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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 of the FTC's Telemarketing Sales Rule ("TSR") by revising the fees charged to entities accessing the National Do Not Call Registry.

EFFECTIVE DATE: Revised Section 310.8 will become effective September 1, 2004.

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 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).[1]

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.

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

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[1] 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).

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. 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 Prevention Act, 15 U.S.C. 6101-08 ("the Telemarketing Act"), the FTC issued a Notice of Proposed Rulemaking to amend the fees charged to entities accessing the National Do Not Call Registry, 69 FR 23701 (April 30, 2004) ("the Revised Fee NPRM").

In the Revised Fee NPRM, the Commission proposed revising the fees for access to the national registry in order to raise $18 million to offset costs the agency 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 early March 2004, the Commission proposed revising the fees to charge $45 annually for each area code of data requested from the national registry, with the first five area codes of data provided

at no cost.[2] The maximum annual fee would have been capped at $12,375 for entities accessing 280 area codes of data or more. *Id.* at 23703.

The Commission received 25 comments in response to the Revised Fee NPRM.[3] Based on its review of the record in this proceeding, and on its law enforcement experience in this area, the Commission hereby promulgates this Final Rule revising the fees for entities accessing the National Do Not Call Registry.

II. Imposition of the Fees and Use of the Funds

A number of commenters disapprove of raising the fees charged for access to the National Do Not Call Registry. Generally, these commenters state that the proposed increase in fees will be "economically devastating" to the teleservices industry and will "inevitably lead to the loss of telemarketing jobs."[4] ATA claims that the proposed fee increase "serves only to underscore and exacerbate constitutional and systematic failings in the DNCR fee structure."[5]

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[2] 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. Under the proposed rule, obtaining additional data from the registry during the first semi-annual, six month period would have required a payment of $45 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 would have been $25. These payments for additional data would provide the entity access to those additional area codes of data for the remainder of its annual term.

[3] 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 Revised Fee NPRM will be cited in this Notice as "[Acronym of Commenter] at [page number]."

[4] DMA at 2; MPA at 1. *See also* TCIM at 2; ATA at 1-3; IMC at 1-2; AIA at 1.

[5] ATA at 1-3. *See also* IMC at 1-2. ATA raised similar arguments regarding the (continued...)

On the other hand, other commenters cite the registry as being for "the greater good of all consumers" whose costs are appropriately borne by the telemarketing industry.[6]

Some of the commenters that disapprove of the proposed increase in fees state that, prior to any fee increase, "the FTC must investigate whether there are entities that should be paying for access but fail to do so."[7] Since the opening of the national registry, the agency has monitored industry payment for access. We have found no evidence of widespread noncompliance with the Original Fee Rule. Moreover, no commenter has provided any concrete information about such alleged noncompliance, only speculation.[8] As part of our law enforcement activities, we welcome any specific information that can be provided in this regard. The FTC is conducting non-public investigations of consumer complaints for violations of the

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[5] (...continued)
constitutionality of the imposition of fees on entities accessing the national registry in its litigation against the FTC, and the Tenth Circuit rejected those arguments. ATA is seeking review of the Tenth Circuit's decision before the Supreme Court. *Mainstream Mktg. Servs., Inc., et al. v. FTC*, 358 F.3d 1228 (10th Cir. 2004), *petition for cert. filed*, 72 U.S.L.W. 3726 (U.S. May 14, 2004) (No. 03-1552). Any response to those arguments is most appropriately left to that forum.

[6] *See, e.g.*, RH at 1; DF at 1.

[7] ATA at 5. *See also* MRS at 1; TB at 1; MM at 1; NMHC at 2.

[8] For example, according to NMHC, an FTC press release indicates that through March 2004, 52,000 entities accessed all or part of the registry, but as of December 2003, the agency received "do-not-call" complaints about 55,000 specific companies. NMHC suggests this showed "widespread noncompliance" with the existing regulations. NMHC at 2. Such speculation is based on a misunderstanding of the FTC statistics cited. Complaining consumers are reporting company names in a multitude of variations. As a hypothetical example, one complaint may be against a company called "Calls 2 You," while another complaint may be against the same company but with the name entered as "Calls To You." Thus, each specific name may not represent a different company engaged in telemarketing. Moreover, not all entities about which consumers complained are non-compliant. For example, companies calling only consumers with whom they have an established business relationship or entities exempt from the TSR are not required to pay for access.

fee provision as well as violations of the do-not-call provisions of the TSR, and will file law enforcement actions addressing such violations when appropriate.[9]

Other commenters suggest that the FTC should use fines obtained from enforcement actions to offset some of the fee increase.[10] They correctly note that the FTC can obtain civil penalties for violations of the TSR, including violations of the "do-not-call" provisions, of up to $11,000 per violation.[11] By statute, however, the FTC cannot keep 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.[12] Accordingly, by law, any fines obtained from enforcement actions cannot be used to offset fees.

A few commenters assert that the FTC has provided insufficient information about how funds have been expended to date.[13] MPA inquires why enforcement costs should be so high, given the "exceptional compliance" by the industry with the "do-not-call" rules.[14] DMA claims that the fees should be used only to cover the costs to operate the registry. "Combating fraud should be funded from the FTC appropriation just as it is for other consumer protection

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[9] *See, e.g., FTC v. National Consumer Council, et al.,* No. SACV04-0474 CJC (JXJx) (C.D. Cal., filed Apr. 23, 2004); *FTC v. Debt Mgmt. Found. Servs., Inc.*, No. 8:04CV-1674-T-17NSS (N.D. Fla., filed July 20, 2004).

[10] *See, e.g.,* IMC at 4; MH at 3; ARDA at 4.

[11] *See* 16 CFR 1.98.

[12] *See* Miscellaneous Receipts Act, 31 USC 3302.

[13] *See, e.g.,* NAR at 4-5; ARDA at 2; MPA at 1.

[14] MPA at 1.

programs."[15] ATA argues that "the fees are not used solely to maintain and enforce the [do-not-call] rules."[16]

Contrary to these commenters' assertions, the Commission has provided significant information about the basis for the fees it has raised to date, and has consistently and specifically limited the amount of fees to be collected to those needed to implement and enforce the "do-not-call" provisions of the Amended TSR. As stated in the Revised Fee NPRM, 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 national 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 appropriate information. Second, funds are collected for law enforcement efforts, including identifying targets, coordinating domestic and international initiatives, challenging alleged violators, and consumer and business education efforts. These law enforcement efforts are a significant component of the total costs, given the large number of ongoing investigations currently being conducted by the agency, and the substantial effort necessary to thoroughly complete such investigations. Third, funds are collected to cover agency 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.[17]

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[15] DMA at 3.

[16] ATA at 3.

[17] NAR claims that much of the agency's current costs exceed the agency's statutory (continued...)

ATA correctly notes that some of the costs set forth above will be used for improvements to the Consumer Sentinel system, which is a repository for all fraud-related complaints received by the FTC, and includes "do-not-call" related complaints. However, ATA and DMA are incorrect in stating that the fees raised are used to fund the FTC's fraud-related program.[18] To the contrary, the fees raised from entities accessing the national registry have been and will be used for enhancements to the agency's information technology infrastructure, enhancements that are essential to enable Consumer Sentinel to accommodate the "do-not-call" program. These enhancements include sorting, maintaining, and providing sufficient capacity for law enforcement agents from across the country to access the over 400,000 "do-not-call" complaints received to date, as well as the more than 62 million registered telephone numbers and the tens of thousands of records regarding companies that access the registry.[19]

In conclusion, the Commission adheres to its statutory authority in raising fees that are necessary to implement and enforce the "do-not-call" provisions of the Amended TSR. In an effort to raise the $18 million to offset costs the agency expects to incur in this Fiscal Year for

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[17] (...continued)
authority, since they are related to "maintenance" of the registry and not "implementation." NAR at 4. This semantic argument fails to take into account that the generally understood definition of "implementation" – to carry out or accomplish a mission – includes maintenance.

[18] *See* ATA at 3; DMA at 3.

[19] *See* "National Do Not Call Registry Celebrates One Year Anniversary," FTC Press Release dated June 24, 2004 (www.ftc.gov/opa/2004/06/dncanny.htm). In contrast, in 2003, the Consumer Sentinel system received over 500,000 complaints related to the FTC's entire mission, including complaints related to Identity Theft. *See* "FTC Releases Top Ten Consumer Complaint Categories in 2003," FTC Press Release dated January 22, 2004 (www.ftc.gov/opa/2004/01/top10.htm).

those purposes, the Commission concludes that an increase in fees is necessary, as discussed below.

III. Small Business and Exempt Entity Access

In the Revised Fee NPRM, the Commission proposed to continue allowing all entities accessing the national registry to obtain the first five area codes of data for free. The Commission proposed allowing such free access "to limit the burden placed on small businesses that only require access to a small portion of the national registry." 69 FR at 23703. 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 Revised Fee NPRM, "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.* In addition, the Commission noted that requiring a large number of 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 the additional payment transactions. *Id.*

A number of commenters oppose providing the first five area codes of data at no charge. Many noted that only 11 percent of all entities accessing the national registry currently pay the

entire cost of the registry.[20] They maintain that larger companies should not be "obligated to subsidize" the operation of smaller companies or exempt organizations.[21] "These [smaller] organizations derive benefit from access to the National Do-Not-Call Registry. They should be obligated either to pay the full access fee or some portion of the fee."[22] According to TCIM, those entities that do not pay "place an unfair burden on the 6,000 who do pay for access. We believe that everyone who makes outbound telemarketing calls ought to pay their fair share of the registry's costs."[23] Others state that a nominal charge for five area codes is not overly burdensome to any business, regardless of size. "The fact that there will be additional resources required on the part of the Registry to process additional payments, does not outweigh the need for equitable distribution of cost across all entities."[24]

In order to address what they consider to be the inequitable treatment of the current fee structure, some commenters suggest reducing the number of area codes provided for free. For example, IMC suggests reducing the number of free area codes from five to three. This would "reduce the unfair impact of the current fee structure" while not causing "a financial hardship for the majority of companies whose costs would increase by less than $100 per year."[25] Others suggest that there should be a "modest $100 flat fee on all entities who desire to subscribe to five

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[20] *See, e.g.*, Comerica at 1; ATA at 4.

[21] *See, e.g.*, SLIC at 1; Comerica at 1; Cendant at 3-4; ATA at 4; TCIM at 2.

[22] SLIC at 1.

[23] TCIM at 2.

[24] Comerica at 1.

[25] IMC at 4. *See also* MH at 1 (reduce the number of free area codes to four); ARDA at 3 (reduce the number of free area codes to 2 or 1).

area codes or fewer."[26] Finally, Cendant suggests that small businesses should pay some nominal fee, established under a sliding scale formula.[27]

On the other hand, many commenters support providing the first five area codes of data at no charge. They suggest that this will help "encourage entrepreneurship in America."[28] NADA states: "Removing the exemption would have a significant impact on our members and many other small and medium size businesses . . . . These businesses already have assumed significant training, systems and other compliance costs associated with the National DNC rules . . . . Imposing a fee for accessing the first five area codes would impose a disproportionate burden on small entities that already are struggling to comply with the ever-expanding list of federal requirements affecting their businesses."[29] Similarly, NAR cites information from the Small Business Administration's Office of Advocacy which shows that "very small firms with fewer than 20 employees . . . spend 60 percent more per employee than larger firms to comply with federal regulations."[30]

Further, a number of commenters suggest that the Commission should do more to protect small businesses. CAR maintains that the fee increase will detrimentally affect small businesses

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[26] ATA at 5. *See also* ARDA at 3. ATA maintains that this would give a $25 "savings" to those accessing five area codes.

[27] Cendant at 3-4. "In establishing the fee formula, the Commission should consider financial factors of the entity such as income or average annual receipts, or the Commission could consider the average number of employees per business unit accessing the DNC list . . . . The sliding fee scale used by the Commission should be designed so that a business will not have to pay more than 2% of their income for access." *Id.*

[28] RH at 1. *See also* ACB at 1-2; NMHC at 1-2; NNA at 1-2; NADA at 1-2.

[29] NADA at 1-2. *See also* NNA at 1-2; CAR at 1.

[30] NAR at 4.

located in highly populated areas "with more than five area codes within a one hundred mile radius of one another."[31] NNA suggests that the FTC should consider expanding the small business exemption, especially to cover small businesses that do business nationwide, such as niche publications, by allowing free access to any entity that meets the "general definitions for small businesses codified under the Small Business Act and implemented by the Small Business Administration through its Office of Size Standards."[32]

After considering all of the comments submitted in this proceeding, the Commission still believes it is important to provide small businesses with some relief from the burdens of complying with the "do-not-call" provisions of the Amended TSR. While the Commission recognizes that only a small percentage of the total number of entities accessing the national registry pay for that access, these figures also illustrate the large number of small businesses that would be adversely affected by a change in the number of area codes provided at no cost. In fact, over 57,000 entities have accessed five or fewer area codes of the national registry. Most of these entities – realtors, car dealers, community-based newspapers, and other small businesses – are precisely the types of businesses which the Regulatory Flexibility Act requires the agency to consider when adopting regulations. Moreover, the Commission finds significant the information submitted by commenters showing the disproportionate impact compliance with the

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[31] CAR at 1 (citing New York City, New Jersey, Los Angeles, San Francisco, Pennsylvania, Washington, DC).

[32] NNA at 2. *See also* NAR at 1-2 ("many small businesses . . . 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").

"do-not-call" regulations may have on small businesses. In order to lessen that impact, the Commission believes that relief to such businesses is appropriate.

The Commission does not believe that the suggested alternatives for providing such relief would provide the same level of assistance to small businesses without imposing undue burdens that the current system does not impose. For example, the suggestion to charge a flat $100 fee on all entities accessing five area codes or less would result in tens of thousands of entities that access from one to two area codes of data to be required to pay more than the per area code amount paid by all other entities. In effect, this proposal would have an even greater disproportionate impact on those entities than if they were charged for each area code accessed. The suggestion to base the fees on the actual size of the entity requesting access would require all entities to submit sensitive data concerning annual income, number of employees, or other similar factors. It also would require the agency 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."[33] As a result, the Commission continues to believe that the most appropriate and effective method to provide relief to small businesses is to provide access to a certain number of area codes at no charge.

As for the exact number of area codes to provide at no charge, the comments presented have failed to persuade the Commission that any change in the current level of five free area

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[33] 68 FR 16238, 16243 n.53.

codes is necessary or appropriate. The Commission recognizes 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, that would also result in increased costs to thousands of small businesses. On the other hand, the Commission also recognizes that some small businesses located in large metropolitan areas may need to make calls to more than five area codes. However, increasing the number of area codes provided at no charge would decrease the pool of paying entities, and further increase the fees paid by those entities. As a result, the Commission believes it has struck the appropriate balance, in an effort to relieve some of the burden faced by small businesses while still achieving the goal of covering the necessary costs to implement and enforce the "do-not-call" provisions of the Amended TSR, in allowing all entities to gain access to the first five area codes of data from the national registry at no cost.

In the Revised Fee NPRM, the Commission also proposed to continue allowing "exempt" organizations to obtain free access to the national registry.[34] The Commission stated its belief 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-

[34] 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*), and who do not access the national registry for any other purpose.

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. 69 FR at 23703.

A number of commenters support continuing allowing "exempt" entities to access the national registry at no charge, for the reasons set forth in the Revised Fee NPRM.[35] Others oppose the provision, claiming that such free access exacerbates the inequities in the system.[36] In fact, ATA claims that "the costs of a regulation that seeks to address a problem should be paid by all entities that advance its objectives."[37]

The Commission continues to believe that if it charged exempt entities for access to the national registry, many if not most of those entities would no longer seek access. As a result, registered consumers would receive an increase in the number of unwanted telephone solicitations. Exempt entities are, by definition, under no legal obligation to access the national 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 continue to allow all such exempt entities to access the national registry at no charge, after they have completed the required certification.

IV. Calculation of the Revised Fees

As previously stated, the Commission proposed in the Revised Fee NPRM to increase the fees charged to access the National Do Not Call Registry to $45 annually for each area code of

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[35] *See, e.g.*, Comerica at 1; MH at 1-2; ACB at 2.

[36] *See, e.g.*, SLIC at 1.

[37] ATA at 6-7.

data requested, with the maximum annual fee capped at $12,375 for entities accessing 280 area codes of data or more.[38] The Commission based this proposal on the total number of entities that accessed the registry from its opening through early March, 2004.[39] The Commission noted, however, that it would adjust the final revised fee to reflect the actual number of entities that had accessed the registry at the time of issuance of the Final Rule.[40]

From early March through June 1, 2004, a significant number of entities accessed the national registry for the first time. As of June 1, 2004, over 65,000 entities had accessed the national registry. More than 57,000 of those entities had accessed five or fewer area codes of data at no charge, and 1,100 "exempt" entities also accessed the registry at no charge. Thus, more than 7,100 entities have paid for access to the registry, with over 1,200 entities paying for access to the entire registry.

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[38] The Commission proposed reducing the maximum number of area codes for which an entity would be charged from 300 to 280 to more closely correlate the charges for access to the registry with the number of active area codes in use in the country today. As the Commission stated in the Revised Fee NPRM, 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. *See* 69 FR at 23703 n.6. The Commission received no comments on this revision, and continues to believe that this change is appropriate.

[39] At that time, over 52,000 entities had accessed all or part of the information in the registry. More than 45,500 of those entities had accessed five or fewer area codes of data at no charge. Approximately 900 "exempt" entities had accessed the registry, also at no charge. As a result, approximately 6,000 entities had paid for access to the registry, with slightly over 1,100 entities paying for access to the entire registry. *See* 69 FR at 23702.

[40] *Id.* at 23703 n.5.

Based on these revised figures, and the need to raise $18 million of 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 national registry as follows. The fee charged for each area code of data will be $40 per year, with the first five area codes provided to each entity at no charge. "Exempt" organizations, as described in footnote 33, above, will continue to be allowed access to the national registry at no charge. The maximum amount that will be charged any single entity will be $11,000, 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 $20.

MPA suggests that to "lessen the negative impact on the telemarketing industry, the Commission should consider phasing in any increase in fees over a period of time."[41] In order to raise the appropriate fees to cover costs that are incurred in Fiscal Year 2004, which ends September 30, 2004, this suggestion is not possible. As a result, the Commission establishes September 1, 2004, as the effective date for this rule change, which is approximately one year following the opening of the national registry to entities engaged in telemarketing. Thus, the revised fees will be charged to all entities that renew their subscription account number after their first year's subscription has expired.

Beginning in August 2004, organizations accessing their accounts and the National Do Not Call Registry data at www.telemarketing.donotcall.gov will find additional information on the web site regarding the new fees and the expiration of their subscriptions. The web site will

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[41] MPA at 1.

display the actual expiration date of an account upon login and will begin accepting subscription renewals on September 1, 2004. However, an organization may not renew its subscription any sooner than 30 days prior to its expiration. If an organization does not access the web site until after its subscription has expired, it will be prompted to renew the subscription at that time.

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 an estimated 65,000 entities will access the registry each year. The Commission's staff has increased its estimate of the total paperwork burden accordingly, and has notified the Office of Management and Budget ("OMB") of the resulting minor change in burden hours to the existing clearance, OMB Control No. 3084-0097.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 *et seq*., requires the agency 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 agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. As explained in the Revised Fee NPRM and this Statement, the Commission 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 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 published an IRFA with the Revised Fee NPRM, 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 continues to believe 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 2004 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 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.[42] 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.

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[42] *See* 13 CFR 121.201.

As described in Section IV, above, to date more than 57,000 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 will be subject to 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 2004 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 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 were discussed in Section V of the Revised Fee NPRM.[43]

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 maintained in the national registry. As noted earlier, however, compliance costs for small entities are not anticipated to have a significant

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[43] *See* 69 FR at 23704.

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 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 $40 per area code of data accessed, up to a maximum of $11,000; *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 $40 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 $20 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