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“DO-NOT-CALL LIST” TESTIMONY
BEFORE THE HOUSE COMMITTEE ON ENERGY AND COMMERCE*

TESTIMONY BY: TIMOTHY J. MURIS

JANUARY 8, 2003

Mr. Chairman, I am Timothy J. Muris, Chairman of the Federal Trade Commission.¹ I am pleased to appear today, on behalf of the Commission, to provide the Committee with information about our recently-announced amendments to the Telemarketing Sales Rule (“TSR” or “Rule”). In particular, you have asked about our request for authority to collect fees to offset the costs of implementing the “do-not-call” amendments to the TSR. Our testimony provides an overview of the TSR amendment process, discussion of the do-not-call provisions, and an examination of the funding request. The do-not-call registry is an important aspect of the Commission’s ongoing efforts to protect consumers’ privacy, and we look forward to working with this Committee to ensure its implementation in fiscal year 2003.

I. The TSR Review

The FTC promulgated the do-not-call and other substantial amendments to the TSR under the express authority granted to the Commission by the Telemarketing and Consumer Fraud and Abuse Prevention Act (“the Telemarketing Act” or “the Act”).² The Telemarketing Act, adopted in 1994, directed the Commission to issue a trade regulation rule defining and prohibiting deceptive or abusive telemarketing acts or practices. Specifically, the Telemarketing Act mandated that the rule include prohibitions against any pattern of unsolicited telemarketing calls “which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy,”³ as well as restrictions on the hours unsolicited telephone calls can be made to consumers.⁴ Accordingly, the Commission adopted the Telemarketing Sales Rule on August 16, 1995, which, inter alia, defined and prohibited certain deceptive telemarketing practices,⁵ prohibited calls by any telemarketer or seller to any consumer who had previously requested not to receive such calls from that telemarketer or seller (the “company-specific” do-not-call provision),⁶ and prohibited calls to consumers before 8:00 AM or after 9:00 PM, local time for the consumer.

The Telemarketing Act directed the Commission to undertake a review of the TSR within five years of its promulgation.⁷ The Commission began its review of the TSR on November 24, 1999, with the publication of a Federal Register Notice announcing a public forum on January 11, 2000, to examine the TSR’s do-not-call provision.⁸ At that forum, industry representatives, consumer groups, and state law enforcement and regulatory officials discussed the existing do-not-call requirement, which prohibited telemarketers from placing calls to consumers who asked not to receive more calls from that telemarketer; efforts by industry at self-regulation in this area; the growing number of state laws establishing do-not-call lists; the absence of caller identification information for some telemarketing calls; and growing consumer dissatisfaction with unwanted and abandoned telemarketing calls.⁹

On February 28, 2000, the Commission published a second notice in the Federal Register, broadening the scope of its inquiry to encompass the effectiveness of all the TSR's provisions.¹⁰ This notice invited comments on the TSR as a whole.¹¹

In response to this notice, the Commission received ninety-two comments from representatives of industry, law enforcement, and consumer groups, as well as from individual consumers.¹² The comments uniformly praised the effectiveness of the TSR in combating the fraudulent practices that had plagued the telemarketing industry before the Rule was promulgated. They also strongly supported the Rule's continuing role as the centerpiece of federal and state efforts to protect consumers from interstate telemarketing fraud. Commenters questioned the effectiveness of the Rule's provisions dealing with consumers' right to privacy, such as the do-not-call provision and the provision restricting calling times. In particular, commenters noted that the company-specific do-not-call provision was extremely burdensome to consumers, open to violation, and hard to enforce. In addition, the company-specific do-not-call provision did not address the invasive and abusive potential of each company's initial call as telemarketing has vastly increased. They also identified a number of areas ripe for fraud and abuse, as well as the emergence of new technologies that affect telemarketing for industry members and consumers. Following the receipt of public comments, the Commission's second forum was held on July 27 and 28, 2000. On June 13, 2000, the Commission reported on its do-not-call review at a hearing before this Committee's Subcommittee on Telecommunications, Trade and Consumer Protection ("the Subcommittee") that focused on proposed legislation to protect consumers from unwanted telemarketing calls.¹³ Chairman Tausin opened the hearings with remarks about consumers' growing perception of telemarketing's intrusiveness. Noting that, from 1997 to 1999, the FTC experienced greater than an eight-fold increase in consumer complaints about telemarketing, Chairman Tausin observed:

We, of course, can only speculate as to the reason for this rise in consumer complaint. Perhaps more and more people see telemarketing as an intrusion on their personal in-home privacy, particularly during meal time. Don't we all have a sense of that? And perhaps pitches and telemarketing sales pitches and consumer relation practices are becoming more offensive.¹⁴

A look back at the Commission's consumer complaint data shows that Chairman Tausin's observation that consumers view unwanted telemarketing calls as an intrusion was correct: consumer complaints to the FTC about unwanted telemarketing calls have continued to increase significantly over the past three years.

II. The Do-Not-Call Amendments to the TSR

On November 7, 2001, the Commission testified before this Committee's Subcommittee on Commerce, Trade and Consumer Protection, and delineated its enforcement and programmatic priorities.¹⁵ Among the areas highlighted was consumer privacy. The Commission stated its intent to increase the resources dedicated to privacy protection and, specifically, to consider amending the TSR to create a national do-not-call registry.

The TSR review, in fact, offered several opportunities for the Commission to address privacy

protections. In January 2002, the Commission issued its Notice of Proposed Rulemaking (“NPR”) to amend the Telemarketing Sales Rule to address several important concerns raised by consumers during the rule review.¹⁶ First, the NPR proposed an amendment prohibiting telemarketers from blocking the transmission of caller identification information on outbound telephone calls. Second, the NPR proposed specific restrictions on the use of “predictive dialer” software that, the rule review record showed, resulted in consumers receiving “dead air” or disconnected calls from telemarketers. Finally, the NPR proposed to require telemarketers subject to the Rule to subscribe to a national do-not-call registry, to be established and maintained by the Commission, and to prohibit them from calling consumers who place their telephone numbers on the national registry.

The Commission ultimately received over 64,000 written comments in its rulemaking proceeding. The overwhelming majority of these comments expressed concern about unwanted telemarketing calls, and supported the do-not-call registry proposal.¹⁷ The Commission concluded that the rulemaking record showed that a national do-not-call registry was necessary to protect consumers’ privacy from an abusive pattern of calls placed by a seller or telemarketer, and formally announced its adoption of the do-not-call amendments on December 18, 2002.¹⁸

Throughout the rulemaking process, the Commission’s staff sought to harmonize its proposed registry with the states for maximum efficiency and cost-savings. At least twenty-seven states have enacted do-not-call laws, and twenty-five states have implemented their laws by establishing registries and collecting fees from telemarketers. To comply with these state laws, telemarketing firms that conduct business in all states are required to pay an estimated \$10,139 in annual fees to obtain the state registries. Without an effort to centralize these registries under one national system, states would continue to enact their own laws and establish their own registries. With over half of the states requiring telemarketers to buy their “no-call” lists, and more states considering legislation to do the same, telemarketers ultimately will have to purchase dozens of separate lists at an ever-increasing cost. A national system that also provides free access to the states is a more efficient approach.

As the Commission indicated in the Statement of Basis and Purpose for the amended Telemarketing Sales Rule, the amendment does not preempt state do-not-call laws.¹⁹ Based upon extensive discussions among the FTC staff and state enforcement colleagues, however, the Commission believes it likely that, over the next twelve to eighteen months, the FTC and the states will harmonize their do-not-call requirements and procedures. Indeed, we believe that most states will begin using the FTC’s do-not-call registry to satisfy state law requirements, and will stop operating their own registries and collecting fees from telemarketers subject to state “no call” laws. In the handful of instances where state do-not-call laws differ from the FTC’s amended TSR, we are hopeful that state authorities will ask their legislatures to amend their statutes to make them more consistent with the FTC’s Rule. We also are hopeful that state authorities will ask their legislatures to make technical amendments to a variety of state laws to make it possible for the states to transfer their registry data to the national registry; to permit telemarketers to subscribe to the national registry to comply with state laws; and to allow state agencies to phase out their state registries. Through harmonization, we believe we can eliminate costly inefficiencies to telemarketers by creating one national registry - that is, one source of

information - with one fee.

The national registry will provide efficiency benefits to consumers as well. It will give them an easy, no-cost way to sign up under both state and federal do-not-call laws, and to file complaints if telemarketers call them in violation of state or federal laws. Further, the national registry will benefit telemarketers by eliminating consumers from their lists who do not wish to be called. This should enable telemarketers to be more efficient and effective in conducting their marketing initiatives.

III. Funding and Offsetting Fee Collection Request

As mentioned earlier, the agency seeks Congressional approval to fund the operation of the do-not-call registry and its related functions through offsetting fee collections. We anticipate that the costs will fall primarily in three broad categories: (1) costs of development and operation of the do-not-call registry, including the handling of complaints; (2) enforcement costs, which includes consumer and business education and international coordination; and (3) agency infrastructure and administration costs, including information technology structural supports.

The first category relates to the development and operation of the do-not-call registry. The phrase “do-not-call registry” refers to a comprehensive, automated system that will handle a range of functions.²⁰ The system will enable consumers to register their telephone numbers via either a toll-free telephone number or a dedicated website. Both methods of registration will use technologies to provide reasonable assurance that the person registering is authorized to do so, and will retain only the telephone numbers of the registrant. To complement this registration process and enhance harmonization with existing state do-not-call lists, the registry will permit states to transfer their data into the registry.

Further, the system will allow telemarketers, at a minimum, quarterly access to all the registration information. Telemarketer access to the registry will be through a secure website maintained by the selected vendor, and will be granted based upon area codes selected by the telemarketer, following payment of the requisite fees.²¹

The system also must permit access by law enforcement agencies to appropriate information. Law enforcers will be able to obtain data to determine when a consumer registered, when or if a particular telemarketer accessed the registry, and what information (i.e., which area codes) the telemarketer accessed. Access by law enforcement agencies will be provided through the Commission’s existing Consumer Sentinel system, which is a secure Internet website.

Additionally, the system will be designed to handle complaints from consumers who indicate they have received telemarketing calls in violation of the TSR. Consumers will be able to lodge such complaints either by a toll-free telephone call or online.²²

In sum, the scope of the do not call system is considerable. It will have the immediate capacity to register and verify over sixty million telephone lines and process hundreds of thousands (and possibly millions) of complaints.²³

The second cost category consists of various expenditures to enforce the do-not-call and related TSR provisions. As with all TSR enforcement, we plan to coordinate “sweeps” with our state partners and the Department of Justice, thereby leveraging resources and maximizing the deterrent impact. Further, given the fact that various telemarketing operations are moving offshore, international coordination will be especially important in the future. As such, it is a vital part of our enforcement plan.

We consider consumer and business education as important complements to enforcement in securing compliance with the TSR. Past law enforcement initiatives have made clear that a key to compliance is education. Because the amendments to the TSR are substantial, and the do-not-call system is an entirely new feature, educating consumers and businesses will reduce confusion, enhance consumers’ privacy, and ensure the overall effectiveness of the new system. Based on our experience, a substantial outreach effort will be necessary and constructive.

The last category of costs consists of expenditures for related agency infrastructure and administration, including necessary enhancements to the agency’s information technology structural support. For example, as noted above, law enforcement agencies will access do-not-call complaints through the existing Consumer Sentinel secure website. Currently, there are nearly one million consumer complaints in the Sentinel system (including identity theft-related complaints). Over one thousand individual law enforcers access the Sentinel system, passing through its secure firewall. The Sentinel system allows these law enforcers to successfully and securely identify targets, categorize trends, and buttress existing investigations.

The Sentinel system and attendant infrastructure must be upgraded to handle the anticipated increased demand from state law enforcers for access to the do-not-call complaints. Further, the Sentinel system will require substantial changes so that it may handle the significant additional volume of complaints that are expected. As noted above, the vendor’s system must be able to accept hundreds of thousands and possibly millions of consumer complaints. Those complaints will be transferred to and accessible within the Sentinel system. The impact to the Sentinel system by such a huge influx of complaints can be illustrated as follows: In calendar year 2002, the Sentinel system received about 360,000 complaints. With do-not-call, the Sentinel system must be equipped to handle easily twice that volume of complaints, which will require significant changes to our information technology infrastructure.

The FTC has recently proposed FY 2003 appropriations language that requests funding and authority to collect fees sufficient to cover the costs discussed above. Specifically, the language provides for “offsetting collections derived from fees sufficient to implement and enforce the do-not-call provisions of the Telemarketing Sales Rule, 16 C.F.R. Part 310, promulgated under the Telephone Consumer Fraud and Abuse Prevention Act (15 U.S.C. § 6101 *et seq.*), estimated at \$16,000,000.” It is important to emphasize that this figure is only an estimate of the implementation and enforcement costs. This is largely because the most substantial component - developing and operating the do-not-call registry - is part of an ongoing procurement process. In addition, we anticipate that there may be numerous, difficult-to-estimate costs associated with implementing and enforcing the do-not-call provisions.

The Commission will determine the details of these new fees through a rulemaking proceeding. Such a proceeding will allow interested industry members and the general public to comment on, and provide information and input to, the actual fee structure.

Absent Congressional approval for funding and fee collection very soon, preferably by the end of this month, the do-not-call system will not be available to consumers in FY 2003 because the agency will not be able to collect fees in FY 2003. Our target time line is as follows: We will be ready to award a contract in early February. Consumers will be able to register their telephone lines four months later, i.e., June-July 2003. States also will be able to download their own do-not-call lists into the registry as of June. Next, in August, telemarketers will subscribe to the list, pay the requisite fees, and begin accessing those area codes needed.²⁴ Consumer and business education efforts will continue throughout this time period. The do-not-call provisions become effective one month after telemarketers are first provided access to the national registry. Law enforcement efforts to ensure compliance with the do-not-call provisions of the amended TSR may begin at that time.

IV. Conclusion

These amendments to the TSR will greatly benefit American consumers, allowing them to continue receiving the telemarketing calls they want, while empowering them to stop unwanted intrusions into the privacy of their homes. The amendments also will help direct marketers target their telephone marketing campaigns to consumers who want to hear from them over the telephone. Consumers who want to continue receiving the calls they currently receive need take no action. Consumers who wish to reduce the number of telemarketing calls they receive may do so by placing their telephone numbers on the national do-not-call list when registration opens. Those consumers still can receive calls from companies with which they have an existing business relationship, unless they instruct those particular companies, on a company-by-company basis, to stop calling them.²⁵ Consumers who have placed their telephone number on the registry also can give permission to specific companies to call them.²⁶

The Commission appreciates the opportunity to describe its recently-promulgated amendments to the Telemarketing Sales Rule. We look forward to working with the Committee and the Congress as we move forward to implement these important provisions in the current fiscal year.

* The *Richmond Journal of Law & Technology* has not verified the accuracy of these remarks. The *Journal* has verified the accuracy of the author's endnotes.

¹ The written statement represents the views of the Federal Trade Commission. My oral presentation and responses are my own and do not necessarily reflect the views of the Commission or of any other Commissioner.

² 15 U.S.C. §§ 6101-08 (2003).

³ 15 U.S.C. § 6102(a)(3)(A) (2003).

⁴ 15 U.S.C. § 6102(a)(3)(B) (2003).

⁵ 16 C.F.R. § 310.3 (2003).

⁶ 16 C.F.R. § 310.4(b)(1)(ii) (2003).

⁷ 15 U.S.C. § 6108 (2003).

⁸ 64 Fed. Reg. 66124 (Nov. 24, 1999).

⁹ The transcript of the “Do-Not-Call Forum” is available on the FTC’s website. *See* Federal Trade Commission, *Do-Not-Call Forum*, at <http://www.ftc.gov/bcp/rulemaking/tsr/dncforum/index.html> (last updated Apr. 1, 2003).

¹⁰ 65 Fed. Reg. 10428 (Feb. 28, 2000).

¹¹ The notice also announced a second public forum to be held on July 27 and 28, 2000 to discuss provisions of the TSR other than the do-not-call requirement. The transcript for the second TSR Forum is located on the FTC’s website. *See* Federal Trade Commission, *Telemarketing Sales Review*, at <http://www.ftc.gov/bcp/rulemaking/tsr/tsragenda/index.htm> (last updated Oct. 19, 2000).

¹² These public comments may be found on the FTC’s website. *See* Federal Trade Commission, *Telemarketing Sales Rule Review: Public Comments*, at <http://www.ftc.gov/bcp/rulemaking/tsr/comments/index.html> (last visited Feb. 18, 2004).

¹³ *The Know Your Caller Act of 1999 and the Telemarketing Victim Protection Act of 1999: Hearing on H.R. 3100 and H.R. 3180 Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce*, 106th Cong 26-34 (2000) (statement of Eileen Harrington, Associate Director for Marketing Practices, Federal Trade Commission).

¹⁴ *Id.* at 1 (statement of Rep. Tauzin, Chairman, Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce).

¹⁵ The testimony may be found on the FTC’s website. *See* Federal Trade Commission, *Testimony of Timothy Muris Before the Subcommittee on Commerce, Trade and Consumer Protection of the House Energy and Commerce Committee*, Nov. 7, 2001, available at <http://www.ftc.gov/os/2001/11/muris011107.htm>.

¹⁶ 67 Fed. Reg. 4492 (Jan. 30, 2002).

¹⁷ These comments may be found on the FTC’s website. *See* Federal Trade Commission, *Rule Review & Proposed Amendments to the Telemarketing Sales Rule (TSR)*, at <http://www.ftc.gov/bcp/rulemaking/tsr/tsr-review.htm> (last updated Apr. 30, 2003).

¹⁸ Apart from the national do-not-call registry, the Commission adopted other amendments to give consumers better tools to stop unwanted calls. Within one year, telemarketers will be required to transmit caller i.d. information so consumers can know who has called them. Consumers’ comments reflect

their strong desire to have this information, which is analogous to a return address on postal mail. This information also will enable consumers to file meaningful complaints against telemarketers who call them in violation of the TSR. Another amendment regulates telemarketers' use of predictive dialer software. During the rule review, consumers complained of disconnected telemarketing calls, which are generated by predictive dialers set to cause excessive call abandonment. Under the amended rule, telemarketers may use predictive dialers only if they set the abandonment rate at 3% or less, and, within two seconds of the consumer's answering the call, play a message identifying the caller. This package of amendments addresses the most intrusive practices identified during our rule review and amendment proceeding. The amended rule is available on the FTC website. *See* Federal Trade Commission, *Final Amended Rule and Accompanying Statement of Basis & Purpose*, available at <http://www.ftc.gov/os/2002/12/tsrfrn.pdf> (last visited Feb. 18, 2004).

¹⁹ "At this time, the Commission does not intend the Rule provisions establishing a national 'do-not-call' registry to preempt state 'do-not-call' laws. Rather, the Commission's intent is to work with those states that have enacted 'do-not-call' registry laws, as well as with the FCC, to articulate requirements and procedures during what it anticipates will be a relatively short transition period leading to one harmonized 'do-not-call' registry system and a single set of compliance obligations." *Id.* at 158-59.

²⁰ A number of these functions are discussed in more detail in the *TSR Statement of Basis and Purpose*. *See id.* at 157-64.

²¹ The exact fees to be assessed and other aspects regarding telemarketer subscription to the do-not-call registry, will be addressed in a separate rule making that will commence upon Congressional approval of funding.

²² The Commission currently receives consumer complaints through its toll-free number, 1-877-FTC-HELP or online at <http://www.ftc.gov>. We hope to steer most do-not-call complaints to the selected vendor's dedicated complaint system, where they can be processed and verified in an efficient manner. Nonetheless, we anticipate that some consumers will complain through the agency's other channels.

²³ States that have established statewide do-not-call registries have experienced consumer registration levels ranging from a few percent of the telephone lines in use within the state, to over 40% of all lines. Forty percent of all consumer telephone lines in the United States would equal approximately sixty million telephone numbers. In the State of Missouri, about two percent of consumers who signed up for Missouri's registry filed complaints with the State within nine months. Assuming two percent of consumers who sign up for the FTC's do-not-call registry file complaints, the Commission could expect to receive 1.2 million complaints.

²⁴ Because the fiscal year ends in September, this time line gives us very little margin for error in implementing the rule in time to collect fees in fiscal year 2003.

²⁵ *See* Amended TSR § 310.4(b)(1)(iii)(B)(ii).

²⁶ *Id.* § 310.4(b)(1)(iii)(B)(i).