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Via Electronic Delivery

June 28, 2002

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

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

To The Commission:

This comment letter is submitted on behalf of MasterCard International Incorporated ("MasterCard")¹ in response to the proposal published by the Federal Trade Commission ("FTC") that would amend the FTC's Telemarketing Sales Rule ("TSR") to impose user fees on telemarketers for access to a national "do-not-call" registry ("User Fee Proposal") which is the subject of an earlier proposal by the FTC.

Background

On January 30, 2002, the FTC proposed a broad revision to the TSR that included, among other things, a proposal to establish a nationwide "do-not-call" registry ("Registry Proposal"). The Registry Proposal is intended to enable a consumer to opt out of receiving telemarketing calls by adding his or her name to a registry maintained by the FTC. Under the FTC's Registry Proposal, telemarketers would be required to access the registry and ensure that they do not make telemarketing calls to consumers who have opted out. MasterCard and many other commenters expressed general support for the concept of a "centralized" do-not-call registry but also raised significant concerns regarding the Registry Proposal. For example, the Registry Proposal does not "centralize" the do-not-call process because it does not preempt the many state do-not-call provisions already in existence. In addition, the Registry Proposal does not

¹ MasterCard is a global membership organization comprised of financial institutions that are licensed to use the MasterCard service marks in connection with a variety of payments systems.

contain any exemption allowing businesses to contact their existing customers and raises a number of operational and logistical issues which have not yet been resolved.

On May 29, 2002, the FTC published its User Fee Proposal setting forth a proposed mechanism for funding the do-not-call registry. The User Fee Proposal would require telemarketers to pay an annual fee of \$12 per area code accessed from the registry. The annual fee would be capped at \$3,000 per telemarketer. Access to the registry would be limited to telemarketers, either working on their own behalf or on behalf of other sellers or telemarketers. Any telemarketer engaging in telemarketing on behalf of other sellers or telemarketers, or who uses the information included in the registry to remove telephone numbers from the telemarketing lists of other sellers or telemarketers, would be required to pay the annual fee(s) for each such seller or telemarketer, even if the parties are affiliated. Telemarketers would also be required to certify that they are accessing the registry solely to comply with the TSR. If a telemarketer is accessing the registry on behalf of other sellers or telemarketers, that telemarketer must identify each of the other sellers or telemarketers on whose behalf it is accessing the registry, and it must certify that the other sellers or telemarketers will be using the information gathered from the registry solely to comply with the provisions of the TSR.

Timing

As a general matter, MasterCard believes that some type of user fee imposed on telemarketers might be appropriate if the Registry Proposal were revised to preempt state telemarketing laws, allow telemarketers and sellers to contact existing customers, and address other significant concerns including the restrictions on the use of preacquired billing information.² We do not believe, however, that the propriety of the User Fee Proposal can be assessed at this juncture. We believe it would be more appropriate for the FTC to propose a funding mechanism for the registry only once it becomes clear what the registry will be and how it will operate. Given the complexities associated with the Registry Proposal, and the FTC's need to address many particulars in the Registry Proposal, it is difficult for affected parties to predict what the impact of the amended TSR will be on their business practices. For this reason, it may not be realistic to expect those who will be affected by the registry to be in a position to provide the level of comments needed by the FTC to fully consider how to fund the registry.

² See MasterCard's comment letter to the FTC dated April 15, 2002 for a more detailed discussion of the necessary changes to the Registry Proposal.

For example, the basic issues of costs and recoupment cannot be analyzed adequately until additional details are known about how the registry will be implemented. The FTC expects the registry to cost \$5 million in Fiscal Year 2003 ("FY03") and would like to recoup \$3 million in FY03 through user fees. We are concerned that the accuracy of this estimate may be difficult to assess in view of the many variables regarding the registry itself. We understand that the FTC expects to: (i) provide toll-free access to the registry; (ii) use a computer system to match the telephone number to the number from where the individual was calling; (iii) provide other options for those that do not match; (iv) provide a customer inquiry line; and (v) absorb the equipment and personnel costs associated with maintaining a large database accessible to thousands of businesses.³ The FTC expects that up to 60 million consumers will add themselves to the registry. Assuming that only half of those consumers register in the first year, that would mean that it would cost just over 16 cents to register (and maintain records for) each consumer if the FTC's \$5 million estimate were correct. This figure seems to be low based on available information regarding just the cost of each toll-free call. But without knowing the specifics with respect to the operation of the registry, it is impossible to know whether the \$5 million cost estimate, or other estimates aimed at recouping such costs, would be reasonable.

Regardless of evaluating the ultimate costs or amount of fees needed to recoup those costs, it is extremely difficult to project how much revenue will be generated by the User Fee Proposal. Given the scope of the proposed changes to the TSR as a result of the Registry Proposal, current business practices could be significantly affected. Until the final details of the registry, and the final TSR in general, are known, businesses cannot make projections as to how their marketing patterns will be affected or how they will use the registry. Issues such as whether it will be necessary to refer to the registry in order to call current customers, and how the FTC's approach will relate to existing state requirements, are significant variables in any revenue estimation. Furthermore, many current practices may be reduced in some degree depending on how issues such as the use of preacquired account information are resolved. Finally, many telemarketing campaigns may not be undertaken at all due to the increased costs associated with many of the items in the Registry Proposal.

In sum, given that it is difficult to: (i) know what the true cost of the registry will be to the FTC, (ii) estimate what a realistic revenue target should be, and (iii) predict the volume of revenue generated, we are concerned that the User Fee Proposal may be premature at this time. Therefore, we request that the FTC either withdraw the current User Fee Proposal or reissue a second proposed rule once the details of the registry are developed and made public.

³ See the User Fee Proposal and comments made by David M. Torok, staff attorney for the FTC, at the FTC forum on June 5, 2002 regarding the Registry Proposal.

The User Fee

In developing the User Fee Proposal, the FTC notes that it is guided in its efforts 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" and that the head of each agency may prescribe regulations establishing the charge for a service provided by the agency. The FTC states that if a registry is implemented, it will provide a "thing of value" to telemarketers — a list of all consumers who have indicated a preference not to receive telemarketing calls — and therefore it is appropriate to charge telemarketers a user fee.⁴ MasterCard respectfully notes that telemarketing under the registry as proposed may be *less* valuable to many telemarketers and sellers than telemarketing under the current law. In this regard, current law allows consumers to prevent specific companies from telemarketing to them. However, the registry is essentially an all-or-nothing approach which will not reward companies for engaging in reasonable and consumer-friendly telemarketing practices. Rather, such companies are likely to suffer on account of less appealing telemarketers driving consumers to place their telephone numbers on the registry. The "opt in" approach in the Registry Proposal, which is apparently intended to alleviate the all-or-nothing impact, is not likely to be workable. As suggested above, however, if the Registry Proposal were modified to include preemption, to permit the ability to continue contact with existing

⁴ We note that existing case law may be relevant to the FTC as it makes any final determination regarding the appropriateness of the user fee. For example, the Supreme Court has stated in a circumstance similar to that addressed in the User Fee Proposal, in addressing the Federal Communications Commission's 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 Commission for operating a CATV unit of supervision and then to contrive a formula that reimburses the Commission 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." *National Cable Television Ass'n v. U.S.*, 415 U.S. 336, 343 (1974).

In addition, in *National Cable Television Ass'n v. FCC*, 554 F.2d 1094, 1104-07 (D.C. Cir. 1976), it was noted that an agency 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.

Also, the D.C. Circuit Court of Appeals has stated that "the agency [seeking to impose the fee] 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." *Engine Manufacturers Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994) (cites omitted).

customers, and to resolve other important issues,⁵ the Registry Proposal may provide a thing of value thereby justifying a user fee.

Access

The User Fee Proposal would restrict access to the registry to "telemarketers," as defined in the TSR. Although we believe the FTC has appropriately highlighted the need to restrict access to the registry, we urge the FTC to allow access by a limited set of others. For example, there are many reasons a seller who is not a telemarketer should be permitted access to the registry, such as in order to evaluate whether to undertake a sales campaign through a telemarketer. Without access to the registry, a seller also could not evaluate its telemarketer's compliance with the TSR as proposed in § 310.4(b)(2)(vi) of the TSR. There may be reasons that entities other than sellers or telemarketers may need access to the registry, such as for use by law enforcement or other federal or state agencies. Therefore, we urge the FTC not to limit access to the registry only to telemarketers.

Assessment of Fees

The FTC intends to impose the user fee on telemarketers who access the registry. Furthermore, any telemarketer who engages in telemarketing on behalf of other sellers or telemarketers, or who uses the information included in the registry to remove telephone numbers from the telemarketing lists of other sellers or telemarketers, would pay this fee for each such seller or telemarketer, even if the parties are affiliated. This approach raises a number of concerns. For example, we do not believe that one seller who uses multiple telemarketers for a single nationwide campaign should absorb more costs than a similar seller who uses one telemarketer for multiple nationwide campaigns. It is also not clear how this approach would operate in the context of products offered by more than one entity.

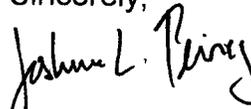
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⁵ See MasterCard's comment letter to the FTC dated April 15, 2002 for a more detailed discussion of the necessary changes to the Registry Proposal.

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MasterCard 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 call me, at the number indicated above, or Michael F. McEneney at Sidley Austin Brown & Wood LLP, at (202) 736-8368, our counsel in connection with this matter.

Sincerely,



Joshua L. Peirez
Vice President &
Senior Legislative/Regulatory Counsel

cc: Michael F. McEneney, Esq.