

disagrees and believes that the registry fee provision is constitutional. To the extent the fee imposes a restraint on speech, it restrains only commercial speech. The Supreme Court has “observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it.” See *Central Hudson Gas & Elec. v. Pub. Serv. Comm. of N.Y.*, 447 U.S. 557, 571 n.13 (1980) (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771–72 n.24 (1976)). Moreover, the Final Fee Rule ensures that the fee is collected from the telemarketing industry through procedures that safeguard against unbridled discretion in the hands of a government official or agency.<sup>8</sup> The registry fees are more akin to the registration fees or business licenses that are commonly imposed upon businesses before they can engage in commercial speech. A regulatory fee on speech is constitutionally permissible when it is related sufficiently to the costs of administering and enforcing that regulation.<sup>9</sup>

### III. Access to the National Do Not Call Registry

#### A. Entities That Are Allowed Access

In Section 310.8(e) of the Revised Fee NPRM, the Commission proposed 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.<sup>10</sup> The Commission stated

view of permits to engage in constitutionally protected speech whose issuance depended on the payment of a license tax because it acted as a prior restraint on speech”).

<sup>8</sup> ATA and DMA also challenge the fee size and structure. See, e.g., ATA-Revised Fee at 10 (categorizing the registry’s fee structure as “irrationally differentiated”); DMA-Revised Fee at 1. Because Congress’s guidance on the amount of the fees to be collected and the Commission’s efforts to tailor the fee structure are best understood in context, these First Amendment concerns will be addressed throughout the remaining sections of this Statement.

<sup>9</sup> See, e.g., *Coalition for Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1324 n.16 (11th Cir. 2000); *National Awareness Foundation v. Abrams*, 50 F.3d 1159, 1164–1168 (2d Cir. 1995).

<sup>10</sup> Proposed Section 310.8(e) also permitted 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 Consumer Sentinel, a dedicated, secure website available only to law enforcement agencies. The Commission is expanding this provision of the Final Fee Rule to allow access to the national registry to any “government agency that has law enforcement authority.” This revised language more effectively mirrors the list of law enforcement agencies that currently have access to Consumer Sentinel, and that therefore will have access to the national registry data.

that such access to the National Do Not Call Registry may be necessary to effectuate more fully the purpose of the “do-not-call” regulations; namely, to enable consumers to stop unwanted telemarketing calls. Such access would allow those entities that are exempt from the FTC’s jurisdiction, but that want to scrub their calling lists as a matter of customer service, to obtain the information necessary to do so. It also would allow sellers to obtain access, as well as other entities that have traditionally provided service to the telemarketing industry. The Commission further stated that the information in the national registry should be used for no other purpose than to stop unwanted telemarketing calls. Thus, the Commission proposed that, prior to gaining access to the national registry, 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.

A number of commenters supported the Commission’s proposal to allow for such broad access to the national registry.<sup>11</sup> Others suggested that nonprofit organizations soliciting donations also should be allowed to access the national registry. For example, DMA noted that such access would “effectuate the purposes of the do-not-call regulations” by allowing such entities to voluntarily scrub their calling lists.<sup>12</sup> The Commission agrees that nonprofit organizations that wish to obtain access to the national registry to prevent calling consumers whose telephone numbers are on the registry, even though they are not required by rule to do so, should be allowed the opportunity. As a result, the Commission is amending Section 310.8(e) by eliminating the phrase “commercial purposes” from this provision, and instead allowing access to the national registry to entities “engaged in or causing others to engage in telephone calls to consumers.” As previously stated, each entity will be required to certify, under penalty of law, that it is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent calls to telephone numbers on the registry.

<sup>11</sup> See ARDA-Revised Fee at 2; BOA-Revised Fee at 1; Household-Revised Fee at 2; NCL-Revised Fee at 1 (“Entities that are exempt from the FTC’s jurisdiction should not be prevented from voluntarily accessing the registry to avoid calling consumers who do not wish to receive telemarketing solicitations.”).

<sup>12</sup> DMA-Revised Fee at 15–16. See also NCL-Revised Fee at 1.

#### B. Entities Required To Pay the Fee

The Revised Fee NPRM proposed requiring each seller to pay, on an annual basis, the appropriate fee for accessing the National Do Not Call Registry prior to initiating, or causing a telemarketer to initiate, an outbound telephone call. After paying the appropriate fee each annual period, the seller would be provided with a unique account number that it could use to gain direct access to the national registry at any time during its annual period.<sup>13</sup> In addition, the seller could provide its account number to any telemarketer or service provider with which it does business. That unique account number would permit the telemarketer or service provider to gain access to the information to which the seller has subscribed. The Commission noted that under this revised fee structure, each seller would be charged only one time annually for access to the information included in the national registry, and would be allowed to transfer its ability to access the national registry to whatever telemarketers or service providers it wished to employ on its behalf.

A number of commenters noted that the proposed rule would require certain sellers to pay for access to the national registry, even if they do not have to gain such access under the Amended TSR.<sup>14</sup> Specifically, under the Amended TSR, a seller that calls only persons with whom the seller has an established business relationship, or from whom the seller has obtained the express written agreement to call, is not required to access the national registry prior to engaging in those calls.<sup>15</sup> Nonetheless, as proposed, the Revised Fee NPRM would require such sellers to pay the annual fee prior to making such calls. ATA described this aspect of the proposed fees as a “particularly invidious prior restraint” and thus a violation of the First Amendment because telemarketers are forced to “pay a fee even where they have no use for information in the registry.”<sup>16</sup> As VISA noted, the FTC should “clarify in the final rule that if a seller is not required to access the registry pursuant to an exemption or otherwise, the seller

<sup>13</sup> As set forth in Section 310.8(d) of the Revised Fee NPRM and the Final Fee Rule, the “annual period” is defined as the twelve months following the first day of the month in which the person paid the fee. For example, a seller who pays its annual fee on September 15, 2003, has an “annual period” that runs from September 1, 2003 through August 31, 2004.

<sup>14</sup> See ABA-Revised Fee at 1; ATA-Revised Fee at 5–6; VISA-Revised Fee at 1–2.

<sup>15</sup> See 16 CFR 310.4(b)(1)(iii)(B)(i) and (ii).

<sup>16</sup> ATA-Revised Fee at 5–6.