

7. Do consumers and businesses who purchase a negative option product or service through telemarketing have a preference for how they communicate with the seller (e.g., email, phone, online chat, or some other method)?

8. Do consumers and businesses who purchase negative option products or services through telemarketing typically have email accounts where they can receive notice of negative option programs? Do they typically provide email addresses to sellers or telemarketers? Do they have a preference for how they cancel the negative option or service? If not, what is the best way for those consumers and businesses to cancel negative-option programs?

9. When sellers or telemarketers sell negative option programs to consumers and businesses, what personal information do they obtain? How often do sellers or telemarketers communicate with consumers by email?

10. How often do sellers or telemarketers use unfair or deceptive acts or practices to sell goods or services with a negative option feature solely through inbound telemarketing that are not part of an upsell? Are goods or services other than tech support sold in this manner? If so, which goods or services and how often are they sold in this manner? Should the TSR be further amended to provide consumers with additional protections against these deceptive acts or practices? How so?

## VI. Comment Submissions

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before August 2, 2022. Write “Telemarketing Sales Rule ANPR, R411001” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

Because of the public health emergency in response to the COVID-19 outbreak and the agency’s heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comment online through the <https://www.regulations.gov> website. To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write “Telemarketing Sales Rule ANPR, R411001” on your comment and on the envelope and mail your comment to the following address: Federal Trade Commission, Office of the Secretary,

600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B), Washington, DC 20580.

Because your comment will be placed on the publicly accessible website, <https://www.regulations.gov>, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “trade secret or any commercial or financial information which . . . is privileged or confidential”—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at [www.regulations.gov](https://www.regulations.gov)—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this document and the news release describing it. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments it

receives on or before August 2, 2022. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

By direction of the Commission.

**April J. Tabor,**  
Secretary.

[FR Doc. 2022-10922 Filed 6-2-22; 8:45 am]

**BILLING CODE 6750-01-P**

## FEDERAL TRADE COMMISSION

### 16 CFR Part 310

#### RIN 3084-AB19

### Telemarketing Sales Rule

**AGENCY:** Federal Trade Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Trade Commission (“FTC” or “Commission”) seeks public comment on proposed amendments to the Telemarketing Sales Rule (“TSR”). The proposed amendments would require telemarketers and sellers to maintain additional records of their telemarketing transactions, prohibit material misrepresentations and false or misleading statements in business to business (“B2B”) telemarketing transactions, and add a new definition for the term “previous donor.” The modified recordkeeping requirements are necessary to protect consumers from deceptive or abusive telemarketing practices and support the Commission’s law enforcement mandate to enforce the TSR. The prohibition on material misrepresentations and false or misleading statements is necessary to protect businesses from deceptive telemarketing practices. The new definition of “previous donor” will clarify that a telemarketer may not use prerecorded messages to solicit charitable donations on behalf of a charitable organization unless the recipient of the call made a donation to that particular charitable organization within the prior two years.

**DATES:** Comments must be received by August 2, 2022.

**ADDRESSES:** Interested parties may file a comment online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write “Telemarketing Sales Rule (16 CFR part 310—NPRM) (Project No. R411001)” on your comment and file your comment through <https://www.regulations.gov>. If you prefer to file your comment on paper, mail your

comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex B), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** Benjamin R. Davidson, (202) 326-3055, [bdavidson@ftc.gov](mailto:bdavidson@ftc.gov), or Patricia Hsue, (202) 326-3132, [phsue@ftc.gov](mailto:phsue@ftc.gov), Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Mail Stop CC-8528, Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

The Federal Trade Commission issues this notice of proposed rulemaking (“NPRM”) to invite public comment on proposed amendments to the TSR (part 310). The proposed amendments to the recordkeeping requirements reflect evolutions in the marketplace that make it more difficult for the Commission and other regulators to obtain records of sellers’ and telemarketers’ telemarketing activities to enforce the TSR. The principal proposed amendments would require sellers or telemarketers to retain additional records of their telemarketing activities and clarify the existing recordkeeping requirements to more clearly delineate the information telemarketers or sellers must keep to comply with those provisions. The Commission is also proposing to prohibit in B2B telemarketing transactions: (1) Several types of material misrepresentations in the sale of goods or services; and (2) false or misleading statements to induce a person to pay for goods or services or to induce a charitable contribution (collectively, “misrepresentations”). This prohibition is necessary to help protect businesses from deceptive telemarketing practices. Finally, the Commission is proposing a new definition of the term “previous donor” to clarify that telemarketers are prohibited from using prerecorded messages to solicit charitable contributions from consumers on behalf of a non-profit charitable organization unless the consumer donated to that non-profit charitable organization within the last two years.

This NPRM invites written comments on all issues raised by the proposed amendments, including answers to the specific questions set forth in Section IV of this document.

**II. Overview of the Telemarketing Sales Rule**

Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act” or “Act”) in 1994 to curb deceptive and abusive telemarketing practices and provide key anti-fraud and privacy protections for consumers receiving telephone solicitations to purchase goods or services.<sup>1</sup> The Telemarketing Act directed the Commission to adopt a rule prohibiting deceptive or abusive telemarketing practices, including prohibiting telemarketers from undertaking a pattern of unsolicited calls that reasonable consumers would consider coercive or abusive of their privacy, restricting the time of day telemarketers may make unsolicited calls to consumers, and requiring telemarketers to promptly and clearly disclose that the purpose of the call is to sell goods or services.<sup>2</sup> The Act also generally directed the Commission to address in its rule other acts or practices it found to be deceptive or abusive, including acts or practices of entities or individuals that assist and facilitate deceptive telemarketing, and to consider including recordkeeping requirements.<sup>3</sup> Finally, the Act authorized state Attorneys General, or other appropriate state officials, and private litigants to bring civil actions in federal district court to enforce compliance with the FTC’s rule.<sup>4</sup>

Pursuant to the Act’s directive, the FTC promulgated the TSR on August 23, 1995.<sup>5</sup> The FTC included recordkeeping requirements in § 310.5, stating the provision was “necessary to enable law enforcement agencies to ascertain whether sellers and telemarketers are complying with the requirements of the Final Rule, to identify persons who are involved in any challenged practices, and to identify customers who may have been injured.”<sup>6</sup> The FTC also included a prohibition on misrepresenting several categories of material information in § 310.3(a)(2).<sup>7</sup> The categories were based

<sup>1</sup> 15 U.S.C. 6101–6108.

<sup>2</sup> 15 U.S.C. 6102(a)(3). The Telemarketing Act was subsequently amended in 2001 to add Section 15 U.S.C. 6102(a)(3)(D), which requires a telemarketer to promptly and clearly disclose that the purpose of the call is to solicit charitable contributions. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (“USA PATRIOT Act”)*, Public Law 107–56, 115 Stat. 272 (Oct. 26, 2001).

<sup>3</sup> 15 U.S.C. 6101(a). See also 2002 notice of proposed rulemaking, 67 FR 4492, 4510 (Jan. 30, 2002).

<sup>4</sup> 15 U.S.C. 6103, 6104.

<sup>5</sup> See Statement of Basis and Purpose and Final Rule (“Original TSR”), 60 FR 43842 (Aug. 23, 1995).

<sup>6</sup> *Id.* at 43857.

<sup>7</sup> *Id.* at 43848.

on “established case law” and “allegations in complaints filed in recent years by the Commission.”<sup>8</sup> The Commission also included a prohibition on making false or misleading statements to induce a person to pay for goods or services, or to induce a charitable contribution, in § 310.3(a)(4).<sup>9</sup> Section 310.3(a)(4) was designed to “provide[] law enforcement with flexibility to address new ways that sellers and telemarketers engaged in fraud might attempt to take consumers’ money.”<sup>10</sup>

The original TSR excluded several types of calls, including B2B calls other than those that sold office and cleaning supplies.<sup>11</sup> The Commission required B2B calls that sold office and cleaning supplies to comply with the TSR because, in the Commission’s experience, calls involving the sale of those products were “by far the most significant business-to-business problem area.”<sup>12</sup>

Since then, the Commission has amended the Rule on four occasions: (1) In 2003 to, among other things, create the National Do-Not Call Registry and extend the Rule to telemarketing calls soliciting charitable contributions;<sup>13</sup> (2) in 2008 to prohibit prerecorded messages (“robocalls”) selling a good or service or soliciting charitable contributions;<sup>14</sup> (3) in 2010 to ban the telemarketing of debt relief services requiring an advance fee;<sup>15</sup> and (4) in 2015 to bar the use in telemarketing of certain novel payment mechanisms widely used in fraudulent transactions.<sup>16</sup>

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 43851.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 43867.

<sup>12</sup> *Id.* at 43861.

<sup>13</sup> See Statement of Basis and Purpose and Final Amended Rule (“2003 TSR Amendments”), 68 FR 4580 (Jan. 29, 2003) (adding Do Not Call Registry, charitable solicitations, and other provisions).

<sup>14</sup> See Statement of Basis and Purpose and Final Rule Amendments (“2008 TSR Amendments”), 73 FR 51164 (Aug. 29, 2008) (addressing the use of robocalls).

<sup>15</sup> See Statement of Basis and Purpose and Final Rule Amendments (“2010 TSR Amendments”), 75 FR 48458 (Aug. 10, 2010) (adding debt relief provisions). The prohibition on misrepresenting material aspects of debt relief services in 310.3(a)(2)(x) was added in 2010 along with other debt relief provisions. See 2010 TSR Amendments, 75 FR at 48498. The Commission subsequently published correcting amendments to the text of § 310.4 of the TSR. Telemarketing Sales Rule; Correcting Amendments, 76 FR 58716 (Sept. 22, 2011).

<sup>16</sup> See Statement of Basis and Purpose and Final Rule Amendments (“2015 TSR Amendments”), 80 FR 77520 (Dec. 14, 2015) (prohibiting the use of remotely created checks and payment orders, cash-to-cash money transfers, and cash reload mechanisms).

### A. 2008 Robocall Amendment for Charitable Solicitations

Pursuant to the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (“USA PATRIOT Act”),<sup>17</sup> the Commission amended the TSR in 2003 to extend its coverage to telemarketing calls soliciting charitable contributions.<sup>18</sup> As part of that amendment, the Commission defined “donor” as “any person solicited to make a charitable contribution.”<sup>19</sup> The Commission declined to limit the definition of donor to those who have “an established business relationship with the non-profit charitable organization.”<sup>20</sup> The Commission stated its intent was for the term “donor. . . . [to] encompass not only those who have agreed to make a charitable contribution but also any person who is solicited to do so, to be consistent with [the Rule’s] use of the term ‘customer.’”<sup>21</sup>

In 2008, the Commission amended the TSR to prohibit robocalls soliciting charitable donations unless the robocall was delivered to a “member of, or previous donor to, a non-profit charitable organization on whose behalf the call is made” and the seller or telemarketer otherwise complied with the provisions of § 310.4(b)(1)(v)(B).<sup>22</sup> In allowing robocalls to previous donors, the Commission stated it was recognizing the strong interests of non-profit charitable organizations in reaching those with “whom the charity has an existing relationship—*i.e.*, members of, or previous donors to[,] the non-profit organization on whose behalf the calls are made . . . .”<sup>23</sup> The Commission concluded that allowing “telefunders to make impersonal prerecorded cold calls on behalf of charities that have no prior relationship with the call recipients . . . would defeat the amendment’s purpose of protecting consumers’ privacy.”<sup>24</sup> Although the Commission’s Statement of Basis and Purpose for the 2008 Amendment makes clear the Commission intended previous donor to mean a donor who has previously provided a charitable contribution to the particular non-profit charitable organization, the Commission did not include a definition of the term

“previous donor” to explicitly effect that intention.

Because the TSR’s definition of donor is “any person solicited to make a charitable contribution,” the Commission’s 2008 Amendment could be misinterpreted as allowing a telemarketer to send robocalls to any consumer it had previously *solicited* for a donation on behalf of a non-profit charitable organization, regardless of whether the consumer actually agreed to donate to that charitable organization. Thus, the Commission proposes to add a new definition of “previous donor” to clarify the exemption, explicitly referencing consumers from whom the non-profit charitable organization has received a donation in the last two years.<sup>25</sup>

### B. TSR’s Recordkeeping Provisions Regulatory History

Since the Commission promulgated the TSR in 1995, it has not made substantial changes to its recordkeeping requirements under § 310.5. The TSR generally requires telemarketers and sellers to keep for a 24-month period records of: (1) Any substantially different advertisement, including telemarketing scripts; (2) lists of prize recipients, customers, and telemarketing employees directly involved in sales or solicitations; and (3) all verifiable authorizations or records of express informed consent or express agreement.<sup>26</sup> They may keep the records in any form and in the same manner and format as they would keep such records in the ordinary course of business, and they may allocate responsibilities of complying with the Rule’s recordkeeping requirements between the seller and telemarketer.<sup>27</sup>

During its 2003 and 2010 rulemaking processes, the Commission considered whether it should modify the recordkeeping provisions in tandem with the substantive amendments under consideration.<sup>28</sup> In each instance, however, the Commission declined to

make substantial modifications to that provision, deeming such changes unnecessary to enact the substantive amendments it was promulgating.<sup>29</sup> In its 2003 Amendment adding the DNC provisions and extending the TSR to charitable solicitations, the Commission inserted a reference to “solicitations” in § 310.5(a)(4) to require telemarketers and sellers to keep records of employees involved in charitable solicitations.<sup>30</sup> It also inserted the phrase “express informed consent or express agreement” in § 310.5(a)(5) to require sellers and telemarketers to keep records of those agreements, in addition to verifiable authorizations, since those agreements were newly added terms in the 2003 amendments.<sup>31</sup> For its 2010 Amendment, the Commission noted the existing recordkeeping requirements would extend to new providers of debt relief services as a result of the Amendment.<sup>32</sup>

In 2015, the Commission amended the TSR to expressly state a seller or telemarketer bears the burden of demonstrating that a seller has an existing business relationship (“EBR”) with a consumer whose number is on the Commission’s Do Not Call (“DNC”) Registry, or has obtained express written agreement (“EWA”) from such a consumer, as required by § 310.4(b)(1)(iii)(B)(1)–(2).<sup>33</sup> The Commission stated that these two amendments reflected existing law, but the Commission adopted the amendments to make clear the burden of proof was on sellers and telemarketers to assert these affirmative defenses.<sup>34</sup> The Commission also reiterated this carve out from the DNC prohibitions applies only to sellers “that obtained the EWA directly from, or has an EBR directly with, the person called.”<sup>35</sup> The Commission, however, did not amend the recordkeeping requirements to clarify what records a seller or telemarketer must keep to assert these affirmative defenses, believing that telemarketers and sellers would naturally maintain such records in the ordinary course of business

<sup>17</sup> Public Law 107–56, 115 Stat. 272 (Oct. 26, 2001).

<sup>18</sup> 2003 TSR Amendments, 68 FR at 4582.

<sup>19</sup> *Id.* at 4590.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 4590–91.

<sup>22</sup> See 2008 TSR Amendments, 73 FR at 51185.

<sup>23</sup> *Id.* at 51193.

<sup>24</sup> *Id.* at 51194.

<sup>25</sup> The Commission proposes implementing a time limit for the existence of an established relationship so that consumers will not receive robocalls in perpetuity from organizations to which they have donated. The Commission chose two years to account for the possibility that consumers who donate annually may not necessarily donate exactly one year apart (*i.e.*, one year the consumer might donate in January and the following year the consumer might not donate until December). The Commission seeks public comment on whether two years is an appropriate time period.

<sup>26</sup> 16 CFR 310.5(a).

<sup>27</sup> 16 CFR 310.5(b) and (c).

<sup>28</sup> In 2003, the Commission added a recordkeeping requirement for the abandoned call safe harbor but did not include that provision in § 310.5(a). See 2003 TSR Amendments, 68 FR at 4645.

<sup>29</sup> See, e.g., 2003 TSR Amendments, 68 FR at 4653–54 (declining to implement any of the suggested recordkeeping revisions that were raised in the public comments); 2010 TSR Amendments, 75 FR at 48502.

<sup>30</sup> 2003 TSR Amendments, 68 FR at 4653–54.

<sup>31</sup> *Id.*

<sup>32</sup> 2010 TSR Amendments, 75 FR at 48502.

<sup>33</sup> 2015 TSR Amendments, 80 FR at 77555–56.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (emphasis added). As such, “cold calls to consumers whose name and numbers were purchased from a third-party list broker are [still] prohibited under the TSR’s do-not-call provisions because the calls are not placed by the specific seller that obtained the EWA or EBR.” *Id.*

without affirmatively being required to do so.

The telemarketing landscape has changed drastically since the Commission promulgated the Rule's original recordkeeping provisions. Technological advancements have made it easier and cheaper for unscrupulous telemarketers to engage in illegal telemarketing, resulting in a greater proliferation of unwanted calls.<sup>36</sup> Technological advancements have also reduced the burden and costs of recordkeeping.<sup>37</sup> While the Commission has made substantial amendments to the TSR over the last 25 years to address the rise in unwanted calls—including by identifying new abusive and deceptive telemarketing practices such as prohibiting robocalls and calls to consumers on the DNC Registry<sup>38</sup>—the TSR's recordkeeping provisions have remained largely static. As such, they no longer adequately meet the needs of the Commission's law enforcement mission to protect consumers.

### C. Law Enforcement Challenges in Enforcing the TSR

To date, the Commission has brought more than 150 enforcement actions against companies and telemarketers under the TSR for DNC, robocall, spoofed caller identification (“caller ID”), and assisting and facilitating violations.<sup>39</sup> In bringing those cases, the

<sup>36</sup> See, e.g., Prepared Statement of the Federal Trade Commission Before the United States Senate Aging Committee on Commerce Science and Transportation: Abusive Robocalls and How We Can Stop Them (Apr. 18, 2018), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1366628/p034412\\_commission\\_testimony\\_re\\_abusive\\_robocalls\\_senate\\_04182018.pdf](https://www.ftc.gov/system/files/documents/public_statements/1366628/p034412_commission_testimony_re_abusive_robocalls_senate_04182018.pdf) (last visited Jan. 31, 2022). From 2016 to 2020, the Commission received on average over 5.5 million Do Not Call complaints per year, and the DNC Registry currently has over 240 million active telephone numbers. FTC, Do Not Call Data Book 2020 (“2020 DNC Databook”), at 6 (Oct. 2020), available at [https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2020/dnc\\_data\\_book\\_2020.pdf](https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2020/dnc_data_book_2020.pdf) (last visited Jan. 31, 2022). By comparison, within one year of its launch, the DNC Registry had over 62 million active telephone numbers registered, and the Commission received over 500,000 Do Not Call complaints. See Annual Report to Congress for FY 2003 and 2004 Pursuant to the Do Not Call Implementation Act on Implementation of the National Do Not Call Registry, at 3 (Sept. 2005), available at <https://www.ftc.gov/sites/default/files/documents/reports/national-do-not-call-registry-annual-report-congress-fy-2003-and-fy-2004-pursuant-do-not-call/051004dncfy0304.pdf> (last visited Jan. 31, 2022); National Do Not Call Registry Data Book for Fiscal Year 2009, at 4 (Nov. 2009), available at [https://www.ftc.gov/sites/default/files/documents/reports\\_annual/fiscal-year-2009/091208dncadatabook.pdf](https://www.ftc.gov/sites/default/files/documents/reports_annual/fiscal-year-2009/091208dncadatabook.pdf) (last visited Jan. 31, 2022).

<sup>37</sup> See *infra* Section V.C. and note 95.

<sup>38</sup> See *supra* notes 5–13.

<sup>39</sup> See Enforcement of the Do Not Call Registry, available at <https://www.ftc.gov/news-events/>

Commission has identified several challenges in obtaining the necessary records to determine whether a particular telemarketing campaign is covered by and compliant with the TSR, which entities are involved in the telemarketing campaign, and which consumers have been harmed by violations of the TSR.

The primary hurdles are in: (1) Identifying the telemarketer and seller responsible for the telemarketing campaign; (2) obtaining records of the telemarketing calls reflecting the date, time, duration, and disposition of each call, as well as the phone number(s) that placed and received each call (*i.e.* “call detail records”); and (3) linking the content of the telemarketing calls with the call detail records to determine which TSR provisions might apply to the telemarketing activity.

The TSR currently requires telemarketers and sellers to retain records of “all substantially different advertising, brochures, telemarketing scripts and promotional materials” used in their telemarketing activities.<sup>40</sup> It does not require sellers or telemarketers to keep other records of their telemarketing activities including call detail records or records of the nature of their telemarketing campaigns, such as whether the campaign used prerecorded messages, placed calls to consumers (“outbound telemarketing”) or induced calls from consumers through advertising (“inbound telemarketing”), or solicited from consumers or businesses. Nor does it require telemarketers or sellers to keep records that link a particular telemarketing campaign to a set of call detail records. The Commission's law enforcement experience has shown, absent a recordkeeping requirement, it is increasingly difficult to obtain these critical records and associate the records with the nature, purpose, or content of a particular telemarketing campaign, frustrating the Commission's law enforcement efforts. As discussed below, the Commission proposes recordkeeping requirements that ensure it is able to adequately assess whether a telemarketing campaign complies with the TSR and remedy the current gaps impeding effective law enforcement.

When the TSR was promulgated in 1995, the Commission relied on consumer complaints about unwanted calls to evaluate whether a particular telemarketing campaign likely violated the TSR and warranted further investigation. It also relied on consumer

*media-resources/do-not-call-registry/enforcement* (last visited Jan. 31, 2022).

<sup>40</sup> 16 CFR 310.5(a).

complaints to identify the relevant telemarketer responsible for making the calls. Specifically, the Commission could use the calling number included in the consumer's complaint to identify the voice service provider (“voice provider”)<sup>41</sup> responsible for sending the call and send a civil investigative demand (“CID”) to the voice provider in question to identify the responsible telemarketer through the voice provider's billing records. The Commission could also obtain the voice provider's call detail records for that telemarketer and use that data as a proxy for the seller's or telemarketer's telemarketing campaign.

The proliferation of new technologies over the years has enabled bad actors to “spoof” or fake a calling number and send calls cheaply from within the United States and abroad.<sup>42</sup> As a result, bad actors have sent increasingly large numbers of unlawful spoofed calls, making it more difficult for law enforcement to identify the telemarketer and seller responsible for a particular telemarketing campaign and obtain the applicable call detail records.<sup>43</sup> For example, to identify a suspect telemarketer using “spoofed” calls, the Commission needs to issue CIDs to multiple voice providers in order to trace the call from the consumer to the telemarketer's voice provider. In some instances, by the time the Commission has identified the relevant voice provider, the voice provider may not have retained the records.<sup>44</sup> As such, the call detail records either no longer exist or are not available for law enforcement purposes, and the Commission cannot identify the bad actor responsible for the spoofed calls. While the Commission has employed other tools to successfully identify and take action against telemarketers violating the law, the absence of call detail records can present challenges, particularly in

<sup>41</sup> In this NPRM, a voice service provider broadly refers to any provider of telephony services, including telecommunications carriers, interconnected VoIP service providers, and any other voice service providers.

<sup>42</sup> See *supra* note 36. On June 25, 2019, the FTC announced “Operation Call It Quits,” which included 94 actions against illegal robocallers, many of which used spoofing technology. See Press Release, FTC, Law Enforcement Partners Announce New Crackdown on Illegal Robocalls (June 25, 2019), available at <https://www.ftc.gov/news-events/press-releases/2019/06/ftc-law-enforcement-partners-announce-new-crackdown-illegal> (last visited Jan. 31, 2022).

<sup>43</sup> *Id.*

<sup>44</sup> In other instances, voice providers assert it is cost prohibitive to retrieve because they only maintain records in an easily retrievable format for several months before archiving them in the ordinary course of business.

demonstrating violations of the TSR's do-not-call provisions.<sup>45</sup>

Even when the Commission is successful in obtaining the call detail records from the voice provider and identifying the seller or telemarketer responsible for the telemarketing campaign, that information is limited. As noted above, call detail records typically include only: (1) The phone number that placed the call ("calling number"); (2) the phone number that received the call ("called number"); (3) the date, time, and duration of the call; and (4) the disposition of the call (*i.e.*, was the call answered or connected, transferred to another phone number, disconnected or dropped). The records do not contain other important information, including the purpose of the call, the identity of the seller or charitable organization, or the nature of the call, such as whether the telemarketer used prerecorded messages. Although sellers and telemarketers are required to keep records of their advertisements, such as telemarketing scripts, which may include information on the purpose of the call or the identity of the seller, they are not currently required to maintain records that identify the specific telemarketing campaign in which they used each advertisement or the associated call detail records.<sup>46</sup>

The lack of records linking the call detail records to the nature, purpose, and content of the telemarketing campaign presents challenges to law enforcement. Without this link, it is difficult for the Commission to ascertain, among other issues: (1) The seller or charitable organization for which the telemarketer is placing calls; (2) the good or service the telemarketer is offering for sale or the charitable purpose for which the telemarketer is soliciting contributions; (3) whether the telemarketer used robocalls, was telemarketing to consumers or

businesses, or the caller ID,<sup>47</sup> if any, they transmitted in outbound telephone calls; and (4) the representations made during the call. Moreover, without information linking the call detail records to a particular telemarketing campaign, the Commission cannot tell when the telemarketing campaigns began and ended or how many calls the telemarketer made in a particular telemarketing campaign.

In the FTC's law enforcement experience, sellers and telemarketers often claim they cannot provide this information because they do not keep call detail records or records associating a telemarketing campaign with the voice provider's call detail records. For example, telemarketers typically assert the voice provider's call detail records include both their telemarketing and non-telemarketing calls (*i.e.*, non-sales calls) but they cannot identify those that are telemarketing calls because they do not keep such records. In other instances, telemarketers who run telemarketing campaigns on behalf of numerous sellers or non-profit charitable organizations assert they cannot identify the telemarketing calls they made on behalf of a particular client. Without such information, the Commission cannot readily determine whether all the calls pertain to a particular telemarketing campaign the Commission is seeking information about or if the calls are for an unrelated seller and telemarketing campaign.

The ability to associate relevant call detail records with information on the nature and content of the call is also critical for inbound telemarketing campaigns. Although many such calls are exempt from the TSR under § 310.6(b)(4) through (b)(6), the exemptions do not apply to all inbound telemarketing calls and many such calls must still comply with the TSR.<sup>48</sup> Telemarketers frequently claim the voice provider's records of their inbound calls (when they exist) do not uniformly reflect calls that would be subject to the TSR. For example, they claim the voice providers' records of inbound calls include customer service

calls that would be exempt from the TSR.

Sellers or telemarketers are in the best position to have information about their telemarketing calls. Thus, the Commission proposes new recordkeeping requirements that require sellers and telemarketers to retain records of this information. Such records are important in enabling the Commission to ascertain what sections of the TSR apply to their telemarketing campaigns and whether the telemarketing campaigns are compliant with the TSR.

The Commission also proposes to clarify existing recordkeeping requirements to address telemarketers' and sellers' frequent assertion that the TSR does not apply to their telemarketing campaigns because one of the TSR exemptions applies. Commonly asserted defenses to the FTC's law enforcement actions include that the calls were sales calls to business entities and not consumers, the seller or telemarketer has an EBR or EWA to make calls to consumers registered on the DNC Registry, or the seller has an express agreement, in writing, authorizing that particular seller to place robocalls to a consumer. Another frequently asserted defense is the consumer never requested to be placed on the entity-specific do-not-call list, made the request only after the telemarketing call had been made, or the consumer had asked to be placed on the entity-specific do-not-call list for one seller but the telemarketer had made subsequent calls on behalf of a different seller.

While the Commission has amended the TSR to address some of these defenses, making clear the seller or telemarketer bears the burden of proof,<sup>49</sup> some sellers and telemarketers still assert the defense in response to law enforcement inquiries even if their records are incomplete. For example, in some instances, the telemarketer's purported proof of a consumer's express written agreement is simply a list of the consumers' IP addresses and timestamps of the purported agreement. The Commission does not believe that information is sufficient proof to demonstrate a consumer has provided express written agreement to receive robocalls or to receive outbound telemarketing calls when a consumer has placed her phone number on the FTC's DNC Registry. Thus, in addition to proposing new recordkeeping requirements, the Commission also proposes amending existing

<sup>45</sup> In March 2020, the FCC adopted new rules requiring all originating and terminating voice providers to adopt the implementation of caller ID authentication using technical standards known as "STIR/SHAKEN" in their internet Protocol (IP) portions of their networks by June 30, 2021 to reduce the number of spoofed robocalls. See FCC, Press Release, *FCC Mandates That Phone Companies Implement Caller ID Authentication to Combat Spoofed Robocalls* (Mar. 31, 2020), available at <https://docs.fcc.gov/public/attachments/DOC-363399A1.pdf> (last visited Jan. 31, 2022). The FCC is also exploring whether to expand the mandate to intermediate voice providers and whether adoption of similar standards on the non-IP portions of voice provider networks is feasible. *Id.* While the adoption of STIR/SHAKEN standards will provide a means of authenticating the caller ID information for some calls, spoofed calls will continue to challenge law enforcement in the future.

<sup>46</sup> 16 CFR 310.5(a)(1).

<sup>47</sup> Voice providers frequently state that their call detail records contain the calling number, or the phone number that actually placed the call, but they do not have information on the name that the telemarketer chooses to submit to the call recipient's caller identification service, which provides caller identification name information to the call recipient.

<sup>48</sup> 16 CFR 310.6(b)(5) and (6) (*e.g.*, inbound telemarketing calls regarding prize promotions, investment opportunities, and debt relief services, among others, are excluded from the inbound telemarketing exemption).

<sup>49</sup> See, *e.g.*, 2015 TSR Amendments, 80 FR at 77555–56.

recordkeeping provisions to provide further guidance and clarification on the type of information necessary to assert an applicable affirmative defense.

#### D. Public Comments on Recordkeeping

In 2014, the Commission embarked on a regulatory review of the TSR, in which it sought feedback on a number of issues including the existing recordkeeping requirements.<sup>50</sup> It raised some of the challenges the Commission has faced in bringing enforcement actions under the TSR, including the difficulty in obtaining call detail records, and sought feedback on whether the current recordkeeping requirements are sufficient for law enforcement agencies to enforce the Rule's DNC provisions.<sup>51</sup> Specifically, the Commission raised the possibility of requiring sellers and telemarketers to "retain records of the telemarketing calls they have placed" to address the Commission's ongoing law enforcement challenges. It asked for public comments on: (1) The cost and burden that the lack of such a requirement imposed on law enforcement and consumers, (2) the cost and burden such a provision would impose, particularly for small businesses, and (3) whether there is an alternative solution that would reduce the law enforcement challenges and minimize the burden on industry.<sup>52</sup>

The Commission received comments from other state and federal law enforcement agencies confirming the problems the Commission has experienced in enforcing the TSR are not unique to the agency.<sup>53</sup> The Department of Justice ("DOJ") cited "extreme difficulties" in obtaining call records from voice providers that provide usable information because they "may contain, among other things, non-telemarketing calls" or calls by telemarketers for other clients not targeted in the investigation.<sup>54</sup> DOJ also argued the burden of keeping call detail records would be "slight" since "computer data storage prices are no longer an obstacle to maintaining records," and stated it is "confident that most, if not all, reputable sellers and telemarketers currently maintain

accurate records of their outbound calls."<sup>55</sup>

The National Association of Attorneys General ("NAAG") stated in its experience subpoenas to voice providers are "time-consuming and frequently fruitless," with those served on offshore voice providers going unanswered and U.S. voice providers either refusing to provide the records or requesting an "exorbitant fee for doing so."<sup>56</sup> NAAG also argued "savings realized by telemarketers" from modern dialing technologies "should not be realized at the expense of law enforcement's resources and consumer protection."<sup>57</sup>

Consumer advocacy groups concurred that requiring the retention of outbound call detail records would benefit consumers. The National Consumer Law Center, Consumer Federation of America, Americans for Financial Reform, Consumers Union, Consumer Action, Consumer Federation of California, The Maryland Consumer Rights Coalition, National Association of Consumer Advocates, U.S. PIRG, Virginia Citizens Consumer Council, and Consumer Assistance Council, Inc. of Cape Cod and the Islands (collectively, "NCLC, et al.") submitted a joint comment supporting a recordkeeping requirement for all outbound telemarketing calls, and further advocating sellers and telemarketers should also be required to record the entirety of all completed calls so it is possible to examine the "overall net impression" of the representations made to determine if they are unfair or deceptive.<sup>58</sup> AARP argued that in addition to call detail records, sellers and telemarketers should also maintain complete recordings of calls to "ease the burden on federal and state enforcers as well as make it easier for citizens to bring private cases."<sup>59</sup> Another commenter also noted "TCPA plaintiffs would benefit from companies keeping internal records."<sup>60</sup>

Industry comments generally opposed any mandatory requirement to maintain call detail records, arguing that imposing such a requirement would be overly burdensome, particularly for small businesses.<sup>61</sup> None of the industry comments, however, provided concrete information or data on the costs

associated with requiring telemarketers to maintain call detail records, nor did they suggest any alternative solutions that address the Commission's law enforcement challenges while minimizing the burden on industry.

Additionally, a few industry comments confirmed some businesses are already requiring telemarketers to retain call detail records in the regular course of business.<sup>62</sup> Notably, the Association of Magazine Media ("MPA") supported requiring "telemarketers to retain their own call records" as a "reasonable and workable approach."<sup>63</sup> MPA also stated "[s]ome magazine publishers are currently requiring third party telemarketing providers to maintain outbound call records for three years," and argued recordkeeping requirements would provide "an added layer of transparency that further blocks opportunities for fraudulent behavior."<sup>64</sup>

#### E. The Business-to-Business Exemption

The Original TSR included an exemption for B2B calls other than B2B calls that sold office and cleaning supplies.<sup>65</sup> The Commission decided not to exempt from the TSR B2B calls that sold office and cleaning supplies because, in the Commission's experience, those calls were "by far the most significant business-to-business problem" at the time.<sup>66</sup> The Commission also commented it would "reconsider that position if additional business-to-business telemarketing activities become problems after the Final Rule has been in effect."<sup>67</sup>

In 2003, the Commission reconsidered the scope of the B2B exemption and issued a Notice of Proposed Rulemaking that would require B2B sales of internet or web services to also comply with the TSR.<sup>68</sup> The Commission explained the sale of these services had "increased dramatically" and these product areas

<sup>50</sup> See 2014 TSR Rule Review, 79 FR 46732, 46735 (Aug. 11, 2014).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 46738.

<sup>53</sup> The public comments submitted in response to the 2014 TSR Rule Review are available at <https://www.ftc.gov/policy/public-comments/2014/08/initiative-578> (last visited Jan. 31, 2022).

<sup>54</sup> DOJ, No. 00111, at 1. DOJ notes that multiple defendants have "asserte[d] as a defense the inaccuracies of their own telemarketing call records." *Id.* (emphasis in original).

<sup>55</sup> *Id.* at 2.

<sup>56</sup> NAAG, No. 00117, at 11–12.

<sup>57</sup> *Id.* at 12.

<sup>58</sup> NCLC et al., No. 00110, at 10.

<sup>59</sup> AARP, No.00097, at 5.

<sup>60</sup> West Italian, No. 00113, at 3.

<sup>61</sup> See, e.g., Professional Association for Customer Engagement ("PACE"), No. 00107, at 5; American Bankers Insurance Association ("ABIA"), No. 00106, at 1, 3; National Automobile Dealers Association ("NADA"), No. 00112, at 2.

<sup>62</sup> See American Resort Development Association ("ARDA"), No.00100, at 7; Association of Magazine Media ("MPA"), No. 00116, at 4.

<sup>63</sup> MPA, No. 00116, at 4.

<sup>64</sup> *Id.*

<sup>65</sup> Original TSR, 60 FR at 43867.

<sup>66</sup> Original TSR at 43861.

<sup>67</sup> *Id.*

<sup>68</sup> 2002 notice of proposed rulemaking, 67 FR at 4500. "internet Services" meant any service that allowed a business to access the internet, including internet service providers, providers of software and telephone or cable connections, as well as services that provide access to email, file transfers, websites, and newsgroups. *Id.* "Web services" was defined as "designing, building, creating, publishing, maintaining, providing, or hosting a website on the internet." *Id.* The Commission intended for the term internet services to encompass any and all services related to accessing the internet and the term web services to encompass any and all services related to operating a website. *Id.*

“ha[d] emerged as one of the leading sources of complaints.”<sup>69</sup> The Commission ultimately decided not to modify the B2B exemption because the Commission wanted 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.”<sup>70</sup> The Commission again noted it would “continue to monitor closely” the B2B telemarketing practices in this area and “may revisit the issue in subsequent Rule Reviews should circumstances warrant.”<sup>71</sup>

Since 2003, the Commission has continued to see businesses harmed by deceptive B2B telemarketing. Deceptive B2B telemarketing comes in many forms,<sup>72</sup> including schemes that sell business directory listings,<sup>73</sup> web hosting or design services,<sup>74</sup> search

engine optimization services,<sup>75</sup> and market-specific advertising opportunities,<sup>76</sup> as well as schemes that impersonate the government.<sup>77</sup> For example, some of these schemes were the subject of a coordinated FTC-led crackdown on scams targeting small businesses, called “Operation Main Street,” announced in June of 2018.<sup>78</sup> The Commission believes it is now time to reassess the B2B exemption and address problems associated with B2B telemarketing.

The Commission is issuing an ANPR that seeks comments on the B2B exemption generally, including comments addressing whether the Commission should remove the exemption entirely.<sup>79</sup> The Commission recognizes requiring all B2B calls to comply with all TSR requirements would be a significant change that will require careful consideration.<sup>80</sup> While that process is underway, the Commission proposes in this NPRM to require all B2B telemarketing calls to comply with the TSR’s existing

prohibitions on misrepresentations articulated in § 310.3(a)(2) and (4).

When the Commission issues a rule prohibiting deceptive practices pursuant to the Telemarketing Act, the Commission assesses whether the rule prohibits conduct that involves a material representation likely to mislead consumers acting reasonably under the circumstances.<sup>81</sup> When the Commission included the prohibition on specific material misrepresentations<sup>82</sup> in § 310.3(a)(2) of the original TSR, the Commission identified these particular misrepresentations “based on established case law and the Commission’s policy statement on deception.”<sup>83</sup> The prohibition in § 310.3(a)(4) on making false or misleading statements to induce any person to pay for goods or services or induce a charitable contribution was included to prohibit sellers “from gaining access to consumers’ money through false and misleading statements.”<sup>84</sup> The prohibitions in § 310.3(a)(2) and (4) have been critical tools in the Commission’s efforts to combat deceptive telemarketing.

The Commission is of the view that requiring B2B calls to comply with these provisions should not impose any burden on the telemarketing industry because Section 5 of the FTC Act generally prohibits telemarketers from making misrepresentations when they sell products or solicit charitable contributions.<sup>85</sup> As noted above, the Commission is not, at this time, proposing B2B sellers and telemarketers comply with other provisions of the TSR, such as the TSR’s recordkeeping requirements, or the requirements that

<sup>81</sup> See 15 U.S.C. 6102(a); 2003 TSR Amendments, 68 FR at 4612. The Commission assesses abusive telemarketing practices using its traditional unfairness analysis. See, e.g., 2013 Notice of Proposed Rulemaking, 78 FR 41201 (July 9, 2013).

<sup>82</sup> 310.3(a)(2) prohibits, among other things, misrepresenting: The total cost to purchase a good or service, material restrictions on the use of the good or service, material aspects of the central characteristics of the good or service, material aspects of the seller’s refund policy, or the seller’s affiliation with or endorsement by any person or government agency. See 16 CFR 310.3(a)(2)(i) through (vii).

<sup>83</sup> Original TSR at 43848. The Commission added § 310.3(a)(2)(x) in 2010. 2010 TSR Amendments, 75 FR at 48498. This section contains prohibitions “related to the sale of debt relief services,” which the Commission also determined are likely to be material and misleading.

<sup>84</sup> *Id.* at 43851. The Commission created a broad prohibition to “provide[] law enforcement with flexibility to address new ways that sellers and telemarketers engaged in fraud might attempt to take consumers’ money.” *Id.*

<sup>85</sup> 15 U.S.C. 45(a)(1).

<sup>69</sup> *Id.* at 4531.

<sup>70</sup> 2003 TSR Amendments 68 FR at 4663.

<sup>71</sup> *Id.*

<sup>72</sup> A 2018 survey conducted by the Better Business Bureau revealed that the same scams that harm consumers, such as tech support scams and imposter scams, also harm small businesses, and that 57% of scams that impact small businesses are perpetrated through telemarketing. Better Business Bureau, *Scams and Your Small Business Research Report*, at 9–10 (June 2018), available at <https://www.bbb.org/SmallBizScams> (last visited Jan. 31, 2022).

<sup>73</sup> See, e.g., *FTC v. Your Yellow Book Inc.*, No. 14–cv–786–D (W.D. Ok. July 24, 2014), available at <https://www.ftc.gov/system/files/documents/cases/140807youryellowbookcmpt.pdf> (last visited Jan. 31, 2022); *FTC v. OnlineYellowPagesToday.com, Inc.*, No. 14–cv–0838 RAJ (W.D. Wa. June 9, 2014), available at <https://www.ftc.gov/system/files/documents/cases/140717onlineyellowpagescmpt.pdf> (last visited last visited Jan. 31, 2022); *FTC v. Modern Tech, Inc.*, et. al., No. 13–cv–8257 (Nov. 18, 2013) available at <https://www.ftc.gov/sites/default/files/documents/cases/131119yellowpagescmpt.pdf> (last visited Jan. 31, 2022); *FTC v. 6555381 Canada Inc. d/b/a Reed Publishing*, No. 09–cv–3158 (N.D. Ill. May 27, 2009) available at <https://www.ftc.gov/sites/default/files/documents/cases/2009/06/090602reedcmpt.pdf> (last visited Jan. 31, 2022); *FTC v. 6654916 Canada Inc. d/b/a Nat’l. Yellow Pages Online, Inc.*, No. 09–cv–3159 (N.D. Ill. May 27, 2009), available at <https://www.ftc.gov/sites/default/files/documents/cases/2009/06/090602nypocmpt.pdf> (last visited Jan. 31, 2022); *FTC v. Integration Media, Inc.*, No. 09–cv–3160 (N.D. Ill. May 27, 2009), available at <https://www.ftc.gov/sites/default/files/documents/cases/2009/06/090602goamcmpt.pdf> (last visited Jan. 31, 2022); *FTC v. Datacom Mktg. Inc.*, et. al., No. 06–cv–2574 (N.D. Ill. May 9, 2006), available at <https://www.ftc.gov/sites/default/files/documents/cases/2006/05/060509datacom complaint.pdf> (last visited Jan. 31, 2022); *FTC v. Datatech Commc’ns, Inc.*, No. 03–cv–6249 (N.D. Ill. Aug. 3, 2005) (filing amended complaint), available at <https://www.ftc.gov/sites/default/files/documents/cases/2005/08/050825compdatatech.pdf> (last visited Jan. 31, 2022); *FTC v. Ambus Registry, Inc.*, No. 03–cv–1294 RBL (W.D. Wa. June 16, 2003), available at <https://www.ftc.gov/sites/default/files/documents/cases/2003/07/ambuscomp.pdf> (last visited Jan. 31, 2022).

<sup>74</sup> See *FTC v. Epixtar Corp.*, et. al., No. 03–cv–8511(DAB) (S.D.N.Y. Nov. 3, 2003), available at <https://www.ftc.gov/sites/default/files/documents/>

[cases/2003/11/031103comp0323124.pdf](https://www.ftc.gov/sites/default/files/documents/cases/2003/11/031103comp0323124.pdf) (last visited Jan. 31, 2022); *FTC v. Mercury Marketing of Delaware, Inc.*, No. 00–cv–3281 (E.D. Pa. Aug. 12, 2003) (filing for an Order to Show Cause Why Defendants Should Not be Held in Contempt), available at <https://www.ftc.gov/sites/default/files/documents/cases/2003/08/030812contempmercury marketing.pdf> (last visited Jan. 31, 2022).

<sup>75</sup> See, e.g., *FTC v. Pointbreak Media, LLC*, No. 18–cv–61017–CMA (S.D. Fla. May 7, 2018), available at [https://www.ftc.gov/system/files/documents/cases/matter\\_1723182\\_pointbreak\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/matter_1723182_pointbreak_complaint.pdf) (last visited Jan. 31, 2022); *FTC v. 7051620 Canada, Inc.* No. 14–cv–22132 (S.D. Fla. June 9, 2014), available at <https://www.ftc.gov/system/files/documents/cases/140717nationalbusadcmpt.pdf> (last visited Jan. 31, 2022).

<sup>76</sup> See, e.g., *FTC v. Production Media Co.*, No. 20–cv–00143–BR (D. Or. Jan. 23, 2020), available at [https://www.ftc.gov/system/files/documents/cases/production\\_media\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/production_media_complaint.pdf) (last visited Jan. 31, 2022).

<sup>77</sup> See, e.g., *FTC v. DOTAuthority.com*, No. 16–cv–62186 (S.D. Fla. Sept. 13, 2016) available at <https://www.ftc.gov/system/files/documents/cases/162017dotauthority-cmpt.pdf> (last visited Jan. 31, 2022); *FTC v. D & S Mktg. Solutions LLC*, No. 16–cv–01435–MSS–AAS (M.D. Fla. June 6, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160621dsmarketingcmpt.pdf> (last visited Jan. 31, 2022).

<sup>78</sup> See Press Release, FTC, BBB, and Law Enforcement Partners Announce Results of Operation Main Street: Stopping Small Business Scams Law Enforcement and Education Initiative (June 18, 2018), available at <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-bbb-law-enforcement-partners-announce-results-operation-main> (last visited Jan. 31, 2022).

<sup>79</sup> The ANPR is published elsewhere in this issue of the **Federal Register**.

<sup>80</sup> Among other things, it would require telemarketers to ensure their recordkeeping systems comply with the TSR’s requirements, pay fees to access the National Do Not Call Registry, and provide mandatory disclosures in telemarketing calls. See, e.g., 16 CFR 310.3(a)(1) (required disclosures); 310.5 (recordkeeping requirements); 310.8 (fee for access to the Do Not Call Registry).

sellers and telemarketers access the Do Not Call Registry and pay fees.<sup>86</sup>

### III. Proposed Revisions

The Commission proposes amending the § 310.5 recordkeeping provisions to require sellers and telemarketers to maintain additional records of their telemarketing activities. The proposed amendments identify specific records that, in the Commission's law enforcement experience, are difficult for the Commission to obtain if the telemarketer or seller does not maintain these records, but are necessary for the Commission to ensure compliance with the TSR.

The proposed amendments also clarify certain of the existing recordkeeping requirements by providing additional guidance to sellers and telemarketers regarding what the Commission considers a complete record and the penalties for failing to keep such records. In developing the proposed amendments, the Commission carefully considered the types of records sellers and telemarketers likely keep in the ordinary course of business, any additional burden the proposed amendments would impose, and the types of records the Commission considers necessary to enforce the TSR.

The Commission also proposes amending the exemption for B2B telemarketing calls in § 310.6(b)(7) to require all such calls to comply with § 310.3(a)(2) and (4). The proposed amendments would provide businesses the same protections the TSR provides consumers against misrepresentations. Finally, the Commission proposes adding a definition of "previous donor" to effectuate its original intent in the 2008 TSR Amendments.

The Commission invites written comments on the proposed amendments, and in particular, seeks answers to the questions set forth in Section IV below. The written comments will assist the Commission in determining whether to implement the proposed amendments and whether the amendments as proposed strike an appropriate balance between the goal of protecting consumers from deceptive and abusive telemarketing and harm from imposing compliance burdens.

#### A. New Recordkeeping Requirements

The proposed amendments require sellers and telemarketers to retain new categories of information the Commission considers necessary for it to pursue law enforcement actions

against those who have violated the TSR. Specifically, the proposed amendments require the retention of the following new categories: (1) A copy of each unique prerecorded message; (2) call detail records of telemarketing campaigns; (3) records sufficient to show a seller has an established business relationship with a consumer; (4) records sufficient to show a consumer is a previous donor to a particular charitable organization; (5) records of the service providers a telemarketer uses to deliver outbound calls; (6) records of a seller or charitable organization's entity-specific do-not-call registries; and (7) records of the Commission's DNC Registry that were used to ensure compliance with this Rule.<sup>87</sup>

#### 1. Section 310.5(a)(1)—Substantially Different Advertising Materials and Each Unique Prerecorded Message

Section 310.5(a)(1) currently requires sellers and telemarketers to keep records of "all substantially different advertising, brochures, telemarketing scripts, and promotional materials." The proposed amendments to § 310.5(a)(1) would require telemarketers and sellers to also keep a copy of each unique prerecorded message they use in telemarketing, including each call a telemarketer makes using soundboard technology.<sup>88</sup> In the FTC's law enforcement experience, records of each unique prerecorded message are necessary for the Commission to ensure compliance with the TSR. The Commission does not believe keeping copies of each unique robocall will be unduly burdensome because the recordings are typically of short duration. For calls utilizing soundboard technology, the Commission is mindful such calls may be of longer duration than a typical robocall. As such, the Commission seeks comment on the burden that may be imposed by requiring sellers or telemarketers to keep each unique prerecorded message involving the use of soundboard technology, including how many telemarketers employ soundboard

<sup>87</sup> As discussed in Sections III.A.3 and III.A.4, the proposed amendments requiring records of EBR or previous donor status will only apply if a seller or telemarketer intends to assert that a consumer has an EBR with the seller or is a previous donor to a particular charitable organization.

<sup>88</sup> Soundboard technology is technology that allows a live agent to communicate with a call recipient by playing recorded audio snippets instead of using his or her own live voice. See FTC Staff Opinion Letter on Soundboard Technology, at 1 (Nov. 10, 2016), available at [https://www.ftc.gov/system/files/documents/advisory\\_opinions/letter-lois-greisman-associate-director-division-marketing-practices-michael-bills/161110staffopinion\\_soundboarding.pdf](https://www.ftc.gov/system/files/documents/advisory_opinions/letter-lois-greisman-associate-director-division-marketing-practices-michael-bills/161110staffopinion_soundboarding.pdf) (last visited Jan. 31, 2022).

technology in telemarketing, how many calls they make using soundboard technology, the average duration of each call, and whether the telemarketer typically keeps recordings of such calls in the ordinary course of business.<sup>89</sup>

The proposed amendments also clarify a copy of each substantially different advertising, brochure, telemarketing script, promotional material, and each unique robocall constitutes one record, and failure to keep one substantially different version of such records is one violation of the TSR.<sup>90</sup> This provision applies to each telemarketing script, including robocall and upsell scripts. Telemarketers or sellers would be required to keep such records for 5 years from the date the record is no longer used in telemarketing. The Commission is proposing to modify this time period so it dates from the time the record is no longer in use to account for the possibility the advertisement may be in use for more than 5 years, which would exceed the proposed recordkeeping time period.

#### 2. § 310.5(a)(2)—Call Detail Records

As discussed above, the Commission frequently has difficulty obtaining the call detail and other records of a seller or telemarketer's telemarketing activities.<sup>91</sup> Ensuring the availability of such records is necessary to enable the Commission to adequately determine whether the telemarketer or seller is complying with the TSR.<sup>92</sup>

To address these problems, the Commission proposes to amend the TSR to add § 310.5(a)(2), which would require the retention of call detail records. Such call detail records include, for each call a telemarketer places or receives, the calling number; called number; time, date, and duration of the call; and the disposition of the call, such as whether the call was answered, dropped, transferred, or connected. If the call was transferred, the record should also include the phone number or IP address the call was transferred to as well as the company name, if the call was transferred to a company different from the seller or telemarketer that placed the call.

The proposed addition of § 310.5(a)(2) would require the retention of other records that help identify the nature and purpose of each call including: (1) The identity of the telemarketer who placed or received each call; (2) the seller or

<sup>89</sup> See *infra* Section IV.B.4.

<sup>90</sup> See *infra* Section III.B.6 (clarifying that a failure to keep one record constitutes one violation of the TSR).

<sup>91</sup> See *supra* Section II.C

<sup>92</sup> See *supra* Section II.C–D.

<sup>86</sup> See 16 CFR 310.5 (recordkeeping requirements); § 310.8 (fee for access to the Do Not Call Registry).

charitable organization for which the telemarketing call is placed or received; (3) the good, service, or charitable purpose that is the subject of the call; (4) whether the call is to a consumer or business, utilizes robocalls, or is an outbound call; and (5) the telemarketing script(s) and robocall (if applicable) that was used in the call. Finally, proposed § 310.5(a)(2) would require the retention of records regarding the caller ID transmitted if the call was an outbound call, including the name and phone number that was transmitted, and records of the telemarketer's authorization to use the phone number and name that was transmitted.

As stated above, the proposed addition of § 310.5(a)(2) is necessary for the Commission to determine whether the TSR applies to the calls in the telemarketing campaign and which particular sections of the TSR the seller and telemarketer must comply with for that particular telemarketing campaign.<sup>93</sup>

Although some consumer advocates recommended telemarketers and sellers should also be required to retain recordings of all their telemarketing calls,<sup>94</sup> the Commission believes at this time, it would be overly burdensome to require retention of call recordings of each telemarketing call, particularly for small businesses. Requiring telemarketers and sellers to retain records of the substantially different telemarketing script(s) and unique robocall used in each call should provide the Commission with sufficient information regarding the content of the call, thus striking an appropriate balance between the Commission's interest in ensuring compliance with the

TSR and avoiding the imposition of unnecessary burdens on businesses.

The Commission also believes implementing this new provision should not be overly burdensome for telemarketers or sellers since the cost of electronic storage is decreasing over time.<sup>95</sup> Additionally, given the prevalent use of technology such as autodialers in telemarketing campaigns, the Commission believes telemarketers likely already prepare similar call detail records in the regular course of business and can do so in an automated fashion. For the categories of information that may not be generated in an automated fashion, such as records of which script was used in the telemarketing calls, the seller's identity, or other information regarding the content of the call, the Commission believes telemarketers should be able to create a record of this information without much difficulty. For example, if the script contains information about the identity of the seller and the product or service being sold or the charitable purpose for which contributions are being solicited, the telemarketer or seller need only keep records of which telemarketing script is used for a particular telemarketing campaign.

### 3. § 310.5(a)(5)—Established Business Relationship

As discussed above, the Commission proposes adding § 310.5(a)(5) to further clarify what records a seller must keep in order to “demonstrate that the seller has an established business relationship” with a consumer. Specifically, for each consumer with whom a seller asserts it has an established business relationship, the seller must keep a record of the name and last known phone number of that consumer, the date the consumer submitted an inquiry or application regarding that seller's goods or services, and the goods or services inquired about.<sup>96</sup> The Commission does not believe adding this provision to the recordkeeping requirements will impose any significant burdens on sellers or telemarketers because sellers or

telemarketers must already collect and use this information to ensure they are complying with the requirements of this affirmative defense. They are only being asked to retain the records demonstrating their compliance.

### 4. § 310.5(a)(6)—Previous Donor

Similar to the EBR requirements described above, the Commission also proposes adding § 310.5(a)(6) to clarify that if a telemarketer intends to assert a consumer is a previous donor to a particular non-profit charitable organization,<sup>97</sup> the telemarketer must keep a record, for each such consumer, of the name and last known phone number of that consumer, and the last date the consumer donated to the particular non-profit charitable organization. The Commission does not believe this provision will impose any new burdens on telemarketers since this is information a non-profit charitable organization already keeps and telemarketers that comply with the TSR will likely seek this information in the ordinary course of business.

### 5. § 310.5(a)(9)—Other Service Providers

The Commission proposes including a new record keeping requirement in § 310.5(a)(9) requiring sellers and telemarketers to keep records of all service providers the telemarketer uses to deliver outbound calls in each telemarketing campaign. Such service providers include, but are not limited to, voice providers, autodialers, sub-contracting telemarketers, or soundboard technology platforms. The Commission does not intend for this provision to include every voice provider involved in delivering the outbound call, but limits this provision to the service providers with which the seller or telemarketer has a business relationship. For each such entity, the seller or telemarketer must keep records of any applicable contracts, the date the contract was signed, and the time period the contract is in effect.

The Commission also proposes that the seller or telemarketer maintain such records for five years from the date the contract expires or five years from the date the telemarketing activity covered by the contract ceases, whichever is shorter. The Commission proposes that the telemarketer or seller maintain such records for that specified time period to provide the Commission and other law enforcement agencies sufficient time to complete any investigation of noncompliance. Such information is

<sup>97</sup> The Commission also proposes adding a new definition of “previous donor.” See *supra* Section II.A.

<sup>93</sup> See *supra* Section I.I.C.

<sup>94</sup> See NCLC, No. 00110, at 10 (recommending that sellers keep recordings of all outbound calls); AARP, No.00097, at 5 (same). In response to the FTC's Advance Notice of Proposed Rulemaking Concerning the Use of Prenotification Negative Option Plans, 84. FR 52393 (Oct. 2, 2019), a number of state attorneys general (“State AGs”) submitted a comment requesting amendments to the TSR to address negative option offers. Specifically, the State AGs suggested that for all negative option offers, sellers and telemarketers should “record the entire transaction and retain it for a specified period of time and provide a full refund if the consumer [complains] of unauthorized charges, unless the company is able to provide the consumer with the recording of the phone call establishing the consumer's affirmative consent to be charged.” See State AGs' Comment (#0082-0012), available at <https://www.regulations.gov/comment/FTC-2019-0082-0012> (last visited Jan. 31, 2022). For the reasons stated above and the reasons stated in Section IV.C of the Advance Notice of Proposed Rulemaking that the Commission is issuing simultaneously with this NPRM, the Commission does not believe imposing this requirement is necessary.

<sup>95</sup> For example, electronic storage can cost \$.74 per gigabyte for onsite storage including hardware, software, and personnel costs. See Gartner, Inc. “IT Key Metrics Data 2020: Infrastructure Measures—Storage Analysis.” Gartner December 18, 2019.

<sup>96</sup> A seller may also show it has an established business relationship with a consumer if that consumer purchased, rented, or leased the seller's goods or services or had a financial transaction with the seller during the 18 months before the date of the telemarketing call. The Commission is modifying the existing recordkeeping provisions to state that records of existing customers should also include the date of the financial transaction to establish EBR under these circumstances. See *infra* Section III.B.3.

necessary for the Commission to determine whether any other entities assisted and facilitated in violating the TSR. The Commission calculates the five-year period from the date the contract expires or the date the telemarketing activity ceases rather than the date the contract was signed to account for the possibility the contract could be of long-standing duration. The Commission does not believe this requirement is overly burdensome because telemarketers and sellers likely keep such records in the ordinary course of business.

#### 6. §§ 310.5(a)(10) and (11)—DNC and Entity-Specific DNC

The NPRM also includes two new provisions requiring telemarketers and sellers to maintain for five years records related to the entity-specific do-not-call registry and the FTC's DNC Registry. For the entity-specific do-not-call registry, the Commission proposes requiring telemarketers and sellers to retain records of: (1) The consumer's name, (2) the phone number(s) associated with the DNC request, (3) the seller or charitable organization from which the consumer does not wish to receive calls, (4) the telemarketer that made the call; (5) the date the DNC request was made; and (6) the good or service being offered for sale or the charitable purpose for which contributions are being solicited.

For the FTC's DNC Registry, the Commission proposes requiring telemarketers or sellers to keep records of every version of the FTC's DNC Registry the telemarketer or seller downloaded to ensure compliance with the TSR. The Commission does not believe these two proposed recordkeeping requirements impose a substantial burden on the telemarketer or seller since telemarketers complying with the TSR already keep such records in the ordinary course of business to avail themselves of the TSR's safe harbor provisions.<sup>98</sup>

The Commission, however, invites public comment on whether and for how long telemarketers and sellers maintain records in the ordinary course of business of every version of the FTC's DNC Registry they access to comply with the TSR's safe harbor rules, and if not, whether requiring them to do so would be overly burdensome. The Commission also invites comment from other law enforcement agencies and any other interested parties regarding whether a record of the name of the telemarketer or seller who accessed the registry, the subscription account number used to access the registry, the

telemarketing campaign for which it was accessed, and the date of access would suffice to ensure telemarketers and sellers are complying with the TSR.<sup>99</sup>

#### B. Modification of Existing Recordkeeping Requirements

##### 1. Time Period To Keep Records

In this NPRM, the Commission proposes changing the time period telemarketers and sellers must keep records from two years to five years from the date the record is made, except for § 310.5(a)(1) and (9), which require retention of records for five years from the date such records are no longer in use.<sup>100</sup> The Commission is proposing to change the time period from two years to five years because the Commission needs adequate time to complete its investigations of non-compliance with the TSR. Given the additional complexities of identifying the telemarketer and seller responsible for particular telemarketing campaigns and gathering the necessary evidence, two years is no longer a sufficient amount of time for the Commission to fully complete its investigations of noncompliance. Given the decreasing cost of data storage, the Commission does not believe changing the length of time sellers and telemarketers are required to keep records will be unduly burdensome.

##### 2. § 310.5(a)(3)—Prize Recipients

The TSR currently requires telemarketers and sellers to retain the "name and last known address" of each prize recipient.<sup>101</sup> The Commission is proposing to modify this provision also to require sellers and telemarketers to retain the last known telephone number and the last known physical or email address for each prize recipient.<sup>102</sup> The Commission is proposing this change to reflect current business practices in communicating with customers. The Commission does not believe retention of such records is unduly burdensome since telemarketers and sellers likely keep such information in the regular course of business.

<sup>99</sup> See *infra* Section IV.B.9.

<sup>100</sup> The records covered by these two sections include advertising materials and the service providers who assisted in outbound telemarketing, respectively. See *supra* Sections III.A.1 and III.A.5.

<sup>101</sup> 16 CFR 310.5(a)(2).

<sup>102</sup> The Commission proposes to modify the form of this section so that it aligns with the new additions to § 310.5(a) but makes no substantive changes except adding the prize recipient's last known phone number and last known physical or email address as described above.

##### 3. § 310.5(a)(4)—Customer Records

The TSR currently requires sellers or telemarketers to retain 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."<sup>103</sup> To account for the new requirement telemarketers and sellers keep records of each consumer with whom a seller intends to assert it has an EBR, the Commission proposes modifying § 310.5(a)(4) to require the seller or telemarketer to keep records of the date the customer purchased the good or service.<sup>104</sup> The Commission also proposes modifying § 310.5(a)(4) to require the retention of the customer's last known telephone number and the customer's last known physical address or email address to account for current business practices in communicating with existing customers. Because the Commission believes sellers likely already keep records of this information in the ordinary course of business, the Commission does not believe these modifications will cause significant additional burden.

The Commission recognizes requiring telemarketers and sellers to retain information regarding consumers' names, phone numbers, and either their email or physical addresses, in combination with the goods or services they have purchased, raises privacy concerns. The Commission emphasizes telemarketers and sellers have an obligation under Section 5 of the FTC Act to adhere to commitments they make about their information practices, and take reasonable measures to secure consumers' data.<sup>105</sup>

##### 4. § 310.5(a)(8)—Records of Consent

Section 310.5(a)(5) of the TSR currently requires sellers or telemarketers to keep records of "[a]ll verifiable authorizations or records of express informed consent or express agreement required to be provided or received under [the TSR]." The Commission proposes modifying this

<sup>103</sup> 16 CFR 310.5(a)(3).

<sup>104</sup> The Commission proposes to modify the form of this section so that it aligns with the new additions to § 310.5(a) but makes no substantive changes except adding the date the customer purchased the good or service, the customer's last known phone number, and the customer's last known physical or email address as described above.

<sup>105</sup> See generally Federal Trade Commission 2020 Privacy and Data Security Update, available at [https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-2020-privacy-data-security-update/20210524\\_privacy\\_and\\_data\\_security\\_annual\\_update.pdf](https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-2020-privacy-data-security-update/20210524_privacy_and_data_security_annual_update.pdf) (last visited Jan. 31, 2022).

<sup>98</sup> 16 CFR 310.4(b)(3)(iii) and (b)(3)(iv).

requirement to keep records of verifiable authorizations, express informed consent or express agreement (collectively, “consent”) to clarify what information the Commission believes is a complete record sufficient for a telemarketer or seller to assert such an affirmative defense.<sup>106</sup> Specifically, for each consumer from whom a seller or telemarketer states it has obtained consent, the Commission proposes requiring sellers or telemarketers to maintain records of that consumer’s name and phone number, a copy of the consent requested in the same manner and format it was presented to that consumer, a copy of the consent provided, the date the consumer provided consent, and the purpose for which consent was given and received.

For a copy of the consent provided under § 310.3(a)(3), 310.4(a)(7), (b)(1)(iii)(B)(1), or (b)(1)(v)(A), a complete record must include all of the requirements outlined in those respective sections. For example, a copy of the consent provided to receive prerecorded sales messages under § 310.4(b)(1)(v)(A) must evidence, in writing: (1) The consumer’s name, telephone number, and signature; (2) the consumer states she is willing to receive prerecorded messages from or on behalf of a specific seller; (3) the seller obtained consent only after clearly and conspicuously disclosing that the purpose of the written agreement is to authorize that seller to place prerecorded messages to that consumer; and (4) the seller did not condition the sale of the relevant good or service on the consumer providing consent to receive prerecorded messages.

If the telemarketer or seller requested consent verbally, the copy of consent requested need not be a recording of the conversation unless such a recording is required by another provision of the TSR. For such consent requests, unless such a recording is required by another provision of the TSR, a copy of the telemarketing script of the request for consent will suffice as a complete record. The Commission does not believe requiring the telemarketer or seller to keep records of consent imposes significant additional burden since it is likely telemarketers and sellers who comply with the TSR already keep such records in the ordinary course of business.

<sup>106</sup> See *supra* Section II.C at 14 (a list of consumer IP addresses is not a complete record of consent when the Commission cannot tell the name of the consumer allegedly providing consent and cannot know the nature of the purported consent).

#### 5. § 310.5(b)—Format of Records

The NPRM includes a modification to the formatting requirements for records that include phone numbers, time, or duration. For such records, the Commission proposes to require that international phone numbers must comport with the International Telecommunications Union’s Recommendation E.164 format and domestic numbers must comport with the North American Numbering plan. For time and duration, the Commission proposes such records be kept to the closest whole second, and time must be recorded in Coordinated Universal Time (UTC). The Commission does not believe specifying these format requirements will cause any undue burden since the numbering formats are standard practice across the telecommunications industry, and the proposed time and duration formats are widely used, so sellers and telemarketers can easily select them when they set up an automated method of maintaining call detail records.

#### 6. § 310.5(c)—Violation of Recordkeeping Provisions

The Commission proposes clarifying that the failure to keep each record required by § 310.5 in a complete and accurate manner constitutes a violation of this Rule. The Commission wants to state clearly that a violation does not mean a failure to keep all records, but instead that failure to keep each required record constitutes a separate violation. To do otherwise would create a perverse incentive for deceptive telemarketers to choose not to comply with the recordkeeping provisions when the only consequence would be liability for a single violation of the TSR. Such an outcome would negate the entire purpose of implementing recordkeeping requirements.

#### 7. § 310.5(d)—Safe Harbor for Incomplete or Inaccurate Records Kept Pursuant to § 310.5(a)(2)

The Commission proposes including a safe harbor provision for temporary and inadvertent errors in keeping call detail records pursuant to § 310.5(a)(2). Specifically, a seller or telemarketer would not be liable for failing to keep records under § 310.5(a)(2) if it can demonstrate: (1) It has established and implemented procedures to ensure completeness and accuracy of its records under § 310.5(a)(2); (2) it trained its personnel in the procedures; (3) it monitors compliance and enforces the procedures, and documents its monitoring and enforcement activities; and (4) any failure to keep accurate or

complete records under § 310.5(a)(2) was temporary and inadvertent.

The Commission believes providing a safe harbor for the recordkeeping requirements under § 310.5(a)(2) is appropriate since the process of maintaining such records will likely be automated by technology, and telemarketers and sellers should not be held liable under this section of the TSR for brief and inadvertent technological errors so long as they make good faith efforts to comply.

#### 8. § 310.5(e)—Compliance Obligations

The Commission also proposes modifying the compliance obligations in § 310.5(e). In the event the seller and telemarketer fail to allocate responsibility for maintaining the required records, the TSR currently designates which recordkeeping obligations fall on the telemarketer and which fall on the seller. The Commission is proposing to modify the TSR so that if the seller and telemarketer fail to allocate recordkeeping obligations between themselves, the responsibility for complying with this Section will fall on both parties. This would avoid disputes between sellers and telemarketers over which party is responsible for recordkeeping. Also, because the parties may still allocate the recordkeeping obligations, the Commission does not believe modifying this provision would alter the overall burden of complying with the TSR; rather, it should incentivize the parties to delineate clearly their respective responsibilities.

#### C. Modification of the B2B Exemption

The Commission proposes narrowing the B2B exemption to require B2B telemarketing calls to comply with § 310.3(a)(2)’s prohibition on misrepresentations and § 310.3(a)(4)’s prohibition on false or misleading statements. The Commission believes a prohibition on such deceptive conduct will protect businesses from illegal telemarketing without burdening industry since the FTC Act already prohibits businesses from making misrepresentations and false or misleading statements.

#### D. New Definitions

The Commission proposes adding a new definition for the term “previous donor” to implement the Commission’s original intent to allow robocalls soliciting charitable donations on behalf of a particular non-profit charitable organization only to consumers who have an established relationship with that organization. The proposed definition also specifies the consumer

must have made a donation to the non-profit charitable organization within the two-year period immediately preceding the date of the robocall. The Commission proposes implementing a time limit for the existence of an established relationship and chose two years to account for the possibility that consumers who donate annually may not necessarily donate exactly one year apart (*i.e.*, one year the consumer might donate in January and the following year the consumer might not donate until December). The Commission, however, seeks public comment on whether two years is an appropriate time period to use in determining whether the consumer has an established relationship with a particular organization.

#### E. Corrections to the Rule

The Commission also proposes five corrections to the Rule. The first is a clerical correction to the cross-reference citations in § 310.6(b)(1), (2), and (3) changing the cross-references from § 310.4(a)(1) and (7), (b), and (c) to § 310.4(a)(1) and (8), (b), and (c).

The second is modifying the time requirements in the definition of EBR to change it from months to days. For § 310.2(q)(1), the time requirement to qualify for EBR will be modified from 18 months between the date of the telephone call and financial transaction to 540 days. For § 310.2(q)(2), the time requirement to qualify for EBR will be modified from three months between the date of the telephone call and the date of the consumer's inquiry or application to 90 days. The Commission is proposing these modifications to make the technical calculations of whether a consumer has an EBR with a particular seller easier to determine since the number of days to qualify would be fixed instead of fluctuating depending on which months were applicable.

The third correction is to add an email address to § 310.7 so state officials or private litigants can more easily provide notice to the Commission that the state official or private litigant intends to bring an action under the Telemarketing Act.

The fourth correction is amending § 310.5(a)(7) so it is consistent in form with the new proposed additions to § 310.5(a). The substantive requirements of this section will remain the same.

The fifth correction is amending § 310.5(f) to remove an extraneous word. The substantive requirements of this section will remain the same.

#### IV. Request for Comment

The Commission seeks comments on all aspects of the proposed requirements, including the likely effectiveness of the proposed requirements to combat violations of the TSR and any alternatives to the proposed requirements. The Commission also seeks comments on the estimated burden compliance with the proposed regulations will impose on sellers and telemarketers. In their replies, commenters should provide any available evidence and data that supports their position, such as empirical data on the costs of complying with the proposed amendments.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before August 2, 2022. Write “Telemarketing Sales Rule (16 CFR part 310—NPRM) (Project No. R411001)” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

Because of the public health emergency in response to the COVID-19 outbreak and the agency's heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comment online through the <https://www.regulations.gov> website. To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write “Telemarketing Sales Rule (16 CFR part 310—NPRM) (Project No. R411001)” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex B), Washington, DC 20024. If possible, please submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website, <https://www.regulations.gov>, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone

else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “trade secret or any commercial or financial information which . . . is privileged or confidential”—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at [www.regulations.gov](https://www.regulations.gov)—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this document and the news release describing it. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments it receives on or before August 2, 2022. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

In addition to the issues raised above, the Commission solicits public comment on the list of questions below regarding the costs and benefits of the proposed amendments. The Commission requests that comments

provide the factual data upon which they are based. These questions are designed to assist the public and should not be construed as a limitation on the issues on which a public comment may be submitted.

#### A. General Questions for Comments

1. What would be the impact (including any benefits and costs), if any, of the proposed amendments on consumers?

2. What would be the impact (including any benefits and costs), if any, of the proposed amendments on individual firms (including small businesses) that must comply with them?

3. What would be the impact (including any benefits and costs), if any, on industry, including those who may be affected by the proposed amendments but not obligated to comply with the Rule?

4. What changes, if any, should be made to the proposed amendments to minimize any costs to consumers or to industry and individual firms (including small businesses) that must comply with the Rule?

5. How would each change suggested in response to Question 4 affect the benefits that might be provided by the proposed amendment to consumers or to industry and individual firms (including small businesses) that must comply with the Rule?

6. How would the proposed amendments impact small businesses with respect to costs, profitability, competitiveness, and employment? What other burdens, if any, would the proposed amendments impose on small businesses, and in what ways could the proposed amendments be modified to reduce any such costs or burdens?

7. How many small businesses would be affected by each of the proposed amendments?

8. With respect to each of the proposed amendments, are there any potentially duplicative, overlapping, or conflicting federal statutes, rules, or policies currently in effect?

#### B. Specific Questions for Comments

1. Is 5 years an appropriate time period to require telemarketers and sellers to maintain records? If not, what is an appropriate time period and why?

2. What are the current practices of sellers and telemarketers in keeping records of their telemarketing activities? How will the proposed amendments alter the current practices?

3. Is the proposed requirement to retain a record of each unique robocall recording used in telemarketing, under § 310.5(a)(1), overly burdensome? If so,

what are the costs or burdens associated with keeping a record of each unique robocall recording?

4. What are the costs or burdens associated with keeping a record of each call in which soundboard technology is used? How many telemarketers employ soundboard technology in telemarketing? How many calls do telemarketers make on average in one year using soundboard technology? What is the average duration of each call using soundboard technology? Do telemarketers typically keep recordings of such calls in the ordinary course of business? If so, how long do telemarketers typically keep such recordings in the ordinary course of business?

5. Do the proposed recordkeeping requirements of 310.5(a)(2) adequately identify all data categories a telemarketer or seller should retain from the call detail records of their telemarketing activities? If not, what data categories are missing? Alternatively, are there data categories that are overly burdensome or unnecessary to ensure the telemarketer and seller are complying with the TSR? If the data categories are overly burdensome, is there an alternative proposal on how a telemarketer or seller can retain the information from that data category in a less burdensome manner?

6. Is the proposed requirement to identify the robocall recording used in each call, under § 310.5(a)(2), overly burdensome? If so, what are the costs or burdens associated with this requirement? Is there an alternative proposal that would still give the Commission information on what robocall was used in the call but is less burdensome for the seller or telemarketer?

7. Does the proposed amendment to § 310.5(a)(8) adequately describe the information the telemarketer or seller needs to retain to provide proof of verifiable authorizations, express informed consent, or express agreement? If not, what other information should the telemarketer or seller be required to retain to show proof of verifiable authorizations, express informed consent, or express agreement?

8. Does the proposed amendment to § 310.5(a)(8) require sufficient records to demonstrate whether telemarketers or sellers who obtain preacquired account information through data pass are authorized to bill consumers? If not, what other information should the telemarketer or seller be required to retain?

9. Does the proposed amendment to § 310.5(a)(8) sufficiently address any potential harms caused by telemarketers or sellers using preacquired account information through data pass? Does it also sufficiently address any new harms that have emerged since 2014 caused by telemarketers or sellers using preacquired account information through data pass? If not, what harms have emerged since 2014? What other changes should be made to the TSR to address harms caused by data pass of preacquired account information?

10. Does the proposed amendment in § 310.5(a)(9) requiring the telemarketer or seller to retain records of all service providers a telemarketer uses to deliver an outbound call provide adequate guidance on which service providers are referenced in this provision? If not, is there an alternative description that would more accurately provide guidance on what service providers a telemarketer or seller would need to retain records of as required by this provision? Would such a description be flexible enough to account for changes in the telecommunications industry, including technological developments?

11. Should the Commission require the telemarketer or seller to retain records of every version of the Commission's DNC Registry that it downloaded to ensure compliance with the TSR or would requiring a record of each instance the telemarketer or seller accessed the registry, including the date of access, the subscription account number used to access, the telemarketing campaign for which it was accessed, and the entity that accessed the registry, be sufficient to ensure compliance with the TSR?

12. Should the Commission include the safe harbor provision in § 310.5(d) for the retention of records identified in § 310.5(a)(2)? Is such a safe harbor necessary? Alternatively, does the proposed safe harbor provide adequate protection to the seller or telemarketer against mistakes that cannot readily be prevented? Should the safe harbor provision apply only to records identified in § 310.5(a)(2) or should it also apply to other records required by § 310.5?

13. Should sellers and telemarketers be allowed to decide by contract which entity is responsible for retaining records under this Rule? If not, should both sellers and telemarketers be required to retain records under this Rule? Alternatively, should the Commission specify which entity should be required to retain specific categories of records?

14. Should the definition of previous donor include a two-year time limit

after which a consumer is no longer considered a previous donor to a particular charitable organization? If not, what is the appropriate amount of time that can lapse before a consumer should no longer be considered a previous donor to a particular charitable organization?

15. How many calls on average do sellers and telemarketers make per year?

16. What call detail records do sellers and telemarketers currently keep?

17. How much do sellers and telemarketers pay to retain call detail records on a monthly basis?

18. Are there other costs associated with creating and preserving call detail records?

19. How many different prerecorded messages do sellers and telemarketers use with their campaigns and what is the file size of the messages?

20. To what extent do existing recordkeeping requirements, such as those found under the Telephone Consumer Protection Act, overlap with the proposed rule's recordkeeping requirements?

21. Are businesses harmed by deception in B2B telemarketing? Would requiring B2B telemarketing to comply with the TSR's prohibitions on misrepresentations and making false or misleading statements help businesses?

22. Are businesses harmed by B2B telemarketing in ways not addressed by the FTC's past law enforcement work?

23. Would the proposed amendment to the B2B exemption burden sellers or telemarketers? If so, in what way, and what is the burden?

## V. Paperwork Reduction Act

The current Rule contains various provisions that constitute information collection requirements as defined by 5 CFR 1320.3(c), the definitional provision within the Office of Management and Budget ("OMB") regulations implementing the Paperwork Reduction Act (PRA).<sup>44</sup> U.S.C. chapter 35. OMB has approved the Rule's existing information collection requirements through September 30, 2022 (OMB Control No. 3084-0097). The proposed amendments will make changes in the Rule's recordkeeping requirements that will increase the PRA burden as detailed below. Accordingly, FTC staff will submit this notice of proposed rulemaking and the associated Supporting Statement to OMB for review under the PRA.<sup>107</sup>

The proposed rule contains new recordkeeping requirements and

modifications to existing recordkeeping requirements. The new recordkeeping provisions would require sellers or telemarketers to retain: (1) A copy of each unique prerecorded message; (2) call detail records of telemarketing campaigns; (3) records sufficient to show a seller has an established business relationship with a consumer; (4) records sufficient to show a consumer is a previous donor to a particular charitable organization; (5) records regarding the service providers a telemarketer uses to deliver outbound calls; (6) records of a seller or charitable organization's entity-specific do-not-call registries; and (7) records of the Commission's DNC Registry that were used to ensure compliance with this Rule. The proposed modifications to the existing recordkeeping requirements would: (1) Change the time period for retaining records from two years to five years;<sup>108</sup> (2) clarify the records necessary for sellers or telemarketers to demonstrate the person it is calling has consented to receive the call; and (3) specify the format for records that include phone numbers, time, or duration.

As explained above, the Commission believes for the most part, sellers and telemarketers already generate and retain these records in the ordinary course of business. For example, to comply with the TSR, sellers and telemarketers must already have a reliable method to identify whether they have a previous business relationship with a customer or whether the customer is a prior donor. They must also access the DNC Registry and maintain an entity-specific DNC registry. Moreover, sellers and telemarketers are also likely to keep records about their existing customers or donors and service providers in the ordinary course of business. The proposed rule would also require telemarketers and sellers to keep call detail records of their telemarketing campaigns, but in the Commission's experience the technological methods sellers and telemarketers use to implement their campaigns can also reliably generate the records of those

<sup>108</sup> As described above, changing industry practice including increased spoofing of Caller ID information has made it more difficult to identify the telemarketers and sellers responsible for particular telemarketing campaigns and has hindered evidence gathering. As a result, two years is no longer always a sufficient amount of time for the Commission to fully complete its investigations of noncompliance and therefore the Commission is proposing to increase the required retention period for recordkeeping under the Rule. Given the decreasing cost of data storage, the Commission does not believe that changing the length of time sellers and telemarketers are required to keep records will be unduly burdensome.

campaigns that would be required under the proposed rule.

### A. Estimated Annual Hours Burden

The Commission estimates the PRA burden of the proposed amendments based on its knowledge of the telemarketing industry and data compiled from the Do Not Call Registry. In calendar year 2021, 11,756 telemarketing entities accessed the Do Not Call Registry; however, 536 were exempt entities obtaining access to data.<sup>109</sup> Of the non-exempt entities, 6,835 obtained data for a single state. Staff assumes these 6,835 entities are operating solely intrastate, and thus would not be subject to the TSR. Therefore, Staff estimates approximately 4,385 telemarketing entities (11,756—536 exempt—6,835 intrastate) are currently subject to the TSR. The Commission also estimates there will be 75 new entrants to the industry per year.

The Commission has previously estimated that complying with the TSR's current recordkeeping requirements requires 100 hours for new entrants to develop recordkeeping systems that comply with the TSR and 1 hour per year for established entities to file and store records after their systems are created, for a total annual recordkeeping burden of 4,385 hours for established entities and 7,500 hours for new entrants who must develop required record systems.<sup>110</sup>

Because the proposed rule contains new recordkeeping requirements, the Commission anticipates in the first year after the proposed amendments take effect, every entity subject to the TSR would need to ensure their recordkeeping systems meet the new requirements. The Commission estimates this undertaking will take 50 hours. This includes 10 hours to verify the entities are maintaining the required records, and 40 hours to create and retain call detail records. This yields an additional burden of 219,250 hours for established entities (50 hours × 4,385 covered entities).

For new entrants, the Commission estimates the new requirements will increase their overall burden for establishing new recordkeeping systems from 100 hours per year to 150 hours

<sup>109</sup> See National Do not Call Registry Data Book for Fiscal Year 2020 ("Data Book"), available at [https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2020/dnc\\_data\\_book\\_2020.pdf](https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2020/dnc_data_book_2020.pdf) (last visited Jan. 31, 2022). An exempt entity is one that, although not subject to the TSR, voluntarily chooses to scrub its calling lists against the data in the Registry.

<sup>110</sup> See Information Collection Activities; Proposed Collection; Comment Request 87 FR 23177 (Apr. 19, 2022).

<sup>107</sup> This PRA analysis focuses specifically on the information collection requirements created by or otherwise affected by the proposed amendments.

per year. This yields a total burden for new entrants of 11,250 hours (150 hours  $\times$  75 new entrants per year).

#### B. Estimated Annual Labor Costs

The Commission estimates annual labor costs by applying appropriate hourly wage rates to the burden hours described above. The Commission estimates established entities will employ skilled computer support specialists to modify their recordkeeping systems.

Applying a skilled labor rate of \$29.11/hour<sup>111</sup> to the estimated 50 burden hours for established entities yields approximately \$6,384,560 in labor costs in the first year after the proposed amendments would take effect (4,385 respondents  $\times$  \$1,456).

As described above, the Commission estimates new entrants will spend approximately 150 hours per year to establish new recordkeeping systems. Applying a skilled labor rate of \$29.11/hour to the estimated 150 burden hours for new entrants, the Commission estimates the annual labor costs for new entrants would be approximately \$327,525 (75 entrants  $\times$  \$4,367).

#### C. Estimated Non-Annual Labor Costs

Staff previously estimated the non-labor costs to comply with the TSR's recordkeeping requirements were *de minimis* because most affected entities would maintain the required records in the ordinary course of business. Staff estimated the recordkeeping requirements could require \$50 per year in office supplies to comply with the Rule's recordkeeping requirements. Because the proposed recordkeeping requirements require retaining additional records, Staff estimates these requirements will increase to \$60 per year in office supplies.

The new recordkeeping requirements also require entities to retain call detail records and audio recordings of prerecorded messages used in calls. Staff estimates the costs associated with preserving these records will also be *de minimis*. The Commission regularly obtains call detail records from voice providers when investigating potential TSR violations, and these records are kept in databases with small file sizes even when the database contains information about a substantial number

of calls. For example, the Commission received a 2.9 gigabyte database that contained information about 56 million calls. The Commission also received a 1.2 gigabyte database that contained information about 5.5 million calls. Similarly, audio files of most prerecorded messages will not be very large because prerecorded messages are typically short in duration. Storing electronic data is very inexpensive. Electronic storage can cost \$.74 per gigabyte for onsite storage including hardware, software, and personnel costs.<sup>112</sup> Commercial cloud-based storage options are less expensive and can cost around \$.20 per gigabyte per year.<sup>113</sup> The Commission estimates the non-labor costs associated with electronically storing audio files of prerecorded messages and call detail records will cost around \$5 a year.

The Commission invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the FTC's burden estimates, including whether the methodology and assumptions used are valid; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of collecting information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this document to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting "Currently under Review—Open for Public Comments" or by using the search function. The [reginfo.gov](http://reginfo.gov) web link is a United States Government website produced by OMB and the General Services Administration (GSA). Under PRA requirements, OMB's Office of Information and Regulatory Affairs (OIRA) reviews Federal information collections.

<sup>112</sup> See Gartner, Inc. "IT Key Metrics Data 2020: Infrastructure Measures—Storage Analysis." Gartner December 18, 2019.

<sup>113</sup> Amazon's storage rate for S3 Standard—Infrequent Access storage is \$0.0125 per GB per month. Available at <https://aws.amazon.com/s3/pricing/?nc=sn&loc=4> (last visited Jan. 31, 2022); Google's storage rate for Archive Storage in parts of North America is \$0.0012 per GB per month. Available at <https://cloud.google.com/storage/pricing> (last visited Jan. 31, 2022).

## VI. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires that the Commission conduct an analysis of the anticipated economic impact of the proposed amendments on small entities.<sup>114</sup> The RFA requires the Commission provide an Initial Regulatory Flexibility Analysis ("IRFA") with a proposed rule unless the Commission certifies the rule will not have a significant economic impact on a substantial number of small entities.<sup>115</sup>

The Commission believes that the proposed amendment would not have a significant economic impact upon small entities, although it may affect a substantial number of small businesses. In the Commission's view, the proposed amendment should not significantly increase the costs of small entities that are sellers or telemarketers because the proposed amendments primarily require these entities to retain records they are already generating and preserving in the ordinary course of business. The Commission does not believe the proposed amendments requiring small entities that are sellers or telemarketers to comply with the TSR's prohibitions on misrepresentations should impose any additional costs on small entities. Therefore, based on available information, the Commission certifies that amending the Rules as proposed will not have a significant economic impact on a substantial number of small entities, and hereby provides notice of that certification to the Small Business Administration ("SBA"). Nonetheless, the Commission has determined it is appropriate to publish an IRFA in order to inquire into the impact of the proposed amendments on small entities. The Commission invites comment on the burden on any small entities that would be covered and has prepared the following analysis.

#### A. Description of the Reasons the Agency Is Taking Action

The Commission proposes amending the TSR to require telemarketers and sellers to maintain additional records regarding their telemarketing transactions. As described in Section II, the proposed amendments are intended to update the TSR's existing recordkeeping requirements so the requirements comport with the substantial amendments to the TSR since the recordkeeping requirements were first made. The requirements are

<sup>114</sup> 5 U.S.C. 601–612.

<sup>115</sup> 5 U.S.C. 605.

<sup>111</sup> This figure is derived from the mean hourly wage shown for "Computer Support Specialist." See "Occupational Employment and Wages—May 2021" Bureau of Labor Statistics, U.S. Department of Labor, Last Modified March 31, 2022, Table 1 ("National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2021") available at <https://www.bls.gov/news.release/ocwage.t01.htm> (last visited April 5, 2022).

also necessary in light of the technological advancements that have made it easier and cheaper for unscrupulous telemarketers to engage in illegal telemarketing. The proposed amendments would also require B2B telemarketers to comply with the TSR's prohibition on misrepresentations. These amendments are necessary to help protect businesses from deceptive telemarketing practices. The proposed amendments would also amend the definition of "previous donor" to clarify that a seller or telemarketer may not use prerecorded messages to solicit charitable donations on behalf of a charitable organization unless the recipient of the call previously donated to that charitable organization within the last two years.

#### *B. Statement of Objectives of, and Legal Basis for, the Proposed Amendments*

The objective of the proposed amendments is to update the TSR's recordkeeping requirements in order to assist the Commission's enforcement of the TSR, and to prohibit misrepresentations in B2B telemarketing. The legal basis for the proposed amendments is the Telemarketing Act, which authorizes the Commission to issue rules to prohibit deceptive or abusive telemarketing practices.

#### *C. Description and Estimated Number of Small Entities To Which the Rule Will Apply*

The proposed amendments to the Rule affect sellers and telemarketers engaged in "telemarketing," defined by the Rule to mean "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."<sup>116</sup> As noted above, staff estimate 4,385 telemarketing entities are currently subject to the TSR, and approximately 75 new entrants enter the market per year. For telemarketers, a small business is defined by the SBA as one whose average annual receipts do not exceed \$16.5 million.<sup>117</sup> Because

<sup>116</sup> 16 CFR 310.2(dd). The Commission notes that, as mandated by the Telemarketing Act, the interstate telephone call requirement in the definition excludes small business sellers and the telemarketers which serve them in their local market area, but may not exclude some small business sellers and telemarketers in multi-state metropolitan markets, such as Washington, DC.

<sup>117</sup> Telemarketers are typically classified as "Telemarketing Bureaus and Other contact Centers," (NAICS Code 561422). See Table of Small Business Size Standards Matched to North American Industry Classification System Codes, available at <https://www.sba.gov/sites/default/files/>

virtually any business could be a seller under the TSR, it is not possible to identify average annual receipts that would make a seller a small business as defined by the SBA. Commission staff are unable to determine a precise estimate of how many sellers or telemarketers constitute small entities as defined by SBA. The Commission invites comment and information on this issue.

#### *D. Projected Reporting, Recordkeeping, and Other Compliance Requirements, Including Classes of Small Entities and Professional Skills Needed To Comply*

The proposed rule contains new recordkeeping requirements and modifications to existing recordkeeping requirements. The new recordkeeping requirements would require sellers or telemarketers to retain: (1) A copy of each unique prerecorded message; (2) call detail records of telemarketing campaigns; (3) records sufficient to show a seller has an established business relationship with a consumer; (4) records sufficient to show a consumer is a previous donor to a particular charitable organization; (5) records regarding the service providers a telemarketer uses to deliver outbound calls; (6) records of a seller or charitable organization's entity-specific do-not-call registries; and (7) records of the Commission's DNC Registry that were used to ensure compliance with this Rule. The proposed modifications to the existing recordkeeping requirements would: (1) Change the time period for retaining records from two years to five years; (2) clarify the records necessary for sellers or telemarketers to demonstrate the person they are calling has consented to receive the call; and (3) specify the format for records that include phone numbers, time, or duration. The small entities potentially covered by the proposed amendment will include all such entities subject to the Rule. The Commission has described the skills necessary to comply with these recordkeeping requirements in Section V above.

#### *E. Identification of Duplicative, Overlapping, or Conflicting Federal Rules*

The Telephone Consumer Protection Act of 1991, 47 U.S.C. 227, and its implementing regulations, 47 CFR 64.1200 (collectively, "TCPA") contain recordkeeping requirements that may overlap with the recordkeeping

2019-08/  
SBA%20Table%20of%20Size%20Standards  
Effective%20Aug%202019.%202019.pdf (last visited Jan. 31, 2022).

requirements proposed by the new rule. For example, the proposed provision requiring sellers or telemarketers to keep a record of consumers who state they do not wish to receive any outbound calls made on behalf of a seller or telemarketer, 16 CFR 310.5(a)(10), overlaps to some degree with the TCPA's prohibition on a person or entity initiating a call for telemarketing unless such person or entity has procedures for maintaining lists of persons who request not to receive telemarketing calls including a requirement to record the request.<sup>118</sup> The Commission's proposed recordkeeping requirements do not conflict with the TCPA's recordkeeping requirements because sellers and telemarketers can comply with both sets of requirements simultaneously. Moreover, in the Commission's experience, the recordkeeping requirements under the TCPA do not lessen the need for the more robust recordkeeping requirements the Commission is proposing to further its law enforcement efforts. The Commission invites comment and information regarding any potentially duplicative, overlapping, or conflicting federal statutes, rules, or policies.

#### *F. Significant Alternatives to the Proposed Amendments*

The Commission has not proposed any specific small entity exemption or other significant alternatives to the proposed rule. The Commission has made every effort to avoid imposing unduly burdensome requirements on sellers and telemarketers by limiting the recordkeeping requirements to records both necessary for the Commission's law enforcement and typically already kept in the ordinary course of business.

### **VII. Communications by Outside Parties to the Commissioners or Their Advisors**

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding, from any outside party to any Commissioner or Commissioner's advisor, will be placed on the public record.<sup>119</sup>

### **VIII. Incorporation by Reference**

Consistent with 5 U.S.C. 552(a) and 16 CFR part 51, the Commission proposes to incorporate the specifications of the following standard issued by the International Telecommunications Union: ITU-T E.164: Series E: Overall Network Operation, Telephone Service,

<sup>118</sup> 47 CFR 65.1200(d)(3).

<sup>119</sup> See 16 CFR 1.26(b)(5).

Service Operation and Human Factors (published 11/2010). The E.164 standard establishes a common framework for how international telephone numbers should be arranged so calls can be routed across telephone networks. Countries use this standard to establish their own international telephone number formats and ensure those numbers have the information necessary to route telephone calls successfully between countries.

This ITU standard is reasonably available to interested parties. The ITU provides free online public access to view read-only copies of the standard. The ITU website address for access to the standard is: <https://www.itu.int/en/pages/default.aspx>.

**List of Subjects in 16 CFR Part 310**

Incorporation by reference, Telemarketing, Trade practices.

For the reasons stated above, the Federal Trade Commission proposes to amend part 310 of title 16 of the Code of Federal Regulations as follows:

**PART 310—TELEMARKETING SALES RULE**

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

Authority: 15 U.S.C. 6101–6108.

**PART 310—[AMENDED]**

- 2. In § 310.2,
- a. Revise paragraph (q)
- b. Redesignate paragraphs (aa) through (hh) as follows:

Old section	New section
(aa)	(bb)
(bb)	(cc)
(cc)	(dd)
(dd)	(ee)
(ee)	(ff)
(ff)	(gg)
(gg)	(hh)
(hh)	(ii)

■ c. Add new paragraph (aa).

The revision and addition read as follows:

**§ 310.2 Definitions.**

\* \* \* \* \*

(q) 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 540 days immediately preceding the date of a telemarketing call; or

(2) The consumer’s inquiry or application regarding a good or service offered by the seller, within the 90 days

immediately preceding the date of a telemarketing call.

\* \* \* \* \*

(aa) Previous donor means any person who has made a charitable contribution to a particular charitable organization within the two-year period immediately preceding the date of the telemarketing call soliciting on behalf of that charitable organization.

\* \* \* \* \*

■ 3. Revise § 310.5 to read as follows:

**§ 310.5 Recordkeeping.**

(a) Any seller or telemarketer must keep, for a period of 5 years from the date the record is produced unless specified otherwise, the following records relating to its telemarketing activities:

(1) A copy of each substantially different advertising, brochure, telemarketing script, and promotional material, and a copy of each unique prerecorded message. Such records must be kept for a period of 5 years from the date that they are no longer used in telemarketing;

(2) A record of each telemarketing call, which must include:

- (i) The telemarketer that placed or received the call;
- (ii) the seller or person for which the telemarketing call is placed or received;
- (iii) the good, service, or charitable purpose that is the subject of the telemarketing call;
- (iv) whether the telemarketing call is to a consumer or a business;
- (v) whether the telemarketing call is an outbound telephone call;
- (vi) whether the telemarketing call utilizes a prerecorded message;
- (vii) the calling number, called number, date, time, and duration of the telemarketing call;
- (viii) the telemarketing script(s) and prerecorded message, if any, used during the call;
- (ix) the caller identification telephone number, and if it is transmitted, the caller identification name that is transmitted in an outbound telephone call to the recipient of the call, and any contracts or other proof of authorization for the telemarketer to use that telephone number and name, and the time period for which such authorization or contract applies; and

(x) the disposition of the call, including but not limited to, whether the call was answered, connected, dropped, or transferred. If the call was transferred, the record must also include the telephone number or IP address that the call was transferred to as well as the company name, if the call was transferred to a company different from

the seller or telemarketer that placed the call;

(3) For each prize recipient, a record of the name, last known telephone number, and last known physical or email address of that prize recipient, and the prize awarded for prizes that are represented, directly or by implication, to have a value of \$25.00 or more;

(4) For each customer, a record of the name, last known telephone number, and last known physical or email address of that customer, the goods or services purchased, the date such goods or services were purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;<sup>1</sup>

(5) For each consumer with whom a seller asserts it has an established business relationship under § 310.2(q)(2), a record of the name and last known telephone number of that consumer, the date that consumer submitted an inquiry or application regarding the seller’s goods or services, and the goods or services inquired about;

(6) For each consumer that a telemarketer intends to assert is a previous donor to a particular charitable organization under § 310.2(aa), a record of the name and last known telephone number of that consumer, and the last date that consumer donated to that particular charitable organization;

(7) For each current or former employee directly involved in telephone sales or solicitations, a record of the name, any fictitious name used, the last known home address and telephone number, and the job title(s) of that employee; 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;

(8) All verifiable authorizations or records of express informed consent or express agreement (collectively, “Consent”) required to be provided or received under this Rule. A complete record of Consent includes the following:

- (i) The name and telephone number of the person providing Consent;
- (ii) a copy of the request for Consent in the same manner and format in which it was presented to the person providing Consent;
- (iii) the purpose for which Consent is requested and given;

<sup>1</sup> 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 part 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, will constitute compliance with paragraph (a)(4) of this section.

(iv) a copy of the Consent provided;  
 (v) the date Consent was given; and  
 (vi) for the copy of Consent provided under § 310.3(a)(3) or 310.4(a)(7), (b)(1)(iii)(B)(1), or (b)(1)(v)(A), a complete record must also include all information specified in those respective sections of this Rule;

(9) A record of each service provider a telemarketer used to deliver an outbound telephone call to a consumer on behalf of a seller for each good or service the seller offers for sale through telemarketing. For each such service provider, a complete record includes the contract for the service provided, the date the contract was signed, and the time period the contract is in effect. Such contracts must be kept for 5 years from the date the contract expires, or 5 years from the date the telemarketing activity that the contract applies to ceased, whichever period of time is shorter;

(10) A record of each consumer who has stated she does not wish to receive any outbound telephone calls made on behalf of a seller or charitable organization pursuant to § 310.4(b)(1)(iii)(A) including: The name of the consumer, the telephone number(s) associated with the request, the seller or charitable organization from which the consumer does not wish to receive calls, the telemarketer that called the consumer, the date the consumer requested that she cease receiving such calls, and the goods or services the seller was offering for sale or the charitable purpose for which a charitable contribution was being solicited; and

(11) A record of each version of the Commission's "do-not-call" registry that was used to ensure compliance with § 310.4(b)(1)(iii)(B). Such record must include the date the version was obtained, and the seller or telemarketer who obtained that version.

(b) A seller or telemarketer may keep the records required by paragraph (a) of this section in the same manner, format, or place as they keep such records in the ordinary course of business. The format for records required by paragraph (a)(2)(vii) of this section, and any other records that include a time or telephone number, must also comply with the following:

(1) The format for domestic telephone numbers must comport with the North American Numbering plan;

(2) The format for international telephone numbers must comport with the standard established in the ITU-T E.164;

(3) The time and duration of a call must be kept to the closest second; and

(4) Time must be recorded in Coordinated Universal Time (UTC).

(c) Failure to keep each record required by paragraph (a) of this section in a complete and accurate manner, and in compliance with paragraph (b) of this section, as applicable, is a violation of this Rule.

(d) For records kept pursuant to paragraph (a)(2) of this section, the seller or telemarketer will not be liable for failure to keep complete and accurate records pursuant to this section if it can demonstrate, with documentation, that as part of its routine business practice:

(1) It has established and implemented procedures to ensure completeness and accuracy of its records;

(2) It has trained its personnel, and any entity assisting it in its compliance, in such procedures;

(3) It monitors compliance with and enforces such procedures, and maintains records documenting such monitoring and enforcement; and

(4) Any failure to keep complete and accurate records was temporary and due to inadvertent error.

(e) 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 will govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If by written agreement the telemarketer bears the responsibility for the recordkeeping requirements of this section, the seller must establish and implement practices and procedure to ensure the telemarketer is complying with the requirements of this section. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, both the telemarketer and the seller are responsible for complying with this section.

(f) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer must maintain all records 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 must maintain all records required under this section.

(g) The material required in this section is incorporated by reference into this section with the approval of the Director of the Federal Register under 5

U.S.C. 552(a) and 1 CFR part 51. All approved material is available for inspection at the Federal Trade Commission (FTC) and at the National Archives and Records Administration (NARA). Contact FTC at: FTC Library, (202) 326-2395, Federal Trade Commission, Room H-630, 600 Pennsylvania Avenue NW, Washington, DC 20580; or by email at [Library@ftc.gov](mailto:Library@ftc.gov). For information on the availability of this material at NARA, email: [fr.inspection@nara.gov](mailto:fr.inspection@nara.gov) or go to [www.archives.gov/federal-register/cfr/ibr-locations.html](http://www.archives.gov/federal-register/cfr/ibr-locations.html). It is available from: The International Telecommunications Union, Telecommunications Standardization Bureau, Place des Nations, CH-1211 Geneva 20; (+41 22 730 5852); <https://www.itu.int/en/pages/default.aspx>.

(1) Recommendation ITU-T E.164: Series E: Overall Network Operation, Telephone Service, Service Operation and Human Factors, 2010.

(2) [Reserved.]

■ 4. Amend § 310.6 as follows:

■ a. In paragraphs (b)(1) through (3), remove the text “§§ 310.4(a)(1), (a)(7), (b), and (c)” and add, in its place, the text “§§ 310.4(a)(1), (a)(8), (b), and (c)”; and

■ b. Revise paragraph (b)(7) to read as follows:

**§ 310.6 Exemptions.**

\* \* \* \* \*

(b) \* \* \*

(7) Telephone calls between a telemarketer and any business to induce the purchase of goods or services or a charitable contribution by the business, *provided*, however that this exemption does not apply to:

(i) The requirements of § 310.3(a)(2) and (4); or

(ii) Calls to induce the retail sale of nondurable office or cleaning supplies; *provided*, however, that §§ 310.4(b)(1)(iii)(B) and 310.5 shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

■ 5. Amend § 310.7 by revising paragraph (a) to read as follows:

**§ 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, must serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this part. The notice must be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade

Commission, Washington, DC 20580, at [tsrnotice@ftc.gov](mailto:tsrnotice@ftc.gov) and must 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 must serve the Commission with the required notice immediately upon instituting its action.

\* \* \* \* \*

By direction of the Commission.

**April J. Tabor,**  
Secretary.

[FR Doc. 2022-09914 Filed 6-2-22; 8:45 am]

BILLING CODE 6750-01-P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[Docket Number USCG-2022-0372]

RIN 1625-AA00

#### Safety Zone; Parade, Willamette River, Portland, OR

**AGENCY:** Coast Guard, Homeland Security (DHS).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard is proposing to establish a temporary safety zone for certain waters of the Willamette River. This action is necessary to provide for the safety of participants and the maritime public during a float parade on the Willamette River in Portland, Oregon on July 10, 2022. This proposed rulemaking would prohibit non-participant persons and vessels from being in the safety zone unless authorized by the Captain of the Port Columbia River or a designated representative. We invite your comments on this proposed rulemaking.

**DATES:** Comments and related material must be received by the Coast Guard on or before June 21, 2022.

**ADDRESSES:** You may submit comments identified by docket number USCG-2022-0372 using the Federal Decision Making Portal at <https://www.regulations.gov>. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this proposed rulemaking, call or email LT Sean Murphy, Waterways Management Division, Marine Safety Unit Portland,

U.S. Coast Guard; telephone 503-240-9319, email [D13-SMB-MSUPortlandWWM@uscg.mil](mailto:D13-SMB-MSUPortlandWWM@uscg.mil).

#### SUPPLEMENTARY INFORMATION:

##### I. Table of Abbreviations

CFR Code of Federal Regulations  
DHS Department of Homeland Security  
FR Federal Register  
NPRM Notice of proposed rulemaking  
§ Section  
U.S.C. United States Code  
COTP Captain of the Port Columbia River

##### II. Background, Purpose, and Legal Basis

On April 22, 2022, the Human Access Project notified the Coast Guard that it will need to reschedule The Big Float, an annually recurring marine event. The event consists of a float parade from 11 a.m. to 6 p.m. on July 10, 2022. Hazards from a float parade include potentially oversized decorations, lower traffic speed, and falling debris. The Captain of the Port Columbia River (COTP) has determined that the potential hazards associated with the float parade would be a safety concern for anyone within the designated area of the safety zone before, during, or after the parade.

The purpose of this rulemaking is to protect personnel, vessels, and the marine environment in these navigable waters before, during, and after the scheduled event. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231).

##### III. Discussion of Proposed Rule

The COTP is proposing to establish a safety zone from 10:30 a.m. until 6:30 p.m. on July 10, 2022. The safety zone will cover all navigable waters of the Willamette River, in Portland Oregon, enclosed by the Hawthorne Bridge, the Marquam Bridge, and west of a line beginning at the Hawthorne Bridge at approximate location 45°30'50" N; 122°40'21" W, and running south to the Marquam Bridge at approximate location 45°30'27" N; 122°40'11" W. The duration of the zone is intended to ensure the safety of vessels and these navigable waters before, during, and after the scheduled 11 a.m. to 6 p.m. parade. No vessel or person would be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. The regulatory text we are proposing appears at the end of this document.

##### IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses

based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

##### A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This NPRM has not been designated a "significant regulatory action," under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, duration, and time-of-year of the safety zone. The safety zone created by this proposed rule is designed to minimize its impact on navigable waters. This proposed rule will prohibit entry into certain navigable waters of the Willamette River and is not anticipated to exceed 7 hours in duration. Thus, restrictions on vessel movement within that particular area are expected to be minimal. Moreover, under certain conditions vessels may still transit through the safety zone when permitted by the COTP. The Coast Guard will issue a broadcast notice to mariners via VHF-FM marine channel 16 about the zone and the rulemaking allows vessels to seek permission to enter the zone.

##### B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601-612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree