

June 28, 2002

Via Hand Delivery

Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

**Re: Telemarketing Rulemaking – User Fee Comment
FTC File No. R411001**

Dear Secretary Clark:

We appreciate the opportunity to comment on the Federal Trade Commission's ("FTC" or "Commission") notice of proposed rulemaking (the "User Fee Rulemaking") on amendments to its Telemarketing Sales Rule¹ ("TSR"). This comment letter is submitted by Ameriquest Mortgage Company ("Ameriquest"), a nationwide residential mortgage lender.²

Ameriquest respectfully urges the FTC to refrain from adopting the rule as proposed. As detailed herein, we do not believe that the FTC has the authority to impose user fees on telemarketers, because applicable law provides that user fees may only be imposed on those who receive a special benefit from the underlying service or activity. In the case of a national do-not-call registry, it is consumers, not telemarketers, who would receive a benefit. Furthermore, even if the Commission did have the authority to impose a user fee on telemarketers, doing so would unfairly burden smaller-sized businesses, the cost of which would ultimately be passed on to consumers in the form of higher costs.

¹ 16 C.F.R. §§ 310.1 et seq.

² A description of Ameriquest and its operations is set forth in the comments Ameriquest provided to the Commission in response to the Commission's January 30, 2002 proposed amendments to the TSR. 67 Fed. Reg. 4,492 (January 30, 2002) (the "Registry Proposal").

This comment letter is divided into two parts. Part I sets forth our primary argument that a user fee cannot be imposed on telemarketers, because consumers, not telemarketers, would derive the benefit of the FTC's proposed database. Part II explains that even if the FTC could properly impose a user fee on telemarketers, doing so would harm smaller businesses by increasing their costs of operation, thus reducing competition and ultimately driving up the costs of consumer goods and services.

I. The FTC Does Not Have The Authority To Impose A User Fee On Telemarketers

Ameritrust does not believe that the FTC has the authority to impose a user fee on telemarketers to fund its proposed do-not-call registry.

A. Applicable Law Requires That User Fees Be Imposed On The Specific Beneficiaries Of The Underlying Agency Service

The FTC cites the Independent Offices Appropriations Act of 1952³ ("IOAA") as its authority for undertaking the User Fee Rulemaking.⁴ The IOAA states that each service or thing of value provided by an agency or a person must be "self-sustaining to the extent possible,"⁵ and indicates that if an agency establishes a charge for a service or thing of value provided by the agency, the charge must be: (i) fair; and (ii) based on (a) the costs to the government, (b) the value of the service or thing to the recipient, (c) public policy or interest served, and (d) other relevant facts.⁶

The Office of Management and Budget's Budget Circular No. A-25 Revised (the "Circular") provides guidance for agencies implementing the IOAA. The Circular "establishes Federal policy regarding fees assessed for government services."⁷ For a user fee to be permissible under the IOAA and the Circular, the persons required to pay the fee must derive a "special benefit," *i.e.*, a specific benefit from the underlying service or thing of value that goes beyond that accruing to the general public.⁸ The Circular

³ 31 U.S.C. § 9701.

⁴ See 67 Fed. Reg. 37,362 (May 29, 2002).

⁵ 31 U.S.C. § 9701.

⁶ 31 U.S.C. § 9701(b).

⁷ OMB Circular No. A-25 (Revised) ¶ 1.

⁸ OMB Circular No. A-25 (Revised) ¶ 4.

expressly prohibits an agency from imposing a fee where the identification of the “specific beneficiary” is “obscure” and the service primarily benefits the general public.⁹

B. The Specific Beneficiaries Of The Proposed Registry Are Consumers

In the User Fee Rulemaking, the Commission claims that its national registry would provide a “special benefit” to telemarketers. Specifically, the Commission indicates that the special benefit to telemarketers would consist of: (i) the ability to engage in telemarketing lawfully and in compliance with FTC regulations; and (ii) access to a list of consumers who have indicated a preference not to receive certain telemarketing calls for the purpose of focusing telemarketing sales.¹⁰

Contrary to the Commission’s claim, the national do-not-call registry will not confer a special benefit on telemarketers. In fact, just the opposite is true – a national registry would significantly impair the operations of the telemarketers who would be required to use it. As detailed in Ameriquest’s comments to the Registry Proposal, a national registry would seriously harm the businesses that would be subject to it, by increasing their costs of operation and placing them at a competitive disadvantage to those businesses not burdened by the rule.¹¹

⁹ OMB Circular No. A-25 (Revised) ¶ 6(a)(4). We note that courts have recognized the distinction between agency services designed to benefit the general public and those designed to convey a special benefit on specific beneficiaries. For instance, in Public Service Co. of Colorado v. Andrus, 433 F. Supp. 144 (Dist. Colo. 1977), the court discussed a 1950 Senate report that distinguished between the Department of Agriculture’s (“DoA”) meat inspection program and its meat grading program. Meat packagers are prohibited from packaging or marketing any meat before the DoA inspects the meat to determine its edibility. The DoA performs this inspection “service” for the “good of all the people.” Meat grading is rendered by the DoA only upon request of meat packagers and is designed to indicate the quality of meat rather than determine its edibility. In contrast to the inspection service, which benefits the public, the grading service benefits the meat packagers by assisting them to demonstrate the quality of their products. 433 F. Supp. 144, 151 (quoting S. Rep. No. 2120, 81st Cong., 2d Sess.). For this reason, the DoA can charge meat packagers for performing grading services, but not for performing inspection services. In the case of the do-not-call registry, the FTC proposes to provide a service that, like the DoA’s meat inspection service, would confer a benefit on the public, not the telemarketers required to comply with it. As such, imposing a fee on telemarketers for the registry would not be reasonable.

¹⁰ 67 Fed. Reg. 37,363 (May 29, 2002). Note that this argument assumes the adoption of the Registry Proposal as currently proposed.

¹¹ For instance, whereas independent mortgage companies such as Ameriquest would have to go to the expense and inconvenience of complying with the registry, depository institutions that compete with Ameriquest for mortgage loan customers would not.

Furthermore, although we strongly believe that consumers would ultimately be harmed if the Commission adopted the registry,¹² the putative beneficiaries of the registry would be the consumers who chose to include themselves on it, not the telemarketers who would be subjected to it. The Commission has repeatedly articulated that the proposed do-not-call registry is intended to benefit consumers. In its Registry Proposal, the FTC asserted that it undertook the rulemaking in an effort to protect consumers' privacy by providing a means for consumers "to be free of telemarketing calls."¹³

C. Cost Of Providing A Public Benefit Cannot Be Imposed On Telemarketers

Even if telemarketers would somehow receive some benefit from the proposed registry, the cost cannot be imposed on them. The key principle behind the IOAA is that there exist a nexus between the service provided by the agency and the person assessed the fee, other than the mere fact that the person is regulated by the agency. The case law is well settled that "tangential costs that bear no nexus to the services rendered cannot be recovered."¹⁴ In the event that the "benefit" – in this case, the registry – creates an independent public benefit, then the cost of providing the benefit to the public cannot be imposed on the regulated entities.¹⁵

The FTC has asserted that consumers would reap an independent public benefit from the creation of the database, namely the protection of their "privacy." Even if the FTC were correct that telemarketers would also somehow reap a benefit from the registry – *i.e.*, the ability to engage lawfully in their chosen business – it must subtract from the fees assessed to telemarketers the value of the benefit provided to consumers. This would result in a zero sum fee to telemarketers, because the Commission's costs in the creation of the database consist entirely of compiling the names of consumers (upon their request) and the cost of such consumers' toll-free calls to the Commission. In short, the Commission cannot charge telemarketers for the registry, because there is no nexus between the cost of creating the registry and the value derived by telemarketers.

¹² As detailed in Ameriquest's comments on the Registry Proposal, a national database would reduce the product and service choices available to consumers, decrease competition among goods and services providers, and increase costs to consumers.

¹³ 67 Fed. Reg. 4,518-19 (January 30, 2002).

¹⁴ Nat'l Cable Television Ass'n, Inc. v. FCC, 554 F.2d 1094, 1107 (D.C. Cir. 1976).

¹⁵ Central & Southern Motor Freight Tariff Ass'n v. United States, 777 F.2d 722, 732 (D.C. Cir. 1985).

In summary, because consumers, not telemarketers, are the intended beneficiaries of the national database, we believe that the IOAA and Circular prohibit the FTC from charging telemarketers a user fee to create the national registry.

II. The User Fee Rulemaking Would Be Harmful To Small Businesses And Consumers

Ameritrust believes that even if the FTC could properly impose a user fee on telemarketers for accessing a national registry, doing so would harm smaller businesses by increasing their costs of operation, thus reducing competition and driving up the costs of consumer goods and services.

A. The Registry Will Cost More Than The Commission Estimates

To begin with, we believe that the actual cost of establishing a national registry, and the resulting user fees, will be significantly higher than the Commission estimates.

The User Fee Rulemaking explains the process by which the FTC calculated the expected amount of the user fee. Specifically, the Commission estimated that the cost to develop and implement a national registry would be approximately \$5 million in the first year, and that it would need to raise \$3 million of this total cost from user fees. Furthermore, based on industry literature, the FTC approximated that the number of telemarketers that would need to access the registry is approximately 3,000.¹⁶ The FTC divided the estimated cost of the registry by the number of anticipated telemarketers and the number of area codes the telemarketers are likely to utilize, and concluded that each of the 3,000 telemarketers would be required to pay \$12 per area code per year. The user fee would be capped at \$3,000 per year per telemarketer.

We believe that the total cost to create a national registry would significantly exceed the \$5 million projected by the Commission. As the Commission knows, a number of states have recently adopted do-not-call statutes. We looked to these states for guidance with respect to projected costs. In California, for example, the Senate Rules Committee report to Senate Bill 771 (which established California's Do-Not-Call registry) projected the fiscal impact to the state as \$2.2 million in start-up costs alone.¹⁷

¹⁶ 67 Fed. Reg. 37,364 (May 29, 2002).

¹⁷ Senate Rules Committee, Bill Analysis (September 12, 2001).

The population of the State of California, as of 2001, was approximately 34 million.¹⁸ The population of the United States, in comparison, is 287 million. Thus, even though California's population is less than one eighth of the United States' population, the estimated cost of the California registry was close to one half of the FTC's estimated cost of the national registry. Although we recognize that there may be some economies of scale, we believe that it will cost significantly more than twice the amount of the California registry to implement a national registry designed to accommodate more than eight times the population of California. Accordingly, we believe that the actual user fees required to fund the Commission's proposed registry would be significantly higher than the Commission estimates.

B. The User Fee Is Only Part Of The Cost And Would Disadvantage Smaller Businesses And Harm Consumers

Of course, the proposed user fees represent only a fraction of the total economic burden that a national registry would impose on businesses that engage in telemarketing. The operational costs that would result from the Registry Proposal are staggering. These operational costs include, but certainly are not limited to, the cost of integrating the registry into the telemarketers' systems, the cost of training staff to utilize the registry, and the cost of integrating compliance with the FTC's registry with other registries, such as the Direct Marketing Association registry and the registries of the many states that have enacted do-not-call requirements.

As detailed in Ameriquest's comments to the Registry Proposal, the businesses that rely on telemarketing to advertise their goods and services tend to be smaller businesses that cannot afford other, more expensive forms of marketing. In contrast, larger companies can afford other, more expensive forms of advertising and would in any case be better equipped to bear the burden and absorb the costs of implementing a national registry. As a result, the user fees proposed by the Commission, combined with the other costs that would result from the Registry Proposal, would disproportionately burden smaller companies and put them at a considerable disadvantage to their larger competitors. Of course, this result would harm consumers by reducing the product and service choices available to them, and driving up the costs of those products and services that would remain available.

*

*

*

*

¹⁸ Source: U.S. Census Bureau.

Secretary Clark
Federal Trade Commission
June 28, 2002
Page 7

As detailed above, Ameriquest does not believe that the FTC has the authority to impose the cost of its proposed do-not-call registry on telemarketers. Furthermore, even if the Commission did have the requisite authority, we believe that forcing telemarketers to pay user fees would place smaller businesses and consumers at a disadvantage. For these and the foregoing reasons, we respectfully urge the Commission to refrain from adopting the User Fee Rulemaking.

We would like to thank you for the opportunity to comment on the User Fee Rulemaking and for your consideration of our suggestions. If you or other members of the FTC staff have any questions, we would be pleased to discuss them with you.

Sincerely,

Ameriquest Mortgage Company

By: _____
Thomas J. Noto
General Counsel