. The Commission agrees that such sellers or telemarketers would be in compliance, noting that this would constitute no change from the existing Rule.

69 Fed. Reg. 16,372 (Mar. 29, 2004).

We believe it is essential for the FCC to adopt the same clarification to ensure that small businesses may use the single number lookup feature in lieu of downloading registered phone numbers for their intrastate telephone solicitations to consumers. Many of these businesses cannot feasibly download, store and scrub their outgoing telephone solicitations against the extensive list of phone numbers contained in the Registry. They rely on the single number lookup feature to ensure they do not call non-exempt registered telephone numbers. The benefits of this useful compliance tool will be significantly reduced if these entities must conduct a physical download of the registered telephone numbers at the time they register as a seller and every month or three months thereafter. Unless this clarification is provided, many small businesses will continue to conduct downloads for no purpose other than availing themselves of the safe harbor protection. This creates an unnecessary burden as this mechanical exercise does nothing to further compliance with the prohibition against initiating telephone solicitations to registered phone numbers absent an exemption. 47 CFR § 64.1200(c)(2).

Second Requested Clarification

In order for small sellers to benefit from our first requested clarification, we urge the Commission to clarify that the need to “[maintain] and [record] a list of telephone numbers that the seller may not contact,” 47 CFR § 64.1200(c)(2)(i)(C), does not apply to sellers that use the single-number lookup feature to screen their outgoing, nonexempt telephone solicitations.

This safe harbor requirement clearly is intended for sellers and telemarketers that conduct a physical download of registered telephone numbers. It is not intended for sellers that use the single-number lookup feature in lieu of conducting a physical download to screen their telephone solicitations. See 68 Fed. Reg. 45,142 (Jul. 31, 2003)(The single number lookup feature will

NADA Comments to FCC

April 14, 2004

Page Five

“permit small volume callers to comply with the national registry requirements of the TSR without having to download a potentially large list of all registered telephone numbers within a particular area”). If the Commission permits sellers to screen their telephone solicitations using the single number lookup feature but continues to require them to maintain and record a list of telephone numbers from the National DNC Registry that they may not contact, the Commission will effectively require these sellers to conduct the physical download for no purpose other than availing themselves of the safe harbor protection. This would prevent these sellers from realizing the benefit of our first requested clarification and force them to engage in a mechanical exercise that is unrelated to avoiding unwanted telephone solicitations to consumers. In order to carry out the purpose of the single number lookup feature and eliminate a significant and avoidable compliance burden on small businesses, we request you issue this proposed clarification.

Effective Date

If the Commission adopts its proposed amendment, it should permit sellers and telemarketers adequate time to comply with the monthly download requirement. The FTC recognized this concern when it stated that “sellers and telemarketers ... may need an extended period to make the necessary modifications in their systems and procedures to be able to comply with this amended provision.” 69 Fed. Reg. 7,331 (Feb. 13, 2004). The need for additional time is particularly important to small business entities. Accordingly, we recommend the Commission establish an effective date for the proposed amendment that is no earlier than January 1, 2005 or six months from the date the final amendment is published in the *Federal Register*, whichever is later.

Thank you for the opportunity to comment on this matter. We appreciate the ongoing efforts of FCC staff to assist our members with their compliance responsibilities.

Sincerely,

Paul D. Metrey
Director, Regulatory Affairs