

**FEDERAL TRADE COMMISSION**

**RIN: 3084-0098**

**16 CFR Part 310**

**Telemarketing Sales Rule Fees**

**AGENCY:** Federal Trade Commission.

**ACTION:** Notice of proposed rulemaking; request for public comment.

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**SUMMARY:** The Federal Trade Commission (the “Commission” or “FTC”) is issuing a Notice of Proposed Rulemaking (“NPRM”) to amend the Telemarketing Sales Rule (“TSR”) to revise the fees charged to entities accessing the National Do Not Call Registry, and invites written comments on the issues raised by the proposed changes.

**DATES:** Written comments must be submitted on or before June 1, 2004.

**ADDRESSES:** Interested parties are invited to submit written comments. Comments should refer to “TSR Fee Rule, Project No. P034305,” to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H-159 (Annex K), 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Comments containing confidential material must be filed in paper form. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

An electronic comment can be filed by (1) clicking on <http://www.regulations.gov>; (2) selecting “Federal Trade Commission” at “Search for Open Regulations;” (3) locating the summary of this Notice; (4) clicking on “Submit a Comment on this Regulation;” and (5) completing the form. For a given electronic comment, any information placed in the following fields -- “Title,” “First Name,” “Last Name,” “Organization Name,” “State,” “Comment,” and “Attachment” -- will be publicly available on the FTC Web site. The fields marked with an asterisk on the form are required in order for the FTC to fully consider a particular comment. Commenters may choose not to fill in one or more of those fields, but if they do so, their comments may not be considered.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments with all required fields completed, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at [www.ftc.gov](http://www.ftc.gov). As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC’s privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

**FOR FURTHER INFORMATION CONTACT:** David M. Torok, Staff Attorney, (202) 326-3075, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background:**

On December 18, 2002, the Commission issued final amendments to the Telemarketing Sales Rule, which, *inter alia*, established the National Do Not Call Registry, permitting consumers to register, via either a toll-free telephone number or the Internet, their preference not to receive certain telemarketing calls. 68 FR 4580 (Jan. 29, 2003) (“Amended TSR”). Under the Amended TSR, most telemarketers are required to refrain from calling consumers who have placed their numbers on the registry. 16 CFR 310.4(b)(1)(iii)(B). Telemarketers must periodically access the registry to remove from their telemarketing lists the telephone numbers of those consumers who have registered. 16 CFR 310.4(b)(3)(iv).<sup>1</sup>

Shortly after issuance of the Amended TSR, Congress passed The Do-Not-Call Implementation Act, Pub. L. No. 108-10 (2003) (“the Implementation Act”). 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]. . . . No 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.” *Id.* at § 2.

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<sup>1</sup> The Commission recently amended the TSR to require telemarketers to access the national registry at least once every 31 days, effective January 1, 2005. *See* 69 FR 16368 (Mar. 29, 2004).

On July 29, 2003, pursuant to the Implementation Act and the Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7 (2003), the Commission issued a Final Rule further amending the TSR to impose fees on entities accessing the National Do Not Call Registry. 68 FR 45134 (July 31, 2003) (“the Original Fee Rule”). Those fees were based on the FTC’s best estimate of the number of entities that would be required to pay for access to the national 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 Original Fee Rule established an annual fee of \$25 for each area code of data requested from the national registry, with the first five area codes of data provided at no cost.<sup>2</sup> The maximum annual fee was capped at \$7,375 for entities accessing 300 area codes of data or more. *Id.* at 45141.

In the Consolidated Appropriations Act of 2004, Pub. L. No. 108-199 (Jan. 23, 2004) (“the 2004 Appropriations Act”), Congress permitted the FTC to collect offsetting fees in Fiscal Year 2004 to implement and enforce the TSR. *Id.* at Division B, Title V. Pursuant to the 2004 Appropriations Act and the Implementation Act, as well as the Telemarketing Fraud and Abuse

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<sup>2</sup> Once an entity requested access to area codes of data in the national 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.

Prevention Act, 15 U.S.C. 6101-08 (“the Telemarketing Act”), the FTC is issuing this NPRM to amend the fees charged to entities accessing the National Do Not Call Registry.

## **II. Calculation of Proposed Revised Fees**

In the Original Fee Rule, the Commission estimated that 10,000 entities would be required to pay for access to the National Do Not Call Registry. The Commission based its estimate on the “best information available to the agency” at that time. 68 FR at 45140. It noted that this estimate was based on “a number of significant assumptions,” about which the Commission had sought additional information during the comment period. The Commission noted, however, that it received virtually no comments providing information supporting or challenging these assumptions. *Id.* As a result, the Commission anticipated “that these fees may need to be reexamined periodically and adjusted, in future rulemaking proceedings, to reflect actual experience with operating the registry.” *Id.* at 45142.

Since the opening of the National Do Not Call Registry to entities engaged in telemarketing on September 2, 2003, through early March, 2004, over 52,000 entities have accessed all or part of the information in the registry. More than 45,500 of those entities have accessed five or fewer area codes of data at no charge. Approximately 900 “exempt” entities have accessed the registry, also at no charge.<sup>3</sup> As a result, approximately 6,000 entities have

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<sup>3</sup> The Original 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),  
(continued...)

paid for access to the registry, with slightly over 1,100 entities paying for access to the entire registry.

As previously stated, the Commission can collect offsetting fees in Fiscal Year 2004 to implement and enforce the Amended TSR.<sup>4</sup> See the 2004 Appropriations Act, Division B, Title V. The Commission is proposing a revised Fee Rule to raise \$18 million of fees to offset costs it expects to incur in this Fiscal Year for the following purposes related to implementing and enforcing the “do-not-call” provisions of the Amended TSR. First, funds are required to operate the national registry. This 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 appropriate information. Second, funds are required for law enforcement efforts, including identifying targets, coordinating domestic and international initiatives, challenging alleged violators, and consumer and business education efforts, which are critical to securing compliance with the Amended TSR. Third, funds are required to cover agency infrastructure and administration costs, including information technology structural supports and distributed mission overhead support costs for staff and non-personnel expenses such as office space, utilities, and supplies.

The Commission proposes to revise the fees charged for access to the national registry based on the assumption that approximately the same number of entities will access similar

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<sup>3</sup> (...continued)  
and who do not access the national registry for any other purpose.

<sup>4</sup> The 2004 Appropriations Act permitted the Commission to collect offsetting fees of \$23.1 million for those purposes. This \$23.1 million includes collections of \$5.1 million from the Fiscal Year 2003 Original Fee Rule that were actually collected in Fiscal Year 2004 and \$18 million to be raised from this year’s Amended Fee Rule.

amounts of data from the national registry during their next annual period.<sup>5</sup> Based on that assumption, and the continued allowance for free access to “exempt” organizations and for the first five area codes of data, the proposed revised fee would be \$45 per area code. The maximum amount that would be charged to any single entity would be \$12,375, which would be charged to any entity accessing 280 area codes of data or more.<sup>6</sup> The fee charged to entities requesting access to additional area codes of data during the second six months of their annual period would be changed from \$15 to \$25.

The Commission proposes to continue allowing all entities accessing the national registry to obtain the first five area codes of data for free.<sup>7</sup> The Commission allowed such free access in the Original Fee Rule “to limit the burden placed on small businesses that only require access to

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<sup>5</sup> Telemarketers were first able to access the national registry on September 2, 2003. As a result, the first year of operation will not conclude until August 31, 2004. The Commission realizes that a small number of additional entities may access the national registry for the first time prior to September 1, 2004, and should be considered in calculating the revised fees. However, the Commission believes that most, if not virtually all, of those new entrants will be smaller entities accessing five or fewer area codes, and thus will have no effect on the calculation of the revised fees. Should this assumption prove incorrect, the Commission will adjust the assumption to reflect the actual number of entities that have accessed the registry, and make the appropriate reductions to the fees, at the time of issuance of the Final Rule.

<sup>6</sup> The proposed fee structure would reduce the maximum number of area codes for which an entity would be charged from 300 to 280. The Commission is proposing this revision to more closely correlate the charges for access to the registry with the number of active area codes in use in the country today. There are approximately 317 available area codes in the nation, virtually all of which include registered telephone numbers. However, approximately 35 of those area codes are not currently in active service, but are reserved for use in the future. (Telephone numbers from those area codes that have been added to the national registry include numbers to be activated in the future and numbers that are currently active for billing or other purposes.) As a result, there are currently approximately 280 active area codes, with additional area codes scheduled to become active in the future.

<sup>7</sup> If all entities accessing the national registry were charged for the first five area codes of data, the cost per area code would be reduced to \$32, while the maximum amount charged to access the entire national registry would be \$8960.

a small portion of the national registry.” 68 FR at 45140. The Commission noted that such a fee structure was consistent with the mandate of the Regulatory Flexibility Act, 5 U.S.C. 601, which requires that to the extent, if any, a rule is expected to have a significant economic impact on a substantial number of small entities, agencies should consider regulatory alternatives to minimize such impact. As stated in the Original 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.” *Id.* at 45141. In addition, requiring over 45,000 entities to pay a small fee for access to five or fewer area codes from the national registry would place a significant burden on the registry, requiring the expenditure of even more resources to handle properly that additional traffic. Nonetheless, the Commission continues to seek comment on this issue.

The Commission also proposes to continue allowing “exempt” organizations, as discussed in footnote 3, above, to obtain free access to the national registry. The Commission believes that any exempt entity, voluntarily accessing the national 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 national registry in the future, resulting in an increase in unwanted calls to consumers. As with free access to five or fewer area codes, the Commission seeks comment on this issue as well.

### **III. Invitation to Comment**

All persons are hereby given notice of the opportunity to submit written data, views, facts, and arguments addressing the issues raised by this Notice. Written comments must be submitted on or before June 1, 2004. Comments should refer to “TSR Fee Rule, Project No. P034305,” to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H-159 (Annex K), 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled “Confidential.”<sup>8</sup> The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

An electronic comment can be filed by (1) clicking on <http://www.regulations.gov>; (2) selecting “Federal Trade Commission” at “Search for Open Regulations;” (3) locating the summary of this Notice; (4) clicking on “Submit a Comment on this Regulation;” and (5) completing the form. For a given electronic comment, any information placed in the following fields -- “Title,” “First Name,” “Last Name,” “Organization Name,” “State,” “Comment,” and “Attachment” -- will be publicly available on the FTC Web site. The fields marked with an asterisk on the form are required in order for the FTC to fully consider a

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<sup>8</sup> Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission’s General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

particular comment. Commenters may choose not to fill in one or more of those fields, but if they do so, their comments may not be considered.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments with all required fields completed, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at [www.ftc.gov](http://www.ftc.gov). As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

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

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record. *See* 16 CFR 1.26(b)(5).

#### **V. Paperwork Reduction Act**

The proposed revised fee provision does not create any new recordkeeping, reporting, or third-party disclosure requirements. However, the Commission now has data based on the operation of the National Do Not Call Registry indicating that 52,000 entities will access the registry each year. The Commission's staff has increased its estimate of the total paperwork burden accordingly, and the Office of Management and Budget ("OMB") has adjusted the existing clearance, OMB Control No. 3084-0097.

Any entity that accesses the National Do Not Call Registry, regardless of whether it is paying for access, must submit the minimal identifying information that the Commission deems necessary. The proposed rule does not change the information to be collected from these entities or the frequency of collection. The staff continues to estimate, as it did in the Original Fee Rule NPRM, that it should take no longer than two minutes for each entity to submit this basic information, and that each entity would have to submit the information annually.<sup>9</sup> Because of the increased estimate of the number of entities accessing the registry, this requirement will result in 1,733 burden hours (52,000 entities x 2 minutes per entity = 104,000 minutes, or 1,733 hours). In addition, the staff continues to estimate that possibly one-half of those entities may need, during the course of their annual period, to submit their identifying information more than once in order to obtain additional area codes of data. This would result in an additional 867 burden hours (26,000 entities x 2 minutes per entity = 52,000 minutes, or 867 hours). Thus, the staff estimates that the revised fee provision will impose a total paperwork burden of approximately 2,600 hours per year. This is an increase of 2,225 hours from the previous estimate of 375 hours.

The Commission's staff anticipates that clerical employees (or other low-level administrative personnel) of affected entities will fulfill the function of supplying company-identifying information to the registry contractor. Assuming a clerical hourly wage of \$10 per

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<sup>9</sup> 68 FR 16238, 16245 (April 3, 2003). As stated in the Original Fee Rule NPRM, this estimate is likely to be conservative for Paperwork Reduction Act purposes. The OMB regulation defining "information" generally excludes disclosures that require persons to provide facts necessary simply to identify themselves, e.g., the respondent, the respondent's address, and a description of the information the respondent seeks in detail sufficient to facilitate the request. See 5 CFR 1320.3(h)(1).

hour, the cumulative annual labor cost to respondents to provide the requisite information is \$26,000 (2,600 hours x \$10 per hour). This is an increase of \$22,250 from the previous estimate of \$3,750.

## **VI. Regulatory Flexibility Act**

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

### **A. Reasons for the proposed rule**

As outlined in Section II, above, the Commission is proposing to amend the fees charged to entities accessing the national registry in order to raise sufficient amounts to offset the current year costs to implement and enforce the Amended TSR.

**B. Statement of Objectives and Legal Basis**

The objective of the current proposed rule is to collect sufficient fees from entities that must access the National Do Not Call Registry. The legal authority for this NPRM is the 2004 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. *See* 13 CFR 121.201. Similar standards, *i.e.*, \$6 million or less in annual receipts, apply for many retail businesses which may be “sellers” and subject to the proposed revised fee provisions outlined in this NPRM. In addition, there may be other types of businesses, other than retail establishments, that would be “sellers” subject to the proposed rule.

As described in Section II, above, more than 45,500 entities have accessed five or fewer area codes of data from the national registry at no charge. 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 would be subject to the proposed revised fee rule. The Commission invites comment on this issue, including information about the number and type of small business entities that may be subject to the revised fees.

**D. Projected Reporting, Recordkeeping and Other Compliance Requirements**

The information collection activities at issue in this NPRM consist principally of the requirement that firms, regardless of size, that access the national registry submit minimal identifying and payment information, which is necessary for the agency to collect the required

fees. The cost impact of that requirement and the labor or professional expertise required for compliance with that requirement are discussed in section V, above.

As for compliance requirements, small and large entities subject to the revised 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 maintained in the national 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 recognizes that alternatives to the proposed revised fee are possible. For example, instead of a fee based on the number of area codes that a telemarketer accesses from the national registry, access could be provided on the basis of a flat fee regardless of the number of area codes accessed, or on a fee that does not permit free access for one to five area codes. The Commission believes, however, that those alternatives would likely impose greater costs on small businesses, to the extent they are more likely to access fewer area codes than larger entities. Accordingly, the Commission believes its current proposal is likely to be the least burdensome for small businesses, while achieving the goal of covering the necessary costs to implement and enforce the Amended TSR.

Despite these conclusions, the Commission welcomes comment on any significant alternatives that would further minimize the impact on small entities, consistent with the objectives of the Telemarketing Act, the 2004 Appropriations Act, and the Implementation Act.

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

Telemarketing, Trade practices.

**VII. Proposed Rule**

Accordingly, for the reasons stated in the preamble, the Federal Trade Commission proposes to amend part 310 of title 16 of the Code of Federal Regulations as follows:

**PART 310—TELEMARKETING SALES RULE**

1. The authority 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 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 \$45 per area code of data accessed, up to a maximum of \$12,375; *provided*, however, that there shall be no charge for the first five area codes of data accessed by any person, and *provided further*, that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the National Do Not Call Registry without being required under this Rule, 47 CFR 64.1200, or any other federal law. Any person accessing the National Do Not Call Registry may not participate in any arrangement to share the cost of accessing the registry, including any

arrangement with any telemarketer or service provider to divide the costs to access the registry among various clients of that telemarketer or service provider.

(d) After a person, either directly or through another person, pays the fees set forth in § 310.8(c), the person will be provided a unique account number which will allow that person to access the registry data for the selected area codes at any time for twelve months following the first day of the month in which the person paid the fee (“the annual period”). To obtain access to additional area codes of data during the first six months of the annual period, the person must first pay \$45 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 \$25 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.

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By direction of the Commission.

Donald S. Clark

Secretary