

**FEDERAL TRADE COMMISSION****16 CFR Part 310****Telemarketing Sales Rule Fees****AGENCY:** Federal Trade Commission.**ACTION:** Revised notice of proposed rulemaking and request for public comment.

**SUMMARY:** The Federal Trade Commission (the “Commission” or “FTC”) is issuing a Revised Notice of Proposed Rulemaking (“Revised Fee NPRM”) to amend the FTC’s Telemarketing Sales Rule (“TSR”) by adding a new section that would impose fees on entities accessing the national do-not-call registry. This Revised Fee NPRM invites written comments on the issues raised by the proposed changes, and seeks answers to the specific questions set forth in Section X.

The Commission is also announcing that full compliance with § 310.4(b)(1)(iii)(B), the “do-not-call” registry provision of the Amended TSR, will be required on October 1, 2003.

**DATES:** Written comments will be accepted until May 1, 2003. Time is of the essence to promulgate the proposed fees. Thus, the Commission does not anticipate providing any extension to this comment period.

**ADDRESSES:** The Commission encourages comments to be submitted electronically to the following e-mail address: [feerule@ftc.gov](mailto:feerule@ftc.gov). Alternatively, commenters may submit an original plus two paper copies of their comments to the Office of the Secretary, Room 159, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580. To encourage prompt and efficient review and dissemination of the comments to the public, all paper comments should also be submitted, if possible, in electronic form, on a 3½ inch computer disk, with a label on the disk stating the name of the commenter and the name and version of the word processing program used to create the document. (Programs should be submitted in ASCII text format to be accepted.) Individual members of the public filing comments need not submit multiple copies or comments in electronic form.

All comments and any electronic versions (*i.e.*, computer disks) should be identified as “Telemarketing Rulemaking—Revised Fee NPRM Comment. FTC File No. R411001.” The Commission will make this NPRM and, to the extent possible, all comments received in electronic form in response to this NPRM, available to the public

through the Internet at the following address: <http://www.ftc.gov>.

Comments on proposed revisions bearing on the Paperwork Reduction Act should additionally be submitted to: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10102, Washington, DC 20503, ATTN.: Desk Officer for the Federal Trade Commission, as well as to the FTC Secretary at the address above.

**FOR FURTHER INFORMATION CONTACT:**

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

**SUPPLEMENTARY INFORMATION:****Background**

On January 30, 2002, the FTC published a Notice of Proposed Rulemaking to amend the FTC’s TSR and to request public comment on the proposed changes. 67 FR 4492 (Jan. 30, 2002) (“the Rule NPRM”). Among other provisions, the Rule NPRM proposed to establish a national do-not-call registry, to be maintained by the FTC, that would permit consumers who prefer not to receive telemarketing calls to contact one centralized registry to effectuate this preference. On May 29, 2002, the FTC published another Notice of Proposed Rulemaking to further amend the TSR by imposing user fees on sellers and telemarketers for their access to the proposed national do-not-call registry. 67 FR 37362 (May 29, 2002) (“the User Fee NPRM”). In issuing the User Fee NPRM, the Commission was guided by the Independent Offices Appropriations Act of 1952, 31 U.S.C. 9701, and the Office of Management and Budget Circular No. A–25. The Commission received 34 comments submitted in response to the User Fee NPRM.<sup>1</sup>

The Commission issued final amendments to the TSR on December 18, 2002. 68 FR 4580 (Jan. 29, 2003). Among the changes made to the TSR, the Commission adopted the proposal to establish a national do-not-call registry, permitting consumers to register, via either a toll-free telephone number or the Internet, their preference not to receive telemarketing calls. When full

<sup>1</sup> A list of commenters to the User Fee NPRM and the Rule NPRM, and the acronyms used to identify those entities, was included in Attachment B to the Statement of Basis and Purpose for the Amendments to the TSR, 68 FR 4677–78 (Jan. 29, 2003) (“TSR SBP”). Comments submitted in response to the User Fee NPRM will be cited in this Notice as “[Name of Commenter]–User Fee at [page number].” Comments submitted in response to the Rule NPRM will be cited as “[Name of commenter]–Rule NPRM at [page number].”

compliance with the do-not-call provisions of the Amended TSR is required, on October 1, 2003, telemarketers will be required to refrain from calling consumers who have placed their numbers on this registry. 16 CFR 310.4(b)(1)(iii)(B). To ensure compliance with this requirement, telemarketers will be required to access the national registry at least once every three months in order to remove from their telemarketing lists those consumers who have placed their telephone numbers on the national registry. 16 CFR 310.4(b)(3)(iv). When it issued the Amended TSR, the Commission reserved its decision on the issues raised in the User Fee NPRM, stating that it would issue a revised Notice of Proposed Rulemaking to seek further comment on the issues raised in that proceeding. See 68 FR 4580, 4640 n. 716.

On February 20, 2003, the President signed into law the Consolidated Appropriations Resolution of 2003, Public Law 108–7 (2003) (“the Appropriations Act”), which appropriated funds for the operation of the FTC during fiscal year 2003. In the same Act, Congress also authorized the agency to collect fees sufficient to implement and enforce the do-not-call provisions of the TSR. Congress further estimated the costs for fiscal year 2003 at \$18,100,000. *Id.* at Division B, Title II. See also The Do-Not-Call Implementation Act, Public Law 108–10 (2003) (“the Implementation Act”) at section 2. Pursuant to the Appropriations Act and the Implementation Act, as well as the Telemarketing Fraud and Abuse Prevention Act, 15 U.S.C. 6101–08 (“the Telemarketing Act”), the FTC is issuing this Revised Fee NPRM.<sup>2</sup>

<sup>2</sup> Many commenters to the User Fee NPRM claimed that the FTC lacked the authority to impose a user fee based on the Independent Offices Appropriations Act of 1952. *See, e.g.*, ABA–User Fee at 1–3; Ameriquest–User Fee at 1–5; Discover–User Fee at 1–4; DMA–User Fee at 1–7 (“If the FTC wants to collect fees for its regulation of non-deceptive and non-abusive telemarketing, it must obtain approval from Congress to do so”). DMA’s comments were supported by ERA, PMA, and MPA. Other commenters suggested that consumers should be charged the fee necessary to implement the national registry. *See, e.g.*, ARDA–User Fee at 1–4; ATA–User Fee at 3–6; Idaho Realtors–User Fee at 1–2; Infocision–User Fee at 4; ITC–User Fee at 3–5; MBNA–User Fee at 3; NEMA–User Fee at 2–3; SBC–User Fee at 2–5. But see NASUCA–User Fee at 2; NCL–User Fee at 1; TRA–User Fee at 3. Still other commenters suggested that the User Fee NPRM was premature, and that they had insufficient information available to properly comment on the proposal. *See, e.g.*, CBA–User Fee at 1; Household–User Fee at 3; MasterCard–User Fee at 1–3. With the passage of the Appropriations Act, the Implementation Act, and the Amended TSR, these comments are moot.

## II. Access to the Do-Not-Call Registry

### A. Entities That Are Allowed Access

In the User Fee NPRM, the Commission proposed limiting access to the national do-not-call registry to telemarketers in order to maintain the security of the information included in the registry.<sup>3</sup> In addition, because the proposed amendments to the TSR prohibited the use of information in the national registry for any purpose other than compliance with the do-not-call provisions of the Proposed Rule, the Commission believed that only telemarketers would need to access that information.

A number of commenters stated that broader access to the national registry is necessary. In particular, some commenters suggested that sellers<sup>4</sup> should be allowed to gain access to evaluate telemarketing campaigns run on their behalf and to evaluate telemarketers' Rule compliance.<sup>5</sup> Others suggested that "outside compliance firms" and "list scrubbers" should be given access, since they provide a valuable service for telemarketers.<sup>6</sup> Still others stated that telemarketers and sellers who are exempt from the FTC's jurisdiction would have no access to the list even if they want to voluntarily suppress calls. These commenters suggested that the FTC make the registry available to any entity provided that the information in the registry is used solely for the purpose of preventing telephone calls to numbers on that list.<sup>7</sup>

The Commission agrees that broader access to the national do-not-call registry may be necessary to effectuate more fully the primary purpose of the do-not-call regulations; namely, to enable consumers to stop unwanted telemarketing calls. Limiting access only to telemarketers, as defined by the Amended TSR, would prevent those entities that are exempt from the FTC's jurisdiction, but that want to scrub their calling lists as a matter of customer service, from obtaining the information necessary to do so. Such limited access also may prevent sellers from engaging in thorough Rule compliance, and may unnecessarily hinder the services provided to the telemarketing industry

<sup>3</sup> User Fee NPRM at 37365 and proposed § 310.9(c).

<sup>4</sup> The Amended TSR defines a "seller" as "any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration." 16 CFR 310.2(z).

<sup>5</sup> See CBA-User Fee at 4; Discover-User Fee at 4-5; MasterCard-User Fee at 5.

<sup>6</sup> See ARDA-User Fee at 5; NEMA-User Fee at 4.

<sup>7</sup> See Discover-User Fee at 4-5; Household-User Fee at 5-6; MBNA-User Fee at 3.

by list brokers and others. At the same time, the Commission agrees with the comment of NASUCA that the information in the national registry should be used for no other purpose than to stop unwanted telemarketing calls.<sup>8</sup> As a result, the Commission now proposes, at Section 310.8(e), to allow access to the national registry by telemarketers, sellers, others engaged in or causing others to engage in telephone calls for commercial purposes, and service providers acting on behalf of such persons.<sup>9</sup> Prior to gaining such access, a person would be required to certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent calls to telephone numbers on the registry.

### B. Entities That Are Required To Pay the Fee

The User Fee NPRM proposed requiring telemarketers who gained access to the national do-not-call registry to pay for that access. In addition, the User Fee NPRM proposed requiring telemarketers who engage in telemarketing on behalf of sellers or other telemarketers, or who use the information included in the registry to remove telephone numbers from the telemarketing lists of sellers and other telemarketers, to pay a fee for each such seller or telemarketer.<sup>10</sup>

A number of commenters criticized this provision, claiming that it would result in sellers, telemarketers, and list brokers paying the proposed user fee multiple times for the same information.<sup>11</sup> Some commenters pointed out that many sellers use more than one telemarketer in any given year, and such sellers would be required to

<sup>8</sup> See NASUCA-User Fee at 7-8.

<sup>9</sup> Proposed Section 310.8(e) also permits access to the national registry by any government agency that has the authority to enforce a federal or state do-not-call statute or regulation. Such agencies will access information in the national registry through a dedicated, secure website available only to them.

<sup>10</sup> User Fee NPRM at 37363 and proposed § 310.9(a).

<sup>11</sup> DMA also maintained that the payment structure proposed in the User Fee NPRM may violate the Paperwork Reduction Act, 44 U.S.C. 3506 *et seq.* ("PRA"), which prohibits federal agencies from restricting or regulating the use, resale, or re-dissemination of public information by the public, and Section 105 of the Copyright Act, 17 U.S.C. 105, which expressly bars the federal government from copyrighting its own works. The Commission disagrees with the DMA's interpretations of these laws. First, the registry list of telephone numbers of consumers who express a preference not to be called by telemarketers is not "public information," as that term is used in the PRA. In fact, dissemination of the list to the public is a violation of the Amended TSR. See 16 CFR 310.4(b)(2). Second, the Commission is in no way attempting to copyright the information contained in the national registry.

purchase access to the national registry many times over.<sup>12</sup> As one commenter stated, a "seller who uses only one telemarketer all year for nationwide telemarketing campaigns should not be more favorably treated than another who uses several telemarketers to conduct similar campaigns."<sup>13</sup> Other commenters maintained that telemarketers calling on behalf of multiple clients "should pay only one user fee and not a fee for every client on whose behalf they perform this service."<sup>14</sup> On the other hand, NCL commented that if list brokers are allowed access to the registry, their payments should be based upon the number of clients they represent. "Charging them only for the total number of area codes they obtain would be unfair to telemarketers that do not use list brokers and would undermine the economic viability of the registry."<sup>15</sup>

The Commission does not intend to charge the same company multiple times for access to the national registry, and has gained much relevant and important information from comments on its original proposal. At the same time, the Commission is now guided by congressional authority permitting it to cover the costs of implementing and enforcing the do-not-call provisions of the Amended TSR, estimated at \$18.1 million this fiscal year. The Commission seeks to raise those funds as equitably as possible, to ensure that the burden of the fees is fairly divided among the entire business community that benefits from the making of outbound telephone calls.

To avoid billing entities twice for the same information, and to divide the fees among the industry in an equitable manner, the Commission is now proposing that each seller must pay, on an annual basis, the appropriate fee for accessing the national registry prior to initiating, or causing a telemarketer to initiate, an outbound telephone call.<sup>16</sup>

<sup>12</sup> See, *e.g.*, MasterCard-User Fee at 5; CBA-User Fee at 4; Discover-User Fee at 4; Household-User Fee at 6; VISA-User Fee at 2.

<sup>13</sup> CBA-User Fee at 4. *See also* ITC-User Fee at 6 ("Service bureaus like our company typically represent multiple clients. It is also typical for our clients to use multiple telemarketing companies as vendors. Therefore, several telemarketing companies would end up paying the fee several times for the same seller.")

<sup>14</sup> MBNA-User Fee at 3-4. *See also* ABA-User Fee at 3-4 (separate fees for both sellers and telemarketers unnecessarily complicates the payment schedule); ARDA-User Fee at 4 (there is "no legitimate reason for each seller that uses a single telemarketer to pay the same fee for scrubbing against the same list").

<sup>15</sup> NCL-User Fee at 1.

<sup>16</sup> The TSR defines an "outbound telephone call" as "a telephone call initiated by a telemarketer to Continued

After paying the appropriate fee each annual period,<sup>17</sup> the seller will be provided with a unique account number, and can use that number to gain direct access to the national registry at any time during its annual period. In addition, the seller can provide its account number to any telemarketer or list broker with which it does business, which in turn will permit that telemarketer or list broker to gain access to the information to which the seller has subscribed.<sup>18</sup> The Commission proposes that such a revised fee structure is more appropriate than its original proposal. Under this revised fee structure, each seller would be charged only one time annually for access to the information included in the national registry, and would be allowed to transfer its ability to access the national registry to whatever telemarketers or list brokers it wishes to employ on its behalf.

In a further effort to avoid requiring an entity to pay twice for access to the same information, the Commission now proposes that telemarketers who are not also sellers—*i.e.*, entities that engage in telemarketing only on behalf of others—should not have to pay a separate fee for their access to the national registry.<sup>19</sup>

induce the purchase of goods or services or to solicit a charitable contribution.” 16 CFR 310.2(u). A “telemarketer,” in turn, is “any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.” 16 CFR 310.2(bb). Finally, “telemarketing” is defined as a “plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones, and which involves more than one interstate telephone call.” 16 CFR 310.2(cc). Thus, sellers engaging in a plan, program, or campaign involving only intrastate telemarketing calls would not be required to pay a fee or access the national registry pursuant to the TSR. In addition, solicitations to induce charitable contributions via outbound telephone calls are not covered by the do-not-call requirements of the TSR. 16 CFR 310.6(a). As a result, sellers involved only in such solicitations similarly would not be required to pay a fee or access the national registry. Of course, entities engaged in conducting surveys are not seeking to induce the purchase of goods or services and therefore are not engaged in “telemarketing” nor subject to the TSR. Similarly, political fund raising is not “telemarketing” and is not covered.

<sup>17</sup> The fee that would be charged for access to the national registry is discussed in Section III.D, below. A seller’s “annual period” is discussed in Section IV, below.

<sup>18</sup> VISA suggested a similar type of pricing structure, in which the FTC could “license” the registry to individual sellers, which in turn could employ a telemarketer to use the registry, if they desire, subject to confidentiality and use restrictions. VISA-User Fee at 2.

<sup>19</sup> Similarly, list brokers who develop and/or scrub the calling lists for their seller-clients would not have to pay for their individual access to the national registry. Instead, they also would have to certify that their seller-clients have paid for access to the national registry prior to gaining access to the national registry.

Charging such “pure” telemarketers for access in effect would cause their seller-clients to pay twice for access to the national registry. Instead, under the instant proposal, such telemarketers would be required to ensure that their seller-clients have paid for access to the national do-not-call registry prior to initiating outbound telephone calls on their behalf. Telemarketers would gain this assurance by obtaining and using the seller’s unique account number to the national registry.

As previously stated, the Commission seeks to spread the fee burden equitably across all entities that engage in telemarketing. Sellers are the ultimate beneficiaries of telemarketing campaigns, and all covered sellers must access the national registry to remain in compliance with the do-not-call provisions of the Amended TSR. As a result, all sellers should pay an appropriate fee for that access, but should pay that fee only one time during each annual period. The Commission does not agree with those commenters that suggested the agency should charge only telemarketers, and not their clients, for access to the national registry.<sup>20</sup> By only charging telemarketers for access to the national registry, and charging them only once for their access on behalf of multiple clients, the fee structure would unfairly benefit those sellers that employ a telemarketer with multiple clients, since those sellers would pay less of a fee for access to the same information than sellers that engage in their own telemarketing without hiring a telemarketer. Thus, the Commission is proposing to charge sellers and not telemarketers or list brokers for access to the national registry.<sup>21</sup>

Proposed § 310.8(a) of the Rule would make sellers directly liable for initiating, or causing a telemarketer to initiate, an outbound telephone call without first paying the appropriate fee for access to the national registry. Proposed Section 310.8(b) would make telemarketers

<sup>20</sup> See, e.g., ABA-User Fee at 3–4; MBNA-User Fee at 3–4; ITC-User Fee at 6.

<sup>21</sup> ABA stated that a single fee to telemarketers would enhance the privacy and security of the national registry by discouraging seller-clients from accessing the national registry individually in order to scrub their calling lists. Instead, sellers would allow their telemarketers to access the registry on their behalf. ABA-User Fee at 3–4. As stated above, the Commission believes that charging only telemarketers would be inequitable. The Commission also believes that the certification required of sellers who access the national registry, as discussed in Section II.A, above, will help to address the security and privacy concerns raised by ABA. Moreover, telemarketers would still be allowed to access the registry on behalf of their seller-clients under the current proposal, using their seller-clients’ account number.

directly liable for initiating an outbound telephone call on behalf of a seller without first ensuring that their seller-clients have paid for up-to-date access to the national do-not-call registry. The Commission proposes to impose this liability under the authority of the Appropriations Act and the Implementation Act, in addition to the Telemarketing Act, which provides the authority for the other portions of the Amended TSR. The Commission believes such direct liability on sellers and telemarketers is necessary to effectuate fairly the mandate of the Appropriations Act and the Implementation Act, which authorize the Commission to collect fees sufficient to cover the costs of implementing and enforcing the do-not-call provisions of the Amended TSR. Without such direct liability, the Commission is concerned that not all entities that obtain information from the national registry will pay their fair share of the fees for that registry, resulting in increased fees for those entities that do pay. As a result of the proposed imposition of this direct liability, the failure of a seller to pay the appropriate fee prior to initiating or causing another entity to initiate an outbound telephone call, and the failure of a telemarketer to ensure that a seller has paid the appropriate fee prior to initiating an outbound telephone call on its behalf, would be a violation of the Amended TSR, subject to all remedies available for such violations.

#### C. Corporate Divisions, Subsidiaries, and Affiliates

In the User Fee NPRM, the Commission proposed following the compliance guide for the original TSR by requiring that distinct corporate divisions of a single corporation be considered separate sellers for the purposes of payment of the annual fees. Factors used to determine if corporate divisions would be treated as separate sellers would include whether there is substantial diversity between the operational structure of the divisions, and whether the goods or services sold by the divisions are substantially different from each other.

In response to this proposal, some commenters suggested that the Commission treat divisions of the same corporation as one seller and allow the sharing of the registry among them.<sup>22</sup> Another suggested the same treatment for a “family” of affiliated companies.<sup>23</sup> Wells Fargo stated that this treatment would allow a company to purchase a

<sup>22</sup> See, e.g., ARDA-User Fee at 5; CBA-User Fee at 4.

<sup>23</sup> Household-User Fee at 2.

single copy of the list to maintain “a centralized scrub service that would be available to its affiliates. While this may reduce revenues somewhat, it would greatly increase compliance.”<sup>24</sup>

The Commission is concerned that any such treatment of corporate divisions, subsidiaries, or affiliates could greatly diminish the number of entities that will pay for access to the national registry, provide an unfair advantage to larger, multi-divisional corporations, and potentially increase the fees required to be paid by smaller, less complex corporate entities. As a result, the Commission proposes to treat each separate division, subsidiary, or affiliate of a corporation as a separate seller for purposes of § 310.8. The Commission notes that such treatment will not diminish the effectiveness of corporate “centralized scrub services.” In effect, such centralized services can still be performed, provided that each corporate division, subsidiary, or affiliate has paid the appropriate fee for access to the national registry. It should be noted that divisions, subsidiaries, or affiliates of a seller that must pay for access to the national registry need not individually download the information in the registry on their own behalf. They need to pay only for the requisite access, and would be able to provide their unique account number to another division, subsidiary, or affiliate to perform the actual downloading of information and corporate list scrubbing. *See* section IV, below, for further discussion of the proposed operation of the fee collection system.

### III. Calculation of Fees

#### A. Number of Entities Accessing the National Registry

To establish the appropriate fees to charge entities that access consumer telephone numbers included in the national registry, the Commission must first estimate the number of such entities that would be required to pay the proposed fee. As stated in the User Fee NPRM, this step is among the most difficult, given the dearth of information about the number of sellers currently in the marketplace who make outbound telemarketing calls to consumers.<sup>25</sup> In the User Fee NPRM, the Commission determined, after examining relevant industry literature and the record in this and past TSR rulemaking proceedings, that the most pertinent information for determining the number of firms that would be required to pay the proposed user fee would be the number of firms

that access state do-not-call registries. At that time, the most telemarketing firms that accessed any individual state registry was 2,932. Thus, in order to propose a realistic fee structure that would ensure sufficient funds would be collected to cover the costs of a national registry, the Commission estimated in the User Fee NPRM that 3,000 entities would pay for access to the information in the national registry.<sup>26</sup> The Commission sought comment and evidence to determine whether this estimate was realistic and appropriate.

Only one of the 34 comments received in response to the User Fee NPRM provided any information relevant to this inquiry.<sup>27</sup> That commenter, DialAmerica Marketing, Inc. (“DialAmerica”), stated that it has 700 clients for which it would have to obtain access to the entire national do-not-call registry.<sup>28</sup> In other words, DialAmerica’s client base would comprise over 23 percent of all entities that the Commission estimated would be required to access the national registry.<sup>29</sup> This information casts doubt on the original estimate. The Commission is therefore proposing a new estimate of the number of firms that will access the national registry, developed through a calculation using the limited information provided in the comments, combined with relevant industry-wide data that the Commission has been able to identify. This calculation makes a number of significant assumptions based on the best information available to the agency at this time. In Section X, below, the Commission asks specific questions about each of these assumptions, seeking information as to their reliability. The Commission asks commenters to provide any information they can about any and all of these

<sup>26</sup> The Commission previously had estimated, in the notice of amended application to the OMB under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, that there were 40,000 telemarketing industry members affected by the TSR in the United States. *See* the Rule NPRM, 67 FR at 4534. As explained in the User Fee NPRM, the Commission does not believe that prior estimate is representative in the instant context. *See* User Fee NPRM at 37364, n. 7.

<sup>27</sup> The Commission also received some company-specific information from another commenter in response to the Rule NPRM. CDI-Rule NPRM at 1.

<sup>28</sup> DialAmerica-User Fee at 2. According to Customer Inter@ction Solutions, a monthly magazine of the teleservices industry, DialAmerica is the second-largest outbound teleservices agency in the United States. *See* <http://www.tmcnet.com/cis/0302/0302top50a.htm> (visited 4 February, 2003).

<sup>29</sup> Moreover, DialAmerica stated that its annual fees for obtaining access on behalf of all of its clients would result in that company alone paying for 70 percent of the total amount that was to be raised by the User Fee NPRM.

assumptions, including company-specific information and data that could help the agency to refine its estimates of the number of firms that will need to access the national registry.

Since scrubbing against the do-not-call registry is only required on outbound calls made to consumers,<sup>30</sup> the Commission begins its calculation with the assumption that DialAmerica has 700 clients for which it makes these types of calls. According to the Winterberry Group, DialAmerica has revenues of \$300 million per year, and outbound calls account for 90 percent of its call volume.<sup>31</sup> Assuming that DialAmerica’s revenues per call are the same for inbound and outbound calls, its revenues from outbound calls would total \$270 million (90 percent of \$300 million).

According to Customer Inter@ction Solutions, 85 percent of DialAmerica’s business involves sales to consumers.<sup>32</sup> If the Commission assumes that the 85 percent of DialAmerica’s business that involves sales to consumers is 90 percent outbound, consumer outbound sales calls would account for \$229.5 million in revenue (85 percent of \$270 million). If DialAmerica receives \$229.5 million in revenue from its 700 clients for whom it does outbound calling to consumers, this implies that the average revenue per client is about \$328,000 (\$229.5 million/700).

According to the Winterberry Group, total expenditures on teleservices were \$147.7 billion in 2000. Of this, 48.1 percent was spent on outbound calling, and 49.6 percent was spent on sales calls to consumers.<sup>33</sup> Assuming that the same percentage of expenditures on calls to businesses and calls to consumers are for outbound calls would imply that just under 24 percent of the total spent on teleservices is spent on outbound calls to consumers (48.1 percent × 49.6 percent = 23.9 percent).

Also, according to the Winterberry Group, total expenditures on third-party teleservices providers amounted to \$19.2 billion—13 percent of the \$147.7 billion total expenditures on such services—in 2000.<sup>34</sup> If the Commission

<sup>30</sup> See 16 CFR §§ 310.4(b)(1)(iii)(B); 310.6(b)(7).

<sup>31</sup> Winterberry Group, Industry Map: Teleservice Industry—Multi-Channel Marketing Drives Universal Call Centers 16 (January 2001) (“Winterberry Group”). The Winterberry Group is a consulting firm that works with the direct marketing industry. *See* <http://www.winterberrygroup.com> (visited 25 March 2003).

<sup>32</sup> Customer Inter@ction Solutions: Outsourcing, <http://www.tmcnet.com/cis/0302/0302top50a.htm> (visited 4 February, 2003).

<sup>33</sup> Winterberry Group at 2, 8, 9.

<sup>34</sup> *Id.* at 9.

<sup>24</sup> Wells Fargo-User Fee at 2.

<sup>25</sup> *See* User Fee NPRM at 37363–64.

assumes that, as with overall expenditures on teleservices, roughly 24 percent of expenditures on third-party providers was for outbound calling to consumers, expenditures on third-party outbound calls to consumers would total \$4.59 billion (23.9 percent of \$19.2 billion).

If the Commission assumes that the DialAmerica figure of \$328,000 in revenues per client is representative of third-party providers of outbound calls to consumers in general, this would imply that there are approximately 14,000 such telemarketer-client relationships (\$4.59 billion/\$328,000 = 13,994).<sup>35</sup>

If the Commission assumes that the average firm that uses third-party service providers uses three different providers for different campaigns over the course of a year, there would only be about 4,650 firms using such third-party providers (13,965 firms/3 = 4,655), and the average firm that uses third-party telemarketers would spend an average of \$984,000 per year on outbound telemarketing to consumers (\$328,000 × 3).

None of these figures accounts for firms that do their calling using their own staff and their own in-house equipment, which account for \$128.5 billion—87 percent of total expenditures—spent on teleservices.<sup>36</sup> Again assuming that roughly 24 percent of expenditures by companies using

<sup>35</sup> The only other comment providing any information of assistance in determining the number of entities that would pay a fee to access the national registry came from CDI. CDI stated that it specializes in outbound calling for daily and weekly newspapers ranging in size from 5,000 subscribers to over 1 million subscribers, makes calls on behalf of 140 different clients each month, and employs over 400 people. CDI-Rule NPRM at 1. Unlike DialAmerica, however, the Commission was unable to discover any information about CDI's revenues, making its company-specific information less useful in formulating assumptions regarding the number of industry members. However, by comparing CDI's 400 employees to the 11,000 people employed by DialAmerica (approximately 3.6 percent of the size of DialAmerica), and assuming that sales per employee are the same for the two firms, one might estimate CDI's revenues are around \$11 million (approximately 3.6 percent of DialAmerica's \$300 million in annual revenue). If CDI has revenues around \$11 million and calls on behalf of 140 clients during the entire year, their per-client revenues would be only about \$78,500 per year. (Of course, the fact that CDI calls on behalf of 140 clients each month does not mean that they have only 140 clients during the entire year. They may have different clients each month, which would make the revenue per client even lower.) If the figures for CDI are representative of a significant share of the telemarketing industry and if, as a result, the average revenue per firm is significantly lower than what DialAmerica realizes, the estimated number of telemarketer-client relationships would increase proportionally. This NPRM is specifically seeking information and comment about these figures from the industry.

<sup>36</sup> See Winterbery Group at 2.

their own resources to make calls are for outbound calling to consumers, total expenditures on these services would be \$30.71 billion (23.9 percent of \$128.5 billion). These firms are probably larger on average—and probably do more telemarketing—than the firms that use third-party service providers. If the Commission assumes that they spend, on average, five times as much as firms that use third-party telemarketers, they would be spending \$4.92 million per firm (\$984,000 × 5). This would suggest that there are another 6,250 firms who do their own telemarketing (\$30.71 billion/\$4.92 million = 6,242 firms).

In total, this would suggest that there are some 10,900 firms doing outbound calling to consumers—4,650 firms using third-party telemarketers, plus 6,250 doing their own calling. Of course, some of these firms would not be required to scrub against the FTC list because they are either engaged in charitable solicitations or are calling on behalf of an industry that is exempt from FTC regulation. Other firms that make only intrastate calls would likewise not need to obtain the list. The firms that only make intrastate calls are likely to be the smaller firms that tend to use third-party providers to make their calls.

If the Commission assumes that 40 percent of firms that use third-party providers and 25 percent of firms that do their own telemarketing are exempt from coverage,<sup>37</sup> approximately 2,800 firms that use third party providers (60 percent of 4,655 = 2,793) and 4,700 firms that do their own telemarketing (75 percent of 6,231 = 4,682) would be required to access the national do-not-call registry. Thus, the total number of firms accessing the registry would be 7,500.

#### *B. Amount of Information for Which an Entity Would Be Charged*

In the User Fee NPRM, the Commission proposed a fee structure based on the number of different area codes of data that an entity wished to use annually.<sup>38</sup> The Commission proposed charging for access to the registry per area code because that charge most closely approximated the cost of operating the national registry. The Commission also determined that

<sup>37</sup> Firms that are exempt from coverage include those engaged only in intrastate telemarketing or in making solicitations to induce charitable contributions. See footnote 16, above. In addition, firms outside of the FTC's jurisdiction that make their own telemarketing calls, such as common carriers, banks, savings and loans, as well as companies that engage in the business of insurance, are also exempt from coverage and not included in our estimate of the number of firms that will have to access the national registry.

<sup>38</sup> See User Fee NPRM at 37364.

many telemarketers and sellers engage in regional rather than nationwide calling campaigns, and therefore would not need consumer registration data for the entire nation.

A number of commenters that addressed this issue supported using area codes as a basis for assessing the fee.<sup>39</sup> In fact, SBA noted that the flexibility inherent in allowing entities to access the national registry by area code "would be beneficial to small businesses."<sup>40</sup> On the other hand, other commenters suggested that imposing fees based on the number of area codes accessed, rather than imposing a flat fee, would create "unnecessary administrative complications."<sup>41</sup> However, the Commission has determined that it is not overly complex, from a system implementation prospective, to provide access to and collect fees for the national registry by area code. In fact, providing the entire national registry to every entity that seeks access, even if that entity will not need all of that information, would put a significantly larger strain on the resources necessary to deliver that information, resulting in an unnecessary increase in system costs. Another commenter stated that the "management of tracking user fees for area codes that each individual client calls for a sales campaign would be an extremely burdensome task for larger telemarketers."<sup>42</sup> The Commission acknowledges that charging for access to the national registry by area code may entail some complexity for large telemarketers. On balance, however, the Commission believes that the countervailing benefits of allowing access to the registry by area code outweigh any potential costs. As a result, the Commission continues to propose providing access to the national registry based on the number of area codes of information sought.<sup>43</sup>

<sup>39</sup> See ARDA-User Fee at 4; NCL-User Fee at 1; AARP-User Fee at 2.

<sup>40</sup> SBA-User Fee at 4.

<sup>41</sup> ABA-User Fee at 3. Accord Household-User Fee at 4; ITC-User Fee at 6; MBNA-User Fee at 2; TRA-User Fee at 3.

<sup>42</sup> DialAmerica-User Fee at 2.

<sup>43</sup> One commenter requested clarification that if access to the entire registry is requested, the requestor will not have to input a list of all area codes. Household at 6. That is correct. An entity seeking access to the entire national registry will simply have to check a box indicating that preference, without having to list any area codes. In addition, the registry will offer the same access capabilities for the area codes within each state, so that entities will be able to select all area codes within a certain state simply by requesting access to information for that state.

### C. Small Business Access

In the User Fee NPRM, the Commission proposed providing free registry access to any firm wishing to obtain data from only one to five area codes.<sup>44</sup> The Commission proposed such free access to limit the burden placed on small businesses that only require access to a small portion of the national registry. The Commission noted that its proposal was consistent with the mandate of the Regulatory Flexibility Act, 5 U.S.C. 601, which requires that to the extent, if any, a rule is expected to have a significant economic impact on a substantial number of small entities, agencies should consider regulatory alternatives to minimize such impact.<sup>45</sup>

A number of commenters supported this small business exemption.<sup>46</sup> Others opposed it for various reasons. Household stated that any fee should be assessed to all entities obtaining access to the national registry because there is no rational basis to do otherwise, and "telemarketers and sellers should not have to subsidize the telemarketing activities of other telemarketers or sellers, regardless of their size."<sup>47</sup> ITC stated that the number of area codes purchased is a poor indicator of the extent of actual use, and a structure without exemptions is simpler and easier to administer.<sup>48</sup> TRA stated that "the area or population served by five or fewer area codes could be enormous," and that all telemarketers should be required to help defray the cost of the national registry.<sup>49</sup> SBSC maintained that the five area code exemption does not provide sufficient protections for small businesses, since many small businesses are located in geographic areas with many area codes, and some small businesses may actually be national in scope.<sup>50</sup> Finally, NASUCA expressed concern that telemarketers may "game" the system to avoid paying for access—especially by treating "distinct corporate divisions of a single corporation" as separate entities, thus allowing each division to gather five area codes and pool the numbers among themselves. NASUCA also stated that there can be variations in the number of customers within an

area code and the number of area codes within a state, creating inconsistencies in the amount of data for which a telemarketer will be paying.<sup>51</sup>

After evaluating these comments, the Commission still believes that it is appropriate to provide access to a small portion of the data in the national registry for free. The Commission agrees with the comments that stated the imposition of fees may be unduly burdensome, and could have a disproportionate impact, on small businesses.<sup>52</sup> The Commission is attempting to alleviate that burden to the greatest extent possible, while still collecting the necessary fees in as equitable manner as possible. By providing free access to a small portion of the national registry, the Commission is attempting to alleviate some of the disproportionately heavier burdens faced by small businesses. The Commission recognizes that not all small businesses will be able to enjoy the benefits of this proposal, since some small businesses may engage in telemarketing in a geographic area larger than five area codes. However, the Commission believes that most entities that will benefit from this proposal will be small businesses. Moreover, providing this free access does not significantly increase the complexity of implementing the national registry.<sup>53</sup>

The Commission also believes its proposal will prevent companies from "gaming" the system to gain free access

on a large scale. It would be a violation of the proposed fee rule for a telemarketer, or a seller to cause a telemarketer, to initiate outbound telephone calls in an area of the country for which it did not pay for access to the national registry. Thus, distinct corporate divisions of the same company that acquire only five area codes of data could not make outbound telephone calls outside of those five area codes without violating the proposed rule. As a practical matter, it is unlikely that any company would organize its divisions by limiting each division's telemarketing to five area codes, just to avoid the proposed fee. The Commission believes that the costs associated with trying to "game" the system in such a manner would be much larger than the benefits of avoiding the proposed fees.

While the Proposed Rule provides free access to a small portion of the national registry, the Commission continues to seek comment on other alternatives that would balance the burdens faced by small businesses with the need to raise appropriate fees to fund the registry in an equitable manner.

As for the appropriate level of free access, the Commission continues to seek comment on this issue as well.<sup>54</sup> Absent evidence to the contrary, the Commission believes that five area codes is an appropriate compromise between the goals of equitably and adequately funding the national registry, on the one hand, and providing appropriate relief for small businesses, on the other. While the Commission understands that five area codes could provide free access to a significant geographic area, the Commission also is attempting to address those small businesses that work in large metropolitan areas, which often have multiple area codes within a relatively small geographic area. Furthermore, while the Commission is mindful of the possible variations in the number of telephone numbers included in each area code, the Commission believes the only more equitable way to divide access to the national registry, other than by area code, might be by individual telephone number. Such a fine gradation, assuming its feasibility,

<sup>44</sup> See User Fee NPRM at 37364.

<sup>45</sup> But see section IX, below, where the Commission determines that the instant proposed Rule would not have a significant economic impact on a substantial number of small entities.

<sup>46</sup> See, e.g., NCL-User Fee at 1; SBA-User Fee at 1, 4; AARP-User Fee at 2.

<sup>47</sup> Household-User Fee at 3-4.

<sup>48</sup> ITC-User Fee at 6.

<sup>49</sup> TRA-User Fee at 6.

<sup>50</sup> Small Business Survival Committee ("SBSC")-User Fee at 2.

<sup>51</sup> NASUCA-User Fee at 3-6.

<sup>52</sup> See ICTA-User Fee at 1-2; Ameriquest-User Fee at 6; Celebrity Prime Foods-User Fee at 1.

<sup>53</sup> In the Commission's view, an alternative approach that would provide small business with exemptive relief more directly tied to size status would not balance the private and public interests at stake any more equitably or reasonably than the approach currently proposed by the Commission. For example, an across-the-board exemption from all fees for small businesses, no matter how many area codes they access, would shift the entire cost of the registry to larger businesses and require assessing them even higher access fees, while giving the small business community access to the registry without any cost-sharing responsibility whatsoever. Compared to the Commission's current proposal, which requires small businesses that telemarket beyond five area codes to pay access fees, a categorical small-business exemption would not be as consistent with the general legislative mandate that the Commission recover the registry's costs from those telemarketing entities obtaining access to the registry. Alternatively, it might be argued that allowing small businesses to pay reduced rates across the entire fee schedule could achieve substantially the same level and balance of exemptive relief and cost recoupment as the current proposal to provide free access to five area codes or fewer. A reduced fee schedule based on small business size, however, would still ultimately require a certification and determination of that status to implement and enforce, and thus would present greater administrative, technical, and legal costs and complexities than the Commission's current exemptive proposal, which does not require any proof or verification of that status.

<sup>54</sup> SBA commented that it had insufficient information to determine whether five area codes is an appropriate level of free access, and recommended that the FTC contact small telemarketers to inquire how many area codes they commonly access in a given year during the course of business. SBA-User Fee at 4. ICTA suggested that the number of area codes of data that could be acquired without paying a fee be increased from five to ten, but provided no rationale for this suggestion. ICTA-User Fee at 1-2.

would significantly increase the complexity of the system, both in terms of accessing and delivering the data. The Commission believes the increase in the complexity weighs against such an approach. Thus, the Commission continues to propose that access to five or fewer area codes of data in the national registry be provided for free.

#### D. Fees for Access

As previously discussed, both the Appropriations Act and the Implementation Act authorize the Commission to raise fees sufficient to cover the costs of implementing and enforcing the do-not-call provisions of the Amended TSR, estimated at \$18.1 million for fiscal year 2003. The Commission anticipates that it will need to raise the entire estimated \$18.1 million authorized to cover the costs associated with those efforts in this fiscal year. Costs fall primarily in three broad categories. First are the actual estimated contract costs along with associated agency costs to develop and operate the do-not-call registry. These cover things like the registration procedures and handling of complaints, the transfer of registration information from state lists to the registry, telemarketer access to the registration information, and the management and operation of law enforcement access to appropriate information. The second category of costs relates to enforcement efforts. These costs will include law enforcement initiatives, both domestic and international, to identify targets and challenge alleged violators. Enforcement costs also include consumer and business education, which are critical complements to enforcement in securing compliance with the do-not-call provisions. The third category of costs covers agency infrastructure and administration costs, including information technology structural supports. In particular, the Consumer Sentinel system (the agency's repository for all consumer fraud-related complaints) and its attendant infrastructure must be upgraded to handle the anticipated increased demand from state law enforcers for access to do-not-call complaints. Further, the Consumer Sentinel system will require substantial changes so that it may handle the significant additional volume of complaints that are expected.

In order to raise \$18.1 million this fiscal year, and assuming that 7,500 firms will pay for that access, the Commission proposes charging an annual fee of \$29 for each area code of

data accessed.<sup>55</sup> There would be no fee charged for access to five or fewer area codes of data. In addition, the Commission continues to propose placing a cap on the maximum annual fee that would be charged an entity that wants access to the entire national database. That maximum fee would be \$7,250, which would be charged for using 250 area codes of data or more. As a result of this revised proposed fee schedule, there would be no charge for obtaining only five area codes of data; six area codes of data would cost \$174; twenty-five area codes would cost \$725; two hundred area codes would cost \$5,800; and access to the data from all area codes would be capped at \$7,250 annually.

As stated above, these proposed fees are based on certain assumptions and estimates.<sup>56</sup> The Commission anticipates that whatever fees may be adopted would be reexamined periodically and would likely need to be adjusted, in future rulemaking proceedings, to reflect actual experience with operating the registry.

#### IV. Operation of the National Registry for the Telemarketing Industry

The Commission is developing a fully-automated, secure Web site dedicated to providing members of the telemarketing industry with access to the registry's list of telephone numbers, sorted by area code. The first time a company accesses the system, it will be asked to provide certain limited identifying information, such as company name and address, company contact person, and the contact person's telephone number and e-mail address. If an entity is accessing the registry on behalf of a client-seller, the entity will also need to identify that client.

The only consumer information that companies will receive from the national registry is a registrant's telephone number.<sup>57</sup> Those telephone

<sup>55</sup> Only two commenters responded to questions in the User Fee NPRM as to whether an annual or a monthly fee would be a more preferable, efficient, and appropriate method of fee collection. Both supported the use of an annual fee, as opposed to monthly one. See Household-User Fee at 4; MBNA-User Fee at 4.

<sup>56</sup> In addition to the assumptions set forth in Section III.A, above, concerning the number of firms that will access the national registry, the Commission continues to assume that, on average, sellers will pay to obtain information from 83 area codes in the national registry. See User Fee NPRM at 37368, question 5.

<sup>57</sup> In fact, that is the only personal identifying information submitted by consumers that will be maintained in the national registry. The registry will also maintain other information about the registration for law enforcement purposes, such as the date and method of registration, but that information will not be available to companies accessing the registry.

numbers will be sorted and available by area code. Companies will be able to access as many area codes as desired, by selecting, for example, all area codes within a certain state. Of course, companies will also be able to access the entire national registry, if desired. In addition, after providing the required identifying information and paying the appropriate fee, if any, companies will be allowed to check, via interactive Internet pages, a small number of telephone numbers (less than ten) at a time to permit small volume callers to observe the do-not-call requirements of the TSR without having to download a potentially large list of all telephone numbers within a particular area.

When a seller first submits an application to access registry information, the company will be asked to specify the area codes that it wants to access. As discussed above, each seller accessing the registry data will be required to pay an annual fee for that access, based on the number of area codes of data the seller accesses. Fees will be payable via credit card (which will permit the real-time transfer of data) or electronic funds transfer (which will require the seller to wait approximately one day for the funds to clear before data access will be provided). A seller must pay these fees prior to gaining access to the registry.

Sellers will be able to access data as often as they like during the course of one year (defined as their "annual period") for those area codes that are selected with the payment of the related annual fee.<sup>58</sup> If, during the course of the year, sellers need to access data from more area codes than those initially selected, they would be required to pay for access to those additional area codes. For purposes of these additional payments, the annual period is divided into two semi-annual periods of six-months each. Obtaining additional data from the registry during the first semi-annual, six-month period will require a payment of \$29 for each new area code. During the second semi-annual, six-month period, the charge of obtaining data from each new area code requested during that six-month period is \$15. These payments for additional data would provide sellers access to those additional areas of data for the remainder of their initial annual term.

After payment is processed, the seller will be given a unique account number and permitted access to the appropriate portions of the registry. That account number will be used in future visits to

<sup>58</sup> To protect system integrity, a company will be permitted to download the entire national registry only once in any 24-hour period.

the Web site, to shorten the time needed to gain access. On subsequent visits to the Web site, sellers will be able to download either an entire updated list of numbers from their selected area codes, or a more limited list, consisting only of additions to or deletions from the registry that have occurred since the company's last download. This would limit the amount of data that a company needs to download during each visit.

Telemarketers, list brokers, and other entities working on behalf of sellers will need to submit their client-seller's account number to gain access to the national registry. The extent of their access will be limited by the area codes requested and paid for by their client-sellers. They also will be permitted to access the registry as often as they wish for no additional cost, once the annual fee has been paid by their client-sellers.<sup>59</sup> As indicated in the Rule NPRM discussion of section 310.4(b)(3)(iv), however, the Rule requires a seller or telemarketer to employ a version of the do-not-call registry obtained from the Commission no more than three months prior to the date any telemarketing call is made.

#### **V. Date By Which Full Compliance With the Do-Not-Call Provisions of the Amended TSR Will Be Required**

In the Statement of Basis and Purpose to the Amended TSR, the Commission stated that it would announce at a future time the date by which full compliance with § 310.4(b)(1)(iii)(B), the do-not-call registry provision, would be required.<sup>60</sup> At that time, the Commission anticipated that full compliance with the do-not-call provision would be required approximately seven months from the date a contract is awarded to create the national registry.

On March 1, 2003, the Commission awarded the contract to create the national do-not-call registry to AT&T Government Solutions, Inc. Accordingly, the Commission is now announcing that full compliance with § 310.4(b)(1)(iii)(B), the "do-not-call" registry provision of the Amended TSR, will be required on October 1, 2003.

Companies will be able to begin accessing the national do-not-call registry on September 1, 2003. As a result, to remain in compliance with the do-not-call provisions of the Amended TSR, all covered sellers will be required to access the national registry for the first time between September 1–30, 2003. During that same time frame, all

covered sellers or entities working on their behalf must download the portions of the national registry for those areas of the country in which they will either initiate an outbound telephone call or cause a telemarketer to initiate an outbound telephone call on their behalf.

#### **VI. Invitation to Comment**

All persons are hereby given notice of the opportunity to submit written data, views, facts, and arguments concerning these proposed changes to the Commission's Telemarketing Sales Rule. The Commission invites written comments to assist it in ascertaining the facts necessary to reach a determination as to whether to adopt as final the proposed changes to the Rule. The Commission encourages comments to be submitted electronically to the following e-mail address: *feerule@ftc.gov*. Alternatively, commenters may submit an original plus two paper copies of their comments to the Office of the Secretary, Room 159, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580. All comments must be submitted on or before May 1, 2003. Time is of the essence to promulgate these proposed fees. Thus, the Commission does not anticipate providing any extension to this comment period.

Comments submitted will be available for public inspection in accordance with the Freedom of Information Act, 5 U.S.C. 552, and Commission Rules of Practice, on normal business days between the hours of 9 a.m. and 5 p.m. at the Public Reference Section, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580. The Commission will make this NPRM and, to the extent possible, all comments received in response to this NPRM, available to the public through the Internet at the following address: *http://www.ftc.gov*.

#### **VII. Communications by Outside Parties to 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. *See* 16 CFR 1.26(b)(5).

#### **VIII. Paperwork Reduction Act**

This Revised Fee NPRM does not involve any new collection of information requirements that were not already proposed in the User Fee

NPRM. However, the Commission has raised its estimate of the number of firms subject to this collection of information, which increases accordingly the cumulative paperwork burden presented by this proposed revision. The Commission informed the Office of Management and Budget about this proposed burden increase.

The Commission continues to propose requiring those firms that access the national do-not-call registry to submit minimal identifying information that the operator of the registry deems necessary to collect the proposed fee, as outlined in section IV, above. The information to be collected from those firms, and the frequency of that collection, has not changed from the User Fee NPRM.<sup>61</sup> The Commission estimated, in the User Fee NPRM, that it should take no longer than two minutes for each firm to submit this basic information, and that each firm would have to submit the information annually.<sup>62</sup> Given current estimates that there are approximately 7,500 firms that will have to access the information in the national registry, the Commission estimates that this revised proposal will result in 250 burden hours (7,500 firms x 2 minutes per firm = 15,000 minutes, or 250 hours). In addition, the Commission continues to estimate that possibly one-half of those firms may need, during the course of their annual period, to submit their identifying information more than once in order to obtain additional area codes of data. This would result in an additional 125 burden hours (3,750 telemarketers x 2 minutes per telemarketer = 7,500 minutes, or 125 hours). Thus, the Commission estimates that the revised fee provision will impose a total paperwork burden of approximately 375 hours per year.

The Commission anticipates that clerical employees (or other low-level administrative personnel) of affected entities will fulfill the function of supplying company-identifying information to the registry contractor. Assuming a clerical hourly wage of \$10 per hour, the cumulative annual labor cost to respondents to provide the requisite information is \$3,750 (375 hours x \$10 per hour).

<sup>61</sup> See User Fee NPRM at 37365–66.

<sup>62</sup> *Id.* at 37366. As stated in the User Fee NPRM, this estimate is likely to be conservative for PRA purposes. The OMB regulation defining "information" generally excludes disclosures that require persons to provide facts necessary simply to identify themselves, e.g., the respondent, the respondent's address, and a description of the information the respondent seeks in detail sufficient to facilitate the request. *See* 5 CFR 1320.3(h)(1).

<sup>59</sup> Telemarketers, list brokers, and other entities working on behalf of sellers will also be limited to downloading the entire national registry only once in any 24-hour period.

<sup>60</sup> *See* 68 FR at 4664.

The Commission once again invites comment that will enable it to:

1. Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
2. Evaluate the accuracy of the Commission's estimates of the burdens of the proposed collections of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and validity of the information to be collected; and
4. Minimize the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical or other technological collection techniques or other forms of information technology.

## IX. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 604(a), requires an agency either to provide an Initial Regulatory Flexibility Analysis ("IRFA") with a proposed rule, or certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. The FTC does not expect that the final rule concerning fees will have the threshold impact on small entities. As discussed in section III.C, above, this NPRM specifically proposes charging no fee for access to data included in the registry from one to five area codes. As a result, the Commission anticipates that many small businesses will be able to access the national registry without having to pay any annual fee. Thus, it is unlikely that there will be a significant burden on small businesses resulting from the adoption of the proposed fees.

The Commission reached a similar conclusion in the User Fee NPRM.<sup>63</sup> Nonetheless, the Commission determined that it was appropriate to publish an IRFA in the User Fee NPRM, in order to inquire into the impact on small entities of both the amendments to the TSR proposed in the User Fee NPRM, as well as the proposed amendments to the TSR set forth in the Rule NPRM. The Commission welcomed comment on any significant alternatives that would further minimize the impact on small entities, consistent with the objectives of the Telemarketing Act, the proposed amendments to the TSR set forth in the

Rule NPRM, and the requirements of the User Fee Statute.

In response to this request for comment, SBA commended the FTC on its regulatory flexibility analysis and supported permitting small firms to access a limited number of area codes per year without a charge, but noted that overlapping federal and state do-not-call registries may create undue burdens for small businesses.<sup>64</sup> SBA included a number of suggestions to minimize the impact of multiple do-not-call registries on small businesses.<sup>65</sup> As indicated in the TSR SBP, the Commission is working with the states to develop a single, national do-not-call registry—a "one-stop shop" for consumers to register their preference not to receive telemarketing calls, and for sellers and telemarketers to gain access to that registration information.<sup>66</sup> To further those goals, the Commission will allow all states, and the DMA if it so desires, to download into the national registry—at no cost to the states or the DMA—the telephone numbers of consumers who have registered with them their preference not to receive telemarketing calls. Telemarketers and sellers will be allowed to access that data through the national registry as the information is received. Such harmonization will decrease significantly any burdens imposed by the multiple do-not-call registries that currently exist.

The Commission continues to welcome comment on any significant alternatives to those proposed in the instant NPRM that would further minimize the impact on small entities, consistent with the objectives stated herein and with the Amended TSR, the

<sup>64</sup> See SBA-User Fee at 1. See also Section III.C, above, for a discussion of other comments the Commission received on its approach to minimizing the impact of this rulemaking on small businesses.

<sup>65</sup> *Id.* at 5–6. SBA also responded to our request for information concerning the number of small businesses that might be subject to the proposed User Fee Rule by provided information from the North American Industry Classification System ("NAICS"). According to the NAICS, there are 2,305 firms identified as "Telemarketing Bureaus" (NAICS Code 561422), 1,279 of which qualify as a small business (one with annual receipts of \$5 million or less). SBA also noted "that 1,127 telecommunications firms have receipts under \$1 million, which makes them particularly small and vulnerable to burdensome costs of Federal regulations." *Id.* at 3. The FTC appreciates this information. However, as discussed in Section II.B, above, "telemarketing bureaus" no longer would be required to pay a fee to access the national registry. Instead, sellers would be required to pay the fee. Therefore, to determine the number of small businesses affected by the instant NPRM, the Commission is seeking information on the number of small business sellers that engage in outbound telemarketing and that are subject to the FTC's jurisdiction. Unfortunately, the NAICS does not provide this level of detailed industry classification.

<sup>66</sup> See TSR SBP at 4641.

Appropriations Act, and Implementation Act.

## X. Questions for Comment on the Proposed Rule

The Commission seeks comment on the various aspects of the proposed revisions to the TSR set forth in this NPRM. Without limiting the scope of issues on which it seeks comment, the Commission is particularly interested in receiving comments on the questions that follow. In responding to these questions, include detailed, factual supporting information whenever possible.

1. This Revised Fee NPRM estimates that there are 7,500 firms that will access the national do-not-call registry. Is that estimate realistic and appropriate? What evidence, if any, do you have concerning the number of sellers that either directly engage in, or hire telemarketers to engage in, "outbound telephone calls" to consumers?

2. In estimating the number of firms that will access the national do-not-call registry, the Commission made a number of assumptions, including the following:

a. The average revenue per client for telemarketers making outbound telemarketing calls to consumers is about \$328,000;

b. It is reasonable to estimate the level of expenditures on outbound calls to consumers by taking the product of published figures on the percentage of total telemarketing expenditures that involve outbound calls—including both calls to consumers and to businesses—and published figures on the percentage of expenditures that are for calls to consumers—including both inbound and outbound calling. This figure, approximately 24 percent, can then be used to estimate the level of outbound calling to consumers both by (1) firms that use third-party telemarketers to do their calling and (2) those firms that do their own calling;

c. Sellers that use third-party telemarketers on average employ three different telemarketers to make outbound calls to consumers over the course of a year;

d. Sellers using their own resources to make telemarketing calls spend, on average, five times as much on telemarketing as do firms that use third-party telemarketers;

e. Approximately 40 percent of sellers that use third-party telemarketers and 25 percent of sellers that engage in their own telemarketing will not be required to access the national do-not-call registry, either because they are engaged in charitable solicitations, are making

<sup>63</sup> See User Fee NPRM at 37366–67.

only intrastate calls, or are calling on behalf of an industry that is exempt from FTC jurisdiction.

Are these estimates, and others used in arriving at a figure for the number of firms that will be required to access to the national do-not-call registry, realistic and appropriate? What evidence can you provide to support the view that these estimates are reasonable or that they should be different?

3. How many area codes of data will the average firm accessing the national do-not-call registry purchase? How many firms will require access to 250 of more area codes of data? How many will need access to 5 or fewer area codes?

4. Is it appropriate to require each separate corporate division, subsidiary, and affiliate that engages in outbound telemarketing to pay a separate fee to access the national registry? Why or why not? If a separate fee is not appropriate, what is a better way to differentiate between large and small enterprises? Would that alternative method maintain the fairness of the fee collection system while not significantly decreasing the number of entities that will pay for access to the national registry?

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

Telemarketing, Trade practices.

#### XI. Proposed Rule

Accordingly, for the reasons set forth in the preamble, the 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 citation for part 310 continues to read as follows:

**Authority:** 15 U.S.C. 6101–6108.

2. Add § 310.8 to read as follows:

#### § 310.8 Fee for access to do-not-call registry.

(a) It is a violation of this Rule for any seller to initiate, or cause any telemarketer to initiate, an outbound telephone call to any person whose telephone number is within a given area code unless such seller first has paid the annual fee, required by § 310.8(c), for access to telephone numbers within that area code that are included in the national do-not-call registry maintained by the Commission under § 310.4(b)(1)(iii)(B).

(b) It is a violation of this Rule for any telemarketer, on behalf of any seller, to initiate an outbound telephone call to any person whose telephone number is within a given area code unless that

seller first has paid the annual fee, required by § 310.8(c), for access to the telephone numbers within that area code that are included in the national do-not-call registry.

(c) The annual fee, which must be paid prior to obtaining access to the do-not-call registry, is \$29 per area code of data accessed, up to a maximum of \$7,250; provided, however, that if a seller obtains no more than five (5) area codes of data annually, there shall be no charge for this information.

(d) After a seller pays the fees set forth in § 310.8(a), the seller will be provided a unique account number which will allow that seller, or an entity designated by that seller, to access the registry data for the selected area codes at any time for twelve months following the first day of the month in which the seller paid the fee (“the annual period”). To obtain access to additional area codes of data during the first six months of the annual period, the seller must first pay \$29 for each additional area code of data not initially selected. To obtain access to additional area codes of data during the second six months of the annual period, the seller must first pay \$15 for each additional area code of data not initially selected. The payment of the additional fee will permit the seller or the seller’s designee to access the additional area codes of data for the remainder of the annual period.

(e) Access to the do-not-call registry is limited to telemarketers, sellers, others engaged in or causing others to engage in telephone calls for commercial purposes, service providers acting on behalf of such persons, and any government agency that has the authority to enforce a federal or state do-not-call statute or regulation. Prior to accessing the do-not-call registry, a person must provide the identifying information required by the operator of the registry to collect the fee, and must certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent telephone calls to telephone numbers on the registry. If the person is accessing the registry on behalf of other sellers, that person also must identify each of the other sellers on whose behalf it is accessing the registry, must provide each seller’s unique account number for access to the national registry, and must certify, under penalty of law, that the other sellers will be using the information gathered from the registry solely to comply with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on the registry.

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

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#### DEPARTMENT OF DEFENSE

##### Office of the Secretary

##### 32 CFR Part 199

##### RIN 0720-AA76

#### TRICARE Program; Inclusion of Anesthesiologist’s Assistants as Authorized Providers; Coverage of Cardiac Rehabilitation in Freestanding Cardiac Rehabilitation Facilities

**AGENCY:** Office of the Secretary, Department of Defense.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule establishes a new category of provider as an authorized TRICARE provider, and it increases the settings where cardiac rehabilitation can be covered as a TRICARE benefit. It recognizes anesthesiologist’s assistants as authorized providers under certain circumstances. It also authorizes cardiac rehabilitation services, which are already a covered TRICARE benefit when provided by hospitals, to be provided in freestanding cardiac rehabilitation facilities.

**DATES:** Public comments must be received by June 2, 2003.

**ADDRESSES:** Forward comments to: TRICARE Management Activity (TMA), Medical Benefits and Reimbursements Systems, 16401 East Centretech Parkway, Aurora, CO 80011–9043.

**FOR FURTHER INFORMATION CONTACT:** Stephen E. Isaacson, Medical Benefits and Reimbursement Systems, TMA, (303) 676–3572.

##### SUPPLEMENTARY INFORMATION:

#### A. Inclusion of Anesthesiologist’s Assistants as Authorized Providers

At present only two types of anesthesia providers may provide services to TRICARE beneficiaries— anesthesiologists and certified registered nurse anesthetists (CRNAs). In some areas of the country, anesthesiologist’s assistants, after completing the specified training, being accredited, and being licensed by the state also provide anesthesia services. The Centers for Medicare and Medicaid Services (CMS) already recognizes anesthesiologist’s assistants as authorized providers (42 CFR 410.69).