

## FEDERAL TRADE COMMISSION

## 16 CFR Part 310

## Telemarketing Sales Rule Fees

AGENCY: Federal Trade Commission.

ACTION: Final rule.

**SUMMARY:** The Federal Trade Commission (the "Commission" or "FTC") is issuing this Final Rule to amend the FTC's Telemarketing Sales Rule ("TSR") by adding a new Section 310.8 that would impose fees on entities accessing the National Do Not Call Registry.

**EFFECTIVE DATE:** Section 310.8 ("the Final Fee Rule") will become effective September 1, 2003, the first day that entities engaged in telemarketing will be able to access the National Do Not Call Registry.

**ADDRESSES:** Requests for copies of this Final Fee Rule should be sent to: Public Reference Branch, Federal Trade Commission, Room 130, 600 Pennsylvania Avenue, NW., Washington, DC 20580. The complete record of this proceeding is also available at that address, and on the Internet at: <http://www.ftc.gov/bcp/rulemaking/tsr/tsrrulemaking/index.htm>.

**FOR FURTHER INFORMATION CONTACT:**

David M. Torok, (202) 326-3075, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:****I. Background**

On January 30, 2002, the FTC published a Notice of Proposed Rulemaking to amend the FTC's TSR and to request public comment on the proposed changes. 67 FR 4492 (Jan. 30, 2002) ("the Rule NPRM"). Among other provisions, the Rule NPRM proposed to establish a National Do Not Call Registry, to be maintained by the FTC, that would permit consumers who prefer not to receive telemarketing calls to register on one centralized list. On May 29, 2002, the FTC published another Notice of Proposed Rulemaking to further amend the TSR by imposing user fees on sellers and telemarketers to access the proposed registry. 67 FR 37362 (May 29, 2002) ("the User Fee NPRM"). In drafting the User Fee NPRM, the Commission was guided by the Independent Offices Appropriations Act of 1952, 31 U.S.C. 9701, and Office of Management and Budget Circular No. A-25. The Commission received 34 comments in response to the User Fee NPRM.

The Commission issued final amendments to the TSR on December 18, 2002. 68 FR 4580 (Jan. 29, 2003). Among the changes made to the TSR, the Commission adopted the proposal to establish a National Do Not Call Registry, permitting consumers to register, via either a toll-free telephone number or the Internet, their preference not to receive telemarketing calls. The Amended TSR requires telemarketers to refrain from calling consumers who have placed their numbers on the national registry, starting October 1, 2003, the date by which full compliance with the "do-not-call" registry provisions of the Amended TSR, 16 CFR 310.4(b)(1)(iii)(B), is required. *See* 68 FR 16238, 16245 (April 3, 2003). To comply with this requirement, telemarketers will be required to access the national registry at least once every three months to remove from their telemarketing lists the telephone numbers of those consumers who have placed their numbers on the registry. 16 CFR 310.4(b)(3)(iv). When it promulgated the Amended TSR, the Commission reserved its decision on the issues raised in the User Fee NPRM, stating that it would seek further comment in a revised Notice of Proposed Rulemaking. *See* 68 FR 4580, 4640 n. 716.

On February 20, 2003, the President signed into law the Consolidated Appropriations Resolution of 2003, Pub. L. 108-7 (2003) ("the Appropriations Act"), which appropriated funds for the operation of the FTC during fiscal year 2003. In the Appropriations Act, Congress also authorized the agency to collect fees sufficient to implement and enforce the "do-not-call" provisions of the Amended TSR. Congress further estimated the costs for fiscal year 2003 at \$18,100,000. *Id.* at Division B, Title II. *See also* The Do-Not-Call Implementation Act, Pub. L. 108-10 (2003) ("the Implementation Act") at sec. 2. Pursuant to the Appropriations Act and the Implementation Act, as well as the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-08 ("the Telemarketing Act"), the FTC issued a Revised Fee Notice of Proposed Rulemaking ("the Revised Fee NPRM"). 68 FR 16238 (April 3, 2003). The Commission received 35 comments in response to the Revised Fee NPRM.<sup>1</sup>

<sup>1</sup> A list of the commenters in this proceeding, and the acronyms used to identify each, is attached hereto as Appendix A. Comments submitted in response to the Revised Fee NPRM will be cited in this Notice as "[Acronym of Commenter]-Revised Fee at [page number]." Comments submitted in response to the User Fee NPRM will be cited as

On July 3, 2003, the Federal Communication Commission ("FCC") issued its Report and Order in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 ("the FCC Rules").<sup>2</sup> Among numerous other provisions, the FCC Rules prohibit any "person or entity" from "initiating any telephone solicitation" to a "residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government."<sup>3</sup>

Based on its review of the record in this proceeding, and on its law enforcement experience in this area, the Commission hereby promulgates this Final Rule establishing fees for entities accessing the National Do Not Call Registry.

**II. Constitutionality**

Some commenters, principally ATA and DMA, contended that both the National Do Not Call Registry and its associated fees would violate telemarketers' First Amendment rights.<sup>4</sup> The Commission was mindful of the First Amendment implications of the national registry while amending the TSR,<sup>5</sup> and throughout this rulemaking has carefully considered the constitutionality of the proposed Fee Rule.<sup>6</sup>

Relying primarily on case law addressing speech entitled to full First Amendment protection, ATA contended the registry's fees are unconstitutional in part because by "making purchase of the list a precondition for engaging in telemarketing, the Commission has structured the list as a prior restraint on protected speech."<sup>7</sup> The Commission

"[Acronym of Commenter]-User Fee at [page number]."

<sup>2</sup> The FCC Rules may be found at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-03-153A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-153A1.pdf).

<sup>3</sup> 47 CFR 64.1200(c)(2), amended July 3, 2003.

<sup>4</sup> *See* ATA-Revised Fee at 1-16; DMA-Revised Fee at 6-7. *See also* ICL-Revised Fee at 5-6 (asserting simply "Given that the nondeceptive and nonmisleading telemarketing activity is protected commercial speech, the decision to charge some persons, corporate or individual, more than others with no relation to furtherance of residential privacy is unconstitutional."); DB-Revised Fee; JJ-Revised Fee; BP-Revised Fee; GS-Revised Fee; JS-Revised Fee; & SS-Revised Fee at 1-2 (individuals voicing concerns about freedom of speech).

<sup>5</sup> *See, e.g.*, 68 FR 4580, 4634-37 (January 29, 2003).

<sup>6</sup> To the extent that ATA and DMA challenge the constitutionality of the National Do Not Call Registry itself, and not the fee proposal, the rulemaking on the registry is closed and the parties are briefing the matter for the courts to decide.

<sup>7</sup> ATA-Revised Fee at 3-6. *See also* DMA-Revised Fee at 6 n.11 (contending "the Court took a dim