

June 28, 2002

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room 159
Washington, DC 20580

Dear Mr. Secretary:

This comment letter is submitted on behalf of the Consumer Bankers Association (“CBA”)¹ in response to the Federal Trade Commission’s (“FTC”) notice of proposed rulemaking to amend the FTC’s Telemarketing Sales Rule (“TSR”) to impose user fees on telemarketers for their access to a national “do-not-call” list (“DNC list”) (“Fee Proposal”). According to the FTC, the Proposal would be implemented only if the FTC were to adopt a DNC list. CBA appreciates the opportunity to comment on the Proposal.

Summary

The CBA agrees with the need to establish a national DNC list. However, as we discussed in our previous comments to the FTC, we believe that any such proposal must provide for national uniformity with respect to all its provisions.² Although the CBA endorses the concept of a national DNC list, we believe that the current Proposal is not yet ripe for consideration. Although we believe it is prudent for the FTC to explore possible funding mechanisms for a potential DNC list, we do not believe enough information has been made available to properly evaluate the Proposal. For example, we are not aware of the underlying cost assumptions with respect to the FTC’s \$5 million cost projection for fiscal year 2003 (“FY2003”). It is also not clear how the DNC list will function. Without this information, it is difficult to assess whether the Fee Proposal would generate the appropriate level of revenue.

With respect to the user fee, CBA is concerned that sellers will be forced to absorb significant costs in connection with the Proposal, and such costs will necessarily be passed on to consumers—the very consumers who choose *not* to participate in the DNC list. We believe these costs may become significant in light of the fact that the \$3,000 annual cap is not a true limit. Furthermore, it is likely that the costs of the DNC list will exceed those projected by the FTC, which may result in additional costs on those who must access the DNC list. For these reasons, and others mentioned below, we believe the FTC should reevaluate the Proposal in its current form. Should the FTC decide that some costs should be recouped through a user fee, the FTC should reissue a proposed rule only once affected parties can assess the impact of the DNC list and additional information regarding cost and revenue estimates are provided.

¹ The Consumer Bankers Association is the recognized voice on retail banking issues in the nation’s capital. Member institutions are the leaders in consumer finance (auto, home equity and education), electronic retail delivery systems, bank sales of investment products, small business services, and community development. CBA members include 85% of the nation’s largest 50 bank holding companies and hold two-thirds of the industry’s total assets.

² See CBA’s comment letter of April 15, 2002, which further describes other issues we believe are necessary as part of a federal DNC operation.

Cost Assumptions

The FTC states that it expects the DNC list to cost \$5 million in FY2003. However, it is the experience of our members that providing such a service to the entire country will cost more than \$5 million in the first year. In fact, the attorneys general of 49 states, many of which who have had direct experience in creating similar lists and the attendant databases, enforcement regimes, etc., have stated that the \$5 million estimate “will not be adequate to create the [DNC list] database, much less to cover the costs of maintenance and enforcement, even assuming significant state assistance in that endeavor.”³

We believe it would be important for affected parties to understand how the FTC calculated the estimated expenses associated with the DNC list. Without knowing how this estimate was determined, it is difficult to assess whether it presents a realistic baseline for purposes of the actual costs which may be imposed on those who access the DNC list. In fact, there is relevant case law which notes that

the agency [proposing a user fee for a service] must provide a public explanation of the specific expenses included in the cost basis for a particular fee, and an explanation of the criteria used to include or exclude particular items....[T]he Administrative Procedure Act [also] requires the agency to make available to the public, in a form that allows meaningful comment, the data the agency used to develop the proposed rule.⁴

Revenue Assumptions

The FTC states that it intends to recoup \$3 million through the imposition of user fees on those who access the DNC list. CBA has no information with respect to how the FTC determined that \$3 million should be recovered, other than this was the amount suggested in the FTC’s budget proposal. We note that in proposing a \$3 million revenue target the FTC is guided in its efforts to develop the Proposal by the Independent Offices Appropriations Act of 1952 which states, in relevant part, that “each service or thing of value provided by an agency...to a person...is to be self-sustaining to the extent possible.” The FTC believes that a DNC list would provide those who rely on telemarketing a “thing of value,” *i.e.* a list of all consumers who have indicated a preference not to receive telemarketing calls. We would respectfully suggest that the current law is more valuable in this regard, allowing consumers to opt out of receiving calls only from those entities which consumers find annoying or invasive without penalizing sellers who strive to telemarket in a consumer-friendly manner.

³ Comments and Recommendations of the Attorneys General of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Northern Mariana Islands, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, Wyoming, the Corporation Counsel of the District of Columbia, and the Hawaii Offices of Consumer Protection, *In the Matter of: Telemarketing Review – Comment FTC File No. R411001*, at 25.

⁴ *Engine Manufacturers Ass’n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994) (cites omitted).

However, with respect to what an appropriate revenue target may be, case law suggests that the FTC may charge no more than the reasonable cost it incurs to provide the “thing of value,” or the value of the service to the recipient, whichever is less.⁵ Even if the FTC’s \$5 million cost estimate with respect to the DNC list were accurate, we are not aware of any estimates with respect to *the value of the service provided* to those who will pay the user fee. CBA believes that such information would be important in order to properly evaluate the FTC’s baseline assumption that \$3 million in user fees should be assessed. We also believe that information regarding the value of the benefits provided to the public would be an important component to an evaluation of the revenue target. In fact, the Supreme Court has stated, in the context of the Federal Communications Commission’s (“FCC”) imposition of annual fees on community antenna television (“CATV”) systems, that

it is not enough to figure the total cost (direct and indirect) to the [FCC] for operating a CATV unit of supervision and then to contrive a formula that reimburses the [FCC] for that amount. Certainly some of the costs inured to the benefit of the public, unless the entire regulatory scheme is a failure, which we refuse to assume.⁶

Given this opinion, we believe it would be important for the FTC to provide an analysis of “the costs inured to the benefit of the public” in order to determine whether the costs of the DNC list have been apportioned appropriately.

Impact of the DNC List

The FTC has requested comment with regard to whether the Proposal will generate \$3 million in FY2003. For purposes of revenue calculations, the FTC estimates that 3,000 telemarketers will access an average of 83 area codes at \$12 per area code, resulting in approximately \$3 million in user fees. The estimate that 3,000 telemarketers will access the DNC list is based on the fact that a large state with a similar DNC list had almost 3,000 telemarketers access the list.

We do not believe we can provide the FTC with a meaningful estimate of how much revenue will be generated by the Proposal. Specifically, we do not know how the DNC list will be implemented and what its impact will be on the industry. There are several variables associated with the DNC list which may have a substantial impact on how many entities will be required to access the DNC list. There are also several variables that will affect business decisions with respect to telemarketing, and whether some sellers may abandon this method of reaching consumers altogether. In short, the CBA does not believe that enough information is available to determine how many people will be assessed a user fee, or how often.

Overall Cost to Industry and Consumers

We believe that sellers of products will be forced to absorb significant costs under the Proposal. As noted above, CBA believes that the Proposal significantly understates the cost of implementing and maintaining the DNC list. We are concerned that the FTC would attempt to

⁵ *National Cable Television Ass’n v. FCC*, 554 F.2d 1094, 1104-07 (D.C. Cir. 1976).

⁶ *National Cable Television Ass’n v. U.S.*, 415 U.S. 336, 343 (1974).

recover any additional costs through increased user fees. Furthermore, we do not believe that the FTC has proposed a true cap on annual user fees. Specifically, although the Proposal provides for a \$3,000 annual fee cap, the cap would apply to a telemarketer—not to a seller.⁷ Therefore, it is conceivable that, under the Proposal, a seller could be forced to absorb well over \$3,000 if it relies on more than one telemarketer to provide services in a single year. Furthermore, a diversified company which provides products through many different subsidiaries would be forced to incur \$3,000 *per subsidiary*.⁸ The cost burden is likely to be amplified if the cap were increased in light of the DNC list’s actual increased costs.

The costs of the DNC list will not be limited only to sellers and telemarketers. In fact, we believe the FTC must consider the affect that the Proposal will have on consumers who purchase products offered through telemarketing. Market forces will require sellers to recoup much, if not all, of the costs imposed by the Proposal. Therefore, additional costs will be passed to consumers who purchase products offered through telemarketing. *It seems unfair that consumers who choose not to participate in the DNC list will pay a significant portion of the costs for those who do.*

Access

Under the Fee Proposal, only “telemarketers” (as defined in the TSR) would have access to the DNC list. Although access to the DNC list must necessarily be limited, we believe there are reasons why others should be permitted access to the DNC list. For example, not all sellers are “telemarketers,” yet the Proposal should not deny a seller access to the DNC list. The DNC list may be important to a seller evaluating whether a telemarketing campaign would be a sound business decision or to evaluate its telemarketer’s compliance with the TSR. There are many others who should have access to the DNC list, such as federal regulators, law enforcement, service providers, etc. We believe the FTC should consider these factors and amend the Proposal accordingly.

Reevaluation of the Proposal

Given the uncertainties surrounding the Proposal, including the actual cost to the FTC, the value provided to those who would pay a user fee, the benefit provided to the public, and the true impact of the DNC list, we believe the FTC should reevaluate the Proposal at this time. In fact, in light of the complexities in assessing a user fee and the inherent unfairness of taxing (indirectly) consumers who purchase products over the phone, we believe the FTC should consider alternative funding mechanisms, including the use of general revenues, to cover the cost of the DNC list. Should the FTC, after reevaluating the Proposal, determine that it wishes to proceed with respect to assessing user fees, we urge the FTC to reissue a proposed rule which addresses the concerns raised above.

⁷ Indeed, the FTC should consider revising the Proposal so that the user fee is assessed in a manner which provides more uniformity—a seller who uses only one telemarketer all year for nationwide telemarketing campaigns should not be more favorably treated than another who uses several telemarketers to conduct similar campaigns.

⁸ We also note that, given the prevalence of sales through subsidiaries, the proposed fee mechanism may prove complicated for telemarketers attempting to determine whether (and when) they must pay an additional fee on behalf of a seller.

Once again, CBA appreciates the opportunity to comment on this important matter. If you have any questions concerning our comments, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to contact me (703-276-3873, msullivan@cbanet.org) or Courtney Clelan (703-276-3883, cclelan@cbanet.org).

Sincerely,

Marcia Z. Sullivan
Director, Government Relations