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Federal Trade Commission

16 CFR Part 310
Telemarketing Sales Rule; Final Rule

FEDERAL TRADE COMMISSION

16 CFR Part 310

RIN 3084–0098

Telemarketing Sales Rule

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Trade Commission (''FTC'' or ''Commission''), pursuant to a directive in the Consolidated Appropriations Act of 2004, issues its Statement of Basis and Purpose (''SBP'') and final amended Telemarketing Sales Rule (''TSR'' or ''Rule'') Section 310.4(b)(3)(iv). This amended section of the TSR now requires sellers and telemarketers, in complying with the do-not-call provisions of the TSR, to use a version of the National Do Not Call Registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, rather than three (3) months prior to the date any call is made, as is allowed under the current TSR.

EFFECTIVE DATE: The amended Section 310.4(b)(3)(iv) of the TSR will become effective on January 1, 2005.

ADDRESSES: Requests for copies of the amended Rule and this SBP should be sent to: Public Reference Branch, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580. The complete record of this proceeding is also available at that address. Relevant portions of the proceeding, including the amended Rule and SBP, are available at: *http://www.ftc.gov.*

FOR FURTHER INFORMATION CONTACT: Catherine Harrington-McBride, (202) 326–2452, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The amended Rule now requires sellers and telemarketers, in complying with the Do Not Call provisions of the TSR, to use a version of the National Do Not Call Registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made.

Statement of Basis and Purpose

I. Background

On February 13, 2004, the Commission published in the **Federal Register** a Notice of Proposed Rulemaking (''NPRM'') [1] to amend the TSR's Do Not Call safe harbor provision, 16 CFR 310.4(b)(3)(iv), to substitute the phrase ''no more than thirty (30) days prior to the date any call is made'' for the phrase that originally appeared in that provision, ''no more than three (3) months prior to the date any call is made.'' The proposed amendment would have changed, from quarterly to every thirty (30) days, the frequency with which telemarketers and sellers would have to obtain and purge from their calling lists numbers appearing on the National Do Not Call Registry. It also would have reduced, from three (3) months to thirty (30) days, the amount of time a consumer must wait after entering his or her number on the Registry to assert a valid Do Not Call complaint. The proposed amendment was mandated by the Consolidated Appropriations Act of 2004, which, inter alia, directs that ''not later than 60 days after the date of enactment of this Act, the Federal Trade Commission shall amend the Telemarketing Sales Rule to require telemarketers subject to the Telemarketing Sales Rule to obtain from the Federal Trade Commission the list of telephone numbers on the 'do-not-call' registry once a month.'' [2]

In the NPRM, the Commission sought comment on two specific issues relating to the proposed amendment: (1) The use of the phrase ''thirty (30) days,'' rather than the term used in the statute, ''once a month;'' and (2) the appropriate effective date for the proposed amendment. The Commission received 186 comments in response to its NPRM. Virtually all consumers and consumer groups favored both reducing the amount of time a consumer must wait to receive the benefits of inclusion on the National Do Not Call Registry, and using the phrase ''thirty (30) days,'' rather than ''monthly'' in the amended Rule.[3] On the other hand, most business and industry commenters stated that shortening the time interval at which they must scrub their calling lists was burdensome and unnecessary.[4] Business and industry commenters were divided, however, about whether they endorsed the Commission's proposal to use a ''thirty (30) day'' standard rather than a ''monthly'' standard, with some agreeing that such a standard was clearer, while others argued that a monthly standard is preferable because it provides greater flexibility for businesses to determine the schedule on which they could most conveniently scrub their lists within the parameters of the new time frame set forth in the Appropriations Act. All commenters generally recommended an effective date of anywhere from three (3) months to a year or longer after adoption. The 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 mandate of the Appropriations Act to amend the Rule, and on careful review of the record developed in this rulemaking proceeding, the Commission has determined to modify the TSR safe harbor provision regarding the interval at which businesses must obtain Registry data. Under the amended Rule provision adopted herein, a seller or telemarketer must obtain Registry data and purge registered numbers from their call lists no more than thirty-one (31) days prior to making a telemarketing call. Recognizing, however, that it may take time for all businesses to implement procedures for effecting this more frequent ''scrub'' schedule, the Commission has set the effective date for this amended provision of the Rule as January 1, 2005, allowing businesses more than nine (9) months to ready their systems and procedures. This time frame will also enable the Commission

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[1] 69 FR 7329 (Feb. 13, 2004). The Commission also issued and posted on its Web site a press release including a copy of the text of the complete NPRM on February 10th, in recognition of the fact that the extra three days could benefit potential commenters faced with a necessarily short comment period (the FTC had only 60 days from the enactment of the Appropriations Act of 2004 to issue a final amended Rule). *See* ''FTC Seeks Public Comment on Proposed Amendment of Telemarketing Sales Rule,'' Feb. 10, 2004 (available electronically at: *http://www.ftc.gov/opa/2004/02/040210tsrnpr.htm).*

[2] Consolidated Appropriations Act of 2004, Public Law 108–199, 188 Stat 3. The requirement is in Division B, Title V.

[3] *See, e.g.,* Traylor at 1 (continues to get calls from telemarketers and would like to see time for scrubbing shortened); Davis at 1; Mitchell at 1 (''Three months allows for a lot of unwanted calls.''); Strang at 1 (''Such action would bring the TSR into line with the FCC's requirement that company specific do-not-call requests be honored no later than 30-days after the request is made. It would also limit consumers' potential exposure to unwanted calls after entry of their number into the database.''); Mey at 1 (''Reducing this interval will clearly benefit consumers by enabling them to assert a valid Do-Not-Call complaint thirty (30) days after entering their numbers on the registry, rather than having to wait three months.''); Sachau at 1; Hurlburt at 1; *But see* Rice-Williams at 1 (unnecessary and not worth insignificant result).

[4] Advertiser at 1; Hawkins at 1; Heroy at 1; Skinner at 1; Sprecher at 1; Cage at 1; D&D Air at 1; Meltzer at 1; Rice at 1 (stating monthly scrubbing would be too burdensome); Beach at 1 (too soon to implement any changes to a relatively new federal regulatory scheme); McGarry (small businesses will be particularly burdened by the proposed amendment); Hometown News (monthly scrubbing too expensive); McMullin at 1 (too expensive especially for small businesses); Mitchell at 1 (''cost prohibitive and unnecessarily time consuming''); Green Banner at 1 (will triple costs). *But see* Clapsaddle at 1; Willoughby at 1; TCIM Services at 1.

and the vendor that operates the National Do Not Call Registry to implement modifications to Registry systems necessitated by the anticipated increase in usage resulting from this Rule amendment.

III. Discussion of the Issues on Which Comment Was Specifically Solicited

The Commission requested comment on two specific issues relating to the proposed amendment. The first was whether the use of the phrase ''thirty (30) days,'' rather than the term used in the statute, ''once a month,'' was appropriate. The second was what the appropriate effective date for the proposed amendment should be. The major themes that emerged from the record are summarized below.

1. Thirty (30) Days

In the NPRM, the Commission stated that it ''believes that the term 'thirty (30) days' achieves greater clarity and precision in effectuating Congress's twofold intent in the Appropriations Act—to shorten from quarterly to monthly the interval for telemarketers and sellers to purge registered telephone numbers from their calling lists, and to enable consumers to assert valid Do Not Call complaints thirty (30) days after entering their numbers on the Registry rather than having to wait three months.'' [5] Further, the Commission noted that the term ''thirty (30) days'' provides an unambiguous standard that would make ''compliance easier to effectuate.''

Based on the record in this proceeding, the Commission has determined that an interval of thirty-one (31) days is preferable to the thirty (30) day standard, which had been proposed in the NPRM. Therefore, the TSR do-not-call safe harbor, Section 310.4(b)(3)(iv)—which provides that a seller or telemarketer will not be liable for violating the Do Not Call Registry provisions if it meets certain criteria—is amended to specify the thirty-one (31) day requirement, as follows:

> The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to § 310.4(b)(3)(iii) or § 310.4(b)(1)(iii)(B), employing a version of the ''do-not-call'' registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process.

The Commission believes that such a modification fully effectuates the intent of the statute while not unduly constraining businesses. As discussed below, the record shows that many businesses were opposed to the ''thirty (30) day'' standard because they believed it would not allow sufficient flexibility for businesses, particularly small businesses.

Consumers and consumer groups nearly universally supported the Commission's proposal to use a ''thirty (30) days'' rather than monthly standard, noting that such a standard not only would be less ambiguous,[6] thus creating a brighter line for businesses to heed in complying with the Rule, but also would remove the possibility that a telemarketer could thwart Congressional intent that scrubbing be done at a monthly interval while still technically complying—for example, by accessing the Registry at 11 p.m. on the last day of one calendar month and again at 12:01 a.m. on the first day of the next, effectively scrubbing bi-monthly.[7]

Business and industry groups' views varied as to whether a ''thirty (30) day'' standard is preferable to a ''monthly'' one.[8] Some businesses supported the thirty (30) day standard as less ambiguous, and therefore advantageous to those that need to comply with the Rule.[9] ATA stated that it ''takes no position whether a monthly or 30-day requirement is preferable,'' but recommended that if ''the thirtieth day falls on a weekend or holiday, the update need not be implemented until the following business day.'' [10] Still others critiqued the standard as unnecessarily inflexible, with many suggesting alternative approaches. These approaches are discussed below.

Relatively few individual businesses commented on the merits of the Commission's proposal to substitute the phrase ''thirty (30) days'' for the term ''once a month,'' which was used in the statute.[11] One such commenter, DialAmerica, stated that the Commission's proposed approach ''could present confusion and allow for inadvertent mistakes by companies. Having a set monthly schedule is more beneficial than having to count days between downloads. Businesses are primarily run on a calendar cycle basis and not a thirty-day basis.'' Another commenter, NNA, stated that '' '30 days' is a more precise term than 'monthly,' * * * but that ''the term monthly provides greater flexibility, especially for the smallest of its members.'' [12] NASUCA made a similar point, noting that the thirty (30) day standard could be problematic for telemarketers who wish to access the registry the same day every month, and suggested that the final rule substitute the phrase ''on the same day each month or no more than 30 days prior to the date any call is made.'' [13]

In addition to comments about the interval at which telemarketers must scrub their call lists, some commenters raised related concerns. NASUCA argued that the Appropriations Act language is mandatory, thus the ''scrub'' provision should be an affirmative requirement under the Rule, rather than an element in the do-not-call safe harbor.[14] This argument is based on the statutory language that the Rule be amended ''to require telemarketers subject to the Telemarketing Sales Rule to obtain from the Federal Trade Commission the list of telephone numbers on the ''do-not-call'' registry'' (emphasis added). ACLI took the argument further, asserting that because the Appropriations Act does not mention the safe harbor provision, this language must be read to require a new affirmative obligation to ''scrub.'' This argument fails to take into account that the obligation to ''scrub'' never has been

[5] 69 FR 7329, 7330 (Feb. 13, 2004).

[6] AARP at 2 (noting that such a standard ''will provide industry, government and consumers with clearly defined parameters for updating''); Heinemann at 1 (agreeing ''that the wording should be 'thirty (30) days' as opposed to 'monthly.' This leaves no ambiguity as to how often the list should be acquired.''); Mey at 1 (''[T]hirty (30) days' provides much greater clarity than the term 'monthly.' ''); NCL at 1 (agrees that the term ''monthly'' could be ambiguous); NMHC/NAA at 1—(''every 'thirty (30) days' more accurately describes the regular time period in which telemarketers must scrub from their call lists new additions to the National Do Not Call Registry. Thirty days is a precise term that will reduce potential confusion, * * *''). *But see,* NASUCA at 13 (noting that a thirty (30) day standard could be a problem for telemarketers who wish to access the registry the same day every month).

[7] AARP at 2 (''[The thirty (30) day standard] prevents telemarketers from accessing on Jan. 1 and Feb. 29, which would flout Congressional intent.'').

[8] Numerous business commenters criticized generally the requirement to scrub more frequently; however, as the Commission noted in the NPRM, the mandate of the Appropriations Act of 2004 is clear, and the question of whether to require monthly scrubbing is not at issue in this proceeding. *See* 69 FR 7329, 7331 (Feb. 13, 2004).

[9] *See, e.g.,* MAR at 1 (''a thirty day standard is clearer'').

[10] ATA at 3, n.5 (noting that ''[t]his next-day business approach conforms to that found elsewhere in the Commission's rules'' (citing 16 CFR 1.14(c)), 4.3(a)). *See also* NRF at 3–4.). The Commission declines to adopt this recommendation. The thirty-one (31) day standard adopted in the amended Rule will provide businesses the maximum flexibility allowable under the Appropriations Act mandate.

[11] Out of 186 comments, only about fourteen (14) individual businesses commented specifically on the issue of whether the amended provision should require telemarketers to obtain the Registry on a monthly basis or every 30 days.

[12] NNA at 1–2 (stating that it ''would be very easy for a small firm to lose track of a month with 31 days, and update their list a day late.''). See also, D&D Air at 1 (every 30 days ''would result in a nightmare'').

[13] NASUCA at 5. *See also* Skinner/In-Home Lenders at 1.

[14] NASUCA at 2–3.

cast as an affirmative requirement; rather, it has always been framed in the context of a provision in the safe harbor. No commenters argued that the current format and structure of the Rule are unworkable or problematic. The Commission believes the manner in which the provision is incorporated in the Rule works well. Moreover, because Congress is presumed to know the content and structure of the regulation it amends,[15] it is reasonable to believe, absent explicit guidance to the contrary, that lawmakers intended that their amendment to this specific provision in the Rule's safe harbor would remain in the safe harbor. Therefore, the Commission declines to adopt an affirmative obligation that sellers and telemarketers scrub their lists each month.

Three alternatives to the thirty (30) day approach proposed in the NPRM emerged from the comments; the ''range of dates'' approach, the ''business days'' approach, and the ''grace period'' approach. These alternative suggestions are discussed in the following paragraphs.

The ''Range of Dates'' Approach. First, some commenters urged that, rather than requiring that a seller or telemarketer obtain information from the National Do Not Call Registry at an interval of a fixed number of days, the Rule should allow a business to obtain such information within a range of dates, such as between the 25th and 35th days prior to a call being made,[16] between the 1st and 15th of every month,[17] or ''no more frequently than every 28 calendar days, but no less frequently than every 31 calendar days,'' [18] to take into consideration the different number of days in each month.

The suggestion that the Commission require scrubbing within a numerical range, such as between the 25th and 35th days prior to a call being made, would obviate the bi-monthly download problem detailed in the NPRM, but would not comport with Congress' mandate that telemarketers and sellers scrub their lists ''once a month'' (*i.e.,* no month has more than 31 days). A numerical range with an upper limit of 31 days would meet the Congressional mandate, but the lower limit would serve no purpose; it would only reduce flexibility for firms who have to comply. The suggestion that the Commission employ a date range (*i.e.,* the Registry must be accessed between the 1st and 15th of each month) would comport with the Congressional mandate for ''once a month'' purging and would solve the bi-monthly download problem, but it would place needless strain on the Registry by crowding all access into a limited time period and reduce flexibility for firms whose business cycle would be better suited to downloads outside the prescribed time frame. The final range suggested—no more frequently than every 28 calendar days, but no less frequently than every 31 calendar days—also would comport with the Congressional mandate and would resolve the bi-monthly download problem. Preventing access more frequently than every 28 days, however, would serve no discernable purpose while denying telemarketers and sellers the ability to keep from alienating consumers who have registered during the preceding 27 days. The Commission, therefore, declines to adopt any of the range proposals suggested by commenters.

The ''Business Days'' Approach. The second alternative to the proposed thirty (30) day standard was advanced by NRF. Under this alternative, the interval at which companies would be required to scrub would be based on the number of business days in a month—*i.e.*, not counting weekends or national holidays. ''For instance, companies could be required to update their lists every 22 business days (to take into account the average number of business days each month).'' [19]

The Commission believes that from a variety of perspectives such a ''business day'' standard would be unnecessarily complicated. From the standpoint of compliance, businesses—particularly small businesses—would have difficulty determining with certainty just when they would be required to access the Registry and purge their lists before undertaking a telemarketing campaign. From the standpoint of consumers wishing to file a Do Not Call complaint, it would be unnecessarily difficult to determine the point in time when a complaint would be accepted by the Registry system. The burden would be on consumers to calculate the number of business days since their registration. Finally, from the enforcement standpoint, it would be unnecessarily complicated under a ''business day'' regime to program the Registry systems so that they could easily identify when a violation has occurred. Therefore, the Commission declines to adopt this recommendation.

The ''Grace Period'' Approach. Finally, some commenters argued that the statute mandates only that the Commission require that sellers and telemarketers obtain information from the National Do Not Call Registry every thirty (30) days (or once a month), but does not necessarily require that they cease calling consumers at the time they obtain the Registry information.[20] One such commenter, SBC, urged that the final Rule include a grace period by which calls to numbers on such list must actually cease.[21] The Commission believes there is no support for this interpretation of the Appropriations Act. Indeed, the plain language of the statute requires that the Commission amend the Rule to ''require telemarketers * * * to obtain from the Federal Trade Commission the list of telephone numbers on the ''do-not-call'' registry once a month.'' [22] No mention is made in the statute of any grace period for effectuating consumer's requests not to be called, nor is such a model

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[15] *See Hall* v. *EPA,* 273 F.3d 1146, 1158 (9th Cir. 2001) (''[w]hen Congress incorporates the text of past interpretations, Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing * * * interpretations''), *citing, Bragdon* v. *Abbott,* 524 U.S. 624, 631 (1998). *See also Ford* v. *Schering-Plough Corp.,* 145 F.3d 601, 611 (3d Cir. 1998) (''Where Congress adopts a new law incorporating sections of prior law, Congress normally can be presumed to have had knowledge of interpretation given to incorporated law, at least insofar as it affects new statute.'') (*citing Lorillard* v. *Pons,* 434 U.S. 575, 581 (1978).

[16] MBNA at 1–2 (noting that this approach would ''allow telemarketers to avoid overtime and other expenses resulting from having to perform downloading on weekends or holidays, and to avoid the possibility of having to perform more than 12 down loadings in a year.'')

[17] Dial America at 1 (recommending ''a requirement that companies must download and implement an updated version of the Registry between the first and fifteenth of every month. This will allow companies two weeks time to comply as well as give companies a consistent set schedule to incorporate as a regular business practice. At the same time, utilizing a 15-day window to download and implement the Registry will help to reduce any constraints on the systems since not every company will need to download on the same date.'')

[18] NRF at 3 (''Alternatively, companies could be required to update their lists no more frequently than every 28 calendar days, but no less frequently than every 31 calendar days, to take into consideration the different number of days in each month.'')

[19] NRF at 3–4.

[20] DMA at 4; SBC at 2; ACLI at 2; Sterling at 1; Stonebridge at 2; Verizon at 2.

[21] *See, e.g.,* SBC at 2 (''the statutory mandate does not require a seller or telemarketer to use a version of the Registry updated no more than thirty (30) days prior to the date a call is made.'') Although SBC suggested including a grace period, neither SBC nor any other commenter provided any factual support for the notion that any sort of grace period is needed by industry to be able to scrub effectively without undue burden.

[22] The exact language in the Act is: ''Provided further, That, not later than 60 days after the date of enactment of this Act, the Federal Trade Commission shall amend the Telemarketing Sales Rule to require telemarketers subject to the Telemarketing Sales Rule to obtain from the Federal Trade Commission the list of telephone numbers on the 'do-not-call' registry once a month.'' Consolidated Appropriations Act of 2004, Pub. L. 108–199, 188 Stat 3. The language is in Division B, Title V.

contemplated by the existing Rule. The legislative history also provides no support for this argument. In fact, the legislative history suggests that the sole purpose behind shortening the interval for purging call lists is to reduce the amount of a time consumers need to wait to see a reduction in unwanted telemarketing calls, and to be able to file a valid complaint.[23] Without some explicit indication that Congress intended to provide a grace period—or at least viewed a grace period as consistent with the imperative to shorten the Rule's time frame for purging call lists and accepting complaints—the Commission will not incorporate a grace period into the Rule. Therefore, the Commission declines to adopt this recommendation.

IV. The Final Rule: The 31-Day Standard

Although the recommendations of several of the commenters, discussed above, would require purging lists within the statutorily-mandated ''once a month'' time period, the Commission believes that the best and simplest resolution is to amend the Rule to require that telemarketers and sellers obtain data from the National Do Not Call Registry and purge registered numbers from their call lists no more than thirty-one (31) days prior to making a telemarketing call. This approach retains all of the advantages of the proposals allowing a range of acceptable dates, yet provides a simpler, more straightforward, and more easily understandable standard for businesses, consumers, and law enforcement.

The thirty-one (31) day interval ensures that telemarketers and sellers have a set interval at which they must access the data in the registry, avoiding the concern articulated in the NPRM that otherwise, a business could literally be in compliance while only obtaining data at roughly bi-monthly intervals. It also provides businesses the maximum flexibility allowable by the statute, by providing an interval that mirrors the length of the most frequently occurring and longest month, rather than that of the less frequently occurring month (*i.e.*, thirty (30) days). This longer interval will enable a business to choose any of a number of possible options in scheduling its access to the Registry, including, but not limited to: accessing on the first day of every month,[24] the third Friday of every month, or at thirty-one (31) day intervals, regardless of the day or date.

Therefore, based on the record in this proceeding and the statutory mandate in the Appropriations Act, the Commission modifies § 310.4(b)(3)(iv) of the do-not-call safe harbor to read: ''The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to § 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the ''do-not-call'' registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process.''

V. Effective Date

The second issue on which the Commission sought comment in the NPRM is the appropriate effective date for this amendment. As the Commission acknowledged in the NPRM, ''[m]odifying the Commission's established Registry system to account for increased download traffic and logic changes will take some time,'' and sellers and telemarketers ''similarly may need an extended period to make the necessary modifications in their systems and procedures to be able to comply with this amended provision.'' [25] The Commission requested that business and industry commenters ''provide factual information regarding the amount of time it reasonably will take sellers and telemarketers to modify their business procedures and systems to be able to comply with the amended provision.'' [26]

The few individuals and consumer groups that responded to this question suggested an effective date of three (3) to six (6) months,[27] or ''as soon as is practicable so that the benefits to consumers who use the registry will not be unduly delayed.'' [28] Industry members recommended an effective date anywhere from six (6) months to longer than a year.[29] Despite the varied suggestions as to a specific appropriate effective date, business and industry commenters reasoned that an effective date should be postponed to allow businesses, particularly small businesses, to implement systems and procedures to comply with the amended Rule.

Based on its experience in establishing and maintaining the National Do Not Call Registry, and on a review of the record in this proceeding, the Commission has determined to set the effective date for this amended provision as January 1, 2005. This time period is virtually the same as that allowed to prepare for the rollout of the National Do Not Call Registry in 2003.[30] In its comment, which recommended this effective date, ATA also noted that, ''by allowing substantial lead time for business to come into compliance with the new rule,'' the Commission could ''moderate the impact of the rule change.''

Some commenters called for effective dates even further in the future. One, NRF, stated that an effective date of ten (10) to twelve (12) months following publication of the final amended Rule provision is desirable because of the ''problem of efficiently and quickly downloading a list that contains tens of millions of phone numbers each and every month—especially for those involved in national sales and ongoing campaigns.'' [31] NRF further commented that because ''the current practice of many retailers involved in telemarketing campaigns is to 'pull' the list of customers that they intend to contact several weeks in advance of a calling campaign that may itself last several weeks,'' that this amendment will require logistical change in the way retailers conduct their business.[32]

Other commenters noted that an effective date of one year following the Rule amendment publication would be appropriate to enable businesses, particularly small businesses, to adjust their business practices to accommodate

[23] U.S. House of Representatives, 108th Cong., 1st Sess. Conference Report to Accompany H.R. 2673. Report No. 108–401 (Nov. 25, 2003) p. 641 (''To improve responsiveness to an individual's decision to enroll in the Do-Not-Call program, the conference report includes bill language requiring telemarketers who are subject to the Telemarketing Sales Rule to obtain from the Federal Trade Commission the list of telephone numbers on the Do-Not-Call Registry once a month.'')

[24] This option—to allow for updating on the same day each month—was recommended by D&D Air at 1.

[25] 69 FR 7329 (Feb. 13, 2004).

[26] *Id.*

[27] Heinemann at 1 (''I feel that the effective date should be somewhere between 3 to 6 months from the enactment of the new rules. I find no reason why it shold take longer than 3 months for a person or company to update their systems to download the list every 30 days. In fact I believe that most people would be able to accomplish this task within a month. By making the effective date 3 months from the enactment of the rules, you would be placing no undue burden on businesses but you would be increasing the effectiveness of the law for new consumers that sign up.'').

[28] NCL at 2 (noting that the FTC and marketers will need time to retool their systems, and that NCL and other organizations will need time to revise their educational materials).

[29] *See, e.g.*, SBC at 5 (6 months); NRF at 2–3 (10–12 months); Mastercard (12 months); Sterling at 2 (18 months). Although most of the comments received lacked detailed support for the assertion that additional time was necessary, many commenters noted that due to the necessarily short comment period, it would be impossible to provide more detailed and meaningful data in support of their assertions.

[30] The final amended TSR was announced in December, 2002, (although published in the **Federal Register** on January 29, 2003), and businesses were required to begin downloading in September 2003).

[31] NRF at 2–3.

[32] *Id.*

the more frequent ''scrubbing'' required by the amended safe harbor provision.[33] MBNA noted that ''[u]sing past effective dates as a guideline, and given that enactment of the new requirement was totally unexpected by telemarketers,'' a year is ''reasonable and appropriate.''[34] MidFirst agreed, and noted that, in addition to allowing businesses necessary time to ''modify systems and procedures,'' an effective date of at least one year from the adoption of the amended Rule would ''ensure the FTC can handle the increased frequency of Web site hits and downloads and other procedural requirements.''[35]

Indeed, modifying the Commission's established Registry system to account for increased download traffic and logic changes will take some time, as noted in the NPRM. The Commission believes, however, that its system will be ready by January 1, 2005.[36] Although the Commission is sympathetic to arguments that the amendment comes at a time when many businesses, particularly small businesses, are still grappling with the initial implementation of procedures and systems for downloading data from the Registry,[37] an effective date of January 1, 2005, will enable most sellers and telemarketers to complete a full year of quarterly downloads prior to switching to downloading every thirty-one (31) days. Further, the Commission notes that the National Do Not Call Registry includes a feature whereby businesses returning to the Registry after an initial download may request only a list of changes to their previous list (newly added and newly removed numbers), rather than a completely new list. The Commission believes that this feature, designed to minimize the burden on businesses, particularly small businesses, should alleviate some of the burden on business of scrubbing their lists more frequently under the amended Rule.

VI. Other Issues Raised in the Comments

NADA requested that the Commission clarify that a small seller or telemarketer would be deemed to be in compliance if it registered and paid the annual fee (as may be required), even though it only obtains numbers by use of the single-number lookup feature in the National Do Not Call Registry. The Commission agrees that such sellers or telemarketers would be in compliance, noting that this would constitute no change from the existing Rule.

Another commenter requested confirmation that ''the Commission will update the list at least as frequently as telemarketers must download the list.'' Indeed, the registration database is updated on a daily basis, and is always available to sellers and telemarketers, should any choose to purge their call lists that frequently.

VII. Paperwork Reduction Act

The information collection requirements contained in the TSR were reviewed by OMB under the Paperwork Reduction Act and cleared on July 24, 2003, under OMB Control Number 3084–0097. The rule amendment, as discussed above, changes the interval at which entities covered by the TSR must obtain data from the National Do Not Call Registry from every three (3) months to every thirty-one (31) days. Thus, the rule amendment does not impose any new, or affect any existing, record submission, recordkeeping, or public disclosure requirement that would be subject to review and approval by the Office of Management and Budget pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501–3520.

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601–612, requires an agency to provide an Initial Regulatory Flexibility Analysis (''IRFA'') with a proposed rule and a Final Regulatory Flexibility Analysis (''FRFA'') with the final rule, if any, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 603–605.

As discussed in the NPRM, the Appropriations Act expressly mandates the modification, and, therefore, any associated economic impact. Nonetheless, the Commission determined that it was appropriate to publish an IRFA in order to inquire into the impact of the proposed rule on small entities, and is also publishing a FRFA with its final amended Section 310.4(b)(3)(iv). Therefore, the Commission has prepared the following analysis.

1. Need for and Objectives of the Rule

The modification of the TSR, discussed above, is pursuant to the directive of the Appropriations Act of 2004, which mandates that ''not later than 60 days after the date of enactment of th[at] Act, the Federal Trade Commission shall amend the Telemarketing Sales Rule to require telemarketers subject to the Telemarketing Sales Rule to obtain from the Federal Trade Commission the list of telephone numbers on the ''do-not-call'' registry once a month.''[38]

2. Objectives and Legal Basis.

The objectives of the amended rule provision are discussed above. The legal basis for the amended rule provision is the Appropriations Act of 2004, as discussed above.

3. Description and Estimate of Number of Small Entities Subject to the Final Rule or Explanation of Why No Estimate Is Available.

This proposed rule will primarily impact sellers that make interstate telephone calls to consumers (outbound calls) in an attempt to sell their products or services. Also affected may be firms that provide telemarketing services to others on a contract basis. As noted in the NPRM, during the proceedings to amend the TSR to include National Do Not Call Registry provisions, the Commission sought public comment and information on the number of small business sellers and telemarketers that would be impacted by those amendments.[39] In its requests, the Commission noted the lack of publicly available data regarding the number of small entities. As the Commission received no further information in response to the NPRM issued in this proceeding, the number of firms making outbound calls cannot be reliably estimated.[40]

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[33] CAR at 1; NMHC/NAA at 1–2; ARDA at 5 (also noting the ''burdensom regulatory schedule looming ahead'' [referencing the CAN–SPAM rulemakings] as a reason to allow a delayed implementation of this provision).

[34] MBNA at 3.

[35] Midfirst at 1; NNA at 2 (recommending an effective date of April 1, 2005).

[36] As noted by some commenters, the Appropriations Act language only directs the FTC, not the Federal Communications Commission (FCC), which regulates both inter- and intrastate telemarketing, to amend its rules. *See, e.g.,* Countrywide at 1–2; NRF at 4; NASUCA at 7–8. The FCC is considering a change to bring their rules in line with the TSR. *See* ''FCC Seeks Comment on Rules To Eliminate Spam From Mobile Phones; Commission Also Asks for Comments on Possible 'Safe Harbor' for Telemarketing Calls to Mobile Phones,'' Mar. 11, 2004 (containing reference to the FCC's impending NPRM on a thirty (30) day scrub interval). The January 1st effective date will also allow for interagency coordination necessary to implement the statutory mandate.

[37] ATA at 2 (only a few months' experience with the rules); Cage at 1 (forced to changed before law is six months old); NAA at 2 (companies have only had to scrub their lists twice since the Do-Not-Call List went into effect). *See also* Countywide at 5; Maine at 1.

[38] Consolidated Appropriations Act of 2004, Pub. L. 108–199, 188 Stat 3. The requirement is in Division B, Title V.

[39] *See* 68 FR 4580, 4667 (Jan. 29, 2003); 68 FR 45134, 45143 (July 31, 2003) (noting, in the final amended rules, that comment was requested, but not received, regarding the number of small entities subject to the National Do Not Call Registry provisions of the amended TSR).

[40] 68 FR 4580, 4667 (Jan. 29, 2003) (noting that Census data on small entities conducting

Nevertheless, the Commission believes that, to the extent that this amendment has an economic effect on small business, the Commission has adopted an approach that minimizes the impact to ensure that it is not substantial, while fulfilling the mandate of the Appropriations Act that all businesses obtain data from the National Do Not Call Registry on a monthly basis.

As discussed above in detail, based on the record, the Commission has extended the interval at which businesses must access Registry data and purge their calling lists of numbers contained on the Registry to thirty-one (31) days, the maximum allowable pursuant to the Appropriations Act mandate. And, in recognition of the need for businesses, particularly small businesses, to modify their procedures and systems to accommodate this amendment, the Commission has set the effective date for this amended Rule provision as January 1, 2005, allowing more than nine months time for necessary preparations.

4. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement of Obtaining Data From the National Do Not Call Registry Every Thirty (30) Days and the Type of Professional Skills That Will Be Necessary To Comply.

As discussed in the NPRM, this amendment does not impose any new, or affect any existing, reporting, disclosure, or specific recordkeeping requirements within the meaning of the Paperwork Reduction Act. The Commission further posited in the NPRM that it did not ''believe that the modification requiring sellers and telemarketers to obtain data from the National Registry at a more frequent interval will create a significant burden on sellers or telemarketers that have already established systems to comply with the requirement in the existing TSR that requires accessing the Registry database on a quarterly basis.'' But, the Commission recognized that ''[t]here will likely be additional costs* * * incurred to access the Registry every thirty days (effectively twelve (12) times per year) versus the current requirement of every three months (effectively four (4) times per year).[41]

Many commenters argued that the amended Rule provision will be burdensome on businesses, particularly small businesses. NADA noted that ''dealers and other small businesses can expect a corresponding increase in the personnel costs necessary to download the data and perform the scrub. Because small businesses may lack available personnel to perform this additional function, they may find it necessary to outsource the function to a vendor,'' which would further increase costs associated with the more frequent scrub requirement.[42] However, as described below, in response to Question 5, the Commission has taken steps to minimize the impact of the amended Rule provision on small businesses, to the extent possible while still effectuating the mandate of the Appropriations Act.

5. Steps the Agency Has Taken To Minimize Any Significant Economic Impact on Small Entities, Consistent With the Stated Objectives of the Appropriations Act, Including the Factual, Policy, and Legal Reasons For Selecting the Alternative Finally Adopted, and Why Each of the Significant Alternatives Was Rejected.

As noted in the NPRM, the Appropriations Act of 2004 provides the Commission no discretion in the matter of whether to amend the TSR.'' The Commission, however, included in the NPRM a request for factual information about the amount of time it will take for ''sellers and telemarketers, including small businesses, to modify their business procedures and systems to be able to comply with the amended provision.'' Based on the record, the Commission has determined to set the effective date for this amendment as January 1, 2005. This time frame will, as noted above, provide businesses, especially small businesses,[43] adequate time to modify their systems and procedures to comply with the amended provision. In addition, the Commission has extended the interval at which businesses must access Registry data and purge their calling lists of numbers contained on the Registry to thirty-one (31) days, the maximum allowable pursuant to the Appropriations Act mandate.

Thus, while the Commission considered more burdensome alternatives (*i.e.*, choosing an interval of thirty (30), rather than thirty-one (31) days, the Commission rejected those alternatives, as discussed above, in favor of a regulatory approach that was the least burdensome to all regulated entities, including small entities, if any.

IX. Amended Rule

■ Accordingly, the Commission amends title 16, 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 § 310.4 by revising paragraph (b)(3)(iv) to read as follows:

§ 310.4 Abusive telemarketing acts or practices.

* * *

(b) * * *

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to § 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the ''do-not-call'' registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process;

* * * * *

By direction of the Commission.

Donald S. Clark,

Secretary.

Note: This appendix will not appear in the Code of Federal Regulations.

telemarketing does not distinguish between those entities that conduct exempt calling, such as survey calling, those that receive inbound calls, and those that conduct outbound calling campaigns. Moreover, sellers who act as their own telemarketers are not accounted for in the Census data).

[41] Based on data obtained during the TSR amendment finalized in 2003, the Commission estimated that ''the cost of accessing the National Do Not Call Registry to purge the numbers it contains from a company's calling list (separate from the fee paid to obtain the list) is around $100. Given this estimate, sellers and telemarketers seeking to comply with the proposed rule modification would pay $1200 per year ($100 per scrub x 12 scrubs per year) rather than $400 per year ($100 per scrub x 4 scrubs per year).''

[42] NADA at 2 (recommending a January 1, 2005 effective date). *See also* Ziskind at 1 (noting that the more frequent scrub interval will ''add an additional burden to REALTORS,'' and cost ''cost us time and money''); NRF at 2 (''for smaller businesses, in particular, the extra hours they may be forced to spend each month in order to prepare to contact their customers is subtracted from the time they could spend serving those customers'').

[43] The Commission notes that the TSR applies only to interstate telemarketing campaigns, and thus, is likely to exempt numerous small business entities that only conduct their telemarketing within a single state. The FCC, which regulates intrastate calling, while not mandated by the Appropriations Act to modify its telemarketing rules, is considering a change to bring them in line with the TSR. *See* ''FCC Seeks Comment on Rules to Eliminate Spam From Mobile Phones; Commission Also Asks for Comments on Possible ''Safe Harbor'' for Telemarketing Calls to Mobile Phones,'' Mar. 11, 2004 (containing reference to the FCC's impending NPRM on a thirty (30) day scrub interval).

Appendix A

List of Acronyms for Commenters

AARP—AARP
ACLI—American Council of Life Insurers
Adler, Jeff
Advertiser—The Advertiser of Polk County
ARDA—American Resort Development Association
ATA—American Teleservices Association
Anderson, Melissa
Aubee, Arnold
Bauder, Christine
Beach, Kerry
Bergmann, Ken
Black, Michelle
Blum, Charles
Boyer, Donna
Breen, Wynn
Bressler, Marque
Byrnes, Theresa M
Cage, Chris
CAR—California Association of Realtors
Campbell, Tricia
CapAR—Capital Area Association of Realtors
Carruba, Guy
Cartwright, Douglas
Cartwright, Iris
Castaldo, Carol
Castle, Bill
Ciesielski, Ronald
Clapsaddle, Mel
Classified—Classified Technologies
Constandinou, Sophia
Cordner, Maria
Country—Country Peddler
Countrywide—Countrywide Financial Services
Couto, Manuel
Covington—The Covington Group
Cueman, Robert
D& D—D&D Air Conditioning
Davidson, Scott
Davis, Donald R.
Davis, Richard
DeCarlo, Dennis
DePalma, Larry
DeVose II, Leon
DialAmerica
DiGiulio, James
DiSabato, Joseph
DMA—Direct Marketing Association
Dobson, Liane
Elliott, Lori
Engle, Susan
Evertsen, Karen
Farello, Marsha
Ferreira, Armando
Ferrigno, James
Ferriss, Theresa
Gale, Willian
Gatchalian, Paz
Gawel, Dorothy
Gonyea, B.
Green Banner—Green Banner Publications
Hanna, Gary
Hanson, Catherine
Hargrave, David
Hartman, Eileen
Hasselbring, David
Hawkins, Dee
Heinemann, Michael
Henderson, Cameron
Heroy, David
Hirsch, Andrew
Hometown—Hometown News
Hurlburt, Kris
Ieradi, Robert
Jackson, Dorothy
Jacobson, Kathryn
Kachar, Mehmet
Kahn, Robert
Kamel, Felicia
Kelly, Robert
Kelly, Sharon
Kidney, Alice
Kowol, Michael
Kraus, Elizabeth
Kumar, Bhupendra
Kwasniewski, Jan
Labrum, Carole
Lavin, Louis
Lee, James
Legg, Michelle
Leonardo, Rosemarie
Levandoski, Michael
Lubeck, Robert
Mack, Brendon
Madden, Mike
ME–AR—Maine Association of Realtors
Mancuso, Daniel
MD–AR—Maryland Association of Realtors
Massengill, Lisa
Mastercard
Matson, Sandra
MBNA
McGarry, Dennis
McMullin, Craig
Meany, Michael
Meltzer,
Mendoza, Jimmy
Mey, Diana
Michaud, Robert
Midfirst Bank
Mitchell, Jeffrey
Mitchell, Robert
Mogano, Louis
Mongeon, Kenneth
Morano, Valli
Mraz, Lawrence
Musser, Linda
NASUCA—National Association of State Utility Consumer Advocates
NADA—National Automobile Dealers Association
NCL—National Consumers League
NNA—National Newspaper Association
National Penn—National Penn Bank
NRF—National Retail Federation
NJ–AR—New Jersey Association of Realtors
NYCPB—New York State Consumer Protection Board
Nicholson, Walter
Nuzzo, Michael
NMHC/NAA—National Multi Housing Council/National Apartment Association
O'Neal, James
O'Neill (TCIM Services)
Othman, Wafa
Paraiso, Geraldine
Pattisall, Jr., Richard C.
Picardo, Kathleen
Polio, Erick
Popp, Dianne
Port, Linda
Private Citizen
Rafferty, Catherine
Rhame, Susanne
Rice, Prestelene
Rice-Williams, Lisa
Riehl, Mary
Rodriguez, Anthony
Rose-Valente, Judith
Runyon, Jennifer
Ryan, Christopher
Rzempoluch, John
Sachau, Barb
Sadlon, Carolyn
Sanderson, Harvey
SBC—SBC Communications
Schleuter, Christian
Schmidt, Mark
Schneider, Diane
Schueler, Deborah
Sciacca, Lydia
Skinner, David
SC–AR—South Carolina Association of Realtors
Sprecher, Steve
Stanley, Kenneth
Sterling Jewelers
Stonebridge—Stonebridge Life Insurance Co.
Strang, Wayne
Tekula, Joseph
Thomas, William
Titchell, Sharon
Traylor—Traylor Communications
Trentacosta, Theresa
Trimble, Robert
Van Diver, Karen
Venegas, Pedro
Verbel, Joshua
Verizon
Vosgerichian, Gary
Waite, Rachel
Walker, Marti
Wankel, Janice
Warchol, Robert
Weber, Cathy
Weisinger, Mimi
Wessel, Mary Ann
Willoughby, David
Wine, Randolph
Wojciechowicz, David
Wojciechowicz, Laura
Ziskind, Ross

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