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November 5, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Submission Regarding CG Docket No. 02-278 (Do-Not-Call Rules)

Dear Ms. Dortch:

This letter, submitted on behalf of the NATIONAL ASSOCIATION OF REALTORS® (NAR), responds to a recent filing in this proceeding that badly misstates the interpretation that NAR seeks as part of its Petition for Reconsideration of the Commission's decision adopting Do-Not-Call regulations. As previously stated, NAR has urged the Commission to clarify that a person who has deliberately entered into the market of selling a home, which represents a major commercial transaction, is engaging in an at-home business and thus is not covered by the Do-Not-Call rules. The "for sale by owner" ("FSBO") market is a well-recognized, multi-million dollar industry that looks quite similar to the traditional real estate business with one distinction — inquiries regarding the sale of the home go to the FSBO's residence, instead of an outside office. The recent filing in opposition to NAR's position on FSBOs[1] merits a response because it miscomprehends or misconstrues NAR's position, and purports to rely on court cases that are either outdated or irrelevant to the Commission's reconsideration of its rules.

The recent filing by Mr. Joe Shields states that "[w]ith NAR's logic performing maintenance on a car or the home would turn a home into a business." That is not true. FSBOs consciously and intentionally enter the market of home buying and selling to engage in a substantial commercial transaction (just to illustrate, the median sales price for homes in the Washington, D.C. metropolitan area is $352,000). In many cases, as described

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[1] *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Ex Parte Comments of Joe Shields in Opposition to the Ex Parte Petition for Reconsideration Filed with the Commission by the National Association of Realtors, CG Docket No. 02-278 (filed Oct. 26, 2004).

in previous ex parte comments filed by NAR, FSBOs essentially act as their own real estate agent, by arranging for advertising, title searches, home and pest inspections, surveys, appraisals and other details of the transaction. Thus, FSBOs today seek to act in nearly every way as a real estate professional. Clearly, once a FSBO has entered the real estate market in this way, with respect to the selling of a home the FSBO is engaged in a business, and the interpretation sought by NAR would only apply to such persons. A person selling a home is nothing like someone performing maintenance on a car. The FSBO is consciously advertising his interest in entering into a major commercial transaction; no such advertisement or intentional entry into the relevant marketplace is made by fixing one's own car.[2]

Mr. Shields's filing also cites to two state court cases that relate to the Telephone Consumer Protection Act, but these cases are inapposite. *Adamo v. AT&T*, 2001 WL 1382757 (Ohio Ct. App. 2001), an unpublished decision from the Ohio Court of Appeals, is entirely unrelated and outdated. It concerns, among other things, calls from AT&T to plaintiff's home number after the plaintiff had asked that AT&T place his number on its company-specific do not call list in 1998. Unwanted calls continued to come to the plaintiff from AT&T in 1999, a judgment was issued in 2000 against AT&T for continuing to place calls to plaintiff, but AT&T continued to place unwanted calls to the plaintiff after the judgment was issued. There is no indication in the case that the plaintiff was engaged in any business out of his home or that he had intentionally entered the market with respect to anything about which AT&T was calling.

The second case cited in the responding comments is *Margulis v. Fairfield Resorts, Inc.*, which interprets the rules prior to the 2003 Report and Order in this proceeding. The Missouri court finds that, in its opinion, the FCC would not consider calls to a home-based business to be exempt from the pre-2003 Report and Order rules. In 2003, however, Congress instructed the FCC to issue rules that "maximize consistency with the rule promulgated by the Federal Trade Commission."[3] As noted in previous NAR filings, the Federal Trade Commission ("FTC") has explicitly exempted home-based businesses from the do-not-call rules. The relevant portion of the FTC's decision is attached.

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[2] To the extent there is a parallel between car maintenance and home selling, the proper analogy is this: a person who wishes to engage in the business of car repair out of one's own home may take out advertisements or place a sign in front of her home indicating that she will repair cars for a fee. That person may be intentionally entering the car repair market; a person repairing one's own car is not. The Federal Trade Commission has made clear that home-based businesses are not covered by its rules, and a person so engaged would appear to be covered by the FTC's interpretation.

[3] Do-Not-Call Implementation Act, Pub. L. 108-10, 117 Stat. 557 (2003), § 3.

The issue of whether home-based businesses are outside the scope of the do-not-call rules is thus settled. NAR is simply seeking clarification on the logical proposition that a person entering the real estate market as a FSBO is operating a business with respect to the sale of that home.

Respectfully submitted,

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Counsel to NAR

Attachment

cc: Ms. Lynn King

RULES and REGULATIONS

FEDERAL TRADE COMMISSION

16 CFR Part 310

Telemarketing Sales Rule

Wednesday, January 29, 2003

***4580** AGENCY: Federal Trade Commission.

ACTION: Final Amended Rule.

SUMMARY: In this document, the Federal Trade Commission ("FTC" or "Commission") issues its Statement of Basis and Purpose ("SBP") and final amended Telemarketing Sales Rule ("amended Rule"). The amended Rule sets forth the FTC's amendments to the Telemarketing Sales Rule ("original Rule" or "TSR"). The amended Rule is issued pursuant to the Commission's Rule Review, the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act" or "Act") and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act").

EFFECTIVE DATES: The amended Rule will become effective March 31, 2003. Full compliance with § 310.4(a)(7), the caller identification transmission provision, is required by January 29, 2004. The Commission will announce at a future time the date by which full compliance with § 310.4(b)(1)(iii)(B), the "do-not-call" registry provision, will be required. The Commission anticipates that full compliance with the "do-not-call" provision will be required approximately seven months from the date a contract is awarded to create the national registry.

ADDRESSES: Requests for copies of the amended Rule and this SBP should be sent to: Public Reference Branch, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580. The complete record of this proceeding is also available at that address. Relevant portions of the proceeding, including the amended Rule and SBP, are available at http:// www.ftc.gov.

FOR FURTHER INFORMATION CONTACT: Catherine Harrington-McBride, (202) 326-2452, Karen Leonard, (202) 326-3597, Michael Goodman, (202) 326-3071, or Carole Danielson, (202) 326-3115, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The amended Rule: (1) retains most of the original Rule's requirements concerning deceptive and abusive telemarketing acts or practices without major substantive changes; (2) establishes a national

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FN627 See June 2002 Tr. I at 19-40.

For example, Dr. James Miller, testifying on behalf of CCC, estimated that if the Commission's "do-not-call" proposal were enacted as proposed, it would cost all firms that sell their products via outbound telemarketing combined a total of $6.6 million to purchase access to the FTC's "do-not-call" registry and to check their calling lists against the "do-not-call" list to ensure that they do not call consumers who have asked not to be called. [FN628] If companies could comply with both FTC and state regulations by purchasing access to the FTC's list and not calling consumers whose numbers appeared on that list, this would represent the total burden on firms to avoid calling consumers who did not wish to be called. However, Dr. Miller testified that the total cost to comply with the state regulations as well as the FTC requirements, should firms still have to purchase separate lists from each state having its own do-not-call provisions, could approximate $100 million. [FN629]

FN628 See June 2002 Tr. I at 209. Dr. Miller's testimony drew from the Miller Study (see note 591 above). As the study explains, the $6.6 million figure assumes that 3,000 firms will pay $1,000 each on average to obtain access to the list and that it will take the average firm approximately two hours of effort at a cost of $50 per hour each time it is necessary to compare the firm's calling list against the "do-not-call" registry. As proposed in the NPRM, firms would have been required to do this comparison 12 times each year so that the average firm would have incurred a total expense of $2,200. Miller Study at 11-12. Because the amended Rule does not require firms to compare their calling lists to the FTC's "do-not-call" registry monthly as did the NPRM proposal, the estimated cost using Dr. Miller's methodology would now be around $4.5 million.

FN629 See June 2002 Tr. I at 209.

Finally, commenters raised various issues and offered suggestions relating to the implementation of a national "do-not-call" registry. For example, various commenters questioned the accuracy of automatic number identification ("ANI") verification, the length of time a consumer's telephone number should remain on the list, who should be able to sign up for the list, whether the Commission should allow third parties to submit telephone numbers, the type of information that should be collected, and the accuracy of the Commission's cost estimates. [FN630] These issues are discussed in the section below addressing implementation.

FN630 See, e.g., AFSA-NPRM at 4-10; Craftmatic-NPRM at 3; DC-NPRM at 5; DialAmerica-NPRM at 13; Discover-NPRM at 3; EPIC-NPRM at 14; ERA-NPRM at 29- 32; HSBC-NPRM at 2; MBA-NPRM at 2; NYSCPB-NPRM at 7-13. See also June 2002 Tr. I at 138-271.

Coverage of the "do-not-call" provisions. A number of commenters asked the Commission to clarify coverage of its "do-not-call" provisions. Some queried whether calls to home businesses would be subject to the "do-not-call" requirements. [FN631] The Rule exempts telemarketing calls to businesses (except for sellers or telemarketers of nondurable office or cleaning supplies). Therefore, calls to home businesses would not be subject to the amended Rule's "do-not-call" requirements.

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