

FEDERAL TRADE COMMISSION

RIN: 3084-0098

16 CFR Part 310

Telemarketing Sales Rule Fees

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (the “Commission” or “FTC”) is issuing this Final Rule to amend Section 310.8 (“the Fee Rule”) of the FTC’s Telemarketing Sales Rule (“TSR”) by revising the fees charged to entities accessing the National Do Not Call Registry (“the Registry”).

EFFECTIVE DATE: Revised Section 310.8 will become effective September 1, 2005.

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

FOR FURTHER INFORMATION CONTACT: David B Robbins, (202) 326-3747, Division of Planning & Information, Bureau of Consumer Protection,

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20580.

SUPPLEMENTARY INFORMATION: The amended rule increases the annual fee for each area code of data to \$56.00 per area code, or \$28.00 per area code of data during the second six months of an entity’s annual subscription period. The maximum amount that would be charged to any single entity for accessing 280 area codes of data or more is increased to \$15,400.00. In addition, the amended rule retains the provisions regarding free access by “exempt” organizations, as well as free access to the first five area codes of data by all entities.

Statement of Basis and Purpose

I. Background:

On December 18, 2002, the Commission issued final amendments to the TSR, which, *inter alia*, established the Registry, permitting consumers to register, via either a toll-free telephone number or the Internet, their preference not to receive certain telemarketing calls (“Amended TSR”).¹ Under the Amended TSR, most telemarketers are required to refrain from calling consumers who have placed their numbers on the Registry.² Telemarketers must periodically access

¹ See 68 FR 4580 (Jan. 29, 2003) (codified at 16 CFR 310).

² 16 CFR 310.4(b)(1)(iii)(B).

the Registry to remove from their telemarketing lists the telephone numbers of those consumers who have registered.³

Shortly after issuance of the Amended TSR, Congress passed the Do-Not-Call Implementation Act (“the Implementation Act”).⁴ The Implementation Act gave the Commission the specific authority to “promulgate regulations establishing fees sufficient to implement and enforce the provisions relating to the ‘do-not-call’ registry of the [TSR].”⁵ The Implementation Act also provides that “[n]o amounts shall be collected as fees pursuant to this section for such fiscal years except to the extent provided in advance in appropriations Acts. Such amounts shall be available * * * to offset the costs of activities and services related to the implementation and enforcement of the [TSR], and other activities resulting from such implementation and enforcement.”⁶

³ 16 CFR 310.4(b)(3)(iv). The TSR requires telemarketers to access the Registry at least once every thirty-one days, effective January 1, 2005. *See* 69 FR 16368 (March 29, 2004).

⁴ Do-Not-Call Implementation Act, Pub. L. 108-10, 117 Stat. 557 (2003).

⁵ *Id.* at § 2.

⁶ *Id.*

On July 29, 2003, pursuant to the Implementation Act and the Consolidated Appropriations Resolution, 2003,⁷ the Commission issued a Final Rule further amending the TSR to set fee amounts for entities accessing the National Do Not Call Registry (“the 2003 Fee Rule”).⁸ Those fees were based on the FTC’s best estimate of the number of paying entities that would access the Registry, and the need to raise \$18.1 million in Fiscal Year 2003 to cover the costs associated with the implementation and enforcement of the “do-not-call” provisions of the Amended TSR. The Commission determined that the fee structure would be based on the number of different area codes of data that an entity wished to access annually. The 2003 Fee Rule established an annual fee of \$25 for each area code of data requested from the Registry, with the first five area

⁷ Consolidated Appropriations Resolution, 2003, Pub. L. 108-7, 117 Stat. 11 (2003).

⁸ 68 FR 45134 (July 31, 2003).

codes of data provided at no cost.⁹ The maximum annual fee was capped at \$7,375 for entities accessing 300 area codes of data or more.¹⁰

On July 30, 2004, pursuant to the Implementation Act and the Consolidated Appropriations Act, 2004 ("the 2004 Appropriations Act"),¹¹ the Commission issued a revised Final Rule further amending the TSR, which increased fees on entities accessing the National Do Not Call Registry ("the 2004 Fee Rule").¹² Those fees were based on the FTC's experience through June 1, 2004, its best estimate of the number of paying entities that would access the Registry, and the need to raise \$18 million in Fiscal Year 2004 to cover the costs

⁹ Once an entity requested access to area codes of data in the Registry, it could access those area codes as often as it deemed appropriate for one year (defined as its "annual period"). If, during the course of its annual period, an entity needed to access data from more area codes than those initially selected, it would be required to pay for access to those additional area codes. For purposes of these additional payments, the annual period was divided into two semi-annual periods of six months each. Obtaining additional data from the Registry during the first semi-annual, six month period required a payment of \$25 for each new area code. During the second semi-annual, six month period, the charge for obtaining data from each new area code requested during that six-month period was \$15. These payments for additional data would provide the entity access to those additional area codes of data for the remainder of its annual term.

¹⁰ 68 FR at 45141.

¹¹ Consolidated Appropriations Act, 2004, Pub. L. 108-199, 118 Stat. 3 (2004).

¹² 69 FR 45580 (July 30, 2004).

associated with the implementation and enforcement of the "do-not-call" provisions of the Amended TSR. The Commission determined that the fee structure would continue to be based on the number of different area codes of data that an entity wished to access annually. The 2004 Fee Rule established an annual fee of \$40 for each area code of data requested from the Registry, with the first five area codes of data provided at no cost.¹³ The maximum annual fee was capped at \$11,000 for entities accessing 280 area codes of data or more.¹⁴

In the Consolidated Appropriations Act, 2005 ("the 2005 Appropriations Act"),¹⁵ Congress directed the FTC to collect offsetting fees in the amount of \$21.9 million in Fiscal Year 2005 to implement and enforce the TSR.¹⁶ Pursuant to the 2005 Appropriations Act and the Implementation Act, as well as the Telemarketing Fraud and Abuse Prevention Act ("the Telemarketing Act"),¹⁷ the

¹³ *Id.* at 45584. The 2004 Fee Rule has the same fee structure as the 2003 Fee Rule; however, fees were increased from \$25 to \$40 per area code, from \$15 to \$20 per area code for the second semi-annual six month period, and from a maximum of \$7,375 to \$11,000.

¹⁴ *Id.*

¹⁵ Consolidated Appropriations Act, 2005, Pub. L. 108-447, 118 Stat. 2809 (2004).

¹⁶ *Id.* at Division B, Title V.

¹⁷ 15 U.S.C. 6101-08.

FTC issued a Notice of Proposed Rulemaking to amend the fees charged to entities accessing the Registry (“the 2005 Fee Rule NPR”).¹⁸

In the 2005 Fee Rule NPR, the Commission proposed revising the fees for access to the Registry in order to raise \$21.9 million to offset costs the FTC expects to incur in this Fiscal Year for purposes related to implementing and enforcing the “do-not-call” provisions of the Amended TSR. Based on the number of entities that had accessed the Registry through the end of February 2005, the Commission proposed revising the fees to charge \$56 annually for each area code of data requested from the Registry, with the first five area codes of data provided at no cost. As a consequence of the increase in the per-area-code charge, the maximum annual fee would increase to \$15,400 for entities accessing 280 area codes of data or more.¹⁹

In the 2005 Fee Rule NPR, the Commission sought comment on the following issues relating to the proposed amendment:

(1) whether entities accessing the Registry should continue to obtain the first five area codes of data for free;²⁰

¹⁸ 70 FR 20848 (April 22, 2005).

¹⁹ *Id.* at 20852.

²⁰ *Id.* at 20850. The Commission was particularly interested in
(continued...)

(2) whether “exempt” organizations should continue to be provided with free access to the Registry;²¹

²⁰ (...continued)

comments addressing (a) whether there are alternatives to providing free access to the first five area codes of data that would better balance the burdens faced by small businesses with the need to raise appropriate fees to fund the Registry in a more equitable manner; (b) the propriety of changing or eliminating the number of area codes for which there is no charge, and the effect, if any, on entities that access the Registry, including small businesses; (c) the nature and type of entities that are accessing five or fewer area codes at no cost, and whether these entities are primarily the types of businesses that the Regulatory Flexibility Act requires the FTC to consider when adopting regulations, and whether such entities need access to one, two, three, four, or five area codes; and (d) whether any changes in the number of free area codes would affect an entity’s business practices, including whether an entity would choose not to access an area code if it had to pay for that area code or whether the entity would pay to continue accessing that area code.

²¹ *Id.* at 20851. The 2005 Fee Rule NPR, the 2003 Fee Rule, and the 2004 Fee Rule stated that “there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the National Do Not Call Registry without being required to under this Rule, 47 CFR 64.1200, or any other federal law.” 16 CFR 310.8(c). Such “exempt” organizations include entities that engage in outbound telephone calls to consumers to induce charitable contributions, for political fund raising, or to conduct surveys. They also include entities engaged solely in calls to persons with whom they have an established business relationship or from whom they have obtained express written agreement to call, pursuant to 16 CFR 310.4(b)(1)(iii)(B)(i) or (ii), and who do not access the Registry for any other purpose. *See* 70 FR at 20849 n. 22. *See also* 69 FR at 45585-45586, and 68 FR at 45144.

(3) the number and type of small business entities that may be subject to the revised fees;²² and

(4) whether there are any significant alternatives that would further minimize the impact of the rule on small entities, consistent with the objectives of the Telemarketing Act, the 2005 Appropriations Act, the Implementation Act, and the Regulatory Flexibility Act.²³

In response to the 2005 Fee Rule NPR, the Commission received nine comments.²⁴ The amended rule, comments, and the basis for the Commission's decision on the various recommendations are analyzed in detail below.

II. The Amended Rule

Based on the 2005 Appropriations Act, the Implementation Act, and the Telemarketing Act, as well as its review of the record in this proceeding, and on its law enforcement experience in this area, the Commission has decided to modify the fees required under the TSR Fee Rule. Under the amended rule

²² See 70 FR at 20851.

²³ *Id.* at 20850.

²⁴ A list of the commenters in this proceeding, and the acronyms used to identify each, is attached hereto as an appendix. Comments submitted in response to the 2005 Fee Rule NPR will be cited in this Notice as “[Acronym of Commenter] at [page number].” The nine comments that were submitted included a joint comment filed on behalf of the DMA, the ATA, and the NAA (i.e., DMA/ATA/NAA).

provisions adopted herein, the annual fee for accessing the Registry will increase from \$40.00 per area code to \$56.00 per area code, and from a maximum of \$11,000.00 to \$15,400.00 for access to 280 area codes of data or more. The fee for accessing area codes during the second six months of an entity's annual subscription period also will increase, from \$20.00 to \$28.00. Further, the Commission has decided to continue to provide all organizations with free access to the first five area codes of data, and has decided to continue to provide "exempt" organizations with free access to the Registry, as well.

III. Discussion of Comments

The Commission received nine comments in response to the 2005 Fee Rule NPR.²⁵ Of the nine comments received, one comment was from a consumer who favored providing free access to the entire Registry to all entities "in order to promote the widest possible distribution of the Do Not Call Lists," thereby maximizing the "positive effect of the legislation."²⁶ The remaining eight comments were submitted by a mix of business and industry commenters, all of whom were opposed to the increase in fees, but who were divided on whether the Commission should reduce or eliminate the number of free area codes provided.

²⁵ See the appendix for a list of commenters.

²⁶ See DM at 1.

In addition, one commenter opposed the proposal to continue providing free access to “exempt” organizations.²⁷ Importantly, in addressing the specific issues posed by the Commission, the commenters submitted only limited data or information that differed from that previously submitted in connection with fee rulemakings. Instead, the comments primarily relied on information provided by the FTC as part of its 2005 Fee Rule NPR, and/or in previous rulemaking proceedings.²⁸ Similarly, the primary arguments submitted in response to the 2005 Fee Rule NPR’s proposal to raise fees also have been previously considered by the Commission.²⁹

²⁷ See ARDA at 3.

²⁸ For example, four of the commenters noted, as did the Commission in the 2005 Fee Rule NPR, that 100 percent of the fees are paid by a small minority of the entities that access the Registry (*e.g.*, only 11 percent of entities who access the Registry actually pay anything for such access). See comments submitted by FNBO, WF, WST, and ARDA. However, this same point was also made in the 2004 Fee Rule proceeding: “[m]any noted that only 11 percent of all entities accessing the registry currently pay the entire cost of the registry.” See 69 FR at 45582.

²⁹ As another example, comments also included suggestions that the Commission use “revenue from enforcement proceedings to subsidize” the Registry, and that the Commission should “increase efforts to identify those entities that are not accessing the Registry,” rather than increase the fees on those that are already complying with the rules. See ARDA at 2-3. However, this same point was also made in the 2004 Fee Rule proceeding: “The FTC must investigate whether there are entities that should be paying for access but fail to do so” and “the FTC should use fines obtained from enforcement actions to offset some of
(continued...)

While most of the comments submitted represented views previously considered, some of the comments raised new points. For example, three of the commenters expressed concern that fees are continuing to increase each year.³⁰ One comment also expressed opposition to any increase in fees that might be attributable to the inclusion of wireless telephone numbers on the Registry.³¹ This same comment posited that the Commission should not adopt the increase in fees, because it is “unjustified at this time and unnecessary for continued operation of the registry.” This comment further stated that the Commission is “not required to collect fees up to [the] amount, which was authorized by Congress,” but rather, that the Commission should only collect fees up to the amount necessary to fund and operate the Registry, an amount this comment sets at \$18.1 million.³²

The major themes that emerged from the record are summarized below.

²⁹ (...continued)

the fee increase.” *See* 69 FR at 45581-45582. Two of the comments also question whether the fees that are being collected are being used for purposes other than to fund the Registry. *See* ARDA at 3, and DMA/ATA/NAA at 3. This same issue was also raised in the 2004 Fee Rule proceeding: “the fees should be used only to cover the costs to operate the registry.” *See* 69 FR at 45582.

³⁰ *See* FNBO at 2, ARDA at 1, and DMA/ATA/NAA at 2.

³¹ *See* DMA/ATA/NAA at 4.

³² *Id.* at 1-2.

1. Five Free Area Codes

In the 2005 Fee Rule NPR, the Commission proposed, at least for the next annual period, to continue allowing all entities accessing the Registry to obtain the first five area codes of data for free. The Commission proposed to continue allowing such free access “to limit the burden placed on small businesses that only require access to a small portion of the Registry.”³³ The Commission noted, as it has in the past, that such a fee structure was consistent with the mandate of the Regulatory Flexibility Act,³⁴ which requires that to the extent, if any, a rule is expected to have a significant economic impact on a substantial number of small entities, agencies should consider regulatory alternatives to minimize such impact. As stated in the 2005 Fee Rule NPR and in the 2004 Fee Rule, “the Commission continues to believe that providing access to five area codes of data for free is an appropriate compromise between the goals of equitably and adequately funding the national registry, on one hand, and providing appropriate relief for small businesses, on the other.”³⁵ In addition, the Commission noted again, as it has in the past, that requiring a large number of entities to pay a small fee for access to

³³ See 70 FR at 20850. See also 68 FR at 45140, and 69 FR at 45582.

³⁴ 5 U.S.C. 601.

³⁵ See 70 FR at 20850. See also 68 FR at 45141, and 69 FR at 45584.

five or fewer area codes from the Registry would place a significant burden on the Registry, requiring the expenditure of even more resources to handle properly that additional traffic.³⁶

While the 2005 Fee Rule NPR proposed to continue providing free access to five area codes of data, the Commission nevertheless noted a particular interest in comments regarding the propriety, impact, and effects of these provisions on all entities accessing the Registry. In this regard, the Commission specifically observed that “the implementation and enforcement costs are borne by a small percentage of entities that access the registry,”³⁷ but “that the cost of accessing the registry is relatively modest.”³⁸ As an example the Commission explained that, if it were to stop providing free access to five or fewer area codes, the cost for accessing five area codes of data could be as little as \$185. Therefore, “given the modest nature of the fees, along with the increasing burden borne by those organizations that do pay for access,”³⁹ the Commission noted its particular interest in comments addressing these issues.

³⁶ See 70 FR at 20850.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

The Commission received seven comments that addressed the issue of five free area codes. Four of the commenters opposed providing the first five area codes of data at no charge, noting that the entire cost of the Registry is borne by a small percentage of all entities who access the system.⁴⁰ They maintained that a fee structure that requires so few organizations to bear such a significant portion of the total costs is not equitable.⁴¹ Commenters also reiterated the Commission's view that if the Commission were to stop providing free access to five or fewer area codes, the cost for accessing five area codes of data would be relatively modest.⁴² These commenters also suggested that any additional burden to the system caused by the need to collect additional payments should be factored into

⁴⁰ See FNBO, WF, WST, and ARDA. These commenters relied solely on the data presented in the Commission's 2005 Fee Rule NPR, noting, for example, that only 11 percent of all entities accessing the Registry currently pay the entire cost of the Registry. Commenters also noted the complementary statistic, that approximately 89% of all entities who access the Registry pay nothing. See, e.g., FNBO at 2; WST at 1 (noting that an even greater burden is borne by those entities who purchase all area codes); and ARDA at 2.

⁴¹ See FNBO at 2; WST at 2; WF at 1; and ARDA at 1-2.

⁴² See WF at 1, stating that the "cost of paying for access to the first five area codes * * * would hardly be a significant burden on even the smallest of businesses." See also WST at 2, stating that "this amount would not seem so exorbitant as to place an undue burden on small business."

the fees, assuming that this would not increase fees beyond the amounts proposed in the 2005 Fee Rule NPR.⁴³

These commenters suggested that eliminating access to five free area codes would make the fee structure more equitable,⁴⁴ and that “the cost of the Registry should be borne by all users that are required to access the Registry and absorbed as a cost of doing business.”⁴⁵ Another alternative suggested by one commenter was that the Commission continue to provide free access to five area codes, “provided they qualify as a small business as defined by the Small Business Administration.”⁴⁶ One commenter also suggested that the Commission charge “at least a reduced fee.”⁴⁷

⁴³ See FNBO at 1, and WST at 2. FNBO stipulated, however, “that the Commission should only allocate fees to all required users if it can be done without increasing expenditures, which could result in increased fees for everyone.”

⁴⁴ *Id.*

⁴⁵ See FNBO at 2.

⁴⁶ See WST at 2.

⁴⁷ See ARDA at 1-2.

On the other hand, three of the comments supported providing the first five area codes of data at no charge.⁴⁸ One commenter stated that:

Removing the five area code exemption would disproportionately impact [small] businesses as they would pay the same per area code fee as larger telemarketers, that place a much heavier volume of calls to phone numbers registered within these area codes. * * *

Removing the exemption altogether would have a significant impact on our members and many other small and medium size businesses. * * * These businesses have already assumed significant training, systems, and other compliance costs associated with the National DNC rules and other federal and state telemarketing restrictions.⁴⁹

⁴⁸ See NAR at 2, NADA at 1, and DMA/ATA/NAA at 1.

⁴⁹ See NADA at 1-2. Two commenters specifically questioned the relationship between the size of a business, and the number of area codes such businesses need to access. See ARDA at 2, and NAR at 1. ARDA and NAR suggested that some small businesses may need to place a low volume of calls to many area codes, while some large businesses may place a large volume of calls to a limited number of area codes. Accordingly, ARDA and NAR suggested that the Commission's current fee structure, based on area codes accessed, does not adequately address small business issues. However, ARDA and NAR proposed two opposing solutions to this problem: ARDA suggested that all entities should be charged for all area codes they access, thus eliminating the free access to five area codes, while NAR suggested that small businesses should be provided free

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Another commenter cited information from the Small Business Administration's Office of Advocacy which it claimed shows that "small businesses represent 99 percent of American companies" and "very small firms with fewer than 20 employees * * * spend 60 percent more per employee than larger firms to comply with federal regulations."⁵⁰ This commenter also pointed out that:

in today's increasingly interconnected world, a business may be small in size * * * but not be limited to a small geographic market area * * * many small businesses, including real estate agents and brokers, often have the need to call a limited number of consumers who reside in a variety of states and/or area codes beyond their primary five area code local calling region.⁵¹

⁴⁹ (...continued)
access to the entire Registry, thus expanding the free access currently provided.

⁵⁰ See NAR at 2.

⁵¹ See NAR at 1. NADA's comment echoed these concerns. NADA also provided an example to illustrate the impact it felt would occur: "Since most major metropolitan areas cover more than one area code, most businesses that serve that area would be affected if the number of free area codes were reduced. For example, the DC Metropolitan area consists of the following area codes: 202, 703, 571, 301, 240. If a small automobile dealership in this area were limited to one or two free area codes on the registry, they would have to pay to access the remaining area codes. Thus, any reduction in the number of free area codes would likely have a significant economic impact on small businesses." See NADA at 2.

After considering all of the comments submitted in this proceeding, the Commission has determined to retain the provision allowing the free access of up to five area codes. Although the Commission continues to recognize that only a small percentage of the total number of entities accessing the Registry pay for that access, these figures also illustrate the large number of small businesses that likely would be adversely affected by a change in the number of area codes provided at no cost. In fact, over 50,000 entities have accessed five or fewer area codes of the Registry. As observed in the 2005 Fee Rule NPR and the 2004 Fee Rule, the Commission continues to believe that most of these entities – realtors, car dealers, community-based newspapers, and other small businesses – are precisely the types of businesses that the Regulatory Flexibility Act requires the FTC to consider when adopting regulations.⁵² Moreover, the Commission again finds significant the information submitted by commenters discussing the disproportionate impact

⁵² The comments submitted in response to the 2005 Fee Rule NPR do not offer any information or data to contradict this assertion. In this regard, we note that the business and organization commenters who support the proposal to continue providing five free area codes, purport to represent more than 1.2 million members and/or affiliates; many of whom appear to be small business entities. *See* NAR, NADA, and DMA/ATA/NAA. However, those business and organization commenters who oppose the proposal to continue providing five free area codes appear to represent a much smaller number of organizations, and do not purport to represent a significant number of small business entities. However, the Commission also notes that the volume of comments received does not conclusively indicate the number of organizations that will be affected by the rule change.

compliance with the “do-not-call” regulations may have on small businesses. In order to lessen that impact, the Commission believes that retaining the five free area code provision is appropriate.

The Commission does not believe that the alternatives suggested instead of the five free area code provision would be as effective in minimizing the impact of the Do Not Call regulations on small businesses and that these proposed alternatives may create undue burdens that the current system does not impose. For example, the suggestion to eliminate or reduce the number of area codes provided for free would result in tens of thousands of entities that currently access the Registry for free being required to pay the same fee to access the Registry as much larger businesses. While, to some, such a fee might seem modest, it nonetheless would represent an increase in costs to more than 50,000 entities, most of whom are already disproportionately impacted by the cost of complying with the “do-not-call” regulations. Alternatively, the suggestion to base the fees on the actual size of the entity requesting access would, as noted in the 2004 Fee Rule, require all entities to submit sensitive data concerning annual income, number of employees, or other similar factors. It also would require the FTC to develop an entirely new system to gather that information, maintain it in a proper manner, and investigate those claims to ensure proper compliance. As the

Commission has previously stated, such a system “would present greater administrative, technical, and legal costs and complexities than the Commission’s current exemptive proposal, which does not require any proof or verification of that status.”⁵³ As a result, the Commission continues to believe that the most appropriate and effective method to minimize the impact of the Rule on small businesses is to provide access to a certain number of area codes at no charge.

The comments also do not provide any new information to support a change in the number of area codes to provide at no charge. Thus, the Commission does not believe that any change in the current level of five free area codes is necessary or appropriate. The Commission continues to recognize that reducing the number of free area codes would result in slightly lower fees charged to the entities that must pay for access. At the same time, however, as noted previously, such a change also would result in increased costs to thousands of small businesses. On the other hand, the Commission is not persuaded that it should increase the number provided at no charge, although it continues to recognize that some small businesses located in large metropolitan areas may need to make calls to more than five area codes. Obviously, increasing the number of area codes provided at no charge would decrease the pool of paying entities, and

⁵³ See 69 FR at 45583. See also 68 FR at 16243 n.53.

further increase the fees that entities must pay. As a result, the Commission continues to believe that allowing all entities to gain access to the first five area codes of data from the Registry at no cost is appropriate.

2. *Exempt Entity Access*

In the 2005 Fee Rule NPR, the Commission also proposed to continue allowing “exempt” organizations to obtain free access to the Registry.⁵⁴ The Commission stated its belief that any exempt entity, voluntarily accessing the Registry to avoid calling consumers who do not wish to receive telemarketing calls, should not be charged for such access. Charging such entities access fees, when they are under no legal obligation to comply with the “do-not-call” requirements of the TSR, may make them less likely to obtain access to the Registry in the future, resulting in an increase in unwanted calls to consumers.⁵⁵

Three of the comments supported continuing to allow “exempt” entities to access the Registry at no charge, for the reasons set forth in the 2005 Fee Rule NPR.⁵⁶ One commenter opposed the provision, claiming that fees are necessary in

⁵⁴ See *supra* footnote 21, citing 70 FR at 20849 n. 22, 69 FR at 45585-45586, and 68 FR at 45144.

⁵⁵ See 70 FR at 20851.

⁵⁶ See FNBO at 2, WF at 1, and WST at 2.

order to make it more difficult for “bad actors”⁵⁷ to gain access to the system, as well as to help “fund the Registry.”⁵⁸

The Commission continues to believe that if it charged exempt entities for access to the Registry, many, if not most, of those entities would no longer seek access.⁵⁹ As a result, as noted in the 2004 Fee Rule, registered consumers would receive an increase in the number of unwanted telephone calls. Exempt entities are, by definition, under no legal obligation to access the Registry. Many are outside the jurisdiction of the FTC. They are voluntarily accessing the Registry in order to avoid calling consumers whose telephone numbers are registered. They should be encouraged to continue doing so, rather than be charged a fee for their efforts. The Commission will, therefore, continue to allow such exempt entities to access the Registry at no charge, after they have completed the required certification.

⁵⁷ The Commission has found no evidence of widespread non-compliance with the Do Not Call provisions of the TSR. *See* discussion in section III.3.

⁵⁸ *See* ARDA at 3.

⁵⁹ *See also* WF at 1, stating that “it is safe to assume that few if any such entities would access the list at all if they were required to pay for such access.”

3. Imposition of the Fees and Use of the Funds

While the commenters disagreed on whether access to five area codes of data should continue to be provided at no cost, they were unanimous in their opposition to the increase in fees for access to the National Do Not Call Registry. Generally, in addition to arguing that it would be unfair to continue raising fees on the small percentage of entities who pay for accessing the Registry,⁶⁰ commenters also posited other reasons in opposition to the increase.

One commenter disapproved of the proposed increase in fees, stating that “the Commission should increase efforts to identify those entities that are not accessing the Registry as required.”⁶¹ Since the opening of the Registry, the FTC has monitored industry payment for access. We have found no evidence of widespread noncompliance with the 2004 Fee Rule. Moreover, no commenter has provided any concrete information about such alleged noncompliance. As part of our law enforcement activities, we continue to welcome any specific information that can be provided in this regard. The FTC continues to conduct non-public investigations of violations of the fee provision as well as violations of the do-not-

⁶⁰ See discussion starting in section III.1., above.

⁶¹ See ARDA at 3.

call provisions of the TSR, and will file law enforcement actions addressing such violations when appropriate.⁶²

This same commenter suggested that the FTC should use “revenue from enforcement actions” to offset some of the fee increase.⁶³ However, as stated in the 2004 Fee Rule, by statute, the FTC cannot retain any civil penalties it obtains in such law enforcement actions. Instead, all such civil penalties are deposited into the General Fund of the United States Treasury.⁶⁴ Accordingly, by law, any monies obtained from enforcement actions cannot be used to offset fees.

Two of the commenters also questioned whether fees that are being collected are being used for purposes other than to fund the Registry.⁶⁵ One commenter stated that “fees * * * should only be used to fund enforcement and administrative costs directly associated with the Registry,”⁶⁶ and another commenter stated that they “are concerned that fees are being used for

⁶² As of April 21, 2005, the FTC had initiated seven DNC Registry cases and obtained four settlements (two of those cases were filed by the Department of Justice on the FTC’s behalf). In addition, the FTC had filed four cases against do-not-call scams.

⁶³ See ARDA at 2.

⁶⁴ See Miscellaneous Receipts Act, 31 U.S.C. 3302.

⁶⁵ See ARDA at 3 and DMA/ATA/NAA at 3.

⁶⁶ See ARDA at 3.

telemarketing enforcement based on fraud or other violations of the TSR, where there may also be an incidental violation of the registry.”⁶⁷ These commenters also noted the Commission’s statements regarding industry’s high rate of compliance, and argued that it is unfair to continue increasing fees and imposing enforcement costs on the very organizations that are most compliant with the rules.⁶⁸

Consistent with the Implementation Act, and as stated in previous rulemaking proceedings,⁶⁹ the Commission has limited the amount of fees to be collected to those needed to implement and enforce the “do-not-call” provisions of the Amended TSR. The amount of fees collected pursuant to this revised rule is intended to offset costs in the following three areas: first, funds are collected to operate the Registry. This operation includes items such as handling consumer registration and complaints, telemarketer access to the Registry, state access to the Registry, and the management and operation of law enforcement access to

⁶⁷ See DMA/ATA/NAA at 3.

⁶⁸ See ARDA at 2, and DMA/ATA/NAA at 3-4. DMA/ATA/NAA further stated their belief that “it is inappropriate for entities that comply with the law to bear the enforcement costs of the FTC. If the do-not-call registry is as successful as the FTC indicates, the FTC itself or Congress should provide any additional necessary funding increases over the current fee structure.” See DMA/ATA/NAA at 3-4.

⁶⁹ See 69 FR at 45582. See also 68 FR at 45141.

appropriate information. Second, funds are collected for law enforcement and educational activities, including identifying targets, coordinating domestic and international initiatives, challenging alleged violators, and consumer and business education outreach. These law enforcement efforts are a significant component of the total costs, given the large number of ongoing investigations currently being conducted by the FTC, and the substantial effort necessary to complete such investigations. Third, funds are collected to cover infrastructure and administration costs associated with the operation and enforcement of the Registry, including information technology structural supports and distributed mission overhead support costs for staff and non-personnel expenses such as office space, utilities, and supplies.⁷⁰

Three of the commenters also raised concerns regarding the pattern of annual fee increases that the Commission has adopted.⁷¹ One commenter stated that it was “concerned, given the sharp increases in the cost of the Registry over the first two years of activation, that this cost will continue to increase and over

⁷⁰ See 70 FR at 20850.

⁷¹ See FNBO at 2, ARDA at 1, and DMA/ATA/NAA at 2.

time become a significant cost that will ultimately be passed on to the consumer.”⁷² Another commenter raised the concern that:

As the user fee increases, it is inevitable that compliant sellers will be motivated to 1) reduce or stop outbound telemarketing; or 2) avoid paying the fees in violation of the rules. Either event will reduce the number of sellers (and/or area codes accessed by the sellers), which will result in lower fees, and in turn result in more fee increases in the future to be paid by only the most profitable businesses.⁷³

A third commenter stated that while fees have increased, the “Commission has not indicated in the NPRM that costs to run the registry have increased or that enforcement or other costs have increased.”⁷⁴ The Commission has increased the fees charged to telemarketers for accessing the Registry; in 2004, this was primarily because fewer area codes of information were purchased than were

⁷² See FNBO at 2. Interestingly, FNBO also notes “that the Registry’s overall cost per year does not in and of itself significantly impact our company’s bottom line.” *Id.*

⁷³ See ARDA at 1-2.

⁷⁴ See DMA/ATA/NAA at 2.

anticipated in the 2003 Fee Rule.⁷⁵ As part of the 2004 Fee Rule proceedings, the Commission reviewed the fees that had been collected, along with data about the number of area codes that had been purchased, and revised its initial assumptions accordingly. As a result, the Commission increased the fees based on the latest information then available.⁷⁶ Similarly, in the 2005 Fee Rule NPR, the Commission analyzed the current information, and issued a proposal that reflected both the amount that needed to be raised,⁷⁷ along with the number of area codes that were projected to be purchased. As a result, the fees that were proposed in the 2005 Fee Rule NPR represented an increase over the fees adopted in the 2004 Fee Rule.

In this regard, one commenter stated its belief that this increase is unjustified and only reflects the “increase in the annual congressional authorization.”⁷⁸ However, an increase in the amount of funding required to cover

⁷⁵ See 68 FR at 45140. As stated in the 2003 Fee Rule, the fees were “based on the best information available to the agency at [that] time.” However, as the Commission noted, we “received virtually no comments providing information on the validity of the Commission’s assumptions.”

⁷⁶ See 69 FR at 45584.

⁷⁷ The Commission views the current Congressional authorization as an instruction regarding the fees to be collected.

⁷⁸ See DMA/ATA/NAA at 2. The Commission also notes that
(continued...)

the administrative costs of the Registry, while a component of the fee increase, is not the only component. As in the 2004 Fee Rule, a second major factor that influenced the increase proposed in the 2005 Fee Rule NPR was the number of area codes that were purchased by entities accessing the Registry. The fees that the Commission proposed in the 2005 Fee Rule NPR reflect both the amount of funds necessary to implement and enforce the Registry, as well as the number of area codes that the Commission assumes will be purchased by entities accessing the Registry, based on the Commission's current experience. Importantly, the Commission believes that, through experience, it will continue to obtain better information about the number of entities accessing the Registry, their purchasing behavior, and the costs associated with running the Registry. The Commission expects this experience and improved information to result in more stable and predictable fee rates.

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(...continued)

DMA/ATA/NAA stated that Congress authorized the Commission to collect \$18.1 million in offsetting fees in 2004. However, Congress actually authorized the Commission to collect \$23.1 million in the 2004 Appropriations Act. However, in its rulemaking, the Commission stated that it was only seeking \$18.1 million in offsetting fees during Fiscal year 2004 because of the \$5.1 million from the 2003 Fee Rule that the Commission collected in Fiscal Year 2004. *See* 69 FR at 23702 n. 4.

In addition, one commenter also expressed opposition to any increase in fees that might be attributable to the inclusion of wireless telephone numbers on the Registry, stating that:

Telemarketing calls to wireless numbers without consent are prohibited under the FCC's rules implementing the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. §§ 227 et seq. Thus, as a legal matter, consumers receive no fewer telemarketing calls by placing their wireless numbers on the registry. Because such calls already are prohibited in the first instance, there is no basis for allowing such numbers to be placed on the registry.⁷⁹

However, this commenter overstated the nature of the prohibition enacted by the Federal Communication Commission ("FCC"). The FCC's prohibitions on telemarketing calls placed to wireless telephone numbers, proscribe the use of an "automatic telephone dialing system or an artificial or prerecorded message" to place such calls.⁸⁰ In this regard, the Commission has received no information that would suggest that those engaged in telemarketing activities only use the

⁷⁹ See DMA/ATA/NAA at 4.

⁸⁰ See FCC Telemarketing and Telephone Solicitation Rules, 47 CFR 64.1200 (2005).

aforementioned technology to place calls to consumers. The TSR's prohibitions concerning fraudulent or abusive telemarketing acts or practices apply to both land line and wireless telephones, and the Registry has never differentiated between the two. At this point, the Commission sees no reason to make such a distinction.

Accordingly, the Commission concludes that an increase in fees is necessary.

IV. Calculation of the Revised Fees

As previously stated, the Commission proposed in the 2005 Fee Rule NPR to increase the fees charged to access the National Do Not Call Registry to \$56 annually for each area code of data requested, with the maximum annual fee capped at \$15,400 for entities accessing 280 area codes of data or more. The Commission based this proposal on the total number of entities that accessed the Registry from March 1, 2004 through February 28, 2005.⁸¹ The Commission noted, however, that it would adjust the final revised fee to reflect the actual

⁸¹ At that time, more than 60,800 entities had accessed all or part of the information in the Registry. Approximately 1,300 of these entities are "exempt" and therefore have accessed the Registry at no charge. An additional 52,700 entities have accessed five or fewer area codes of data, also at no charge. As a result, approximately 6,700 entities have paid for access to the Registry, with slightly less than 1,100 entities paying for access to the entire Registry. *See* 70 FR at 20849-20850.

number of entities that had accessed the Registry at the time of issuance of the Final Rule.⁸²

As of June 1, 2005, there have been no significant or material changes in the number of entities that have accessed the Registry since the Commission issued the 2005 Fee Rule NPR.

Therefore, based on the figures contained in the 2005 Fee Rule NPR, and the need to raise \$21.9 million in fees to offset costs it expects to incur in this Fiscal Year for implementing and enforcing the “do-not-call” provisions of the Amended TSR, the Commission is revising the fees to be charged for access to the Registry as follows: the fee charged for each area code of data will be \$56 per year, with the first five area codes provided to each entity at no charge. “Exempt” organizations, as defined by the Do Not Call regulations, will continue to be allowed access to the Registry at no charge. The maximum amount that will be charged any single entity will be \$15,400, which will be charged to any entity accessing 280 area codes of data or more. The fee charged to entities requesting access to additional area codes of data during the second six months of their annual period will be \$28.

⁸² *Id.* at 20850 n.24.

The Commission establishes September 1, 2005, as the effective date for this rule change. Thus, the revised fees will be charged to all entities that renew their subscription account number after their current subscription has expired.

V. Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act,⁸³ the Office of Management and Budget (“OMB”) has approved the information collection requirements in the 2004 Fee Rule and assigned OMB Control Number 3084–0097. The rule amendment, as discussed above, provides for an increase in the fees that are charged for accessing the National Do Not Call Registry, but creates no new recordkeeping, reporting, or third-party disclosure requirements that would be subject to review and approval by OMB pursuant to the Paperwork Reduction Act.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”), 5 U.S.C. 601 *et seq.*, requires the FTC to provide an Initial Regulatory Flexibility Analysis (“IRFA”) with its proposed rule, and a Final Regulatory Flexibility Analysis (“FRFA”) with its final rule, unless the FTC certifies that the rule will not have a significant economic impact on a substantial number of small entities. As explained in the 2005 Fee

⁸³ 44 U.S.C. 3501–3520.

Rule NPR and this Statement, the Commission hereby certifies that it does not expect that its Final Amended Fee Rule will have the threshold impact on small entities. As discussed above, this Amended Rule specifically charges no fee for access to data included in the Registry from one to five area codes. As a result, the Commission anticipates that many small businesses will be able to access the Registry without having to pay any annual fee. Thus, it is unlikely that there will be a significant burden on small businesses resulting from the adoption of the proposed revised fees. Nonetheless, the Commission published an IRFA with the 2005 Fee Rule NPR, and is also publishing a FRFA with its Final Amended Fee Rule below, in the interest of further explaining its determination, even though the Commission believes that it is not required to publish such analyses.

A. Reasons for consideration of agency action

The Amended Final Fee Rule has been considered and adopted pursuant to the requirements of the Implementation Act and the 2005 Appropriations Act, which authorize the Commission to collect fees sufficient to implement and enforce the “do-not-call” provisions of the Amended TSR.

B. Statement of Objectives and Legal Basis

As explained above, the objective of the Amended Final Fee Rule is to collect sufficient fees from entities that must access the National Do Not Call Registry. The legal authority for this Rule is the 2005 Appropriations Act, the Implementation Act, and the Telemarketing Act.

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

The Small Business Administration has determined that “telemarketing bureaus” with \$6 million or less in annual receipts qualify as small businesses.⁸⁴ Similar standards, *i.e.*, \$6 million or less in annual receipts, apply for many retail businesses that may be “sellers” and subject to the revised fee provisions set forth in this Amended Final Rule. In addition, there may be other types of businesses, other than retail establishments, that would be “sellers” subject to this rule.

To date more than 50,000 entities have accessed five or fewer area codes of data from the Registry at no charge.⁸⁵ While not all of these entities may qualify as small businesses, and some small businesses may be required to purchase access to more than five area codes of data, the Commission believes that this is the best estimate of the number of small entities that will be subject to

⁸⁴ See 13 CFR 121.201.

⁸⁵ See *supra* note 81.

this Amended Final Rule. In any event, as explained elsewhere in this Statement, the Commission believes that, to the extent the Amended Final Fee Rule has an economic impact on small business, the Commission has adopted an approach that minimizes that impact to ensure that it is not substantial, while fulfilling the legal mandate of the Implementation Act and 2005 Appropriations Act to ensure that the telemarketing industry supports the cost of the National Do Not Call Registry.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The information collection activities at issue in this Amended Final Rule consist principally of the requirement that firms, regardless of size, that access the Registry submit minimal identifying and payment information, which is necessary for the FTC to collect the required fees. The cost impact of that requirement and the labor or professional expertise required for compliance with that requirement were discussed in Section VI of the 2005 Fee Rule NPR.⁸⁶

As for compliance requirements, small and large entities subject to the Amended Fee Rule will pay the same fees to obtain access to the National Do Not Call Registry in order to reconcile their calling lists with the phone numbers

⁸⁶ See 70 FR at 20851.

maintained in the Registry. As noted earlier, however, compliance costs for small entities are not anticipated to have a significant impact on small entities, to the extent the Commission believes that compliance costs for those entities will be largely minimized by their ability to obtain data for up to five area codes at no charge.

E. Duplication With Other Federal Rules

None.

F. Discussion of Significant Alternatives

The Commission discussed the proposed alternatives in Section III, above.

List of Subjects in 16 CFR Part 310

Telemarketing, Trade practices.

VII. Final Rule

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

PART 310—TELEMARKETING SALES RULE

1. The authority citation for part 310 continues to read as follows:
Authority: 15 U.S.C. 6101-6108.
2. Amend §§ 310.8(c) and (d) to read as follows:

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

* * * * *

(c) The annual fee, which must be paid by any person prior to obtaining access to the National Do Not Call Registry, is \$56 per area code of data accessed, up to a maximum of \$15,400; *provided*, however, that there shall be no charge for the first five area codes of data accessed by any person, and *provided further*, that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the National Do Not Call Registry without being required under this Rule, 47 CFR 64.1200, or any other federal law. Any person accessing the National Do Not Call Registry may not participate in any arrangement to share the cost of accessing the registry, including any arrangement with any telemarketer or service provider to divide the costs to access the registry among various clients of that telemarketer or service provider.

(d) After a person, either directly or through another person, pays the fees set forth in § 310.8(c), the person will be provided a unique account number which will allow that person to access the registry data for the selected area codes at any time for twelve months following the first day of the month in which the person paid the fee (“the annual period”). To obtain access to additional area

codes of data during the first six months of the annual period, the person must first pay \$56 for each additional area code of data not initially selected. To obtain access to additional area codes of data during the second six months of the annual period, the person must first pay \$28 for each additional area code of data not initially selected. The payment of the additional fee will permit the person to access the additional area codes of data for the remainder of the annual period.

* * * * *

By direction of the Commission.

Donald S. Clark

Secretary

Appendix

List of Acronyms for Commenters to the TSR 2005 Fee Rule Proposal

<u>Commenter</u>	<u>Acronym</u>
1. American Resort Development Association	ARDA
2. Darian Miller	DM
3. Direct Marketing Association, Inc. (DMA), American Teleservices Association (ATA), and Newspaper Association of America (NAA)	DMA/ATA/NAA
4. First National Bank of Omaha	FNBO
5. Influent, Inc.	INF
6. National Association of Realtors	NAR
7. National Automobile Dealers Association	NADA
8. Wells Fargo & Company	WF
9. West Corporation	WST