

Indeed, many recommended that the Commission take a more restrictive "opt-in" approach, and prohibit telemarketing except to those consumers who expressly agree in advance to accept sales calls.⁵⁷⁶ State regulators also supported a national registry, provided it did not preempt the "do-not-call" legislation already passed in many states or preclude the states from enforcing these laws.⁵⁷⁷

A number of industry commenters supported the general concept of a national "do-not-call" registry that would preempt state "do-not-call" laws, provided an exemption for "existing business relationships" were added to the Rule. The need for an established business relationship exemption was the most emphatic and consistent theme of industry comments, but other points were raised as well. Some questioned whether the Commission had the statutory authority to establish such a registry.⁵⁷⁸ Others argued that a national "do-not-call" registry would impose an unconstitutional restriction on commercial speech.⁵⁷⁹ Still others felt that an FTC registry was not necessary because the current system was sufficient to protect consumer privacy.⁵⁸⁰ These commenters supported increased enforcement of existing federal and state "do-not-call" laws. Charitable organizations and the telemarketers who serve them uniformly opposed the national "do-not-call" registry proposal if applicable to charitable solicitations by for-profit telemarketers. They argued that such a registry would violate the First Amendment and that it would have a devastating impact on the level of contributions that non-profit

organizations depend upon to fulfill their missions.⁵⁸¹

Based on the entire record in this proceeding, the Commission has determined to retain the provision in the original Rule that prohibits a seller or telemarketer from calling a consumer who has previously asked not to be called by or on behalf of that seller. The Commission has also determined to supplement that provision by amending the Rule to establish a national "do-not-call" registry. For the reasons set forth herein, the Commission has decided to limit coverage of the national registry to telemarketing calls made by or on behalf of sellers of goods or services, thus exempting telemarketing calls on behalf of charitable organizations. Calls on behalf of charitable organizations will be subject to the company-specific "do-not-call" provision. In addition, the Commission has decided to retain the provision that allows consumers who sign up on the national "do-not-call" registry to provide express agreement to specific sellers to call them, but has modified that provision to require that evidence of such agreements be written, not oral. Furthermore, the Commission has decided to supplement that express agreement provision with a narrowly-defined exemption for "established business relationships." The Commission is persuaded that these provisions will work in a complementary fashion to effectuate the appropriate balance between protecting consumer privacy and enabling sellers to have access to their existing customers. Of course, even a seller who is exempt from the prohibition against calling a consumer based on the existence of an "established business relationship" with that consumer must honor that consumer's direct request not to be called under the company-specific "do-not-call" provision.

Background. The original Rule's company-specific approach, which prohibited a seller or telemarketer from calling a person who had previously asked not to be called, was intended to prohibit abusive patterns of calls from a seller or telemarketer to a person. During the Rule Review, industry representatives generally supported the Rule's current company-specific approach, stating that it provides consumer choice and satisfies the consumer protection mandate of the Telemarketing Act while not imposing an undue burden on industry.⁵⁸² The

vast majority of individual commenters, however, joined by consumer groups and state law enforcement representatives, claimed that the TSR's company-specific "do-not-call" provision is inadequate to prevent the abusive patterns of calls it was intended to prohibit.⁵⁸³ They cited several problems with the current "do-not-call" scheme as set out in the FTC and FCC regulations:⁵⁸⁴ the company-specific approach is extremely burdensome to consumers, who must repeat their "do-not-call" request with every telemarketer that calls;⁵⁸⁵ consumers' repeated requests to be placed on a "do-not-call" list are ignored;⁵⁸⁶ consumers have no way to verify that their names have been taken off of a company's calling list;⁵⁸⁷ consumers find that using the TCPA's private right of action⁵⁸⁸ is very complex and time-consuming, and places an evidentiary burden on the consumer who must keep detailed lists of who called and when;⁵⁸⁹ and finally, even if the consumer wins a lawsuit against a company, it is difficult for the consumer to enforce the judgment.⁵⁹⁰

In addition to the fact that it has proven ineffective, there is another problem that is not even addressed by the company-specific provision. In particular, because a great many telemarketers are now placing huge patterns of unsolicited telemarketing calls,⁵⁹¹ many consumers find even an

NAA-RR at 2; NASAA-RR at 4; PLP-RR at 1. See also DNC Tr. at 132-80.

⁵⁸³ See NAA-RR at 17-19; NCL-RR at 13-14; DNC Tr. at 132-80. See also, e.g., Anderson-RR at 1; Bennett-RR at 1; Card-RR at 1; Conway-RR at 1; Garbin-RR at 1; A. Gardner-RR at 1; Gilchrist-RR at 1; Gindin-RR at 1; Harper-RR at 1; Heagy-RR at 1; Johnson-RR at 1; McCurdy-RR at 1; Menefee-RR at 1; Mey-RR *passim*; Mitchel-RR at 1; Nova53-RR at 1; Peters-RR at 1; Rothman-RR at 1; Vanderburg-RR at 1; Ver Steegt-RR at 1; Worsham-RR at 1.

⁵⁸⁴ The FCC's "do-not-call" regulations under the TCPA are at 47 CFR 64.1201.

⁵⁸⁵ Garbin-RR at 1; NAA-RR at 17; Ver Steegt-RR at 1.

⁵⁸⁶ Harper-RR at 1; Heagy-RR at 1; Holloway-RR at 1; Johnson-RR at 1; Menefee-RR at 1; Mey-RR *passim*; Nova53-RR at 1; Nurik-RR at 1; Peters-RR at 1; Rothman-RR at 1; Runnels-RR at 1; Schiber-RR at 1; Schmied-RR at 1; Vanderburg-RR at 1.

⁵⁸⁷ McCurdy-RR at 1; Schiber-RR at 1.

⁵⁸⁸ The TCPA permits a person who receives more than one telephone call in violation of the FCC's "do-not-call" regulations to bring an action in an appropriate state court to enjoin the practice, to receive money damages, or both. 47 U.S.C. 227(b)(3). The consumer may recover actual monetary loss from the violation or receive \$500 in damages for each violation, whichever is greater. *Id.* If the court finds that a company willfully or knowingly violated the FCC's "do-not-call" rules, it can award treble damages. *Id.*

⁵⁸⁹ Kelly-RR at 1; NAA-RR at 17-19; NACAA-RR at 2; NCL-RR at 13-14.

⁵⁹⁰ Kelly-RR at 1.

⁵⁹¹ Based on figures provided by the telemarketing industry, a study prepared for CCC

NPRM at 8; NFPPA-NPRM at 1; Pelland-NPRM *passim*; Proctor-Connecticut-NPRM at 2; Private Citizen-NPRM at 1; TDI-NPRM at 4-5; Worsham-NPRM at 1. Of the approximately 49,000 comments, about 33,000 supported the creation of a national registry, while about 13,700 opposed it. Of the 14,700 comments from Gottschalks' customers, almost 11,500 supported the creation of a "do-not-call" registry, while only about 1800 opposed the idea of a registry.

⁵⁷⁶ See, e.g., EPIC-NPRM at 4; NCL-NPRM at 8.

⁵⁷⁷ See, e.g., Connecticut-NPRM at 1-2, 3; DC-NPRM at 4; Kansas-NPRM at 2; NAA-RR at 4-29; NYSCPB-NPRM at 1; Tennessee-NPRM at 2, 9-10; Texas PUC-NPRM at 1, 2; Virginia-NPRM at 1-2. See also AARP-NPRM at 1; NCL-NPRM at 9-10; NCLC-NPRM at 13; PRC-NPRM at 4; Private Citizen-NPRM at 2; TDI-NPRM at 4-5.

⁵⁷⁸ See, e.g., Discover-NPRM at 2; ERA-NPRM at 26; NRF-NPRM at 2-3; NAA-NPRM at 2; Paramount-NPRM at 1; PMA-NPRM at 6, 24-26.

⁵⁷⁹ See, e.g., NAA-NPRM at 2; Paramount-NPRM at 2; PBP-NPRM *passim*; Redish-NPRM *passim*.

⁵⁸⁰ See, e.g., Craftmatic-NPRM at 3; ERA-NPRM at 5, 28; PMA-NPRM at 6; TeleStar-NPRM at 2; Weber-NPRM at 2.

⁵⁸¹ See, e.g., DMA-NonProfit-NPRM *passim*; Not-for-Profit Coalition-NPRM *passim*; Hudson Bay-NPRM *passim*. See also June 2002 Tr. III at 110, 205-10.

⁵⁸² ARDA-RR at 2; ATA-RR at 8-10; Bell Atlantic-RR at 4; DMA-RR at 2; ERA-RR at 6; MPA-RR at 16;

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initial call from a telemarketer or seller to be abusive and invasive of privacy. Several states responded to the growing consumer frustration with unsolicited telemarketing calls and the ineffectiveness of the company-specific approach by passing legislation to establish statewide "do-not-call" lists. To date, 27 states have passed such legislation, and numerous other states have considered similar bills.⁵⁹²

estimates that the annual number of outbound calls that are answered by a consumer is 16,129,411,765 (i.e., 16 billion calls). James C. Miller, III, Jonathan S. Bowater, Richard S. Higgins, and Robert Budd, "An Economic Assessment of Proposed Amendments to the Telemarketing Sales Rule," June 5, 2002, (hereinafter "Miller Study") at 28, Att. 1. This figure does not include those calls that are abandoned.

⁵⁹² DNC Tr. at 16, 137, 157-58. As of August, 2002, 27 states had passed "do-not-call" statutes. Florida established the first state "do-not-call" list in 1987. (Fla. Stat. Ann. § 501.059). Oregon and Alaska followed with "do-not-call" statutes in 1989. Instead of a central registry, these two states opted to require telephone companies to place a black dot in the telephone directory by the names of consumers who do not wish to receive telemarketing calls. (1999 Or. Laws 564; Alaska Stat. Ann. § 45.50.475). In 1999, Oregon replaced its "black dot" law with a "no-call" central registry program. (Or. Rev. Stat. § 464.567). See also article regarding Oregon law in 78 *BNA Antitrust & Trade Reg. Report* 97 (Feb. 4, 2000). After those three states adopted their statutes, there was little activity at the state level for about a decade. Then, in 1999, a new burst of legislation occurred as five more states passed "do-not-call" legislation—Alabama (Ala. Code § 8-19C); Arkansas (Ark. Code Ann. § 4-99-401); Georgia (Ga. Code Ann. § 46-5-27; see also rules at Ga. Comp. R. & Regs. 515-14-1); Kentucky (Ky. Rev. Stat. Ann. § 367.46955(15)); and Tennessee (Tenn. Code Ann. § 65-4-401; see also rules at Tenn. Comp. R. & Regs. Chap. 1220-4-11). During 2000, six more states enacted "do-not-call" statutes—Connecticut (Conn. Gen. Stat. Ann. § 42-288a); Idaho (Idaho Code § 48-1003); Maine (Me. Rev. Stat. § 4690-A); Missouri (Mo. Rev. Stat. § 407.1095); New York (N.Y. General Business Law § 399-z; see also rules at NY Comp. R. & Regs. tit. 12 § 4602); and Wyoming (Wyo. Stat. Ann. § 40-12-301). As of August, 2002, another eleven states had joined the ranks—California (S.B. 771, to be codified at Cal. Bus. & Prof. Code § 17590); Colorado (H.B. 1405, to be codified at Colo. Rev. Stat. § 6-1-901); Illinois (S.B. 1830, signed Aug. 9, 2002); Indiana (H.B. 1222, to be codified at Ind. Code Ann. § 24.4.7); Kansas (S.B. 296, to be codified at Kan. Stat. Ann. 2001 Supp. § 50-670, signed May 29, 2002); Louisiana (H.B. 175, to be codified at La. Rev. Stat. 45:844.11); Massachusetts (H.B. 5225, signed Aug. 10, 2002); Minnesota (S.B. 3246, to be codified at Minn. Stat. § 325E.311, signed May 15, 2002); Oklahoma (S.B. 950, to be codified at Okla. Stat. tit. 15 § 775B.1, signed Apr. 15, 2002); Pennsylvania (H.B. 1469, to be codified as amendment to Pa. Cons. Stat. § 2241; Texas (H.B. 472, to be codified at Tex. Bus. & Com. Code Ann. § 43.001); Vermont (S. 62, Pub. Act 120, to be codified at Vt. Stat. Ann. tit. 9 § 2464a, signed June 5, 2002); and Wisconsin (Section 2435 of 2001 Wisconsin Act 16, 2001 S.B. 55, to be codified at Wis. Stat. 100.52). In addition, numerous states are considering or recently have considered laws that would create state-run "do-not-call" lists, including Arizona, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maryland, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, and

The comments received in response to the NPRM show that frustration with unsolicited telemarketing calls continues despite the efforts of the DMA, the states, and the TCPA/TSR company-specific approaches to the problem. Individual commenters overwhelmingly supported the establishment of a national "do-not-call" registry.⁵⁹³ This was true even of those individuals who were already signed up on their state's "do-not-call" registry or on the DMA's TPS.⁵⁹⁴ Although many of these individuals stated that they had found their state registry to be effective in reducing the number of unwanted calls, they thought that a national registry would be a beneficial addition to their state registry because, among other things, a central registry would eliminate some of the loopholes in the state laws, thus increasing coverage, and would provide the convenience of a one-stop method of reducing unwanted calls.⁵⁹⁵ Similarly, individuals who were signed up on the DMA's TPS list also said that the list had been effective in reducing the number of unwanted calls, yet they felt that a national registry was needed because they were still receiving unwanted calls.⁵⁹⁶

West Virginia. See CallCompliance table of state "do-not-call" laws and proposed legislation, <http://www.callcompliance.com/pages/STATElist.html> (accessed July 24, 2002). The "do-not-call" issue has also drawn the attention of federal legislators, who have introduced several bills aimed at addressing consumers' concerns. For example, in the 106th Congress, H.R. 3180 (introduced by Rep. Salmon) would have required telemarketers to tell consumers that they have a right to be placed on either the DMA's "do-not-call" list or on their state's "do-not-call" list. This proposal also would have required all telemarketers to obtain and reconcile the DMA and state "do-not-call" lists with their call lists. Similar legislation was introduced in the 107th Congress by Rep. King (H.R. 232, the "Telemarketing Victim Protection Act"). In addition, on December 20, 2001, Sen. Dodd introduced S. 1881, the "Telemarketing Intrusive Practices Act of 2001," which would require the FTC to establish a national "do-not-call" registry.

⁵⁹³ The Commission received approximately 64,000 email and written comments. Of those, approximately 44,000 supported the proposed national "do-not-call" registry, while only about 15,000 opposed the creation of such a registry. (The remaining 5,000 comments did not address this issue.)

⁵⁹⁴ The Commission received approximately 7,500 comments from consumers who live in states that have "do-not-call" statutes. See, e.g., Dan Seaman (AL) (Msg. 1127); Shawn Baumgartner (FL) (Msg. 2771); Edwin Rodriguez (CO) (Msg. 4573); Michelle Crouch (GA) (Msg. 4973); and Rona Owen (TX) (Msg. 6247).

⁵⁹⁵ See, e.g., Michelle Crouch (GA) (Msg. 4973); Dan Seaman (AL) (Msg. 1127) (state registry has too many exemptions); Clive and Jane Romig (FL) (Msg. 19125) (current remedies are inadequate).

⁵⁹⁶ See, e.g., Robert Winters (Msg. 18984) (resurgence of calls after a while); Gregory Stahmer (Feb. 21, Part 6, Msg. 150) (continues to get unwanted calls); Robert Baly (Feb. 27, Part 1, Msg. 551).

Consumer groups supported the creation of a national "do-not-call" registry,⁵⁹⁷ and some privacy advocates urged the Commission to take an even more restrictive "opt-in" approach by banning telemarketing to any consumer who has not expressly agreed to receive telephone solicitations.⁵⁹⁸ With certain caveats, state regulators also supported the proposal for a national "do-not-call" registry.⁵⁹⁹ Some states that already have a state "do-not-call" list in place indicated that a national list would complement the current regime of state legislation and could be an effective addition to the arsenal of tools available to consumers in reducing unwanted calls.⁶⁰⁰ However, states and consumer advocates cautioned that such a system should be implemented in close coordination with the states and should not supplant more restrictive state laws.⁶⁰¹

Industry commenters generally believed that the current system is working and that a national "do-not-call" registry is unnecessary.⁶⁰² They expressed the view that the DMA's Telephone Preference Service ("TPS") is tantamount to a national "do-not-call" registry. In fact, according to their comments, the TPS has greater coverage than the FTC registry would have because it covers certain entities such as common carriers, banks, and charitable organizations beyond FTC jurisdiction.⁶⁰³ They argued that these

⁵⁹⁷ AARP-NPRM at 1; CCA-NPRM at 1; ConsumerPrivacyGuide.com-NPRM at 1; EPIC-NPRM at 2-3; LSAP-NPRM at 12-15; NAAG-NPRM at 4; NACAA-NPRM at 2; NARUC-NPRM at 1, 3; NASUCA-NPRM at 2; NCL-NPRM at 8; NCLC-NPRM at 13; PRC-NPRM at 1; Worsham-NPRM at 1. The U.S. Department of Justice also supported the creation of a national "do-not-call" list maintained by the FTC. DOJ-NPRM at 4-5.

⁵⁹⁸ See, e.g., EPIC-NPRM at 3; Worsham-NPRM at 5.

⁵⁹⁹ See, e.g., CCA-NPRM at 1; Connecticut-NPRM at 1-2, 3; DC-NPRM at 4; Kansas-NPRM at 2; NAAG-NPRM at 4-29; NYSCPB-NPRM at 1-2; Tennessee-NPRM at 2; Texas PUC-NPRM at 1, 2; Virginia-NPRM at 1-2.

⁶⁰⁰ CCA-NPRM at 1; Connecticut-NPRM at 1; Kansas-NPRM at 1; NAAG-NPRM at 6, 12, 29; NYSCPB-NPRM at 1-2; Tennessee-NPRM at 2.

⁶⁰¹ Connecticut-NPRM at 1-2, 3; Kansas-NPRM at 1; NAAG-NPRM at 6-13; NACAA-NPRM at 4-5; NCL-NPRM at 9; NYSCPB-NPRM at 2-4, 13-17; Private Citizen-NPRM at 2; Tennessee-NPRM at 2, 9-10; Texas PUC-NPRM at 3-4. See also June 2002 Tr. I at 19-40.

⁶⁰² See, e.g., ATA-NPRM at 21-25; Craftmatic-NPRM at 3; DMA-NPRM at 7-8; ERA-NPRM at 5, 28; Fleet-NPRM at 2; Green Mountain-NPRM at 21-23; Lenox-NPRM at 4-5; MPA-NPRM at 34-35; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM at 3; Pacesetter-NPRM at 2-3; PMA-NPRM at 6; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TeleStar-NPRM at 2; TRC-NPRM at 2; Weber-NPRM at 2.

⁶⁰³ See, e.g., ATA-NPRM at 24-25; DMA-NPRM at 8-11; ERA-NPRM at 27-28; MPA-NPRM at 34-35; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM

gaps in the national registry's coverage due to the FTC's limited jurisdiction would make a national "do-not-call" list more confusing than helpful to consumers.⁶⁰⁴ Some industry members suggested that the states are the more appropriate forum for creation of "do-not-call" lists.⁶⁰⁵ Some of these commenters argued that, unlike a national list, that must be "one size fits all," states can be more responsive to the needs of their citizens and tailor their lists to those differing needs.⁶⁰⁶

The record in this matter overwhelmingly shows the contrary—as detailed earlier, it shows that the company-specific approach is seriously inadequate to protect consumers' privacy from an abusive pattern of calls placed by a seller or telemarketer. The comments also show that consumers continue to be angered by and frustrated with the pattern of unsolicited telemarketing calls they receive from the multitude of sellers and telemarketers. A national "do-not-call" registry addresses both types of abuse. It provides a mechanism that a consumer may use to indicate that he or she finds unsolicited telemarketing calls abusive and an invasion of privacy. It will also protect a consumer from repeated abusive calls from a seller or telemarketer. These problems cannot be fully addressed by state lists. While state "do-not-call" lists may be effective in reducing calls for the citizens in those states, about half the states do not have such legislation. A federal list would protect those consumers who are not currently protected. In addition, as EPIC pointed out in its comment, the state "do-not-call" lists vary with regard to exempt entities, with some containing so many exemptions that virtually all telemarketers are exempt.⁶⁰⁷ A federal list would provide uniformity with regard to those entities within the FTC's jurisdiction. Finally, although industry touts the state lists as

the appropriate approach to "do-not-call," they also challenge the states' authority to regulate interstate calls under the state "do-not-call" laws.⁶⁰⁸ The Telemarketing Act grants the states the authority to enforce the TSR in federal court.⁶⁰⁹ Therefore, a national "do-not-call" registry maintained by the FTC pursuant to the TSR (and enforceable by the states) would quell any challenges to state "do-not-call" enforcement with respect to interstate telemarketing.

Some industry members would have the FTC forget about a national registry and continue to let consumers use the current national self-regulatory system set up through DMA's TPS.⁶¹⁰ DMA has provided an important public service by administering the TPS, and the Commission applauds the efforts of the industry to regulate itself. However, the self-regulatory model has two serious shortcomings which limit its use as an effective national "do-not-call" registry: a self-regulatory system is voluntary; and to the extent that sanctions exist for non-compliance, DMA may apply those sanctions only against its members, not non-members.⁶¹¹ On the other hand, lists established pursuant to the FTC Act and the Telemarketing Act, as well as those established pursuant to state law, have the force of law, and violators are subject to civil penalties. This type of sanction makes it more likely that companies will take their "do-not-call" obligations seriously.

The Commission recognizes that its jurisdictional limitations will impact the effectiveness of a national "do-not-call" registry. However, the Commission notes that while certain specific entities are exempt from coverage, the telemarketing companies that solicit on their behalf are nonetheless covered by the TSR.⁶¹² Moreover, many consumers have signed up for state "do-not-call" lists,⁶¹³ all of which include various

exemptions. Consumers in those states have accepted the limitations of the state "do-not-call" lists and have been satisfied at the prospect of at least *reducing* the number of unwanted telephone solicitations that they receive.⁶¹⁴ Indeed, an FTC registry may be more inclusive than some state "do-not-call" lists.⁶¹⁵ The Commission believes that consumer education will minimize consumer confusion over what calls will and will not be allowed under a national "do-not-call" registry.

Industry pointed to the economic importance of outbound telemarketing, which accounted for \$274.2 billion in 2001,⁶¹⁶ and warned that a national "do-not-call" registry would have dire economic consequences.⁶¹⁷ In its supplemental comments, DMA submitted a study showing "the face of the telemarketing industry."⁶¹⁸ According to DMA predictions, job losses would impact most seriously on women, minorities, and rural areas—the groups and regions from which most telemarketers are drawn.⁶¹⁹ Individual sellers and telemarketing firms estimated that they might have to lay off up to 50 percent of their employees if such a registry were to go into effect.⁶²⁰ Numerous individual telemarketers submitted comments in which they talked about the pride they have in their work and their fear of losing their livelihood.⁶²¹

WALL ST. J., Apr. 11, 2002, at A2. See also NAAG-NPRM at 4, n.3.

⁶¹⁴ See generally June 2002 Tr. I at 110-21.

⁶¹⁵ See EPIC-NPRM at 19 (noting that some state laws are ineffective due to the number of exempted entities).

⁶¹⁶ DMA, "The Faces and Places of Outbound Telemarketing in the United States," (June 2002) ("DMA study") at 1.

⁶¹⁷ See *id.* See also NATN-NPRM at 1; NSDI-NPRM at 2; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 1.

⁶¹⁸ DMA study, see note 616 above.

⁶¹⁹ The DMA study indicates that teleservices workers are overwhelmingly female, high-school educated, and African-American or Hispanic. Almost 62 percent of all females working as teleservices agents are working mothers, and 30 percent are part of a welfare-to-work program or were recently on public assistance. DMA study at 2. The study also indicates that outbound telemarketing call centers can be found in every state, often in rural areas or small towns and cities that are economically distressed. *Id.* at 4. See also NATN-NPRM at 1; NSDI-NPRM at 2; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 1.

⁶²⁰ See NATN-NPRM at 1; NSDI-NPRM at 2; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 1; Teleperformance-NPRM at 2; TRC-NPRM at 2-3. However, the Commission notes that these companies offered no analysis to substantiate their claims regarding the impact of the national registry.

⁶²¹ See, e.g., Alhafez (Mar. 22, part 1, Msg. 1712); Cameron (Mar. 6, part 1, Msg. 951); Dillon (Mar. 21, part 2, Msg. 1622). See also, e.g., ACI Telecentrics-

at 3; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TRC-NPRM at 2.

⁶⁰⁴ See, e.g., ERA-NPRM at 28, 36; MPA-NPRM at 34-35; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM at 3; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TRC-NPRM at 2.

⁶⁰⁵ See, e.g., ATA-NPRM at 23-25; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM at 3; possibleNOW.com-NPRM at 1; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TRC-NPRM at 2. See also Tennessee-NPRM at 6-7.

⁶⁰⁶ See, e.g., ATA-NPRM at 23-25; Noble-NPRM at 2; NATN-NPRM at 2; NEMA-NPRM at 4; NSDI-NPRM at 3; possibleNOW.com-NPRM at 1; Success Marketing-NPRM at 2; Synergy Solutions-NPRM at 3; Teleperformance-NPRM at 2; TRC-NPRM at 2. See also Tennessee-NPRM at 6-7.

⁶⁰⁷ EPIC-NPRM at 19.

⁶⁰⁸ See, e.g., ATA-NPRM at 24.

⁶⁰⁹ 15 U.S.C. 6108.

⁶¹⁰ See, e.g., ATA-NPRM at 21-25; Craftmatic-NPRM at 3; DMA-NPRM at 7-8; ERA-NPRM at 5, 28; Fleet-NPRM at 2; Green Mountain-NPRM at 21-23; Lenox-NPRM at 4-5; MPA-NPRM at 34-35; Noble-NPRM at 2; NATN-NPRM at 2; NSDI-NPRM at 3; Pacesetter-NPRM at 2-3; PMA-NPRM at 6; Synergy Solutions-NPRM at 2; Technion-NPRM at 4; Teleperformance-NPRM at 2; TeleStar-NPRM at 2; TRC-NPRM at 2; Weber-NPRM at 2.

⁶¹¹ DMA has about 5,000 members. DMA-NPRM at 1.

⁶¹² 67 FR at 4497.

⁶¹³ For example, Missouri and Indiana each have more than 1 million telephone numbers on their lists; New York's list contains more than 2 million numbers. See *Missouri No Call Tops 1 Million Three Days Before One-Year Anniversary of Law*, Office of Missouri Attorney General, June 28, 2002, <http://www.ago.state.mo.us/062802.htm>; and David Wessel, *On Hold: Gagging the Telemarketers*,

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The Commission recognizes that telemarketing is a legitimate method of selling goods and services. It is important to remember that the “do-not-call” registry will impact only outbound telemarketing, and will have no effect whatsoever on the greater portion of the industry devoted to inbound calls from consumers.⁶²² The Commission also recognizes the importance of outbound telemarketing to federal, state, and local economies. Telemarketing provides needed jobs to rural areas and small towns that often face high unemployment, and to people who often face difficulties in obtaining other employment, such as individuals moving off of welfare.

Although industry fears the economic impact a national registry might have, ironically, an FTC “do-not-call” registry may actually benefit rather than harm industry. For example, the federal framework, with its exemptions, would provide greater consistency of coverage, at least with regard to interstate calls. In addition, industry would benefit because telemarketers would reduce time spent calling consumers who do not want to receive telemarketing calls and would be able to focus their calls only on those who do not object to such calls.⁶²³

Industry emphasized the importance of harmonizing federal and state laws. To the extent that industry members supported creation of a national “do-not-call” list, they conditioned their support on preemption of state laws.⁶²⁴ These commenters argued that the major, if not only, benefit to industry from a national “do-not-call” registry would be to eliminate the costs of purchasing multiple lists and complying with a patchwork of potentially 50 different state laws.⁶²⁵ Absent

Levie (Msg. 19322); InfoCision Management-Davis (Msg. 23968); HFC-Beneficial-Darst (Msg. 33709); Household-Alioto (Msg. 27876); LTD Direct-Rockwood (Msg. 27601); and TCIM Services Inc.-Davis (Msg. 22871).

⁶²² In 2001, inbound telemarketing accounted for 55 percent of total teleservice expenditures and was expected to grow to 62 percent by 2004.

Winterberry Group, “Industry Map: Teleservice Industry—Multi-Channel Marketing Drives Universal Call Centers” at 9 (Jan. 2001).

⁶²³ Industry representatives also have indicated that they do not wish to call consumers who do not want to receive telemarketing calls. See DNC Tr. at 41, 51, 53-56, 61, 71.

⁶²⁴ See, e.g., AFSA-NPRM at 3-5; Craftmatic-NPRM at 3; Discover-NPRM at 2; HSBC-NPRM at 1; MBA-NPRM at 2; NCTA-NPRM at 15-16; NRF-NPRM at 7-8; Nextel-NPRM at 3-4, 26-27; PMA-NPRM at 28; SIIA-NPRM at 3; Time-NPRM at 3-4; Community Bankers-Supp. at 4; ARDA-Supp. at 1; ICTA-Supp. at 1. See also June 2002 Tr. at 19-40.

⁶²⁵ See, e.g., AFSA-NPRM at 3-5; Craftmatic-NPRM at 3; Discover-NPRM at 2; HSBC-NPRM at 1; MBA-NPRM at 2; NCTA-NPRM at 15-16; NRF-NPRM at 7-8; Nextel-NPRM at 3-4, 26-27; PMA-NPRM at 28; SIIA-NPRM at 3; Time-NPRM at 3-4.

preemption, industry believed that a national registry would only add another layer of bureaucracy and one more list that they must purchase.⁶²⁶ The June 2002 Forum discussed in depth the interplay between the national “do-not-call” registry and state laws. Participants agreed that the Commission should seek comity with state laws, and that a single list would provide substantial benefits to both industry and consumers.⁶²⁷

For example, Dr. James Miller, testifying on behalf of CCC, estimated that if the Commission’s “do-not-call” proposal were enacted as proposed, it would cost all firms that sell their products via outbound telemarketing combined a total of \$6.6 million to purchase access to the FTC’s “do-not-call” registry and to check their calling lists against the “do-not-call” list to ensure that they do not call consumers who have asked not to be called.⁶²⁸ If companies could comply with both FTC and state regulations by purchasing access to the FTC’s list and not calling consumers whose numbers appeared on that list, this would represent the total burden on firms to avoid calling consumers who did not wish to be called. However, Dr. Miller testified that the total cost to comply with the state regulations as well as the FTC requirements, should firms still have to purchase separate lists from each state having its own do-not-call provisions, could approximate \$100 million.⁶²⁹

Finally, commenters raised various issues and offered suggestions relating to the implementation of a national “do-not-call” registry. For example, various commenters questioned the accuracy of automatic number identification (“ANI”) verification, the length of time a consumer’s telephone number should remain on the list, who should be able to sign up for the list, whether the Commission should allow third parties to submit telephone numbers, the type

⁶²⁶ *Id.*

⁶²⁷ See June 2002 Tr. I at 19-40.

⁶²⁸ See June 2002 Tr. I at 209. Dr. Miller’s testimony drew from the Miller Study (see note 591 above). As the study explains, the \$6.6 million figure assumes that 3,000 firms will pay \$1,000 each on average to obtain access to the list and that it will take the average firm approximately two hours of effort at a cost of \$50 per hour each time it is necessary to compare the firm’s calling list against the “do-not-call” registry. As proposed in the NPRM, firms would have been required to do this comparison 12 times each year so that the average firm would have incurred a total expense of \$2,200. Miller Study at 11-12. Because the amended Rule does not require firms to compare their calling lists to the FTC’s “do-not-call” registry monthly as did the NPRM proposal, the estimated cost using Dr. Miller’s methodology would now be around \$4.5 million.

⁶²⁹ See June 2002 Tr. I at 209.

of information that should be collected, and the accuracy of the Commission’s cost estimates.⁶³⁰ These issues are discussed in the section below addressing implementation.

Coverage of the “do-not-call” provisions. A number of commenters asked the Commission to clarify coverage of its “do-not-call” provisions. Some queried whether calls to home businesses would be subject to the “do-not-call” requirements.⁶³¹ The Rule exempts telemarketing calls to businesses (except for sellers or telemarketers of nondurable office or cleaning supplies). Therefore, calls to home businesses would not be subject to the amended Rule’s “do-not-call” requirements.

Some commenters asked whether the “do-not-call” requirements would cover calls to cellular or wireless telephones and pagers. The Commission intends that § 310.4(b)(1)(iii) apply to any call placed to a consumer, whether to a residential telephone number or to the consumer’s cellular telephone or pager. Consumers are increasingly using cellular telephones in place of regular telephone service,⁶³² which is borne out by the dramatic increase in cellular phone usage.⁶³³ The Commission believes that it is particularly important to allow consumers an option to reduce unwanted telemarketing calls to cellular telephones or to pagers because some cellular services charge the consumer for incoming calls, thus adding insult to injury when the consumer is charged for

⁶³⁰ See, e.g., AFSA-NPRM at 4-10; Craftmatic-NPRM at 3; DC-NPRM at 5; DialAmerica-NPRM at 13; Discover-NPRM at 3; EPIC-NPRM at 14; ERA-NPRM at 29-32; HSBC-NPRM at 2; MBA-NPRM at 2; NYSCPB-NPRM at 7-13. See also June 2002 Tr. I at 138-271.

⁶³¹ See, e.g., IBM-NPRM at 11-12; Pelland-NPRM at 3.

⁶³² See FCC Notice of Proposed Rulemaking and Memorandum Opinion and Order in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, CC Docket No. 92-90 (Sept. 18, 2002) (hereinafter “FCC TCPA 2002”) at 27, para. 42 (citing a USA Today/CNN/Gallop poll showing that one in five mobile telephone users use their wireless phone as their primary phone, Michelle Kessler, *18 % See Cellphones as Their Main Phone*, USA TODAY, Feb. 1, 2002). See also Wendy Ruenzel, *More Cell Phone Users Dispense with Traditional Phone Line*, POST CRESCENT, Aug. 6, 2001; Simon Romero, *When the Cellphone Is the Home Phone*, N.Y. TIMES, Aug. 29, 2002; Joelle Tessler, *Small But Growing Number of Cell Phone Users Abandon Land Lines*, SAN JOSE MERCURY NEWS, Aug. 15, 2002.

⁶³³ See FCC TCPA 2002 at 26-27, para. 42, n.160 (noting that, in the ten-year period between 1991 and 2001, the number of wireless subscribers increased from about 7.5 million to approximately 128 million. From 1993 to 2001, the average minutes of use per subscriber per month increased from 140 minutes to 385 minutes.) (citations omitted).

the unwanted telemarketing call to the consumer's cellular telephone.⁶³⁴

Established business relationship. Industry commenters overwhelmingly opposed as unworkable the Commission's proposal to allow consumers to give their express authorization to companies from which they wished to receive calls. Industry stated that it would be cost prohibitive for them to contact their customers to obtain authorization (although they provided no detailed support for this argument) and that consumer inertia would keep consumers from independently providing that type of affirmative authorization.⁶³⁵ They also argued that consumers may not know in advance which companies they want to hear from.⁶³⁶

Industry commenters noted that, without an exemption permitting calls to existing customers, companies would be unable to conduct normal servicing of customers' accounts, since such customer service calls frequently are multiple purpose calls that also include attempts to sell additional goods or services to the customer.⁶³⁷ Additionally, magazines and newspapers would be unable to contact consumers whose subscriptions had expired to offer them a new subscription.⁶³⁸ Commenters from financial institutions pointed out that, if not permitted to call current customers, they may run afoul of their fiduciary relationship with those customers.⁶³⁹ Sellers argued that it would be cost prohibitive for them to use direct mail or other means to contact their customers to obtain authorization to call.⁶⁴⁰

Industry commenters also pointed out that, in failing to include an exemption for existing business relationships, the

proposed Rule was at odds with the approach taken by the states with regard to "do-not-call" registries. All state "do-not-call" laws, except Indiana's, include such an exemption.⁶⁴¹ State regulators noted that there have been few complaints from consumers about calls from companies with whom they have an existing business relationship.⁶⁴² In addition, FCC regulations under the TCPA exempt "established business relationships" from the company-specific "do-not-call" regulations.⁶⁴³ Individual commenters who expressed an opinion on this issue were divided on whether there should be such an exemption. Analysis of individual consumer comments that touched on this issue indicates that about 860 favored an exemption for calls from firms with whom they already have an established relationship, while about 1080 opposed such an exemption.⁶⁴⁴ Furthermore, over 13,000 of the nearly 15,000 comments submitted by Gottschalks' customers supported allowing Gottschalks to call them even if they signed up on a "do-not-call" registry to block other calls.

⁶⁴¹ See, e.g., Ark. Code Ann. § 4-99-403(2)(A); Colo. Rev. Stat. § 6-1-903(10)(B)(II); Conn. Gen. Stat. Ann. § 42-288a(a)(9); Fla. Stat. Ann. § 501.059(1)(c); Ga. Code Ann. § 46-5-27(b)(3)(B); Mo. Rev. Stat. § 407.1095(3)(b); and Tenn. Code Ann. § 65-4-401(6)(B)(iii).

⁶⁴² See June 2002 Tr. I at 118 (New York: "Well, [consumers are not unhappy], and a lot of times they complain, and you could say that's prima facie evidence they're unhappy. We call them back and say, gee, did you have a transaction with these folks? They claim you did on X, Y and Z, and they furnished us this paperwork. And then they say, oh, yeah. They don't seem to be mad."); June 2002 Tr. I at 118-19 (Missouri: "Most people when you call them back are delighted that 70 to 80 percent of their phone calls have been caused to not come in, so when we explain to them that you had a relationship or you explain to them that some of these calls are exempt, they understand when you explain that to them, and they're delighted, because our anecdotal information shows that 70 to 80 percent of the calls people had been receiving, they're not receiving now."); and see generally, June 2002 Tr. I at 110-21.

⁶⁴³ 47 CFR 64.1200(c)(3). The TCPA requires such an exemption. 47 U.S.C. 227(a)(3).

⁶⁴⁴ See, e.g., GBELois (Msg. 44) ("If a person is a member, subscriber, current customer, etc., of a company and the company is calling regarding the status of that relationship then the company should not be obligated to conform to the do not call registry."); Jerry Warnke (Msg. 371) ("Have to be a way to exempt businesses or organizations when they are returning your phone calls or they have a need to call you with an ongoing relationship."). But see, e.g., Karl Engelberger (Msg. 331) ("All pre-existing agreements and relationships should be voided and can, at the line subscribers discretion be re-established."); Don Price (Msg. 483) ("Sometimes pre-existing relationships are those hardest to communicate with regarding the fact that the individual wants to end the relationship with the telemarketer business—once you give or buy something, many telemarketers expect you to continue what you started and make it a monthly habit—even if that was never your intent.").

Finally, industry commenters suggested that the Commission's rationale for not including an exemption for "established business relationships" was faulty.⁶⁴⁵ In adopting the original Rule, the Commission had expressed the view that such an exemption was inappropriate because it was not workable in the context of fraud.⁶⁴⁶ These commenters pointed out that the "do-not-call" registry was driven by privacy concerns, not concerns about fraud. Therefore, they argued, the Commission's stated rationale was inapplicable in the "do-not-call" context.⁶⁴⁷ However, these commenters misunderstood the Commission's rationale in not including an exemption for "established business relationship" in the proposed "do-not-call" provision. In fact, the Commission's rationale for not including such an exemption in its proposal was driven not by concerns about fraud, but by the same privacy concerns that those commenters noted. The Commission believed that the national registry should contain few exemptions in order to provide consumers with the most comprehensive privacy protection possible.

Because the proposed Rule did not contain any "established business relationship" exemption, it is not surprising that few commenters raised this issue unless they were advocating that such an exemption be added. In response to industry's strong advocacy in favor of an "established business relationship" exemption, however, the June 2002 Forum elicited comment on whether such an exemption would be appropriate. Privacy advocates opposed any exemptions to the registry, stating that exemptions erode the effectiveness of a "do-not-call" registry.⁶⁴⁸ These commenters feared that, because of the difficulty in crafting such an exemption narrowly, an "established business relationship" exemption would provide too great a loophole, and would severely hamper the effectiveness of a national "do-not-call" registry.⁶⁴⁹ One consumer spoke at the June 2002 Forum about the dangers inherent in such an exemption.⁶⁵⁰ AARP noted in its supplemental comments that an exemption appeared to be necessary, but

⁶⁴⁵ See, e.g., DMA-NPRM at 34-36; NCTA-NPRM at 8; Nextel-NPRM at 13-15; Wells Fargo-NPRM at 4.

⁶⁴⁶ See 60 FR at 43859.

⁶⁴⁷ See, e.g., DMA-NPRM at 34-36; NCTA-NPRM at 8; Nextel-NPRM at 13-15; Wells Fargo-NPRM at 4.

⁶⁴⁸ See, e.g., EPIC-NPRM at 20-21; NCL-NPRM at 10.

⁶⁴⁹ NCL-NPRM at 10.

⁶⁵⁰ June 2002 Tr. I at 278-82 (Diana Mey).

⁶³⁴ See, e.g., Andy Vuong, *Telemarketers tap cellphone: Complaints on rise as solicitors dial into no-call exemption*, DENVER POST, July 30, 2002; Jennifer Bayot, *Now, That Ringing Cellphone May Be a Telemarketer's Call*, N.Y. TIMES, July 5, 2002.

⁶³⁵ See, e.g., AFSA-NPRM at 8; BofA-NPRM at 9; Cox-NPRM at 6; MBA-NPRM at 5.

⁶³⁶ See, e.g., DialAmerica-NPRM at 14; Roundtable-NPRM at 4-5.

⁶³⁷ See, e.g., ACA-NPRM at 2; ARDA-NPRM at 17; Associations-NPRM at 2; Cendant-NPRM at 5; Comcast-NPRM at 2; DMA-NPRM at 34; HSBC-NPRM at 1; MBA-NPRM at 1-2.

⁶³⁸ See NAA-NPRM at 12, June 28-Supp. at 1, and July 31-Supp. at 1; NNA-NPRM at 3.

⁶³⁹ See, e.g., ABA-NPRM at 10; ABIA-NPRM at 4; AFSA-NPRM at 13-14; AmEx-NPRM at 3; BofA-NPRM at 3; Bank One-NPRM at 4-5; VISA-NPRM at 13; Wells Fargo-NPRM at 4. However, unless such a customer service call includes an inducement to purchase additional goods or services, it would fall outside the definition of "telemarketing" and, therefore, beyond the scope of the Rule's coverage.

⁶⁴⁰ See, e.g., Comcast-NPRM at 2; CAP-Supp. at 1-2.

urged that the Commission keep the exemption very narrow and limit it to existing relationships only, as opposed to prior relationships.⁶⁵¹

Based on the record as a whole, the Commission is persuaded that the benefits of including an exemption for established business relationships outweigh the costs of such an exemption. Therefore, the Commission has decided to provide an exemption for "established business relationships" from the national "do-not-call" registry, as long as the consumer has not asked to be placed on the seller's company-specific "do-not-call" list. Once the consumer asks to be placed on the seller's "do-not-call" list, the seller may not call the consumer again regardless of whether the consumer continues to do business with the seller. If the consumer continues to do business with the seller after asking not to be called, the consumer *cannot* be deemed to have waived his or her company-specific "do-not-call" request.⁶⁵²

The amended Rule limits the "established business relationship" exemption to relationships formed by the consumer's purchase, rental or lease of goods or services from, or financial transaction with, the seller within 18 months of the telephone call or, in the case of inquiries or applications, to three months from the inquiry or application. As indicated in the discussion of the definition of "established business relationship" in § 310.2(n), this time frame is consistent with most state laws that include a time limit.⁶⁵³ The exemption is terminated by the consumer's request to be placed on the company's "do-not-call" list, which is consistent with the FCC's regulations and those of many of the states.⁶⁵⁴ As explained above in the discussion of § 310.2(n), the definition

of "established business relationship" encompasses those affiliates of the seller that the consumer would reasonably expect to be included given the nature and type of goods or services offered and the identity of the affiliate.

In addition to an exemption for "established business relationships," the Commission has decided to retain the provision that allows sellers to obtain the express agreement of consumers who wish to receive telephone calls from that seller, but has modified the provision to require that such express agreement may be evidenced only by a signed, written agreement. The Commission believes that it is important to limit the established business relationship to those where there is ongoing contact or where the relationship has recently lapsed or terminated. However, the Commission recognizes that consumers may have ongoing relationships with sellers where the contacts may be infrequent. Therefore, the Commission has decided to retain the provision that would allow sellers to obtain the consumer's express agreement to call, regardless of whether there has been contact during the prior 18 months. In order to minimize the potential for abuse, the amended Rule does not permit sellers or telemarketers to obtain the consumer's oral authorization. Rather, the amended Rule requires that the express agreement meet the same standards as written authorization in § 310.3(a)(3)(i)—*i.e.*, that the express agreement be in writing, signed by the consumer—and must also include the telephone number to which the calls may be placed. Because the express agreement requires the consumer's signature, the Rule makes it more difficult for sellers and telemarketers to bury the consent in the fine print of a document where the consumer might not notice it. The Commission intends that the consent be clear and conspicuous. This express agreement is effective as long as the consumer has not asked to be placed on the seller's company-specific "do-not-call" list. Once the consumer asks to be placed on the seller's "do-not-call" list, the seller may not call the consumer again regardless of whether the consumer continues to do business with the seller.

First Amendment and related considerations applicable to "do-not-call" provisions. As noted above, the proposal to include charitable solicitation telemarketing by for-profit telemarketers within the scope of a national "do-not-call" registry requirement drew extensive negative comment from non-profit organizations and their representatives. These

commenters advanced a number of criticisms of the proposal based upon the practical effects it would foreseeably produce if adopted. They also argued that the proposal was fatally flawed from the standpoint of First Amendment analysis. Each of the major points made by these commenters is discussed below.

Because of the central role of the telephone and of professional fundraisers in the non-profit arena, non-profit organizations and their representatives uniformly predicted financial disaster for the non-profit sector if such a proposal were adopted.⁶⁵⁵ According to DMA-NonProfit, a quarter of all charitable contributions raised in 2001 came from telephone solicitation,⁶⁵⁶ and an estimated 60 to 70 percent of that solicitation was performed by professional fundraisers.⁶⁵⁷ These commenters feared the detrimental impact of a national "do-not-call" registry on this important element of the non-profit world's financial support system.⁶⁵⁸ One commenter opined that the proposed "do-not-call" registry requirement would reduce the potential donor pool by between 40 to 50 percent, and based on sign-up rates in some states, possibly by as much as 70 or 80 percent.⁶⁵⁹

The proposed registry's impact on non-profit organizations' ability to solicit previous donors was of particular concern. According to a number of commenters, it is axiomatic that persons who have already contributed to a non-profit or charitable organization are much more likely to contribute than are persons who have never done so.⁶⁶⁰ In

⁶⁵⁵ See, e.g., DMA-NonProfit-NPRM at 16; Not-for-Profit Coalition-NPRM at 7. See also Red Cross-NPRM at 3; APTS-NPRM at 2-3; Childhood Leukemia-NPRM at 1; FireCo-NPRM at 1; California FFA-NPRM at 2; Edwardsville FFA-NPRM at 1; HRC-NPRM at 1-2; Leukemia Society-NPRM at 1-2; March of Dimes-NPRM at 1; Michigan Nonprofit-NPRM at 1; Purple Heart-NPRM at 2; NC Zoo-NPRM at 1; NPR-NPRM at 2; AAST-NPRM at 5; FOP-NPRM at 2; Southern Poverty-NPRM at 2.

⁶⁵⁶ DMA-NonProfit-NPRM at 2 (citing the Turner Study, see note 142 above).

⁶⁵⁷ DMA-NonProfit-NPRM at 2. See also Not-for-Profit Coalition-NPRM at 6.

⁶⁵⁸ See, e.g., ACE-NPRM at 1; ADA-NPRM at 1; Red Cross-NPRM at 3; Blood Centers-NPRM at 2; Childhood Leukemia-NPRM at 1; LifeShare-NPRM at 1; March of Dimes-NPRM at 2; NPR-NPRM at 4-5; FOP-NPRM at 3, 4; Project Angel Food-NPRM at 1.

⁶⁵⁹ Not-for-Profit Coalition-NPRM at 9.

⁶⁶⁰ AFP-NPRM at 4 ("For nearly all nonprofit organizations, pre-existing donors and volunteers constitute the source of a majority of all gifts and volunteer time. These individuals are most committed to a cause and best understand the organization. Donors should not lose the opportunity to hear from organizations they supported in the past."); March of Dimes-NPRM at 3 ("The most generous donors and volunteers are

⁶⁵¹ AARP-Supp. at 3.

⁶⁵² See June 2002 Tr. I at 278-82 (Consumer recounted that a telemarketer from a retailer telephoned her, notwithstanding the fact that she was on the retailer's "do-not-call" list. When she questioned them about this apparent error, the telemarketer said that she had recently made a purchase at the retailer, which re-created an "established business relationship," which exempted them from complying with her "do-not-call" request.)

⁶⁵³ See discussion of § 310.2(n) and note 135, above.

⁶⁵⁴ See 47 CFR 64.1200(f)(4), and discussion in FCC TCPA 2002 (see note 633 above) at 8765, para. 23, and at 8770, para. 34, n.63. In addition, several state "do-not-call" statutes contain a similar provision in their exemption for "established business relationships" which terminates the exemption if the consumer has asked not to be called. See, e.g., Alaska, California, Colorado, Connecticut, Illinois, Kansas, New York, Oklahoma, Texas, and Wyoming. See note 592, above, for citations to each state's "no-call" laws and/or regulations.

this regard, Not-for-Profit Coalition stated that “[c]ompounding the harm is the fact that the registry would apply equally to donors with a long history of supporting bona fide non-profit and charitable organizations as well as new prospective donors. Depriving charities and non-profits of the ability to contact prior supporters will be financially devastating.”⁶⁶¹

Not-for-Profit Coalition also argued that the effect of the “do-not-call” registry requirement would be to drive non-profit organizations away from efficient use of professional telefundraisers, and toward inefficient in-house operations.⁶⁶² According to commenters, the efficiency benefits of using professional telefundraisers may be substantial. For example, Hudson Bay stated:

HBC’s phone canvass is mostly for smaller non-profit organizations (and the state chapters of large ones). Instead of renting space, buying computers and phone equipment, hiring supervisors and so on, HBC’s clients find it cheaper to contact their members and donors by sharing these resources. Even after paying HBC’s fee, which ranges from 4 to 7%, it is much cheaper for these non-profits to centralize these services. The savings achieved by phone company volume discounts alone pays more than half of HBC’s fee.⁶⁶³

Several representatives of non-profit organizations argued that under relevant First Amendment precedent, charitable fundraising is fully protected speech, and that attempts by the government to regulate it are subject to the highest level of scrutiny.⁶⁶⁴ These commenters also noted that under the relevant precedents, no distinction between the speech of the non-profit organization and that of the professional telefundraiser actually making the calls is recognized—both are equally protected. Several criticized the proposal’s exemptions for solicitations by “political clubs, committees, or parties” and “constituted religious organizations” as making distinctions based on the type of speech or speaker

those who have a prior relationship with the Foundation If the Foundation cannot contact prior donors and volunteers on the basis of a preexisting relationship, then the effectiveness of our fundraising program will be jeopardized.” See also, e.g., APTS-NPRM at 2; ADA-NPRM at 1; AAST-NPRM at 3; FireCo-NPRM at 1; NTC-NPRM at 3; Southern Poverty-NPRM at 2; NCLF-NPRM at 1.

⁶⁶¹ Not-for-Profit Coalition-NPRM at 10.

⁶⁶² *Id.* at 18, 19.

⁶⁶³ Hudson Bay-Goodman-NPRM at 2. See also, e.g., APTS-NPRM at 3; Not-For-Profit Coalition-NPRM at 19.

⁶⁶⁴ See, e.g., Hudson Bay-Goodman-NPRM at 4, 5; DMA-NonProfit-NPRM at 7; Not-For-Profit Coalition-NPRM at 15.

that are impermissible under the First Amendment.⁶⁶⁵

The Commission believes that, with respect to telemarketing that solicits sales of goods or services, the “do-not-call” registry provisions are consistent with the relevant First Amendment cases. In *Central Hudson Gas & Elec. v. Pub Serv. Comm. of N.Y.*, the Supreme Court established the applicable analytical framework for determining the constitutionality of a regulation of commercial speech that is not misleading and does not otherwise involve illegal activity.⁶⁶⁶ Under that framework, the regulation (1) must serve a substantial governmental interest; (2) must directly advance this interest; and (3) may extend only as far as the interest it serves⁶⁶⁷—that is, there must be “a ‘fit’ between the legislative ends and the means chosen to accomplish those ends . . . a fit that is not necessarily perfect, but reasonable . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.”⁶⁶⁸

With regard to the first of these criteria, protecting the privacy of consumers from unwanted commercial telemarketing calls is a substantial governmental interest.⁶⁶⁹ “Individuals are not required to welcome unwanted speech into their own homes and the government may protect this freedom.”⁶⁷⁰ The “do-not-call” registry is designed to advance the privacy rights of consumers by providing them with an effective, enforceable means to make known to sellers their wishes not to receive solicitation calls. Simply put, sellers or telemarketers soliciting sales may not call persons who have placed themselves on the registry. The registry is also designed to cure the inadequacies as a privacy protection measure that became apparent in the company-specific “do-not-call” provisions included in the original Rule.⁶⁷¹ Thus, the second of *Central*

⁶⁶⁵ See, e.g., DMA-NonProfit-NPRM at 5, 6; Not-for-Profit Coalition at 41.

⁶⁶⁶ 447 U.S. 557 (1980).

⁶⁶⁷ *Id.* at 566.

⁶⁶⁸ *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

⁶⁶⁹ In some instances, the “do-not-call” registry provisions will also serve another substantial governmental interest—prevention of fraud and abuse, as in cases where elderly consumers are signed up on the registry to protect them from exploitative or fraudulent telemarketers. Cf. *Metromedia v. San Diego*, 453 U.S. 490, 509 (1981) (holding, *inter alia*, that San Diego’s “twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial government goals.”)

⁶⁷⁰ *Frisby v. Schultz*, 487 US 474, 485 (1988).

⁶⁷¹ The shortcomings of the company-specific approach are set forth above in the discussion of § 310.4(b)(1)(iii).

Hudson’s criteria is satisfied. Finally, the national “do-not-call” registry is a mechanism closely and exclusively fitted to the purpose of protecting consumers from unwanted telemarketing calls.

In *Rowan v. Post Office Dept.*, the Supreme Court upheld a federal statute empowering a homeowner to bar mailings from specific senders by notifying the Postmaster General that she wished to receive no further mailings from that sender.⁶⁷² The Court stated:

We therefore categorically reject the argument that a vendor has a right under the constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even “good” ideas on an unwilling recipient. That we are often “captives” outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. The asserted right of a mailer, we repeat, stops at the outer boundary of every person’s domain. . . . To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that “a man’s home is his castle” into which “not even the king may enter” has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.⁶⁷³

Under *Rowan*, the First Amendment allows a statutory scheme whereby a person may block a sender’s mailings by notifying the Postmaster General, who then will prevent that sender’s mailings from being delivered to that person. The Commission believes that the First Amendment similarly raises no impediment to Rule provisions that will enable a person by signing up on a national “do-not-call” registry to block commercial communications via telephone, which are far more intrusive than the communications, at issue in *Rowan*, via printed words and images.⁶⁷⁴

⁶⁷² 397 U.S. 728 (1969).

⁶⁷³ *Id.*, at 737-38 (internal citations omitted).

⁶⁷⁴ While the statute under consideration in *Rowan* was focused on mailed advertisements of a sexual nature, the Court specifically rejected arguments that it should be read narrowly to cover only “salacious” or “pandering” advertisements—or even all advertisements. Instead, the court upheld the statute interpreted as covering all mailings from the sender, regardless of whether they were advertisements, and regardless of

With respect to telemarketing that solicits charitable contributions, the Commission believes that the applicable analytical framework is more stringent.⁶⁷⁵ “[C]haritable solicitations involve a variety of speech interests . . . that are within the protection of the First Amendment and therefore have not been dealt with as purely commercial speech.”⁶⁷⁶ In considering the more stringent analysis, the Commission notes, preliminarily, that the company-specific “do-not-call” provisions that apply to charitable solicitation telemarketing are content-neutral. “Laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.”⁶⁷⁷ The company-specific “do-not-call” provisions apply equally to all for-profit solicitors, regardless of whether they are seeking sales of goods or services or charitable contributions, and regardless of what may be expressed in the solicitation calls

whether they were sexually provocative. The determinative factor was that the mailings were unwanted. The Commission does not advance a theory, however, that *Rowan* should be read here to cover any non-commercial communications.

⁶⁷⁵ *Metromedia* makes clear that a less exacting standard is applied in analyzing a regulation’s constitutionality with respect to commercial speech than in analyzing the same regulation’s constitutionality with respect to noncommercial speech. “[I]nsofar as it regulates commercial speech, the San Diego ordinance meets the constitutional requirements of *Central Hudson*.... It does not follow, however, that San Diego’s ban on signs carrying noncommercial advertising is also valid Commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech.” *Metromedia*, 453 U.S. at 513. In *Watchtower Bible and Tract Soc’y v. Village of Stratton*, ___ U.S. ___, 122 S. Ct. 2080 (2002), where the Court invalidated an ordinance that required anyone who wanted to engage in door-to-door canvassing or soliciting to obtain a permit before doing so, the Court went out of its way to suggest that the ordinance might have been constitutional if it were limited to commercial speech. *Id.* at 2089. This may be dicta, but it is significant because the Court seems to have approved a distinction between commercial and noncommercial speech—the same distinction drawn in the amended Rule—and to have done so in the same context as the Rule, *i.e.*, solicitation that threatens to invade the privacy of the home.

⁶⁷⁶ *Riley v. Nat’l. Fed. of the Blind*, 487 U.S. 781 (1988) (internal quotation marks omitted).

⁶⁷⁷ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 648 (1994). “[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.” *Turner* at 642, citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). See also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“[The] principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”). See also *Am. Target Adver. v. Giani*, 199 F.3d 1241 (10th Cir. 2000), cert. denied, 531 U.S. 811 (2000) (applying this principle in the context of solicitation).

themselves or the viewpoints of the organizations on whose behalf the solicitation calls are made. Thus, these provisions are content-neutral.⁶⁷⁸

As in the case of commercial speech, the analysis applicable to charitable solicitations also inquires into the nature of the governmental interest that the regulation seeks to advance. The case law indicates that with respect to the higher level of scrutiny applicable to charitable solicitation, privacy protection is a sufficiently strong governmental interest to support a regulation that touches on protected speech.⁶⁷⁹ However, the case law also indicates that, in the case of charitable solicitation, greater care must be given to ensuring that the governmental interest is actually advanced by the regulatory remedy, and tailoring the regulation narrowly so as to minimize its impact on First Amendment rights. In *Riley* and *Schaumburg*, the Court rigorously examined laws that regulated the percentage of charitable contributions raised by a professional fundraiser that could be retained as the fundraiser’s fee. The Court struck down the laws because there was, in the Court’s view, at best an extremely tenuous correlation between charity fraud and the percentage of funds paid as a professional fundraiser’s fee; the laws therefore were unlikely to achieve their intended purposes of preventing fraud and protecting charities. The Court also found that these laws were not tailored narrowly enough to minimize the impact on the charities’ First Amendment rights.

By contrast, a very tight nexus exists between the Commission’s legitimate interest in protecting consumers’ privacy against unwanted telemarketing calls and the company-specific “do-not-call” provisions that apply to telemarketing to solicit charitable contributions. This nexus does not rely on an attenuated theoretical connection between fraud and the percentage of funds raised that a telefunder takes as its fee. Rather, there is a direct correlation between the governmental

⁶⁷⁸ Similarly, the “do-not-call” registry provisions are also content-neutral, because they apply equally to all sellers and telemarketers engaged in the solicitation of sales of goods or services, regardless of the content of the calls, or the viewpoints of the telemarketers or the sellers.

⁶⁷⁹ “The Village argues that three interests are served by its ordinance: the prevention of fraud, the prevention of crime, and the protection of residents’ privacy. We have no difficulty concluding, in light of our precedent, that these are important interests that the village may seek to safeguard through some form of regulation.” *Watchtower*, 122 S. Ct. 2080 (2002); *Schaumburg v. Citizens for Better Env’t.*, 444 U.S. 620, 637 (1980) (protecting the public from fraud, crime, and undue annoyance are indeed substantial).

interest and the regulatory means employed to advance that interest: The consumer requests a specific caller not to call again, and the regulation requires the caller to make a record of and honor that request in the future.

The Commission approaches with extreme care the issue of tailoring “do-not-call” requirements narrowly to advance its legitimate interest in privacy protection and yet minimize the impact on the First Amendment rights of charitable organizations and the telemarketers who solicit on their behalf. The Commission is concerned that subjecting charitable solicitation telemarketing—along with commercial telemarketing to solicit sales of goods and services—to national “do-not-call” registry requirements may sweep too broadly, because it could, for example, prompt some consumers to accept the blocking of charitable solicitation calls that they would not mind receiving, as an undesired but unavoidable side-effect resulting from signing up for the registry to stop sales solicitation calls.⁶⁸⁰ In the NPRM, the Commission proposed to resolve this problem by including in the Rule a provision enabling consumers who signed up for the “do-not-call” registry nonetheless to choose selectively to receive calls from specific entities from whom they would welcome solicitation calls. This proposed solution met with uniform condemnation from non-profit organizations, who opined that it would be too costly for non-profit organizations to obtain prospective donors’ express permission to call, and too difficult for consumers to exercise their right to hear from them.⁶⁸¹ The Commission is persuaded that these objections may be well-founded, and that this, therefore, would not be an adequate approach to narrow tailoring.

Another solution alluded to in a specific question posed in the NPRM might be to bifurcate the registry into separate categories, one for commercial solicitation and another for charitable solicitation, enabling consumers to sign up separately to stop commercial calls while allowing charitable solicitations.⁶⁸² At this time, however,

⁶⁸⁰ Childhood Leukemia-NPRM at 1 (“I firmly believe if this change is implemented, people attempting to avoid calls from those who sell goods and services over the telephone will put themselves out of reach of our organization, thereby threatening our financial foundation. The victims will be the children because we will no longer have the resources to help them.”)

⁶⁸¹ Non-profit organizations also argued that this proposal was tantamount to a constitutionally impermissible requirement for non-profits to seek permission to speak before speaking.

⁶⁸² “Should the “do-not-call” registry be structured so that requests not to receive

the Commission believes that such an approach may be impractical because of cost considerations and because of the difficulty for consumers to understand and deal with the complications of such a system. Thus, these factors may render a bifurcated registry an insufficient or excessively cumbersome response to the imperative of narrow tailoring.

After careful consideration of the record as a whole and the relevant case law, the Commission has determined that the best approach to achieve narrow tailoring of the "do-not-call" provisions at this time is to exempt from the "do-not-call" registry requirements solicitations to induce charitable contributions via outbound telephone calls,⁶⁸³ and instead to bring charitable solicitation telemarketing only within the ambit of the company-specific "do-not-call" regime contained in the original Rule.⁶⁸⁴

The Commission believes that the encroachment upon consumers' privacy rights by unwanted solicitation calls is not exclusive to commercial telemarketers; consumers are disturbed by unwanted calls regardless of whether the caller is seeking to make a sale or

telemarketing calls to induce the purchase of goods and services are handled separately from requests not to receive calls soliciting charitable contributions?" Question 5 i, 67 FR at 4539. Few commenters addressed this question, and those who did so expressed only the most general views, without advocating or opposing the concept of bifurcation. See, e.g., NYSCPB-NPRM at 23 ("[T]he technical problems and costs of implementing such a system might be prohibitive."); NCLC-NPRM at 19; NCL-NPRM at 9; NAAG-NPRM at 20. Only about 100 individual consumer email comments received by the Commission responded to a direct question on the issue included on the Commission's website. A minority of these commenters (about 40 percent) expressed the view that the "do-not-call" registry should not treat calls from charitable fundraisers differently, while about 60 percent expressed the view that it should do so.

⁶⁸³ "Solicitations to induce charitable contributions via outbound telephone calls are not covered by § 310.4(b)(1)(iii)(B) of this Rule." Section 310.6(a) of the amended Rule.

⁶⁸⁴ The comments of many non-profit or charitable organizations indicate that these organizations have a policy of maintaining a "do-not-call" list even though not legally required to do so. Lautman-NPRM at 1 ("[P]rofessional fundraisers use the Direct Marketing Association's 'do not call' database, in addition to client maintained 'do not call' lists."); HRC-NPRM at 1 ("[W]e have (like most nonprofit organizations) eliminated unwanted calls to our donors by requiring our telemarketing partners to keep a 'do-not-call' list. We also require them to use the Direct Marketing Association's 'do not call' list."); Telefund-NPRM at 1 ("Most non-profit organizations maintain lists of their own donors who prefer to be contacted via the mail. Telefund Inc. also maintains such a database for its clients."); See also ADA-NPRM at 1; American Rivers-NPRM at 1; Angel Food-NPRM at 1; APTS-NPRM at 3; Childhood Leukemia-NPRM at 1; FOP-NPRM at 1; Italian American Police-NPRM at 1; Illinois Police-NPRM at 1; Leukemia Society-NPRM at 2; SO-CN-NPRM at 1; SO-CO-NPRM at 1; National Children's Cancer-NPRM at 1; Southern Poverty-NPRM at 2; Stage Door-NPRM at 1.

to ask for a charitable contribution.⁶⁸⁵ Thus, the Commission rejects the suggestion from numerous non-profit organizations and their representatives that no privacy protection measures are necessary with respect to charitable solicitation telemarketing, and that telefundraisers should be exempt from even the company-specific "do-not-call" provisions.⁶⁸⁶

The Commission believes that even though the company-specific approach has not been fully adequate to the task of protecting consumers' privacy rights against an onslaught of commercial solicitations, this more limited approach does provide some privacy protection in the context of charitable fundraising, and works better to accommodate both the right of privacy and the right of free speech. The Commission is persuaded by the arguments of Hudson Bay that fundamental differences between commercial solicitations and charitable solicitations may confer upon the company-specific "do-not-call" requirements a greater measure of success with respect to preventing a pattern of abusive calls from a fundraiser to a consumer than it was able to produce in the context of commercial fundraising:

When a pure commercial transaction is at stake, callers have an incentive to engage in all the things that telemarketers are hated for. But non-commercial speech is a different matter. The success of an advocacy call does not hinge entirely on whether the recipient decides to part with a sum of money. A calling center employee working for a citizens' group is less interested in the volume of calls than in effective communication of the group's concerns. That is the reason the money is needed in the first place, not for profit.

* * *

In a non-commercial call the recipient is more than a potential source of income. Rather he or she is also a voter, a constituent, a consumer, a source of information to others, and a potential source of a future contribution, even if not in the current call. There is more than a sale, there is a cause at stake. It is, therefore, self-defeating for the advocacy caller to engage in the abusive telemarketing practices that motivated the draft TSR. Such a caller risks alienating the

⁶⁸⁵ One indication of this is that, even though the FTC web page advising consumers on how to comment specifically included a direct question calling attention to the possibility of a separate database for charitable fundraisers, only about 100 consumer email comments responded to it. A great many consumer email comments expressed the view that unsolicited calls disturb their privacy, and did not distinguish between sales calls and other types of solicitation calls, such as those for charities.

⁶⁸⁶ See generally Not-For-Profit Coalition-NPRM; DMA-NonProfit-NPRM.

recipient of the call against the cause not just against the caller or their organization.⁶⁸⁷

Nevertheless, if experience indicates that the company-specific approach does not in fact provide adequate protections for consumers' privacy in the context of charitable solicitation telemarketing, the Commission may revisit this decision in the future, and reconsider whether to require telemarketing calls soliciting charitable donations to comply with the national "do-not-call" registry requirements.

FTC authority to establish a "do-not-call" registry. Several industry members questioned whether the FTC had the statutory authority to establish a national "do-not-call" registry.⁶⁸⁸ They argued that the Telemarketing Act does not mention the creation of a "do-not-call" registry and that, in fact, another statute (TCPA) had directed another agency (the FCC) to explore the possibility of establishing such a registry.⁶⁸⁹ They noted that the FCC had considered such a registry and rejected it in 1992 in favor of a company-specific approach that required consumers to tell those companies from which they did not wish to receive calls to place them on the company's "do-not-call" list.⁶⁹⁰

Congress passed the Telemarketing Act three years after the FCC rejected a national registry. As noted in the NPRM, the Telemarketing Act authorizes the Commission to prescribe rules "prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices," and specifically mandates that these rules prohibit telemarketers from undertaking "a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."⁶⁹¹ Thus, establishment of the national "do-not-call" registry is squarely within the authority granted by the statute.

The goal in both the TCPA and § 6102(a)(3) of the Telemarketing Act is to protect consumer privacy. When Congress directed the FTC to include in the TSR a prohibition against a pattern of unsolicited telephone calls which the reasonable consumer would consider

⁶⁸⁷ See also HRC-NPRM at 1 ("Most importantly, nonprofits are dependent upon the revenue generated by their supporters and will do nearly anything to honor their requests and treat them with the utmost respect.")

⁶⁸⁸ See, e.g., Advanta-NPRM at 2; ATA-NPRM at 6-10, 20-21; DMA-NPRM at 16-22; ERA-NPRM at 26-27; MPA-NPRM at 34-38; PMA-NPRM at 25-26. See also ARDA-Supp. at 1; ATA-Supp. at 7.

⁶⁸⁹ See, e.g., DMA-NPRM at 16-22; ERA-NPRM at 26; MPA-NPRM at 34-38; PMA-NPRM at 25-26.

⁶⁹⁰ FCC Report and Order, CC Docket No. 92-90, 7 FCC Rcd 8752 at 8762-67 (Oct. 16, 1992).

⁶⁹¹ 15 U.S.C. 6102 (a)(1) and (a)(3)(A) (emphasis added).

coercive or abusive of such consumer's right to privacy, Congress knowingly put the FTC on the same path that the FCC had trod three years earlier, but did not mandate that the two agencies arrive at the identical conclusion. Instead, the Telemarketing Act is written broadly and does not limit how the Commission is to effectuate the Congressional mandate; it leaves the method of achieving the goal of protecting privacy to the Commission's discretion.⁶⁹² There is nothing in the TCPA that would lead to the conclusion that the FCC was the only federal agency authorized to create a national registry. In fact, although Congress had passed the TCPA only three years earlier, it mandated in the Telemarketing Act that the FTC promulgate provisions similar to those that the FCC had promulgated pursuant to TCPA. For example, although FCC regulations already restricted the times that telemarketers can call consumers,⁶⁹³ Section 6102(a)(3)(B) of the Telemarketing Act directed the FTC to also include in its regulations a provision that would prohibit telemarketers from making unsolicited phone calls to consumers during certain hours of the day or night. Thus, Congress clearly intended to provide the FTC with sufficient authority to remedy the problem of unwanted telemarketing calls by means of a national registry, notwithstanding that the FCC had earlier decided not to exercise its own authority to do so.

Interplay between the national "do-not-call" registry and state "do-not-call" laws. The NPRM specifically requested comment on how the proposed establishment of a national "do-not-call" registry should interplay with similar requirements on the state level.⁶⁹⁴ In response, NAAG and representatives of individual states with "do-not-call" laws expressed concern about the possible preemptive effect of a national "do-not-call" registry.⁶⁹⁵ On the other hand, industry representatives urged that if, despite their opposition, the Commission adopted TSR

provisions establishing a national "do-not-call" registry, the national registry must preempt similar state requirements.⁶⁹⁶

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.⁶⁹⁷ The Commission is actively consulting with the individual states to coordinate implementation of the national registry to minimize duplication and maximize efficiency for consumers and business. The Commission's goal is a consistent, efficient system whereby consumers, in a single transaction, can register their requests not to receive calls to solicit sales of goods or services, and sellers and telemarketers can obtain a single list to ensure that in placing calls they do not contravene those consumers' requests. In adopting the "do-not-call" provisions in the amended Rule, the Commission intends to advance that goal. At this time, the Commission specifically reserves further action on the issue of preemption until sufficient time has passed to enable it to assess the success of the approach outlined above.⁶⁹⁸

Implementation of a National Do-Not-Call Registry

In developing an implementation plan for a national "do-not-call" registry, the Commission has been guided by a number of concerns. Most importantly, the Commission has sought to ensure

the accuracy and validity of the consumer telephone numbers added to the registry, and to build a system that can handle the potential volume of consumer requests to be placed on the registry.⁶⁹⁹ Equally important, the system must ensure the security of the information maintained in the registry. The registry also must be easily accessible to both telemarketers and appropriate law enforcement agencies. In addition, the Commission seeks to develop the system with the lowest possible costs.

The Commission conducted extensive research to determine the feasibility of a national "do-not-call" registry and to develop a plan for implementing such a registry. The NPRM asked for comment on a number of specific implementation questions.⁷⁰⁰ The staff contacted the states with their own registries, and also contacted many of the contractors used by those states to develop their registries. On February 28, 2002, as part of its research, the Commission issued a Request for Information ("RFI") to contractors capable of assisting the FTC in the development, deployment, and operation of the national registry.⁷⁰¹ Thirty-six different companies responded to the RFI. In August 2002, the Commission issued a Request for Quotes ("RFQ") to selected vendors.⁷⁰² A number of those vendors have submitted proposals and quotes to the Commission; the agency is currently evaluating those proposals.⁷⁰³

Based on all of the information gathered during this process, the Commission plans to develop a national registry with three components: consumer registration; access to the consumer registration database by telemarketers and sellers; and law enforcement access to both the consumer registration database and the list of telemarketers and sellers who have accessed the consumer registration database. The entire system will be fully automated to simplify the process and keep costs to a minimum.

Consumer registration. Consumers will be able to add their telephone numbers to the national "do-not-call" registry through two methods: either through a toll-free telephone call or over

⁶⁹² See KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.2 (3rd ed. 1994) (noting that agencies have the power to "fill any gaps" that Congress either expressly or implicitly left to the agency to decide pursuant to the decision in *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). It is, therefore, permissible for agencies to engage in statutory construction to resolve ambiguities in laws directing them to act, and courts must defer to this administrative policy decision.

⁶⁹³ 47 CFR 64.1200(e)(1). See also discussion at 7 FCC Rcd at 8767-68.

⁶⁹⁴ 67 FR at 4539.

⁶⁹⁵ See, e.g., NAAG-NPRM at 6-14; Connecticut-NPRM at 3; DC-NPRM at 4-5 (District of Columbia); NYSCPB-NPRM at 13-17 (New York); Texas PUC-NPRM at 3-4.

⁶⁹⁶ See, e.g., ATA-NPRM at 28-29; DMA-NPRM at 3, 14; ERA-NPRM at 34.

⁶⁹⁷ In this regard, the Commission notes that in September 2002, the FCC published an NPRM to review its TCPA regulations, including, among other things, whether its company-specific "do-not-call" requirement has been effective and whether a national registry would better serve the public interest. See FCC TCPA 2002.

⁶⁹⁸ See generally *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990) (preemption can occur "where it is impossible for a private party to comply with both state and federal requirements, see, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)."); *Crosby v. Nat'l. Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Ass'n of Banks in Ins. v. Duryee*, 270 F.3d 397, 404 (6th Cir. 2001) (where state and federal laws are inconsistent, state law can be preempted even if it was enacted to protect its citizens or consumers).

⁶⁹⁹ Consumer interest in state "do-not-call" registries has varied from a few percent to over 40 percent of all telephone lines within the state.

⁷⁰⁰ 67 FR at 4538-39.

⁷⁰¹ See <http://www.ftc.gov/procurement>.

⁷⁰² The Commission issued the RFQ to those vendors that expressed an interest in developing the national registry and that were on General Service Administration ("GSA") schedules to provide goods or services to the federal government.

⁷⁰³ All vendor responses to both the RFI and RFQ contain confidential proprietary business information and therefore cannot be made public.

the Internet. Consumers who choose to register by phone will have to call the registration number from the telephone line that they wish to register. Their calls will be answered by an Interactive Voice Response (“IVR”) system. After a brief introductory message, the consumer will be asked to enter on his or her telephone keypad the telephone number from which the consumer is calling. The number entered will be checked against the automatic number information (“ANI”) that is transmitted with the call. If the telephone number the consumer enters on the keypad matches the ANI of the line from which the consumer is calling, then the IVR system will inform the consumer that the number is registered and the call will end. If the telephone number does not match, the IVR system will advise the consumer to call back from the telephone the consumer wishes to register. In the small percentage of calls in which ANI is not available, the system will offer other verification options.

Using this process, the Commission will verify, at a minimum, that each consumer is calling from a telephone line assigned the number the consumer is attempting to register. The Commission has determined that this is sufficient verification for the limited purposes involved here — ensuring that a telephone number in the national registry was entered by someone in the household to which that telephone number is assigned.⁷⁰⁴ A number of commenters stated that the FTC should prohibit third parties from registering consumers’ preferences not to receive telemarketing calls with the national “do-not-call” registry, citing concerns that such third-party registrations could lead to abuse.⁷⁰⁵ The Commission agrees that third-party registrations should not be permitted, and believes that the verification procedures to be established for telephone registrations will prevent these potential types of

⁷⁰⁴ Unlike the Commission’s cases challenging the unauthorized billing of goods or services to consumers’ telephone numbers based solely on ANI verification, *see, e.g., FTC v. Verity Int’l, Ltd.*, No. 00 Civ. 7422 (LAK) (S.D.N.Y. 2000); *FTC v. American TelNet, Inc.*, No. 99-1587 CIV:KING (S.D. Fla. 1999), the verification process needed to ensure the validity of numbers in the national registry is much less stringent. Here, only the right not to receive unwanted telemarketing calls is being asserted; the line subscriber is not incurring charges for goods and services, possibly purchased by unauthorized third parties, based on ANI information.

⁷⁰⁵ *See, e.g., DialAmerica-NPRM* at 13; *Household-NPRM* at 13; *Texas PUC-NPRM* at 2; *PMA-NPRM* at 29. NAAG also cited recent state cases against companies that have deceptively offered to add consumers’ numbers, for a fee, to “do-not-call” lists. *See NAAG-NPRM* at 19, n.47.

third-party abuse, because the person registering will have to be present physically in the household with which the telephone number being registered is associated.

Other commenters suggested that only the line subscriber or person who is billed for the telephone line be allowed to register that number in the national registry.⁷⁰⁶ In fact, one commenter suggested that the FTC should “permit each adult user of the telephone to prevent calls to him or herself, but not to be able to bar all calls to all adults using that telephone.”⁷⁰⁷ The Commission does not believe this is a realistic approach. Because numerous people in a household often share a common telephone number, the Commission has determined that the decision to be part of the “do-not-call” registry does not rest with the line subscriber (or any single resident) alone. In such a shared-number situation, the privacy rights of all are affected by unwanted telemarketing calls. Thus, the decision to register the household telephone number in the national registry is a joint decision of all household members. The Commission’s telephone registration system will accept the registration from any member of the household, but will remind consumers that they are registering on behalf of all household members.⁷⁰⁸

⁷⁰⁶ *See, e.g., DialAmerica-NPRM* at 13; *Nextel-NPRM* at 26.

⁷⁰⁷ *AUSA-NPRM* at 8.

⁷⁰⁸ Several commenters supported allowing any household member to register the household telephone number. *See, e.g., NCL-NPRM* at 9 (allow registration requests to be made by the line subscriber, spouse, roommate, care giver, or others with a legitimate interest). One telemarketer that calls on behalf of non-profit organizations opposed this view, commenting that “each person has an individual, separate constitutional right to speak and be in association with other like-minded people, and the groups to which they belong also have the right to contact their members and the public at large. When dealing with fully protected, non-commercial speech, any do-not-call list that keeps track only of numbers, rather than names and numbers, needs some way to be certain that everyone who is lawfully and regularly reached at a telephone number has consented to be cut off from the organizations to which they belong.” *Hudson Bay-Goodman-NPRM* at 13 (emphasis omitted). As an initial matter, non-commercial speech is not covered by the national “do-not-call” provisions of the amended Rule. *See* amended Rule § 310.6(a) (exempting solicitations to induce charitable contributions via outbound telephone calls from § 310.4(b)(1)(iii)(B) of the Rule). Moreover, the Commission has determined that to accomplish its privacy protection objectives, there is no workable alternative to allowing any member of a household to exercise the “do-not-call” rights of the entire household using a shared telephone number. Households in which one member wants to sign up with the national “do-not-call” registry and another does not have the option of subscribing to an additional telephone line that is not on the registry and may therefore receive telemarketing calls, or they can provide express authorization to

Consumers who choose to register via the Internet will go to a website dedicated to the registration process, where they will be asked to enter the telephone number they wish to register. Consumers will be told that they may register only their household or personal telephone number(s). As with the telephone registration system, they will be reminded that if they share a household number with others, they are registering on behalf of all household members. The Commission is considering two possible methods for verifying consumers’ information. One possible option is that a consumer will be asked to enter certain address information, such as his or her zip code and the numeric portion of his or her street address, which the system would then check against a national database to ensure that it matches the telephone number provided. The second possible option is that the consumer will be asked to enter his or her email address; the system will send a confirming email to that address, and the consumer will then have to respond to reconfirm his or her registration decision.

The Commission will use one or both of these verification methods for Internet registrations. Such verification processes will enhance the likelihood that individuals will register their own telephone numbers. If the email verification process is used, the Commission will also develop procedures to prevent large numbers of registrations from being confirmed through the same email account. Once again, the Commission has determined that these are sufficient verification procedures for the limited purpose of adding telephone numbers to the national “do-not-call” registry, and should help prevent the potential abuses cited concerning massive third-party registrations.

specific entities to receive telemarketing calls from them, regardless of their national registry status, pursuant to § 310.4(b)(1)(iii)(B)(i) of the amended Rule. The Commission notes that the “do-not-call” provisions will not “cut off” individuals from organizations or sellers because it will not foreclose other means of communication with any member of the household, such as by conventional mail, email, or door to door solicitation. The “do-not-call” provisions are strongly analogous to laws requiring solicitors to honor a “no solicitation” sign posted by a homeowner, which the Supreme Court has approved in such cases as *Martin v. Struthers*, 319 U.S. 141 (1941), involving “a form of regulation . . . which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed.” According to the Court, “[t]his or any similar regulation leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs—with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant. . . .” *Id.* at 148.

For both telephone and Internet registrations, the only personal identifying information that will be maintained by the national "do-not-call" registry will be the consumer's telephone number. Based on our discussions with the states, that appears to be the only piece of information that is needed by telemarketers.⁷⁰⁹ Moreover, the Commission has determined that it has no need for consumer names or addresses in the registry.⁷¹⁰ Thus, the Commission will not collect that information.

Consumers will be able to verify or cancel their registration status using either the telephone or Internet. The same verification procedures established for the initial registration will apply to these requests as well. Allowing consumers to verify their registration status and to cancel their registrations if they so wish offers yet another method to enhance the accuracy of the national registry.

The Commission has determined that consumer registrations will remain valid for five years, with the registry periodically being purged of all numbers that have been disconnected or reassigned. The Commission wishes to minimize the inconvenience to consumers entailed in periodically re-registering their preference not to receive telemarketing calls.⁷¹¹ However, the Commission is also aware that the length of time registrations remain valid directly affects the overall accuracy of

the national registry.⁷¹² A number of commenters stated that 16 percent of all telephone numbers change each year, and that 20 percent of all Americans move each year.⁷¹³ Unless the system includes a process to counteract this effect, numbers in the national registry that have been disconnected and then reassigned to other line subscribers would remain in the registry even though those line subscribers to whom the numbers are reassigned may not object to receiving telemarketing calls. To guard against this possibility, the system will include a procedure to periodically check all telephone numbers in the national registry against national databases, and those telephone numbers that have been disconnected or reassigned will be purged from the registry. This procedure will help maintain the accuracy of the national registry, while limiting the number of times consumers must go through the registration process.⁷¹⁴ The Commission believes that a five-year registration period coupled with the periodic purging of disconnected telephone numbers from the registry adequately balances, on the one hand, the need to maintain a high level of accuracy in the national registry and, on the other hand, the onus on consumers to periodically re-register their telephone numbers.

Access to consumer registration information. To comply with the amended Rule's "do-not-call"

provisions, telemarketers and sellers must gain access to the telephone numbers in the national registry so that they can "scrub" their call lists to eliminate the telephone numbers of consumers who have registered a desire not to be called. For the telemarketer and seller access component of the registry, the Commission plans to develop a fully-automated, secure website dedicated to providing this information to telemarketers and sellers. The first time a telemarketer or seller accesses the system, the company will be asked to provide certain limited identifying information, such as company name and address, company contact person, and the contact person's telephone number and email address. If a telemarketer is accessing the registry on behalf of a client seller, the telemarketer will also need to identify that client.

The only consumer information telemarketers and sellers will receive from the national registry is the registrants' telephone numbers. Those telephone numbers will be sorted and available by area code. Telemarketers and sellers will be able to access as many area codes as desired, by selecting, for example, all area codes within a certain state or region of the country. Of course, telemarketers and sellers will also be able to access the entire national registry, if desired.

When a seller or telemarketer first submits an application to access registry information, the company will be asked to specify the area codes that they want to access.⁷¹⁵ Each company accessing the registry data will be required to pay an annual fee for that access, based on the number of area codes of data the company accesses.⁷¹⁶ Fees will be payable via credit card (which will permit the real-time transfer of data) or electronic funds transfer (which will require the telemarketer or seller to wait approximately one day for the funds to clear before data access will be provided).

After payment is processed, the telemarketer or seller will be given an account number and permitted access to the appropriate portions of the registry.

⁷⁰⁹ In fact, based on discussions between the states and the Commission staff, it appears that in states where additional information is provided to telemarketers, the states have received requests to strip their lists of all information except the telephone number.

⁷¹⁰ Some commenters stated that the Commission would have to collect consumers' names, addresses and telephone numbers for the national registry to remain accurate. See, e.g., NAA-NPRM at 12; Household-NPRM at 13. Another stated that to keep the registry accurate, "the Commission must be prepared to accept a data stream from every local exchange carrier in the country on a daily basis." SBC-NPRM at 11. The Commission has learned that this is not necessarily true. National databases with sufficient accuracy that contain only telephone numbers now exist, permitting the Commission to purge a telephone number from the national registry when that number is disconnected or the party in whose name the number is registered changes.

⁷¹¹ Consumer inconvenience includes not just their time and effort necessary to register, but also their need to remember when it is time to re-register. Of course, requiring frequent consumer re-registrations also increases the costs of operating the national registry. Several commenters supported allowing registrations to continue indefinitely, until the consumer's phone number is disconnected or he requests that his number be removed. See, e.g., New Orleans at 9; NCL at 9. In addition, 14 states with "do-not-call" registries do not specify a renewal period for registrations in their "do-not-call" statutes (Alabama, Alaska, California, Colorado, Indiana, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, New York, Oklahoma, Pennsylvania, and Tennessee).

⁷¹² Commenters citing this concern over the accuracy of the national registry reached various conclusions concerning the time period for which registrations remain should remain valid. Some suggested registrations remain valid for only one year. See DialAmerica-NPRM at 13; NCTA-NPRM at 16; Nextel-NPRM at 26. Others stated that registrations should remain valid for two years, unless the Commission can ensure greater accuracy through some purging process. See NRF-NPRM at 18; PMA-NPRM at 29. Still others suggested that a five-year registration period is sufficient. See NAAG-NPRM at 18; Household-NPRM at 13. State registration periods vary from one year to five years, while, as stated in the previous footnote, fourteen states impose no expiration on consumer registrations. Three states require consumers to renew their registration annually (Arkansas, Florida, and Oregon). Two states (Georgia and Wisconsin) have a two-year registration, and two others (Texas and Idaho) have registrations that are good for three years. Six states require consumers to re-register after five years (Connecticut, Illinois, Kansas, Maine, Vermont, and Wyoming).

⁷¹³ See DMA-NPRM at 12; Nextel-NPRM at 26; Household-NPRM at 13; SBC-NPRM at 11. Of course, not all consumers who move change their telephone numbers. For consumers who keep their existing telephone numbers when they move, no action by either the consumer or the Commission is necessary to maintain the registry's accuracy.

⁷¹⁴ The DMA TPS is operated in a similar manner. TPS registrations remain valid for five years. During that five-year period, the DMA checks the information in the TPS against the U.S. Postal Service's National Change of Address List, purging the telephone numbers of those registered consumers who have moved. DMA-NPRM at 7, 12.

⁷¹⁵ They will be able to amend the list of area codes for which they seek data on future visits, provided they pay the appropriate fee for the additional area codes.

⁷¹⁶ On May 29, 2002, the Commission issued a Notice of Proposed Rulemaking to add a new section 310.9 to the Rule, which would establish a "user fee" for telemarketer access to the national do-not-call registry. 67 FR. 37362. After reviewing the comments received in response to that NPRM, the Commission has decided that it will issue a revised NPRM seeking additional comment on the fee issue in the near future. Section 310.8 of the amended Rule has been reserved for the fee section.

That account number will be used in future visits to the website, to shorten the time needed to gain access. On subsequent visits to the website, telemarketers and sellers will be able to download either an entire updated list of numbers from their selected area codes, or a more limited list, consisting only of additions to or deletions from the registry that have occurred since the company's last download. This would limit the amount of data that a company needs to download during each visit. Telemarketers and sellers will be permitted to access the registry as often as they wish for no additional cost, once the annual fee has been paid. As indicated in the discussion of Section 310.4(b)(3)(iv), however, the Rule requires a seller or a telemarketer to employ a version of the "do-not-call" registry obtained from the Commission no more than three months prior to the date any telemarketing call is made.

Law enforcement access to the registry. Any law enforcement agency that has responsibility to enforce either the Rule or any state do-not-call statute or regulation will be permitted to access appropriate information in the national registry. This information will be provided through a secure Internet website, with access obtained through the Commission's existing Consumer Sentinel® system. Law enforcers will be able to query the registry to determine if and when a particular telephone number was registered by a consumer. They will also be able to query if and when a particular telemarketer or seller accessed the registry, and the information accessed by that telemarketer or seller. Such law enforcement access to data in the national registry is critical to enable state Attorneys General and other appropriate law enforcement officials to gather evidence to support enforcement actions under the Telemarketing and Consumer Fraud and Abuse Prevention Act,⁷¹⁷ and, as discussed below, once harmonization between the national registry and state do-not-call programs has been completed, to support law enforcement action under state law as well.

Harmonization of various do-not-call registries. As discussed above, the Commission is working with the states to develop a single, national "do-not-call" registry. The Commission envisions allowing consumers throughout the United States to register their preference not to receive telemarketing calls in a single transaction with one governmental agency. In addition, the Commission

anticipates allowing telemarketers and sellers to access that consumer registration information through one visit to a national website, developed for that purpose.

To further those goals, the Commission will allow all states, and the DMA if it so desires, to download into the national registry—at no cost to the states or the DMA—the telephone numbers of consumers who have registered with them their preference not to receive telemarketing calls. Telemarketers and sellers will be allowed to access that data through the national registry as the information is received.

It will take some time to achieve these goals completely, however. Some states will be able to transfer their state "do-not-call" registration information, and will cease requiring telemarketers to access the state registries, by the time telemarketers first gain access to the national registry. For other states, it may take from 12 to 18 months to achieve those results. At least one state, Indiana, may need up to three years before it can become part of the national system. In any event, the Commission will continue to work diligently with the states in an effort to harmonize these different systems.

Implementation time line. As stated above, the Commission has issued an RFQ to vendors to develop and operate a national "do-not-call" registry. The implementation time line for the registry begins on the date the contract is awarded to a vendor in response to that RFQ. The Commission anticipates awarding the contract as soon as the agency receives appropriate authority and funding from Congress to begin building the national registry.

Consumers will be allowed to begin to register their preference not to receive telemarketing calls approximately four months after a contract for the national "do-not-call" registry is awarded. To avoid an unmanageable surge of calls when the national registry is initially opened, the Commission anticipates phasing in registry availability to consumers one geographic region at a time throughout the United States over a period of approximately two months. Telemarketers and sellers will be given access to the telephone numbers in the national registry approximately six months after the contract is awarded. The effective date for the "do-not-call" provisions of the amended Rule will be approximately seven months after the date the contract to develop and implement the system is awarded. Thus, to comply with the amended Rule, telemarketers will need to obtain the list of registered telephone numbers during

the sixth month after the contract is awarded, allowing themselves sufficient time to scrub their calling lists before placing outbound telemarketing calls in the seventh month after the date the contract is awarded.

As stated below in the Effective Date section, in the future the Commission will announce the date by which full compliance with the national "do-not-call" registry provisions of the amended Rule will be required. As noted elsewhere in this document, full compliance with all other provisions of the amended Rule—with the exception of the Caller ID provision (§ 310.4(a)(7))—will be required by the date on which the amended Rule is effective, March 31, 2003. Full compliance with the Caller ID provisions will be required by January 29, 2004.

§ 310.4(b)(1)(iv) — Abandoned calls & § 310.4(b)(4) — Safe harbor for abandoned calls

In the NPRM, the Commission explained that "abandoned calls" violate § 310.4(d) of the original Rule because such calls failed to provide the requisite prompt disclosures.⁷¹⁸ In providing this explanation, the Commission noted that "abandoned calls" include two distinguishable scenarios: "hang up" calls, in which telemarketers hang up on consumers whom they have called without speaking to them; and "dead air" calls, in which there is a prolonged period of silence between the consumer's answering a call and the connection of that call to a sales representative.⁷¹⁹ The record shows that both types of abandoned calls arise from the use of predictive dialers, which promote telemarketers' efficiency by calling multiple consumers for every available sales representative.⁷²⁰ Doing so maximizes the amount of time representatives spend speaking with consumers and minimizes the amount of time representatives spend waiting to reach a prospective customer.⁷²¹ An inevitable "side effect" of predictive dialers' functionality is that the dialer will reach more consumers than can be connected to available sales

⁷¹⁸ 67 FR at 4524.

⁷¹⁹ 67 FR at 4522.

⁷²⁰ ABA-NPRM at 12; ATA-NPRM at 32; CADM-NPRM at 3; DialAmerica-NPRM at 22; Pelland-NPRM at 2; Sytel-NPRM at 3; Miller Study at 13; <http://www.predictive-dialers.com/home/faq.html>.

⁷²¹ ATA-NPRM at 31; ERA-NPRM at 41; MPA-NPRM at 31; NAA-NPRM at 14; Private Citizen-NPRM at 3; PMA-NPRM at 30; TeleDirect-NPRM at 2.

representatives.⁷²² In those situations, the dialer will either disconnect the call or keep the consumer connected in case a sales representative becomes available.⁷²³

According to one consumer organization, the Rule's prohibition on abandoned calls as set forth in the NPRM addresses "one of the most invasive practices of the telemarketing industry."⁷²⁴ "Hang up" calls and "dead air" frighten consumers,⁷²⁵ invade their privacy,⁷²⁶ cause some of them to struggle to answer the phone only to be hung up on,⁷²⁷ and waste the time and resources of consumers working from home.⁷²⁸

The amended Rule prohibits abandoning outbound telephone calls, but constructs a safe harbor allowing telemarketers to continue using predictive dialers in a regulated manner. Under § 310.4(b)(1)(iv), an outbound telephone call is abandoned if, once the call has been answered by a consumer, the telemarketer fails to connect the call to a sales representative within two seconds of the consumer's completed greeting. (As explained herein, "hang up" calls and delays of more than two seconds before connecting the call to a sales representative are prohibited by this section of the Rule.) The Commission's prohibition of abandoned calls is authorized by § 6102(a)(3)(A) of the Telemarketing Act, which directs the Commission to prohibit telemarketers from undertaking a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy, and by § 6102(a)(3)(C), which directs the Commission to require telemarketers to promptly and clearly disclose certain material information. Section 6102(a)(3), which directs the Commission to consider recordkeeping requirements in prescribing rules regarding deceptive and abusive telemarketing acts or practices, is the authority for the required recordkeeping related to predictive dialers.

Section 310.4(b)(4), the amended Rule's safe harbor provision, provides that the Commission will refrain from bringing a Rule enforcement action against a seller or telemarketer based on violations of § 310.4(b)(1)(iv) if the seller

or telemarketer's conduct meets certain specified standards designed to minimize call abandonment. These standards are: (1) the seller or telemarketer must employ technology that ensures abandonment of no more than three percent of all calls answered by a consumer, measured per day per calling campaign; (2) the seller or telemarketer must allow each telemarketing call placed to ring for at least fifteen seconds or four complete rings before disconnecting an unanswered call; (3) whenever a sales representative is not available to speak with the person answering the call within two seconds of that person's completed greeting, the seller or telemarketer must promptly play a recorded message; and (4) the seller or telemarketer must retain records, in accordance with § 310.5(b)-(d), establishing compliance with § 310.4(b)(4)(i)-(iii).

Telemarketers voiced strong objection to the NPRM discussion of abandoned calls as violative of § 310.4(d),⁷²⁹ and argued that this interpretation would in effect ban the use of predictive dialers,⁷³⁰ causing the loss of efficiency benefits that arise from the use of predictive dialers.⁷³¹ The Commission is mindful of the benefits of increased efficiency, but believes that the increased efficiency of predictive dialers must be balanced against the abusive nature of abandoned calls. The abuses of abandoned calls were delineated in the NPRM and elsewhere in the record.⁷³² As NAAG asserted at the June 2002 Forum, an abandoned call is basically a

"prank call."⁷³³ However, the Commission is persuaded that a total ban on abandoned calls, which would amount to a ban on predictive dialers, would not strike the proper balance between addressing an abusive practice and allowing for the use of a technology that provides substantially reduced costs for telemarketers. At the June 2002 Forum, one telemarketing group posited that consumers who make purchases via the telephone ultimately benefit from these reduced costs in the form of lower prices.⁷³⁴ Therefore, taking into account the record as a whole, and arguments raised by both sides of this issue, the Commission has determined to prohibit abandoned calls from continuing without regulation, and has created requirements that, in effect, closely govern the use of predictive dialers. Under this approach, consumers will benefit from a substantial reduction in the number of abandoned calls they receive,⁷³⁵ but telemarketers will not be deprived of a large part of the efficiency benefits that accrue from the use of predictive dialers.⁷³⁶ The Commission also notes that the amended Rule's establishment of a national "do-not-call" registry should significantly reduce the number of calls received by consumers who place their numbers on the registry, thereby reducing the number of abandoned calls these consumers must contend with as well.

"Abandoned call": Section 310.4(b)(1)(iv) of the amended Rule defines a prohibited abandoned outbound call as one in which the recipient of the call answers the call, and the telemarketer does not connect the call to a sales representative within two seconds of the person's completed greeting. This definition of abandoned call covers "dead air" and "hang up" calls, in which the telemarketer hangs up on a called consumer without connecting that consumer to a sales representative. This approach to abandoned calls clarifies several issues raised by telemarketers in the record.

The amended Rule removes any possibility of doubt that a call placed by a telemarketer is an outbound telephone call within the meaning of the Rule, even if the telemarketer hangs up on the called consumer without speaking to him or her, or subjects the called consumer to dead air. The Rule's disclosure requirement is triggered once a recipient of a telemarketing call

⁷²² June 2002 Tr. I at 211 (CCC); Time-NPRM at 11; ATA-Supp. at 11; Miller Study at 13-14.

⁷²³ NASUCA-NPRM at 12-13; Sytel-NPRM at 4-7; ATA-Supp. at 11; Miller Study at 13-14.

⁷²⁴ PRC-NPRM at 3.

⁷²⁵ 67 FR at 4523.

⁷²⁶ AARP-NPRM at 9.

⁷²⁷ 67 FR at 4523; Texas PUC-NPRM at 5; Worsham-NPRM at 5.

⁷²⁸ PRC at 3.

⁷²⁹ ABA-NPRM at 12; ACA-NPRM at 9; ATA-NPRM at 30; Associations-NPRM at 3; Capital One-NPRM at 6; DialAmerica-NPRM at 24-25; DMA-NPRM at 44; ERA-NPRM at 40-41; Gannett-NPRM at 4; Infocision-NPRM at 6-7; Metris-NPRM at 10; MPA-NPRM at 29-30; NAA-NPRM at 13, 15; Time-NPRM at 11; Tribune-NPRM at 9.

⁷³⁰ June 2002 Tr. I at 211 (CCC); ABA-NPRM at 12; Advanta-NPRM at 4; Aegis-NPRM at 5; AFSA-NPRM at 16; Capital One-NPRM at 6; Gannett-NPRM at 4; Household Auto-NPRM at 12; ICT-NPRM at 2; PMA-NPRM at 30; PCIC-NPRM at 2; VISA-NPRM at 12; Miller Study at 14. *But see* EPIC-NPRM at 23.

⁷³¹ ACA-NPRM at 8-9; ARDA-NPRM at 15; ANA-NPRM at 6; ATA-NPRM at 31; BofA-NPRM at 9; BRI-NPRM at 3; Discover-NPRM at 6; Fleet-NPRM at 6; FPIR-NPRM at 2; Household Auto-NPRM at 11-12; ICT-NPRM at 2; ITC-NPRM at 2-3; KeyCorp-NPRM at 6; Marketlink-NPRM at 3; MPA-NPRM at 8; NAA-NPRM at 14; Noble-NPRM at 4; NATN-NPRM at 4; NSDI-NPRM at 4; SHARE-NPRM at 4; Synergy Solutions-NPRM at 4; Technion-NPRM at 5; TeleDirect-NPRM at 2; Teleperformance-NPRM at 3; TRC-NPRM at 4; TeleStar-NPRM at 2; Time-NPRM at 10; Allstate-Supp. at 2; Miller Study at 15. *See also* Citigroup-NPRM at 10; IMC-NPRM at 7 (Predictive dialers enhance dialing accuracy); NAA-NPRM at 7 (Predictive dialers help with "do not call" compliance).

⁷³² 67 FR at 4522-24; AARP-NPRM at 9; NAAG-NPRM at 47; NACAA-NPRM at 10; PRC-NPRM at 3.

⁷³³ June 2002 Tr. II at 27 (NAAG). *See also* NAAG-NPRM at 47; McKenna-Supp. at 2.

⁷³⁴ June 2002 Tr. I at 212-13 (CCC). *But see* June 2002 Tr. I at 222-23 (EPIC).

⁷³⁵ AFSA-NPRM at 16; Sytel-NPRM at 7-8.

⁷³⁶ *See* KeyCorp-NPRM at 6; PCIC-NPRM at 2.

answers the phone.⁷³⁷ This approach is consistent with the treatment of this issue in the NPRM.⁷³⁸ The Commission rejects the argument, advanced by ACA, ATA, DMA, and ERA, that abandoned calls cannot be regulated by the Rule because they are not “outbound telephone calls.”⁷³⁹ If this theory were valid, telemarketers could abuse consumers in a variety of ways without violating the Rule as long as they did not also engage in a sales pitch. That interpretation and that result are contrary to the overall purpose and intent of the Telemarketing Act and plainly at odds with the Rule’s definition of “outbound telephone call” and with the Rule generally. A telemarketer initiates a telephone call by causing the called consumer’s telephone to ring. Abandoning the call after the consumer answers but before the sales representative begins a sales pitch is an abusive telemarketing act or practice. Certainly this is the type of practice that prompted Congress, in the Telemarketing Act, to direct the Commission to prohibit telemarketers from undertaking “a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy.”⁷⁴⁰ The record contains ample evidence that consumers find abandoned calls to be coercive or abusive of their privacy rights.⁷⁴¹

ATA, in its comment and at the June 2002 Forum, requested guidance from the Commission on how “abandoned call” would be defined in the Rule.⁷⁴²

⁷³⁷ The safe harbor, which, among other things, directs how long telemarketers must allow a called consumer’s telephone to ring before disconnecting the call, addresses telemarketers’ practices before the consumer answers the phone.

⁷³⁸ 67 FR at 4524.

⁷³⁹ ACA-NPRM at 9-10; ATA-NPRM at 30; DMA-NPRM at 43-44; ERA-NPRM at 40. DMA, ERA, and PMA argued that the FTC lacks authority to regulate telemarketers’ use of predictive dialer technology. [See DMA-NPRM at 4, 42-48; ERA-NPRM at 38-40; PMA-NPRM at 29-30.] Specifically, DMA, ERA, and PMA argued that the FCC has authority to regulate automatic telephone dialing systems through the TCPA. But nothing in the TCPA limits the authority of the FTC under the Telemarketing Act. The Rule’s regulation of abandoned calls falls squarely within the FTC’s authority to regulate abusive telemarketing acts or practices under the Telemarketing Act. As the Commission stated in the NPRM, the harm to consumers that arises from abandoned calls is very real and falls within the areas of abuse that the Telemarketing Act explicitly aimed to address. [See 67 FR at 4524.] The Commission therefore rejects the argument offered by DMA, ERA, and PMA that it lacks the legal authority to address call abandonment in the TSR.

⁷⁴⁰ 15 U.S.C. 6102(a)(3)(A).

⁷⁴¹ AARP-NPRM at 8-9; EPIC-NPRM at 23; Private Citizen-NPRM at 4; McKenna-Supp. at 2. See also Pelland-NPRM at 2.

⁷⁴² ATA-NPRM at 34; June 2002 Tr. II at 38 (ATA). See also Convergys-NPRM at 6; MPA-NPRM at 32-33.

Accordingly, the Commission has clarified, in § 310.4(b)(1)(iv), that an outbound call is “abandoned” if, once answered by a consumer, it is not connected to a sales representative within two seconds of the consumer’s completed greeting (*i.e.*, no more than two seconds of “dead air”).⁷⁴³ As was explained above, this definition of “abandoned call” also includes situations in which the telemarketer hangs up on a consumer who has answered the telemarketer’s call without connecting that call to a sales representative.

Abandoned call “safe harbor”: The abandoned call safe harbor consists of four components, each of which is supported by record evidence. A seller or telemarketer will not be deemed to have violated § 310.4(b)(1)(iv) by abandoning calls, provided that the seller or telemarketer can show that its conduct conforms to the standards specified in this safe harbor.

Under the first subsection of the safe harbor, the seller or telemarketer must employ technology that ensures abandonment of no more than three percent of all calls answered by called consumers. The safe harbor’s three percent abandonment rate is measured per day per calling campaign. The “per day per campaign” unit of measurement is consistent with DMA’s guidelines addressing its members’ use of predictive dialer equipment.⁷⁴⁴ Under this standard, a telemarketer running two or more calling campaigns simultaneously cannot offset a six percent abandonment rate on behalf of one seller with a zero percent abandonment rate for another seller in order to satisfy the Rule’s safe harbor provision. Each calling campaign must record a maximum abandonment rate of three percent per day to satisfy the safe harbor.

What constitutes an “acceptable” abandonment rate was the subject of substantial comment on the record. A number of telemarketers urged the Commission to alter the position implied in the NPRM that the appropriate standard is a zero percent abandonment rate.⁷⁴⁵ Among industry representatives who advanced this

⁷⁴³ DialAmerica-NPRM at 19; Sytel, Outbound Focus Issue 16, <http://www.outboundfocus.com>.

⁷⁴⁴ See <http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38>. See also MBNA-NPRM at 8. But see ATA-NPRM at 35: Commenter advocated a unit of measurement incorporating “a broad period of time” to allow for variances in abandonment rates caused by such factors as the time of day a call is placed; ERA-NPRM at 44; MPA-NPRM at 30, 32; NAA-NPRM at 15; PMA-NPRM at 31; ERA-Supp. at 24.

⁷⁴⁵ DialAmerica-NPRM at 24; NAA-NPRM at 15; PMA-NPRM at 31.

argument, ATA took the most extreme position, arguing against any regulation of abandonment rates.⁷⁴⁶ The Commission rejects this position in light of the record of conduct affiliated with abandoned calls and predictive dialers under the current regulatory scheme.⁷⁴⁷ Other industry comments recommended that the Commission set a “reasonable” or “acceptable” abandonment rate above zero percent that would curb abuses while allowing use of predictive dialers to continue.⁷⁴⁸ A third group of telemarketers argued that the Commission’s abandonment rate should be consistent with DMA’s current guideline, which calls for an abandonment rate no higher than five percent.⁷⁴⁹ Consumer groups and law enforcement representatives advocated strongly for a zero abandonment rate.⁷⁵⁰

Taking all of these viewpoints into account, the Commission has concluded that neither extreme strikes the right balance on this issue. The Commission believes that a maximum abandonment rate of three percent strikes a reasonable balance between curbing a very abusive practice and preserving some of the substantial economic benefits that accrue from the use of predictive dialers. Two telemarketers essentially supported this abandonment rate as being “feasible, realistic” and “fully capable” of being achieved.⁷⁵¹ ATA asserted that the three percent standard would result in “a significant drop in efficiency” among some of its members.⁷⁵² Sytel, a leading provider of predictive dialer technology, urged the Commission not to set a rate *below* three

⁷⁴⁶ ATA-NPRM at 33; ATA-Supp. at 14. See also TeleDirect-NPRM at 2.

⁷⁴⁷ 67 FR at 4522-23. In the present environment, telemarketers have engaged in predictive dialer practices that frighten, disturb, and aggravate consumers. See, e.g., June 2002 Tr. II at 17-18 (AARP); June 2002 Tr. II at 21 (NAAG); June 2002 Tr. II at 22 (DialAmerica).

⁷⁴⁸ BofA-NPRM at 9; Citigroup-NPRM at 10; ITC-NPRM at 3; KeyCorp-NPRM at 6; MasterCard-NPRM at 13; Time-NPRM at 11.

⁷⁴⁹ <http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38>; ABA-NPRM at 12; AFSA-NPRM at 16; ARDA-NPRM at 16; CBA-NPRM at 10; Citigroup-NPRM at 10; Discover-NPRM at 6; ERA-NPRM at 43; MPA-NPRM at 8, 32-33; June 2002 Tr. II at 24 (ERA). See also NAA-NPRM at 15; PMA-NPRM at 31; ERA-Supp. at 22-23; MPA-Supp. at 6, 23; NAA-Supp. at 2; Miller Study at 2. But see NASUCA-NPRM at 14; Tribune-NPRM at 9.

⁷⁵⁰ EPIC-NPRM at 22-23; NAAG-NPRM at 47; NASUCA-NPRM at 14; NCL-NPRM at 11; PRC-NPRM at 3; Private Citizen-NPRM at 4; June 2002 Tr. I at 220 (Junkbusters). See also Horick-NPRM at 1; McKenna-Supp. at 2. But see McClure-NPRM at 1.

⁷⁵¹ PCIC-NPRM at 2; Aegis-NPRM at 5. See also ARDA-Supp. at 1: “A rate between three and five percent is reasonable.”

⁷⁵² June 2002 Tr. II at 49 (ATA). See also ATA-Supp. at 15; Associations-Supp. at 6-7; ERA-Supp. at 23; MPA-Supp. at 23; NAA June 28-Supp. at 2.

percent to allow for continuing use of predictive dialers.⁷⁵³ The three percent standard is also consistent with the California Public Utilities Commission's Interim Opinion regarding predictive dialer use and abandoned calls.⁷⁵⁴

The second component of the abandoned call safe harbor addresses "ring time" or "early hang ups." According to Sytel, some telemarketers using predictive dialers may disconnect calls to consumers after allowing the phone to ring for only a very short period of time before hanging up, without giving consumers a reasonable opportunity to answer the phone; these disconnected calls are not considered "abandoned" by predictive dialers.⁷⁵⁵ Employing a short "ring time" is yet another way for telemarketers to maximize the efficiency of their sales representatives; the predictive dialer calls many more consumers than the telemarketer can handle to minimize the chance that a sales representative will remain idle.⁷⁵⁶ This kind of call is abusive of a consumer's right to privacy, as consumers' lives at home are interrupted without any benefit or purpose whatsoever. One runs to the phone only to have it stop ringing before one can pick it up; or answers it only to find no one there. Surprisingly, one commenter, MPA, actually argued in favor of allowing telemarketers to hang up after one ring if no sales representatives were available to handle the call.⁷⁵⁷ Sytel recommends that the Commission follow DMA guidelines on predictive dialers, which recommend allowing the phone to ring at least four times or for twelve seconds before disconnecting the call.⁷⁵⁸ Sytel stated that the practice of "early hangups" is widespread, and it urged the Commission to set a "ring time" standard that allows consumers a reasonable length of time to answer the phone.⁷⁵⁹ The Commission has concluded that a modified version of the DMA guidelines presents a reasonable approach. Under this part of the safe harbor, telemarketers must let the phone ring either four times or for fifteen seconds before disconnecting the

call.⁷⁶⁰ This ring time standard will give consumers, including the elderly or infirm who may struggle to get to the telephone, a reasonable opportunity to answer telemarketing calls while preventing the undesirable result of consumers' privacy being disrupted by ringing phones with no caller present on the other end of the line.

The third component of the abandoned call safe harbor requires telemarketers to play a recorded message whenever a sales representative is not available to speak with a consumer within two seconds of the consumer's completed greeting. The silence that consumers face when the sales representative is unavailable and does not respond after the consumer says, "hello", is "dead air."⁷⁶¹ The recorded message will significantly mitigate the problems associated with "dead air" by identifying the caller responsible for the extended silence.

According to the record amassed in this proceeding, dead air is an unavoidable feature of predictive dialers.⁷⁶² Some dead air in telemarketing calls is caused by answering machine detection ("AMD"): consumers are met with silence as the dialer determines whether the call was answered by a person or an answering machine.⁷⁶³ Dead air also results when the dialer waits for a sales representative to become available to speak with the called consumer.⁷⁶⁴ Sytel argued in favor of setting a maximum dead air standard of two seconds.⁷⁶⁵ DMA's predictive dialer guidelines also set a two second maximum for dead air.⁷⁶⁶ This standard is consistent with the recent CPUC Interim Opinion governing predictive dialers.⁷⁶⁷ Based on the record established on this issue—that use of predictive dialers inevitably entails some dead air and that two seconds of dead air allows predictive dialers to impart significant efficiencies—the

amended Rule provision allows two seconds of dead air before a call answered by a consumer will be considered "abandoned."

Consumers on the receiving end of dead air may wonder if "someone is waiting to get into my home when I'm away, or . . . determining when I'm home alone."⁷⁶⁸ The Commission believes it is not so much the pause that frightens consumers, it is the silence. By playing a recorded message giving the name and telephone number of the seller responsible for the call, the fear generated by telemarketers' dead air is substantially mitigated, and telemarketers are able to continue using predictive dialer technology.⁷⁶⁹

The "recorded message" component of the safe harbor must be read in tandem with the prohibition of abandoned calls, under which telemarketers must connect calls to a sales representative within two seconds of the consumer's completed greeting to avoid a violation of the Rule. Clearly, telemarketers cannot avoid liability by connecting calls to a recorded solicitation message rather than a sales representative. The Rule distinguishes between calls handled by a sales representative and those handled by an automated dialing-announcing device.⁷⁷⁰ The Rule specifies that telemarketers must connect calls to a sales representative rather than a recorded message.⁷⁷¹

The record reflects a range of views regarding the prospect of using recorded messages in telemarketing. A consumer advocacy group, a law enforcement body, and some telemarketers expressed support for recorded messages as a way to mitigate the abuses arising from dead air.⁷⁷² Others opposed requiring the use of recorded messages.⁷⁷³ DMA opposed it based on the assumption that telemarketers' messages would need to include all of the prompt disclosures required by § 310.4(d).⁷⁷⁴ DMA noted

⁷⁵³ June 2002 Tr. II at 53 (Sytel).

⁷⁵⁴ CPUC Interim Opinion, Rulemaking 02-02-020 (June 27, 2002) at 20. The CPUC concluded that, based on comments it had received in its rulemaking process, "most responsible users of predictive dialing equipment are either already at or near a 3 percent error rate or can achieve it with minimum reprogramming effort."

⁷⁵⁵ Sytel-NPRM at 4; Sytel, Outbound Focus Issue 16, <http://www.outboundfocus.com>.

⁷⁵⁶ Private Citizen-NPRM at 3.

⁷⁵⁷ June 2002 Tr. II at 25 (MPA).

⁷⁵⁸ Sytel-NPRM at 4; <http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38>.

⁷⁵⁹ Sytel-NPRM at 4.

⁷⁶⁰ According to Sytel, the 15-second standard has been adopted by the United Kingdom DMA. Outbound Focus Issue 16, <http://www.outboundfocus.com>.

⁷⁶¹ ARDA-NPRM at 15.

⁷⁶² Sytel, Outbound Focus Issue 16, <http://www.outboundfocus.com>; Sytel-NPRM at 4-5. See also ATA-NPRM at 34; Cendant-NPRM at 9; DMA-NPRM at 42.

⁷⁶³ DialAmerica-NPRM at 19-20; Private Citizen-NPRM at 3; Sytel-NPRM at 4-5; Time-NPRM at 10.

⁷⁶⁴ ARDA-NPRM at 15; DialAmerica-NPRM at 20-21; Sytel-NPRM at 4.

⁷⁶⁵ Sytel-NPRM at 5-6.

⁷⁶⁶ See <http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38>. But see ATA-Supp. at 14 (supporting a four-second dead air standard); ERA-Supp. at 25, MPA-Supp. at 23 (Commenters' proposed definition of "abandoned call" has no dead air time limit).

⁷⁶⁷ CPUC Interim Opinion at 11-12.

⁷⁶⁸ AARP-NPRM at 9.

⁷⁶⁹ ARDA-NPRM at 15-16; Household Auto-NPRM at 12; NACAA-NPRM at 10; PCIC-NPRM at 2; TeleDirect-NPRM at 3; Texas PUC-NPRM at 5.

⁷⁷⁰ But see Kans. Rev. Stat. 50-670(b)(6), which does not distinguish between the two.

⁷⁷¹ This comports with the CPUC Interim Opinion governing predictive dialers, DMA's guidelines for predictive dialers, and Sytel's recommended approach. See CPUC Interim Opinion at 10-12; <http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38>; Sytel-NPRM at 3.

⁷⁷² AARP-NPRM at 9; ARDA-NPRM at 15; BofA-NPRM at 9; CADM-NPRM at 1; Household Auto-NPRM at 12; PCIC-NPRM at 2; Texas PUC-NPRM at 5. See also McClure-NPRM at 2. But see MasterCard-NPRM at 13.

⁷⁷³ DMA-NPRM at 44; EPIC-NPRM at 24; Time-NPRM at 11; Worsham-NPRM at 5.

⁷⁷⁴ DMA-NPRM at 44. See also Capital One-NPRM at 6-7; NASUCA-NPRM at 13-14; NCL-NPRM at 11; Private Citizen-NPRM at 4.

that recorded messages containing these disclosures could violate the TCPA.⁷⁷⁵ Time similarly opposed it based on concern for requiring the recorded message to include the prompt disclosures and, in addition, posited that consumers would not support receiving recorded-message disclosures on their answering machines.⁷⁷⁶ The Commission's approach to the recorded message component of this safe harbor should allay these concerns.⁷⁷⁷ The recorded message need not include all required prompt disclosures; rather, the message need contain no more than the seller's name and telephone number.⁷⁷⁸ Of course, it must comply with applicable state and federal laws governing the use of recorded messages, such as the FCC's TCPA regulations. Moreover, telemarketers are not required to leave a recorded message on the answering machines of consumers who are not home to answer the telemarketer's call. In light of the limited nature of the elements of the recorded message component of the safe harbor, the Commission's approach also resolves Sytel's caution against allowing the use of recorded messages without regulation.⁷⁷⁹

The fourth component of the abandoned call safe harbor is a recordkeeping requirement. Specifically, telemarketers using predictive dialers under this safe harbor must keep records documenting compliance with the first three components of this safe harbor in a manner that is in accordance with the recordkeeping requirements of the Rule set out in § 310.5(b)-(d). The record clearly establishes the need for this requirement. According to statements at the June 2002 Forum, some telemarketers routinely exceed DMA's recommended maximum abandonment rate of five percent.⁷⁸⁰ At the June 2002 Forum, DMA explained that enforcement of its guideline was difficult despite receiving complaints.⁷⁸¹ The Commission foresees that, absent recordkeeping

requirements, the Commission would encounter similar difficulty in enforcing this aspect of the amended Rule. Furthermore, the record does not contain opposition to a recordkeeping requirement associated with the use of predictive dialers, and the records required by the Commission in this provision of the Rule are similar to those supported by industry representatives in the CPUC's predictive dialer rulemaking proceeding.⁷⁸² The Commission believes that predictive dialer technology can capture and preserve abandonment rate records as a matter of routine;⁷⁸³ records showing compliance with the ring time and recorded message requirements will not impose a significant burden on telemarketers who wish to take advantage of this safe harbor.

§ 310.4(b)(2) — Restrictions on use of list

Section 310.4(b)(1)(iv) of the proposed Rule prohibited any seller or telemarketer from selling, purchasing, or using a seller's "do-not-call" list for any purpose other than complying with the Rule's "do-not-call" provision. The amended Rule retains the provision but modifies the language to also prohibit the sale, purchase, rental, lease, or use of the national registry maintained by the Commission for any purpose other than compliance with the Rule's "do-not-call" provision or otherwise to prevent telephone calls to telephone numbers on either the sellers' lists or the national registry.

Those commenters who addressed this provision supported such a prohibition.⁷⁸⁴ NCL stated that, since consumers who sign up for a "do-not-call" list are seeking to preserve their privacy, it would be an invasion of their privacy to use any information that would identify those consumers (e.g., names or telephone numbers) for any purpose other than to ensure that those individuals do not receive unsolicited telemarketing calls.⁷⁸⁵

In addition to expanding the provision to cover the sale, purchase, rental, lease, or other use of the registry, the amended Rule has made this prohibition a separate and distinct abusive practice. In the proposed Rule, this provision was part of § 310.4(b)(1), which sets out prohibited practices by telemarketers, including adherence to the "do-not-call" provision. Section

310.4(b)(1) also prohibited sellers from causing telemarketers to engage in the prohibited practices. However, the Commission believes that it is important for *all* persons, not just sellers and telemarketers, to use the "do-not-call" lists properly. Therefore, the amended Rule retains this provision, renumbered as § 310.4(b)(2), but extends the prohibition to "*any person*," in order to prohibit all entities, not just sellers and telemarketers, from misusing "do-not-call" lists. By extending the prohibition to "any person," the Commission intends that the provision apply to such parties as list brokers and other entities that do not fall within the definitions of "seller" or "telemarketer." In addition, the amended Rule adds a provision that permits a person to use either seller-specific lists, or the national registry, not only to comply with the "do-not-call" provisions of the Rule, but also "to prevent telephone calls to telephone numbers on such lists." This provision will permit an entity not subject to the amended Rule for whatever reason (e.g., because it is outside of the Commission's jurisdiction) to access the national registry in order to scrub its calling lists, if it wants to avoid calling consumers who have expressed a preference not to receive telemarketing calls.

§ 310.4(b)(3) — Safe harbor for "do-not-call"

Section 310.4(b)(3) provides sellers and telemarketers with a limited safe harbor from liability for violating the "do-not-call" provision found in § 310.4(b)(1)(iii).⁷⁸⁶ During the original rulemaking, the Commission determined that sellers and telemarketers should not be held liable for calling a person who previously asked not to be called if they had made a good faith effort to comply with the Rule's "do-not-call" provision and the call was the result of error. The Rule established four requirements that a seller or telemarketer must meet in order to avail itself of the safe harbor: (1) it must establish and implement written procedures to comply with the "do-not-call" provision; (2) it must train its personnel in those procedures; (3) it must maintain and record lists of persons who may not be contacted; and (4) any subsequent call must be the result of error.

These criteria tracked the FCC's regulations, which set forth the minimum standards that companies must follow to comply with the TCPA's

⁷⁸⁶ This provision has been renumbered in the amended Rule. In the original Rule and in the NPRM, the "safe harbor" provision is § 310.4(b)(2).

⁷⁷⁵ DMA-NPRM at 44. See also Sytel-NPRM at 6; Worsham-NPRM at 5.

⁷⁷⁶ Time-NPRM at 11. See also ANA-NPRM at 6; Associations-NPRM at 3.

⁷⁷⁷ Capital One-NPRM at 6-7.

⁷⁷⁸ When consumers receive this information, they will not have to wonder whether the call has been placed by someone with sinister motives, as described by AARP. See AARP-NPRM at 9; ATA-Supp. at 11.

⁷⁷⁹ Sytel-NPRM at 6.

⁷⁸⁰ June 2002 Tr. II at 29 (ATA); June 2002 Tr. II at 45 (DialAmerica); June 2002 Tr. II at 52 (Syte). See also Capital One-NPRM at 6; DialAmerica-NPRM at 23; NASUCA-NPRM at 14; Sytel-NPRM at 7.

⁷⁸¹ June 2002 Tr. II at 51 (DMA).

⁷⁸² CPUC Interim Opinion at 20-22.

⁷⁸³ TeleDirect-NPRM at 2.

⁷⁸⁴ See, e.g., AARP-NPRM at 3; EPIC-NPRM at 16; NCL-NPRM at 8-9; NYSCPB-NPRM at 6-7; Texas PUC-NPRM at 1-2; Verizon-NPRM at 5. See also June 2002 Tr. I at 215-25.

⁷⁸⁵ NCL-NPRM at 8-9.

“do-not-call” provision.⁷⁸⁷ In the NPRM, the Commission proposed three additional requirements which have to be met by sellers or telemarketers or others acting on behalf of a seller or charitable organization before they may avail themselves of the “safe harbor:” (1) they must use a process to prevent telemarketing calls from being placed to any telephone number included on the Commission’s national registry using a version of the registry obtained not more than 30 days before the calls are made; (2) they must maintain and record consumers’ express verifiable authorizations to call; and (3) they must monitor and enforce compliance with their “do-not-call” procedures.

Based on the record in this matter, and for the reasons set forth below, the amended Rule retains the “safe harbor” requirement to monitor and enforce compliance. However, the amended Rule deletes the “safe harbor” provision expressly requiring maintenance and recording of express verifiable authorizations.⁷⁸⁸ In addition, § 310.4(b)(3)(iv), the “safe harbor” requirement to purchase and reconcile the registry, has been modified to delete the 30-day requirement and, instead, require that telemarketers employ a version of the registry which has been obtained no more than three months before a call is made, and to maintain records documenting that process.⁷⁸⁹

The Commission continues to believe that the Rule should contain a “safe harbor” from liability for violations of its “do-not-call” provision. Commenters generally agreed with this position.⁷⁹⁰ Sellers or telemarketers who have made a good faith effort to provide consumers or donors with an opportunity to exercise their “do-not-call” rights should not be liable for violations that result from error. Further, as discussed in the NPRM, the Commission believes that the same rationale applies to potential violations of § 310.4(b)(1)(ii), and therefore has, in the introductory sentence of § 310.4(b)(5), extended the “safe harbor” to cover violations of *both* amended §§ 310.4(b)(1)(ii) and (iii). Section 310.4(b)(1)(ii) prohibits a seller or telemarketer from denying or interfering with a person’s right to be placed on a “do-not-call” list, whereas

§ 310.4(b)(1)(iii) prohibits calling a person who has previously requested to be placed on such a list.

Although the Commission has extended the “safe harbor” provision to cover the additional practice of denying or interfering with a consumer’s right to be on a “do-not-call” list, it has also tightened the provision by adding the requirement that sellers and telemarketers monitor compliance and take disciplinary action for non-compliance in order to be eligible for the safe harbor. Section § 310.4(b)(5)(v) of the amended Rule requires the seller or telemarketer to monitor and enforce compliance with the procedures established in § 310.4(b)(5)(i).

During the Rule Review, numerous commenters described the problems they had encountered in attempting to assert their “do-not-call” rights and with companies that continued to call after the consumer asked not to be called.⁷⁹¹ Several commenters echoed these complaints in their responses to the NPRM.⁷⁹² This anecdotal evidence indicates that some entities may not be enforcing employee compliance with their “do-not-call” policies. In fact, one consumer reported that telemarketers for two different companies told her that it was not necessary that a company’s “do-not-call” policy be effective, only that such a policy exist.⁷⁹³

To clarify this apparent misconception about the Rule’s requirements, the Commission proposed that, in order to avail themselves of the “safe harbor” provision, sellers and telemarketers must be able to demonstrate that, as part of ordinary business practice, they monitor and enforce compliance with the written procedures required by § 310.4(b)(5)(i). The Commission received few comments on this proposal, and those commenters supported the proposal.⁷⁹⁴ Therefore, the Commission retains § 310.4(b)(5)(v) unchanged, except for renumbering. It is not enough that a seller or telemarketer has written procedures in place; the company must be able to show that those procedures

have been and *are implemented* in the regular course of business. Thus, a seller or telemarketer cannot take advantage of the safe harbor exemption in § 310.4(b)(5) unless it can demonstrate that it actually trains employees in implementing its “do-not-call” policy, and enforces that policy.

Finally, in the “safe harbor” provision in the proposed Rule, the Commission required that the seller or telemarketer use a process to prevent calls to telephone numbers on the national “do-not-call” list, employing a version of the “do-not-call” registry obtained from the Commission not more than 30 days before the calls are made, and to maintain records documenting this process.⁷⁹⁵ Virtually all comments on the safe harbor provision were directed at the proposed 30-day requirement for using the registry, which would have required sellers and telemarketers to reconcile or “scrub” the names on the registry with their customer list every 30 days. Industry commenters were unanimous in their view that a 30-day requirement would be extremely burdensome.⁷⁹⁶ They also pointed out that a 30-day requirement would be virtually impossible to meet without shutting down operations for a day to scrub their lists, and would be particularly burdensome for small businesses with few employees or those that do not use sophisticated technology.⁷⁹⁷ Industry commenters urged the Commission to require quarterly updating, which is the standard adopted by the majority of states in implementing their “do-not-call” statutes.⁷⁹⁸ They pointed out that, after an initial period of “volatility” when consumers sign up for the new registry, the number of names on the registry will stabilize and there may not be as great a need for frequent updating.⁷⁹⁹

⁷⁹⁵ This requirement was in § 310.4(b)(2)(iii) of the proposed Rule.

⁷⁹⁶ See, e.g., ABA-NPRM at 12; AFSA-NPRM at 9-10; ARDA-NPRM at 13; Capital One-NPRM at 5-6; Cox-NPRM at 38; Discover-NPRM at 3; Household Auto-NPRM at 8; Household Credit-NPRM at 13; Household Finance-NPRM at 13; HSBC-NPRM at 2; Nextel-NPRM at 26; NFIB-NPRM at 2; NRF-NPRM at 16. See also June 2002 Tr. I at 234-72.

⁷⁹⁷ See, e.g., ABA-NPRM at 12; AFSA-NPRM at 9-10; ARDA-NPRM at 13; Capital One-NPRM at 5-6; Cox-NPRM at 38; Discover-NPRM at 3; HSBC-NPRM at 2; Nextel-NPRM at 26; NFIB-NPRM at 2; NRF-NPRM at 16. See also June 2002 Tr. I at 234-72.

⁷⁹⁸ See, e.g., ABA-NPRM at 12; AFSA-NPRM at 9-10; ARDA-NPRM at 13; Capital One-NPRM at 5-6; Cox-NPRM at 38; Discover-NPRM at 3; Household Auto-NPRM at 8, 10; Household Credit-NPRM at 13, 15; HSBC-NPRM at 2; Nextel-NPRM at 26; NFIB-NPRM at 2; NRF-NPRM at 16. See also June 2002 Tr. I at 234-72.

⁷⁹⁹ See June 2002 Tr. I at 237-39.

⁷⁸⁷ 47 CFR 64.1200(e)(2).

⁷⁸⁸ This requirement was in § 310.4(b)(2)(v) of the proposed Rule.

⁷⁸⁹ This requirement was in § 310.4(b)(2)(iii) of the proposed Rule.

⁷⁹⁰ See, e.g., ARDA-NPRM at 13; BofA-NPRM at 6; NACAA-NPRM at 9; Verizon-NPRM at 4-6. But see CATS-NPRM at 2; Patrick-NPRM at 5-6

(cautioning that the standards set forth in the “safe harbor” should be obligatory for all telemarketers subject to the Rule).

⁷⁹¹ See, e.g., Bennett-RR at 1; A. Gardner-RR at 1; Gilchrist-RR at 1; Gindin-RR at 1; Harper-RR at 1; Heagy-RR at 1; Johnson-RR at 3; McCurdy-RR at 1; Menefee-RR at 1; Mey-RR, *passim*; Nova53-RR at 1; Peters-RR at 1; Runnels-RR at 1.

⁷⁹² See, e.g., Synergy Global-NPRM at 1-2 (ex-telemarketer says firm ignored “do-not-call” lists); Denny (Feb. 21, Msg. 970); Connolly (Mar. 6, Msg. 961); Young (Feb. 27, Msg. 165); Jackson (Feb. 2, Msg. 521); Horowitz (Feb. 27, Msg. 598); Truitt (Feb. 28, Msg. 687); Griffin (Feb. 28, Msg. 708); Loeher (Feb. 28, Msg. 729).

⁷⁹³ Mey-RR at 2. See also DC-NPRM at 6-7.

⁷⁹⁴ See, e.g., DC-NPRM at 6-7; Verizon-NPRM at 5. But see Patrick-NPRM at 5-6 (cautioning that the standards set forth in the “safe harbor” should be obligatory for all telemarketers subject to the Rule).

The Commission is persuaded that the costs of requiring monthly updating outweigh any additional benefits that might accrue to consumers from such a provision. Based on the record in this matter, the amended Rule modifies the "safe harbor" requirement that lists be reconciled every 30 days. Instead, renumbered § 310.4(b)(3)(iv) of the amended Rule requires that the seller or telemarketer employ a version of the registry obtained not more than three months before any call is made, and maintain records documenting the process it uses to prevent telemarketing to any number on the list. Thus, telemarketers will be required to update their lists at least every three months, a time period that is consistent with most state requirements. Instead of making the list available on specific dates, the registry will be available for downloading on a constant basis, 24 hours a day, seven days a week, so telemarketers can access the registry at any time. As a result, each telemarketer's three-month period may begin on a different date. The Commission intends that the records documenting the process to prevent telemarketing calls to telephone numbers on the "do-not-call" registry will include copies of any express agreements the seller has obtained from consumers giving their permission for the seller to call, as well as documentation showing when and how often the seller has reconciled its list of names and/or telephone numbers against the national "do-not-call" registry.

The Commission is confident that the additional criteria in the amended Rule do not conflict with FCC regulations. FCC regulations are silent as to the process to be used, or the specific time frame within which the company must reconcile the names on its "do-not-call" list with its list of prospective customers to be called in a telemarketing campaign.⁸⁰⁰ Therefore, any FTC requirement that there be a process in place to prevent calls to telephone numbers on a "do-not-call" list would not conflict with the FCC's regulations. Similarly, FCC regulations are silent as to the requirement to monitor compliance and take action to correct any non-compliance, or to maintain

⁸⁰⁰ FCC regulations require companies to reconcile "do-not-call" requests for company-specific lists on a continuing or ongoing basis. Specifically, 47 CFR § 64.1200(e)(2)(iii) requires the seller or telemarketer to record the consumer's "do-not-call" request and place the consumer's name and telephone number on the company's "do-not-call" list at the time the request is made. The TSR is silent as to how frequently a company must reconcile "do-not-call" requests for company-specific lists.

evidence of express verifiable written authorization to accept telemarketing calls. Thus, the proposed Rule would not conflict with the FCC's regulations. Furthermore, as discussed more fully above, the Commission believes that it is necessary for the amended Rule to diverge from FCC regulations by imposing a monitoring requirement in the "safe harbor" provision in order to clarify the applicability of the safe harbor.

§ 310.4(c) — Calling time restrictions

Section 310.4(c) of the original Rule proscribes the making of outbound telemarketing calls before 8:00 a.m. and after 9:00 p.m. local time at the called person's location.⁸⁰¹ In response to comments received during the Rule Review suggesting further limitations on calling times, the Commission noted in the NPRM that it declined to adopt further restrictions because the original Rule's calling times strike the appropriate balance between protecting consumer privacy and not unduly burdening industry.

In response to the NPRM, the Commission received more than 100 comments from consumers on this issue, the vast majority of which recommended that the calling times be limited in some fashion. Many consumers urged that the calling times provision further restrict calls during the "dinner hour,"⁸⁰² or at either end of the day, arguing that calls that come at 8:00 a.m. or 9:00 p.m. are inconvenient, particularly for families with small children.⁸⁰³ Some commenters urged the Commission to prohibit telemarketing on Saturdays, Sundays, or the entire weekend.⁸⁰⁴ Still others urged the Commission to consider the plight of those shift workers for whom the current calling hours provide little or no protection from calls during "sleep time."⁸⁰⁵

The few industry comments regarding calling times were supportive of the

⁸⁰¹ See 16 CFR 310.4(c).

⁸⁰² See, e.g., Harvey Butler (Msg. 197); Roy Broman (Msg. 452); Robert Clifton (Msg. 3762); Ernie and Helen Darrow (Msg. 9941); SSMBOYLE (Msg. 14401); Worsham-NPRM at 4.

⁸⁰³ See, e.g., John Hallberg Jones (Msg. 1644); Jim Coupal (Msg. 3504); Adam Block Willow (Msg. 3513); Donald Nelson (Msg. 4225); Lollla469 (Msg. 5115); Anonymous (Msg. 27184).

⁸⁰⁴ See, e.g., Sjkble (Msg. 12060) (no Saturday calls); OMEGA217 (no Sunday calls); David Meads (Msg. 13726) (no Sunday calls); Lisa Hallman (Msg. 20291) (no Sunday calls); H00Kie (Msg. 1040) (no weekend calls); Lee C. Clayton (Msg. 1950) (no weekend calls); Sherrell Goggin (Msg. 2247) (no weekend calls); Henry Miller (Msg. 10173) (no weekend calls); Nanagusgus (Msg. 12471) (no weekend calls).

⁸⁰⁵ See, e.g., Paul Merchant, Jr. (Msg. 387); Bobby Morris (Msg. 639); Gayle Tanner (Msg. 4505); Anonymous (Msg. 27196).

current hours, but critical of the notion that allowing consumers to customize their preferred calling times via the national "do-not-call" registry would be workable.⁸⁰⁶ EPIC noted that it favored retaining the current calling times provision, but found it desirable to allow consumers who wish to do so to set other preferred times via the national "do-not-call" registry.⁸⁰⁷

As noted in the NPRM, the Commission believes the current calling hours provide a reasonable window for telemarketers to reach their existing and potential customers. The Commission recognizes that while some consumers may find it objectionable to receive telemarketing calls between 8:00 a.m. and 9:00 p.m., the majority of consumers would not find calls within these hours to be particularly abusive of their privacy. Furthermore, consumers who wish to avoid telemarketing calls will, under the amended Rule, have the option of placing their telephone numbers on the national "do-not-call" registry, thus blocking most unwanted calls at all times.⁸⁰⁸ Therefore, the Commission declines to modify the calling hours prescribed by § 310.4(c), and retains this provision without amendment.

§ 310.4(d) — Required oral disclosures

Section 310.4(d) of the original Rule requires that a telemarketer in an outbound call make certain oral disclosures promptly, and in a clear and conspicuous manner. The NPRM proposed to make two minor modifications to the wording of this section. First, the Commission proposed inserting, after the phrase "in an outbound telephone call," the phrase "to induce the purchase of goods or services." This would clarify that § 310.4(d) applies only to telemarketing calls made to induce sales of goods or services (in contrast to proposed new § 310.4(e), which contains an analogous phrase clarifying that § 310.4(e) will apply to calls made "to induce a charitable contribution"). Second, the Commission proposed to add the word "truthful" to clarify that it is not enough that the disclosures be made; the disclosures must also be made

⁸⁰⁶ See ARDA-NPRM at 13 (noting it felt no need to comment on this provision because the Commission had proposed no modification, and urging that no customizable calling preferences be allowed); NAA-NPRM at 17.

⁸⁰⁷ See EPIC-NPRM at 18, 22 (noting that while generally acceptable, the current calling times "represent only the Commission's judgment on what time of day people most value their privacy," and urging the Commission to allow for customizable calling time preferences).

⁸⁰⁸ See amended Rule § 310.4(b)(1)(iii)(B), discussed above.

truthfully. The amended Rule adopts both modifications, but also provides additional guidance on when the oral disclosures should be made in upsell transactions and what information should be disclosed in those situations.

The Commission received very few comments on these proposed changes. NAAG expressed its support for inclusion of the word “truthfully” in this section, noting that however obvious it might seem that mandatory disclosures be made truthfully, abuses have occurred when, for example, a telemarketer misstates the purpose of the call, claiming it is a “courtesy” call rather than a sales call.⁸⁰⁹ The Commission agrees that the express requirement that the required disclosures be “truthful” will benefit consumers, and should impose no additional burden on telemarketers. Thus, this requirement is adopted in the amended Rule.

A few commenters recommended limiting or expanding the provision. ASTA urged the Commission to limit the applicability of parts of the oral disclosure provision so that sellers with whom a customer had a prior business or personal relationship would be exempt from making two particular disclosures: 1) that the purpose of the call is to sell goods and services (§ 310.4(d)(2)); and 2) the nature of the goods and services (§ 310.4(d)(3)).⁸¹⁰ ASTA argued that it does not believe “situations in which there is a prior business or personal relationship between the parties, are, in practice, subject to the same sort of abuses that the Rule seeks to address by way of [the § 310.4(d)(2) and (3) disclosures].”⁸¹¹ Tribune made a similar argument, requesting an exemption from compliance with the § 310.4(d) disclosures for newspapers with whom a customer has a prior business relationship. According to Tribune, in many instances, newspapers call current subscribers to ascertain whether the customer is satisfied, and then to offer additional services, such as the weekday paper in addition to an existing Sunday-only subscription; Tribune also believes the required oral disclosures may be off-putting to customers.⁸¹² The Commission does not believe that the existence of a prior or even an ongoing business or personal relationship obviates the need for the required prompt oral disclosures in calls that are, in whole or in part, designed to induce the purchase of goods or services.

Therefore, the Commission declines to create exemptions to § 310.4(d).

DOJ recommended that an additional disclosure—the “seller’s title or position in the company”—be added to this section, arguing that such a disclosure would directly address the fraudulent practice wherein a telemarketing sales agent misrepresents that he or she holds a position of great authority within the company on behalf of whom the call is made, such as a claim that he or she is the president of the company.⁸¹³ Although the Commission agrees that such misrepresentations could be injurious to consumers, the Commission does not believe that in non-fraudulent solicitations a prompt, truthful disclosure of the telemarketing sales representative’s position within the company would be so beneficial to consumers as to outweigh the costs to business of making such an additional disclosure. Further, the Commission believes that it is highly likely that fraudulent telemarketers who resort to such prevarication to induce sales will be in violation of other provisions of the Rule as well.⁸¹⁴ Therefore, the Commission declines to add a disclosure regarding the telemarketing sales agent’s position within the company.

A few commenters requested further clarification regarding the meaning of the term “promptly,” suggesting that it is too vague to be a useful guideline in the Rule.⁸¹⁵ One of these commenters also sought to clarify the timing of the prompt oral disclosures required by this section in a multiple purpose call.⁸¹⁶ These two issues were discussed at length in the NPRM, and the Commission reiterates here what it has previously stated: 1) the term “promptly,” as used in the Rule, means “at once or without delay, and before any substantive information about a prize, product or service is conveyed to the customer,” a standard which allows for some flexibility without sacrificing the consumer’s need to know certain material information prior to the beginning of any sales pitch; and 2) in

⁸¹³ DOJ-NPRM at 5 (also noting that some fraudulent telemarketers claim to be with government agencies. The Commission notes that such a misrepresentation would violate amended Rule § 310.3(a)(2)(vii)).

⁸¹⁴ For example, such a “false and misleading” statement, if made to “induce any person to pay for goods or services or to induce a charitable contribution,” would violate amended Rule § 310.3(a)(4).

⁸¹⁵ LSAP-NPRM at 17 (urging that the term “promptly” be defined as “at the outset of the call”); NASUCA-NPRM at 16; Patrick-NPRM at 3 (suggesting that at least the identity of the seller be disclosed “first, before any other information is disclosed”).

⁸¹⁶ See NASUCA-NPRM at 16.

“any multiple purpose call where the seller or telemarketer plans, in at least some of those calls, to sell goods or services, the [§ 310.4(d) disclosures] must be made ‘promptly,’ during the first part of the call, before the non-sales portion of the call takes place.”⁸¹⁷ The Commission does not believe that any change in the text of the Rule is necessary to achieve clarity regarding these two issues, nor does it believe the suggested modifications would provide greater clarity; thus, the Commission declines to modify this section.

A few commenters suggested that an additional disclosure—of the seller’s telephone number—should be added.⁸¹⁸ NASUCA suggested that this number be one useful to consumers who wish to be placed on a seller’s “do-not-call” list, while Patrick suggested that the number be one consumers could use to report violations of the Rule. Patrick suggested, in the alternative, that the Rule prohibit the failure to provide name, address, and telephone number information for the seller or telemarketer, if such information is requested by the consumer. The Commission previously has expressed its concern that if too many disclosures are required, particularly in the beginning of the call, their effectiveness is diluted. Further, the Commission believes that amended § 310.4(a)(7), regarding transmission of Caller ID, and § 310.4(b)(1)(iii)(B), creating a national “do-not-call” registry, will help to mitigate the problem these commenters have proposed to cure. Therefore, the Commission declines to require a disclosure of the seller’s telephone number in this section.

As explained in the discussion of § 310.2(dd) above, regarding the definition of “upselling,” the Commission believes that upsell transactions are analogous to outbound telephone calls. Therefore, the amended Rule requires that the oral disclosures mandated by § 310.4(d) must be promptly disclosed at the initiation of the upsell if any of the information in these disclosures differs from the disclosures made in the initial transaction. For example, in an external upsell (where there is a second seller), the consumer must be told the identity of the second seller—the one on whose behalf the upsell offer is being made. In an internal upsell, however, the identity of the seller remains the same in both transactions and need not be repeated in the second transaction. Thus, the Commission has inserted the phrase “or internal or external upsell” after the

⁸¹⁷ 67 FR at 4526 (citing the original SBP).

⁸¹⁸ NASUCA-NPRM at 15; Patrick-NPRM at 4.

⁸⁰⁹ See NAAG-NPRM at 47.

⁸¹⁰ See ASTA-NPRM at 2.

⁸¹¹ ASTA-NPRM at 2.

⁸¹² See Tribune—NPRM at 9–10.

term "outbound telephone call" in § 310.4(d) of the amended Rule; and has inserted the requirement that "in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent the information in the upsell differs from the disclosures provided in the initial telemarketing transaction." The goal in this provision is to ensure that consumers receive all of the information they need in order to make an informed decision whether to make a purchase,⁸¹⁹ without requiring duplicative or irrelevant disclosures.

§ 310.4(d)(4) — Sweepstakes disclosure

Section 310.4(d)(4) of the original Rule required that a telemarketer promptly disclose that no purchase or payment is necessary to be eligible to win a prize or participate in a prize promotion if a prize promotion is offered. In the NPRM, the Commission proposed to modify § 310.4(d)(4) to require that the telemarketer disclose that a purchase will not enhance a customer's chances of winning a prize or sweepstakes, which would make the amended Rule's disclosure requirement consistent with the requirements for direct mail solicitations under the Deceptive Mail Prevention and Enforcement Act ("DMPEA").⁸²⁰ As discussed above with regard to the same disclosure in § 310.3(a)(1)(iv), commenters generally supported this proposal.⁸²¹

PMA maintained that the disclosure was unnecessary and that there was no

evidence in the record to support adding the disclosure.⁸²² Nonetheless, PMA stated that, as a gesture of good faith, they would not oppose the change.⁸²³ They asked, however, that the Commission allow them flexibility on when to make the disclosure, rather than mandating that it be made "promptly," as required by § 310.4(d), because the disclosure would be more meaningful if it were delivered in conjunction with the sales solicitation rather than the discussion about the sweepstakes.⁸²⁴

The Commission believes that it is important that consumers promptly be put on notice when a call promoting a sweepstakes also includes a sales solicitation. The Commission does not believe it necessary to script the telemarketing call or to define with finite specificity within how many seconds particular disclosures must be made. As with the Rule's requirement that the telemarketer promptly disclose that no purchase or payment is necessary to win a prize,⁸²⁵ the Commission believes that the disclosure that a purchase will not enhance the consumer's chances of winning may occur "before or in immediate conjunction with the description of the prize."⁸²⁶ As the Commission stated in the original Rule's SBP, this language was included in § 310.4(d)(4) "to prohibit deceptive telemarketers from separating the disclosure (in that instance, of the fact that no purchase or payment is necessary to win a prize) from the description of the prize, thereby negating or diluting its salutary effect."⁸²⁷ Although this guidance does not alter the imperative that the disclosures be made "promptly"—*i.e.*, "at once or without delay," but "[a]t a minimum. . . before any sales pitch is given"⁸²⁸—it should provide telemarketers of prize promotions the necessary flexibility in making the requisite disclosures.

Therefore, the Commission has determined that it is an abusive telemarketing act or practice to fail to disclose truthfully, promptly, and in a clear and conspicuous manner, in any prize promotion, that no purchase or payment is required to win a prize or

participate in a prize promotion, that any purchase or payment will not increase the customer's chances of winning, and, upon request, the no-purchase/no-payment method of participating in the prize promotion.

§ 310.4(e) — Required oral disclosures in charitable solicitations

As noted in the NPRM, § 1011(b)(2)(D) of the USA PATRIOT Act mandates that the TSR include a requirement to address abusive practices in the solicitation of charitable contributions.⁸²⁹ Specifically, the USA PATRIOT Act directs the Commission to include in the Rule:

a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and to make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.⁸³⁰

In response to this mandate, the Commission included in the proposed Rule new § 310.4(e), which requires in calls to solicit charitable contributions the truthful, prompt, clear and conspicuous disclosure of two pieces of information: 1) the identity of the charitable organization on behalf of which the request is being made; and 2) that the purpose of the call is to solicit a charitable contribution.⁸³¹ The Commission declined to require the oral disclosure of a charitable organization's mailing address because it was dubious that requiring disclosure of this information in every instance would prove sufficiently beneficial to consumers to justify the costs incurred by telemarketers, and the charities for whom they solicit, of making this disclosure.⁸³² However, the Commission did pose specific questions on this issue, including whether the disclosure requirement should be triggered only when a donor asks for such information.⁸³³

Few comments addressed the proposed requirements for disclosures in the solicitation of charitable

⁸¹⁹ As the Commission noted in the NPRM:

"[I]n external up-selling, when calls are transferred from one seller or telemarketer to another, or when a single telemarketer solicits on behalf of two distinct sellers, it is crucial that consumers . . . clearly understand that they are dealing with separate entities. In the original Rule, the Commission determined that a disclosure of the seller's identity was necessary in every outbound call to enable the customer to make a fully-informed purchasing decision. In the case of a call transferred by one telemarketer to another to induce the purchase of goods or services, or one in which a single telemarketer offers the goods or services of two separate sellers, it is equally important that the consumer know the identity of the second seller, and that the purpose of the second call is to sell goods or services."

67 FR at 4500. The proposed Rule also required telemarketers on behalf of charitable organizations to adhere to the requirements for upsell transactions. However, the record in this proceeding does not show any evidence that upselling is prevalent in the solicitation of charitable contributions. Therefore, the Commission has deleted any reference to charitable solicitations from the upselling provisions. The Commission will continue to monitor this issue, and, if necessary, may address it in future rule reviews.

⁸²⁰ *Id.* 39 U.S.C. 3001(k)(3)(A)(II).

⁸²¹ NAAG-NPRM at 54-55; NACAA-NPRM at 6-7; NCL-NPRM at 4. See also June 2002 Tr. II at 105-15.

⁸²² PMA-NPRM at 4-8.

⁸²³ PMA-NPRM at 5, 7; ARDA-NPRM at 14-15. See also June 2002 Tr. II at 106, 108 (PMA and ARDA state that they do not oppose the disclosure).

⁸²⁴ June 2002 Tr. II at 106-07. ARDA also requested flexibility in the timing of the disclosure. ARDA-NPRM at 14-15 and June 2002 Tr. II at 108.

⁸²⁵ This provision is found at § 310.4(d)(4) of the original and amended Rules.

⁸²⁶ 16 CFR 310.4(d)(4); 60 FR at 43856.

⁸²⁷ 60 FR at 43856-57.

⁸²⁸ TSR Compliance Guide at 15. See also 60 FR at 43856.

⁸²⁹ See 67 FR at 4522 (discussing the USA PATRIOT Act's mandate to include in the TSR certain prompt disclosures in the solicitations of charitable contributions).

⁸³⁰ Section 1011(b)(2)(D), Pub. L. 107-56 (Oct. 26, 2001).

⁸³¹ Proposed Rule § 310.4(e); see also 67 FR at 4522 (including the discussion of the rationale for including these specific disclosures).

⁸³² 67 FR at 4522.

⁸³³ 67 FR at 4522, 4539.

contributions.⁸³⁴ AFP agreed that the proposed Rule struck the appropriate balance, by requiring disclosure of both the identity of the charity and the fact that the purpose of the call was to solicit a charitable contribution, but not requiring disclosure of the mailing address of the charity.⁸³⁵ AFP also noted that the required disclosures are consistent with its own ethics standards and its belief that these disclosures are sufficient to effectuate the purposes of the USA PATRIOT Act.⁸³⁶ AFP recommended against including a required disclosure of the charitable organization's mailing address, arguing that such information would be of little use to consumers in discerning whether a charity was legitimate, and that the time and distraction involved in disclosing an address would be "counterproductive to the charitable contribution process."⁸³⁷

Hudson Bay expressed its view that both of the proposed disclosures are unconstitutional.⁸³⁸ According to Hudson Bay, the requirement that a telefunder promptly disclose that the call is to solicit a charitable contribution runs afoul of the First Amendment because it mandates not only what must be said, but when.⁸³⁹ Hudson Bay further argues that the mandatory disclosure of the name of the charitable organization on behalf of which the solicitation is made strips charitable organizations of their right to anonymity and violates the First Amendment's guarantee of freedom of association.⁸⁴⁰

As previously noted, the USA PATRIOT Act directs the Commission to include these specific disclosures in the TSR.⁸⁴¹ Congress' purpose in the Telemarketing Act, in requiring telemarketers to disclose basic identifying information in unsolicited outbound telemarketing calls, is to ensure that the consumer is given information promptly that will enable the consumer to decide whether to allow the infringement on his or her time and privacy to go beyond the initial invasion. The Commission believes that the USA PATRIOT Act amendments are consistent with this

purpose. Moreover, the Commission believes there is a tight nexus between this purpose and the statutory and regulatory means employed to achieve this purpose. The Commission also believes that these disclosure requirements are very narrowly tailored to impinge as little as possible on protected speech while still accomplishing the purpose Congress intended. The Commission has exercised restraint in implementing this statutory mandate, keeping the disclosure requirements for charitable solicitation telemarketing to the bare minimum necessary to fulfill the purpose of the USA PATRIOT Act amendments. The Commission notes that the Supreme Court has specifically noted that requiring a professional fundraiser "to disclose unambiguously his or her professional status . . . [is a] narrowly tailored requirement [that] would withstand First Amendment scrutiny."⁸⁴² The Commission believes that if a requirement to disclose one's status as a professional fundraiser would pass First Amendment scrutiny, then so would a requirement to make the disclosures now required by the Rule to fulfill the mandate of the USA PATRIOT Act amendments.

Some commenters recommended that the Commission expand the provision to require additional disclosures in certain circumstances. For example, NAAG recommended that, in the event a paid telefunder is making the charitable solicitation, three additional disclosures be required: "(1) the name of the caller; (2) the name of the telemarketing company; and (3) the fact that the caller is being paid to solicit."⁸⁴³ NCL concurred, suggesting that the Rule require fundraisers to "identify themselves as well as the charities on whose behalf they are operating."⁸⁴⁴ NAAG and NCL argued that this additional set of disclosures would provide three distinct benefits. First, such disclosures would prevent donors from being deceived about the identity of the solicitor. NAAG noted that in many instances, for-profit fundraisers "misrepresent that they are affiliated with, or members of, the charity or public safety organization in whose name they are calling."⁸⁴⁵ Second, the information would serve as an important means of identifying potential Rule violators.⁸⁴⁶ The third benefit from

these suggested disclosure requirements would be the triggering role they would serve, prompting consumers to inquire, of the telefunder or of a state regulatory agency, about the amount of their contribution that will go to charity after the fundraiser takes its share.⁸⁴⁷

The Commission declines to add a mandatory disclosure of the name of the caller in calls to induce charitable contributions. In the initial proposed TSR, the Commission had included such a requirement for all outbound telephone calls;⁸⁴⁸ but it was deleted because commenters noted that "'desk names' are commonly used in the industry to protect the safety and privacy of employees, and to protect against potential prejudice and harassment."⁸⁴⁹ The Commission concluded that the disclosure of the seller's identity is most meaningful to consumers, not the name of the individual with whom they are speaking. The Commission can conceive of no reason why this analysis would not apply with equal force in the context of charitable solicitations. Moreover, the Commission is not persuaded that disclosure of this information is necessary to advance the privacy objectives underlying the Commission's authority to prohibit "abusive" practices pursuant to § 6102(a)(3) of the Telemarketing Act.⁸⁵⁰ Therefore, the Commission declines to include in the amended Rule a requirement that the caller's name be disclosed in charitable telemarketing solicitations.

The Commission also declines to adopt the suggestion that it mandate disclosure of the name of the telemarketing company.⁸⁵¹ In adopting the original Rule, the Commission rejected such a disclosure in the context of the sale of goods or services because it was deemed unnecessary; rather, a requirement to disclose the identity of the seller—which is clearly material to the consumer—was included. In the charitable fundraising context, the Commission believes the identity of the charity is the analogous material item of

⁸³⁴ As noted above in the section discussing amended § 310.3(d), AARP and NCL noted in their comments in response to the NPRM that they supported the goal of expanding the Rule's ambit to cover charitable solicitations.

⁸³⁵ See AFP-NPRM at 3.

⁸³⁶ *Id.*

⁸³⁷ *Id.* (noting, however, that it had no objection to requiring the disclosure of the mailing address, provided the donor asked for such information).

⁸³⁸ See Hudson Bay-Goodman-NPRM at 6-7.

⁸³⁹ *Id.* (citing *Riley*, 441 [sic] U.S. at 791).

⁸⁴⁰ *Id.* at 7 (citing *Talley v. California*, 362 U.S. 60 (1960)).

⁸⁴¹ USA PATRIOT Act, § 1011.

⁸⁴² *Riley*, 487 U.S. at 799, n.11.

⁸⁴³ NAAG-NPRM at 52.

⁸⁴⁴ NCL-NPRM at 11. See also Make-A-Wish-NPRM at 6 (recommending adding a disclosure that the professional fundraiser is being paid for its services); NASCO-NPRM at 6.

⁸⁴⁵ NAAG-NPRM at 52.

⁸⁴⁶ NCL-NPRM at 11.

⁸⁴⁷ NAAG-NPRM at 52; see also NCL at 11.

⁸⁴⁸ See 60 FR at 8331 (§ 310.4(d)(1)(i)).

⁸⁴⁹ 60 FR at 30418.

⁸⁵⁰ See discussion of § 310.4 above, describing the Commission's analysis of its authority to prohibit "abusive" practices.

⁸⁵¹ The Commission notes, however, as discussed by NAAG, that at least 20 states have statutes requiring such a disclosure. NAAG-NPRM at 52. The Commission believes that the states, which have extensive regulatory authority over charities, and extensive experience in such regulation, may continue to require disclosures beyond those mandated by the TSR, and notes that compliance with the TSR will not fulfill telemarketers obligations under any such state laws or regulations.

information. The Commission believes there is a limit to the number of distinct items of information that can reasonably be absorbed at the beginning of a solicitation call. This being the case, the Commission believes that the charity's identity is a more meaningful piece of information than the name of the professional fundraising company. In this regard, it is noteworthy that the USA PATRIOT Act did not specifically require such a disclosure.⁸⁵² Arguably, disclosure of the identity of the telemarketer may be beneficial to potential donors because it may prompt them to think and inquire about the portion of a contribution that will be consumed by a professional fundraiser's fee; but the Commission believes the record falls short of showing that the benefits of mandating such a disclosure would outweigh the burdens it would impose upon legitimate charities who choose to conduct their fundraising efforts using professional telemarketers.⁸⁵³ Therefore, the Commission does not believe the current record supports a finding that disclosure of this information is necessary to prevent "abusive" practices pursuant to § 6102(a)(3) of the Telemarketing Act.⁸⁵⁴

For similar reasons, the Commission also declines to require a mandatory disclosure that the telemarketer is a paid fundraiser. The comments on this issue reflect considerable concern about instances where only a minuscule portion of contributions are devoted to the actual support of a charitable

organization's mission, while the telefunder's fee gobbles up the lion's share. This occurs in some instances,⁸⁵⁵ but the record does not support an inference that such a scenario inevitably follows from the use of paid telefundraisers by charitable organizations, and there is evidence on the record tending to show that the opposite is often true: the use of professional telemarketers saves charitable organizations money—as compared with in-house telephone fundraising.⁸⁵⁶

Additionally, the Commission is concerned here, as it is with the other recommended disclosures, about the potential negative consequences that derive from overloading the beginning of a charitable solicitation call. Further, it is notable that the USA PATRIOT Act did not specifically require such a disclosure.⁸⁵⁷ While disclosure of the identity of the telemarketer may, arguably, be beneficial to potential donors because it may prompt them to think and inquire about the proportion of a contribution that will be consumed by a professional fundraiser's fee, the Commission believes the record does not support mandating such a disclosure because of the burden the disclosure would impose on legitimate charities who choose to conduct their fundraising efforts using professional telemarketers.⁸⁵⁸ A showing of these benefits would be necessary to support a requirement for disclosure of this information. Therefore, the Commission declines at this time to add a requirement that the telemarketer disclose that he or she is being paid to solicit charitable contributions.

Other issues regarding abusive practices raised in response to the NPRM.

Commenters responded to the Commission's questions in the NPRM regarding additional issues related to abusive practices that had surfaced during the Rule Review, in particular,

⁸⁵² See USA PATRIOT Act § 1011(b)(2)(D). The absence of such a requirement from the USA PATRIOT Act is noteworthy because such a disclosure was specifically approved in *Riley*, 487 U.S. at 799, n.11.

⁸⁵³ As noted by Not-for-Profit Coalition, Hudson Bay and others, telefundraisers play a critical role in enabling charitable organizations, particularly smaller ones, to raise funds necessary to fund their missions. Not-for-Profit Coalition-NPRM at 17-20; Hudson Bay-Goodman-NPRM at 2.

⁸⁵⁴ The Commission believes that, as in the case of the required oral disclosures in the sale of goods or services, the failure to make certain material disclosures in the solicitation of a charitable contribution rises to the level of an abusive practice under the Rule. As noted in the NPRM, the Commission believes that the prompt disclosure of certain information in a telemarketing call to induce the sale of goods or services is necessary to enable a consumer "to decide whether to allow the infringement on his or her time and privacy to go beyond the initial invasion." 67 FR at 4511. Similarly, a consumer who receives a telemarketing solicitation to induce a charitable contribution must have certain information to determine if he or she wishes to continue the call. At this time, the Commission believes it prudent to require only the disclosure of the name of the charity on whose behalf the fundraising is occurring and that the call is being made to induce a charitable contribution. However, the Commission will continue to study the issue and will revisit it during the next Rule Review.

⁸⁵⁵ See, e.g., Pennies for Charity, 2001, New York Attorney General, <http://www.oag.state.ny.us/charities/pennies01/penintro.html> (accessed Oct. 8, 2002) (stating that "charities retained an average of 31.5% of the funds raised by telemarketers registered to solicit contributions in New York in 2000. Some of the charities received much less than that and some received nothing at all."); NASCO-NPRM at 2 (citing the New York Attorney General's report as well as a 1999 report by the California Attorney General showing charities received only 48.2 percent of funds raised by telemarketers who solicited on their behalf in California that year). See also Private Citizen-NPRM at 5.

⁸⁵⁶ Hudson Bay-Goodman-NPRM at 2.

⁸⁵⁷ See USA PATRIOT Act § 1011(b)(2)(D). This omission, too, is conspicuous in light of the fact that numerous states have included this mandatory disclosure and that such a disclosure is, at least in dicta, sanctioned by the Court in *Riley*. See NAAG-NPRM at 52; *Riley*, 487 U.S. at 799, n.11.

⁸⁵⁸ See note 856 above.

prison-based telemarketing. Commenters also raised other issues: telemarketers' use of courier services to pick up payments from consumers; telemarketers' targeting of vulnerable groups; and the sale of victim lists. Each of these issues, and the reasoning behind the Commission's responses to them, are discussed in detail below.

Prisoner telemarketing: During the Rule Review, the Commission received several comments describing problems that had occurred when sellers or telemarketers used prison inmates to telemarket goods or services. These commenters recommended that the Commission ban the use of prisoners as telemarketers or, in the alternative, tightly regulate it, including requiring that inmates disclose their status as prisoners when they make calls to, or receive calls from, the public.⁸⁵⁹ These commenters cited several graphic incidents in which inmates have abused consumers' information and other resources to which they had access through inmate telemarketing to make improper, invasive, and illegal contact with members of the public.⁸⁶⁰

Specifically, these commenters pointed out that, while working as telemarketers, inmates inevitably gain access to personal information about individuals, including minors, that may endanger the lives and safety of those they call.⁸⁶¹ In the NPRM, the Commission stated that it was extremely concerned about the potential misuse of personal information and abusive telemarketing activity in connection with prison-based telemarketing, but

⁸⁵⁹ See generally Jordan-RR, S. Gardner-RR, Budro-RR, and Warren-RR. In addition, this issue received considerable attention during the Rule Review Forum. See RR Tr. at 220-45, 367-75, 443-47.

⁸⁶⁰ For example, in its 1997 report to Congress on the privacy implications of individual reference services, the FTC cited an example where a prison inmate (and convicted rapist), who was employed as a data processor, used his access to a database containing personal information to compose and send a threatening letter to an Ohio grandmother. See FTC, "Individual Reference Services: A Report to Congress" (Dec. 1997), at 16. Several states, including Wisconsin, Nevada, and Massachusetts, have considered legislation that would require their Departments of Correction to restrict prisoners' access to personal information about individuals who are not prisoners and/or to require prisoners conducting telephone solicitations or answering inbound calls to identify themselves as prisoners. The Utah State Prison stopped using inmates as telemarketers after conceding that they could not ensure that prisoners would not misuse personal information they obtain. See *Prison to End Telemarketing By Inmates*, SALT LAKE TRIB., June 1, 2000, at B1. In addition, DMA noted that it had supported legislation banning the use of inmates in remote sales situations because these sales require the telemarketer to get personal information from the consumer. See RR Tr. at 371-72.

⁸⁶¹ See generally Jordan-RR, Gardner-RR, Warren-RR, and Budro-RR.

also that some public benefit likely came from inmate work programs that entail telemarketing. The Commission noted that the record contained insufficient information upon which to base a proposal regarding prisoner telemarketing or to assess the costs and benefits of such a proposal. Therefore, the NPRM posed several questions to elicit comment on what action by the Commission, if any, might be appropriate regarding this issue.

In response to the NPRM, the Commission received several comments on this issue.⁸⁶² In addition, the June 2002 Forum devoted a session to the topic.⁸⁶³ Based on the entire record in this proceeding, the Commission has determined that any problems associated with the use of prison-based telemarketing would be more appropriately handled by the state legislatures and regulatory agencies than by adding a provision to the TSR.

The comments show that the number of inmates used for commercial telemarketing purposes is a small percentage of the prisoners who are employed in inmate work programs.⁸⁶⁴ The majority of prison-based telemarketing programs are used by federal and state governments, often for such tasks as providing information to consumers who call state tourist bureaus.⁸⁶⁵ A 1999 GAO Report reveals that only seven percent of the inmates who had access to consumer information were performing work for private firms, while 93 percent were working for government agencies, performing tasks such as answering calls from the public to state tourist centers.⁸⁶⁶ Thus, the vast majority of

prison-based telemarketing would be outside the ambit of the Rule because it does not involve "telemarketing" as that term is defined in the Rule.⁸⁶⁷

EPI estimates that there are only ten private companies in the United States who use prisoners as telemarketers, that these ten companies employ approximately 300 inmates in prison-based telemarketing programs, and that all these programs use inmates housed in state prisons.⁸⁶⁸ Commenters noted that the state prison work programs are heavily regulated by the state legislatures and Departments of Correction.⁸⁶⁹ EPI points out that the federally-administered Prison Industry Enhancement ("PIE") program was created to encourage the states and local governments to establish inmate work programs that mimic the private work environment. In passing the legislation, Congress elected to have the states manage these programs.⁸⁷⁰

Opponents of the use of prison-based telemarketing cited the potential for misuse of consumers' personal information by inmates, but were unable to point to actual incidents other than the isolated example raised during the Rule Review.⁸⁷¹ EPI noted that, after an exhaustive search, the 1999 GAO study was able to identify only nine incidents of misuse over an eight-year period, and only three of those nine incidents were the result of telemarketing for a private firm.⁸⁷² Commenters noted that similar problems occur, perhaps with even more frequency, among non-prisoner or civilian telemarketers.⁸⁷³

The proponents of prison-based telemarketing pointed out the significant social and economic benefits that accrue to the inmates, to the states, and to society as a whole by having inmates engage in productive work that develops skills that can later be transferred to a private sector job once the inmate is released.⁸⁷⁴ They indicate that inmate jobs serve as a source of funds to compensate crime victims, provide financial support to children of

inmates, repay taxpayers for the inmates' room and board, and are an effective tool for rehabilitation and reducing recidivism.⁸⁷⁵ They maintain that inmate jobs are "vital to helping keep prisons safe and secure and offering meaningful educational and vocational training to aid in successful re-entry."⁸⁷⁶ These commenters outlined the significant precautions taken in screening and monitoring inmates for these jobs.⁸⁷⁷

Based on the record in this proceeding, the Commission believes that, while there is some evidence of consumer injury in a very few documented cases, it is not possible to conclude that the risk of consumer harm outweighs the countervailing benefits. Such a conclusion would be necessary to condemn prison-based telemarketing as an abusive practice.⁸⁷⁸ The extensive system of state regulation, coupled with the local nature of the work programs, persuades the Commission that any problems associated with prison-based telemarketing would best be handled at the state level.

Use of couriers: In response to the NPRM, AARP again raised its concern that the Commission ban the practice of allowing couriers, including overnight mail delivery services, to pick up payment for goods and services purchased through telemarketing.⁸⁷⁹ AARP points out that the use of couriers in sweepstakes and lottery scams is prevalent, and that some unscrupulous telemarketers use couriers not only to quickly separate the consumer from his or her money, but to make a "contest seem more 'official.'"⁸⁸⁰ AARP notes that, in some instances, even legitimate companies benefit unfairly from the use of couriers by avoiding oversight by the U.S. Postal Service, and by ensuring that non-refundable "deposits" are secured, diminishing the likelihood, in many instances, that a consumer would back out of a transaction.⁸⁸¹ NACAA concurred, and noted its further concern that in-person payment pickups by those posing as public safety officers is a practice perhaps even more harmful to consumers who are intimidated into quickly giving a contribution.⁸⁸²

⁸⁶² DialAmerica-NPRM at 28; Spiegel-NPRM at 1; Worsham-NPRM at 6. In addition, *see generally* CURE-NPRM; CCA-NPRM; UNICOR-NPRM; EPI-NPRM; and EPI-Supp.

⁸⁶³ June 2002 Tr. III at 115-57.

⁸⁶⁴ The comments indicate that federal inmates are not used as telemarketers except in connection with sales to the federal government. (UNICOR is the trade name for Federal Prison Industries, Inc., a wholly-owned government corporation within the U.S. Department of Justice, Federal Bureau of Prisons. UNICOR sells its products primarily to federal agencies and uses federal prisoners in connection with those sales. In addition to calling UNICOR's federal government agencies, the federal prisoners also call the businesses that support UNICOR's federal sales.) UNICOR-NPRM at 2; *see also* EPI-Supp. at 1. UNICOR's sales using prisoner-based telemarketing would not be covered by the TSR. Section 310.6(g) of the Rule exempts telemarketing sales to businesses. In addition, sales to government entities do not fall within the Rule's definition of "person."

⁸⁶⁵ EPI-Supp. at 1.

⁸⁶⁶ "Prison Work Programs, Inmates" Access to Personal Information," GAO/GGD-99-146, cited in EPI-NPRM at 13, n.18. *See also* EPI-Supp. at 1 (All prisoners employed as telemarketers by the private sector are inmates in state prisons, regulated by state agencies.)

⁸⁶⁷ "Telemarketing" is defined, in part, as a "plan, program or campaign which is conducted to induce the purchase of goods or services or a charitable contribution . . ." The prison-based telemarketing used by government agencies does not appear to involve calls to "induce the purchase of goods or services."

⁸⁶⁸ EPI-NPRM at 2, 3, 9.

⁸⁶⁹ CCA-NPRM at 2; EPI-NPRM at 3, 14.

⁸⁷⁰ EPI-NPRM at 3.

⁸⁷¹ DialAmerica-NPRM at 28; Spiegel-NPRM at 1; Worsham-NPRM at 6. *See also* June 2002 Tr. III at 115-57.

⁸⁷² EPI-NPRM at 10.

⁸⁷³ CURE-NPRM at 1; EPI-NPRM at 13-14. *See also* June 2002 Tr. III 115-57.

⁸⁷⁴ *See generally* CURE-NPRM; CCA-NPRM; EPI-NPRM; and UNICOR-NPRM. *See also* June 2002 Tr. III at 115-57.

⁸⁷⁵ *Id.*

⁸⁷⁶ CCA-NPRM at 1. *See also* EPI-NPRM at 5-8; and *generally* CURE-NPRM; and UNICOR-NPRM. *See also* June 2002 Tr. III at 115-57.

⁸⁷⁷ EPI-NPRM at 5-8. *See also* June 2002 Tr. III at 115-57.

⁸⁷⁸ *See* 67 FR at 4510-12.

⁸⁷⁹ AARP-NPRM at 9-10.

⁸⁸⁰ *Id.* (citing NAAG's comment in the original rulemaking proceeding).

⁸⁸¹ AARP-NPRM at 9-10.

⁸⁸² *See* NACAA-NPRM at 10-11.

The record does not contain any new evidence regarding the potential harm that accrues from the use of couriers, or any new evidence regarding the benefits to legitimate companies of being able to use couriers to collect payment. Although the Commission recognizes that fraudulent telemarketers often use couriers to collect payment, it continues to believe that “[t]here is nothing inherently deceptive or abusive about the use of couriers by legitimate business.”⁸⁸³ Moreover, the Commission reiterates its view that telemarketers who seek to use courier services to defraud consumers are likely to “engage in other acts or practices that clearly are deceptive or abusive, and that are prohibited by this Rule.”⁸⁸⁴ Therefore, the Commission declines to adopt the recommendation to ban the use of couriers to collect payment for goods or services sold through telemarketing.

Targeting vulnerable groups and the sale of victim lists: DOJ proposed that the Commission include in the amended Rule a provision that “would prohibit a seller or telemarketer who is engaged in any act or practice that violates §§ 310.3(a), (c), or (d) or 310.4(a)-(e) from purchasing lists of prospective contacts from any source.”⁸⁸⁵ This suggested change responds to the problems of the sale of victim lists and the targeting of vulnerable groups. As DOJ explains, such a provision would “ensure that any injunctive relief it sought in enforcement proceedings would include a prohibition on any further purchases of ‘mooch lists’ by any individual or corporate defendants in the action,” and lay the foundation for criminal contempt proceedings if such an injunction were violated.⁸⁸⁶ DOJ also argued that such an injunction, served on “any list provider known to have done business with the fraudulent telemarketer,” would limit such telemarketer’s ability to resume fraudulent solicitations.⁸⁸⁷ Finally, DOJ noted that such a provision “would enable the Commission to address, at least in part, the targeting of vulnerable victims by fraudulent telemarketers, without having to grapple with the difficulties of defining what constitutes ‘vulnerability’ or ‘targeting.’”⁸⁸⁸

After careful consideration, the Commission has determined not to adopt the provision proposed by DOJ. The Commission believes that it is

unnecessary to include an explicit prohibition against Rule violators purchasing lists of prospective contacts to provide the benefits detailed by DOJ in its comment. In numerous cases, the Commission has already included a similar prohibition in final orders that achieves the goals articulated by DOJ.⁸⁸⁹ Thus, the Commission declines to include a provision to this effect in the amended Rule.

E. Section 310.5 — Recordkeeping

Section 310.5 of the original Rule identifies the kinds of records that must be kept by sellers and telemarketers, and the time period for retention of these records.⁸⁹⁰ In the NPRM, the Commission noted that it had declined to adopt any of the suggested modifications to this section submitted pursuant to the Rule Review. Specifically, the Commission declined to: (1) reduce the record retention period to less than 24 months; or (2) tie the duration of record retention either to the value of the goods or services sold or the refund policy of the seller, believing that such modifications would minimize the effectiveness of this provision in law enforcement.⁸⁹¹ The Commission did note that the effect of the USA PATRIOT Act amendments was to extend the recordkeeping requirement to include not only calls to induce the purchase of goods or services, but also calls to induce charitable contributions.⁸⁹² The only explicit change to the language of the section to implement the USA PATRIOT Act amendments was to add the phrase “or solicitations of charitable contributions” to § 310.5(a)(4) following the phrase “employees directly involved in telephone sales.”⁸⁹³

Very few comments addressed the recordkeeping requirements set forth in § 310.5. ARDA noted that it “agrees with the Commission and feels that the

current provisions are adequate.”⁸⁹⁴ DMA-NonProfit stated that “imposing burdensome and lengthy (two-year) recordkeeping responsibilities” on charities would hurt the ability of charities, especially small ones, because it would divert funds away from fulfillment of charities’ missions.⁸⁹⁵ The Commission believes that the recordkeeping burden on telemarketers who solicit on behalf of charities will be minimal. As noted in the SBP for the original Rule, the recordkeeping provision was already tailored to “strike a balance between minimizing the recordkeeping burden on industry and retaining the records necessary to pursue law enforcement actions. . . .”⁸⁹⁶ In addition, the Commission believes that the records required to be maintained are those commonly maintained by businesses in the ordinary course of business.⁸⁹⁷ The Commission believes that, as applied to telemarketers who solicit on behalf of charities, the burden of compliance with the recordkeeping provision will be further lessened because many of the recordkeeping provisions will be inapplicable in the charitable solicitation context, or are burdens typically borne by the telemarketer, not the organization on whose behalf the calls are made.⁸⁹⁸

NEMA requested that the Commission consider the recordkeeping burden on energy marketers who must, pursuant to their self-regulatory guidelines, already

⁸⁹⁴ ARDA-NPRM at 17. ARDA did reiterate, however, its concern that “overlapping, inconsistent, and conflicting state laws create a substantial burden.”

⁸⁹⁵ DMA-NonProfit-NPRM at 16.

⁸⁹⁶ 60 FR at 43857.

⁸⁹⁷ *Id.*

⁸⁹⁸ For example, § 310.5(a)(2) only applies when the offer includes a prize promotion, a circumstance unlikely to be implicated in most charitable solicitations. Section 310.5(a)(3) only applies in the commercial solicitation context, as it requires maintenance of records showing information about “customers.” Section 310.5(a)(4) is a requirement typically borne by telemarketers, and the Commission believes that charitable organizations are unlikely to incur additional costs of compliance with this provision as a result of the Rule’s inclusion of charitable solicitations. The Commission does not believe that compliance with amended § 310.5(a)(5), which requires that all verifiable authorizations or records of express informed consent or express agreement required to be provided under the Rule be maintained will be unduly burdensome to charities who are less likely to avail themselves of the marketing methods that implicate these Rule requirements. Therefore, the only provision of the recordkeeping section that is likely to affect charities is § 310.5(a)(1), the requirement that “[a]ll substantially different advertising, brochures, telemarketing scripts, and promotional materials” be maintained. To the extent that retention of such materials is not already customary in the non-profit sector, the Commission believes that the burden of compliance is offset by the corresponding law enforcement benefits that accrue from this provision.

⁸⁸³ 60 FR at 30415.

⁸⁸⁴ *Id.*

⁸⁸⁵ DOJ-NPRM at 7.

⁸⁸⁶ *Id.*

⁸⁸⁷ *Id.*

⁸⁸⁸ *Id.*

⁸⁸⁹ See, e.g., *FTC v. Fed. Data Servs.*, No. 00-6462-CV-Ferguson (S.D. Fla. filed Apr. 3, 2000) (Stipulated final judgment entered Jan. 9, 2001); *FTC v. Data Med. Capital, Inc.*, No. SA-CV-99-1266AHS (EHC) (S.D. Cal. filed Oct. 14, 1999) (Stipulated final order for permanent injunction and other settlement of claims entered July 13, 2001); *FTC v. RJB Telecom, Inc.*, No. CIV002017PHXEHC (D. Ariz. filed Oct. 25, 2000) (Stipulated final judgment and order for permanent injunction filed Aug. 27, 2001); *FTC v. Story d/b/a Network Publ’ns.*, No. 3-99CV0968-L (N.D. Tex. filed Apr. 25, 1999) (Stipulated order for permanent injunction and civil penalty filed June 6, 2000).

⁸⁹⁰ 16 CFR 310.5.

⁸⁹¹ 67 FR at 4527-28.

⁸⁹² 67 FR at 4528.

⁸⁹³ Due to an oversight, the text of the NPRM noted the correct language of the provision (“or solicitations of charitable contributions”), while the text of the proposed Rule included an abbreviated version (“or solicitations”).

maintain certain records.⁸⁹⁹ As noted above in the discussion of the express verifiable authorization provision, § 310.3(a)(3)(ii), the Commission believes that sellers, when they accept payment via methods that are novel or lack certain fundamental consumer protections, must obtain express verifiable authorization by any of the three means allowed by the amended Rule. The maintenance of such records is also necessary to ensure the law enforcement goals of the recordkeeping provision.

Finally, ERA noted in its supplemental comment that it believed that it would be expensive for telemarketers conducting upsells to comply with the Rule's recordkeeping requirements.⁹⁰⁰ As addressed above in the discussion of § 310.4(a)(6), the Commission believes that both because the cost of digital audio recording and storage is decreasing, and because of the limited circumstances in which such recording is required under the Rule, the burden on sellers who choose to market goods and services using a combination of a "free-to-pay conversion" coupled with preacquired account information is offset by the consumer protection benefits that will accrue from recording and maintaining consumers' express informed consent in these circumstances.

Thus, the only modification to the language of § 310.5(a)(5) in the amended Rule is to require that in addition to retaining all verifiable authorizations, a seller or telemarketer must keep all "records of express informed consent or express agreement" for 24 months. This modification is necessitated by the introduction of these two terms in § 310.4(a)(6), dealing with unauthorized billing, and § 310.4(b)(1)(iii)(B)(i), addressing permission to a seller to call despite a consumer's inclusion on the national "do-not-call" registry. The Commission believes it is necessary for a seller or telemarketer to retain such records of express informed consent and express agreement to enable the Commission and the states to determine compliance with these provisions of the Rule.

F. Section 310.6 — Exemptions

Section 310.6 exempts certain telemarketing activities from the Rule's coverage.⁹⁰¹ The exemptions to the Rule

were designed to ensure that legitimate businesses are not unduly burdened by the Rule.⁹⁰² Based on the record in this proceeding, and on its law enforcement experience, the Commission has determined to add an exemption, § 310.6(a), to specifically exempt outbound calls to solicit charitable contributions from the national "do-not-call" registry provisions of the amended Rule. In addition, the Commission has determined to modify each of the subsections of the original Rule that are now found in renumbered § 310.6(b).

The Commission amends newly renumbered §§ 310.6(b)(1), (2), and (3)⁹⁰³ to require telemarketers and sellers of pay-per-call services, franchises, and those whose sales involve a face-to-face meeting before consummation of the transaction, to comply with the "do-not-call" and certain other provisions of § 310.4.

The Commission amends renumbered § 310.6(b)(4),⁹⁰⁴ which exempts inbound calls that are not a result of a solicitation, to make this exemption unavailable to upsell transactions and to calls in response to a message left pursuant to the abandoned call safe harbor provision in § 310.4(b)(4)(iii).

The Commission amends the general media exemption, now renumbered § 310.6(b)(5),⁹⁰⁵ and the direct mail exemption, now renumbered § 310.6(b)(6),⁹⁰⁶ to make these exemptions unavailable to upsells, and to telemarketers of credit card loss protection plans and business opportunities other than business arrangements covered by the Franchise Rule. In addition, the amended Rule makes clear that email and facsimile messages are direct mail for purposes of the Rule. Finally, the amended Rule modifies the proposed business-to-business exemption, now at § 310.6(b)(7)⁹⁰⁷ to clarify that sellers and telemarketers of nondurable office or

telephone calls in response to a general media advertisement (except those related to investment opportunities, credit repair, "recovery," or advance fee loan services); (5) inbound telephone calls in response to direct mail solicitations that truthfully disclose all material information (except solicitations relating to prize promotions, investment opportunities, credit repair, "recovery," or advance fee loan services); and (6) business-to-business telemarketing (except calls involving the retail sale of nondurable office or cleaning supplies).

⁹⁰² 60 FR at 43859.

⁹⁰³ These exemptions were found at § 310.6(a), (b), and (c) of the original Rule.

⁹⁰⁴ This provision was § 310.6(d) in the original Rule.

⁹⁰⁵ The general media exemption was at § 310.6(e) in the original Rule.

⁹⁰⁶ The direct mail exemption was at § 310.6(f) in the original Rule.

⁹⁰⁷ The business-to-business exemption was at § 310.6(g) in the original Rule.

cleaning supplies need not comply with the amended Rule's "do-not-call" provisions.

In addition, the amended Rule removes the proposal that would have made the business-to-business exemption unavailable to the telemarketing of Web services, Internet services, and charitable solicitations to businesses. Pursuant to the USA PATRIOT Act amendments to the Telemarketing Act, the Commission amends the Rule to expand several of the exemptions to encompass calls to induce charitable solicitations. Thus, the amended Rule exempts: charitable solicitation calls that are followed by face-to-face payment, § 310.6(b)(3); prospective donors' inbound calls not prompted by a solicitation, § 310.6(b)(4); charitable solicitation calls placed in response to general media advertising, § 310.6(b)(5); and donors' inbound calls placed in response to direct mail solicitations that comply with § 310.4(e). In the NPRM, the Commission proposed to make the business-to-business exemption unavailable for charitable solicitation calls. Based upon the record in this proceeding, the Commission has determined that it should not proceed with this proposal.

§§ 310.6(b)(1), (2), and (3) — Exemptions for pay-per-call services, franchising, and face-to-face transactions

Section 310.6(a) of the original Rule exempts all transactions subject to the Commission's Pay-Per-Call Rule.⁹⁰⁸ Similarly, § 310.6(b) exempts transactions subject to the Commission's Franchise Rule.⁹⁰⁹ Section 310.6(c) exempts transactions in which the sale of goods or services is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation by the seller.⁹¹⁰ In the NPRM, the Commission proposed to retain the exemptions for pay-per-call services, franchising, and face-to-face transactions,⁹¹¹ and require

⁹⁰⁸ The renumbered exemption in the amended Rule is found at § 310.6(b)(1).

⁹⁰⁹ The renumbered exemption in the amended Rule is found at § 310.6(b)(2).

⁹¹⁰ Face-to-face transactions are also covered by the Commission's Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR 429. This exemption has been renumbered in the amended Rule and is now found at § 310.6(b)(3).

⁹¹¹ No modifications to §§ 310.6(b)(1) and (2) are necessary to implement the USA PATRIOT Act amendments because charitable solicitations are not likely to be combined with pay-per-call or franchise sales. Therefore, there is no need to expressly exempt such an unlikely scenario from TSR coverage. However, it is necessary to amend

⁸⁹⁹ NEMA-NPRM at 8-10.

⁹⁰⁰ ERA-Supp. at 7.

⁹⁰¹ Specifically, the original Rule exempts: (1) goods and services subject to the Commission's Pay-Per-Call Rule and Franchise Rule; (2) telemarketing sales consummated after face-to-face transactions; (3) inbound telephone calls that are not the result of any solicitation by the seller or telemarketer; (4)

telemarketers selling these exempted goods and services to comply with § 310.4(a)(1) (prohibiting threats, intimidation, or use of profane or obscene language), § 310.4(a)(7) (requiring transmission of Caller ID), § 310.4(b) (prohibiting abusive pattern of calls and requiring compliance with “do-not-call” provisions), and § 310.4(c) (calling time restrictions).

The NPRM pointed out that the Rule Review record contained ample evidence of consumers’ increasing frustration with unwanted telemarketing calls, including those soliciting for pay-per-call services or sales appointments.⁹¹² A number of participants in the Rule Review Forum concurred that the “do-not-call” provision of the Rule should also be applicable to calls where a seller attempts to set up an in-person sales meeting at a later date.⁹¹³ For these reasons, the Commission proposed making face-to-face, franchise, and pay-per-call transactions subject to the “do-not-call,” calling time restriction, and certain other abusive practices provisions in § 310.4.

Consumer and privacy advocates, as well as state regulators, supported the Commission’s proposal to make these transactions subject to the “do-not-call” and certain other provisions of § 310.4.⁹¹⁴ They recommended that, in order to be effective, a “do-not-call” registry should have as few exemptions as possible. PRC pointed out:

[T]elemarketing as a business practice transcends the boundaries of regulated and unregulated industries. So-called “cold calling” is a common marketing technique, used by the most established regulated entity down to the fraudulent “boiler room” that is here today and gone tomorrow. Each type of entity—and all those in between that make unwanted telephone calls to a private home—contribute to privacy invasions, costs for devices to stop the invasions, and the overall annoyance factor

§ 310.6(b)(3) to exempt charitable solicitations that entail a face-to-face meeting before the donor pays.

⁹¹² 67 FR at 4516-18. One consumer who spoke during the public participation portion of the DNC Forum noted frustration about her inability to invoke her right not to be called again by a company that called her to solicit a sales appointment. See generally DNC Tr. at 241-46 (Mey). See also *FTC v. Access Resource Servs.*, No. 02-60226 CIV GOLD (S.D. Fla. filed Feb. 13, 2002) (regarding Miss Cleo’s psychic services where psychics continued to call consumers despite repeated requests from the consumer to stop calling).

⁹¹³ See RR Tr. at 291-96.

⁹¹⁴ EPIC-NPRM at 20; PRC-NPRM at 3-4 (there should be no exemptions whatsoever from “do-not-call” registry); FCA-NPRM at 1-2 (intrastate calls should not be exempt); NAAG-NPRM at 57; NFDA-NPRM at 5 (in connection with the face-to-face transaction exemption, telemarketers should also be required to comply with the oral disclosure requirements of § 310.4(d)).

voiced so strongly by the public. For this reason, telemarketing abuses can only be curtailed if the practice itself—rather than the type of business involved—is subject to the Commission’s rules.⁹¹⁵

The Commission received no comments opposing application of the “do-not-call” and other abusive practices provisions to pay-per-call transactions. With regard to transactions subject to the Commission’s Franchise Rule, industry commenters expressed concern about ambiguities on how the “do-not-call” and calling time restrictions would be applied when inbound calls are converted to outbound calls.⁹¹⁶ The Commission has addressed this issue in its discussions above of the definition of “outbound call” and required disclosures in upsell transactions. IFA also noted that compliance with a national “do-not-call” registry would be costly, particularly if the registry does not contain an exemption for established business relationships and does not preempt state “do-not-call” laws.⁹¹⁷ The Commission has addressed these issues in its discussion above regarding the national “do-not-call” registry.

Face-to-face transactions: Industry commenters generally opposed making face-to-face transactions subject to the “do-not-call,” calling time restriction, and certain other abusive practices provisions.⁹¹⁸ These commenters argued that face-to-face transactions should continue to be exempt because their practices are already heavily regulated by the states and by the Commission through other FTC rules and thus are less susceptible to abusive practices.⁹¹⁹ However, the national “do-not-call” registry is not focused on fraud, but rather on consumer privacy. The Commission agrees that the incidence of fraud may be diminished in face-to-face transactions, where the transactions are subject to regulation by other Commission rules or by state regulations. For that reason, the Commission has retained the exemption for face-to-face transactions from the provisions of the Rule that address deceptive or other abusive practices. However, the commenters failed to

provide arguments showing why they should be exempted from regulations covering the particular abusive practices set forth in the Commission’s proposal—*i.e.*, a national “do-not-call” registry, calling time restrictions, the prohibition against denying or interfering with a consumer’s right to be placed on a “do-not-call” list, the requirement to transmit Caller ID information, and the prohibition against threats and intimidation.

NAR argued that Congress intended the TSR to address abusive, deceptive, and fraudulent telemarketing practices, not to regulate or prohibit a single telephone call from a real estate professional that simply provides information to a consumer.⁹²⁰ Transactions subject to the Commission’s amended Rule (and thus subject to the national “do-not-call” registry) are those that fall within the definition of “telemarketing,” *i.e.*, “a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call.”⁹²¹ A single, isolated telephone call would not be part of a plan, program, or campaign and thus would not fall within the definition of “telemarketing.” Furthermore, it is unlikely that the majority of real estate agents conduct campaigns of outbound calls to solicit potential customers who live out-of-state. Most of the outbound solicitation calls made by real estate agents are probably intrastate calls that would be excluded from the Rule’s coverage. However, if a real estate agent routinely places outbound calls to solicit potential customers in other states, those calls, in the aggregate, would fall within the definition of “a plan, program, or campaign” of outbound calls and would be subject to the Rule.

NAR also argued that a call to set up a meeting does not fall within the definition of “telemarketing” because such calls do not involve the inducement to purchase using the telephone, but rather non-deceptive

⁹²⁰ NAR-NPRM at 1-2. Similarly, DSA notes that many of the calls by direct sellers involve single telephone calls to individuals with whom the seller has a personal relationship. DSA maintains that calls to individuals with whom an on-going commercial or personal relationship exists are reasonable, frequently welcome, and expected by the consumer, and therefore suggests that the Commission provide an exemption for a prior business or personal relationship. DSA-NPRM at 5-8. As discussed above in the section regarding the national “do-not-call” registry, the amended Rule provides an exemption for “established business relationships.”

⁹²¹ Amended Rule § 310.2(c).

⁹¹⁵ PRC-NPRM at 3-4.

⁹¹⁶ Car Wash Guys-NPRM at 51-56; IFA-NPRM at 2; NFC-NPRM at 3.

⁹¹⁷ IFA-NPRM at 2.

⁹¹⁸ See generally Craftmatic-NPRM; DSA-NPRM; NAR-NPRM; ICFA-NPRM at 2-3; Insight-NPRM. See also June 2002 Tr. III at 157-226. But see ARDA-NPRM at 2, 7-9, which supports creation of a national “do-not-call” registry as long as the registry preempts state laws and the Commission provides an exemption for established business relationships.

⁹¹⁹ See, e.g. DSA-NPRM at 6-7; NAR-NPRM at 4; June 2002 Tr. III 157-226.

communication of information about services that are not offered or made available for purchase in a phone conversation.⁹²² However, the definition of “telemarketing” does not require that the purchase be made during the telephone conversation. The definition simply states that the call be “conducted to induce the purchase of goods or services.” The inducement could be made during the telephone call, or it could be in the form of setting up a subsequent face-to-face meeting at which an additional sales presentation could take place.

In summary, the Telemarketing Act mandates that the Commission’s Rule address abusive telemarketing practices and specifically mandates that the Commission’s Rule include a prohibition on calls that a reasonable consumer would consider coercive or abusive of the consumer’s right to privacy, as well as restrictions on calling times.⁹²³ The rulemaking record shows that face-to-face transactions are *not* less susceptible to certain abusive practices prohibited in § 310.4.⁹²⁴ For this reason, the Commission has determined that telemarketing calls to solicit a face-to-face presentation or the purchase of pay-per-call services should be subject to certain Rule provisions designed to limit abusive practices. Because franchise sales generally involve a face-to-face meeting at some point, these transactions are simply another type of face-to-face transaction and thus the telemarketing of franchises should be held to the same standard.

Therefore, the Commission retains the exemptions for pay-per-call services, franchising, and face-to-face transactions set out in §§ 310.6(b)(1)-(3), but amends the TSR to require that telemarketers making these types of calls comply with §§ 310.4(a)(1) and (7), and §§ 310.4(b) and (c). The amended Rule continues to exempt such calls from the requirements of § 310.3 relating to deceptive practices and from the recordkeeping requirements set out in § 310.5.⁹²⁵ These calls would also continue to be exempt from providing the oral disclosures required by § 310.4(d). Similarly, telemarketers soliciting charitable donations would be exempt from § 310.4(e) when the

payment or donation is made subsequently in a face-to-face setting. However, the amended Rule requires that, even when a call falls within these exemptions, a telemarketer may not engage in the following practices:

- threatening or intimidating a customer, or using obscene language;
- failing to transmit Caller ID information;
- causing any telephone to ring or engaging a person in conversation with intent to annoy, abuse, or harass the person called;
- denying or interfering with a person’s right to be placed on a “do-not-call” registry;
- calling persons whose telephone numbers have been placed on the national “do-not-call” registry maintained by the Commission, unless an established business relationship exists between the seller and the person (telemarketers seeking charitable solicitations are exempted from this requirement);
- calling persons who have placed their names on that seller’s or charitable organization’s “do-not-call” list; and
- calling outside the time periods allowed by the Rule.

§ 310.6(b)(4) — Inbound calls not in response to a solicitation

The amended Rule revises § 310.6(b)(4) to expressly except from the exemption any upsell following an exempt transaction initiated by the consumer. When the Commission issued the original Rule in 1995, this exemption was intended to apply to a single telemarketing transaction initiated by the consumer without any solicitation by the seller or telemarketer. Since then, the practice of upselling has emerged, and has grown dramatically, particularly in the inbound telemarketing context. The reasons for exempting a telemarketing transaction pursuant to § 310.6(b)(4) do not apply to an upsell linked to that initial transaction.

Section 310.6(b)(4) of the amended Rule exempts calls initiated by consumers without solicitation by the seller or telemarketer because such calls are not part of a “plan, program, or campaign to induce the purchase of goods or services.”⁹²⁶ Thus, these calls do not fall within the definition of “telemarketing.” The exemption was intended to cover

incidental uses of the telephone that are not in response to a direct solicitation, *e.g.*, calls from a customer to make hotel, airline, car rental, or similar reservations, to place carry-out or restaurant delivery orders, or to obtain

information or customer technical support.⁹²⁷

Furthermore, in these calls, the consumer presumably is in control of the transaction that the consumer initiated, absent any outbound call or direct mail piece.

In contrast, the upsell is a direct solicitation for a product or service other than that for which the consumer initiated the call. As such, upsells *are* part of a telemarketing “plan, program, or campaign to induce the purchase of goods or services” and thus *do* fall within the definition of “telemarketing.” Furthermore, in upsells, the consumer does not initiate the sales transaction; the sales solicitation is initiated by the seller. When the consumer initiates an unsolicited inbound call, the consumer does not necessarily expect to be offered a good or service during the course of that call (such as in the case of a technical support call), or to be offered additional goods or services (in the case where the consumer was calling to make a purchase). Some commenters suggested that upsells appended to inbound calls should be exempted.⁹²⁸ However, the Commission’s experience indicates that upsells appended to unsolicited inbound calls open the door to potential deception and abuse in the subsequent upsell transaction.⁹²⁹ Accordingly, the amended Rule excepts upsell transactions from the exemption provided for unsolicited inbound calls by consumers in § 310.6(b)(4).

There was substantial comment on the potential cost of subjecting upsells associated with inbound calls to any provisions beyond the Rule’s disclosure requirements.⁹³⁰ The original Rule exempted most inbound calls entirely, since most would fall within either this exemption for calls initiated by the consumer, or into renumbered §§ 310.4(b)(5) or (6) for general media advertisements or certain direct mail solicitations—each of which is discussed below. As a result, sellers and telemarketers were not required to

⁹²² 60 FR at 43860.

⁹²⁸ *See, e.g.*, AFSA-NPRM at 15.

⁹²⁹ Indeed, NAAG noted that the states’ law enforcement experience revealed that upsells often proved problematic when appended to inbound calls initiated by the consumer, or by general media advertisements. NAAG-NPRM at 33 (“[Upsells] are usually inbound calls during which the company receiving the call completes the purpose for which the consumer initiated the call and then entices the consumer to consider another seller’s products. The upsell can follow either a sales call or a call related to customer service such as a call about an account payment or product repair.”) *See, e.g.*, *New York v. Ticketmaster and Time, Inc.*, (Assurance of Discontinuance).

⁹³⁰ *See, e.g.*, DMA-NPRM at 38; ERA-NPRM at 11; PMA-NPRM at 9-13.

⁹²² NAR-NPRM at 3-4. *See also* ICFA-NPRM at 1-2 (regarding funeral goods and services).

⁹²³ 15 U.S.C. 6102(a)(1) and (3)(A)-(B).

⁹²⁴ *See* Gindin-RR at 1; Mey-RR *generally*; DNC Tr. at 241-46; RR Tr. at 291-95.

⁹²⁵ Of course, a seller or telemarketer would have to keep documentation in order to successfully raise the “safe harbor” defense in § 310.4(b)(3) regarding compliance with the amended Rule’s “do-not-call” requirements. The safe harbor relating to abandoned calls, discussed in § 310.4(b)(4), also includes a requirement to maintain certain records.

⁹²⁶ *See* S. REP. NO. 103-80, at 8 (1993).

comply with the Rule's recordkeeping requirements with respect to these exempt telephone calls. While the amended Rule retains these exemptions (although with some modification), upsell transactions are excluded from those exemptions. Thus, to the extent that the Rule requires that records be maintained, including recordings of express verifiable authorization or express informed consent, such records must be maintained regarding these inbound upsells.

Commenters expressed concern primarily about the potential need for sellers and telemarketers to record certain inbound transactions.⁹³¹ These commenters suggested that call centers accustomed to handling only inbound telemarketing calls were not necessarily equipped with recording equipment, and that obtaining and implementing the necessary systems would be prohibitively expensive for many such organizations.⁹³² However, the Commission notes that taping is required only in one circumstance: under new § 310.4(a)(6)(i)(C), the seller or telemarketer must make and maintain a recording of the entire sales transaction any time a telemarketing transaction involves both preacquired account information and a "free-to-pay conversion" feature.⁹³³ In instances where it is necessary to obtain the consumer's express verifiable authorization pursuant to § 310.3(a)(3), the amended Rule provides alternatives to making a recording of the consumer's oral authorization.⁹³⁴ Thus, the number of industry members who would be required to obtain recording equipment is relatively limited. Moreover, with the growth of digital recording technology, the capital investment in recording equipment and record storage is rapidly declining.⁹³⁵

CCC argued that in inbound calls not currently subject to the Rule, the impact of these amendments would be to "unnecessarily increase inbound call length by 50 percent or more and thereby increase the cost of goods or services to consumers."⁹³⁶ CCC also suggested that additional recordkeeping, "public disclosure," and taping requirements will be overly

burdensome.⁹³⁷ While the Commission recognizes that, to the extent telemarketers have not been subject to the Rule, there is potential for additional burdens, the obligations of the Rule are minimal, and generally reflect regular practices already in place for most sellers and telemarketers in the ordinary course of business—such as the basic disclosure requirements, prohibition on misrepresentations, and recordkeeping requirements.⁹³⁸ Moreover, the taping requirement is limited to those transactions that involve both preacquired account information and a "free-to-pay conversion" offer. Thus, only those sellers and telemarketers that choose to structure their upselling campaigns in this fashion will be subject to this additional requirement. The Commission therefore believes that any additional burden caused by these new requirements will be minimal. Ultimately, the Commission believes that the benefits to consumers of receiving the appropriate disclosures in an upsell transaction outweigh the costs to industry of providing those disclosures and ensuring that any charges are authorized by the consumer.

Additionally, it should be clear that telephone calls initiated by a customer or donor in response to a telemarketer's transmission of Caller ID information or use of a recorded message under the abandoned call safe harbor provision described in § 310.4(b)(4) are exempted from this exemption, as the customer or donor in this context would have had no reason to initiate a telephone call but for the solicitation efforts of the seller, charitable organization, or telemarketer. The transmission of Caller ID information and the use of a recorded message are considered forms of solicitation by a seller, charitable organization, or telemarketer under this exemption because they are part of a telemarketer's efforts to induce the purchase of goods or services or a charitable contribution. Although the information displayed on a consumer's caller identification service or provided via a recorded message will not include a sales pitch, it is a "result of [a] solicitation" and therefore outside the scope of the exemption described in this section.

310.6(b)(5) — Exemption for general media advertisements

The Commission received few comments addressing its proposal to narrow the general media exemption by adding two additional categories of

goods or services to the list of its exceptions: credit card loss protection plans, and business opportunities other than those covered by the Franchise Rule or any subsequent rule covering business opportunities the Commission may promulgate.⁹³⁹ The proposed expansion of the exemption to cover charitable solicitations pursuant to the USA PATRIOT Act yielded no comments.

Several of the commenters who addressed the general media exemption opposed having any exemption at all for general media, and therefore supported any effort to narrow it.⁹⁴⁰ NCL stated that if the Commission determined to retain the general media exemption, it supported the addition of credit card loss protection plans and business opportunities other than those covered by the Franchise Rule to the list of goods and services excepted from the exemption. In support of its position, NCL noted that in 35 percent of the work-at-home complaints made to the NFIC in the year 2001, consumers reported that they were solicited through print media.⁹⁴¹ Since work-at-home solicitations are not "business arrangements covered by the Franchise Rule," the exception from the general media exemption will now ensure that inbound calls in response to general media advertisements touting work-at-home opportunities will be subject to the Rule. NCL also noted that although most of the solicitations for credit card loss protection plans were made by telephone, these services should be covered by the Rule regardless of how they are promoted "given the egregious nature of these complaints."⁹⁴²

While commenters and forum participants generally endorsed the proposed narrowing of the general media exemption, some urged the Commission to reconsider whether a general media exemption is "appropriate and workable," arguing that consumers who call in response to such advertisements are vulnerable to fraud and deception unless certain minimal disclosures are made.⁹⁴³ NCL acknowledged that the Commission could combat such deception using its authority under Section 5 of the FTC Act, but argued that consumer injury could better be prevented if disclosures

⁹³¹ CCC-NPRM at 12-13; June 2002 Tr. II at 224 (CCC); June 2002 Tr. II at 232-33 (MPA).

⁹³² CCC-NPRM at 12-13; June 2002 Tr. II at 224 (CCC); MPA-NPRM at 28-29; June 2002 Tr. II at 232-33 (MPA).

⁹³³ See discussion of §§ 310.2(o) and (w), and § 310.4(a)(6) above for a detailed explanation of these provisions.

⁹³⁴ See discussion of § 310.3(a)(3) above.

⁹³⁵ See note 480 above.

⁹³⁶ CCC-NPRM at 16.

⁹³⁷ *Id.*

⁹³⁸ 60 FR at 32682-83 (June 23, 1995).

⁹³⁹ This section was found at § 310.6(e) in the proposed Rule.

⁹⁴⁰ See, e.g., EPIC-NPRM at 25-26; NCL-NPRM at 12; NAAG-NPRM at 58; June 2002 Tr. III at 177, 182-83 (NAAG has historically opposed the exemption; AARP supports NAAG position).

⁹⁴¹ NCL-NPRM at 12.

⁹⁴² *Id.*

⁹⁴³ *Id.* See also June 2002 Tr. III at 177-83 (NAAG and AARP).

were required. NCL further advanced the proposition that all telemarketers should be subject to the express verifiable authorization requirements when consumers' accounts will be billed, regardless of whether calls are outbound or inbound, and, in the latter instance, even when such calls are in response to an advertisement delivered by general media or direct mail.⁹⁴⁴ EPIC noted its position that "[g]eneral media advertising may be deceptive, abusive or merely lack the information required to be disclosed under the Rule, thus substantially reducing the level of protection otherwise afforded to consumers by the Rule."⁹⁴⁵

The Commission declines to adopt these recommendations to further regulate inbound calls resulting from general media advertisements. In the SBP issued with the original Rule, the Commission explained that in its experience "calls responding to general media advertising do not typically involve the forms of deception and abuse the Act seeks to stem."⁹⁴⁶ The Commission's experience since the promulgation of the Rule continues to support the exemption for general media advertising, with targeted exceptions for certain goods or services that have routinely been touted by fraudulent sellers using general media advertising to generate inbound calls. In response to the suggestion that express verifiable authorization be required in all telemarketing transactions when the consumer's account will be billed, the Commission notes that the parameters of the amended express verifiable authorization provision, and the Commission's rationale in adopting it, are discussed above in the analysis of § 310.3(a)(3).⁹⁴⁷

NAAG expressed concern about the growing number of sellers of membership or buying club opportunities that operate using an "upsell" technique after an initial inbound call is placed by consumers in response to an advertisement for a completely different product.⁹⁴⁸ NAAG suggested that the Commission amend the general media exemption to ensure that the Rule does not inadvertently exempt upselling transactions that occur when a consumer calls a seller or telemarketer in response to a general

media advertisement.⁹⁴⁹ The Commission agrees that this scenario would be an unwelcome consequence of the provision's wording and thus has amended this provision to clarify that the exemption may not be claimed in any instances of upselling that occur in the call.

NAAG also recommended that the list of exceptions to the general media exemption be expanded to include other transactions that involve a high risk of abuse, such as discount buyers clubs and offers involving "opt out free trials."⁹⁵⁰ The Commission agrees that the telemarketing of these products or services frequently involves fraudulent or deceptive practices. However, there is no evidence on the record indicating that these products or services are telemarketed through general media advertisements. Rather, the states and the Commission have brought law enforcement actions challenging the deceptive telemarketing of these products predominantly when they are sold via outbound cold calls or in upselling, after the consumer has called to purchase another product or service in response to a general media advertisement.⁹⁵¹ As discussed above, the amended Rule contains a modified general media exemption, which makes the exemption unavailable to upselling transactions that occur in a call in response to a general media advertisement. In addition, the amended Rule contains specific requirements for negative option, "free-to-pay conversion," and upselling transactions.⁹⁵² Therefore, the Commission finds it unnecessary to except discount buyers clubs and offers involving "opt out free trials" from the general media exemption.

DSA opposed the amendment of the general media exemption provision, expressing the concern that the exception for "business opportunities other than business arrangements covered by the Franchise Rule" will require individual direct sellers to comply with the Rule when they solicit

customers or salespeople through general media advertisements.⁹⁵³ DSA argues that "[t]here is nothing inherently deceptive or abusive about communications over the telephone (particularly those initiated by the consumer) regarding a business opportunity" and that "there should be even fewer concerns about communications related to *prospective* transactions involving activities clearly deemed de minimis by the Franchise Rule."⁹⁵⁴ As the Commission stated in the NPRM, it has determined, based on the record and in particular on its extensive law enforcement experience in this area, that "telemarketing fraud perpetrated by the advertising of work-at-home and other business opportunity schemes in general media sources is a prevalent and growing phenomenon."⁹⁵⁵ Outbound telephone calls to induce the purchase of a business opportunity not regulated by the Franchise Rule have been subject to the Rule's coverage since it was promulgated, and the new exception for general media advertisements merely expands that requirement when an inbound call results from the advertisement of such ventures in the general media.⁹⁵⁶ Moreover, if a direct seller is marketing its underlying product to customers, the exception would not bring such activity under the Rule because it would not implicate the sale of a business opportunity.⁹⁵⁷ Furthermore, as the Commission noted in the SBP for the original Rule, DSA's concern about recruitment of persons to engage in the direct sale of goods or services is likely unfounded because the face-to-face exemption takes such efforts outside the Rule's coverage.⁹⁵⁸

Based on its review of the record in this matter, and its law enforcement experience, the Commission has determined to retain the proposed general media provision in the amended

⁹⁵³ DSA-NPRM at 8-9.

⁹⁵⁴ *Id.*

⁹⁵⁵ 67 FR at 4530-31 (this determination is equally applicable to the advertisement by direct mail of business opportunities other than business arrangements covered by the Franchise Rule).

⁹⁵⁶ The Commission noted in the original SBP that "[w]hen a business venture is not covered by the Franchise Rule, then consumers do not receive the protection afforded by that Rule's pre-sale disclosure requirements. Therefore, it is appropriate that telephone sales of such ventures should be covered by this Rule, so that consumers may receive the benefit of its protections." 60 FR at 4360. The addition of the exception provisions to the direct mail and general media exemptions merely expands upon the initial requirement.

⁹⁵⁷ For example, the exception to the general media exemption would bring under the Rule an effort by a direct seller to recruit others to market its products, but not the sale by the direct seller of cosmetics to its own end-customers.

⁹⁵⁸ 60 FR at 43860, n.185.

⁹⁴⁴ NCL-NPRM at 12.

⁹⁴⁵ EPIC-NPRM at 25-26.

⁹⁴⁶ 60 FR at 43860.

⁹⁴⁷ The Commission also notes that new § 310.4(a)(6) requires that, in every instance, a seller or telemarketer secure the consumer's express informed consent to be charged for the goods or services or charitable contribution, and to be charged using the identified account.

⁹⁴⁸ NAAG-NPRM at 58-59.

⁹⁴⁹ *Id.* See also EPIC-NPRM at 25 (agreeing that upselling calls should be subject to the Rule). Cf. Capital One-NPRM at 5 (requesting clarification that upselling calls are exempt, at least in an internal upsell).

⁹⁵⁰ NAAG-NPRM at 59.

⁹⁵¹ See, e.g., *FTC v. Smolev.*, No. 01-8922 CIV ZLOCH (S.D. Fla. 2001); *New York v. MemberWorks, Inc.*, Assurance of Discontinuance (Aug. 2000); *Minnesota v. MemberWorks, Inc.*, No. MC99-010056 (4th Dist. Minn. June 1999); *Minnesota v. Damark Int'l, Inc.*, No C8-99-10638, Assurance of Discontinuance (Ramsey County Dist. Ct. Dec. 3, 1999); *FTC v. S.J.A. Soc'y, Inc.*, No. 2:97 CM 472 (E.D. Va. filed May 31, 1997).

⁹⁵² See amended Rule § 310.3(a)(1)(vii), 310.3(a)(2)(ix), 310.3(a)(3)(iii), 310.4(a)(6), 310.4(a)(7), and 310.4(d).

Rule with two changes. First, the phrase “or any subsequent rule covering business opportunities the Commission may promulgate” has been deleted in the amended Rule. Should the Commission promulgate a rule covering business opportunities, the nexus between the TSR and any such rule will be considered, and any necessary conforming amendments made to the TSR at that time. Second, § 310.6(b)(5) has also been amended to expressly exempt any upsell following the exempt transaction associated with the general media solicitation. As with telephone calls initiated by the consumer without any solicitation by the seller or telemarketer, the reasons for exempting a telemarketing transaction following certain general media solicitations do not apply to an upsell linked to that initial transaction.⁹⁵⁹ The original Rule exempts calls in response to a general media advertisement because “calls responding to general media advertising do not typically involve the forms of deception and abuse the Act seeks to stem.”⁹⁶⁰ However, the Commission recognized that some fraudulent telemarketers and sellers have used general media advertisements to entice victims to call, and thus has excepted those problem areas from the exemption. Upselling is one of the problem areas where general media advertisements have provided the opening for subsequent deception and abuse.⁹⁶¹ In addition, an upsell transaction is not similar to a general media advertisement. It is a wholly new sales offer targeted at the consumer a seller or telemarketer has on the line for some other purpose, whether it be in response to a general media advertisement about a different product or service, or a customer service call initiated by the consumer. Accordingly, the amended Rule excepts upsell transactions from the general media exemption in § 310.6(b)(5).

§ 310.6(b)(6) — Exemption for direct mail solicitations

Section 310.6(b)(6) of the original Rule exempts from the Rule’s requirements inbound telephone calls resulting from a direct mail solicitation

that clearly, conspicuously, and truthfully disclosed all material information required by § 310.3(a)(1). Certain categories of transactions, specifically those in which the solicitation was for a prize promotion, investment opportunity, credit repair service, “recovery” service, or advance fee loan, were excepted from this exemption because the record and the Commission’s law enforcement experience made clear that these particular products and services were so often subject to abuse by fraudulent telemarketers that regulation under the TSR was appropriate.

The proposed Rule retained the direct mail exemption provision, but clarified that advertisements sent via facsimile or electronic mail were considered direct mail for purposes of this exemption.⁹⁶² The proposed Rule also added two new categories of transactions to be excepted from the direct mail exemption: credit card loss protection plans and business opportunities other than those covered by the Franchise Rule or any subsequent Rule covering business opportunities the Commission may promulgate. Finally, pursuant to the USA PATRIOT Act, the proposed Rule expanded the exemption to exclude from the Rule’s coverage inbound calls to solicit a charitable contribution made in response to a direct mail solicitation that complies with § 310.3(a)(1).

The Commission has determined, based on a review of the record and its own law enforcement experience, to adopt the proposed amendments to the direct mail exemption, renumbered in the amended Rule as § 310.6(b)(6). The amended Rule, however, differentiates between the requirements for direct mail solicitations for goods or services and direct mail solicitations for charitable contributions. The amended Rule retains unchanged the requirements of the original Rule—*i.e.*, the direct mail solicitation must clearly, conspicuously, and truthfully disclose all material information required by § 310.3(a)(1). However, because § 310.3(a)(1) applies only to goods and services and not to charitable solicitations, the amended Rule modifies the direct mail exemption language to ensure that prospective donors who receive direct mail solicitations for charitable contributions have protections similar to those enjoyed by consumers who purchase goods or services. Thus, the amended Rule adds language to the direct mail exemption provision prohibiting material misrepresentations regarding

any item contained in § 310.3(d) in charitable solicitations sent by direct mail to donors.

In the proposed Rule, the Commission stated that the direct mail exemption would be applicable to inbound calls made in response to a direct mail charitable solicitation that complies with § 310.3(a)(1). NAAG suggested that inbound calls resulting from a direct mail charitable solicitation be exempt instead if the direct mail piece clearly, conspicuously, and truthfully sets forth the disclosure in § 310.4(e)(1) (the identity of the charitable organization) and the fact that the organization is soliciting a charitable contribution.⁹⁶³ NAAG further recommended that, at a minimum, several categories of information (including the nature of the goods or services and the facts relating to a charitable contribution) deemed important to consumers and donors be expressly referenced in § 310.6(f).⁹⁶⁴ The Commission agrees that the specific disclosures required by § 310.3(a)(1)—targeted at the sale of goods or services—are an imperfect fit with the type of information a potential donor would need to determine if he or she wished to contact a charitable organization in response to a solicitation received via direct mail. Therefore, the amended Rule requires that, in order for the telemarketer to take advantage of the direct mail exemption for inbound calls in response to any direct mail charitable solicitation, such solicitation contain no material misrepresentation regarding any item contained in § 310.3(d) of the Rule.

Section 310.6(b)(6) has also been amended to expressly exempt from the direct mail exemption any upsell following the exempt transaction associated with the direct mail advertisement. As with telephone calls initiated by the consumer without any solicitation by the seller or telemarketer, or in response to general media solicitations, the reasons for exempting a telemarketing transaction triggered by a direct mail advertisement do not apply to an upsell linked to that initial transaction.⁹⁶⁵ Section 310.6(b)(6) of the amended Rule exempts direct mail solicitations only if the disclosures required by § 310.3(a)(1) are truthfully, clearly, and conspicuously provided in the direct mail piece. The Commission

⁹⁵⁹ The reasons for this exception are explained in greater detail in the discussion of amended Rule § 310.6(b)(4) above.

⁹⁶⁰ 60 FR at 43860.

⁹⁶¹ *FTC v. Smolev* (a/k/a Triad Discount Buying Service) is one example of an internal upsell triggered by consumer response to a general media advertisement. *Smolev*, No. 01-8922-CIV ZLOCH (S.D. Fla. 2001). *New York v. Ticketmaster* (Settlement announced on Jan. 7, 2002).

⁹⁶² The direct mail exemption provision is found in the proposed Rule at § 310.6(f).

⁹⁶³ NAAG-NPRM at 59-60.

⁹⁶⁴ *Id.*

⁹⁶⁵ The reasons for this exception are discussed in greater detail in the explanation of §§ 310.6(b)(4) and (5) above. Capital One requested clarification of the applicability of this exemption to upselling transactions. Capital One-NPRM at 5-6. EPIC requested that upselling be subject to the Rule. EPIC-NPRM at 25.

exempted these direct mail solicitations because such solicitations

are not uniformly related to the forms of deception and abuse the Act seeks to stem, nor are they uniformly related to such misconduct. Rather, in certain discrete areas of telemarketing, such solicitations often provide the opening for subsequent deception and abuse. The Commission has drawn upon its enforcement experience, identified those problem areas, and excluded them from this exemption.⁹⁶⁶

Upselling transactions are one of the problem areas where direct mail solicitations have provided the opening for subsequent deception and abuse.⁹⁶⁷ Upon receiving a direct mail solicitation in which all of the material terms of the offer may be available to evaluate in the direct mail piece, the consumer has the time and the information necessary to make an informed decision whether to call and inquire further or make a purchase. By contrast, an upsell presentation provides the consumer no opportunity to review the material disclosures pertinent to the offer. Once again, the upsell is more akin to an unsolicited outbound call to the consumer, who does not necessarily expect to be solicited for a purchase, and who has none of the material information he or she needs to evaluate the offer and make a purchasing decision. Accordingly, the amended Rule excepts upselling transactions from the direct mail exemption in § 310.6(b)(6).

Finally, the phrase "or any subsequent rule covering business opportunities the Commission may promulgate" has been deleted in the amended Rule. Should the Commission promulgate a rule covering business opportunities, the nexus between the TSR and any such rule will be considered, and any necessary conforming amendments made to the TSR at that time.

Facsimile and electronic mail solicitations as "direct mail": NCL and ARDA supported the Commission's view that facsimile and electronic mail solicitations are analogous to direct mail sent via the U.S. Postal Service, and should be considered direct mail for purposes of the exemption.⁹⁶⁸ NCL noted that facsimile ("fax") or electronic mail ("email") solicitations are often sent to promote fraudulent goods or services.⁹⁶⁹ For example, in "Nigerian money offer" schemes, the fastest growing category of telemarketing fraud

reported to NCL, faxes and emails are the primary methods of solicitation.⁹⁷⁰ NCL noted that faxes and email are also used to solicit businesses for a variety of telemarketing scams.⁹⁷¹ DMA also supported the interpretation that advertisements sent via fax or email should be considered as "direct mail" pieces for purposes of the Rule.⁹⁷²

Some commenters opposed the inclusion of fax and email advertisements in the exemption,⁹⁷³ and some expressed concern that the Commission's interpretation could actually increase the number of unwanted solicitations sent to consumers by fax and email.⁹⁷⁴ NCL stated that unsolicited fax advertisements were prohibited under the TCPA because of their intrusive impact on recipients' privacy, and expressed concern that exempting calls in response to unsolicited faxes from the Rule, even if the information in them is accurate and complete, "would ignore this important public policy determination."⁹⁷⁵ NCL recommended that the Commission ban the sending of unsolicited fax advertisements as an abusive practice under the Rule.⁹⁷⁶

The record in this matter provides no support for the assertion that the number of unwanted, but truthful, fax and email solicitations may increase as a result of being exempted from the TSR. The Commission notes that the TCPA, enforced by the FCC, already bans unsolicited fax messages.⁹⁷⁷ The FCC has promulgated rules effectuating the Congressional ban and has enforced those regulations.⁹⁷⁸ Thus, the Commission's determination that, for the purposes of the TSR, faxes and email are forms of "direct mail" should have no impact on the number of unsolicited faxes that are sent. To presume such would be to anticipate that sellers would blatantly ignore the

FCC's regulations. To be entirely clear, however, the Commission wishes to state that its interpretation of the term "direct mail" in no way alters the legality of the underlying direct mail contact. Rather, the new TSR provision will require that, to the extent that a fax or email solicitation is allowed by law, these direct mail solicitations must include the required disclosures, or else resulting inbound calls from consumers will be subject to the entire TSR.⁹⁷⁹

Although it favored the Commission's proposed interpretation which viewed faxes and email as "direct mail" for purposes of the Rule, DMA argued that the Rule should allow the disclosures of material information to be made in the telephone call, rather than in the fax or email advertisement.⁹⁸⁰ As support for its position, DMA stated that to do otherwise could result in increased expense to sellers who use email to reach their target audience, due to the increased length of the message. DMA further argued that the Commission lacks authority to dictate the content of either email or fax advertisements. Finally, DMA posited that, if the intent of the provision is to mandate disclosures, the NPRM failed to evaluate the costs of requiring such disclosures, particularly in email solicitations.⁹⁸¹

The Commission believes that, to warrant exemption of the inbound call in response to a direct mail solicitation from the Rule, it is critical that a consumer receive the required disclosures (or, in the case of a charitable solicitation, that the solicitation not contain misrepresentations) at the time the consumer contemplates contacting the seller or charitable organization by telephone. The amended Rule follows the reasoning of the original Rule, which requires that any direct mail

⁹⁷⁹ If the fax or email advertisement is sent in violation of state or other federal law, the sender would be liable under those federal or state laws, but not under the TSR, unless the fax or email also failed to include the requisite disclosures and the seller or telemarketer, in any subsequent telemarketing effort, failed to abide by the Rule.

⁹⁸⁰ DMA-NPRM at 58 ("The types of disclosures proposed by the Commission are worthwhile, so long as they can be provided over the phone by the telemarketer."). See also Associations-NPRM at 4; Associations-Supp. at 8.

⁹⁸¹ In their supplemental comment, Associations, of which DMA is a member, noted only that inclusion of the required disclosures in an email or fax "imposes significant costs on businesses. Particularly on email communications, 'real estate' and location have significant financial value." Associations-Supp. at 8. This mere assertion remains all that exists on the record regarding the cost of requiring the § 310.3(a)(1) disclosures in an email or fax, and the Commission finds this insufficient to cause it to reconsider its position based on the financial harm argument asserted by Associations.

⁹⁶⁶ 60 FR at 43860.

⁹⁶⁷ See, e.g., *United States v. Prochnow*, No. 1 02-cv-917 (N.D. Ga. 2002).

⁹⁶⁸ See ARDA-NPRM at 17; NCL-NPRM at 12.

⁹⁶⁹ See NCL-NPRM at 12.

⁹⁷⁰ *Id.*

⁹⁷¹ *Id.*

⁹⁷² See DMA-NPRM at 56.

⁹⁷³ See, e.g., EPIC-NPRM at 26.

⁹⁷⁴ See, e.g., CNO-NPRM at 6; NCL-NPRM at 12.

⁹⁷⁵ See NCL-NPRM at 12-13.

⁹⁷⁶ NCL-NPRM at 13.

⁹⁷⁷ 47 U.S.C. 227(b). In its recent Notice of Proposed Rulemaking, the FCC noted that complaints about unsolicited faxes have been steadily increasing, from 519 in 1996 to over 2100 in 2000. FCC TCPA 2002 (see note 633 above), at para. 8. There is no suggestion in the FCC's NPRM that a spike in the actual number of unsolicited faxes has occurred or that any increase is attributable to the FTC's determination that faxes and email are forms of direct mail for purposes of the TSR.

⁹⁷⁸ 47 CFR 64.1200(a)(3). See also FCC Press Release: "FCC Cracks Down on 'Junk Fax' Violations," <http://www.fcc.gov/cgb/news/080802.junkfax.html>; FCC's 2002 NPRM at para. 7, n.40.

solicitation contain the required disclosures in order to afford the consumer an opportunity to know certain material information before determining whether to call the telemarketer. Apart from DMA's comment, the Commission finds no record evidence to support alteration of this requirement simply because the direct mail solicitations are sent by email rather than the U.S. Postal Service. It is not the intent of the Commission to use this provision to require new disclosures surreptitiously; indeed, the disclosures required (and misrepresentations prohibited, in the case of a charitable solicitation) are merely those that a telemarketer must make in the course of any non-exempt telemarketing transaction. Sellers remain free to choose the most advantageous method by which to contact consumers, and those opting for direct mail solicitations sent by email must determine whether the costs of making the relevant disclosures⁹⁸² are offset by the savings attained by being exempt from the rest of the Rule.

Exceptions to the direct mail exemption: Commenters were generally supportive of the Commission's proposal to narrow the direct mail exemption to make it unavailable to sellers of credit card loss protection and business opportunities other than business arrangements covered by the Franchise Rule or any subsequent rule covering business opportunities the Commission may adopt. In expressing its support, NCL noted that, although most solicitations for credit card loss protection plans were made via outbound telephone calls, it endorsed excepting such plans from the exemption to ensure that they will be covered by the Rule regardless of how they are promoted.⁹⁸³ Similarly, NCL supported the exclusion from the direct mail exemption of work-at-home solicitations, noting that in 2001, 42 percent of the victims of work-at-home scams said that the initial method of contact was direct mail.⁹⁸⁴ Because work-at-home solicitations are not "business arrangements covered by the Franchise Rule," the exception from the direct mail exemption will now ensure that inbound calls in response to direct mail advertising work-at-home opportunities will be subject to the Rule.

Some consumer advocates and law enforcement officials argued, however,

⁹⁸² Presumably in the solicitation of a charitable contribution, there is no cost associated with refraining from making misrepresentations.

⁹⁸³ NCL-NPRM at 12.

⁹⁸⁴ *Id.*

that by simply narrowing the categories of offers eligible for the exemption, the proposed Rule did not go far enough to protect consumers.⁹⁸⁵ Instead of narrowing the exemption, NCL recommended that the Commission eliminate the direct mail exemption altogether,⁹⁸⁶ a position with which NAAG and AARP concurred at the June 2002 Forum.⁹⁸⁷ NCL argued that telemarketing fraud and abuse could be prevented if those currently exempt from the Rule's coverage were required to adhere to its provisions, particularly those Rule provisions mandating material disclosures and express verifiable authorization.⁹⁸⁸ As an alternative to eliminating the direct mail exemption, NCL suggested that all telemarketers should be required to obtain customers' express verifiable authorization in every call, even those that would otherwise be exempt, such as inbound calls in response to a direct mail solicitation.⁹⁸⁹ NAAG suggested that the Rule should also except from the direct mail exemption transactions that involve a high risk of abuse, such as the sale of memberships for discount buyers clubs and for transactions involving negative option features.⁹⁹⁰

Based on a review of the record, the Commission declines to adopt these suggestions. In the SBP of the original Rule, the Commission noted that the direct mail exemption was included in the Rule because, in its experience, direct mail solicitations were not "uniformly related to the forms of deception and abuse the Act seeks to stem."⁹⁹¹ Based on this understanding, and in an effort to strike the appropriate balance between reining in fraudulent telemarketers and not unduly burdening legitimate industry, the Commission included the direct mail exemption in the original Rule. While it may be true that fraudulent telemarketing scams might be reduced if the direct mail exemption were excised from the Rule, the Commission believes that to do so would tip the balance and unnecessarily burden legitimate telemarketers without bringing commensurate benefits to consumers. Therefore, the Commission declines to eliminate the exemption entirely.

The Commission also declines to require express verifiable authorization in all calls. The parameters of the

⁹⁸⁵ See NCL-NPRM at 12 (expressing concern that increasing the number of exceptions to exemptions is confusing to businesses and consumers).

⁹⁸⁶ NCL-NPRM at 12.

⁹⁸⁷ June 2002 Tr. III at 177, 182-83.

⁹⁸⁸ NCL-NPRM at 12.

⁹⁸⁹ *Id.*

⁹⁹⁰ See NAAG-NPRM at 59.

⁹⁹¹ 60 FR at 43860.

amended express verifiable authorization provision, and the Commission's rationale in adopting it, are discussed above in the analysis of § 310.3(a)(3). Finally, the Commission declines to add the sale of discount buyers club memberships and solicitations in which there is a negative option feature to the exceptions to the direct mail exemption. The record does not demonstrate that the sale of membership clubs or solicitations in which there is a negative option feature are particularly subject to abuse in conjunction with direct mail solicitations, and thus does not support including such exceptions.⁹⁹²

Other suggested changes

Some commenters raised concerns about the situation where there is a disparity between the disclosures made in a direct mail solicitation and those made in the subsequent telephone call. NAAG urged the Commission to clarify that a pre-call mailing is not truthful if it is inconsistent in some material way with what is stated during the call.⁹⁹³

In order to avail itself of the exemption, a direct mail solicitation must provide the material disclosures required by § 310.3(a)(1) to ensure that the material information about the offer is in the hands of the consumer when the consumer elects whether to place a call to a telemarketer, including information about the total cost and quantity of the goods or services, all material restrictions, limitations or conditions to the offer, and certain information regarding refund policies and prize promotions. By its very definition, this material information is presumed "likely to affect a person's choice of goods or services, or their conduct regarding them."⁹⁹⁴ Thus, in order to meet the Rule's requirement that the information in the direct mail solicitation be "truthful," the information provided to the consumer in the telemarketing call should not vary in any material respect from the disclosures provided in the direct mail solicitation.⁹⁹⁵

⁹⁹² The record does show that buyers club memberships have frequently been associated with complaints regarding preacquired account telemarketing, a practice that is addressed by amended Rule §§ 310.4(a)(5) and (6). Similarly, goods or services offered in conjunction with a "free-to-pay conversion" negative option feature have been shown to result in complaints of unauthorized charges, and are addressed by amended Rule § 310.4(a)(6) and § 310.3(a)(1)(vii) and 310.3(a)(2)(ix).

⁹⁹³ NAAG-NPRM at 59-60.

⁹⁹⁴ *Cliffdale*, 103 F.T.C. at 165.

⁹⁹⁵ The Commission recognizes that, in some instances, prices may be subject to change, or may only be in effect for a specified period of time. A

AFSA expressed concern over the "specter of vicarious liability" for telemarketers who receive inbound calls in response to direct mail solicitations sent by another party in which the required disclosures are not made "truthfully." The Commission believes that under § 310.3(b), the assisting and facilitating provision, liability would only attach if a telemarketer knew or consciously avoided knowing that there was a disparity between the material representations in a direct mail piece and the telemarketing script being used in inbound calls in response to that solicitation.

EFSC requested, in connection with the proposal to broaden the direct mail provision to include solicitations by email and fax, that the Commission explicitly state that "a telemarketer's electronic disclosure of the material information satisfies" the telemarketer's obligation under the Rule.⁹⁹⁶ EFSC argued that the E-SIGN Act makes such electronic disclosures permissible, and that the Commission should explicitly state that such is the case.⁹⁹⁷ As noted above, in the response to DMA's suggestion that it should be permissible to make the required disclosures in the email or fax or in the subsequent telemarketing call, the Commission believes that to avail itself of the direct mail exemption, the seller must include the required disclosures in the direct mail piece itself, for to make these disclosures outside that context would defeat the consumer protection purpose of that requirement.⁹⁹⁸ Thus, for the same reason, the Commission believes that in the case of any direct mail solicitation conveyed by email or fax, the required disclosures would have to be included in the email or fax itself in order for any subsequent telemarketing

disclosure to that effect in the direct mail solicitation should provide the consumer with sufficient notice that the price may fluctuate or may not be available after a particular date.

⁹⁹⁶ EFSC-NPRM at 12.

⁹⁹⁷ *Id.*

⁹⁹⁸ The Commission believes that for purposes of § 310.6(b)(6), it is critical that telemarketing calls in response to direct mail solicitations be exempt only on the condition that the direct mail piece contains the requisite disclosures. The requirement that these disclosures be displayed in the direct mail piece itself ensures that these disclosures are proximate in time and location to the direct mail solicitation, which makes it more likely that consumers will be made aware of certain material information that is useful or necessary to evaluate the sales transaction proposed in the solicitation before responding to it. The Commission notes that this outcome is consistent with § 101(f) of the E-SIGN Act, which states that, "Nothing in this title affects the proximity required by any statute, regulation, or other rule of law with respect to any warning, notice, disclosure, or other record required to be posted, displayed, or publicly affixed." (emphasis added).

call to benefit from the § 310.6(b)(6) exemption.

Finally, NFC requested that the Commission clarify whether the direct mail exemption applies to franchisors.⁹⁹⁹ The Commission believes that § 310.6(b)(2) makes clear that sales of franchises subject to the Commission's Franchise Rule are exempt from the TSR. The sale of business opportunities not covered by the Franchise Rule, however, is subject to regulation by the Rule. Section 310.6(b)(6) of the amended Rule expressly states that a seller of "business opportunities other than business arrangements covered by the Franchise Rule" would not be able to avail itself of the direct mail exemption, and thus would be required to comply with the Rule's provisions. Therefore a business opportunity seller, if not eligible for exemption pursuant to § 310.6(b)(2), would be ineligible for the direct mail exemption because of the specific exception for the sale of such services under § 310.6(b)(6).

§ 310.6(b)(7) — Business-to-business telemarketing

Section 310.6(g) of the original Rule exempts from the Rule's requirements telemarketing calls to businesses, except calls to induce the sale of nondurable office or cleaning supplies. Based on the Commission's law enforcement experience, the Commission proposed in the NPRM to add two more categories to the list of exceptions to the exemption for calls to businesses: the sale of Internet or Web services, and charitable solicitations.¹⁰⁰⁰ The Commission has determined, however, based upon comments received in response to the NPRM, not to include in the amended Rule the exception of the sale of Internet or Web services and charitable solicitations from the business-to-business exemption. The amended Rule retains unchanged the wording in the original Rule, except to add language clarifying that the Commission's national "do-not-call" registry provisions do not apply to the telemarketing of nondurable office or cleaning supplies to businesses. The provision is also renumbered, and can be found at § 310.6(b)(7) of the amended Rule.

Consumer groups and state law enforcement officials argued that the Rule should not contain any exemption for business-to-business telemarketing, but if the Commission were to retain the exemption, they supported narrowing

⁹⁹⁹ NFC-NPRM at 4-5.

¹⁰⁰⁰ See NPRM discussion regarding proposed § 310.6(g), 67 FR at 4531-32.

the exemption as much as possible so that sellers and telemarketers of those products or services that have particularly been subject to abuse would not benefit from the exemption.¹⁰⁰¹ Thus, these commenters generally supported the Commission's proposal to "carve out" the telemarketing of Internet and Web services from the business exemption, citing extensive law enforcement efforts to combat the proliferation of fraudulent telemarketing of website design, hosting, and maintenance services to small businesses.¹⁰⁰²

On the other hand, industry commenters uniformly opposed the "carve out" of Internet and Web services from the business-to-business exemption.¹⁰⁰³ These commenters argued that the proposed definitions of these services were overly broad and that there was insufficient record evidence to support regulation of all Internet and Web services.¹⁰⁰⁴ They noted that federal and state law enforcement efforts had focused on website design, development, hosting, and maintenance services, but that the record does not reveal a pattern of fraud in the sale of Internet access services, including wireless Internet access services.¹⁰⁰⁵ Industry commenters argued that if the Commission persisted in requiring that the telemarketing of Internet and Web services comply with the TSR, the effect would be to chill innovation and development in a nascent industry that is rapidly changing.¹⁰⁰⁶ They also argued that such an action would be anticompetitive because it would subject those sellers and telemarketers who are within the FTC's jurisdiction to the TSR's requirements, while exempting competitors who happen to be common carriers.¹⁰⁰⁷ Furthermore, these commenters stated that although the Commission's goal is to protect small business from fraud in the sale of Internet and Web services, the Commission's proposal would actually

¹⁰⁰¹ See, e.g., NAAG-NPRM at 60; NCL-NPRM at 11.

¹⁰⁰² NAAG-NPRM at 60; NCL-NPRM at 11.

¹⁰⁰³ See, e.g., Comcast-NPRM at 5; Cox-NPRM at 30-32; ICC-NPRM at 1-2; Nextel-NPRM at 23, 24; Reed-Elsevier-NPRM at 5; SBC-NPRM at 2, 13; SIIA-NPRM at 1-2; YPIMA-NPRM at 5. See also June 2002 Tr. III at 210-20, 222-23, 226.

¹⁰⁰⁴ See, e.g., Nextel-NPRM at 23; SBC-NPRM at 3; SIIA-NPRM at 1-2. June 2002 Tr. III at 210-20, 222-23, 226.

¹⁰⁰⁵ See, e.g., Nextel-NPRM at 23; SIIA-NPRM at 1-2. See also June 2002 Tr. III at 213-14, 217-18, 224.

¹⁰⁰⁶ Nextel-NPRM at 24; Reed-Elsevier-NPRM at 7; SBC-NPRM at 14; SIIA-NPRM at 1-2. See also June 2002 Tr. III at 210-24.

¹⁰⁰⁷ See, e.g., DMA-NPRM at 9. See also June 2002 Tr. III at 213-14, 217-18, 224.

harm those small businesses because it would increase their costs and hamper their use of Web-based advertising such as online Yellow Pages.¹⁰⁰⁸ Industry commenters argued that current law enforcement tools, coupled with active industry self-regulation, are sufficient to challenge deceptive and fraudulent telemarketing of Internet or Web services.¹⁰⁰⁹

The Commission finds persuasive industry's arguments that the proposal to make the business-to-business exemption unavailable to telemarketing of Internet and Web services is overbroad and likely to produce perverse results for the small businesses it was intended to protect. The Commission believes that, although coverage by the Rule would provide benefits to law enforcement efforts, current federal and state consumer protection statutes have been effective tools in challenging fraudulent practices in this industry.¹⁰¹⁰ Furthermore, the Commission believes that it is preferable to move cautiously so as not to chill innovation in the development of cost-efficient methods for small businesses to join in the Internet marketing revolution. Therefore, the Commission has removed the proposed exception for Internet and Web services sales to businesses by telephone, which will continue to be exempt from the Rule's coverage. The Commission will, however, continue to monitor closely the practices in the telemarketing of Internet and Web services, and may revisit this issue in subsequent Rule Reviews should circumstances warrant.

Consumer groups and state law enforcement officials also supported the Commission's proposal to make the business-to-business exemption unavailable to entities soliciting charitable contributions, citing the

extensive problems with telefundraisers soliciting on behalf of public safety organizations (so-called "badge fraud" operators) who often target small businesses.¹⁰¹¹ DMA-NonProfit and Not-For-Profit Coalition were among the few non-profit organizations that addressed the business-to-business exemption,¹⁰¹² arguing that the legislative history of the USA PATRIOT Act does not support extending the Rule's coverage to charitable solicitations directed to businesses, particularly in the absence of substantial evidence of abuse.¹⁰¹³ As discussed above, the Commission already has determined to exempt telemarketing on behalf of charitable organizations from the national "do-not-call" registry, thus addressing the principal concern of the non-profit organizations.

The Commission notes that "badge fraud" telemarketing directed at businesses has been a particularly pernicious practice that has been attacked on a regular basis by both the Commission and state regulators.¹⁰¹⁴ Commenters have made it clear, however, that many legitimate non-profit organizations rely heavily on business contributions as a major portion of their donor base.¹⁰¹⁵ The Commission seeks to protect businesses—particularly small

businesses—from fraudulent fundraising, without burdening legitimate non-profit organizations with the cost of complying with unnecessary regulations. As some commenters pointed out, many legitimate non-profit organizations operate on a very narrow margin, and such costs may have a very significant impact on the viability of an organization's fundraising efforts or even the very viability of the organization itself.¹⁰¹⁶

The Commission also notes that law enforcement actions attacking badge fraud under Section 5 and analogous state laws have been effective on a case-by-case basis.¹⁰¹⁷ Furthermore, several of the entities that were targets of these law enforcement efforts also telemarketed to individuals, which would bring them within the purview of the amended Rule with respect to those transactions.¹⁰¹⁸ In addition, the Commission recognizes that there are many legitimate public safety organizations that solicit funds for their charitable purposes in a non-deceptive manner. Therefore, the Commission believes that the more prudent course is to continue to rely upon its authority under Section 5 and the states' authority under their analogous laws to address fraudulent fundraising, and, at this time, to leave beyond the scope of the TSR legitimate charitable fundraising directed to businesses. This issue could be revisited in subsequent Rule Reviews should evidence develop that the Commission has not struck the correct balance in making this determination.

Other recommendations by commenters

Some commenters recommended that the Rule be amended to include more exemptions. For example, several commenters advocated that their industry be exempt from compliance with the national "do-not-call" registry and/or from all of the Rule's provisions.¹⁰¹⁹ The Commission notes that many of those who requested

¹⁰¹¹ See, e.g., NAAG-NPRM at 60-61; NCL-NPRM at 11. See also June 2002 Tr. III at 224-25.

¹⁰¹² Most non-profit organizations commented on the application of the national "do-not-call" registry to their solicitation efforts, not on whether they should be otherwise excepted from the business-to-business exemption. See, e.g., Childhood Leukemia-NPRM at 1; Community Safety-NPRM at 1-2; California FFA-NPRM at 1-2; FPIR-NPRM at 1-2; HRC-NPRM at 1-2; OSU-NPRM at 1; SO-AZ-NPRM at 1-2.

¹⁰¹³ See DMA-NonProfit-NPRM at 14-15; Not-for-Profit Coalition-NPRM at 46-48. There is scant legislative history on the USA PATRIOT Act with regard to this issue.

¹⁰¹⁴ See, e.g., *FTC v. Southwest Mktg. Concepts, Inc.*, No. H-97-1070 (S.D. Tex. filed 1999) (Stipulated Final Judgment and Order for Permanent Injunction and Monetary Relief entered May 28, 1999); *FTC v. Saja*, No. CIV-97-0666 PHX SMM (D. Ariz. filed Apr. 1997); *FTC v. Dean Thomas Corp., Inc.*, No. 1:97CV0129 (N.D. Ind. 1997) (Stipulated Final Judgment entered Jan. 19, 1998); *FTC v. Century Corp.*, No. 1:97CV0130 (N.D. Ind. filed Apr. 7, 1998) (Stipulated Final Judgment and Order entered April 8, 1998); *FTC v. Image Sales & Consultants, Inc.*, No. 1:97CV0131, (N.D. Ind.) (Stipulated Final Judgment and Order entered June 9, 1998); *FTC v. Omni Adver., Inc.*, No. 1:98CV0301 (N.D. Ind. filed Oct. 9, 1998); *FTC v. T.E.M.M. Mktg., Inc.*, No. 1:98CV0300, (N.D. Ind. filed Oct. 5, 1998); *FTC v. Tristate Adver. Unlimited, Inc.*, No. 1:98CV0302 (N.D. Ind. filed Oct 5, 1998); *FTC v. Gold*, No. CV 99-99-2895-WDK (Alj) (C.D. Calif. filed 1998); *FTC v. Eight Point Communications, Inc.*, No. 98-74855 (E.D. Mich. filed Nov. 10, 1998). See also Pa. Stat. Ann. tit. 10 § 162.15(A)(11) (West 2000).

¹⁰¹⁵ See, e.g., DMA-NonProfit-NPRM *passim*; Not-for-Profit Coalition-NPRM *passim*. See also June 2002 Tr. III at 110, 205-10, 220-21.

¹⁰¹⁶ *Id.*

¹⁰¹⁷ See note 1015 above.

¹⁰¹⁸ See, e.g., *Saja*, No. CIV-97-0666 PHX SMM; and *Eight Point Communications*, No. 98-74855.

¹⁰¹⁹ See, e.g., Tribune-NPRM at 2-3 (exempt newspapers because of their "unique position and mission in our society"); Herald Bulletin-NPRM at 1 (exempt newspapers); CNHI-NPRM at 1-2 (exempt newspapers); AFSA-NPRM at 10 (exempt debt collection calls); ACA-NPRM at 2-4 (expressly exempt debt collection activities from the Rule); DBA-NPRM at 5 (expressly exempt debt collectors from the "do-not-call" registry provision); AFSA-NPRM at 14 (exempt financial services companies with an established business relationship); CASE-NPRM at 3 (exempt educational institutions from "do-not-call" registry provision); ANA-NPRM at 7 (explicitly exempt market researchers); Green Mountain-NPRM *passim* (exempt energy marketers).

¹⁰⁰⁸ See, e.g., SBC-NPRM at 15; SIIA-NPRM at 2. See also June 2002 Tr. III at 213-14, 217-18, 224.

¹⁰⁰⁹ See, e.g., Reed-Elsevier-NPRM at 4-5 (noting, for example, that industry has adopted the Best Billing Practices guidelines set forth by the FCC to address unauthorized billing or "cramming" problems); SBC-NPRM at 14. See also June 2002 Tr. III at 213-14, 217-18, 224.

¹⁰¹⁰ See *E-Commerce Fraud Targeted at Small Business: Hearings on Web Site Cramming Before the Senate Committee on Small Business* (Oct. 25, 1999) (statement of Jodie Bernstein, Director of the Bureau of Consumer Protection, FTC); FTC Press Release: "FTC Cracks Down on Small Business Scams: Internet Cramming is Costing Companies Millions," June 17, 1999, <http://www.ftc.gov/opa/1999/small9.htm>. See also, e.g., *FTC v. Shared Network Servs., LLC.*, No. S-99-1087-WBS JFM (E.D. Cal. filed June 12, 2000); *FTC v. U.S. Republic Communications, Inc.*, No. H-99-3657 (S.D. Tex. filed Oct. 21, 1999) (Stipulated Final Order for Permanent Injunction and Other Equitable Relief entered Oct. 25, 1999); *FTC v. WebViper LLC*, No. 99-T-589-N, (M.D. Ala. June 9, 1999); *FTC v. Wazzu Corp.*, No. SA CV-99-762 AHS (ANx) (C.D. Cal. filed June 7, 1999).

exemptions already are exempt from the Rule and, therefore, there is no reason to expressly restate that exemption in the Rule.¹⁰²⁰ The Commission also declines to add additional exemptions on behalf of specific industry segments, with the exception of charitable organizations. As noted above in the discussion on exempting charities from compliance with the national “do-not-call” registry provision, the Commission believes that charitable solicitations present unique circumstances that make an exemption necessary and appropriate. The Commission declines, however, to introduce further limitations to the applicability of the “do-not-call” registry because it believes such action would be inconsistent with the privacy mandate of the Telemarketing Act and would likely result in consumer confusion and frustration.

G. Section 310.7 — Actions by States and Private Persons.

Section 310.7 in the original and proposed Rules sets forth the procedures by which the states and private persons may bring actions under the Rule, as is provided for in the Telemarketing Act.¹⁰²¹ In the NPRM, the Commission noted that it received no comments directly on this section, but that commenters were generally supportive of the Rule’s enforcement scheme allowing the Commission, the states, and private parties to bring actions under the TSR.¹⁰²² The Commission noted that the record at that time contained evidence of two sources of frustration regarding enforcement of the Rule: 1) the \$50,000 monetary threshold required for a private party to bring suit under the Rule; and 2) the difficulty in identifying Rule violators, particularly those who violate the abusive practices section of the Rule.¹⁰²³ The Commission noted then that the amount in controversy requirement was included in the Telemarketing Act, and it is therefore up to Congress to make any change to this amount.¹⁰²⁴ With regard to the difficulty in identifying violators, the Commission expressed its belief that two proposed

provisions—the prohibition on blocking Caller ID information, and the prohibition on denying or interfering with a consumer’s right to be placed on a “do-not-call” list—would be beneficial in addressing these concerns.¹⁰²⁵

The Commission received no comments on this section in response to the NPRM, and thus no modifications are included in the amended Rule.¹⁰²⁶

H. Section 310.8 — Fees.

This section of the Rule, now allocated for the new provision on fees, is reserved. When completed, the fee section will be included here.

I. Section 310.9 — Severability.

This provision of the Rule is retained in the amended Rule, but renumbered as § 310.9. Section 310.8, formerly the section number for the Severability provision, now contains the provision regarding fees for the national “do-not-call” registry.

J. Rulemaking Review Requirement.

The original Rule required that a Rule Review proceeding be commenced within five years of the effective date of the original Rule. The amended Rule does not contain an equivalent provision. The Commission has a policy of reviewing all of its Rules and guides on a periodic basis to ensure that they continue to meet their goals and provide the protections that were intended when they were promulgated. This periodic review also provides an opportunity to examine the economic costs and benefits of the particular Rule or guide under review. The Commission believes that this periodic review should be sufficient for the amended Rule, and that it is unnecessary to include a

¹⁰²⁵ *Id.*

¹⁰²⁶ Some commenters did advocate for meaningful Rule enforcement, including random monitoring and publicity regarding enforcement. See AARP-NPRM at 10 (meaningful enforcement and publicity); EPIC-NPRM at 27 (suggesting random monitoring and also recommending registration and bonding requirements, which the Commission declines to adopt noting the states already have such requirements in many instances, and that further duplication of that effort would not enhance the Commission’s law enforcement efforts). The Commission believes that the enforcement record for the TSR to date, with over 139 cases brought and \$200 million in judgments, shows that the Commission and its state law enforcement partners have made enforcement of the Rule a top priority. Moreover, enforcement actions under the Rule often have been conducted as part of a “sweep” of cases, often accompanied by a media advisory and public education campaign, which serves as a means of raising public awareness of certain kinds of telemarketing fraud. In regard to the suggestion that call centers be randomly monitored for compliance with the Rule, the Commission notes that it has used, and will continue to use, a variety of law enforcement techniques to ensure compliance with the Rule.

specific provision regarding review within the text of the amended Rule.

K. Effective Date.

The amended Rule is effective on March 31, 2003, and full compliance with all provisions of the amended Rule—except § 310.4(a)(7), the caller identification transmission provision, and § 310.4(b)(1)(iii)(B), the national “do-not-call” registry provision—is required by that date. The Commission believes that making the amended Rule effective on March 31, 2003 will provide more than sufficient time for sellers and telemarketers to change their practices to conform to the amended Rule. The publication of the proposed Rule in January 2002 provided industry members with ample notice of the proposed changes in the Rule, and making the amended Rule effective on March 31, 2003 will give industry members sufficient additional time to familiarize themselves with the requirements of the amended Rule, and to ensure that their operations are in full compliance with all except two provisions of the amended Rule.

The Commission has determined that additional time may be required to allow sellers and telemarketers to come into full compliance with the caller identification transmission requirement. Therefore, full compliance with § 310.4(a)(7) is required by January 29, 2004. The Commission will announce at a future time the date by which full compliance with § 310.4(b)(1)(iii)(B), the “do-not-call” registry provision, will be required. The Commission anticipates that full compliance with the “do-not-call” provision will be required approximately seven months from the date a contract is awarded to create the national registry.

IV. Paperwork Reduction Act

In light of both changes to the Rule following the NPRM and public comments received on Commission staff’s prior PRA burden analysis for the NPRM, staff will submit for OMB review and clearance a supporting statement detailing its revised burden analysis.

V. Regulatory Flexibility Act

A. Need for and Objectives of the Rule.

The amendments to the TSR announced here are the result of a review of the existing Rule as required by the Telemarketing Act.¹⁰²⁷ As discussed above in this SBP, and in the NPRM, the objective of the amendments is to fulfill the mandate of the Telemarketing Act to ensure that consumers are protected from

¹⁰²⁰ For example, debt collection and market research activities are not covered by the Rule because they are not “telemarketing”—*i.e.*, they are not calls made “to induce the purchase of goods or services.” Of course, if the debt collection or market research call also included an upsell, the upsell portion of the call would be subject to the Rule as long as it met the criteria for “telemarketing” and was not otherwise exempt from the Rule.

¹⁰²¹ 15 U.S.C. 6103 (states) and 6104 (private persons).

¹⁰²² 67 FR at 4532-33.

¹⁰²³ 67 FR at 4533.

¹⁰²⁴ *Id.*

¹⁰²⁷ 15 U.S.C. 6108.

“deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.”¹⁰²⁸ Other amendments, relating to the solicitation of charitable contributions through telemarketing, are made pursuant to the USA PATRIOT Act.¹⁰²⁹

B. Summary of the Significant Issues.

The public comments on the proposed Rule are discussed above throughout the SBP, as are the changes that have been made in response to comments indicating that the costs of some of the proposed amendments would be excessive. Many of the commenters did not focus specifically on the costs faced by small businesses relative to those that would be borne by other firms. Rather, they argued that the costs to be borne by all firms—including small firms—would be excessive. In response to these comments, the Commission has made a number of modifications in the amended Rule. These changes should significantly reduce the burden on all businesses, including small businesses.

Calls permitted where there is an existing business relationship.

One proposal that commenters contended would impose particularly great costs on small businesses was the proposed national “do-not-call” registry. Commenters were particularly concerned with the requirement that businesses could only call consumers who had put their telephone numbers on the “do-not-call” registry if they had obtained the consumer’s express verifiable authorization to make calls to that consumer. For example, Community Bankers expressed the concern that its members would be unable to use outside telemarketers to contact their existing customers. This would, they suggested, force community banks to do their own telemarketing, at higher cost, because calls made by third party telemarketing bureaus would be covered by FTC regulations.¹⁰³⁰ Another commenter noted that small firms may not have the recording equipment that would be needed to establish that they had obtained the consumer’s express verifiable authorization to accept calls from that seller.¹⁰³¹

Furthermore, many small businesses may not keep their customer records in

a form that would permit them to economically compare the telephone numbers of their customers with those on the national “do-not-call” registry and avoid calling those numbers that appear on the registry.¹⁰³² According to NRF, converting their customer lists to a form that can be feasibly compared to the numbers on the national “do-not-call” registry could cost small businesses up to \$1.00 per name. Furthermore, even after the records are converted, the NRF reports that the cost of eliminating names that appear on the “do-not-call” registry would be higher for small firms than for larger ones. Whereas, it might cost \$0.01 per name to purge a large list, the cost for a small list is put at \$0.10 to \$0.15 per name.¹⁰³³

As discussed above in the SBP, the Commission has decided to alter the “do-not-call” provision proposed in the NPRM. One of the changes is to create an exemption that will allow a seller and its telemarketer to call consumers with whom the seller has an established business relationship, even if the consumer has placed his or her telephone number on the “do-not-call” registry.¹⁰³⁴ The effect of this change will be that businesses—and in particular small businesses—will not need to check their lists of existing customers against the national “do-not-call” registry. There will also be no need to obtain express verifiable permission before calling someone with whom the business has an established business relationship. Thus, most, if not all, of the costs described above will not be faced by small businesses.¹⁰³⁵

Quarterly access to “do-not-call” registry.

In addition, as discussed above, the Commission has decided not to require

¹⁰³² See, e.g., Ameriquest-NPRM at 9.

¹⁰³³ NRF-NPRM at 4-5. ERA placed the cost of comparing a company’s calling lists against the “do-not-call” registry at \$3 to \$5 per 1,000 names, while CCC suggested that the cost would be in the neighborhood of \$50 per hour and that it would take two hours for the average firm to compare their calling lists to the national “do-not-call” registry and delete from the company’s lists any numbers that appear on the “do-not-call” registry. ERA-NPRM at 36; Miller Study at 11-12.

¹⁰³⁴ See discussion of § 310.4(b)(1)(iii) above.

¹⁰³⁵ While small businesses that wish to telemarket their products to consumers who are not existing customers will still have to check their calling lists against the “do-not-call” registry, they will not necessarily have to perform this work themselves. It is the Commission’s understanding that small businesses often find it more economical to employ telemarketing bureaus who make such calls on the behalf of these businesses. A seller that employs a telemarketing bureau can arrange to have the telemarketer compare the names and/or telephone numbers on its lists against the “do-not-call” registry.

sellers and telemarketers to scrub their calling lists against the national “do-not-call” registry on a monthly basis. Instead, such updating will only be required on a quarterly basis.¹⁰³⁶ Commenters argued that this change was necessary to reasonably limit the costs imposed by the “do-not-call” registry.¹⁰³⁷ It should significantly reduce the expense associated with complying with the “do-not-call” requirements since firms will not need to scrub their lists twelve times per year at an expense that has been estimated at around \$100 per seller or telemarketer each time its lists must be scrubbed.¹⁰³⁸

Harmonization with state “do-not-call” regulations.

Many industry representatives argued that in order to avoid imposing an undue burden on business, particularly small businesses, it was essential that the proposed national “do-not-call” registry not simply be added on to the existing set of state “do-not-call” lists. Rather, in the view of industry, the national registry should incorporate existing and any future state lists and all of the lists should operate under a single, unified set of regulations.¹⁰³⁹ While many industry representatives argued that the way to achieve the necessary level of coordination between the state and federal lists was for the Commission to preempt inconsistent state regulations, the Commission has declined to do so at this time. Instead, as discussed above in the SBP, the Commission is engaged in a process of active consultation with the states that have enacted “do-not-call” statutes and with the FCC in order to develop procedures that will result in one harmonized “do-not-call” registry.¹⁰⁴⁰ Once fully effectuated, this harmonization should substantially reduce the burden of having to scrub against a large number of separate lists.

For-profit fundraisers exempted from national “do-not-call” registry compliance.

The burden placed on small charities by the “do-not-call” requirements has also been significantly reduced. As discussed above, the Commission has determined that for-profit firms that make fundraising calls on behalf of

¹⁰³⁶ Amended Rule § 310.4(b)(3).

¹⁰³⁷ Household Bank-User Fee at 2.

¹⁰³⁸ Miller Study at 11-12.

¹⁰³⁹ See, e.g., Household Bank-User Fee at 2-3; ARDA-User Fee at 1; Ameriquest-User Fee at 9-10; ICIA-User Fee at 1; NEMA-User Fee at 4.

¹⁰⁴⁰ This approach is consistent with the recommendation of the Small Business Administration (“SBA”), Office of Advocacy. See SBA-User Fee at 5-6.

¹⁰²⁸ 15 U.S.C. 6102.

¹⁰²⁹ Pub. L. 107-56 (Oct. 26, 2001).

¹⁰³⁰ Community Bankers-User Fee at 3.

¹⁰³¹ AmEx-NPRM at 2. One small company reported that in order to comply with Oregon’s “do-not-call” requirements, they had been forced to spend \$12,500 to get a computer program written and have hired two additional employees at a cost of approximately \$800 per week. (Celebrity Prime Foods-User Fee at 1).

charitable organizations will not be required to ensure that they are not making calls to consumers who have placed their telephone numbers on the national “do-not-call” registry.¹⁰⁴¹ Rather, they will only have to honor individual consumer requests not to be called by the particular charity.¹⁰⁴²

This change is likely to be of significant benefit to smaller charitable organizations since these organizations often find it more efficient to employ for-profit firms to make their calls rather than developing and maintaining the capacity to make such calls using their own staff.¹⁰⁴³ For example, APTS reported that 75 percent of their members chose to hire other firms to manage their telemarketing operations. They further reported that the average annual cost of outsourcing these operations was \$182,000, whereas the estimated cost of the stations doing the same amount of telemarketing with its own personnel was \$224,000, an increase of almost 25 percent.¹⁰⁴⁴ Similarly, Red Cross commented that it is more economical to hire a third party to operate short term blood-donor recruitment programs than to hire and maintain a full-time staff to perform such functions. According to Red Cross “[s]uch trained third party professionals offer expertise and operational efficiencies that cannot be rapidly duplicated by Red Cross to respond to the volatile demand for blood.”¹⁰⁴⁵

Written confirmation as express verifiable authorization.

Another change that should reduce the burden on small firms involves the procedures a firm may use to obtain the consumer’s express verifiable authorization to use an account other than the consumer’s credit card or debit card to pay for a purchase. In the NPRM, the Commission proposed to eliminate a procedure by which a firm was permitted to obtain authorization by sending the consumer written confirmation prior to the time the account was charged. In part this proposal was based on the impression that very few firms used this method of obtaining express verifiable

authorization.¹⁰⁴⁶ However, commenters indicated that this was not the case and that many smaller firms—particularly newspapers—used this method.¹⁰⁴⁷ In response, the Commission has decided to retain the written confirmation method of obtaining express verifiable authorization, with certain modifications, including an exception that makes it unavailable in cases where the transaction involves a “free-to-pay conversion” feature and preacquired account information.¹⁰⁴⁸

No ban on preacquired account information.

Another proposal in the NPRM that attracted considerable business opposition was the prohibition on the disclosure or receipt of any consumer’s billing information. Commenters argued that such a prohibition on the use of preacquired account information would increase the costs of telemarketing. While these costs were not argued to be specific to small businesses, the costs faced by small businesses would be increased along with those of larger ones. According to CCC, requiring the consumer to provide an account number would add between 60 and 90 seconds to the length of a telemarketing call in those instances where the telemarketer already has the consumer’s account information.¹⁰⁴⁹ MPA estimated the cost of requiring consumers to repeat their account information in the case of an upsell to be between 35 and 60 seconds.¹⁰⁵⁰ In addition, MPA suggested that requiring consumers to read their account numbers in all instances would lead some consumers to decide not to purchase the item being offered. The effect could be, they suggested, a reduction of five to 30 percent in consumer purchases in response to particular offers.¹⁰⁵¹ Finally, a ban on the use of preacquired account information could increase the costs of engaging in telemarketing because of errors in the account information obtained from the consumer—either because the consumer misreads the

account number or because the telemarketer makes a mistake in taking down the number.¹⁰⁵²

As discussed in the SBP above, the Commission has decided not to prohibit the acquisition and use of preacquired account information. Instead, the Commission is limiting the prohibition to unencrypted account information and is requiring that telemarketers and sellers obtain the consumer’s express informed consent before any purchase is charged to a consumer’s account using preacquired account information. Except for transactions that involve a “free-to-pay conversion” feature combined with preacquired account information, the only steps a seller or telemarketer is required to undertake to obtain this consent are to provide the consumer with sufficient information for the consumer to understand the account that will be charged and to obtain the consumer’s express agreement to have the purchase charged to that account. Since both of these are practices that an honest business would follow even in the absence of a rule provision, it is clear that the costs businesses argued would follow from the original proposal have been eliminated.

Relaxed regulation of abandoned calls.

Another proposal contained in the NPRM that businesses argued would significantly increase the costs of telemarketing was the proposal to prohibit telemarketers from “abandoning” telemarketing calls—that is, to prohibit making a call unless a telemarketing sales representative is available to talk to the consumer if the consumer answers. Critics of this proposal argued that it would effectively ban the use of predictive dialers.¹⁰⁵³ This would, they argued, significantly reduce the amount of time the individual telemarketing sales person spends talking to consumers. According to CCC, a telemarketing sales person can handle 13 to 14 calls per hour using a predictive dialer set to abandon five percent of calls. Without a predictive dialer, the same agent can only handle around eight calls per hour—a reduction of about 40 percent.¹⁰⁵⁴ Another source suggested that a telemarketer using a predictive dialer could make 20 calls per hour, whereas only five calls per hour would be possible without the dialer.¹⁰⁵⁵

¹⁰⁴⁶ 67 FR at 4508.

¹⁰⁴⁷ See, e.g., June 2002 Tr. III at 32-33 (NAA).

¹⁰⁴⁸ See amended Rule § 310.3(a)(3)(iii), and discussion of that provision above.

¹⁰⁴⁹ Miller Study at 17. According to the Miller Study, the total cost of this prohibition would have been approximately \$1.5 billion. However, this estimate appears to be based on the incorrect assumption that the prohibition on the use of preacquired account information would add 60 to 90 seconds to every sale made in an outbound telemarketing call. In fact, the only sales that would be affected are those where the seller would otherwise obtain payment using preacquired account information.

¹⁰⁵⁰ MPA-NPRM at 24.

¹⁰⁵¹ *Id.* at 19.

¹⁰⁵² ABA-NPRM at 8; Assurant-NPRM at 3-4; BofA-NPRM at 7; Cendant-NPRM at 7.

¹⁰⁵³ June 2002 Tr. I at 211 (CCC); PMA-NPRM at 30; PCIC-NPRM at 2.

¹⁰⁵⁴ Miller Study at 15.

¹⁰⁵⁵ Marketlink-NPRM at 3. This estimate, and perhaps the estimate of CCC, may overestimate the

¹⁰⁴¹ Amended Rule § 310.6(a).

¹⁰⁴² Amended Rule § 310.4(b)(1)(iii).

¹⁰⁴³ Hudson Bay-Goodman-NPRM at 2. Hudson Bay noted that “[i]nstead of renting space, buying computers and phone equipment, hiring supervisors and so on, HBC’s clients find it cheaper to contact their members and donors by sharing these resources. Even after paying HBC’s fee, which ranges from 4 to 7%, it is much cheaper for these non-profits to centralize these services. The savings achieved by phone company volume discounts alone pays more than half of HBC’s fee.”

¹⁰⁴⁴ APTS-NPRM at 3-4.

¹⁰⁴⁵ Red Cross-NPRM at 3-4.

As discussed in the SBP, the Commission has determined to create a safe harbor to the prohibition on abandoned calls. This safe harbor will allow firms to avoid being cited for violation of this provision of the Rule provided they play a recording that identifies the seller and provides the seller's phone number when a sales representative is not available to handle a call and provided that this occurs in three percent or less of calls that are answered by a consumer. This change should substantially reduce the burden that would have been imposed by a total prohibition on abandoned calls.¹⁰⁵⁶

Regulation of upselling.

Finally, the Commission has eliminated an unintended burden that would have resulted from treating any upsell as a separate outbound telemarketing call. As several people have noted, this would have required telemarketers who receive inbound calls to comply with the "do-not-call" provisions of the Rule as well as the calling hours provision before offering any upsell product.¹⁰⁵⁷ Such a requirement would have imposed substantial burdens on sellers who receive inbound telemarketing calls. However, it was never the intention of the Commission to require compliance with either the "do-not-call" provisions or the calling hour provisions in this context,¹⁰⁵⁸ and this requirement has been eliminated in the amended Rule which provides a separate definition of an upsell and clarifies that these provisions do not apply to an upsell.

C. Description of Small Entities to Which the Rule Will Apply.

This Rule will primarily impact firms that make telephone calls to consumers in an attempt to sell their products or services or entities that make calls to

efficiency losses from prohibiting abandoned calls in that the five calls per hour figure is based on the assumption that calls are dialed "manually." This suggests that the estimate may be based on an operation in which the individual sales representative actually dials the number to be called. A requirement not to abandon calls would not require that sales representatives dial their own calls. It would still be possible, if it were cost efficient, to use computer systems to dial the calls, and this could generate some efficiencies relative to manual dialing. What would not be permitted is to dial a call prior to the time a sales representative becomes available or to dial more than one call at a time for each available sales representative.

¹⁰⁵⁶ As CCC testified at the workshop, "[W]hat we found out is that ... below 5 percent or 4 percent or 3 percent [rate of abandonment], you're really beginning to raise costs...." June 2002 Tr. I at 212 (CCC).

¹⁰⁵⁷ See, e.g., June 2002 Tr. I at 210 (CCC); June 2002 Tr. II at 214-15 (DMA).

¹⁰⁵⁸ June 2002 Tr. I at 210-11 (FTC); June 2002 Tr. II at 215 (FTC).

solicit charitable contributions. That is, the Rule will primarily impact entities that make outbound calls to consumers. Also affected will be firms that provide such services for others on a contract basis. It has been estimated that outbound calls to consumers resulted in total sales of \$274.2 billion in 2001, and that the telemarketing industry that markets to consumers employs 4.1 million workers.¹⁰⁵⁹

The number of firms making such outbound telemarketing calls, and the number that qualify as small entities, cannot be reliably estimated. According to the Office of Advocacy of the SBA, United States Census data shows that there are 2,305 firms that are identified as telemarketing bureaus. Of these, 1,279 are classified as being small businesses because they have sales of less than \$5 million per year.¹⁰⁶⁰ These are firms that provide telemarketing services for other firms. However, not all of these firms will be impacted by the Rule to the same extent. According to NAICS, firms that are classified as telemarketing bureaus include firms that provide "telemarketing services on a contract or fee basis for others, such as (1) promoting clients' products or services by telephone, (2) taking orders for clients by telephone, and (3) soliciting contributions or providing information for clients by telephone."¹⁰⁶¹ Firms that take orders for clients by telephone, as well as some firms that provide information for their clients by telephone, are going to be responding to calls made by consumers and not making calls themselves. Unless such firms are engaging in upselling of products or services that involve a "free-to-pay conversion" feature, they will not be impacted by the proposed Rule to any significant extent.

In addition to firms that provide telemarketing services for others, the Rule will have an effect on firms that use telemarketing as a way to market their own products. These may include, among others, retailers, manufacturers, and financial service providers.¹⁰⁶² The number of such firms—and the number of those that are classified as small businesses—cannot be determined

¹⁰⁵⁹ DMA-NPRM at 5. ATA estimates employment in business-to-consumer telemarketing at 5.4 million. ATA-NPRM at 3.

¹⁰⁶⁰ SBA-User Fee at 3. The size of telemarketing bureaus that qualify as being small businesses was increased to \$6 million as of October 2, 2002. See SBA, Small Business Size Standards Matched to North American Industry Classification System (NAICS), <http://www.sba.gov/size/sizetable2002.html>.

¹⁰⁶¹ U.S. Census Bureau, 1997 NAICS Definitions, 561 Administrative and Support Services, <http://www.census.gov/pub/epcd/naics/NDEF561.HTM>.

¹⁰⁶² ATA-User Fee at 2.

because such firms generally think of themselves as producers or sellers of particular products and not as telemarketers. Similarly, in the available statistics, these firms will be classified as producers or sellers of particular products and not as telemarketers.¹⁰⁶³

D. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule.

As discussed above in the SBP, the amended Rule alters some collection of information requirements. The effect of those requirements on all businesses is discussed in detail in the PRA section of this Notice. First, the amended Rule requires firms that use preacquired account information in conjunction with a "free-to-pay conversion" feature to tape record all such transactions to show that they have obtained the consumer's express informed consent to charge the consumer's account.¹⁰⁶⁴ Section 310.5(a)(5) requires that the seller or telemarketer maintain copies of such audio recordings for 24 months. Similarly, § 310.5(a)(5) requires that firms retain for 24 months copies of any written express agreements received from consumers permitting the company to call the consumer even though the consumer's phone number is included on the "do-not-call" registry.¹⁰⁶⁵ Finally, the amended Rule extends the recordkeeping requirements of § 310.5 to include charitable solicitations in a non-sales context, as required by the USA PATRIOT Act. All other amendments to the Rule relate to the Rule's disclosures or other compliance requirements and are necessary to prevent telemarketing fraud and abuse.

The classes of small entities affected by the amendments include telemarketers or sellers engaged in acts or practices covered by the Rule. The types of professional skills required to comply with the Rule's recordkeeping, disclosure, or other requirements would include attorneys or other skilled labor needed to ensure compliance.

E. Steps Taken to Minimize Impact on Small Entities.

As discussed above, the Telemarketing Act directs the Commission to enact "rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or

¹⁰⁶³ Some commenters suggested that small firms are more likely to rely on telemarketing to sell their products because they cannot afford other, more expensive forms of advertising. See, e.g., Ameriquest-User Fee at 6; ATA-NPRM at 4.

¹⁰⁶⁴ See § 310.4(a)(6)(i)(C).

¹⁰⁶⁵ The provision allowing for such consent is at § 310.4(b)(1)(iii)(B)(i).

practices.”¹⁰⁶⁶ Each of the amendments in the amended Rule is intended to better protect consumers from deceptive and abusive telemarketing practices. In order to achieve this end, the Commission believes that it is necessary to enact regulations that cover small and large firms equally. Based on the Commission’s enforcement experience, it is clear that many of the firms that engage in fraudulent telemarketing activities are small firms. A failure to include such small firms within the requirements of the regulations would, therefore, fail to prohibit deceptive practices by the types of firms that account for a significant share of the problems the Commission encounters.

At the same time, as discussed above both in the SBP and in the “Summary of Significant Issues Raised by the Public Comments in Response to the IRFA,” the Commission has sought to minimize as much as possible the burdens imposed on all affected entities, including small businesses. In general, the changes made in response to public comments have further reduced the burdens. The amendments to the disclosure and recordkeeping provisions of the TSR are generally consistent with the business practices that most sellers and telemarketers, regardless of size, would choose to follow, even absent legal requirements.

The Commission has taken care in developing the amendments to the Rule to set performance standards, which establish the objective results that must be achieved by regulated entities, but do not establish a particular technology that must be employed in achieving those objectives. For example, the Commission does not specify the form in which records required by the TSR must be kept. It also allows a seller and a telemarketer making calls on the seller’s behalf to allocate between themselves the responsibility for maintaining required records.

VI. National Environmental Policy Act

Under the Commission’s Rules of Practice implementing the National Environmental Policy Act of 1969 (“NEPA”),¹⁰⁶⁷ no “major action significantly affecting the quality of the human environment will be instituted unless an environmental impact statement (‘EIS’) has been prepared,” if such is required.¹⁰⁶⁸ To determine if such an impact statement is required, the Commission generally prepares an “environmental assessment.” However, such an environmental assessment is

not necessary in every circumstance. For example, in circumstances when the “environmental effects, if any, would appear to be . . . so uncertain that environmental analysis would be based on speculation,” no “environmental assessment” is required.¹⁰⁶⁹ The Commission believes, for the reasons set forth below, that this exception is applicable in the instant case, and that because the environmental effects, if any, of the amended TSR are uncertain and based on speculation, the Commission is not required to prepare an environmental assessment.

The amended TSR would modify the original Rule in several ways. Each of these is outlined above in Section I (F), which summarizes the changes in the amended Rule. However, the only comment that raised the issue of the environmental effects of the Rule did so solely with regard to the national “do-not-call” registry provision. Because the Commission does not believe that any other modification in the amended Rule implicates any impact on the environment, the analysis is confined to this provision.

The “do-not-call” registry provision will establish a centralized means for consumers across the country to notify sellers and telemarketers of their preference not to receive unsolicited outbound telemarketing calls.¹⁰⁷⁰ As discussed in greater detail above, in the section discussing § 310.4(b)(1)(iii), the “do-not-call” registry provision supplements the original Rule’s provision that allows consumers to exercise their “do-not-call” rights on a company-by-company basis. The Commission determined, based on the extensive record evidence from the rulemaking proceeding, that a national “do-not-call” registry is necessary to effectuate the purposes of the Telemarketing Act.¹⁰⁷¹

The comment that addressed the potential environmental impact of the proposed national “do-not-call” registry stated, in relevant part,

For obvious reasons the FTC’s proposed action may drastically reduce the ability to sell goods and services via telemarketing. In addition, and for the reasons stated above [wherein the commenter argues that the national “do-not-call” registry will negatively impact inbound call centers who rely upon a combination of inbound and outbound

calling to survive],¹⁰⁷² consumers’ ability to themselves purchase via catalogs may be compromised as well, as “call centers” are forced to close in the face of insufficient “outbound telemarketing work.” Either event would force consumers to climb into their cars and return to the mall for their wares, a result that itself would increase gas consumption and cause more air pollution.¹⁰⁷³

DeHart concluded, based on its belief that the “do-not-call” registry provision would increase the number of consumers driving to shopping at malls as a result of the implementation of the national “do-not-call” registry provision, that the Commission must prepare an EIS or, at minimum, an environmental assessment.¹⁰⁷⁴

The underlying premise in the DeHart comment, that a national “do-not-call” registry will have a negative impact on call centers that rely in part on inbound telemarketing and in part on outbound telemarketing for their livelihood, is unsupported in the comment. No evidence, other than a mere allusion to a study that purportedly shows that some firms’ cost of providing inbound call center service would increase if their outbound telemarketing load decreased, is provided by DeHart, nor is support for this proposition found in the record as a whole. Therefore, the fundamental assumption on which DeHart’s argument is based is one that appears to be mere speculation.

The Commission believes that speculation, and indeed, logic, could as easily lead to the conclusion that a diminution in outbound calling, resulting from consumers’ decision to place their telephone numbers on the national “do-not-call” registry, could lead sellers to use other channels of distance marketing to sell their products, including channels that would significantly increase inbound telemarketing, such as direct mail, catalog sales, and Internet sales. This would mean that, even if many consumers utilize the “do-not-call” registry, inbound calling may benefit, not suffer, from such a result. Moreover, DeHart cites no authority for the

¹⁰⁷² DeHart-NPRM at 2-3 (although the commenter alludes to a study that corroborates its assertion on this point, no title or citation is provided for such study).

¹⁰⁷³ DeHart-NPRM at 3.

¹⁰⁷⁴ *Id.* The Commission believes that this allegation would constitute, at most, “indirect effects” under the NEPA implementing regulations, or those “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 CFR 1508.8(b). The Commission does not believe that the “do-not-call” registry provision has been or could reasonably be alleged to have “direct effects” or those “caused by the action and occur at the same time and place.” 40 CFR 1508.8(a).

¹⁰⁶⁶ 15 U.S.C. 6102(a)(1).

¹⁰⁶⁷ 42 U.S.C. 4321 *et seq.*

¹⁰⁶⁸ 16 CFR 1.81, 1.82.

¹⁰⁶⁹ 16 CFR 1.83. See also *National Citizens Comm. for Broad. v. FCC*, 567 F.2d 1095, 1098 n.3 (D.C. Cir. 1977).

¹⁰⁷⁰ See discussion of § 310.4(b)(1)(iii) above.

¹⁰⁷¹ 15 U.S.C. 6102(a)(3)(A) (mandating that the Commission include in its Rule “a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy”).

proposition that local retail shopping has, to date, been reduced as a result of inbound or outbound telemarketing. And, the fact remains that, other than DeHart, none of the commenters, including major sellers, telemarketers, and industry groups, provides any evidence relating to the potential for a national "do-not-call" registry to result in a reduction in service or an increase in cost for inbound telemarketing, nor in a concomitant increase in retail shopping done in local malls.

Moreover, the Commission believes there can be no hard evidence on which to base a prediction of consumers' actions following the implementation of the "do-not-call" registry provision. It seems likely, based on the experience of states that have implemented statewide "do-not-call" lists, and the overwhelmingly high response of consumers to the Commission's proposal, that many consumers will avail themselves of the opportunity to place their telephone numbers on the national "do-not-call" registry. However, as noted above, this may or may not have any impact on consumers' decision to shop at local malls, or on their choice of transportation. Thus, while consumer behavior may change as a result of the promulgation of amendments to the Rule, such changes cannot be quantified or even reasonably estimated because consumer decisions are influenced by many variables other than existence of the "do-not-call" registry. Any indirect impact of the amended Rule on the environment would therefore be highly speculative and impossible to accurately predict or measure.

The Commission does not believe that any alternative to creating a national "do-not-call" registry would both provide the benefits of the registry and ameliorate all potential concerns regarding environmental impact. For example, the Commission does not believe that given its justification for the necessity of the registry, eliminating the provision from the amended Rule would be appropriate based solely on the unsupported allegations of indirect environmental effect raised in the DeHart comment. Furthermore, the Commission can think of no alternative other than eliminating the national "do-not-call" registry that would address DeHart's unsupported and highly speculative concern.

In sum, although any evaluation of the environmental impact of the amendments to the TSR is uncertain and highly speculative, the Commission finds no evidence of avoidable adverse impacts stemming from the amended Rule. Therefore, the Commission has

determined, in accordance with § 1.83 of the FTC's Rules of Practice, that no environmental assessment or EIS is required.¹⁰⁷⁵

List of Subjects in 16 CFR Part 310.

Telemarketing, Trade practices.

Accordingly, title 16, part 310 of the Code of Federal Regulations, is revised to read as follows:

PART 310—TELEMARKETING SALES RULE

Sec.

- 310.1 Scope of regulations in this part.
- 310.2 Definitions.
- 310.3 Deceptive telemarketing acts or practices.
- 310.4 Abusive telemarketing acts or practices.
- 310.5 Recordkeeping requirements.
- 310.6 Exemptions.
- 310.7 Actions by states and private persons.
- 310.8 Reserved: Fee for access to "do-not-call" registry.
- 310.9 Severability.

Authority: 15 U.S.C. 6101–6108.

§ 310.1 Scope of regulations in this part.

This part implements the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101–6108, as amended.

§ 310.2 Definitions.

(a) *Acquirer* means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.

(b) *Attorney General* means the chief legal officer of a state.

(c) *Billing information* means any data that enables any person to access a customer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

(d) *Caller identification service* means a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone.

(e) *Cardholder* means a person to whom a credit card is issued or who is authorized to use a credit card on behalf

of or in addition to the person to whom the credit card is issued.

(f) *Charitable contribution* means any donation or gift of money or any other thing of value.

(g) *Commission* means the Federal Trade Commission.

(h) *Credit* means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(i) *Credit card* means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(j) *Credit card sales draft* means any record or evidence of a credit card transaction.

(k) *Credit card system* means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.

(l) *Customer* means any person who is or may be required to pay for goods or services offered through telemarketing.

(m) *Donor* means any person solicited to make a charitable contribution.

(n) *Established business relationship* means a relationship between a seller and a consumer based on:

(1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or

(2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

(o) *Free-to-pay conversion* means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.

(p) *Investment opportunity* means anything, tangible or intangible, that is offered, offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation.

(q) *Material* means likely to affect a person's choice of, or conduct regarding, goods or services or a charitable contribution.

(r) *Merchant* means a person who is authorized under a written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the

¹⁰⁷⁵ 16 CFR 1.83. See also *National Citizens Comm. for Broad. v. FCC*, 567 F.2d 1095, 1098 n.3 (D.C. Cir. 1977).

purchase of goods or services or a charitable contribution.

(s) *Merchant agreement* means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(t) *Negative option feature* means, in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.

(u) *Outbound telephone call* means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.

(v) *Person* means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(w) *Preacquired account information* means any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged.

(x) *Prize* means anything offered, or purportedly offered, and given, or purportedly given, to a person by chance. For purposes of this definition, chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.

(y) *Prize promotion* means:

(1) A sweepstakes or other game of chance; or

(2) An oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.

(z) *Seller* means 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.

(aa) *State* means any state of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(bb) *Telemarketer* means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

(cc) *Telemarketing* means a plan, program, or campaign which is

conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

(dd) *Upselling* means soliciting the purchase of goods or services following an initial transaction during a single telephone call. The upsell is a separate telemarketing transaction, not a continuation of the initial transaction. An "external upsell" is a solicitation made by or on behalf of a seller different from the seller in the initial transaction, regardless of whether the initial transaction and the subsequent solicitation are made by the same telemarketer. An "internal upsell" is a solicitation made by or on behalf of the same seller as in the initial transaction, regardless of whether the initial transaction and subsequent solicitation are made by the same telemarketer.

§ 310.3 Deceptive telemarketing acts or practices.

(a) *Prohibited deceptive telemarketing acts or practices.* It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Before a customer pays¹ for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods

¹ When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment.

or services that are the subject of the sales offer;²

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

(iii) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the customer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and, if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning; and the no-purchase/no-payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate;

(v) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(vi) In the sale of any goods or services represented to protect, insure, or otherwise limit a customer's liability in the event of unauthorized use of the customer's credit card, the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. 1643; and

(vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

² For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226, compliance with the disclosure requirements under the Truth in Lending Act and Regulation Z shall constitute compliance with § 310.3(a)(1)(i) of this Rule.

(ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;

(iii) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;

(iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

(v) Any material aspect of a prize promotion including, but not limited to, the odds of being able to receive a prize, the nature or value of a prize, or that a purchase or payment is required to win a prize or to participate in a prize promotion;

(vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability;

(vii) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity;

(viii) That any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. 1643; or

(ix) Any material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(3) Causing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z,³ or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E.⁴ Such authorization shall be deemed verifiable if any of the following means is employed:

(i) Express written authorization by the customer or donor, which includes the customer's or donor's signature;⁵

(ii) Express oral authorization which is audio-recorded and made available

upon request to the customer or donor, and the customer's or donor's bank or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer's or donor's receipt of all of the following information:

(A) The number of debits, charges, or payments (if more than one);

(B) The date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;

(C) The amount(s) of the debit(s), charge(s), or payment(s);

(D) The customer's or donor's name;

(E) The customer's or donor's billing information, identified with sufficient specificity such that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction;

(F) A telephone number for customer or donor inquiry that is answered during normal business hours; and

(G) The date of the customer's or donor's oral authorization; or

(iii) Written confirmation of the transaction, identified in a clear and conspicuous manner as such on the outside of the envelope, sent to the customer or donor via first class mail prior to the submission for payment of the customer's or donor's billing information, and that includes all of the information contained in

§§ 310.3(a)(3)(ii)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate; *provided*, however, that this means of authorization shall not be deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and preacquired account information.

(4) Making a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution.

(b) *Assisting and facilitating*. It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c) or (d), or § 310.4 of this Rule.

(c) *Credit card laundering*. Except as expressly permitted by the applicable

credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for:

(1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;

(2) Any person to employ, solicit, or otherwise cause a merchant, or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

(3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.

(d) *Prohibited deceptive acts or practices in the solicitation of charitable contributions*. It is a fraudulent charitable solicitation, a deceptive telemarketing act or practice, and a violation of this Rule for any telemarketer soliciting charitable contributions to misrepresent, directly or by implication, any of the following material information:

(1) The nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested;

(2) That any charitable contribution is tax deductible in whole or in part;

(3) The purpose for which any charitable contribution will be used;

(4) The percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program;

(5) Any material aspect of a prize promotion including, but not limited to: the odds of being able to receive a prize; the nature or value of a prize; or that a charitable contribution is required to win a prize or to participate in a prize promotion; or

(6) A charitable organization's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.

§ 310.4 Abusive telemarketing acts or practices.

(a) *Abusive conduct generally*. It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

³ Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR part 226.

⁴ Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.*, and Regulation E, 12 CFR part 205.

⁵ For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(1) Threats, intimidation, or the use of profane or obscene language;

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:

(i) The time frame in which the seller has represented all of the goods or services will be provided to that person has expired; and

(ii) The seller has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Nothing in this Rule should be construed to affect the requirement in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose;

(3) Requesting or receiving payment of any fee or consideration from a person for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney;

(4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person;

(5) Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; *provided*, however, that this paragraph shall not apply to the disclosure or receipt of a customer's or donor's billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction;

(6) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements

in paragraphs (a)(6)(i) through (ii) of this section must be met to evidence express informed consent.

(i) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the seller or telemarketer must:

(A) obtain from the customer, at a minimum, the last four (4) digits of the account number to be charged;

(B) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account number pursuant to paragraph (a)(6)(i)(A) of this section; and,

(C) make and maintain an audio recording of the entire telemarketing transaction.

(ii) In any other telemarketing transaction involving preacquired account information not described in paragraph (a)(6)(i) of this section, the seller or telemarketer must:

(A) at a minimum, identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged; and

(B) obtain from the customer or donor his or her express agreement to be charged for the goods or services and to be charged using the account number identified pursuant to paragraph (a)(6)(ii)(A) of this section; or

(7) Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call; *provided* that it shall not be a violation to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours.

(b) *Pattern of calls.*

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

(i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive

outbound telephone calls established to comply with § 310.4(b)(1)(iii);

(iii) Initiating any outbound telephone call to a person when:

(A) that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited; or

(B) that person's telephone number is on the "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller

(i) has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature⁶ of that person; or

(ii) has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

(iv) Abandoning any outbound telephone call. An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

(2) It is an abusive telemarketing act or practice and a violation of this Rule for any person to sell, rent, lease, purchase, or use any list established to comply with § 310.4(b)(1)(iii)(A), or maintained by the Commission pursuant to § 310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists.

(3) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(ii) and (iii) if it can demonstrate that, as part of the seller's or telemarketer's routine business practice:

(i) It has established and implemented written procedures to comply with § 310.4(b)(1)(ii) and (iii);

(ii) It has trained its personnel, and any entity assisting in its compliance, in

⁶For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

the procedures established pursuant to § 310.4(b)(3)(i);

(iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact, in compliance with § 310.4(b)(1)(iii)(A);

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to §§ 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained from the Commission no more than three (3) months prior to the date any call is made, and maintains records documenting this process;

(v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to § 310.4(b)(3)(i); and

(vi) Any subsequent call otherwise violating § 310.4(b)(1)(ii) or (iii) is the result of error.

(4) A seller or telemarketer will not be liable for violating 310.4(b)(1)(iv) if:

(i) the seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign;

(ii) the seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed⁷; and

(iv) the seller or telemarketer, in accordance with § 310.5(b)-(d), retains records establishing compliance with § 310.4(b)(4)(i)-(iii).

(c) *Calling time restrictions.* Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location.

(d) *Required oral disclosures in the sale of goods or services.* It is an abusive

telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion; *provided*, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

(e) *Required oral disclosures in charitable solicitations.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution, to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the charitable organization on behalf of which the request is being made; and

(2) That the purpose of the call is to solicit a charitable contribution.

§ 310.5 Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

(1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of \$25.00 or more;

(3) The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and

the amount paid by the customer for the goods or services;⁸

(4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales or solicitations; *provided*, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

(5) All verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.

(b) A seller or telemarketer may keep the records required by § 310.5(a) in any form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by § 310.5(a) shall be a violation of this Rule.

(c) The seller and the telemarketer calling on behalf of the seller may, by written agreement, allocate responsibility between themselves for the recordkeeping required by this Section. When a seller and telemarketer have entered into such an agreement, the terms of that agreement shall govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, the seller shall be responsible for complying with §§ 310.5(a)(1)-(3) and (5); the telemarketer shall be responsible for complying with § 310.5(a)(4).

(d) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer shall maintain all records as required under this Section. In the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business shall maintain all records required under this Section.

§ 310.6 Exemptions.

(a) Solicitations to induce charitable contributions via outbound telephone calls are not covered by § 310.4(b)(1)(iii)(B) of this Rule.

(b) The following acts or practices are exempt from this Rule:

(1) The sale of pay-per-call services subject to the Commission's Rule

⁷ This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.

⁸ For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with § 310.5(a)(3) of this Rule.

entitled "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992," 16 CFR Part 308, *provided*, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(2) The sale of franchises subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," ("Franchise Rule") 16 CFR Part 436, *provided*, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(3) Telephone calls in which the sale of goods or services or charitable solicitation is not completed, and payment or authorization of payment is not required, until after a face-to-face sales or donation presentation by the seller or charitable organization, *provided*, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(4) Telephone calls initiated by a customer or donor that are not the result of any solicitation by a seller, charitable organization, or telemarketer, *provided*, however, that this exemption does not apply to any instances of upselling included in such telephone calls;

(5) Telephone calls initiated by a customer or donor in response to an advertisement through any medium, other than direct mail solicitation, *provided*, however, that this exemption does not apply to calls initiated by a

customer or donor in response to an advertisement relating to investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or advertisements involving goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls;

(6) Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this Rule, for any goods or services offered in the direct mail solicitation, and that contains no material misrepresentation regarding any item contained in § 310.3(d) of this Rule for any requested charitable contribution; *provided*, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls; and

(7) Telephone calls between a telemarketer and any business, except calls to induce the retail sale of nondurable office or cleaning supplies; *provided*, however, that § 310.4(b)(1)(iii)(B) and § 310.5 of this Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

§ 310.7 Actions by states and private persons.

(a) Any attorney general or other officer of a state authorized by the state to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, shall serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this Rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, and shall include a copy of the state's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the state or private person shall serve the Commission with the required notice immediately upon instituting its action.

(b) Nothing contained in this Section shall prohibit any attorney general or other authorized state official from proceeding in state court on the basis of an alleged violation of any civil or criminal statute of such state.

§ 310.8 [Reserved: Fee for access to “do-not-call” registry.]**§ 310.9 Severability.**

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission’s intention that the remaining provisions shall continue in effect.

By direction of the Commission.

Donald S. Clark,
Secretary.

Note: Appendices A and B are published for informational purposes only and will not be codified in Title 16 of the Code of Federal Regulations.

Appendix A*List of Acronyms for Rule Review Commenters*

February 28, 2000 Request for Comment

Acronym — Commenter

AARP—AARP
 Alan—Alan, Alicia
 ARDA—American Resort Development Association
 ATA—American Teleservices Association
 Anderson—Anderson, Wayne
 Baressi—Baressi, Sandy
 Bell Atlantic—Bell Atlantic
 Bennett—Bennett, Douglas H.
 Biagiotti—Biagiotti, Mary
 Bishop—Bishop, Lew & Lois
 Blake—Blake, Ted
 Bowman-Kruhm—Bowman-Kruhm, Mary
 Braddick—Braddick, Jane Ann
 Brass—Brass, Eric
 Brosnahan—Brosnahan, Kevin
 Budro—Budro, Edgar
 Card—Card, Giles S.
 Collison—Collison, Doug
 Conn—Conn, David
 Conway—Conway, Candace
 Croushore—Croushore, Amanda
 Curtis—Curtis, Joel
 Dawson—Dawson, Darcy
 DMA—Direct Marketing Association
 DSA—Direct Selling Association
 Doe—Doe, Jane
 ERA—Electronic Retailing Association
 FAMSA—FAMSA-Funeral Consumers Alliance, Inc.
 Gannett—Gannett Co., Inc.
 Garbin—Garbin, David and Linda
 A. Gardner—Gardner, Anne
 S. Gardner—Gardner, Stephen
 Gibb—Gibb, Ronald E.
 Gilchrist—Gilchrist, Dr. K. James
 Gindin—Gindin, Jim
 Haines—Haines, Charlotte
 Harper—Harper, Greg
 Heagy—Heagy, Annette M.
 Hecht—Hecht, Jeff
 Hickman—Bill and Donna
 Hollingsworth—Hollingsworth, Bob and Pat
 Holloway—Holloway, Lynn S.
 Holmay—Holmay, Kathleen
 ICFA—International Cemetery and Funeral Association

Johnson—Johnson, Sharon Coleman
 Jordan—Jordan, April
 Kelly—Kelly, Lawrence M.
 KTW—KTW Consulting Techniques, Inc.
 Lamet—Lamet, Jerome S.
 Lee—Lee, Rockie
 LSAP—Legal Services Advocacy Project
 LeQuang—LeQuang, Albert
 Leshner—Leshner, David
 Mack—Mack, Mr. and Mrs. Alfred
 MPA—Magazine Publishers of America, Inc.
 Manz—Manz, Matthias
 McCurdy—McCurdy, Bridget E.
 Menefee—Menefee, Marcie
 Merritt—Merritt, Everett W.
 Mey—Mey, Diana
 Mitchelp—Mitchelp
 TeleSource—Morgan-Francis/Tele-Source Industries
 NACHA—NACHA-The Electronic Payments Association
 NAAG—National Association of Attorneys General
 NACAA—National Association of Consumer Agency Administrators
 NCL—National Consumers League
 NFN—National Federation of Nonprofits
 NAA—Newspaper Association of America
 NASAA—North American Securities Administrators Association
 Nova53—Nova53
 Nurik—Nurik, Margy and Irv
 PLP—Personal Legal Plans, Inc.
 Peters—Peters, John and Frederickson, Constance
 Reese—Reese Brothers, Inc.
 Reynolds—Reynolds, Charles
 Rothman—Rothman, Iris
 Runnels—Runnels, Mike
 Sanford—Sanford, Kanija
 Schiber—Schiber, Bill
 Schmied—Schmied, R. L.
 Strang—Strang, Wayne G.
 TeleSource—Morgan-Francis/Tele-Source Industries
 Texas—Texas Attorney General
 Thai—Thai, Linh Vien
 Vanderburg—Vanderburg, Mary Lou
 Ver Steegt—Ver Steegt, Karen
 Verizon—Verizon Wireless
 Warren—Warren, Joshua
 Weltha—Weltha, Nick
 Worsham—Worsham, Michael C., Esq.

Appendix B*List of Acronyms for NPRM Commenters**Acronym — Commenter*

1-800-DoNotCall—1-800-DoNotCall, Inc.
 AARP—AARP
 ACA—ACA International
 ACUTA—ACUTA
 Advanta—Advanta Corp.
 Aegis—Aegis Communications Group
 Alabama Police—Alabama State Police Association, Inc.
 AAST—American Association of State Troopers
 ABA—American Bankers Association
 ABIA—American Bankers Insurance Association
 American Blind—American Blind Products, Inc.
 ACE—American Council on Education
 ADA—American Diabetes Association
 AmEx—American Express

AFSA—American Financial Services Association
 Red Cross—American Red Cross
 ARDA—American Resort Development Association
 ARDA-2—American Resort Development Association-Do Not Call Registry
 American Rivers—American Rivers
 ASTA—American Society of Travel Agents
 ATA—American Teleservices Association
 Blood Centers—America’s Blood Centers
 Community Bankers—America’s Community Bankers
 Ameriquest—Ameriquest Mortgage Company
 Armev—Armev, The Honorable Dick (U.S. House of Representatives)
 AFP—Association of Fundraising Professionals
 APTS—Association of Public Television Stations
 ANA—Association of National Advertisers Associations—joint comment of: American Teleservices Association, Direct Marketing Association, Electronic Retailing Association, Magazine Publishers Association, and Promotion Marketing Association
 Assurant—Assurant Group
 Avinta—Avinta Communications, Inc.
 Ayres—Ayres, Ian
 Baldacci—Baldacci, The Honorable John Elias (U.S. House of Representatives)
 BofA—Bank of America
 Bank One—Bank One Corporation
 Beautyrock—Beautyrock, Inc.
 BellSouth—BellSouth Corporation
 Best Buy—Best Buy Company, Inc.
 BRI—Business Response Inc.
 CCAA—California Consumer Affairs Association
 CATS—Californians Against Telephone Solicitation
 Capital One—Capital One Financial Corporation
 Car Wash Guys—WashGuy Systems
 Carper—Carper, The Honorable Thomas R. (U.S. Senate)
 Celebrity Prime Foods—Celebrity Prime Foods
 Cendant—Cendant Corporation
 Chamber of Commerce—Chamber of Commerce of the United States of America
 CRF—Charitable Resource Foundation, Inc.
 Chicago ADM—Chicago Association of Direct Marketing
 Childhood Leukemia—Childhood Leukemia Foundation
 CDI—Circulation Development, Inc.
 CURE—Citizens United for Rehabilitation of Errants
 Citigroup—Citigroup Inc.
 Civil Service Leader—Civil Service Leader
 Collier Shannon—Collier Shannon Scott
 Comcast—Comcast
 CNHI—Community Newspaper Holdings, Inc.
 Community Safety—Community Safety, LLC
 Connecticut—Connecticut Commissioner of Consumer Protection
 CBA—Consumer Bankers Association
 CCC—joint comment of: Consumer Choice Coalition, ACI Telecentrics, Coverdell & Company, Discount Development Services, HSN LP d/b/a HSN and Home Shopping Network, Household Credit Services, MBNA America Bank, MemberWorks

- Incorporated, Mortgage Investors Corporation, Optima Direct, TCIM Inc., Trilegiant Corporation and West Corporation
- CMC—Consumer Mortgage Coalition
- Consumer Privacy—Consumer Privacy Guide
- Convergys—Convergys Corporation
- CCA—Corrections Corporation of America
- CASE—Council for Advancement and Support of Education
- Cox—Cox Enterprises
- Craftmatic—Craftmatic Organization, Inc.
- Davis—Davis, The Honorable Tom (U.S. House of Representatives)
- DBA—Debt Buyers Association
- DeHart—DeHart & Darr Associates
- Deutsch—Deutsch, The Honorable Peter (U.S. House of Representatives)
- DialAmerica—DialAmerica Marketing, Inc.
- DMA—Direct Marketing Association/U.S. Chamber of Commerce
- DMA-NonProfit—Direct Marketing Association NonProfit Federation
- DSA—Direct Selling Association
- Discover—Discover Bank
- DC—District of Columbia, Office of the People's Counsel
- Eagle—Eagle Bank
- EFSC—Electronic Financial Services Council
- EPIC—Joint comment: Electronic Privacy Information Center, Center for Digital Democracy, Junkbusters Corp., International Union UAW, Privacy Rights Clearinghouse, Consumers Union, Evan Hendricks of Privacy Times, Privacyactivism, Consumer Action, Consumer Project on Technology, Robert Ellis Smith of Privacy Journal, Consumer Federation of America, Computer Scientists for Social Responsibility, and Private Citizen, Inc.
- ERA—Electronic Retailing Association
- EPI—Enterprise Prison Institute
- Experian—Experian Marketing Information Solutions, Inc.
- Fiber Clean—Fiber Clean
- Roundtable—Financial Services Roundtable
- Fire Fighters Associations:
- Asheville FFA—Asheville (NC) Fire Fighters Association
- Bethlehem FFA—Bethlehem (PA), IAFF Local 735
- Boone FFA—Boone (IA)
- California FFA—California Professional Firefighters
- Cedar Rapids FFA—Cedar Rapids (IA), IAFF Local 11
- Cedar Rapids Airport FFA—Cedar Rapids Airport (IA)
- Chattanooga FFA—Chattanooga (TN) Fire Fighters Association, Local 820
- Edwardsville FFA—Edwardsville (IL) Fire Fighters Local 1700
- Greensboro FFA—Greensboro (NC)
- Hickory FFA—Hickory (NC) Firefighters Association, IAFF Local 2653
- Indiana FFA—Indiana, Professional Fire Fighters Union of
- Iowa FFA—Iowa Professional Firefighters
- Missouri FFA—Missouri State Council of Fire Fighters
- North Carolina FFA—North Carolina, Professional Fire Fighters & Paramedics of
- North Maine FFA—North Maine (Des Plaines, IL) Firefighters, IAFF Local 224
- Ottumwa FFA—Ottumwa (IA)
- Roanoke FFA—Roanoke (VA) Fire Fighters Association
- Springfield FFA—Springfield (MO) Firefighters Association, Local 52
- Sycamore FFA—Sycamore, IAFF Local 3046
- Utah FFA—Utah, Professional Firefighters of
- Vermont FFA—Vermont, Professional Firefighters of
- Wisconsin FFA—Wisconsin, Professional Fire Fighters of
- FireCo—FireCo, L.L.C.
- Fleet—FleetBoston Financial Corporation
- FOP—Fraternal Order of Police, Grand Lodge
- FPIR—Fund for Public Interest Research, Inc.
- FCA—Funeral Consumers Alliance, Inc.
- Gannett—Gannett Co., Inc.
- Gottschalks—Gottschalks, Inc.
- Greater Niagara—Greater Niagara Newspapers
- Green Mountain—Green Mountain Energy Company
- Gryphon—Gryphon Networks
- Hagel, Johnson & Carper—Joint letter from: The Honorable Chuck Hagel, Tim Johnson, and Thomas R. Carper (U.S. Senate)
- Hastings—Hastings, The Honorable Doc (U.S. House of Representatives)
- Herald Bulletin—Herald Bulletin
- Horick—Horick, Bob
- Household International:
- Household Auto—Joint comment: Household Finance Corp., OFL-A Receivables Corp., and Household Automotive
- Household Credit—Household Bank, Credit Card Services
- Household Finance—Household Finance Corporation
- Household-Montalvo—Montalvo, David
- HSBC—HSBC Bank USA
- Hudson Bay-Anderson—Hudson Bay Company of Illinois-owner
- Hudson Bay-Goodman—Hudson Bay Company-Goodman
- HRC—Human Rights Campaign
- IBM—IBM
- ICT—ICT Group, Inc.
- Illinois Police—Illinois Council of Police & Sheriffs
- Infocision—Infocision Management Corporation
- Inhofe—Inhofe, The Honorable James (U.S. Senate)
- Insight—Insight Realty, Inc.
- ITC—Interactive Teleservices Corp.
- ICFA—International Cemetery & Funeral Association
- IFA—International Franchise Association
- IUPA—International Union of Police Associations
- ICC—Internet Commerce Coalition
- Intuit—Intuit Inc.
- Italian American Police—Italian American Police Society of New Jersey
- Johnson—Johnson, The Honorable Tim (U.S. Senate)
- Kansas—Kansas, House of Representatives
- KeyCorp—KeyCorp.
- Lautman—Lautman & Associates
- LSAP—Legal Services Advocacy Project
- Leggett & Platt—Leggett & Platt
- Lenox—Lenox Inc.
- Leukemia Society—Leukemia & Lymphoma Society
- Life Share—Life Share
- Lucas—Lucas, The Honorable Ken (U.S. House of Representatives)
- MPA—Magazine Publishers Association
- Make-A-Wish—Make-A-Wish Foundation of America
- Manzullo—Manzullo, The Honorable Donald A. (U.S. House of Representatives)
- March of Dimes—March of Dimes Birth Defects Foundation
- Marketlink—Marketlink, Inc.
- MBA—Massachusetts Bankers Association
- MasterCard—MasterCard International
- MBNA—MBNA America Bank, N.A.
- McClure—McClure, Scott
- McConnell—McConnell, The Honorable Mitch (U.S. Senate)
- Metris—Metris Companies, Inc.
- Michigan Nonprofit—Michigan Nonprofit Association
- MidFirst—MidFirst Bank
- MBAA—Mortgage Bankers Association of America
- Myrick—Myrick, The Honorable Sue (U.S. House of Representatives)
- NACHA—NACHA-The Electronic Payments Association
- Nadel—Nadel, Mark S. (law review article: "Rings of Privacy: Unsolicited Telephone Calls and the Right to Privacy," 4 *Yale Journal on Regulation* 99 (Fall 1986))
- NAAG—National Association of Attorneys General
- NACAA—National Association of Consumer Agency Administrators
- NAIFA—National Association of Insurance & Financial Advisors
- NAR—National Association of Realtors
- NARUC—National Association of Regulatory Utility Commissioners
- ARVC—National Association of RV Parks & Campgrounds
- NASCO—National Association of State Charity Officials
- NASUCA—National Association of State Utility Consumer Advocates
- E-Commerce Coalition—National Business Coalition on E-Commerce & Privacy
- NCTA—National Cable & Telecommunications Association
- National Children's Cancer—National Children's Cancer Society, Inc.
- NCLC—Joint comment: National Consumer Law Center, National Association of Consumer Advocates, Consumer Federation of America, Consumers Union, and US Public Interest Research Group
- NCLF—National Children's Leukemia Foundation
- NCL—National Consumers League
- NEMA—National Energy Marketers Association
- NFPPA—National Family Privacy Protection Association
- NFIB—National Federation of Independent Business
- NFC—National Franchise Council
- NFDA—National Funeral Directors Association
- NNA—National Newspaper Association of America
- NPMA—National Pest Management Association
- NPR—National Public Radio
- NRF—National Retail Federation
- NTC—National Troopers Coalition
- Nelson—Nelson, The Honorable E. Benjamin (U.S. Senate)
- NetCoalition—NetCoalition

- Nethercutt—Nethercutt, The Honorable George R., Jr. (U.S. House of Representatives)
- NeuStar—NeuStar, Inc.
- New Orleans—New Orleans, City Council of (CNO)—Utility, Cable & Telecommunications Committee
- NJ Police—New Jersey Police Officers Foundation, Inc.
- NYSCPB—New York State Consumer Protection Board
- NAA—Newspaper Association of America
- Nextel—Nextel Communications, Inc.
- Ney, Sandlin, Jones, Shows and Cantor—Joint letter from: The Honorable Bob Ney, Max Sandlin, Walter Jones, Ronnie Shows, and Eric Cantor (U.S. House of Representatives)
- Noble—Noble Systems
- NATN—North American Telephone Network LLC
- NC Zoo—North Carolina Zoological Society
- Not-For-Profit Coalition—Not-For-Profit and Charitable Coalition
- NSDI—NSDI Teleperformance
- OSU—Ohio State University
- OTC—Ohio Troopers Coalition
- Pacesetter—Pacesetter Corporation
- PVA—Paralyzed Veterans of America
- Paramount—Paramount Lists, Inc.
- Pascrell—Pascrell, The Honorable Bill, Jr. (U.S. House of Representatives)
- Patrick—Patrick, George W.
- Paul—Paul, The Honorable Ron (U.S. House of Representatives)
- Pelland—Pelland, Paul
- PLP—Personal Legal Plans, Inc.
- Michigan Police—Police Officers Association of Michigan
- possibleNOW—possibleNOW.com, Inc.
- PRC—Privacy Rights Clearinghouse
- Private Citizen—Private Citizen, Inc.
- Proctor—Proctor, Alan
- PBP—Progressive Business Publications
- PCIC—Progressive Casualty Insurance Company
- Angel Food—Project Angel Food
- PMA—Promotion Marketing Association
- Purple Heart—Purple Heart Service Foundation, Military Order of
- Ramstad—Ramstad, The Honorable Jim (U.S. House of Representatives)
- Redish—Redish, Martin H., Esq.
- Reed Elsevier—Reed Elsevier Inc.
- Reese—Reese Brothers, Inc.
- SBC—SBC Communications Inc.
- Schrock—Schrock, The Honorable Edward L. (U.S. House of Representatives)
- Sensenbrenner—Sensenbrenner, The Honorable F. James, Jr. (U.S. House of Representatives)
- SHARE—SHARE
- SIIA—Software & Information Industry Association
- Southerland—Southerland, Inc.
- Southern Poverty—Southern Poverty Law Center
- Special Olympics—Special Olympics, Inc.
- SO-AZ—Special Olympics Arizona
- SO-CA—Special Olympics Southern California
- SO-CO—Special Olympics Colorado
- SO-CN—Special Olympics Connecticut
- SO-IA—Special Olympics Iowa
- SO-KY—Special Olympics Kentucky
- SO-MD—Special Olympics Maryland
- SO-MO—Special Olympics Missouri
- SO-MT—Special Olympics Montana
- SO-NH—Special Olympics New Hampshire
- SO-NJ—Special Olympics New Jersey
- SO-NM—Special Olympics New Mexico
- SO-NY—Special Olympics New York
- SO-VT—Special Olympics Vermont
- SO-VA—Special Olympics Virginia
- SO-WA—Special Olympics Washington
- SO-WI—Special Olympics Wisconsin
- SO-WY—Special Olympics Wyoming
- Spiegel—Spiegel, Marilyn
- Stage Door—Stage Door Music Productions, Inc.
- Statewide Appeal—Statewide Appeal Inc.
- Success Marketing—Success Marketing, Inc.
- Synergy Global—Synergy Global Networks, The
- Synergy Solutions—Synergy Solutions, Inc.
- Sytel—Sytel Limited
- Tate—Tate & Associates
- Technion—Technion Communications Corp
- TDI—Telecommunications for the Deaf, Inc.
- TeleDirect—TeleDirect International, Inc.
- Telefund—Telefund, Inc.
- Teleperformance—Teleperformance USA
- TRC—Tele-Response Center
- TeleStar—TeleStar Marketing, L.P.
- TRA—Tennessee Regulatory Authority
- Terry—Terry, The Honorable Lee (U.S. House of Representatives)
- Texas Environment—Texas Campaign for the Environment
- Texas PUC—Texas Office of Public Utility Counsel
- Thayer—Thayer, Richard E., Esq.
- Time—Time, Inc.
- Tribune—Tribune Publishing Company
- UNICOR—UNICOR: (Federal Prison Industries, Inc, DOJ), Federal Bureau of Prisons)
- DOJ—U.S. Department of Justice
- Uniway—Uniway of Coastal Georgia
- Verizon—Verizon Companies
- Virginia—Virginia Attorney General
- VISA—VISA U.S.A., Inc.
- Watts—Watts, The Honorable J.C., Jr. (U.S. House of Representatives)
- Weber—Weber, Ron & Associates, Inc.
- Wells Fargo—Wells Fargo & Company
- White—White, David T.
- WTA—Wisconsin Troopers' Association Inc.
- Worsham—Worsham, Michael C., Esq.
- YPIMA—Yellow Pages Integrated Media Association (YPIMA)
- Supplemental Comments*
- AARP-Supp.—AARP
- AOP-Supp.—Aircraft Owners and Pilots Association (Marsha Mason-Thies)
- Allstate-Supp.—Allstate Life Insurance Company
- Community Bankers-Supp.—America's Community Bankers
- AICR-Supp.—The American Institute for Cancer Research (Kathryn L. Ward)
- Red Cross-Supp.—American Red Cross
- ARDA-Supp.—The American Resort Development Association (Yartin DePoy and Stratis Pridgeon)
- ATA-Supp.—American Teleservices Association
- Associations-Supp.—Associations Letter
- Avinta-Supp.—Avinta (Abe Chen)
- Bond-Supp.—Bond, The Honorable Christopher S. (U.S. Senate)
- Celebrity Prime Foods-Supp.—Celebrity Prime Foods
- Chesapeake-Supp.—The Chesapeake Bay Foundation (Amelia Koch and Melissa Livingston)
- Christian Appalachian-Supp.—The Christian Appalachian Project
- Comic Relief-Supp.—Comic Relief, Inc. (Dennis Albaigh)
- Covington & Burling-Supp.—Covington and Burling
- DialAmerica-Supp.—DialAmerica Marketing, Inc.
- DMA Letter-Supp.—Direct Marketing Association-Transmittal Letter
- DMA Study-Supp.—Direct Marketing Association-Study
- ERA and PMA-Supp.—Electronic Retailing Association and Promotion Marketing Association
- EPI-Supp.—Enterprise Prison Institute
- Domenici-Supp.—Domenici, The Honorable Pete V. (U.S. Senate)
- FDS-Supp.—Federation Department Stores
- Hoar-Supp.—Hoar, Wesley C.
- Illinois-Supp.—Illinois Attorney General's Office
- ICTA-Supp.—Industry Council for Tangible Assets
- Luntz-Supp.—Luntz Research Companies (Chrys Lemon)
- MPA-Supp.—Magazine Publishers of America
- Maryland-Supp.—Maryland Attorney General's Office (Carol Beyers)
- McIntyre-Supp.—McIntyre Law Firm, PLLC (Chrys Lemon)
- McKenna-Supp.—McKenna, Douglas M.
- Memberworks-Supp.—Memberworks National Survey Topline (Chrys Lemon)
- Minnesota-Supp.—Minnesota Attorney General's Office
- Missouri-Supp.—Missouri Attorney General's Office
- NACDS-Supp.—National Association of Chain Drug Stores
- Ney, Sandlin, Jones, Shows and Cantor-Supp.—Joint letter from: The Honorable Bob Ney, Max Sandlin, Walter Jones, Ronnie Shows, and Eric Cantor (U.S. House of Representatives)
- NAR-Supp.—National Association of Realtors
- NWF-Supp.—National Wildlife Federation
- NAA June 28-Supp.—Newspaper Association of America (John F. Sturm)
- NAA July 31-Supp.—Newspaper Association of America
- Not-For-Profit Coalition-Supp.—Not-For-Profit and Charitable Coalition
- PMA-Supp.—Promotion Marketing Association
- Putnam-Supp.—Putnam, The Honorable Adam H. (U.S. House of Representatives)
- Riley-Supp.—Riley, The Honorable Bob (U.S. House of Representatives)
- SBC-Supp.—SBC Communications Inc.
- Time-Supp.—Time, Inc.
- Vermont-Supp.—Vermont Attorney General's Office
- WWF-Supp.—World Wildlife Fund (Deborah Hechinger)
- Worsham-Supp.—Worsham, Michael C.
- User Fee Comments*
- AARP-User Fee—AARP

ABA-User Fee—American Bankers Association
 Red Cross-User Fee—American Red Cross
 ARDA-User Fee—American Resort Development Association
 ATA-User Fee—American Teleservices Association
 Community Bankers-User Fee—America's Community Bankers
 Ameriquest-User Fee—Ameriquest Mortgage Company
 Celebrity Prime Foods-User Fee—Celebrity Prime Foods
 CBA-User Fee—Consumer Bankers Association
 DialAmerica-User Fee—DialAmerica Marketing, Inc.
 DMA Letter-User Fee—Direct Marketing Association
 DMA Comments-User Fee—Direct Marketing Association
 Discover-User Fee—Discover Bank
 ERA/PMA-User Fee—Electronic Retailing Association and Promotion Marketing Association (joint comment)
 Household-User Fee—Household Bank (SB), N.A. and Household Bank (Nevada), N.A. (joint comment)
 Hudson Bay-User Fee—Hudson Bay Company of Illinois, Inc.
 ICTA-User Fee—Industry Council for Tangible Assets
 InfoCision-User Fee—InfoCision Management Corporation
 ITC-User Fee—Interactive Teleservices Corporation
 MPA-User Fee—Magazine Publishers of America
 MasterCard-User Fee—MasterCard International, Inc.
 NACDS-User Fee—National Association of Chain Drug Stores
 NAR-User Fee—National Association of Realtors
 NASUCA-User Fee—National Association of State Utility Consumer Advocates
 NEMA-User Fee—National Energy Marketers Association
 Not-For-Profit Coalition-User Fee—Not-For-Profit and Charitable Coalition
 SBC-User Fee—SBC Communications, Inc.
 Tennessee-User Fee—Tennessee Regulatory Authority
 SBA-User Fee—United States Small Business Administration, Office of Advocacy
 Visa-User Fee—Visa U.S.A., Inc.
 Wells Fargo-User Fee—Wells Fargo & Company

Concurring Statement of Commissioner Orson Swindle in *Telemarketing Sales Rule*, File No. R411001

I wholeheartedly support the amendments to the Telemarketing Sales Rule (“TSR”), because I believe that they will help protect consumers from deceptive and abusive telemarketing practices. In particular, these amendments will give consumers the ability to avoid the sheer volume of unwanted telemarketing calls that many consider to be a nuisance. I write separately to explain my views on two issues — how the Commission determines whether an act or practice is

“abusive” for purposes of the TSR, and the national do-not-call registry.

Abusive Telemarketing Acts or Practices

The Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”) directs the Commission to promulgate rules that prohibit “deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.” 15 U.S.C. 6102 (a)(1). To determine what constitutes an abusive telemarketing practice, the Commission for the most part has used the examples of abusive practices that Congress provided in the Telemarketing Act and principles drawn from these examples. I agree that this is an appropriate analysis, and in light of the rulemaking record as a whole, I fully support the TSR amendments that fall within these parameters. These amendments include, among other things, the provisions involving the national do-not-call registry, transmission of caller identification information, and abandoned calls and predictive dialers.

When the Commission seeks to identify practices as abusive that are less distinctly within the parameters of the Act’s examples and their emphasis on privacy protection, the Commission employs its traditional unfairness analysis.¹ I understand the Commission’s intention to narrow the potentially expansive scope of the term “abusive” by using its unfairness analysis. However, given the broad ordinary meaning of the term “abusive,” I believe that the standard for determining what constitutes an abusive telemarketing practice likely is broader than the stringent definition of the term “unfair.” Therefore, I would have preferred it had the Commission looked to the plain meaning of the term “abusive” and then formulated a separate standard to identify abusive

¹ Given that nothing in the language of the Telemarketing Act or its legislative history indicates that Congress intended the Commission to use its unfairness standard to determine which practices are abusive, I previously raised concerns about this analysis and requested comment on this issue. *Concurring Statement of Commissioner Orson Swindle in Telemarketing Sales Rule Review*, File No. R411001, available at (www.ftc.gov/os/2002/01/swindletsrstatement.htm). Although some comments agreed with this concern, they did not offer an alternative analysis of abusive practices beyond suggesting that the Commission’s authority is limited to the examples of abusive practices included in the Telemarketing Act and its legislative history. See *Statement of Basis and Purpose* at 100, n. 428. However, because the Act does not limit the Commission’s authority to identify abusive practices to the examples in the Act, the Commission may prohibit other practices that it identifies as abusive.

telemarketing practices for purposes of the Telemarketing Act and the TSR.

Nevertheless, I agree with the Commission’s conclusion that a telemarketing practice that meets the strict unfairness standard will constitute an abusive practice for purposes of the Act and the TSR. In light of the rulemaking record, I therefore support the TSR amendments that are analyzed under this standard. This includes the requirement that telemarketers obtain consumers’ or donors’ express informed consent before causing their information to be submitted for payment. The rulemaking record evidences the harm that results from unauthorized billing, the need for the consent requirement, and the need to mandate specific steps that telemarketers must take to obtain consumers’ consent in transactions involving preacquired account information.

In addition, the record supports the prohibition on the disclosure or receipt, for consideration, of unencrypted account numbers for use in telemarketing (except to process a payment for goods or services or a charitable contribution pursuant to a transaction). I do not believe that the mere disclosure of personal financial information, without more, causes or is likely to cause substantial consumer injury. In this situation, however, the rulemaking record provides a basis for concluding that trafficking in unencrypted account numbers is likely to cause substantial consumer injury in the form of unauthorized billing. Industry comments state that there is no legitimate reason to purchase unencrypted lists of credit card numbers. Therefore, there is a strong likelihood that telemarketers who do engage in this practice will misuse the information in a manner that results in unauthorized charges to consumers’ accounts. The Commission’s law enforcement experience corroborates this conclusion.² As a result, I conclude that this practice is abusive for purposes of the Telemarketing Act.

The National Do-Not-Call Registry

The Telemarketing Act and the TSR recognize consumers’ “right to be let alone.” See, e.g., *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (stating that the “right to be let alone” is the “most comprehensive of rights and the right most valued by

² See *Statement of Basis and Purpose* at 97-98. In addition, given the evidence that the use of encrypted account information in telemarketing can result in unauthorized charges, there is an even greater likelihood that injury will occur when a telemarketer has obtained, for consideration, consumers’ actual credit card numbers.

civilized men”). In the context of telemarketing, there is an inherent tension between this right and the First Amendment’s right to free speech. With this in mind, and in light of the rulemaking record as a whole, the Commission has determined to establish a national do-not-call registry. This will enable consumers to stop certain telemarketing calls — calls to induce the purchase of goods and services from companies within the FTC’s jurisdiction (except where the consumer has an “established business relationship” with the seller).

Although the USA PATRIOT Act of 2001 gave the Commission authority to regulate for-profit companies that make telephone calls seeking charitable donations on behalf of charities, the Commission has determined to exempt these entities from the national do-not-call registry requirements. Instead, the Commission requires these telemarketers to comply with the “entity-specific” do-not-call provision, which prohibits them from calling

consumers who have said they do not want to be called by or on behalf of a particular entity. This more narrowly tailored approach seeks to protect consumers from unwanted telemarketing calls seeking charitable donations, while minimizing the impact of the TSR on charities’ First Amendment rights. I do not object to taking this approach at the outset; but if there is evidence that suggests that this approach is not effective in protecting consumers from unsolicited telemarketing calls, the Commission should revisit this decision and require for-profit telemarketers seeking charitable donations to comply with the national do-not-call registry.

While I believe that the amended TSR and the national do-not-call registry will go a long way to help consumers prevent unwanted intrusions into their homes, a number of entities are not subject to the TSR’s requirements. Under the Telemarketing Act and the TSR, the Commission does not have jurisdiction in whole or in part over the

calls of entities such as banks, telephone companies, airlines, insurance companies, credit unions, charities, political campaigns, and political fund-raisers. From the perspective of consumers, the right to be let alone is invaded just as much by unwanted calls from exempt entities (e.g., banks, telephone companies, or political fund-raisers) as it is by such calls from covered entities.³ Therefore, I believe that the entire spectrum of entities that make telemarketing calls to consumers should be subject to do-not-call requirements.

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³ The Federal Communications Commission, however, has requested comment on whether to establish a national do-not-call registry that would address telemarketing calls by at least some of the entities that are exempt from the FTC’s jurisdiction. *Notice of Proposed Rulemaking*, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 67 FR 62667 (Oct. 8, 2002).