

April 15, 2002

Chairman Timothy J. Muris
Commissioner Sheila F. Anthony
Commissioner Mozelle W. Thompson
Commissioner Orson Swindle
Commissioner Thomas B. Leary

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W., RM 159
Washington, DC 20580

RE: *Telemarketing Rulemaking--Comment. FTC File No. R411001.*

FTC Notice of Proposed Rulemaking to Amend the Telemarketing Sales Rule, 16 CFR PART 310 - 67 Federal Register 4491(January 30, 2002).

NARUC Comments and Request to Participate in the FTC's June 5-7, 2002 Public Forum in Washington, DC

Dear Chairman and Commissioners:

Your State commissioners colleagues in the National Association of Regulatory Utility Commissioners ("NARUC") want to thank you for your participation in NARUC and, also, for your obvious concern about the possible impact of your rules in the above-captioned proceedings on existing State programs. We also wanted to mention and commend the outreach to NARUC's members by your hardworking staff, including, on this particular issue, Mrs. Harrington-McBride, Ms. Danielson, Ms. Leonard, Mr. Goodman, and Mr. Wroblewski.

As you know, NARUC is a non-profit quasi-governmental organization founded in 1889. Its members include the governmental agencies engaged in the regulation of utilities and carriers in the fifty States, the District of Columbia, Puerto Rico and the Virgin Islands. NARUC's member agencies regulate the activities of telecommunications, energy, and water utilities. Congress and the Courts have recognized NARUC as the appropriate representative for the public interest concerns of its member commissions.

Shortly after the FTC published notice of this proceeding in the Federal Register, NARUC passed a resolution that ". . .urges the FTC to strengthen protections against unwanted telemarketing activity, including establishment of a national "do not call" registry, so long as these protections serve as nationwide minimum standards which do not preempt State regulations which provide greater protection to consumers and that the national registry incorporates existing "do not call" lists." A copy of that resolution is attached to this pleading.

In support of that position, NARUC states as follows:

BACKGROUND: THE TELEMARKETING ACT AND THE TSR

The FTC's current rule was adopted in August 1995 under the Telemarketing Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"). In that Act, Congress directed the Commission to adopt a rule to define and prohibit deceptive and abusive telemarketing practices. Among other things, the Act directed that the Rule include "a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." In response, the FTC's "TSR" Rule includes a "do-not-call" provision, prohibiting a seller or telemarketer from calling a person who has previously asked not to be called by or on behalf of the seller whose goods or services were being offered. The "do-not-call" provision is company-specific: after a consumer requests not to receive calls from a particular company, that company may not call that consumer again. Other companies, however, may lawfully call that same consumer until he or she requests each one not to call. This permits consumers to choose those companies, if any, from whom they do not wish to receive telemarketing calls. Each company must maintain its own "do-not-call" list of consumers. This seller-specific approach tracks the approach that the Federal Communications Commission adopted in its rules.

THE CURRENT FTC PROPOSED RULEMAKING

The FTC subjects its trade regulation rules to periodic regulatory review to determine whether each rule continues to serve the public interest, and whether it could be modified to increase benefits to consumers without unduly burdening industry, or to reduce compliance costs without sacrificing important protections for consumers. The Commission commenced a review of the TSR in November 1999. Ultimately, the FTC has proposed to modify the TSR by establishing a national centralized "do-not-call" registry that would enable consumers to stop most telemarketing calls by making just one phone call to the FTC. Telemarketers would be required to "scrub" their lists, removing all consumers who have placed themselves on the FTC's centralized registry. As proposed, the rule allows consumers to do the following:

- Opt to use the FTC's centralized registry to eliminate all telemarketing calls from all sellers and telemarketers covered by the TSR;
- Eliminate all telemarketing calls from all sellers and telemarketers covered by the TSR by placing themselves on the central registry, but subsequently agree to accept telemarketing calls only from or on behalf of specific sellers, or on behalf of specific charitable organizations, with respect to which they have provided express verifiable authorization; or
- Opt to eliminate telemarketing calls only from specific sellers, or telemarketers on behalf of those sellers, or on behalf of charitable organizations, by using the company-specific approach in the current Rule provision and the current FCC regulations.

In addition, the FTC also sought comment on whether consumers should be able to select other options such as restrictions on the days or hours of the day that calls may be received.

STATE "DO-NOT-CALL" LAWS

NARUC is pleased that the FTC “. . . recognizes that the interplay between the proposed national "do-not-call" registry and State "do-not-call" laws is very important.”¹ The proposed rulemaking purports to be “. . . neutral on the issue of preemption. It seeks comment on this issue and does not advance any particular view on how the national "do-not-call" registry should interface with existing State "do-not-call" requirements. There are a number of possible scenarios, including sharing of State and FTC "do-not-call" databases.”²

NARUC, via its resolution, supports and commends the FTC for its efforts to strengthen the TSR. We respectfully suggest that the continuation of existing State programs is in the public interest. Today twenty-two States have do not call lists and another 18 – 20 are actively considering legislation.

Our resolution both urges the FTC to strengthen protections against unwanted telemarketing activity, including establishment of a national "do not call" registry, and also respectfully requests that no action be taken by the FTC concerning the establishment of a national "do-not-call" registry that would diminish, harm or place additional financial burdens upon the existing State "do not call" registries

Dual Lists Enhances Deterrence and Leverages the Enforcement Staff of the FTC and the States.

Dual State and FTC regulations can only build on the successful joint enforcement efforts the FTC has experienced to date. In the proposed rulemaking, the Commission notes that the “. . . Act's enforcement scheme allows States to work together, and with the Commission, to jointly sue fraudulent telemarketers in a single action. {footnote omitted} The Commission's own experience confirms that the dual enforcement provision of the Act has been integral in attacking telemarketing fraud. Working together with States in "sweeps" targeted at specific types of telemarketing scams . . .” has been very effective.

As the FTC is aware, generally States are well positioned to receive and act on complaints because they are close to the consumers and familiar with carrier trends in their region. Several citations in the FTC proposed rulemaking cite anecdotal evidence of the extreme consumer interest and participation in current State programs.³ This suggests that State programs have had some impact on complaint levels. Given the rise of State lists and the concomitant likelihood of increased State enforcement activity, one easy way to decrease

¹ See, *Prepared Statement of the Federal Trade Commission on Proposed Amendment of the Telemarketing Sales Rule to Establish a "Do-Not-Call" Registry* before the Judiciary Committee, Senate of the Commonwealth of Kentucky, Frankfort, Kentucky (February 6, 2002).

² Id.

³ See, *e.g.*, Letter dated Jan. 21, 2000, from James Bradford Ramsay, NARUC, to Carole Danielson, FTC, and attached News Release (“More than 40,000 Vermont households are now enrolled in the national telemarketing “do-not-call” registry as a result of a statewide public awareness effort . . . , a more than five-fold increase over pre-campaign levels.”) See also, DNC Tr. at 57-58, 87-89, 94-95 (Florida’s list contains 112,568 names; Kentucky has 50,000 people enrolled; Georgia has signed up more than 180,000 people; Oregon has 74,000 names on its list). Telemarketing representatives report that about 2-5% of the consumers they call ask to be placed on a “do-not-call” list. DNC Tr. at 57-58, 87. Connecticut reports that almost half of its households are on a “do-not-call” list. DM News (June 4, 2001). More than 332,000 phone lines were on Missouri’s “do-not-call” list within a short time of its passage. St. Louis Post Dispatch, p. 8 (April 9, 2001). New York reports more than 1 million households had signed up for its “do-not-call” list by the time it took effect on April 1, 2001.

telemarketing complaints is for the FTC to assure its rules in no way hinder States' ability to enforce its own and the federal rules.

NARUC also respectfully suggests that the FTC can best leverage the deterrence of federal and State enforcement activity by imposing the federal "minimum" standards and allowing additional State requirements – and the associated enforcement actions and fines, proceed against offending telemarketers. The bad actors' exposure to a range of fines and enforcement authority is significantly enhanced by allowing the State lists to remain intact, which, in turn, helps take the profit from those that avoid List obligations while providing the maximum relief for consumers.

Dual Lists, in Tandem with Cooperative FTC-State Promotional Efforts, is Likely to Increase Consumer Awareness of, and Participation in both the National FTC List and the State List. It also actually makes it Less Likely Either List Will Contain Incorrect Data on a Particular Consumer.

Moreover, if the States and the FTC can work towards some sort of accommodation on State and FTC sign-up and promotional programs and sharing of their respective "lists" content, this will undoubtedly result in increased participation in both lists and likely reduce consumer confusion for those that have already signed up for a State lists – whether "free" or for a fee. Moreover, such information sharing makes it less likely either list will contain incorrect information about a particular consumer.

Setting a Federal minimum while retaining State lists with similar or enhanced protections, that may include remedies not available under the FTC's rules, has the added benefit of allowing States to reap some benefit from the effort and resources invested in their respective State programs thus assuring the most efficient use of the already expended State resources.

NARUC looks forward to continuing discussion with the FTC on how best to assure that consumers have realistic access to the full panoply of relief options available under both State and federal law. Through such cooperation both federal and State jurisdictions can improve the over-all effectiveness and efficiency in resolving complaints nation-wide.

As always, if you have any questions about these comments, please do not hesitate to contact me at 202.898.2207 or jramsay@naruc.org.

Respectfully Submitted,

James Bradford Ramsay
NARUC General Counsel

cc : Catherine Harrington-McBride
Karen Leonard
Michael Goodman
Carole Danielson
Michael Wroblewski

Resolution Concerning the FTC Notice of Proposed Rulemaking to Amend the Telemarketing Sales Rule, 16 CFR PART 310

WHEREAS, The National Association of Regulatory Utility Commissioners (NARUC) recognizes the Federal Trade Commission's (FTC) desire and interest to amend the Telemarketing Sales Rule, 16 CFR Part 310, and requests public comment by March 29, 2002 on the proposed changes; and

WHEREAS, The FTC's stated objective in the proposed rulemaking is to prohibit specific deceptive and abusive telemarketing acts and practices and to establish a national "do not call" registry for a two year trial period; and

WHEREAS, NARUC recognizes that despite the success of the existing Rule in correcting many of the abuses and bad practices in the telemarketing industry, complaints about abusive telemarketing practices continue to be filed with the offices of consumer groups, law enforcement agencies and State utility commissions in large numbers; and

WHEREAS, The escalating number of consumers upset with receiving unwanted telephone solicitations is further exemplified by the phenomenal growth in the Direct Marketing Association's ("DMA") list, which has grown to 4 million, increasing by 1 million since June 2000; and

WHEREAS, Consumers' continued frustration over receiving unwanted telephone solicitations at home have prompted twenty (20) States to pass "do-not-call" statutes as of January, 2002, and numerous other States are considering enacting similar laws that would create State-run "do-not-call" registries; and

WHEREAS, States that have enacted "do not call" legislation have gone to great financial expense in the implementation, operation and enforcement of their respective programs; and

WHEREAS, The FTC has requested comments as to whether its proposed rules should pre-empt State "do not call" statutes to the extent that the national "do not call" registry would provide more protection to consumers; *now therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened in its February 2002 Winter Meetings in Washington, D.C, urges all State Commissions to file comments on the FTC's notice of rulemaking; *and be it further*

RESOLVED, That the NARUC General Counsel shall file comments with the FTC on behalf of NARUC in conformance with this Resolution; *and be it further*

RESOLVED, NARUC urges the FTC to strengthen protections against unwanted telemarketing activity, including establishment of a national "do not call" registry, so long as these protections serve as nationwide minimum standards which do not preempt State regulations which provide greater protection to consumers and that the national registry incorporates existing "do not call" lists; *and be it further*

RESOLVED, That NARUC respectfully requests that no action be taken by the FTC concerning the establishment of a national "do-not-call" registry that would diminish, harm or place additional financial burdens upon the existing State "do not call" registries.

***Sponsored by the Consumer Affairs Committee
Adopted by the NARUC Board of Directors on February 13, 2002***

