

also expressly warned that a fee justified largely by the gross revenue of paying sellers would not survive judicial scrutiny.⁶⁹ ARDA suggested that the Commission should make access to the first five area codes free for all sellers. According to ARDA, the “small business that purchases that sixth area code is punished by having to pay for the first five. The small-to-medium business would be less inclined to circumvent the fee requirement if it were only required to pay an incremental cost (\$29) for the sixth and seventh and so forth area codes rather than \$174 for one additional area code.”⁷⁰

After evaluating all of the comments received in this proceeding, the Commission continues to believe that providing access to five area codes of data for free is an appropriate compromise between the goals of equitably and adequately funding the national registry, on the one hand, and providing appropriate relief for small businesses, on the other.⁷¹ Moreover, the Commission is persuaded that it would be more equitable to provide all firms free access to up to five area codes, rather than to only those firms that access five or fewer area codes. It is true that a relatively small firm could need to access six area codes of data. It does not seem fair to charge that firm the full cost for all six area codes, simply because it needed access to one area code more than another small firm. The marginal cost of that sixth area code should not be so high. As a result, the Commission will provide the first five area codes of data from the national registry free to all entities that gain access. Section 310.8 of the Fee Rule is revised accordingly.

C. Fees for Access

As set forth in the Background Section of this Statement, both the Appropriations Act and the Implementation Act authorize the Commission to assess fees sufficient to

cover the costs of implementing and enforcing the do-not-call provisions of the Amended TSR, estimated at \$18.1 million for fiscal year 2003. The Commission continues to anticipate that it will need to raise the entire estimated \$18.1 million authorized to cover the costs associated with those efforts in this fiscal year. A number of commenters claimed that the Commission failed to provide any indication how it intends to spend the \$18.1 million, and that the costs are not justified or necessary.⁷² The Commission disagrees.

As stated in the Revised Fee NPRM, costs for the National Do Not Call Registry fall primarily into three broad categories.⁷³ First are the actual estimated contract costs along with associated agency costs to develop and operate the national registry. This includes items such as handling consumer registration and complaints, the transfer of registration information from state lists to the registry, telemarketer access to the registry, and the management and operation of law enforcement access to appropriate information. The second category of costs relates generally to enforcement efforts. These costs will include law enforcement initiatives, both domestic and international, to identify targets and challenge alleged violators. Enforcement costs also include consumer and business education, which are critical complements to enforcement in securing compliance with the “do-not-call” provisions. The third category of costs covers agency infrastructure and administration costs, including information technology structural supports. In particular, the Consumer Sentinel system (the agency’s repository for all consumer fraud-related complaints) and its attendant infrastructure are being upgraded to handle the anticipated increased demand from state law enforcers for access to “do-not-call” complaints. Further, the Consumer Sentinel system will require substantial changes so that it can handle the significant additional volume of complaints that is expected.

To raise \$18.1 million this fiscal year, and assuming that 10,000 firms will pay for that access,⁷⁴ the Commission will

charge an annual fee of \$25 for each area code of data accessed.⁷⁵ There will be no fee charged to any entity for access to the first five area codes of data. In addition, the Commission will place a cap of \$7,375 as the maximum annual fee that will be charged an entity that wants access to the entire national database. The maximum fee will now be charged for accessing 300 area codes of data or more.⁷⁶ As a result of this Fee Rule, examples of fees that will be charged for various levels of access to the national registry are as follows: obtaining up to five area codes of data would have no charge; six area codes of data would cost \$25; seven area codes would cost \$50; thirty area codes would cost \$625; two hundred area codes would cost \$4,875; and access to the data from all area codes would be capped at \$7,375 annually.⁷⁷

37363. In addition, the Implementation Act clearly authorizes the Commission to raise the appropriate fees from the industry, and not from consumers.

⁷⁵ In the Revised Fee NPRM, the Commission assumed that, on average, sellers will pay to obtain information from 83 area codes of data in the national registry. See Revised Fee NPRM, 68 FR at 16244, n. 56. The addition of entities making intrastate calls will reduce the average number of area codes entities will pay to obtain from the national registry, as will our decision to allow all entities to obtain five area codes of data for free. As a result, the Commission is now estimating that the average entity accessing the national registry will purchase 73 area codes of data.

⁷⁶ The Commission is capping the maximum amount that will be charged for access to the entire national registry to ease the administrative burdens of operating the system and those faced by the largest users of the registry. There are currently 317 area codes included in the national registry, and more area codes are added on an irregular schedule. If there were no maximum fee for access to the national registry, every time a new area code were added, all entities that had paid for access to the entire database would be required to pay an additional fee prior to being able to download the national list. The Commission does not consider the limited additional fees that such a requirement would generate to outweigh this burden. More limited users, on the other hand, who have asked for a specific list of area codes of data, will need to change the scope of their access if they wish to obtain any newly added area codes. Because they already will be asking for a change in their access rights, it will be less of an administrative burden to charge those entities for the additional area codes. Thus, contrary to ATA’s suggestion, the cap in the proposed fee structure is sufficiently related to a consideration of the actual administrative costs of the registry to justify its use. See ATA-Revised Fee at 9.

⁷⁷ DMA contends that while “a nominal fee unrelated to content of the speech may be permissible under certain circumstances,” . . . “a much lower fee [than the Commission has proposed] is also needed to conform with Supreme Court First Amendment jurisprudence on monetary restrictions on speech.” DMA-Revised Fee at 1–2, 6–7. See also ATA-Revised Fee at 15. Contrary to the DMA’s comment, the fee need not be “nominal” so long as it is related sufficiently to the costs of administration and enforcement. Moreover, “[n]ominal is necessarily a relative term, to be judged by how substantial something is when

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⁶⁹ *Id.* at 12.

⁷⁰ ARDA-Revised Fee at 6. See also ATA-Revised Fee at 8. The FCC Rules note that thirty-three states currently have five or fewer area codes. See FCC Rules at ¶ 54.

⁷¹ The Commission continues to believe, as stated in the Revised Fee NPRM, that providing small businesses with exemptive relief more directly tied to size status would not balance the private and public interests at stake any more reasonably than the approach selected. Any reduced fee schedule based on a small business’ size, revenues, or profits would require a certification and determination of that status to implement and enforce, and thus would present greater administrative, technical, and legal costs and complexities than the approach selected by the Commission, which does not require proof or verification of small business status. See Revised Fee NPRM, 68 FR at 16243, n.52.

⁷² See DMA-Revised Fee at 2–6; ERA-Revised Fee at 6–7; MPA-Revised Fee at 5–6.

⁷³ See Revised Fee NPRM, 68 FR at 16244.

⁷⁴ A number of commenters continued to suggest that consumers should pay a portion of the costs to implement and operate the national registry. See, e.g., ARDA-Revised Fee at 7; IMC-Revised Fee at 7; MPA-Revised Fee at 7; PDS-Revised Fee at 1–3. As stated in the User Fee NPRM, the Commission does not believe it is appropriate to charge consumers to protect their privacy from unwanted and abusive telemarketing calls. See User Fee NPRM, 67 FR at