

II. Access to the Do-Not-Call Registry

A. Entities That Are Allowed Access

In the User Fee NPRM, the Commission proposed limiting access to the national do-not-call registry to telemarketers in order to maintain the security of the information included in the registry.³ In addition, because the proposed amendments to the TSR prohibited the use of information in the national registry for any purpose other than compliance with the do-not-call provisions of the Proposed Rule, the Commission believed that only telemarketers would need to access that information.

A number of commenters stated that broader access to the national registry is necessary. In particular, some commenters suggested that sellers⁴ should be allowed to gain access to evaluate telemarketing campaigns run on their behalf and to evaluate telemarketers' Rule compliance.⁵ Others suggested that "outside compliance firms" and "list scrubbers" should be given access, since they provide a valuable service for telemarketers.⁶ Still others stated that telemarketers and sellers who are exempt from the FTC's jurisdiction would have no access to the list even if they want to voluntarily suppress calls. These commenters suggested that the FTC make the registry available to any entity provided that the information in the registry is used solely for the purpose of preventing telephone calls to numbers on that list.⁷

The Commission agrees that broader access to the national do-not-call registry may be necessary to effectuate more fully the primary purpose of the do-not-call regulations; namely, to enable consumers to stop unwanted telemarketing calls. Limiting access only to telemarketers, as defined by the Amended TSR, would prevent those entities that are exempt from the FTC's jurisdiction, but that want to scrub their calling lists as a matter of customer service, from obtaining the information necessary to do so. Such limited access also may prevent sellers from engaging in thorough Rule compliance, and may unnecessarily hinder the services provided to the telemarketing industry

by list brokers and others. At the same time, the Commission agrees with the comment of NASUCA that the information in the national registry should be used for no other purpose than to stop unwanted telemarketing calls.⁸ As a result, the Commission now proposes, at Section 310.8(e), to allow access to the national registry by telemarketers, sellers, others engaged in or causing others to engage in telephone calls for commercial purposes, and service providers acting on behalf of such persons.⁹ Prior to gaining such access, a person would be required to certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent calls to telephone numbers on the registry.

B. Entities That Are Required To Pay the Fee

The User Fee NPRM proposed requiring telemarketers who gained access to the national do-not-call registry to pay for that access. In addition, the User Fee NPRM proposed requiring telemarketers who engage in telemarketing on behalf of sellers or other telemarketers, or who use the information included in the registry to remove telephone numbers from the telemarketing lists of sellers and other telemarketers, to pay a fee for each such seller or telemarketer.¹⁰

A number of commenters criticized this provision, claiming that it would result in sellers, telemarketers, and list brokers paying the proposed user fee multiple times for the same information.¹¹ Some commenters pointed out that many sellers use more than one telemarketer in any given year, and such sellers would be required to

purchase access to the national registry many times over.¹² As one commenter stated, 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."¹³ Other commenters maintained that telemarketers calling on behalf of multiple clients "should pay only one user fee and not a fee for every client on whose behalf they perform this service."¹⁴ On the other hand, NCL commented that if list brokers are allowed access to the registry, their payments should be based upon the number of clients they represent. "Charging them only for the total number of area codes they obtain would be unfair to telemarketers that do not use list brokers and would undermine the economic viability of the registry."¹⁵

The Commission does not intend to charge the same company multiple times for access to the national registry, and has gained much relevant and important information from comments on its original proposal. At the same time, the Commission is now guided by congressional authority permitting it to cover the costs of implementing and enforcing the do-not-call provisions of the Amended TSR, estimated at \$18.1 million this fiscal year. The Commission seeks to raise those funds as equitably as possible, to ensure that the burden of the fees is fairly divided among the entire business community that benefits from the making of outbound telephone calls.

To avoid billing entities twice for the same information, and to divide the fees among the industry in an equitable manner, the Commission is now proposing that each seller must pay, on an annual basis, the appropriate fee for accessing the national registry prior to initiating, or causing a telemarketer to initiate, an outbound telephone call.¹⁶

³ See NASUCA—User Fee at 7–8.

⁹ Proposed Section 310.8(e) also permits access to the national registry by any government agency that has the authority to enforce a federal or state do-not-call statute or regulation. Such agencies will access information in the national registry through a dedicated, secure website available only to them.

¹⁰ User Fee NPRM at 37363 and proposed § 310.9(a).

¹¹ DMA also maintained that the payment structure proposed in the User Fee NPRM may violate the Paperwork Reduction Act, 44 U.S.C. 3506 *et seq.* ("PRA"), which prohibits federal agencies from restricting or regulating the use, resale, or re-dissemination of public information by the public, and Section 105 of the Copyright Act, 17 U.S.C. 105, which expressly bars the federal government from copyrighting its own works. The Commission disagrees with the DMA's interpretations of these laws. First, the registry list of telephone numbers of consumers who express a preference not to be called by telemarketers is not "public information," as that term is used in the PRA. In fact, dissemination of the list to the public is a violation of the Amended TSR. See 16 CFR 310.4(b)(2). Second, the Commission is in no way attempting to copyright the information contained in the national registry.

¹² See, e.g., MasterCard—User Fee at 5; CBA—User Fee at 4; Discover—User Fee at 4; Household—User Fee at 6; VISA—User Fee at 2.

¹³ CBA—User Fee at 4. See also ITC—User Fee at 6 ("Service bureaus like our company typically represent multiple clients. It is also typical for our clients to use multiple telemarketing companies as vendors. Therefore, several telemarketing companies would end up paying the fee several times for the same seller.")

¹⁴ MBNA—User Fee at 3–4. See also ABA—User Fee at 3–4 (separate fees for both sellers and telemarketers unnecessarily complicates the payment schedule); ARDA—User Fee at 4 (there is "no legitimate reason for each seller that uses a single telemarketer to pay the same fee for scrubbing against the same list").

¹⁵ NCL—User Fee at 1.

¹⁶ The TSR defines an "outbound telephone call" as "a telephone call initiated by a telemarketer to

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³ User Fee NPRM at 37365 and proposed § 310.9(c).

⁴ The Amended TSR defines a "seller" as "any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration." 16 CFR 310.2(z).

⁵ See CBA—User Fee at 4; Discover—User Fee at 4–5; MasterCard—User Fee at 5.

⁶ See ARDA—User Fee at 5; NEMA—User Fee at 4.

⁷ See Discover—User Fee at 4–5; Household—User Fee at 5–6; MBNA—User Fee at 3.