FEDERAL TRADE COMMISSION

16 CFR Part 310

Telemarketing Sales Rule Fees

AGENCY: Federal Trade Commission.

ACTION: Final rule.

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

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

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

FOR FURTHER INFORMATION CONTACT: David M. Torok, (202) 326–3075, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

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

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

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

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

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

II. Constitutionality

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

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

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

[2] The FCC Rules may be found at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC–03–153A1.pdf.

[3] 47 CFR 64.1200(c)(2), amended July 3, 2003.

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

[5] *See, e.g.*, 68 FR 4580, 4634–37 (January 29, 2003).

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

[7] ATA-Revised Fee at 3–6. *See also* DMA-Revised Fee at 6 n.11 (contending ''the Court took a dim

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

III. Access to the National Do Not Call Registry

A. Entities That Are Allowed Access

In Section 310.8(e) of the Revised Fee NPRM, the Commission proposed to allow access to the national registry by telemarketers, sellers, others engaged in or causing others to engage in telephone calls for commercial purposes, and service providers acting on behalf of such persons.[10] The Commission stated that such access to the National Do Not Call Registry may be necessary to effectuate more fully the purpose of the ''do-not-call'' regulations; namely, to enable consumers to stop unwanted telemarketing calls. Such access would allow those entities that are exempt from the FTC's jurisdiction, but that want to scrub their calling lists as a matter of customer service, to obtain the information necessary to do so. It also would allow sellers to obtain access, as well as other entities that have traditionally provided service to the telemarketing industry. The Commission further stated that the information in the national registry should be used for no other purpose than to stop unwanted telemarketing calls. Thus, the Commission proposed that, prior to gaining access to the national registry, a person would be required to certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent calls to telephone numbers on the registry.

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

B. Entities Required To Pay the Fee

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

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

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

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

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

[10] Proposed Section 310.8(e) also permitted access to the national registry by any government agency that has the authority to enforce a federal or state ''do-not-call'' statute or regulation. Such agencies will access information in the national registry through Consumer Sentinel, a dedicated, secure website available only to law enforcement agencies. The Commission is expanding this provision of the Final Fee Rule to allow access to the national registry to any ''government agency that has law enforcement authority.'' This revised language more effectively mirrors the list of law enforcement agencies that currently have access to Consumer Sentinel, and that therefore will have access to the national registry data.

[11] *See* ARDA-Revised Fee at 2; BOA-Revised Fee at 1; Household-Revised Fee at 2; NCL-Revised Fee at 1 (''Entities that are exempt from the FTC's jurisdiction should not be prevented from voluntarily accessing the registry to avoid calling consumers who do not wish to receive telemarketing solicitations.'').

[12] DMA-Revised Fee at 15–16. *See also* NCL-Revised Fee at 1.

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

[14] *See* ABA-Revised Fee at 1; ATA-Revised Fee at 5–6; VISA-Revised Fee at 1–2.

[15] *See* 16 CFR 310.4(b)(1)(iii)(B)(i) and (ii).

[16] ATA-Revised Fee at 5–6.

should not be required to pay a user fee provided the seller does not access the registry for other reasons.''[17]

The Commission agrees that sellers engaged solely in calls to persons with whom they have an established business relationship or from whom they have obtained express written agreement to call, and who do not otherwise want to access the national registry, should not have to pay an annual fee. As a result, the Commission is amending Section 310.8(a) to make clear that sellers do not have to pay for access to the National Do Not Call Registry if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to the exemptions set forth in Amended TSR §§ 310.4(b)(1)(iii)(B)(*i*) or (*ii*), and the seller does not access the National Do Not Call Registry for any other purpose. A similar change is being made to Section 310.8(b), regarding telemarketer access to the national registry.

Some commenters requested clarification that sellers exempt from the Amended TSR are not required to access the National Do Not Call Registry and pay the annual fee.[18] With the adoption of the FCC Rules, the list of sellers exempt from the requirements of the National Do Not Call Registry under federal law is considerably narrowed. Any such exempt seller, however, is not required to access the national registry or pay the annual fee. For example, solicitations to induce charitable contributions via outbound telephone calls are not covered by the National Do Not Call Registry requirements of the TSR.[19] As a result, sellers involved only in such solicitations would not be required to pay a fee or access the national registry. In addition, entities engaged solely in conducting surveys are not seeking to induce the purchase of goods or services and therefore are not engaged in ''telemarketing'' nor subject to the TSR.[20] Similarly, political fund raising is not ''telemarketing'' and is not covered.[21] Of course, any of those entities may access the national registry if they voluntarily wish to prevent calling telephone numbers that are on the registry, or if they are required by other laws or regulations to gain such access.

DMA stated that nonprofit organizations voluntarily accessing the national registry to avoid calling potential donors who do not want to receive telemarketing calls should not be charged for such access.[22] The Commission agrees that such charges are unwarranted. Section 310.8(c) is amended to provide that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the national registry without being required under this Rule, the FCC Rules, or any other federal law.[23] Such persons must provide all information required of other entities accessing the registry, must certify, under penalty of law, that they are accessing the registry solely to prevent telephone calls to telephone numbers on the registry, and must further certify that they are accessing the registry without being required under this Rule, the FCC Rules, or any other federal law. Affording these persons such access to the registry will enable them to abide by consumers' choices not to be called by commercial telemarketers. At the same time, the certification requirement—under penalty of law—will enable the Commission to take appropriate steps against those who misuse the registry.

The Commission also proposed in the Revised Fee NPRM that telemarketers who are not also sellers—*i.e.*, entities that engage in telemarketing only on behalf of others—would not have to pay a separate fee for their access to the national registry. Similarly, list brokers or other service providers who develop and/or scrub the calling lists for their seller-clients would not have to pay for their individual access to the national registry. Instead, such telemarketers and service providers would be required to ensure that their seller-clients have paid for access to the National Do Not Call Registry prior to initiating outbound telephone calls, or providing services, on their behalf. Telemarketers and service providers would gain this assurance by obtaining and using the seller's unique account number to access the national registry.

DMA opposed this ''seller pays'' model for the National Do Not Call Registry.[24] Instead, DMA suggested that the FTC ''should leave the issue of who pays for the List to the contractual provisions between service bureaus and sellers.''[25] IMC stated that a ''more workable proposal would be to require each calling entity, third party *or* seller using in house callers to purchase and implement the list. Thus, IMC could purchase access to the registry once and call on behalf of all its clients.''[26] The Commission does not believe such a system would equitably spread the fees for the national registry among all entities that engage in telemarketing. As the Commission explained in the Revised Fee NPRM, sellers are the ultimate beneficiaries of telemarketing campaigns, and covered sellers must gain access to the information in the national registry to remain in compliance with the ''do-not-call'' provisions of the Amended TSR. As a result, all such sellers should pay an appropriate fee for that access. Moreover, by charging only telemarketers for access to the national registry, and charging them only once for their access on behalf of multiple clients, IMC's proposed fee structure would inequitably benefit those sellers that employ a telemarketer with multiple clients. This inequitable advantage is created because those sellers would bear less of the cost of access to the same information than sellers that engage in their own telemarketing without hiring a telemarketer. Thus, the Commission will require sellers, and not their telemarketers or service providers, to pay for access to the national registry.[27]

The FCC Rules recognize that allowing telemarketers and others to share the information obtained from the national registry ''would threaten the financial support for maintaining the database.''[28] In fact, the FCC Rules specifically prohibit any entity that accesses the national registry from ''participat[ing] in any arrangement to share the cost of accessing the national

[17] VISA-Revised Fee at 1–2.

[18] *See* FSR-Revised Fee at 1–2; VISA-Revised Fee at 1–2.

[19] 16 CFR 310.6(a). *See also* 47 CFR 64.1200(f)(9)(iii), amended July 3, 2003 (FCC Rules defining a ''telephone solicitation'' as not including a call or message ''by or on behalf of a tax-exempt nonprofit organization.''

[20] The Amended TSR defines ''telemarketing'' as 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.'' 16 CFR 310.2(cc).

[21] Sellers that engage solely in intrastate telemarketing, or that engage in businesses outside of the jurisdictional limitations of the FTC, are not required by the Amended TSR to access the National Do Not Call Registry or pay for such access. However, such companies are required by the FCC Rules to access the national registry and pay for such access. *See* FCC Rules at ¶ 27.

[22] *See* DMA-Revised Fee at 15–16.

[23] Such persons consist solely of entities engaged in outbound telephone calls to consumers to induce charitable contributions, for political fund raising, or to conduct surveys.

[24] See DMA-Revised Fee at 7–8.

[25] Id.

[26] IMC-Revised Fee at 5.

[27] The FCC Rules require all entities ''making telephone solicitations (or on whose behalf telephone solicitations are made)'' to ''purchase[] access to the relevant do-not-call data from the administrator of the national database.'' 47 CFR 64.1200(c)(2)(i)(E), amended July 3, 2003. The Commission will deem all telemarketers or service providers who are not also sellers to have ''purchased access'' to the national registry by providing the unique account number of the seller on whose behalf the telemarketer or service provider is gaining access.

[28] FCC Rules at ¶ 32, n.129.

database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers.''[29] The Commission agrees with the FCC, and believes such a prohibition is appropriate to include in the Final Fee Rule as well. As a result, the Commission is including similar prohibitory language in Section 310.8(c).[30]

The Revised Fee NPRM did not permit any entity, other than a seller, to purchase the list of numbers in the national registry. A number of commenters noted that telemarketers calling on behalf of exempt entities would be in the ''untenable position'' of being required to comply with the ''do-not-call'' provisions of the Amended TSR, but not having the ability to access the national registry without their exempt seller-clients having paid for access.[31] To address this potential problem, some commenters suggested allowing telemarketers direct access to the national registry.[32] Convergys, a large telemarketer commenter, described a number of other situations when telemarketers may want to subscribe to the national registry although their seller-client is not required to do so, or has already purchased the list. For example, the telemarketer may want to scrub the calling list of a client calling customers with an existing business relationship, or ''to help guard against errors or omissions'' in the sellers' lists and to re-verify the accuracy of those lists.[33]

For the reasons set forth in these comments, the Commission agrees that allowing independent access to the national registry by telemarketers or other service providers is appropriate. As a result, telemarketers or service providers will be allowed to gain access to the national registry on their own behalf, without being limited solely to the access allowed for their seller-clients. To maintain the fairness of the fee structure, however, telemarketers and service providers will be required to pay the appropriate fee for such independent access. Moreover, covered sellers still will be required to pay the fee prior to engaging in, or causing a telemarketer to engage in, outbound telephone calls for which access to the ''do-not-call'' registry is required by the Amended TSR. This ''covered seller pays'' requirement remains in place regardless of whether the telemarketer or service provider employed by the seller independently and voluntarily pays for access to the national registry. In addition, telemarketers and service providers paying for such independent access must certify that they are accessing the national registry solely to comply with the provisions of the Amended TSR, or otherwise to prevent telephone calls to telephone numbers on the national registry. Finally, such telemarketers or service providers are not permitted to use the information they obtain from the national registry on behalf of any entity, covered seller or exempt, unless that entity has paid the appropriate fee for access to the information or, for exempt sellers, has submitted the appropriate certification to gain access to the national registry.

C. Other Registry Access Issues

Commenters raised three other issues regarding access to the national registry. First, commenters suggested allowing sellers and telemarketers to allocate responsibility among themselves for obtaining access to the national registry. The Revised Fee NPRM anticipated that all covered sellers would initially access the national registry on their own behalf, pay the appropriate fee and acquire an account number, which they could then provide to any telemarketer or service provider that they wish to hire. Commenters noted, however, that telemarketers and service bureaus frequently access state ''do-not-call'' lists on behalf of their seller-clients.[34] These commenters maintained that sellers should be permitted to access the national registry either directly, or permit a third party, such as a telemarketer or list broker, to enroll and access on the seller's behalf. ''In either event, a unique account number could be assigned for each seller, thereby allowing it the flexibility to change telemarketers/service providers, or use multiple telemarketers, once an access fee has been paid on its behalf.''[35]

The Commission is persuaded that such flexible access is appropriate. Sellers may contract with telemarketers or other service providers to access the national registry on their behalf to satisfy the rule's requirements. In this way, sellers and their agents can allocate the responsibility for accessing the registry, although the seller remains ultimately liable for calls made on its behalf, and telemarketers remain liable for ensuring that their covered sellers have paid the appropriate fee. A unique account number still will be provided in the seller's name, for use by the seller throughout its annual period. As a result, §§ 310.8(a), (b), and (d) are amended to allow sellers to pay the annual fee ''either directly or through another person.''

The second issue raised by commenters regarding access to the national registry concerns the frequency of that access. Convergys stated that the fee rule should require telemarketers to access the data quarterly, regardless of the number of new clients they might acquire during that period. Telemarketers could then update their access and their registration information (with identities of new sellers) on a quarterly basis.[36] Similarly, DMA stated that it is inefficient to require a service bureau to access the registry separately in the event it signed up a new client, even though it has a current version of the telephone numbers in the registry.[37] Convergys also noted that current telemarketer systems are designed to allow telemarketers to access data directly and use it for more than one client. According to Convergys, limiting access to varying levels paid for by various clients would require significant modifications, burdens and costs.[38]

The Commission never proposed requiring telemarketers or service bureaus to access the national registry or download data separately for each client. There are two requirements in effect that mandate the frequency of access to the national registry. First, § 310.4(b)(3)(iv) of the Amended TSR requires sellers and telemarketers to employ a version of the national registry obtained from the Commission no more than three months prior to the date any call is made. Second, § 310.8(a) of the revised fee rule requires sellers to pay the annual fee prior to initiating, or causing a telemarketer to initiate, outbound telephone calls to persons whose numbers are on the registry. As a result, a telemarketer need only access the national registry once every three months, assuming it can scrub all of its calling lists by using that frequency of access.[39] It can call on behalf of all of

[29] 47 CFR 64.1200(c)(2)(i)(E), amended July 3, 2003.

[30] Inclusion of this prohibition in the Fee Rule also will ''maximize consistency'' between the FTC and FCC Rules. *See* Do Not Call Implementation Act, § 3.

[31] *See* ABA-Revised Fee at 1–2; BOA-Revised Fee at 1–2; Convergys-Revised Fee at 3–5; FSR-Revised Fee at 1–2.

[32] *See* BOA-Revised Fee at 1–2; Convergys-Revised Fee at 5.

[33] *See* Convergys-Revised Fee at 2–5.

[34] *See* ERA-Revised Fee at 3–5; MPA-Revised Fee at 4–5; West-Revised Fee at 1–2.

[35] ERA-Revised Fee at 4.

[36] Convergys-Revised Fee at 6–8.

[37] DMA-Revised Fee at 8.

[38] Convergys-Revised Fee at 6.

[39] The Commission has developed the ''do not call'' rules to allow sellers and telemarketers to determine when and how frequently they need to access the national registry to remain in compliance. Unlike many state systems, the national registry is continuously updated as

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its clients during that period, scrubbing from all of its calling lists those numbers that were included in the national registry at the time the telemarketer accessed the registry. If the seller-client agrees to allow the telemarketer to use the information already in the telemarketer's files from a prior download from the national registry within the previous three months, there is no rule violation for the telemarketer to do so. In other words, telemarketers and service providers acting on behalf of sellers may use one download from the national registry on behalf of multiple clients, as long as the fee for each of the seller-clients is paid.

The third access issue raised by commenters is an objection to the requirement that telemarketers and list brokers must identify their clients when accessing the national registry. According to DMA, these ''contractual relationships are proprietary information and bear no relationship to consumer privacy.'' [40] Convergys stated: ''For any business, customer identity is inherently sensitive, proprietary data and there is no basis in the record for requiring telemarketers to disclose it routinely and in the absence of substantial complaints or other evidence to suggest there have been violations.'' [41] The Commission understands the likely proprietary nature of these business relationships, and notes that, to the extent, if any, such information constitutes trade secrets or other confidential or privileged commercial or financial information, it would not be subject to mandatory public disclosure by the Commission.[42] Nevertheless, this information is critical for effective law enforcement of the ''do not call'' registry provisions of the Amended TSR, as well as for effective collection of the required fees. Typically, consumers reporting ''do-not-call'' complaints will have only the name of the seller provided to the consumer during the call. As part of the investigation of such complaints, law enforcement may seek to determine whether the seller made that call on its own behalf, or used the services of a telemarketer. Information provided by sellers and telemarketers to gain access to the national registry is highly relevant to law enforcement. Querying the registry is faster, less expensive, and a potentially more reliable method of obtaining that information than traditional discovery tools, which also likely would eventually result in the disclosure of the same proprietary information. Equally important, to ensure that all sellers pay their appropriate share of the registry fees, it is critical to know the identity of each seller that pays the fee, and on whose behalf each telemarketer or service provider is accessing the national registry. Thus, the Commission will continue to require, in § 310.8(e), that if a person is accessing the national registry on behalf of other sellers, that person must identify each of the other sellers.

D. Seller and Telemarketer Liability

In the Revised Fee NPRM, the Commission proposed, in Section 310.8(a) of the Rule, to make sellers directly liable for initiating, or causing a telemarketer to initiate, an outbound telephone call without first paying the appropriate fee for access to the national registry. The Commission also proposed, in Section 310.8(b), to make telemarketers directly liable for initiating an outbound telephone call on behalf of a seller without first ensuring that their seller-clients have paid for up-to-date access to the National Do Not Call Registry. The Commission proposed imposing this liability under the authority of the Appropriations Act and the Implementation Act, in addition to the Telemarketing Act, which provides the authority for the other portions of the Amended TSR.

This proposed liability engendered a wide range of comment. For example, NCL stated: ''The FTC's proposal to hold sellers and any entities acting on their behalf directly liable for compliance with the fee requirements is absolutely crucial to prevent abuses in this regard.'' [43] On the other hand, IMC maintained that liability should not exist unless a seller or telemarketer calls a consumer who had placed their number on the registry. According to IMC, liability for simply failing to purchase the list is unrelated to any consumer privacy interest and is unconstitutional.[44]

As the Commission stated in the Revised Fee NPRM, direct liability on sellers and telemarketers is necessary to effectuate fairly the mandate of the Appropriations Act and the Implementation Act, which authorize the Commission to collect fees sufficient to cover the costs of implementing and enforcing the ''do-not-call'' provisions of the Amended TSR. Without such direct liability, the Commission remains concerned that not all entities that obtain information from the national registry will pay their fair share of the fees for that information, resulting in increased fees for those entities that do pay. The Commission continues to believe that the most effective way to ensure that all covered sellers pay their fair share of the registry fees is to impose direct liability upon them if they initiate, or cause a telemarketer to initiate, a call to a consumer without first paying the appropriate annual fee.

As for telemarketer liability, a number of commenters suggested that ''where a service bureau has reasonably relied on evidence that its seller clients have paid for access, the service bureau should not be held liable for the seller's lack of compliance.'' [45] The Commission agrees that telemarketers can rely on the registry for proof of payment as long as that reliance is reasonable given the totality of the circumstances. If a telemarketer or list broker accesses the national registry on behalf of a seller-client and presents that seller-client's unique account number, the telemarketer will be able to determine whether the seller's account is paid up to date, and the extent of access allowed by that payment. The telemarketer or service provider may rely on that information as proof of the seller's payment.

Thus, Sections 310.8(a) and (b) continue to impose direct liability on sellers and telemarketers. The failure of a covered seller to pay the appropriate fee prior to initiating or causing another entity to initiate an outbound telephone call and the failure of a telemarketer to ensure that a covered seller has paid the appropriate fee prior to initiating an

consumers register. As a result, telemarketers obtain the most up-to-date list of telephone numbers each time they access the registry. This allows consumers to see a decrease in telemarketing calls from the first day they register, rather than having to wait for their numbers to be published in a quarterly list. This caused some concern for one commenter, West, that stated: ''Without a defined update schedule, the potential exists for numbers to be missed in the three-month window. It takes approximately twenty to twenty-four hours to update the West system with a do-not-call registry consisting of one million records because the upload happens on a real time basis. Given this, there is the potential for a number that is added one day after West downloads the do-not-call registry to be missed in the three month window. This would require West to actually download the list more than quarterly to avoid this potential problem.'' West-Revised Fee at 2. It is up to the individual seller or telemarketer to determine how frequently it must access the national registry to remain in compliance with the requirement that it use a version of the registry obtained from the Commission not more than three months prior to the date any call is made.

[40] DMA-Revised Fee at 7–8.

[41] Convergys-Revised Fee at 5–6.

[42] *See* Freedom of Information Act Exemption 4, 5 U.S.C. 552(b)(4); FTC Act § 6(f), 15 U.S.C. 46(f).

[43] NCL-Revised Fee at 1–2.

[44] IMC-Revised Fee at 5–6.

[45] DMA-Revised Fee at 15. *See also* IMC-Revised Fee at 6 (suggesting the Final Fee Rule should ''allow a telemarketer to legally rely on a seller providing a working access number as conclusive proof that the seller has properly purchased access to the registry''); ARDA-Revised Fee at 3.

outbound telephone call on its behalf are violations of the Amended TSR, and subject the seller and telemarketer to all remedies available for such violations.

E. Corporate Divisions, Subsidiaries, and Affiliates

In the Revised Fee NPRM, the Commission proposed to treat each separate division, subsidiary, or affiliate of a corporation as a separate seller for purposes of Section 310.8. The Commission rejected comments suggesting that separate subsidiaries, divisions, or affiliates of the same corporation be treated as a single seller, stating that such treatment could greatly diminish the number of entities that will pay for access to the national registry, provide an unjust advantage to larger, multi-divisional corporations, and potentially increase the fees required to be paid by smaller, less complex corporate entities.

NCL agreed with the Commission's proposal, stating that allowing separate subsidiaries, divisions, and affiliates ''to be considered as one seller, even though they would likely be conducting telemarketing campaigns for quite different products or services, would create an inequitable situation for smaller companies and threaten the financial viability of the registry.''[46] On the other hand, this proposal was significantly criticized by industry commenters.[47] They noted that companies organize into affiliated entities for tax, regulatory and historical reasons, often beyond their control.[48] For example, SBC noted that due to statutory and regulatory requirements, it would be required to pay over 44 separate annual fees, even though the services provided by its separate subsidiaries and affiliates are similar and consumers have a reasonable expectation that they are dealing with one company.[49] West stated that the proposal would cause it problems, since telemarketers such as itself would need to understand the corporate divisional structure of their seller-clients, which is not always clear.[50] In addition, a number of commenters noted that this proposal appeared contrary to the Commission's assertion, stated in the Revised Fee NPRM, that the agency did not want to charge the same company multiple times for access to the national registry.[51]

Many commenters suggested, as an alternative, that the Commission should use the ''consumer expectation'' factors set forth in the Amended TSR Statement of Basis and Purpose that apply to the established business relationship exemption to determine whether separate divisions, subsidiaries, or affiliates must pay the annual fee; namely, would consumers reasonably perceive the entity as a single seller based on the nature and type of goods or services sold and the identity of the division, subsidiary or affiliate.[52] On the other hand, another commenter noted that such factors do not provide sufficient notice as to whether any particular division would be required to separately purchase access to the national registry, and that the final rule must provide ''a more definitive definition of the circumstances that would subject multiple divisions to separate fee obligations.''[53]

The Commission agrees that, for purposes of assessing a fee, the test to determine who must pay must be more specific and clear cut than the ''consumer expectation'' test established for the established business relationship exemption. The ''consumer expectation'' test works for determining whether a company has violated the established business relationship exemption because it is consumers themselves who will state, in their complaints, that they did not believe the company that called was related to the company with which they had done business in the past. There will be no such consumer arbiters to determine who should pay the fee. The Commission does agree, however, that those factors are appropriate ones to consider in determining which divisions, subsidiaries, or affiliates should pay a fee.

To develop a more bright line test for which entities must pay, while taking the consumer expectation factors into consideration, the Commission will require separate divisions, subsidiaries, or affiliates to pay a separate annual fee for access to the national registry under the following circumstances: (1) The entity is separately incorporated or, for a non-corporate entity such as a partnership, is a similarly distinct legal entity; and (2) the entity has or markets under a different name. If the name difference reflects only a geographic distinction, that will not be sufficient to require the entity to pay a separate fee for access. For example, ''ABC Marketer of Oklahoma, Inc.'' would not be considered a separate seller, for purposes of the Fee Rule, from its affiliate, ''ABC Marketer of Texas, Inc.'' On the other hand, if the name difference reflects some other distinction, such as product or service, then the separately-incorporated entity would be required to pay a separate fee for access. For example, ''John's Books and Games, Inc.'' would be considered a separate seller from its subsidiary, ''John's Computers, Inc.''[54]

IV. Calculation of Fees

A. Number of Entities Accessing the National Registry

The first step in establishing the appropriate fees to charge entities that access consumer telephone numbers included in the national registry is to estimate the number of such entities that would be required to pay the fee. In both the User Fee NPRM and the Revised Fee NPRM, the Commission acknowledged that this step is among the most difficult, given the dearth of information about the number of companies currently in the marketplace who make outbound telemarketing calls to consumers.[55] In the User Fee NPRM, the Commission determined, after examining relevant industry literature and the record in this and past TSR rulemaking proceedings, that the most pertinent information for determining the number of firms that would be required to pay the proposed user fee would be the number of firms that access state do-not-call registries. At that time, the most telemarketing firms that accessed any individual state registry was 2,932. Thus, to propose a realistic fee structure that would ensure sufficient funds would be collected to cover the costs of a national registry, the Commission estimated in the User Fee NPRM that 3,000 entities would pay for access to the information in the national registry. The Commission sought comment and evidence to determine

[46] NCL-Revised Fee at 2.

[47] *See, e.g.*, ARDA-Revised Fee at 4; BOA-Revised Fee at 2; DMA-Revised Fee at 11–12; ERA-Revised Fee at 5–6; Household-Revised Fee at 2; IMC-Revised Fee at 5; MPA-Revised Fee at 3–4; SBC-Revised Fee at 2–4; Verizon-Revised Fee at 1–4; VISA-Revised Fee at 2.

[48] *See* BOA-Revised Fee at 2; SBC Revised Fee at 2–4; VISA-Revised Fee at 2.

[49] SBC-Revised Fee at 2. See also Verizon-Revised Fee at 1–4 (Verizon includes roughly two dozen separate corporations that engage in telemarketing).

[50] West-Revised Fee at 3.

[51] *See, e.g.*, MPA-Revised Fee at 3–4; SBC-Revised Fee at 2–4.

[52] ARDA-Revised Fee at 4; ERA-Revised Fee at 5–6; MPA-Revised Fee at 3–4; SBC-Revised Fee at 2–4.

[53] BOA-Revised Fee at 2.

[54] The Commission does not believe these changes to the treatment of corporate subsidiaries and affiliates warrant any change to the estimate of the number of entities that will pay for access to the national registry, discussed below. There is no evidence on the record to indicate that the types of subsidiaries and affiliates which no longer will be considered separate sellers under the Final Fee Rule are numerous or widespread throughout the telemarketing industry.

[55] *See* User Fee NPRM, 67 FR at 37363–64, Revised Fee NPRM, 68 FR at 16241.

whether this estimate was realistic and appropriate.

Of the 34 comments received in response to the User Fee NPRM, only one commenter provided any information relevant to this inquiry, stating the number of clients for which it would have to obtain access to the national registry. In addition, a second commenter provided some company-specific information. Based on these comments, the Commission proposed a new estimate of the number of firms that will access the national registry, developed through a calculation using the limited information provided in the comments, combined with relevant industry-wide data available and the Commission's knowledge of the industry. Based on this detailed calculation, set out in the Revised Fee NPRM, the Commission estimated that the total number of firms that would access the national registry would be 7,500.[56]

As the Commission stated in the Revised Fee NPRM, this calculation made a number of significant assumptions based on the best information available to the agency at that time. The Commission asked specific questions about each of these assumptions, seeking information as to their reliability. The Commission also asked commenters to provide any information they could about any and all of these assumptions, including company-specific information and data that could help the agency to refine its estimates of the number of firms that will need to access the national registry.

Once again, the Commission received virtually no comments providing information on the validity of the Commission's assumptions. One ''leading teleservices company'' stated that one of the Commission's assumptions—sellers that use third-party telemarketers on average employ three different telemarketers to make calls to consumers over the course of a year—was ''generally accurate.'' [57] Two telemarketer commenters stated that most of their clients market nationwide.[58] Otherwise, the comments provided no information on this question whatsoever. Instead, the major industry association commenters faulted the Commission's calculations, claiming that they are ''largely without empirical foundation,'' [59] ''speculative and largely unsupported'' and ''completely arbitrary.'' [60]

As previously stated, the Commission's calculations are based on the best information available to the agency at this time. Although the Commission has requested information on this issue on a number of prior occasions, the very entities that have access to such information have rebuffed the agency at every stage. The Commission has no obligation to ''conduct a comprehensive study of the telemarketing industry'' to determine the proper fees, as suggested by the DMA.[61] In fact, it has reason to doubt such a study would be productive, given the industry's ongoing reticence in this area. The Commission has undertaken substantial efforts to determine the number of entities that will be required to access the national registry. It has scoured industry literature, reviewed and analyzed numerous rounds of comments on this issue, and used its knowledge of the industry to make basic assumptions about its operation. Given this review and analysis, and the limited information provided in the comments, the Commission continues to believe that its original estimate that 7,500 entities will be required to pay for access to the national registry is reasonable and appropriate.

However, given the new FCC Rules, additional entities, originally exempt from the Amended TSR, now will be required to access the national registry. In the Revised Fee NPRM, the Commission estimated that a total of 10,900 firms engage in outbound telemarketing to consumers.[62] The Commission reduced that number to account for firms that are engaged in charitable solicitations, firms that are calling directly from sellers exempt from FTC regulation, and firms that make only intrastate calls. Of that group, after the adoption of the FCC Rules, only firms that engage in charitable solicitations remain exempt from the requirement to access the national registry. The Commission estimates that 900 entities engage exclusively in such charitable solicitations, resulting in our revised estimate that 10,000 entities will be required to access the national registry.

B. Access by Area Code; Small Business Access

In both the User Fee NPRM and the Revised Fee NPRM, the Commission proposed a fee structure based on the number of different area codes of data that an entity wished to use annually.[63] The Commission received no comments on this issue in response to the Revised Fee NPRM. As a result, the Commission will continue to charge for access to the national registry based on the number of area codes of information an entity requests.

As for small business access to the national registry, the Commission proposed, in both the User Fee NPRM and the Revised Fee NPRM, to provide free registry access to any firm wishing to obtain data from only one to five area codes.[64] The Commission proposed such free access to limit the burden placed on small businesses that only require access to a small portion of the national registry. The Commission noted that its proposal was consistent with the mandate of the Regulatory Flexibility Act, 5 U.S.C. 601, which requires that to the extent, if any, a rule is expected to have a significant economic impact on a substantial number of small entities, agencies should consider regulatory alternatives to minimize such impact.[65] In the Revised Fee NPRM, the Commission sought comment on other alternatives that would balance the burdens faced by small businesses with the need to raise appropriate fees to fund the registry in an equitable manner, as well as on the appropriate level of free access.

The Commission received few comments in response to this proposal in the Revised Fee NPRM. NCL found the Commission's proposal ''reasonable.'' [66] S&K, on the other hand, stated that the Commission should grant access to five or maybe even ten area codes for free, and ''employ a graduated system that places the majority of the fees on the largest scale sellers or telemarketers, as determined by a mixture of revenues, profits, subsidiaries and overall cost structure.'' [67] In contrast, ATA contended that the proposed fee was unconstitutional precisely because it would impose differential treatment, shift the burden to certain sellers to pay for fees in excess of the benefits they would receive, and thus target and penalize the largest entities more than simply favor small businesses.[68] ATA

[56] *See* Revised Fee NPRM, 68 FR at 16241–42.

[57] IMC-Revised Fee at 1, 4.

[58] Id. at 4–5; West-Revised Fee at 3.

[59] DMA-Revised Fee at 8.

[60] ERA-Revised Fee at 7–8. See also MPA-Revised Fee at 6.

[61] DMA-Revised Fee at 8–10.

[62] *See* Revised Fee NPRM, 68 FR at 16242.

[63] *See* User Fee NPRM, 67 FR at 37364; Revised Fee NPRM, 68 FR at 16242.

[64] *See* User Fee NPRM, 67 FR at 37364; Revised Fee NPRM, 68 FR at 16243–44.

[65] *See also* Section VII, below, where the Commission determines that the instant proposed Rule would not have a significant economic impact on a substantial number of small entities.

[66] NCL-Revised Fee at 2.

[67] S&K-Revised Fee at 2.

[68] ATA-Revised Fee at 10–11.

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

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

C. Fees for Access

As set forth in the Background Section of this Statement, both the Appropriations Act and the Implementation Act authorize the Commission to assess fees sufficient to cover the costs of implementing and enforcing the do-not-call provisions of the Amended TSR, estimated at $18.1 million for fiscal year 2003. The Commission continues to anticipate that it will need to raise the entire estimated $18.1 million authorized to cover the costs associated with those efforts in this fiscal year. A number of commenters claimed that the Commission failed to provide any indication how it intends to spend the $18.1 million, and that the costs are not justified or necessary.[72] The Commission disagrees.

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

To raise $18.1 million this fiscal year, and assuming that 10,000 firms will pay for that access,[74] the Commission will charge an annual fee of $25 for each area code of data accessed.[75] There will be no fee charged to any entity for access to the first five area codes of data. In addition, the Commission will place a cap of $7,375 as the maximum annual fee that will be charged an entity that wants access to the entire national database. The maximum fee will now be charged for accessing 300 area codes of data or more.[76] As a result of this Fee Rule, examples of fees that will be charged for various levels of access to the national registry are as follows: obtaining up to five area codes of data would have no charge; six area codes of data would cost $25; seven area codes would cost $50; thirty area codes would cost $625; two hundred area codes would cost $4,875; and access to the data from all area codes would be capped at $7,375 annually.[77]

[69] *Id.* at 12.

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

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

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

[73] *See* Revised Fee NPRM, 68 FR at 16244.

[74] A number of commenters continued to suggest that consumers should pay a portion of the costs to implement and operate the national registry. *See, e.g.*, ARDA-Revised Fee at 7; IMC-Revised Fee at 7; MPA-Revised Fee at 7; PDS-Revised Fee at 1–3. As stated in the User Fee NPRM, the Commission does not believe it is appropriate to charge consumers to protect their privacy from unwanted and abusive telemarketing calls. *See* User Fee NPRM, 67 FR at 37363. In addition, the Implementation Act clearly authorizes the Commission to raise the appropriate fees from the industry, and not from consumers.

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

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

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

Continued

As stated above and in the Revised Fee NPRM, these fees are based on certain assumptions and estimates. The Commission anticipates that these fees may need to be reexamined periodically and adjusted, in future rulemaking proceedings, to reflect actual experience with operating the registry.

V. Operation of the National Registry for the Telemarketing Industry

The Commission is developing a fully-automated, secure website dedicated to providing members of the telemarketing industry with access to the registry's list of telephone numbers, sorted by area code. The first time an entity accesses the system, it 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 an entity is accessing the registry on behalf of a seller-client, the entity also will need to identify that client.

The only consumer information that companies will receive from the national registry is a registrant's telephone number. Those telephone numbers will be sorted and available by area code. Companies will be able to access as many area codes as desired, by selecting, for example, all area codes within a certain state. Of course, companies also will be able to access the entire national registry, if desired. In addition, after providing the required identifying information and paying the appropriate fee, if any, companies will be allowed to check, via interactive Internet pages, a small number of telephone numbers (less than ten) at a time to permit small volume callers to comply with the national registry requirements of the TSR without having to download a potentially large list of all registered telephone numbers within a particular area.

As previously stated, sellers, telemarketers and other service providers will be allowed to access the national registry. When a seller first submits an application to access registry information, the company will be asked to specify the area codes that it wants to access. As discussed above, each seller accessing the registry data will be required to pay an annual fee, based on the number of area codes of data the seller accesses. Fees will be payable via credit card (which will permit the real-time transfer of data) or electronic funds transfer (which will require the seller to wait approximately three days for the funds to clear before data access will be provided). A seller must pay these fees prior to gaining access to the registry, and may do so either directly or through another entity to which the seller has provided the necessary authority.

Sellers will be able to access data as often as they like during the course of one year (defined as their ''annual period'') for those area codes for which they have paid. However, to protect system integrity, an account number will support a download of the entire national registry only once in any 24-hour period. If, during the course of their annual period, sellers need to access data from more area codes than those initially selected, they would be required to pay for access to those additional area codes. For purposes of these additional payments, the annual period is divided into two semi-annual periods of six months each. Obtaining additional data from the registry during the first semi-annual, six month period will require a payment of $25 for each new area code. During the second semi-annual, six month period, the charge of obtaining data from each new area code requested during that six-month period is $15. These payments for additional data would provide sellers access to those additional areas of data for the remainder of their annual term.

After payment is processed, the seller will be given a unique account number and permitted access to the appropriate portions of the registry. 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, sellers will be able to download either a full updated list of numbers from their selected area codes, or a more limited list, consisting only of changes to 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 other service providers working on behalf of sellers may obtain access to the registry either directly or through the use of their seller-client's unique account number. If access is gained directly, *i.e.*, the telemarketer or service provider decides to obtain the information on its own behalf, either voluntarily or to satisfy other legal requirements, that telemarketer or service provider will need to comply with all requirements placed on sellers accessing the registry, as previously discussed in this Section. Such telemarketers and service providers will be provided a unique account number that can be used only by that company, *i.e.*, that account number will not authorize other companies to access the registry on behalf of the telemarketer or service provider. On the other hand, if telemarketers or service providers are accessing the registry through the use of their seller-client's account number, the extent of their access will be limited to the area codes requested and paid for by their seller-clients. They also will be permitted to access the registry as often as they wish for no additional cost, once the annual fee has been paid by their seller-clients.[78] As indicated in the Rule NPRM discussion of Section 310.4(b)(3)(iv), however, the Rule requires a seller or 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.

Data will be available from the national registry using Internet-based formats and download methods that serve both small and large businesses. Data also will be available in three different sets: full lists, change lists, and small list lookups. For the full lists and the change lists, downloads may be accomplished via a web browser or a programmatic web service. For the small list lookup, a web page will allow a person to enter from one to ten telephone numbers on a form. After entering the numbers and clicking a button, the national registry will display on the web page the list of numbers entered and whether each number is in the national registry or not.

With a web browser, a person will access a secure web page that will allow the person to select: a national download (all area codes), all area codes from individual states, or individual area codes.[79] After selecting the area codes, the person will choose a flat text file or an XML tagged data file. The person also will choose a zipped or unzipped file. After making these selections, the person will click a ''download'' button and be prompted to save the file to his or her company computer. If the person chooses the full list, the flat file will contain just ten-digit telephone numbers, with a single

viewed in its context.'' *National Awareness Foundation* v. *Abrams,* 812 F.Supp. 431, 433 (S.D.N.Y. 1994), *aff'd* 50 F.3d 1159 (2d Cir. 1995). The Commission believes that the $25 fee per area code is nominal, as is the maximum fee of $7,375 for nationwide access, when considered in the context of an annual fee for members of the telemarketing industry engaged in commercial speech. Cf. *Cox* v. *New Hampshire,* 312 U.S. 569, 577 (1949)(upholding a fee up to $300, in 1938 dollars, for a one-day permit to engage in fully protected speech).

[78] Telemarketers and service providers working on behalf of sellers also will be limited to downloading the entire national registry only once in any 24-hour period.

[79] When new area codes are added, the ''by state'' display temporarily will show a new area code proximate to but separate from its state, to ensure that the new area code has been paid for.

number on each line. For the change list in flat file format, each line of the file will contain a telephone number, the date of the change, and an ''A'' (for Added) or ''D'' (for Deleted). The change list data will be fixed-width fields.

The alternative to web browser downloads will be programmatic web services using XML tagged data. This will assist larger companies in automating downloads of the national registry. The XML tags will include the following: a login and encrypted password; the name and email address of the company contact person; certification that access to the registry is solely to comply with the provisions of this Rule; the account number(s) for which the download is being performed; the area code of the telephone numbers to be downloaded; and whether a full list or change list is to be downloaded.

Entities that select a change list will be provided all telephone numbers that have been added to, or deleted from, the registry since the date of their previous access. Change lists, for both flat files and XML tagged data, will be available to provide changes on a daily basis (representing the additions and deletions from the day before).

The telemarketer website on the national registry will have a help desk available during regular business hours via a secure electronic form.

VI. Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* (''PRA''), the Commission sought public comments on the information collection activities contained in the Final Fee Rule. *See* 67 FR 37362 (May 29, 2002); 68 FR 16238 (April 3, 2003). The Commission received no comments on its PRA analysis nor has it modified its proposal in any manner that necessitates revising its original burden estimates for the Final Fee Rule.[80] The Commission additionally sought clearance from OMB for those information collection requirements, and obtained it on July 24, 2003, under OMB Control No. 3084–0097.

[80] While the Commission is increasing its estimate of the number of entities that must pay for access to the national registry, that increase is created by the FCC Rules, which require entities exempt from the FTC's jurisdiction to gain access. Accordingly, the paperwork burden faced by those entities will be reported by the FCC, rather than the FTC. In addition, entities that access the national registry solely because of the FCC Rules are not required to comply with the recordkeeping provisions of the Amended TSR. As a result, the increase in the Commission's estimate of the number of entities required to access the national registry does not affect that aspect of the Commission's prior PRA burden estimates.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.*, requires the agency to provide an Initial Regulatory Flexibility Analysis (''IRFA'') with its proposed rule, and a Final Regulatory Flexibility Analysis (''FRFA'') with its final rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. As explained in the User Fee NPRM, the Revised Fee NPRM, and this Statement, the Commission does not expect that its Fee Rule will have the threshold impact on small entities. Nonetheless, the Commission published an IRFA with the User Fee NPRM, and is also publishing a FRFA with its Final Fee Rule below, in the interest of further explaining its determination, even though the Commission continues to believe that it is not required to publish such analyses.

1. Reasons for Consideration of Agency Action

The Final Fee Rule has been considered and adopted pursuant to the requirements of the Implementation Act and the Appropriations Act, which authorize the Commission to collect fees sufficient to implement and enforce the ''do-not-call'' provisions of the Amended TSR.

2. Objectives of and Legal Basis for the Final Rule

As explained above, the objective of the Final Fee Rule is to collect fees from entities engaged in telemarketing, pursuant to the legal authority set forth in the Implementation Act and Appropriations Act.

3. Description and Estimate of Number of Small Entities Affected by the Final Rule

As explained in the Revised Fee NPRM, comments submitted by the Small Business Administration cited to information from the North American Industry Classification System (''NAICS''), suggesting that there are 2,305 firms identified as ''telemarketing bureaus,'' and that 1,279 of those firms may qualify for small business status, *i.e.*, annual receipts of $5 million or less.[81] Because sellers, and not ''telemarketing bureaus,'' constituted the relevant small entities affected by the Revised Fee NPRM, the Commission sought further public comment and information on the number of small business sellers engaged in outbound telemarketing and subject to the FTC's jurisdiction, since the NAICS classification system does not provide this level of detail.[82] The Commission received no further information in response to this request for comment. As a result, the agency is unable at this time to provide a reliable estimate of the number of affected sellers. In any event, as explained elsewhere in this Statement, the Commission believes that, to the extent the Final Fee Rule has an economic impact on small business, the Commission has adopted an approach that minimizes that impact to ensure that it is not substantial, while fulfilling the legal mandate of the Implementation Act and Appropriations Act to ensure that the telemarketing industry supports the cost of the National Do Not Call Registry.

[81] *See* 68 FR at 16246 n.65.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

These requirements were discussed in the Revised Fee NPRM section regarding agency information collection activities subject to OMB approval under the PRA.[83] The information collection activities at issue consist principally of the requirement that firms, regardless of size, that access the national registry submit minimal identifying and payment information, which is necessary for the agency to collect the required fees.

Compliance requirements of the Final Fee Rule, other than information collection requirements within the meaning of the PRA, are discussed elsewhere in this document and in the User Fee NPRM and Revised Fee NPRM. In sum, as noted earlier, small entities and all other entities subject to the Final Fee Rule are required to pay and obtain access to the National Do Not Call Registry in order to reconcile their calling lists with the phone numbers maintained in the national registry.

5. Duplication With Other Federal Rules

None.

6. Description of Any Significant Alternatives to the Final Rule

As discussed in the User Fee NPRM, the Commission considered a number of alternatives to the proposed fees.[84] In both the User Fee NPRM and Revised Fee NPRM, the Commission solicited comment on any significant alternatives that would further minimize the impact on small entities consistent with the objectives stated in those Notices, the Appropriations Act and the Implementation Act. As discussed

[82] *Id.*

[83] *See* Revised Fee NPRM, 68 FR at 16245.

[84] *See* User Fee NPRM, 67 FR at 37367.

elsewhere in this Statement, the Commission finds that no significant alternatives are available consistent with those objectives.

List of Subjects in 16 CFR Part 310

Telemarketing, Trade practices.

VIII. Final Rule

■ Accordingly, for the reasons set forth above, the Commission hereby amends part 310 of title 16 of the Code of Federal Regulations as follows:

PART 310—TELEMARKETING SALES RULE

■ 1. The authority citation for part 310 continues to read as follows:

Authority: 15 U.S.C. 6101–6108.

■ 2. Add § 310.8 to read as follows:

§ 310.8 Fee for access to the National Do Not Call Registry.

(a) It is a violation of this Rule for any seller to initiate, or cause any telemarketer to initiate, an outbound telephone call to any person whose telephone number is within a given area code unless such seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to telephone numbers within that area code that are included in the National Do Not Call Registry maintained by the Commission under § 310.4(b)(1)(iii)(B); *provided*, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(iii)(B)(*i*) or (*ii*), and the seller does not access the National Do Not Call Registry for any other purpose.

(b) It is a violation of this Rule for any telemarketer, on behalf of any seller, to initiate an outbound telephone call to any person whose telephone number is within a given area code unless that seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to the telephone numbers within that area code that are included in the National Do Not Call Registry; *provided*, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(iii)(B)(*i*) or (*ii*), and the seller does not access the National Do Not Call Registry for any other purpose.

(c) The annual fee, which must be paid by any person prior to obtaining access to the National Do Not Call Registry, is $25 per area code of data accessed, up to a maximum of $7,375; *provided*, however, that there shall be no charge for the first five area codes of data accessed by any person, and *provided further*, that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the National Do Not Call Registry without being required under this Rule, 47 CFR 64.1200, or any other federal law. Any person accessing the National Do Not Call Registry may not participate in any arrangement to share the cost of accessing the registry, including any arrangement with any telemarketer or service provider to divide the costs to access the registry among various clients of that telemarketer or service provider.

(d) After a person, either directly or through another person, pays the fees set forth in § 310.8(c), the person will be provided a unique account number which will allow that person to access the registry data for the selected area codes at any time for twelve months following the first day of the month in which the person paid the fee (''the annual period''). To obtain access to additional area codes of data during the first six months of the annual period, the person must first pay $25 for each additional area code of data not initially selected. To obtain access to additional area codes of data during the second six months of the annual period, the person must first pay $15 for each additional area code of data not initially selected. The payment of the additional fee will permit the person to access the additional area codes of data for the remainder of the annual period.

(e) Access to the National Do Not Call Registry is limited to telemarketers, sellers, others engaged in or causing others to engage in telephone calls to consumers, service providers acting on behalf of such persons, and any government agency that has law enforcement authority. Prior to accessing the National Do Not Call Registry, a person must provide the identifying information required by the operator of the registry to collect the fee, and must certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent telephone calls to telephone numbers on the registry. If the person is accessing the registry on behalf of sellers, that person also must identify each of the sellers on whose behalf it is accessing the registry, must provide each seller's unique account number for access to the national registry, and must certify, under penalty of law, that the sellers will be using the information gathered from the registry solely to comply with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on the registry.

By direction of the Commission.

Donald S. Clark,

Secretary.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix A

List of Acronyms for the TSR Revised Fee Proposal Commenters

Commenter—Acronym
American Bankers Association—ABA
American Resort Development Association—ARDA
American Teleservices Association—ATA
Bahe, Kevin—KB
Bank of America—BOA
Bouffard, David L.—DB
Brown, Jarrett—JB
Citigroup Inc.—Citi
Convergys Corporation—Convergys
Direct Marketing Association—DMA
Electronic Retailing Association—ERA
Financial Services Roundtable—FSR
Girty, John—JG
Goldstein, Mitchell P.—MG
Greene, Shawn—SG
Household Bank (SB), N.A.—Household
Infocision Management Corporation—IMC
Jamtgaard, O. G. Jr.—OJ
Johnson, Jeff—JJ
Lamonds, Cheryl E.—CL
Magazine Publishers of America—MPA
McGowan, Dilton—DM
National Consumers League—NCL
Phone Data Strategies—PDS
Pressley, Bob—BP
Samuels, Sara—SS
SBC Communications Inc.—SBC
Scheid, Justin & Matt Kiverts—S&K
Scott, Richey L.—RS
Smith, Jenna—JS
Stora, Christine—CS
Stutes, Gerald—GS
The Verizon companies—Verizon
VISA U.S.A.—VISA
West Corporation—West

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