

Report to Congress

Pursuant to the Do Not Call Implementation Act

on

Regulatory Coordination in Federal Telemarketing Laws

Submitted by

The Federal Trade Commission

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I. Executive Summary

The Federal Trade Commission's ("FTC") amended Telemarketing Sales Rule ("TSR")¹ and the Federal Communications Commission's ("FCC") revised regulations under the Telephone Consumer Protection Act ("TCPA") derive from distinct Congressional mandates. The Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act")² directs the FTC to promulgate a rule "prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices," and gives the FTC broad discretion in determining how best to remedy such deceptive or abusive conduct. The TCPA directs the FCC to engage in rulemaking "to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object."³ Specifically, the TCPA restricts the use of automated dialing equipment, artificial or prerecorded voice messages, unsolicited advertisements sent to facsimile machines, and the use of an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged, and directs the FCC to prescribe regulations to implement this provision, allowing for discretionary exemptions.

Superimposed on both the Telemarketing Act and the TCPA is the Do Not Call Implementation Act ("DNCA") directive that "the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission (16 C.F.R. 310.4(b))."⁴ Section 310.4(b) of the FTC's TSR primarily addresses Do Not Call and call abandonment. On the whole, the agencies have created consistent and complementary regulatory schemes, not only with regard to Do Not Call and call abandonment, but also other areas outside the scope of 16 C.F.R. § 310.4(b), such as calling time restrictions and transmission of Caller ID information. As discussed below, however, there are some differences between the agencies' regulations that may have an impact on the number of unwanted calls that consumers receive.

The TCPA regulations (FCC) apply more broadly than the amended TSR (FTC) – covering virtually all telemarketing except calls placed by or on behalf of tax-exempt non-profit organizations. When the revised TCPA regulations are more restrictive on sellers and telemarketers, the TCPA regulations prevail and set the standard applicable to all. When the revised TCPA regulations are less restrictive on sellers or telemarketers, however, there may be greater practical impact. In such instances, companies that are subject to the FTC's amended TSR will be required to adhere to a stricter set of regulations than those companies subject only

¹ 16 C.F.R. Part 310.

² 15 U.S.C. §§ 6101-6108.

³ 47 U.S.C. § 227(c)(1).

⁴ Public Law No. 108-10, 117 Stat. 557.

to the TCPA regulations, such as telecommunications common carriers engaged in common carrier activity, banks, and exclusively intrastate sellers and telemarketers.

The FTC submitted comments to the FCC during its rulemaking that explained the FTC's amended TSR, identified areas where the FCC's rule differed, and recommended that the FCC adopt identical regulations. Nevertheless, with respect to those subjects that both regulations cover, we have identified six instances where the FCC's revised TCPA regulations are less restrictive than the amended TSR on sellers or telemarketers. The FTC recommends that the two agencies closely monitor these points of divergence to ensure that the discrepancies do not result in negative consequences for either consumers or businesses.

Two of the differences may impact the number of telemarketing calls that consumers will receive. The first difference involves the method of calculating the maximum three percent call abandonment rate. The FCC's standard provides more flexibility to sellers and telemarketers subject to only its regulations. This standard could permit those sellers and telemarketers to target their call abandonment so that certain groups of consumers receive a disproportionate number of abandoned calls. If an adverse result in fact occurs, the FTC and the FCC should work together to reconcile the different approaches.

The second difference involves the established business relationship exemption to the National Do Not Call Registry requirements. The FTC's established business relationship exemption is narrowly crafted to conform to consumers' likely expectations about receiving calls from companies with whom they do business. The FCC's exemption is broader because it does not require consideration to be exchanged for the formation of a business relationship between a company and the consumer. Thus, consumers who place their numbers on the National Do Not Call Registry may receive more calls than they expect. It is important to be cognizant of the high consumer expectations of the Do Not Call Registry. If telemarketers and sellers attempt to exploit the FCC's arguably broader exemption and consumers receive more calls, this could diminish the effectiveness of the Do Not Call Registry. If this result occurs, the FTC and the FCC should work together to reconcile the different requirements.

The third discrepancy between the agencies' regulations involves the exemption of "personal relationship" calls from the National Do Not Call Registry requirements. Although the amended TSR does not contain a similar exemption, the FTC's business education publication, "Complying With the Telemarketing Sales Rule," advises that:

FTC staff does not contemplate enforcing the National Do Not Call Registry provisions against individuals who make a sales calls out of their own homes to personal friends, family members, or small numbers of personal referrals. In fact, most of the calls made by such small direct sellers probably would be local or "intrastate" calls, and therefore not covered by the TSR. The TSR applies to telemarketing campaigns that involve more than one interstate call.

A fourth divergence involves the call abandonment provisions that restrict the use of predictive dialers. The FTC's regulations allow no more than three percent of telemarketing calls that consumers answer to be abandoned. For those three percent of abandoned calls, consumers will receive a recorded message. The FCC's regulations are similar, but they allow unlimited use of abandoned calls (and therefore recorded messages) in telemarketing calls answered by consumers when: the caller has an established business relationship with the consumer or the called party has granted express consent. Thus, companies subject only to the FCC rule – mainly banks and common carriers engaging in common carrier activity – will be permitted unlimited use of recorded message telemarketing to consumers with whom they have an established business relationship. Companies subject to the TSR (including third-party telemarketers soliciting charitable contributions) will be restricted to using recorded message telemarketing in no more than three percent of the calls that consumers answer, regardless of whether an established business relationship exists.

This disparity may result in some consumers receiving higher numbers of telemarketing calls that, when answered, provide only a recorded message. This could annoy consumers. Although there is risk of abuse inherent in the FCC's approach, the incentive to nurture established business relationships may provide an adequate restraint on the growth of recorded message telemarketing. Nevertheless, if sellers and telemarketers subject only to the FCC's regulations attempt to exploit the FCC's exemption and cause consumers undue aggravation and annoyance, the FTC and the FCC should work together to reconcile the different requirements. The FTC, however, is less concerned about the FCC's exemption that allows recorded telemarketing calls where the company has the consumer's express consent. The FTC's business education publication, "Complying With The Telemarketing Sales Rule," states that the FTC staff do not anticipate enforcing the Rule against sellers and telemarketers who use recorded messages when calling consumers who have given their prior consent.

No action is necessary to reconcile the fifth difference, which results from the FCC's omission of a "monitoring and enforcing compliance" element from the National Do Not Call Registry safe harbor. This specific requirement may be subsumed in the FCC's more general requirement that companies must "use a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do- not-call rules." Such a process would likely include a compliance monitoring and enforcement element, even in the absence of the Amended TSR's more specific articulation.

Finally, with respect to the sixth divergence, the FTC does not believe any action needs to be taken to remedy the disparity in the regulations regarding which entities can be held liable for violations. The TCPA regulations specify that the seller can be held liable for failures to honor Do Not Call requests even if that seller's entity-specific Do Not Call list is maintained by someone other than the seller. The analogous TSR provision specifies that both the seller and the telemarketer calling on behalf of the seller are liable for violations. Although the revised TCPA regulations are less restrictive on telemarketers than the amended TSR, this disparity likely will have limited, if any, practical impact. Even if a particular seller is exempt from coverage of the FTC's amended TSR, any telemarketer working on behalf of such seller will be covered by the

amended TSR in most instances. Thus, in such a situation, the FCC's regulation would hold the seller liable, and the FTC's rule would also hold the telemarketer liable.

II. Introduction

On March 11, 2003, President Bush signed into law the DNCIA, which provides for the FTC to collect fees from sellers and telemarketers to fund the establishment and maintenance of the National Do Not Call Registry. Congress enacted this legislation, and provided complementary appropriations,⁵ to support the FTC's decision to establish such a Registry (conditioned on funding) as part of its amendment of the TSR.⁶

The DNCIA, in Section 3, also directs the FCC to "issue a final rule pursuant to a rulemaking proceeding begun by that agency on September 18, 2002,⁷ under the Telephone Consumer Protection Act,⁸ and to consult and coordinate with the FTC to maximize consistency of the FCC rule with Section 310.4(b) of the FTC's amended TSR (which includes, among other provisions, the Do Not Call Registry requirements). Accordingly, the FCC voted to amend its TCPA regulations on June 26, 2003, and the amended regulations were published in the Federal Register on July 25, 2003.⁹

Finally, Section 4 of the DNCIA includes reporting requirements. In particular, it requires that within 45 days after the promulgation of a final rule by the FCC, the FTC and the FCC each transmit to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science, and Transportation a report to include:

- An analysis of the telemarketing rules promulgated by the FTC;
- An analysis of the telemarketing rules promulgated by the FCC;
- A discussion of inconsistencies between the rules promulgated by the FTC and the FCC;
- A discussion of the effect of any inconsistencies on consumers, and persons paying for access to the registry; and
- Proposals to remedy any such inconsistencies.

⁵ The Omnibus Appropriations Act, Public Law 108-7, enacted Feb. 21, 2003.

⁶ 16 C.F.R. Part 310. The Commission announced its decision to amend the TSR on Dec. 18, 2003. See 68 Fed. Reg. 4580 (Jan. 29, 2003).

⁷ 67 Fed. Reg. 62,667 (Oct. 8, 2002).

⁸ 47 U.S.C. § 227.

⁹ 68 Fed. Reg. 4414 (July 25, 2003).

Pursuant to this mandate, the FTC hereby provides this report¹⁰ addressing each of these topics.

III. Analysis of the FTC's TSR

A. Background

The Telemarketing and Consumer Fraud and Abuse Prevention Act and the Original TSR: The original TSR was promulgated in 1995 pursuant to the Telemarketing Act,¹¹ which directed the FTC to “prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices,”¹² and required, among other things, that the FTC’s Rule include “a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the consumer would consider coercive or abusive of his or her right to privacy.”¹³

Accordingly, the TSR, as originally promulgated by the FTC, addressed a range of deceptive telemarketing practices, including: misrepresentation or failure to disclose specific material aspects of a transaction; assisting and facilitating a third party who violates the Rule; credit card laundering; and failing to obtain the consumer’s express verifiable authorization when payment was by demand draft or “phone check.” Also, the original TSR addressed numerous abusive practices, including: calling before 8:00am or after 9:00pm; calling consumers who previously requested not to be called by or on behalf of a particular seller; and requesting or accepting payment for certain services strongly associated with fraud before actually performing those services.

¹⁰ The FTC and FCC are required to transmit to Congress, in addition to this initial 45-day report, annual reports for each fiscal year from 2003 through 2007 analyzing the effectiveness of the National Do Not Call Registry, and providing statistics regarding its usage and law enforcement proceedings under the agencies’ respective telemarketing rules. Specifically, Section 4(b) of the DNCIA requires that each such annual report include:

- (1) an analysis of the effectiveness of the Do Not Call Registry as a national registry;
- (2) the number of consumers who have placed their telephone numbers on the registry;
- (3) the number of persons paying fees for access to the registry and the amount of such fees;
- (4) an analysis of the progress of coordinating the operation and enforcement of the Do Not Call Registry with similar registries established and maintained by the various States;
- (5) an analysis of the progress of coordinating the operation and enforcement of the Do Not Call Registry with the enforcement activities of the Federal Communications Commission pursuant to the Telephone Consumer Protection Act (47 U.S.C. 227 et seq.); and
- (6) a review of the enforcement proceedings under the Telemarketing Sales Rule (16 CFR 310), in the case of the Federal Trade Commission, and under the Telephone Consumer Protection Act (47 U.S.C. 227 et seq.), in the case of the Federal Communications Commission.

¹¹ The Telemarketing Act became law on August 16, 1994, and is codified at 15 U.S.C. §§ 6101-6108.

¹² 15 U.S.C. § 6102(a)(1).

¹³ 15 U.S.C. § 6102(a)(3)(A).

The Rule Review: In 1999, the FTC initiated a proceeding to review the effectiveness of the TSR.¹⁴ This review began with a *Federal Register* notice announcing a forum, scheduled for January 11, 2000, to explore issues related to the Do Not Call provision of the Rule.¹⁵ After the Do Not Call forum, the Commission, on February 28, 2000, published a second notice in the *Federal Register*, broadening the scope of the Rule review to encompass the effectiveness of all the Rule’s provisions. This notice invited comments and announced a second public forum covering the TSR as a whole.¹⁶ In response to this notice, the FTC received 92 comments from representatives of industry, law enforcement, and consumer groups, as well as from individual consumers. The commenters strongly supported the TSR’s continuing role as the centerpiece of federal and state efforts to protect consumers from interstate telemarketing fraud, but criticized as ineffective the TSR’s provisions dealing with consumers’ right to privacy, such as the entity-specific Do Not Call provision. The comments stressed that new technologies, such as predictive dialers, had dramatically increased the number of telemarketing solicitations, and the frequency with which such calls were “abandoned,” leaving consumers with either an unexplained hang-up or silence known as “dead air.” Commenters noted increasing frustration with telemarketing calls, which many described as unwanted intrusions into their homes and personal time, and they complained that the TSR’s entity-specific Do Not Call provision was inadequate as a means of stopping unwanted calls, and burdensome to consumers, who were required to make a separate request to each seller or telemarketer that he or she not be called again.

The Rule Amendment Proceeding: The agency proposed to amend the Rule by adding provisions designed to address changes in telemarketing practices that had emerged since the promulgation of the original TSR, and that were having a negative impact on consumers. Chief among these proposals was the establishment of a National Do Not Call Registry and the addition of Rule provisions prohibiting sellers and telemarketers from calling telephone numbers of consumers who indicate their desire not to receive telemarketing calls by signing up for the Registry. The proposals also included adding a provision to prohibit telemarketers from blocking transmission of Caller Identification information, and an interpretation of existing Rule provisions that, in effect, would have banned call abandonment as a violation of the Rule’s requirements to make prompt disclosures of certain material information. The FTC also proposed to prohibit telemarketers from denying or interfering with a consumer’s Do Not Call request, and to expand the requirements of the Do Not Call safe harbor to require that sellers or

¹⁴ The Telemarketing Act required that such a review be undertaken within 5 years after promulgation of the mandated rule. 15 U.S.C. § 6108.

¹⁵ The original TSR’s Do Not Call provision required a seller or telemarketer to maintain a list of consumers who requested not to receive calls from or on behalf of the particular seller whose goods or services were being offered, and prohibited calls to those consumers who asserted such requests. 16 C.F.R. § 310.4(b)(ii) (2002). This is the “entity-specific” Do Not Call provision, now supplemented in the TSR with the National Do Not Call Registry provisions.

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

telemarketers wishing to avail themselves of its protection demonstrate that they have actively monitored and enforced compliance with Do Not Call procedures. These proposed changes, and others not related to consumers' privacy, were published in a January 30, 2002, Notice of Proposed Rulemaking (NPRM).¹⁷

In response to the NPRM, the Commission received about 64,000 electronic and paper comments – more than the agency ever received in any previous proceeding. Comments were received from representatives of industry, law enforcement, consumer and privacy groups, and from individual consumers. The comments, by a large majority, supported the proposal to establish a National Do Not Call Registry. Consumers were strongly in favor of such a measure, while industry commenters largely criticized the approach as unnecessary. Beyond their general opposition, industry commenters emphasized that the proposed TSR provision to create a National Do Not Call Registry would be especially deleterious to their business if it lacked an exemption allowing calls to existing and prior customers.

Based on these comments, and comments addressing other provisions of the Rule, the FTC made certain modifications to its proposal and, on December 18, 2002, announced its adoption of the proposed amendments to the TSR, including the establishment of the National Do Not Call Registry, conditioned on Congressional approval for funding the Registry.¹⁸

B. The Amended TSR

1. Scope of Coverage

The Telemarketing Act states that “no activity which is outside the jurisdiction of [the FTC] Act shall be affected by this Act.”¹⁹ Thus, the TSR is subject to the same jurisdictional limitations as the FTC Act. Section 5(a)(2) of the FTC Act exempts banks, savings and loan institutions, federal credit unions, and common carriers subject to the Acts to regulate commerce. Nonprofit organizations (*i.e.*, those not “organized to carry on business for [their] own profit or that of [their] members”)²⁰ are also exempt. Another jurisdictional limitation is imposed by the McCarran-

¹⁷ 67 Fed. Reg. 4492 (Jan. 30, 2002). Also available online at <http://www.ftc.gov/bcp/rulemaking/tsr/tsrrulemaking/tsrfrn020130.pdf>.

¹⁸ 68 Fed. Reg. 4580 (Jan. 29, 2003), attached as Appendix A.

¹⁹ 15 U.S.C. § 6105(a).

²⁰ 15 U.S.C. §§ 44 & 45(a). Although non-profit organizations are outside the jurisdiction of the FTC, § 1011 of the USA PATRIOT Act, Pub. L. 107-56, 115 Stat. 272 (Oct. 26, 2001), expanded the Telemarketing Act's definition of “telemarketing” to encompass any call soliciting a “charitable contribution, donation, or gift of money or any other thing of value.” Thus, the TSR covers fundraising calls placed by for-profit telemarketers on behalf of charities. Nevertheless, the Rule exempts such telemarketers from the National Do Not Call Registry provisions. 16 C.F.R. § 310.6(a).

Ferguson Act, which provides that “the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by state law.”²¹

The Telemarketing Act also exempts certain entities regulated by the Securities and Exchange Commission or the Commodity Futures Trading Commission from coverage by the TSR,²² and limits the reach of the Rule to only interstate telemarketing by defining “telemarketing” as “a plan, program, or campaign which is conducted to induce purchases of goods or services, or a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones and *which involves more than one interstate telephone call.*”²³ (Emphasis supplied.)

2. *TSR Provisions That Have Parallels in The FCC’s Amended TCPA Regulations*

a. The National Do Not Call Registry Provision

Section 310.4(b)(1)(iii)(B) of the amended TSR prohibits sellers and telemarketers from calling any person when: “that person’s telephone number is on the ‘do-not-call’ registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services . . .” This provision addresses concerns expressed very strongly by rulemaking participants that the original Rule’s entity-specific Do Not Call provision was ineffective to stop unwanted calls, and that it placed the burden on the consumer to deal individually with each telemarketer calling his or her home.

b. The Established Business Relationship Exemption To the National Do Not Call Registry Provision

Section 310.4(b)(1)(iii)(B)(ii) of the amended TSR creates an exception to the National Do Not Call Registry provision allowing calls when a seller “has an established business relationship with [a person whose telephone number is on the ‘do-not-call’ registry so long as] that person has not stated that he or she does not wish to receive outbound telephone calls [from the seller on behalf of whom the call is being made].”

The term “established business relationship” is defined in Section 310.2(n) as “a relationship between a seller and a consumer based on: (1) the consumer’s purchase, rental, or lease of the seller’s goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or (2) the consumer’s inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.”

²¹ 15 U.S.C. § 1012(b).

²² 15 U.S.C. §§ 6102(d)(2)(a) & 6102(e)(1).

²³ 15 U.S.C. § 6106(4).

This provision addresses the nearly unanimous concern expressed by industry that companies not be prevented from contacting their existing customers. The exemption is also grounded on rulemaking evidence – including experience of the states with Do Not Call laws that exempt existing business relationship calls – that while consumers may wish to stop calls from companies with whom they have not done business, they may not wish to eliminate all calls from companies that they patronize. Accordingly, the exemption is narrowly crafted, both in terms of duration and the nature of the transaction that define the exemption, to conform to consumers’ likely expectations about receiving calls from companies with whom they do business. Moreover, as explained below, in cases where a consumer who has placed his or her number on the National Do Not Call Registry receives unwanted calls from a company with whom he or she has an established business relationship, the consumer can stop future calls merely by stating that he or she does not wish to receive future calls on behalf of that seller.

c. The Express Written Agreement Exemption to The National Do Not Call Registry Provision

Section 310.4(b)(1)(iii)(B)(i) of the amended TSR creates a second narrow exception to the Do Not Call Registry provision: a seller or telemarketer may call a person whose number is on the National Do Not Call Registry if the seller or telemarketer “has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person’s authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature of that person.”²⁴

This provision is designed to provide the consumer with additional choice in the matter of which telemarketing calls he or she will receive. The consumer can place his or her number on the National Do Not Call Registry and then agree in writing to receive telemarketing calls from selected companies, whether or not he or she has an established business relationship with them.

d. The Charitable Solicitation Exemption to The National Do Not Call Registry Provision

Section 310.6(a) of the amended TSR expressly states that solicitations to induce charitable contributions via outbound telephone calls are not covered by the Do Not Call Registry provision.

e. The Entity-Specific Do Not Call Provision

Section 310.4(b)(1)(iii)(A) of the amended TSR prohibits sellers and telemarketers from calling any person when “that person previously has stated that he or she does not wish to receive

²⁴ This section of the amended TSR includes a footnote at this point specifying that “for purposes of this Rule, the term “signature” shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.”

an outbound telephone call made by or on behalf of the seller whose goods or services are being offered, or made on behalf of the charitable organization for which a charitable contribution is being solicited.” This is the “entity-specific” Do Not Call provision.

This provision was part of the original TSR; the new National Do Not Call Registry provision supplements the entity-specific provision, but does not replace it. The entity-specific provision allows consumers to block unwanted calls from or on behalf of a particular seller. Thus, it enables consumers who decide not to register on the National Do Not Call Registry, to selectively limit telemarketing calls. Also, without infringing on the strong First Amendment protections accorded charitable fundraising, this provision also enables consumers to limit unwanted charitable solicitation calls. Charitable fundraising calls are expressly exempt from the National Do Not Call Registry Provision,²⁵ but are subject to the entity-specific Do Not Call provision. Finally, as noted above, a consumer’s assertion of an entity-specific Do Not Call request trumps a telemarketer’s established business relationship exemption. Therefore, this provision ensures that control over whether to receive telemarketing solicitations, even from companies with whom a consumer has done business, ultimately rests with the consumer.

f. The Do Not Call Safe Harbor

The amended TSR contains a safe harbor, applicable to both the National Do Not Call Registry provision and the entity-specific Do Not Call provision. This provision is intended to protect telemarketers who make a good faith effort to comply with these Do Not Call provisions, but who inadvertently place an outbound call in violation of either of them. In such a case, a telemarketer meeting the criteria of the safe harbor will not be subject to liability for violating the TSR. The safe harbor criteria are largely the same as in the original TSR, with the addition of a provision to require that the seller or telemarketer monitor and enforce compliance with Do Not Call procedures.²⁶

A seller or telemarketer can avail itself of the TSR’s safe harbor if it can demonstrate that, as part of its routine business practice: 1) it has established and implemented written procedures to comply with the denying and interfering²⁷ and Do Not Call provisions of the TSR; 2) it has trained its personnel, and any entity assisting in its compliance, in such written procedures; 3) the seller or telemarketer, or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of telephone numbers the specific seller or charitable organization may not contact; 4) the seller or telemarketer uses a process to prevent telemarketing to any person on an entity-specific Do Not Call list, or to any number on the National Do Not Call Registry, employing a version of the Registry obtained no more than 3 months prior to the

²⁵ 16 C.F.R. § 310.6(a).

²⁶ In addition, the safe harbor provisions also protect sellers and telemarketers from inadvertent errors that result in denial of, or interference with, any person’s right to be placed on a Do Not Call list – practices that are newly prohibited in the amended TSR by § 310.4(b)(1)(ii).

²⁷ This provision, discussed below, prohibits a telemarketer from denying or interfering in any way, directly or indirectly, with a person’s right to be placed on any Do Not Call list.

date any call is made, and maintains records documenting this process; 5) the seller or telemarketer monitors and enforces compliance with its written Do Not Call procedures; and 6) any subsequent call violating either the entity-specific or National Do Not Call Registry provisions of the TSR is the result of error.²⁸

g. Prohibition Against Misuse of Any Do Not Call List

The amended TSR prohibits any person from selling, renting, leasing, purchasing, or using any list established to comply with the entity-specific Do Not Call provision, or the National Do Not Call Registry, for any purpose except compliance with the provisions of the Rule or otherwise to prevent telephone calls to telephone numbers on such lists.²⁹ This provision is designed to ensure the security of consumers' telephone numbers contained on the list. It also ensures that entities subject to the amended TSR not evade the fee for accessing the National Registry database.

h. Mandatory Transmission of Caller ID Information

Another privacy-related provision of the amended TSR that complements the strengthened Do Not Call provisions is Section 310.4(a)(7), which prohibits sellers and telemarketers from failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call. This provision allows that, instead of transmitting the telemarketer's name and number, it is permissible to substitute the name of the seller or charitable organization on behalf of which the telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours.³⁰ When it becomes effective on January 29, 2004, this provision will serve as a "return address" for telemarketers, better enabling consumers who subscribe to Caller ID service to decide whether they wish to accept certain calls. In addition, by eliminating anonymity from telemarketing, this provision will likely increase accountability among telemarketers. Finally, the transmission of Caller ID information will provide another useful tool to help law enforcement in investigating complaints about fraudulent and abusive telemarketing to identify companies allegedly engaging in such conduct.³¹

i. Prohibition of Call Abandonment (and Safe Harbor)

The third major privacy-enhancing addition to the amended TSR is the provision banning abandoned calls. "Call abandonment" refers to scenarios where a consumer rushes to answer the telephone, only to be confronted with nothing but "dead air" on the other end. Call abandonment

²⁸ 16 C.F.R. § 310.4(b)(3).

²⁹ 16 C.F.R. § 310.4(b)(2).

³⁰ 16 C.F.R. § 310.4(a)(7).

³¹ For a more complete discussion of the Caller ID provision of the TSR, see App. A at pp. 4623-28.

results from the use of telemarketing equipment known as “predictive dialers.” Using an algorithm, predictive dialers promote telemarketers’ efficiency by calling more numbers than there are available sales representative at the time each call is being placed. Ideally, by the time each call goes through and is answered, a sales representative is available to handle the call. Inevitably, however, some calls go through and are answered, but no sales representative is available to take them.

The use of predictive dialers maximizes the amount of time telemarketers’ sales representatives spend speaking with prospective purchasers and minimizes the amount of time they spend waiting to reach one. An inevitable “side effect” of predictive dialers’ functionality, however, is that the dialer will sometimes reach more consumers than can be connected with available sales representatives. In those situations, the dialer will either disconnect the call or keep the consumer connected in case a sales representative becomes available. The rulemaking record demonstrated that this is a very troublesome problem for consumers, who, when confronted with no one on the line after rushing to reach the phone, are at worst frightened of potential stalkers and at best annoyed by the “dead air.”

Thus, after review of the record on this issue, the FTC determined to add a provision to the TSR making it a rule violation to abandon any outbound telephone call.³² A call is “abandoned” under this provision if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person’s completed greeting.³³ The FTC, recognizing that to allow zero call abandonment would in effect eliminate the use of predictive dialers, established a safe harbor to restrict but not eliminate call abandonment. In this way the FTC provided consumers with reasonable protection from call abandonment without sacrificing the substantial efficiency benefits predictive dialers confer on industry.

The call abandonment safe harbor provision shields sellers and telemarketers from liability for violating the abandoned call provision if they meet four requirements. First, the seller or telemarketer must employ technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign. Second, a seller or telemarketer must, for every telemarketing call placed, allow the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call. Third, whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person’s completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed. And, finally, the seller or telemarketer must retain records establishing compliance with the abandoned call safe harbor requirements.

j. Calling Time Restrictions

The amended TSR retains the original calling times restriction, which, absent prior consent of a person, prohibits a telemarketer from engaging in outbound telephone calls to a

³² 16 C.F.R. § 310.4(b)(4).

³³ 16 C.F.R. § 310.4(b)(1)(iv).

person's residence at any time other than between 8:00 am and 9:00 pm local time at the called person's location.³⁴ There was very little comment or other indication during the rulemaking that the existing calling time restrictions – modeled on the FCC's original TCPA regulations – were either inadequate to protect consumers or overly burdensome to industry. Therefore they were retained unchanged.

2. *TSR Provisions That Do Not Have Parallels in The FCC's Amended TCPA Regulations*

a. Denying or Interfering with Do Not Call Rights

The amended TSR prohibits a telemarketer from denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telemarketing calls.³⁵ Consumer comments submitted during the Rule Review detailed practices employed by some telemarketers to frustrate consumers' intent to assert their desire to be placed on a company's Do Not Call list, such as hanging up upon receipt of such a request, or willfully failing to process the request.³⁶ This provision makes clear that a seller or telemarketer has an affirmative obligation to accept and process a consumer's Do Not Call request. It is designed to strengthen and make more effective the entity-specific Do Not Call provision. This provision also prohibits telemarketers from denying or interfering with a consumer's right to be placed on the National Do Not Call Registry.

b. Other Provisions

The amended TSR also retains other provisions that were in the original Rule, including:

- the original Rule's disclosure requirements and prohibitions on misrepresentations;³⁷
- the prohibitions against assisting and facilitating others to violate the Rule, by credit card laundering or other actions;³⁸

³⁴ 16 C.F.R. § 310.4(c).

³⁵ 16 C.F.R. § 310.4(b)(1)(ii).

³⁶ See App. A at p. 4628.

³⁷ 16 C.F.R. §§ 310.3(a)(1) & (2).

³⁸ 16 C.F.R. §§ 310.3(b) & (c).

- the prohibition against requesting or receiving payment prior to providing services in transactions involving advance fee loan, credit repair and recovery room offers;³⁹
- the prohibition against threats, intimidation, or the use of profane or obscene language;⁴⁰
- the prohibition on causing any telephone to ring, or engaging any person in conversation, repeatedly or continuously, with intent to annoy, abuse, or harass any person at the called number;⁴¹ and
- the recordkeeping requirements.⁴²

In addition, certain modifications designed to make the Rule more effective in preventing deceptive and abusive telemarketing acts or practices have been added. One such modification, mandated by the USA PATRIOT Act, is the expansion of the TSR to regulate charitable solicitations made through telemarketing.⁴³ Another addresses the emergence in the marketplace of novel payment methods. In response to the proliferation of these methods, the amended TSR requires telemarketers to obtain the express verifiable authorization of customers whenever payment is made by a method other than credit card subject to the protections of the Truth in Lending Act or Regulation Z, or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E.⁴⁴ The amended Rule also addresses the continuing problem of unauthorized billing by requiring a telemarketer to obtain the express informed consent of a customer in every telemarketing transaction (with specific requirements for what demonstrates

³⁹ 16 C.F.R. §§ 310.4(a)(2), (3), and (4).

⁴⁰ 16 C.F.R. § 310.4(a)(1).

⁴¹ 16 C.F.R. § 310.4(b)(1)(i).

⁴² 16 C.F.R. § 310.5.

⁴³ These provisions are included in the amended TSR pursuant to the mandate of Congress, as set forth in the USA PATRIOT Act, Pub. L. 107-56 (Oct. 26, 2001), codified at 15 U.S.C. 6101 et seq. Section 1011 of the PATRIOT Act enlarges the definition of “telemarketing” that appears in the Telemarketing Act to include, in addition to calls to induce the purchase of goods or services, calls to induce “a charitable contribution, donation, or gift of money or other thing of value.” PATRIOT Act, § 1011(b)(3). In addition, the PATRIOT Act directs the Commission to include in the TSR specific prompt disclosure requirements applicable to charitable solicitors, and amends the “deceptive telemarketing acts or practices” provision of the Telemarketing Act to explicitly cover fraudulent charitable solicitations. PATRIOT Act, §§ 1011(b)(1)-(2).

⁴⁴ Truth in Lending Act, 15 U.S.C. § 1601 et seq. , and Regulation Z, 12 C.F.R. Part 226; Electronic Fund Transfer Act, 15 U.S.C. § 1693 et seq., and Regulation E, 12 C.F.R. Part 205. The express verifiable authorization provision is found at 16 C.F.R. § 310.3(a)(3), and is discussed in the amended TSR’s Statement of Basis and Purpose, App. A at 4604-11.

such consent in transactions involving preacquired account information),⁴⁵ and by prohibiting the use of the written confirmation method of obtaining express verifiable authorization in transactions involving preacquired account information and a free-to-pay conversion offer.⁴⁶

In response to record evidence, as well as law enforcement experience showing the prevalence of harm to consumers in the sales of certain types of goods or services, the amended TSR also adds provisions to: mandate disclosures and prohibit misrepresentations in the sale of credit card loss protection plans;⁴⁷ mandate disclosures and prohibit misrepresentations in the case of negative option offers;⁴⁸ expand upon the prize promotion disclosures required by the original TSR;⁴⁹ prohibit disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing;⁵⁰ and clarify that “upselling transactions,” where a solicitation to purchase goods or services is made following an initial transaction during a single telephone call, are covered by the amended TSR.⁵¹ The amended TSR also extends the recordkeeping provision to include records of express informed consent and express agreement, now required by the amended TSR.⁵² Finally, the amended TSR clarifies that facsimile transmissions, electronic mail, and other similar methods of delivery are “direct mail” for purposes of the amended TSR’s direct mail exemption,⁵³ narrows certain exemptions, making them unavailable in instances of upselling and when certain categories of goods or services are being offered, and clarifies that business-to-business calls to induce the retail sale of nondurable office and cleaning supplies are exempt from the National Do Not Call Registry provision.⁵⁴

⁴⁵ See 16 C.F.R. § 310.4(a)(6), and App. A at 4616-26.

⁴⁶ See 16 C.F.R. § 310.3(a)(iii) and App. A at 4611.

⁴⁷ See 16 C.F.R. §§ 310.3(a)(1)(vi) and (a)(2)(viii).

⁴⁸ See 16 C.F.R. §§ 310.3(a)(1)(vii) and (a)(2)(ix).

⁴⁹ See 16 C.F.R. §§ 310.3(a)(1)(iv) and 310.4(d)(4).

⁵⁰ See 16 C.F.R. § 310.4(a)(5).

⁵¹ See generally, App. A at pp. 4595-97.

⁵² See 16 C.F.R. § 310.5(a)(5).

⁵³ See 16 C.F.R. § 310.6(b)(6).

⁵⁴ See 16 C.F.R. § 310.6(b)(1)-(7).

IV. Analysis of the FCC’s Revised TCPA Regulations, and Comparison to the FTC’s Amended TSR

A. Background

The TCPA and Do Not Call: The TCPA, enacted in 1992, directed the FCC to adopt regulations governing certain aspects of unsolicited telemarketing calls and faxes. Among other things, the TCPA authorized the FCC to “require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase.”⁵⁵ In addition, the TCPA broadly authorized the FCC to “compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or entity-specific ‘do-not-call’ systems, and any other alternatives, individually or in combination) for their effectiveness in protecting [telephone subscribers’] privacy rights, and in terms of their cost and other advantages and disadvantages;” and to “develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.”⁵⁶ Thus, requiring the establishment and operation of a do-not-call database was one of many possible alternatives the FCC was empowered to choose to accomplish the privacy protection objectives of the TCPA. When the FCC issued its implementing regulations under the TCPA in 1992, it decided against establishing a national Do Not Call database, opting instead for the entity-specific Do Not Call approach which required consumers to ask each individual seller or telemarketer not to call.⁵⁷

Specifically, the Do Not Call provisions of the original TCPA regulations established calling time restrictions (no calls before 8:00 am or after 9:00 pm) and prohibited initiation of any telephone solicitation to a residential telephone subscriber unless the person or entity initiating the call previously instituted procedures for maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity.⁵⁸

⁵⁵ 47 U.S.C. § 227(c)(3).

⁵⁶ 47 U.S.C. § 227(c)(1)(A) & (E).

⁵⁷ *FCC Report and Order Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90 (Oct. 16, 1992), 7 FCC Rcd 8752 (1992); see http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1071340001 and http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1071340002.

⁵⁸ The minimum standards established by the TCPA regulations for these mandatory procedures included:

- having a written policy, available upon demand, for maintaining a Do Not Call list;
- ensuring that personnel engaged in any aspect of telephone solicitation must be informed and trained in the existence and use of the Do Not Call list;
- recording requests received from a residential telephone subscriber not to receive calls from that

(continued...)

The TCPA's Coverage of Certain Other Telemarketing and Facsimile Advertising Practices: In addition to addressing unwanted telemarketing calls, the TCPA directed the FCC to adopt regulations that would cover a variety of practices, including: the use of automatic telephone dialing system or an artificial or prerecorded voice to call a variety of specified types of telephone lines (e.g., emergency lines such as “911” lines, hospital and nursing home patient room lines, and “called party pays” lines); the use of artificial or prerecorded voices to call residential telephone lines without the line subscriber’s prior permission; the use of fax machines or other devices to send unsolicited advertisements; and the use of automatic dialing systems in a way that ties up two or more telephone lines of a multi-line business simultaneously. The TCPA also directed the FCC to revise or establish technical and procedural standards for fax machines and systems that are used to transmit any artificial or prerecorded voice message via telephone. The original TCPA regulations addressed each of these issues as directed by the TCPA.

Revision of TCPA Regulations: On September 18, 2002, the FCC announced that it was seeking comment on whether its TCPA Regulations should be revised “in order to carry out more effectively Congress’s directives in the TCPA.”⁵⁹ Subsequently, following the FTC’s announcement of the amended TSR on December 18, 2002, the FCC extended the comment period in its rulemaking proceeding to January 31, 2003.⁶⁰ Following passage of the DNCIA in March 2003, the FCC issued a notice seeking comments on the DNCIA’s requirements. On June 26, 2003, the FCC announced its amended TCPA Regulations, which were posted on the FCC website on July 3, 2003, and published in the Federal Register on July 25, 2003.⁶¹

⁵⁸ (...continued)

- person or entity, and placing the subscriber’s name and telephone number on the Do Not Call list at the time the request is made;
- identifying the person or entity making the telephone solicitation, including the name of the individual caller, the name of the person or entity on whose behalf the call is made, and a telephone number or address at which the person or entity may be contacted;
 - applying the subscriber’s request not to be called to the particular business making the call (or on whose behalf the call is made), and not to affiliated entities (absent a specific request by the subscriber to the contrary) unless the consumer reasonably would expect them to be included given the identification of the caller and product being advertised; and
 - requiring that the person or entity making telephone solicitations must maintain a record of a caller’s request not to receive future telephone solicitations, and that such requests be honored for 10 years from the time they are made.

⁵⁹ See FCC Report and Order 01-153 at p. 13. 67 Fed. Reg. 62667 (Oct. 18, 2002).

⁶⁰ See Consumer & Governmental Affairs Bureau Announces An Extension of Time To File Reply Comments on the Telephone Consumer Protection Act (TCPA) Rules, Public Notice, DA 02-2554 (rel. Dec. 20, 2002).

⁶¹ 68 Fed. Reg. 44144 (July 25, 2003), attached hereto as Appendix B, and available on the FCC website at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-153A1.pdf. References to these regulations in this report will be to “revised TCPA regulations” or “revised FCC’s regulations.”

B. The FCC’s Revised TCPA Regulations, Compared to the FTC’s Amended TSR

1. Scope of Coverage

The TCPA, through its definition of the key term “telephone solicitation,” sets the limits of coverage of the FCC’s TCPA regulations. The term is defined in the TCPA as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person’s prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) *by a tax exempt nonprofit organization.*” (Emphasis supplied.) Thus, the parts of the TCPA regulations written in terms of “telephone solicitation” – including the National Do Not Call and entity-specific Do Not Call provisions⁶² – do not cover established business relationship calls or calls by non-profit tax-exempt organizations. The FCC’s regulations go farther than the statute with respect to the nonprofit exemption, exempting calls placed “*by or on behalf of a tax-exempt nonprofit organization.*”⁶³ (Emphasis supplied.)

At any rate, the jurisdictional sweep of the TCPA and the regulations thereunder is very broad, and is unaffected by any limitations like those that restrict the reach of the FTC’s TSR. As a result, in those few instances where the revised TCPA regulations are somewhat more restrictive than analogous provisions of the amended TSR, the revised TCPA provision will govern for all companies subject to both agencies’ regulations. In those few instances where the FTC’s amended TSR is more restrictive than analogous provisions of the revised TCPA provisions, the result will be less restrictive rules for entities under the sole jurisdiction of the FCC – such as telecommunications common carriers engaged in common carrier activity - than for entities subject to both agencies’ regulations.

1. Revised TCPA Regulations that Parallel Analogous Amended TSR Provisions.

a. The FCC’s National Do Not Call Registry Provision

Both agencies’ regulations are closely parallel on this point. The revised TCPA regulations adopt the National Do Not Call Registry as a method by which consumers may block unwanted telemarketing calls. Specifically, the revised TCPA regulations prohibit “telephone solicitation” to any “residential telephone subscriber who has registered his or her telephone number on the national Do Not Call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government.” The FCC has made clear that this provision, like its counterpart in the FTC’s amended TSR, covers wireless telephones as well as

⁶² “Tax-exempt nonprofit organizations are not required to comply with § 64.1200(d) [the entity-specific Do-Not-Call provision].” 47 C.F.R. § 64.1200(d)(7).

⁶³ 47 C.F.R. § 64.1200(f)(9).

land line phones.⁶⁴ And, consistent with the FTC’s TSR, the TCPA regulations state that consumers’ registrations on the National Do Not Call Registry must be honored for a period of 5 years.⁶⁵

b. The FCC’s Established Business Relationship Exemption To the National Do Not Call Registry Provision

This exemption in the revised TCPA Regulations allows companies to call consumers with whom they have an established business relationship even though the consumers have entered their numbers on the National Do Not Call Registry. The FCC defined the term “established business relationship” as “a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber’s purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber’s inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.” The time frames here parallel the analogous time frames in the FTC’s definition of “established business relationship,” but the other terms are broader than those in the amended TSR. Thus, a broader class of calls may be excluded from coverage by the FCC’s rule under this exemption than would be the case with the FTC’s established business relationship exemption.

Both the revised FCC’s regulations and the FTC’s amended TSR provide that an established business relationship with a particular business entity does not extend to affiliated entities unless the consumer would reasonably expect them to be included, given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.⁶⁶

c. The FCC’s Express Written Permission Exemption To the National Do Not Call Registry Provision

Like the amended TSR, the revised TCPA Regulations allow sellers and telemarketers to call any person whose number has been entered on the National Do Not Call Registry if that person has given his or her “prior express invitation or permission” to call, in writing and signed.⁶⁷

d. The FCC’s Tax-Exempt Nonprofit Organization Exemption

⁶⁴ 47 C.F.R. § 64.1200(e); App. A at 4632.

⁶⁵ 47 C.F.R. § 64.1200(c)(2). The FTC stated in the amended TSR’s Statement of Basis and Purpose that consumers’ registrations will remain valid for five years, with the Registry periodically being purged of all numbers that have been disconnected or reassigned. See App. A at 4640.

⁶⁶ See 47 C.F.R. § 64.1200(f)(3)(ii); App. A at 4593-94; 4633-34 (TSR).

⁶⁷ 47 C.F.R. § 64.122(c)(2)(ii).

To the National Do Not Call Registry Provision

The National Do Not Call Registry provision in the revised TCPA Regulations does not reach calls by or on behalf of tax-exempt nonprofit organizations. Such organizations and the telemarketers who make calls on their behalf are exempt from the requirement to access the National Do Not Call Registry database to avoid calling numbers on the Registry.⁶⁸ This parallels the amended TSR, which expressly states that solicitations to induce charitable contributions via outbound telephone calls are not covered by the Do Not Call Registry provision.⁶⁹

e. The FCC’s National Do Not Call Registry Safe Harbor

The National Do Not Call Registry provision in the revised TCPA regulations parallels the analogous provision in the amended TSR, in that it includes a Do Not Call safe harbor.⁷⁰ This protects any person or entity making telephone solicitations (or those on whose behalf telephone solicitations are made) from liability when the violation is in error and the person or entity calling can demonstrate compliance with each of several provisions.⁷¹ Like the amended TSR, the revised TCPA Regulations’ safe harbor requires: written Do Not Call procedures; training of personnel in those procedures; recording and maintenance of entity-specific Do Not Call requests; use of a process to avoid calling numbers in the registry; and documentation of the process used to avoid calling numbers in the Registry.

The Do Not Call safe harbor in the TCPA regulations diverges from the Do Not Call safe harbor in the amended TSR in that the former does not require sellers and telemarketers who wish to avail themselves of the safe harbor to “monitor and enforce compliance” with the Do Not Call procedures established pursuant to the safe harbor. The TCPA regulations also add to the Do Not Call safe harbor a prohibition on “sell[ing], rent[ing], leas[ing], purchas[ing] or us[ing]

⁶⁸ 47 C.F.R. § 64.1200(f)(9); (d)(7).

⁶⁹ 16 C.F.R. § 310.6(a).

⁷⁰ While the amended TSR’s Do Not Call safe harbor covers both the National Do Not Call Registry provision and the entity-specific Do Not Call Provision, the FCC’s safe harbor is crafted to encompass only the National Do Not Call Registry provision. Nevertheless, National Do Not Call Registry safe harbor elements appear in the revised TCPA regulations as affirmative minimum standards applicable to a person who initiates “any call for telemarketing purposes to a residential telephone subscriber.” Although different in format from the analogous amended TSR provision, in practical application there is little, if any, difference.

⁷¹ 47 C.F.R. § 64.1200(c)(2)(i). The amended TSR’s Do Not Call safe harbor provision, which applies to both the National Do Not Call Registry provision and the entity-specific provision, is at 16 C.F.R. § 310.4(b)(3).

the national Do Not Call database, or any part thereof, for any purpose except compliance . . . ,”⁷² which, though not included in the amended TSR Do Not Call safe harbor, is echoed in another provision of the amended TSR.⁷³ Finally, the TCPA Regulations’ safe harbor requires “purchase [of] access to the relevant Do Not Call data from the administrator of the national database” and prohibits “any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers.”⁷⁴ This is consistent with an analogous provision in the amended TSR’s fee provision.⁷⁵

f. The FCC’s Entity-Specific Do Not Call Provision

Like the amended TSR, the revised TCPA Regulations retain the entity-specific Do Not Call provision,⁷⁶ and expressly state that an entity-specific Do Not Call request trumps the established business relationship.⁷⁷

The revised TCPA regulations require that a Do Not Call request be honored “within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request.”⁷⁸ The amended TSR sets no time limit for effectuating a consumer’s entity-specific Do Not Call Request.

⁷² 47 C.F.R. § 64.1200(c)(2)(i)(E).

⁷³ 16 C.F.R. § 310.4(b)(2). It is a violation of this provision of the amended TSR “for any person to sell, rent, lease, purchase, or use any list established to comply with § 310.4(b)(1)(iii)(A) [the entity-specific Do Not Call provision], or maintained by the Commission pursuant to § 310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists.”

⁷⁴ 47 C.F.R. § 64.1200(c)(2)(i)(E).

⁷⁵ 68 Fed. Reg 45144 (July 31, 2003). The provision is to be codified at 16 C.F.R. § 310.8.

⁷⁶ 47 C.F.R. § 64.1200(d).

⁷⁷ 47 C.F.R. § 64.1200(f)(3)(i).

⁷⁸ 47 C.F.R. § 64.1200(d)(3).

Also, the revised TCPA regulations specify that entity-specific Do Not Call requests must be maintained for 5 years.⁷⁹ The amended TSR does not limit the duration of the obligation to maintain entity-specific Do Not Call requests. Like the amended TSR,⁸⁰ the revised TCPA regulation also explicitly includes wireless phones under its entity-specific Do Not Call provision. Finally, the revised FCC provision that requires telemarketers to honor entity-specific Do Not Call requests incorporates elements analogous to the amended TSR's National Do Not Call Registry safe harbor as affirmative minimum standards applicable to a person who initiates "any call for telemarketing purposes to a residential telephone subscriber."

The first of these ten listed standards is the requirement that persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a Do Not Call list.⁸¹ By contrast, for a company to be eligible for the amended TSR's safe harbor, it need only have written procedures regarding compliance with the Do Not Call list requirements; it is not required to make the written procedures available upon demand.⁸²

Second, personnel engaged in telemarketing must be informed of the existence, and trained in the use, of the Do Not Call list.⁸³ Third, if a person or entity making a call for telemarketing purposes receives a request from a residential telephone subscriber not to receive calls from that person or entity, the request must be recorded, and the subscriber's name, if provided, and telephone number must be placed on the entity's Do Not Call list at the time the request is made.⁸⁴ The analogous TSR provision does not explicitly state that the information be placed on the list at the time of the request. Fourth, a residential subscriber's Do Not Call request must be honored within a reasonable time from the date the request is made, not to exceed 30 days.⁸⁵ Again, the analogous TSR provision does not specify a deadline for effectuating the request. Fifth, the TCPA regulations explicitly state that even if a seller's entity-specific Do Not Call list is maintained by someone other than the seller, the seller will be liable for any failures to honor Do Not Call requests.⁸⁶ The amended TSR holds both seller and telemarketer liable for violations.

⁷⁹ 47 C.F.R. § 64.1200(d)(6).

⁸⁰ App. A at 4632.

⁸¹ 47 C.F.R. § 64.1200(d)(1).

⁸² 16 C.F.R. § 310.4(b)(3)(i).

⁸³ 47 C.F.R. § 64.1200(d)(2).

⁸⁴ 47 C.F.R. § 64.1200(d)(3).

⁸⁵ 47 C.F.R. § 64.1200(d)(3).

⁸⁶ 47 C.F.R. § 64.1200(d)(3).

Sixth, a person or entity making a call for telemarketing purposes must obtain a consumer's express prior permission to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a telemarketing call is made or an affiliated entity.⁸⁷ While the amended TSR has no directly parallel requirement, the amended TSR provision prohibiting use of any entity-specific Do Not Call list for any purpose other than compliance with the TSR or "to prevent telephone calls to telephone numbers on such lists"⁸⁸ may be similar in effect.

Seventh, a person or entity making a call for telemarketing purposes must "provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted." By contrast, the analogous provision of the amended TSR requires disclosure of the identity of the seller, that the purpose of the call is to sell goods or services, the nature of the goods or services, and certain material information about any prize promotion being offered.⁸⁹ The revised TCPA regulations specify that the telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.⁹⁰ The TSR does not require that a telephone number be provided.

Eighth, absent a specific request by the consumer to the contrary, a consumer's entity-specific Do Not Call request applies only to the business entity making the call (or on whose behalf the call is made), not to affiliates, "unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised."⁹¹ This is fully consistent with the amended TSR.⁹²

Ninth, a person or entity making calls for telemarketing purposes must maintain a record of a consumer's request not to receive further telemarketing calls, and honor such requests for 5 years from the time the request is made.⁹³ The amended TSR does not specify any time limit for retention of entity-specific Do Not Call requests.

⁸⁷ 47 C.F.R. § 64.1200(d)(3).

⁸⁸ 16 C.F.R. § 310.4(b)(2).

⁸⁹ 16 C.F.R. § 310.4(d).

⁹⁰ 47 C.F.R. § 64.1200(d)(4).

⁹¹ 47 C.F.R. § 64.1200(d)(5).

⁹² App. A at 4634.

⁹³ 47 C.F.R. § 64.1200(d)(6).

Tenth, and finally, this provision exempts tax-exempt nonprofit organizations and entities who solicit contributions on their behalf from compliance with the entity-specific Do Not Call provisions.⁹⁴ By contrast, the TSR, through operation of the USA PATRIOT Act, requires for-profit telemarketers calling on behalf of charities to honor individuals' entity-specific Do Not Call requests.

g. The FCC's Prohibition Against Misuse of The National Do Not Call Registry Database

The Do Not Call safe harbor in the TCPA regulation requires telemarketers to “use a process to ensure that an entity does not sell, rent, lease, purchase, or use the national Do Not Call database, or any part thereof, for any purpose except compliance with this section and any such state or federal law to prevent telephone solicitations to telephone numbers registered on the national database.”⁹⁵ The amended TSR contains a similar provision (located outside the Do Not Call safe harbor), that expressly encompasses both the National Do Not Call Registry and any entity-specific Do Not Call list and that prohibits use of either for any purpose other than compliance with the TSR or “to prevent telephone calls to telephone numbers on such lists.”⁹⁶ The TCPA provision that requires express prior permission to share or forward the consumer's request not to be called to a party other than the person on whose behalf the call is made may provide similar protection from misuse of an entity-specific Do Not Call list.

h. The FCC's Provision Mandating Transmission Of Caller ID Information

The Caller ID provision of the revised TCPA regulations closely tracks the analogous provision of the amended TSR. The revised FCC provision states that “any person or entity that engages in telemarketing . . . must transmit caller identification information.”⁹⁷ The revised FCC provision specifies that the number transmitted “must permit any individual to make a Do Not Call request during regular business hours,” whereas the amended TSR on this point only requires that the number provided be “answered during regular business hours.” The revised TCPA also expressly prohibits blocking the transmission of Caller ID information, which is substantively and effectively identical to the amended TSR's prohibition on failing to transmit such information.⁹⁸

⁹⁴ 47 C.F.R. § 64.1200(d)(7).

⁹⁵ 47 C.F.R. § 64.1200(c)(2)(i)(E).

⁹⁶ 16 C.F.R. § 310.4(b)(2).

⁹⁷ 47 C.F.R. § 64.6101(e).

⁹⁸ 16 C.F.R. § 310.4(a)(7).

i. The FCC's Call Abandonment Provisions

Like the amended TSR, the revised TCPA regulations address the issue of call abandonment. The revised TCPA regulations prohibit disconnecting an unanswered telemarketing call prior to at least 15 seconds or 4 rings, echoing identical elements of the amended TSR's call abandonment safe harbor.⁹⁹ The revised TCPA regulations prohibit abandoning more than three percent of all telemarketing calls that are answered live by a person, measured over a 30-day period, partially tracking a similar element of the amended TSR's call abandonment safe harbor.¹⁰⁰ While the maximum allowable abandonment rate is the same in both agencies' rules, the way that figure is calculated differs. Under the amended TSR, the three percent abandonment rate must be calculated on a "per day, per calling campaign basis,"¹⁰¹ while the TCPA regulation measures this over a 30 day period. Under the revised TCPA, "a call is "abandoned" if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting," which tracks the analogous amended TSR definition.¹⁰²

Under the TCPA regulations, if a caller has an established business relationship with the called party, the call is not deemed to be abandoned if the caller plays a recorded message instead of connecting the call to a live sales representative within two (2) seconds after the called party answers. The amended TSR has no such established business relationship exemption for abandoned calls. Similarly, if a caller has obtained the express consent of the called party to receive recorded message calls, the call is not deemed to be abandoned if the caller plays a recorded message instead of connecting the call to a live sales representative within two (2) seconds after the called party answers. The amended TSR lacks this exemption as well, but as the FTC's business education materials make clear, the FTC staff do not anticipate enforcing the Rule against sellers who use recorded messages when they have obtained the express consent of the called party.

Echoing a third element of the amended TSR's call abandonment safe harbor, the revised TCPA regulations require that whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the called person's completed greeting, a prerecorded identification message must be played, stating only the name and telephone number

⁹⁹ The TCPA provision is found at 47 C.F.R. § 1200(a)(5); the TSR provision is found at 16 C.F.R. § 310.4(b)(4).

¹⁰⁰ 47 C.F.R. § 64.1200(a)(6).

¹⁰¹ This method of measuring the call abandonment rate was suggested, *inter alia*, by Article 43 of the Direct Marketing Association's guidelines, which can be accessed at www.the-dma.org/guidelines/ethicalguidelines.shtml#tele.

¹⁰² Under the amended TSR, a call is "abandoned" under the abandoned call provision "if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting." 16 C.F.R. § 310.4(b)(1)(iv).

of the business, entity, or individual on whose behalf the call was placed, and that the call was for “telemarketing purposes.”¹⁰³ The amended TSR requires name and number, but not a message that the call was for telemarketing purposes. Further, the TCPA regulations require that the telephone number provided must permit any individual to make a Do Not Call request during regular business hours for the duration of the telemarketing campaign.¹⁰⁴ This is more specific than the analogous amended TSR provision.¹⁰⁵ Pursuant to a separate recorded message provision of the TCPA regulations, the message must, at the beginning of the call, clearly state the name under which the business “responsible for initiating the call” is registered to conduct business with the State Corporation Commission (or comparable regulatory authority).¹⁰⁶ This is not required by the amended TSR. And, the telephone number provided may not be a 900-number or any other number for which charges exceed local or long distance transmission charges.¹⁰⁷ The amended TSR does not include this specification.

The fourth and final element of the amended TSR call abandonment safe harbor provision is paralleled in the FCC’s requirement that the seller or telemarketer maintain records establishing compliance with the other elements of the safe harbor.¹⁰⁸

j. The FCC’s Calling Time Restrictions

The revised TCPA regulations retain calling time restrictions that appeared in the FCC’s original TCPA regulations. Because the calling time restrictions in both the original and the amended TSR were modeled on this feature of the FCC’s regulations, complete regulatory consistency is maintained: both agencies’ rules restrict telemarketing calls before 8:00 am or after 9:00 pm, except with the prior consent of the called person.¹⁰⁹ However, the scope of the TSR calling times restriction is broader, because the FCC’s provision exempts companies that have an established business relationship with the called party from the calling time restrictions. The TSR applies the restrictions regardless of whether the caller has an established business relationship with the called party.

¹⁰³ 47 C.F.R. § 64.1200(a)(6).

¹⁰⁴ 47 C.F.R. § 64.1200(a)(6); (b)(2).

¹⁰⁵ 16 C.F.R. § 310.4(b)(4)(iii).

¹⁰⁶ 47 C.F.R. § 64.1200(b)(2) .

¹⁰⁷ 47 C.F.R. §§ 64.1200(a)(6); (b)(2).

¹⁰⁸ 47 C.F.R. § 64.1200(a)(6).

¹⁰⁹ 47 C.F.R. § 64.1200(c)(1).

2. *Revised TCPA Regulations that Do Not Have Parallels in the Amended TSR.*

a. Availability of the National Do Not Call Registry to States

The revised TCPA regulations require the administrator of the registry to make the national database available to the States so that a State may use the telephone numbers that relate to such State as part of any state Do Not Call database.¹¹⁰

b. The Personal Relationship Exemption to The National Do Not Call Registry Provision

Unlike the amended TSR, the FCC's revised TCPA regulations allow sellers and telemarketers to call any person whose number has been entered on the National Do Not Call Registry if the caller has a "personal relationship" with that person (defined in the TCPA regulations to mean that the person called is a "family member, friend, or acquaintance of the telemarketer making the call"). Although the TSR does not include such an express exemption, the FTC's business education publication "Complying With The Amended Telemarketing Sales Rule" makes clear that small direct sellers who wish to avoid contacting a person whose number is on the registry will be able to use the National Do Not Call Registry's single number lookup feature to verify, for free, whether an individual number is in the Registry database. The business education material also states that "FTC staff does not contemplate enforcing the National Do Not Call Registry provisions against individuals who make sales calls out of their own homes to personal friends, family members, or small numbers of personal referrals. In fact, most of the calls made by such small direct sellers probably would be local or 'intrastate' calls, and therefore not covered by the TSR. The TSR applies to telemarketing campaigns that involve more than one interstate call."

c. Notice to Individuals and Telemarketers Of the National Do Not Call Registry

Unique to the revised TCPA regulations are provisions directing common carriers to provide annual notice of the existence of the National Do Not Call Registry to residential subscribers, and one-time notice of the national Do Not Call requirements to telemarketing entities. Specifically, the FCC's revised regulations direct local exchange carriers to "provide an annual notice, via an insert in the subscriber's bill, of the right to give or revoke" registration in "the national Do Not Call database maintained by the federal government and the methods by which such rights may be exercised by the subscriber. The notice must be clear and conspicuous and include, at a minimum, the Internet address and toll free number that residential telephone

¹¹⁰ 47 C.F.R. § 64.1200(h).

subscribers may use to register on the national database.”¹¹¹ Another provision requires common carriers to provide a one-time notification to telemarketing entities of the national Do Not Call requirements, including, at a minimum, citation to 47 C.F.R. § 64.1200 and 16 C.F.R. Part 310.¹¹² These provisions, mandated by the TCPA, have no parallels in the amended TSR.

d. “War Dialing”

In another provision unique to the TCPA regulations, the FCC has addressed the practice of “war dialing,” or using autodialers to dial telephone numbers to determine which lines belong to telephone facsimile machines.¹¹³ The TCPA regulations prohibit the use of any technology to dial any telephone number for the purpose of determining whether the line is a facsimile or voice line.¹¹⁴

e. Recorded Message and Automatic Dialer Calls

The revised TCPA regulations, like the original, prohibit recorded message calls to residential telephone lines, subject to certain exemptions. Recorded message calls to residential phones are not permitted unless:¹¹⁵ 1) the called party has given his or her prior express consent; 2) the call is made for emergency purposes; 3) the call is not made for a commercial purpose, or is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation; 4) the call is made to any person with whom the caller has an established business relationship at the time the call is made; or 5) the call is made by or on behalf of a tax-exempt nonprofit organization.

The TCPA regulations require that permitted recorded messages contain a message at the beginning of the call that clearly states the name under which the business “responsible for

¹¹¹ 47 C.F.R. § 64.1200(g)(1).

¹¹² 47 C.F.R. § 64.1200(g)(2). This provision also states that “failure to receive such notification will not serve as a defense to any person or entity making telephone solicitations from violations of this section.”

¹¹³ See FCC Report and Order 01-153 at p. 81.

¹¹⁴ 47 C.F.R. § 64.1200(a)(7).

¹¹⁵ A related TCPA regulation also prohibits recorded message calls without prior express consent of the called party to: any emergency telephone line (911; hospital, physician, or health care emergency line; poison control center line; or fire protection or law enforcement); any line of any patient room of a hospital, health care facility, elderly home, or similar establishment; or any telephone number assigned to cellular telephone service or any other service for which the called party is charged for the call. 47 C.F.R. § 64.1200(a)(1).

initiating the call” is registered to conduct business with the State Corporation Commission (or comparable regulatory authority).¹¹⁶ Further, the telephone number provided may not be a 900-number or any other number for which charges exceed local or long distance transmission charges.¹¹⁷

In addition, the revised TCPA regulations prohibit the use of an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.¹¹⁸

f. Facsimile Advertisements and Identification

The revised TCPA regulations, like the original, regulate the use of facsimile machines for advertising purposes.¹¹⁹ The FCC’s revised provision is more stringent than that contained in the original. It prohibits use of a facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, and specifies that a facsimile advertisement is not “unsolicited” if the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that includes the facsimile number to which any advertisements may be sent, and clearly indicates the recipient’s consent to receive such facsimile advertisements from the sender.¹²⁰ The revised TCPA regulations also require faxes to be stamped with date and time sent, identity of sender, phone number of sender,¹²¹ and specify that a facsimile broadcaster will be liable if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity, and fails to take steps to prevent such facsimile transmissions.¹²²

g. General Definitions

The revised TCPA regulations add new definitions of “telemarketer” and “telemarketing,” in addition to the definition of “telephone solicitation” that existed in the original TCPA

¹¹⁶ 47 C.F.R. § 64.1200(b)(2) .

¹¹⁷ 47 C.F.R. §§ 64.1200(a)(6) & (b)(2).

¹¹⁸ 47 C.F.R. § 64.1200(a)(4).

¹¹⁹ 47 C.F.R. § 64.1200(a)(3).

¹²⁰ 47 C.F.R. § 64.1200(a)(3)(i). On August 19, 2003, the FCC announced that it would postpone the effective date of this provision until January 1, 2005. See “FCC Extends Effective Date of Amended Fax Advertising Rules Until January 1, 2005,” August 19, 2003, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-237931A1.pdf

¹²¹ 47 C.F.R. § 63.318(d).

¹²² 47 C.F.R. §§ 63.318 and 64.1200(a)(3)(ii).

regulations. These new definitions are somewhat broader than the analogous definitions in the TSR. Under the revised TCPA regulations, “the term telemarketer means the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person,”¹²³ and the term “telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.”¹²⁴

V. Apparent Inconsistencies Between the Amended TSR and the Revised TCPA Regulations; Recommendations to Remedy those Inconsistencies

A. Method of Calculating the Maximum Three Percent Call Abandonment Rate

The revised TCPA prohibits abandoning “more than three percent of all telemarketing calls that are answered live by a person, *measured over a 30-day period.*” (Emphasis supplied.) The amended TSR call abandonment safe harbor permits “abandonment of no more than three (3) percent of all calls answered by a person, *measured per day per calling campaign.*” Thus, the permissible abandonment rate is the same for both agencies’ rules, but the way that figure is calculated differs. The net effect is that the revised TCPA regulations may be, in practice, less restrictive on sellers and telemarketers than the comparable provisions of the amended TSR.

The “per day per campaign” unit of measurement is consistent with the Direct Marketing Association (“DMA”) guidelines addressing its members’ use of predictive dialer equipment.¹²⁵ Under this standard, a telemarketer running two or more calling campaigns simultaneously cannot offset a six percent abandonment rate on behalf of one seller with a zero percent abandonment rate for another seller in order to satisfy the amended TSR’s safe harbor provision. Each calling campaign must record a maximum abandonment rate of three percent per day to satisfy the safe harbor.

The FTC submitted comments to the FCC during its rulemaking proceeding, which explained the FTC’s regulations and recommended that the FCC consider the same approach. Although the FCC recognized that its rate of measurement of call abandonment differs from the FTC’s rule, the FCC stated “we believe a rate measured over a longer period of time will allow for variations in telemarketing campaigns such as calling times, number of operators available, number of telephone lines used by the call centers, and other similar factors.”¹²⁶

¹²³ 47 C.F.R. § 64.1200(f)(6).

¹²⁴ 47 C.F.R. § 64.1200(f)(7).

¹²⁵ See www.the-dma.org/guidelines/ethicalguidelines.shtml#tele (#43).

¹²⁶ 47 C.F.R. § 64.1200(a)(6). In its Report and Order, the FCC stated: “The [Federal Communications] Commission believes that a three (3) percent abandonment rate measured over a 30-day
(continued...)”

Effect on Consumers and Industry: The FCC’s approach to measuring the three percent call abandonment rate over a 30-day period could enable telemarketers to target call abandonments at certain less valued groups of consumers, resulting in their receipt of more than their share of abandoned calls. Under such a scenario, predictive dialers could be set to abandon calls at a higher rate to one subset of the population and a lower rate to another subset of the population. For example, a telemarketer could offset a high abandonment rate in a multi-day cold-call campaign to persons who never previously purchased from the seller, and make up the difference by abandoning no calls in a subsequent campaign targeting its most valued existing customers. Telemarketers could also offset a high abandonment rate in low income zip codes and make up the difference by abandoning no calls in affluent ones. The FTC’s per day per campaign measure obviates the potential for “clumping up” abuse by ensuring an even distribution of abandoned calls to all segments of the public, regardless of their purchasing history or demographic characteristics. Given the detrimental impact of call abandonment on consumers, the FTC does not believe that variations in telemarketing campaigns (such as calling times, number of operators available, and the number of telephone lines used by the call centers), justify allowing call abandonment to fall disproportionately on particular groups of consumers.

The disparity in the method of calculating the maximum permissible call abandonment rate could result in sellers and telemarketers subject to the FCC’s regulations but exempt from the FTC’s amended TSR – such as telecommunications common carriers engaged in common carrier activity – targeting their call abandonment as described above, while sellers and telemarketers subject to both agencies’ regulations will have to comply with the FTC’s more stringent per day per campaign method of calculation. Thus, all consumers receiving calls from sellers and telemarketers covered by the amended TSR would receive a proportionate share of abandoned calls, while some consumers receiving calls from sellers subject only to the FCC’s regulations could receive a disproportionately high number of abandoned calls. It is not clear, however, that the FCC’s different rate of measurement will in fact cause this result.

Recommendation: The FTC and FCC should monitor and analyze the effect of the disparate standards for calculating the call abandonment rate to determine whether they result in any costs or benefits to industry or consumers. If telemarketers subject only to the FCC’s regulations in fact target particular groups of consumers with a disproportionate volume of abandoned calls, then the FTC and the FCC should work together to eliminate the disparity in their regulations.

B. Defining the Established Business Relationship Exemption

¹²⁶ (...continued)

period will ensure that consumers consistently receive fewer disconnected calls, and that telemarketers are permitted to manage their calling campaigns effectively under the new rules on abandoned calls. Although we recognize that this rate of measurement differs from the FTC’s rule, we believe a rate measured over a longer period of time will allow for variations in telemarketing campaigns such as calling times, number of operators available, number of telephone lines used by the call centers, and other similar factors. The record also suggests that an abandonment rate measured over a 30-day period will allow telemarketers to more easily comply with the recordkeeping requirements associated with the use of predictive dialers.” App. B at 44164 (¶ 108).

Both the FTC and FCC regulations provide an exemption to the National Do Not Call Registry for telemarketing calls in which the seller has an existing business relationship with the consumer. However, the agencies' definition of "established business relationship" differs.¹²⁷

The amended TSR describes this type of relationship narrowly and concretely as one "between a seller and a consumer," and specifies that it is based on "the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller." By contrast, the revised TCPA regulations describe the exemption in terms of "prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration . . ."¹²⁸ The FCC's specification that the relationship in question be "between a *person or entity* and a residential subscriber" may not be as precise or limiting as the FTC's "between a *seller* and a *consumer*."¹²⁹ More importantly, the FCC's exemption does not require that consideration be exchanged as a prerequisite for establishing a business relationship. The FTC's clearly circumscribed exemption permit calls only when the consumer has purchased, rented, or leased goods or services from the seller, or engaged in a financial transaction with the seller. It is not apparent how many and what sort of transactions without an exchange of consideration could arguably serve as a basis for a claim under the FCC's regulations that an established business relationship exists. Thus, this is an instance where the revised TCPA regulations are likely less restrictive on sellers and telemarketers than the comparable provisions of the amended TSR.

Effect on consumers and industry: When sellers or telemarketers are subject to both agencies' rules, the FTC's more clearly defined and narrow version of the established business relationship will govern. However, sellers and telemarketers subject only to the FCC's regulations (such as telecommunications common carrier engaged in common carrier activity), may be able to call more consumers who have entered their numbers on the National Do Not Call Registry. Therefore, consumers may receive more calls than they expect. Consumers may not welcome at least some of these calls, because they will be based on a "transaction" that is not characterized by a bona fide exchange between the parties.

¹²⁷ There is no material inconsistency with respect to the part of the established business relationship exemption that is based on a consumer's application or inquiry and that lasts for three months, but there is a disparity in the remainder of the exemption.

¹²⁸ Under the TCPA regulation's definition, an "established business relationship" "means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber **with or without an exchange of consideration**, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party." 47 C.F.R. § 64.1200(f)(3).

¹²⁹ Use of the term "residential subscriber" is specific, and does not contribute to the vagueness of the definition.

Recommendation: The FTC and FCC should monitor and analyze the effect of the disparate definitions of established business relationship to determine whether they result in any costs or benefits to industry or consumers. If sellers and telemarketers subject only to the FCC's regulations attempt to exploit the FCC's apparently broader established business relationship exemption in a manner that erodes the effectiveness of the Registry, then the FTC and the FCC should work together to eliminate the disparity in the regulations.

C. The Personal Relationship Exemption

The revised TCPA regulations include an exemption from compliance with the National Do Not Call Registry provision for calls for which the telemarketer has a "personal relationship" with the recipient of the call (meaning that the person called is a "family member, friend, or acquaintance of the telemarketer making the call"). The amended TSR does not include a provision establishing such an exemption.

Effect on consumers and industry: The "personal relationship" exemption is of particular concern to small direct sellers who target prospects based on acquaintance and personal referrals. Such calls are not likely to be interstate, and thus not subject to the FTC's jurisdiction. The FTC appreciates the concern that direct sellers not be prevented from calling consumers who would not object to receiving their calls.

Recommendation: The FTC has already acted to minimize the effects of this disparity between the two agencies' regulations. Specifically, the FTC's business education publication, "Complying With The Telemarketing Sales Rule," explicitly states that individuals calling small numbers of personal referrals out of their own homes will not be targeted for law enforcement action by the FTC staff. The publication also emphasizes that small direct sellers who wish to avoid contacting a person whose number is on the registry will be able to use the National Do Not Call Registry's single number lookup feature to verify, for free, whether an individual number is in the Registry database. The FTC believes that the guidance it has given about how the amended TSR will be enforced in this regard should alleviate industry concerns regarding this disparity between the two agencies' regulations. The FTC will monitor this issue carefully, and if indications arise that additional action is necessary, it will consider other approaches to reconciling the disparity.

D. Exemption from Call Abandonment Provisions for Established Business Relationship Calls and Calls Where the Called Party Has Granted Express Consent

Under the amended TSR's call abandonment provisions, 97 percent of a telemarketer's calls that are answered by a live consumer must be connected to a live representative within two seconds after the called party completes his or her greeting. The safe harbor permits telemarketers to abandon 3 percent of calls answered by a live person, provided the telemarketer plays a short recorded message promptly after the called party completes his or her greeting. Thus, the amended TSR imposes limits on telemarketing calls that employ recorded messages rather than live operators. These limits are applicable to both commercial telemarketing calls to

solicit sales of goods or services, and telemarketing calls by telefunders to solicit charitable contributions.

By contrast, the TCPA regulations make an exception for established business relationship calls. If a caller has an established business relationship with the called party, the call is not deemed to be abandoned if the caller plays a recorded message instead of connecting the call to a live sales representative within two seconds after the called party answers.¹³⁰ As dictated by the relevant TCPA provision,¹³¹ the FCC's regulations also allow unlimited recorded message calls to consumers who have given express consent to receive such calls. Thus, these are instances when the revised TCPA regulations are less restrictive on sellers and telemarketers than the comparable provisions of the amended TSR.

The FCC's rationale for creating an established business relationship exemption is that "we believe that while consumers may find prerecorded voice messages intrusive, such messages do not necessarily impose the same costs on the recipients as, for example, unsolicited facsimile messages. Therefore, we retain the exemption for established business relationship calls from the ban on prerecorded messages."¹³²

Effect on Business and Consumers: Because of this disparity in the two agencies' regulations, callers subject to the FCC's regulations, but not the FTC's amended TSR, will continue to be able to run calling campaigns that employ a recorded message to present a sales pitch provided the campaign is directed solely to consumers with whom the seller has an existing business relationship. Companies subject the FTC's amended TSR will not be permitted to conduct such campaigns because they would not be connecting the call to a live operator in all but 3 percent of cases.

If companies that are bound only by the FCC's regulation set their predictive dialers to abandon more than three percent of calls to established customers – and legally, these companies could set their dialers as high as they like if they used recorded messages in their calling campaigns – consumers receiving those calls will be faced with a new annoyance: high numbers of calls that, when answered, provide only a recorded message. While such a recorded message may alleviate the anxiety and fear that many consumers experience when they rush to answer the phone and are confronted with only the silence of "dead air,"¹³³ it cannot assuage the frustration and annoyance many will feel if this becomes a prevalent practice. Although the potential for

¹³⁰ 47 C.F.R. § 64.1200(a)(6)(i).

¹³¹ "It shall be unlawful for any person within the United States to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission . . ." 47 U.S.C. § 227(b)(1)(B).

¹³² App. B at 44158 (¶ 80).

¹³³ App. A at 4642.

negative responses from consumers may provide a check on the proliferation of this practice, in other contexts the risk of annoying customers has not reined in aggressive telemarketing practices.

Recommendation: Although there is some risk of abuse inherent in the FCC’s approach, the incentive to nurture established business relationships may provide an adequate restraint on the growth of recorded message telemarketing. Nevertheless, if sellers and telemarketers subject only to the FCC’s regulations attempt to exploit the FCC’s exemption of established business relationship calls from the call abandonment requirements in a manner that causes consumers undue aggravation and annoyance, then the FTC and FCC should work toward reconciling their approach.

**E. National Do Not Call Registry Safe Harbor
Monitoring and Enforcing Compliance Element**

The amended TSR explicitly requires sellers and telemarketers who wish to avail themselves of the safe harbor to “monitor and enforce compliance” with the Do Not Call procedures established pursuant to the safe harbor. The FTC added this element to the amended TSR’s Do Not Call safe harbor¹³⁴ because record evidence collected in the TSR Review proceeding showed that some entities claimed that merely having a Do Not Call policy was sufficient under the law, and that the policy need not be effective.¹³⁵ To ensure that sellers and telemarketers are clear on the point that the safe harbor is available only to those entities who, as part of their regular business practice, monitor and enforce their written Do Not Call procedures, the FTC included this provision in the amended TSR. The analogous provisions of the revised TCPA regulations – which cast elements paralleling the TSR’s Do Not Call safe harbor as affirmative requirements – do not include a requirement to “monitor and enforce compliance.”

Effect on Consumers and Industry: The FTC does not believe that this minor discrepancy will have any material impact on companies complying with the two agencies’ regulations, or on consumers. The TCPA regulations specify that companies must “use a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules.” We believe that in view of the rather sweeping nature of this requirement, the absence of a detailed specification in the revised TCPA regulations that such process include a monitoring and enforcement element is not significant.

Like the revised TCPA regulations, the amended TSR specifies that for a seller or a telemarketer to take advantage of the safe harbor’s protection, it must “use a process to prevent telemarketing to any telephone number on any [Do Not Call registry or] list . . .” The FTC believes that the majority of legitimate companies that engage in telemarketing are law-abiding, and would not likely resort to a sophisticated claim that merely “having” a Do Not Call policy is tantamount to operating one’s business with such a policy as one of its governing principles. Thus, this extra TSR provision is for the most part designed to forestall any outlier’s claim of safe harbor protection based on the unsound theory just described. As a practical matter, the detailed articulation of a separate safe harbor requirement to monitor and enforce is not significant.

¹³⁴ The original TSR’s Do Not Call safe harbor did not include this requirement.

¹³⁵ App. A at 4646.

Recommendation: The FTC believes that this minor discrepancy will not likely cause any problem to consumers or industry.

F. Liability for Violations of the Entity-Specific Do Not Call Provisions

Under the TCPA regulation, even if a seller's entity-specific Do Not Call list is maintained by someone other than the seller, the seller will be liable for any failures to honor Do Not Call requests.¹³⁶ The TSR holds both seller and telemarketer liable for violations. Thus, this is an instance where the revised TCPA regulations are less restrictive on telemarketers than the amended TSR.

Effect on Industry and Consumers: This disparity likely will have limited, if any, practical impact, because even if a particular seller is exempt from coverage of the FTC's amended TSR, any telemarketer working on behalf of such seller will be covered by the amended TSR in most instances. Thus, in such a situation, the FCC's regulation would hold the seller liable, and the FTC's rule would also hold the telemarketer liable.

Recommendation: The FTC does not believe any action need be taken to address this difference between the two agencies' regulations.

¹³⁶ 47 C.F.R. § 64.1200(d)(3). The provision requires that the entity making calls for telemarketing purposes must maintain a record of a caller's [sic] request not to receive further telemarketing calls, and honor such requests for 5 years from the time the request is made.