

FEDERAL TRADE COMMISSION

16 CFR Part 310

Telemarketing Sales Rule

AGENCY: Federal Trade Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: In this document, the Federal Trade Commission (the "Commission" or "FTC") issues a Notice of Proposed Rulemaking to amend the FTC's Telemarketing Sales Rule, and requests public comment on the proposed changes. The Telemarketing Sales Rule prohibits specific deceptive and abusive telemarketing acts or practices, requires disclosure of certain material information, requires express verifiable authorization for certain payment mechanisms, sets recordkeeping requirements, and specifies those transactions that are exempt from the Telemarketing Sales Rule.

This document invites written comments on all issues raised by the proposed changes and seeks answers to the specific questions set forth in Section IX of this document. This document also contains an invitation to participate in a public forum, to be held following the close of the comment period, to afford Commission staff and interested parties an opportunity to explore and discuss issues raised during the comment period.

DATES: Written comments will be accepted until March 29, 2002. Notification of interest in participating in the public forum also must be submitted on or before March 29, 2002. The public forum will be held at the Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580, on June 5, 6, and 7, 2002, from 9:00 a.m. until 5:00 p.m.

ADDRESSES: Six paper copies of each written comment should be submitted to the Office of the Secretary, Room 159, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580. To encourage prompt and efficient review and dissemination of the comments to the public, all comments should also be submitted, if possible, in electronic form, on either a 5¼ or a 3½ inch computer disk, with a label on the disk stating the name of the commenter and the name and version of the word processing program used to create the document. (Programs based on DOS are preferred. Files from other operating systems should be submitted in ASCII text format to be accepted.) Individual members of the public filing comments

need not submit multiple copies or comments in electronic form.

Alternatively, the Commission will accept papers and comments submitted to the following email address: tsr@ftc.gov, provided the content of any papers or comments submitted by email is organized in sequentially numbered paragraphs. All comments and any electronic versions (*i.e.*, computer disks) should be identified as "Telemarketing Rulemaking—Comment. FTC File No. R411001." The Commission will make this document and, to the extent possible, all papers and comments received in electronic form in response to this document available to the public through the Internet at the following address: www.ftc.gov.

Notification of interest in participating in the public forum should be submitted in writing, but separate from written comments, to Carole Danielson, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580. The public forum will be held at the Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

Comments on proposed revisions bearing on the Paperwork Reduction Act should additionally be submitted to: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10102, Washington, DC 20503, ATTN.: Desk Officer for the Federal Trade Commission, as well as to the FTC Secretary at the address above.

FOR FURTHER INFORMATION CONTACT: Catherine Harrington-McBride, (202) 326-2452 (email: cmcbride@ftc.gov), Karen Leonard, (202) 326-3597 (email: kleonard@ftc.gov), Michael Goodman, (202) 326-3071 (email: mgoodman@ftc.gov), or Carole Danielson, (202) 326-3115 (email: cdanielson@ftc.gov), Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

A. Telemarketing Consumer Fraud and Abuse Prevention Act

On August 16, 1994, President Clinton signed into law the Telemarketing Consumer Fraud and Abuse Prevention Act ("Telemarketing Act" or "the Act").¹ The Telemarketing Act was the culmination of Congressional efforts during the early

1990's to protect consumers against telemarketing fraud.² The purpose of the Act was to combat telemarketing fraud by providing law enforcement agencies with powerful new tools, and to give consumers new protections. The Act directed the Commission, within 365 days of enactment of the Act, to issue a rule prohibiting deceptive and abusive telemarketing acts or practices.

The Telemarketing Act specified, among other things, certain acts or practices the FTC's rule must address. The Act also required the Commission to include provisions relating to three specific "abusive telemarketing acts or practices:" (1) A requirement that telemarketers may not undertake a pattern of "unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy;" (2) restrictions on the time of day telemarketers may make unsolicited calls to consumers; and (3) a requirement that telemarketers promptly and clearly disclose in all sales calls to consumers that the purpose of the call is to sell goods or services, and make other disclosures deemed appropriate by the Commission, including the nature and price of the goods or services sold.³ Section 6102(a) of the Act not only required the Commission to define and prohibit deceptive telemarketing acts or practices, but also authorized the FTC to define and prohibit acts or practices that "assist or facilitate" deceptive telemarketing.⁴ The Act further directed the Commission to consider including recordkeeping requirements in the rule.⁵ Finally, the Act authorized State attorneys general, other appropriate State officials, and private persons to bring civil actions in federal district court to enforce compliance with the FTC's rule.⁶

² Other statutes enacted by Congress to address telemarketing fraud during the early 1990's include the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. 227 *et seq.*, which restricts the use of automatic dialers, bans the sending of unsolicited commercial facsimile transmissions, and directs the Federal Communications Commission ("FCC") to explore ways to protect residential telephone subscribers' privacy rights; and the Senior Citizens Against Marketing Scams Act of 1994, 18 U.S.C. 2325 *et seq.*, which provides for enhanced prison sentences for certain telemarketing-related crimes.

³ 15 U.S.C. 6102(a)(3)(A)–(C).

⁴ Examples of practices that would "assist or facilitate" deceptive telemarketing under the Rule include credit card laundering and providing contact lists or promotional materials to fraudulent sellers or telemarketers. *See*, 60 FR 43843, 43853 (Aug. 23, 1995) (codified at 16 CFR part 310 (1995)).

⁵ 15 U.S.C. 6102(a)(3).

⁶ 15 U.S.C. 6103.

¹ 15 U.S.C. 6101–6108.

B. Telemarketing Sales Rule

Pursuant to the Telemarketing Act, the FTC adopted the Telemarketing Sales Rule, 16 CFR part 310, ("Telemarketing Rule," "the Rule," "TSR," or "original Rule") on August 16, 1995.⁷ The Rule, which became effective on December 31, 1995, requires that telemarketers promptly tell each consumer they call several key pieces of information: (1) the identity of the seller; (2) the fact that the purpose of the call is to sell goods or services; (3) the nature of the goods or services being offered; and (4) in the case of prize promotions, that no purchase or payment is necessary to win.⁸ Telemarketers must, in any telephone sales call, also disclose cost and other material information before consumers pay.⁹ In addition, telemarketers must have consumers' express verifiable authorization before using a demand draft (or "phone check") to debit consumers' bank accounts.¹⁰ The Rule prohibits telemarketers from calling before 8:00 a.m. or after 9:00 p.m. (in the time zone where the consumer is located), and from calling consumers who have said they do not want to be called by or on behalf of a particular seller.¹¹ The Rule also prohibits misrepresentations about the cost, quantity, and other material aspects of the offered goods or services, and the terms and conditions of the offer.¹² Finally, the Rule bans telemarketers who offer to arrange loans, provide credit repair services, or recover money lost by a consumer in a prior telemarketing scam from seeking payment before rendering the promised services,¹³ and prohibits credit card laundering and other forms of assisting and facilitating deceptive telemarketers.¹⁴

The Rule expressly exempts from its coverage several types of calls, including calls where the transaction is completed after a face-to-face sales presentation, calls subject to regulation under other FTC rules (e.g., the Pay-Per-Call Rule, or the Franchise Rule),¹⁵ calls that are not in response to any solicitation, calls initiated in response to direct mail, provided certain disclosures are made, and calls initiated in response to advertisements in general media, such as newspapers or

television.¹⁶ Lastly, catalog sales are exempt, as are most business-to-business calls, except those involving the sale of office or cleaning supplies.¹⁷

C. The USA PATRIOT Act of 2001

On Thursday, October 25, 2001, President Bush signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act") of 2001, Pub. L. 107-56 (Oct. 25, 2001). This legislation contains provisions that have significant impact on the TSR. Specifically, section 1011 of that Act amends the Telemarketing Act to extend the coverage of the TSR to reach not just telemarketing to induce the purchase of goods or services, but also charitable fund raising conducted by for-profit telemarketers for or on behalf of charitable organizations. Because enactment of the USA PATRIOT Act took place after the comment period for the Rule review (described below) closed, the Commission did not address issues relating to charitable fundraising by telemarketers in the Rule review.

Section 1011(b)(3) of the USA PATRIOT Act amends the definition of "telemarketing" that appears in the Telemarketing Act, 15 U.S.C. 6106(4), expanding it to cover any "plan, program, or campaign which is conducted to induce * * * a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones and which involves more than one interstate telephone call * * *"

In addition, section 1011(b)(2) adds a new section to the Telemarketing Act directing the Commission to include new requirements in the "abusive telemarketing acts or practices" provisions of the TSR.¹⁸ Section

1011(b)(1) amends the "deceptive telemarketing acts or practices" provision of the Telemarketing Act, 15 U.S.C. 6102(a)(2), by specifying that "fraudulent charitable solicitation" is to be included as a deceptive practice under the TSR.

The impact of the USA PATRIOT amendments to the Telemarketing Act is discussed more fully in the part of this notice that analyzes § 310.1 of the Rule, which deals with the scope of the Rule's coverage. This notice sets forth a number of proposed changes throughout the text of the TSR to implement the USA PATRIOT amendments. Also, in section IX of this notice, the Commission specifically seeks comment and information about its proposals to conform the TSR to section 1011 of the USA PATRIOT Act.

D. Rule Review and Request for Comment

The Telemarketing Act required that the Commission initiate a Rule review proceeding to evaluate the Rule's operation no later than five years after its effective date of December 31, 1995, and report the results of the review to Congress.¹⁹ Accordingly, on November 24, 1999, the Commission commenced the mandatory review with publication of a **Federal Register** notice announcing that Commission staff would conduct a forum on January 11, 2000, limited to examination of issues relating to the "do-not-call" provision of the Rule, and soliciting applications to participate in the forum.²⁰ Seventeen associations, individual businesses, consumer organizations, and law enforcement agencies, each with an affected interest and an ability to represent others with similar interests, were selected to engage in the Forum's roundtable discussion ("Do-Not-Call" Forum), which was held on January 11, 2000, at the FTC offices in Washington, DC.²¹

contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made." Pub. L. 107-56 (Oct. 25, 2001).

¹⁹ 15 U.S.C. 6108.

²⁰ 64 FR 66124 (Nov. 24, 1999). Comments regarding the Rule's "do-not-call" provision, § 310.4(b)(1)(ii), as well as the other provisions of the Rule, were solicited in a later **Federal Register** notice on February 28, 2000. See 65 FR 10428 (Feb. 28, 2000).

²¹ The selected participants were: AARP, American Teleservices Association, Callcompliance.com, Consumer.net, Direct Marketing Association, Junkbusters, KTW Consulting Techniques, Magazine Publishers Association, National Association of Attorneys General, National Association of Consumer Agency Administrators, National Association of Regulatory

Continued

⁷ 60 FR 43843.

⁸ 16 CFR 310.4(d).

⁹ 16 CFR 310.3(a)(1).

¹⁰ 16 CFR 310.3(a)(3).

¹¹ 16 CFR 310.4(c), and 310.4(b)(1)(ii).

¹² 16 CFR 310.3(a)(2).

¹³ 16 CFR 310.4(a)(2)-(4).

¹⁴ 16 CFR 310.3(b) and (c).

¹⁵ 16 CFR 310.6(a)-(c).

¹⁶ 16 CFR 310.6(d)-(f).

¹⁷ 16 CFR 310.2(u) (pursuant to 15 U.S.C. 6106(4) (catalog sales)); 16 CFR 310.6(g) (business-to-business sales). In addition to these exemptions, certain entities including banks, credit unions, savings and loans, companies engaged in common carrier activity, non-profit organizations, and companies engaged in the business of insurance are not covered by the Rule because they are specifically exempt from coverage under the FTC Act. 15 U.S.C. 45(a)(2); but see, discussion immediately following concerning the USA PATRIOT Act amendments to the Telemarketing Act. Finally, a number of entities and individuals associated with them that sell investments and are subject to the jurisdiction of the Securities and Exchange Commission or the Commodity Futures Trading Commission are exempt from the Rule. 15 U.S.C. 6102(d)(2)(A); 6102(e)(1).

¹⁸ Specifically, section 1011(b)(2)(d) mandates that the TSR include "a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable

On February 28, 2000, the Commission published a second notice in the **Federal Register**, broadening the scope of the inquiry to encompass the effectiveness of all the Rule's provisions. This notice invited comments on the Rule as a whole and announced a second public forum to discuss the provisions of the Rule other than the "do-not-call" provision.²² In response to this notice, the Commission received 92 comments from representatives of industry, law enforcement, and consumer groups, as well as from individual consumers.²³ The commenters uniformly praised the effectiveness of the TSR in combating the fraudulent practices that had plagued the telemarketing industry before the Rule was promulgated. They also strongly supported the Rule's continuing role as the centerpiece of federal and State efforts to protect consumers from interstate telemarketing fraud. However, commenters were less sanguine about the effectiveness of the Rule's provisions dealing with consumers' right to privacy, such as the "do-not-call" provision and the provision restricting calling times. They also identified a number of areas of continuing or developing fraud and abuse, as well as the emergence of new technologies that affect telemarketing for industry members and consumers alike.

Specifically, commenters opined that the TSR has been successful in reducing many of the abuses that led to the passage of the Telemarketing Act,²⁴ and that consumer confidence in the industry has increased and complaints about telemarketing practices have decreased dramatically since the Rule

became effective.²⁵ Commenters credited the TSR with these positive developments.²⁶ Commenters generally agreed that the Rule has been effective in protecting consumers, without unnecessarily burdening the legitimate telemarketing industry.²⁷ Commenters also agreed that the Rule has been an effective tool for law enforcement, especially because it allows individual States to obtain nationwide injunctive relief, or to collectively file a common federal action against a single telemarketer, thereby creating enforcement avenues not available under State law.²⁸ Commenters uniformly stressed that it is important to retain the Rule.²⁹

Commenters report that, despite the success of the Rule in correcting many of the abuses in the telemarketing industry, complaints about deceptive and abusive telemarketing practices continue to flow into the offices of consumer groups and law enforcement agencies.³⁰ As will be discussed in greater detail below, many of these complaints suggest that some of the TSR's provisions need to be amended to better address recurring abuses and to reach emerging problem areas.

Following the receipt of public comments, the Commission held a second forum on July 27 and 28, 2000 ("July Forum"), to discuss provisions of the Rule other than the "do-not-call" provision. At this forum, which was held at the FTC offices in Washington, DC, sixteen participants representing associations, individual businesses, consumer organizations, and law enforcement agencies engaged in a roundtable discussion of the effectiveness of the Rule.³¹

At both the "Do-Not-Call" Forum and the July Forum, the participants were encouraged to address each other's comments and questions, and were asked to respond to questions from Commission staff. The forums were open to the public, and time was reserved to receive oral comments from members of the public in attendance. Several members of the public spoke at each of the forums. Both proceedings were transcribed and placed on the public record. The public record to date, including the comments and the forum transcripts, has been placed on the Commission's website on the Internet.³² Based on the record developed during the Rule review proceeding, as well as the Commission's law enforcement experience, the Commission has determined to retain the Rule, but proposes to amend it.

D. Notice of Proposed Rulemaking

By this document, the Commission is proposing revisions to the TSR in order to ensure that consumers receive the protections that the Telemarketing Act, as amended, mandated. The proposed changes to the Rule are made pursuant to the rule review requirements of the Telemarketing Act,³³ and pursuant to the rulemaking authority granted to the Commission by that Act to protect consumers from deceptive and abusive practices,³⁴ including practices that may be coercive or abusive of the consumer's interest in protecting his or her privacy.³⁵ As discussed in detail below, the Commission believes the proposed modifications are necessary to ensure that the Rule fulfills this statutory mandate. As noted, the Commission has proposed changes throughout the Rule pursuant to section 1011 of the USA PATRIOT Act. The Commission invites written comment on the questions in Section IX to assist the Commission in determining whether the proposed modifications strike the appropriate balance, maximizing consumer protections while avoiding the imposition of unnecessary compliance burdens on the legitimate telemarketing industry.

NACAA, NACHA, NCL, NRF, PLP, Private Citizen, Promotion Marketing Association, and Verizon. References to the July Forum are cited as "Rule Tr." followed by the appropriate page designation.

³² The electronic portions of the public record can be found at www.ftc.gov/bcp/rulemaking/tsr/tsr-review.htm. The full paper record is available in Room 130 at the FTC, 600 Pennsylvania Avenue, N.W., Washington, DC 20580, telephone number: 1-877-FTC-HELP (1-877-382-4357).

³³ 15 U.S.C. 6108.

³⁴ 15 U.S.C. 6102(a)(1) and (a)(3).

³⁵ 15 U.S.C. 6102(a)(3)(A).

Utility Commissioners, North American Securities Administrators Association, National Consumers League, National Federation of Nonprofits, National Retail Federation, Private Citizen, and Promotion Marketing Association. References to the "Do-Not-Call" Forum transcript are cited as "DNC Tr." followed by the appropriate page designation.

²² 65 FR 10428 (Feb. 28, 2000). The Commission extended the comment period from April 27, 2000, to May 30, 2000. 65 FR 26161 (May 5, 2000).

²³ A list of the commenters, and the acronyms used to identify each commenter in this Notice, is attached as Appendix A. References to comments are cited by the commenter's acronym followed by the appropriate page designation.

²⁴ For example, complaints about "recovery" schemes declined dramatically, from a number 3 ranking in 1995 to a number 25 ranking in 1999, while complaints about credit repair have remained at a relatively low level since 1995 (steadily ranking about number 23 or 24 in terms of number of complaints received by the National Fraud Information Center ("NFIC")). NCL at 11. Unfortunately, complaints about advance fee loan schemes rose from a number 15 ranking in 1995 to the number 2 ranking in 1998, with about 80% of the advance fee loan companies reported to NFIC located in Canada. NCL at 12.

²⁵ ATA at 6 (consumers now have increased comfort with the telemarketing industry because of the TSR); ATA at 4-5 (according to NAAG, telemarketing complaints declined from the top consumer complaint in 1995 to number 10 in the first year that the Rule was in effect); KTW at 3 (TSR has added value, respect, and credibility to industry); MPA at 5-7 (complaints about magazine sales have decreased); NAA at 2; NCL at 2-3 (reports to NFIC of telemarketing fraud have decreased over the last five years from 15,738 in 1995 to 4,680 in 1999).

²⁶ ATA at 4-5; MPA at 5-7; NAA at 2.

²⁷ AARP at 2; ARDA at 2; ATA at 3-5; Bell Atlantic at 2; DMA at 2; ERA at 2, 6; Gardner at 1; ICFA at 1; KTW at 1; LSAP at 1; MPA at 4-6; NAA at 1-2; NASAA at 1; NACAA at 1; NCL at 2, 17; PLP at 1; Texas at 1; Verizon at 1.

²⁸ AARP at 2; MPA at 4, 6; NAAG at 1; NACAA at 1; NASAA at 1; NCL at 2; Texas at 1.

²⁹ AARP at 2; ARDA at 2; ATA at 3-5; Bell Atlantic at 2; DMA at 2; ERA at 2, 6; Gardner at 1; ICFA at 1; KTW at 1; LSAP at 1; MPA at 4-6; NAA at 1-2; NACAA at 1; NASAA at 1; NCL at 2, 17; PLP at 1; Texas at 1; Verizon at 1.

³⁰ See, e.g., LSAP at 2; NAAG at 4, 10-11; NCL at 5-6, 10, 15-16.

³¹ The selected participants were: AARP, ATA, DMA, DSA, ERA, Junkbusters, MPA, NAAG,

II. Overview

A. Changes in the Marketplace

Since the Rule was promulgated, the marketplace for telemarketing has changed in significant ways that impact the effectiveness of the TSR. The proposed amendments to the TSR, therefore, attempt to respond to and reflect these changes in the marketplace.

One of the changes in the way telemarketing is conducted relates to refinements in data collection and target marketing techniques that allow sellers to pinpoint with greater precision which consumers are most likely to be potential customers.³⁶ These developments offer the obvious benefit of making telemarketing more effective and efficient for sellers. However, enhanced data collection and target marketing also have led to increasing public concern about what is perceived to be increasing encroachment on consumers' privacy. These privacy concerns initially focused on the Internet. However, the privacy debate has expanded to include all forms of direct marketing. Consumers have demanded more power to determine who will have access to their time and attention while they are in their homes.³⁷ Indeed, a majority of the comments received during the Rule review focused on issues relating to consumer privacy and consumer sovereignty, rather than on fraudulent telemarketing practices.

One result of the call for greater consumer empowerment on issues of privacy has been a greater public and governmental focus on the "do-not-call" issue.³⁸ Related to the "do-not-call"

issue is the proliferation of technologies, such as caller identification service, that assist consumers in managing incoming calls to their homes.³⁹ Similarly, privacy advocates have raised concerns about technologies used by telemarketers (such as predictive dialers and deliberate blocking of Caller ID information) that hinder consumers' attempts to screen calls or make requests to be placed on a "do-not-call" list.

A second change in the marketplace involves payment methods available to consumers and businesses. The growth of electronic commerce and payment systems technology has led, and likely will continue to lead, to new forms of payment and further changes in the way consumers pay for goods and services they purchase through telemarketing. Examples of emerging payment devices include stored value cards and a host of Internet-based payment systems.⁴⁰ In addition, billing and collection systems of telephone companies, utilities, and mortgage lenders are becoming increasingly available to a wide variety of vendors of all types of goods and services.⁴¹

The type of payment device used by a consumer to pay for goods and services purchased through telemarketing determines the level of protection that a consumer has in contesting unauthorized charges and, in some instances, the kinds of dispute resolution proceedings available to the consumer should the goods or services be unsatisfactory. Of all the payment devices available to consumers to pay for telemarketing transactions, only credit cards afford limited liability for unauthorized charges and dispute resolution procedures pursuant to federal law.⁴² Therefore, because newly

available payment methods in many instances are relatively untested, and may not provide protections for consumers from unauthorized charges, consumers may need additional protections—and vendors heightened scrutiny—when using these new payment methods.

Finally, over the past five years, the practice of preacquired account telemarketing—where a telemarketer acquires the customer's billing information prior to initiating a telemarketing call or transaction—has increasingly resulted in complaints from consumers about unauthorized charges. Billing information can be preacquired in a variety of ways, including from a consumer's financial institution or utility company, from the consumer in a previous transaction, or from another source.⁴³ In many instances, the consumer is not involved in the transfer of the billing information and is unaware that the seller possesses it during the telemarketing call.⁴⁴

The related practice of "up-selling" has also become more prevalent in telemarketing.⁴⁵ Through this technique, customers are offered additional items for purchase after the completion of an initial sale. In the majority of up-selling scenarios, the

by federal law; however, Visa offers "'\$0 liability' protection in cases of fraud, theft or unauthorized card usage if reported within two business days of discovery," capping liability at \$50 after that. See www.visa.com/ct/debit/main.html. Similarly, Mastercard offers a zero liability policy when loss, theft, or unauthorized use is reported within 24 hours of discovery, and otherwise caps liability at \$50 "in most circumstances." See www.mastercard.com/general/zero_liability.html. In addition, the Commission's 900-Number Rule specifies dispute resolution procedures for disputes involving pay-per-call transactions. 16 CFR 308.7.

⁴³ See NAAG at 10. The review of the TSR was completed before the implementation of the FTC's Privacy Rule, 16 CFR Part 313, mandated by the Gramm-Leach-Bliley Act. 15 USC 6801–6810. The Privacy Rule prohibits financial institutions from disclosing, other than to a consumer reporting agency, customer account numbers or similar forms of access to any non-affiliated third party for use in direct marketing, including telemarketing. 16 CFR 313.12(a).

⁴⁴ *Id.*

⁴⁵ See generally Rule Tr. at 95–99, 107–111, 176–177. For the purposes of this Notice, the Commission intends the term "up-selling" to mean any instance when, after a company captures credit card, or other similar account, data to close a sale, it offers the customer a second product or service. For example, a consumer might initiate an inbound telemarketing call in response to a direct mail solicitation for a given product, and, after making a purchase, be asked if he or she would be interested in another product or service offered by the same or another seller. Sometimes the further solicitation is made by the same telemarketer, and sometimes the call is transferred to a different telemarketer. When the product or service is offered by the same seller, the practice is called internal up-selling; when a second seller is involved, the practice is termed external up-selling.

³⁶ See, e.g., DNC Tr. at 35–36; Rule Tr. at 70–81; ATA at 9 (industry goes to great lengths to identify only those consumers who are likely purchasers of their products). See also Robert O'Harrow, *A Hidden Toll on Free Calls: Lost Privacy—Not even unlisted numbers protected from marketers*, Washington Post, p. A1 (Dec. 19, 1999); Robert O'Harrow, *Horning In On Privacy: As Databases Collect Personal Details Well Beyond Credit Card Numbers, It's Time to Guard Yourself*, Washington Post, p. H1 (Jan. 2, 2002); *Dialing for Dollars: How to be Rid of Telemarketers*, Orlando Sentinel (Sept. 29, 1999), p. E2 (describing process of data mining and types of information gleaned by list brokers for sale to telemarketing firms); Carol Pickering, *They're Watching You: Data-Mining firms are watching your every move—and predicting the next one*, Business 2.0 (Feb. 2000), p. 135; and, *Selling is Getting Personal*, Consumer Reports, p. 16 (Nov. 2000).

³⁷ See, e.g., Bennett at 1; Biagiotti at 1; Card at 1; Conway at 1; Gilchrist at 1; Gindin at 1; Heagy at 1; Holloway at 1; Kelly at 1; Lee at 1; Runnels at 1; Ver Steegt at 1; and DNC Tr. at 83–130. See also O'Harrow, "A Hidden Toll" at A1 and "Horning In" at H1; and Gene Gray, *The Future of the Teleservices Industry—Are You Aware?*, 17 Call Ctr. Solutions (Jan. 1999) p. 90.

³⁸ See generally DNC Tr. See also George Raine, *Drive to Ban Unsolicited Sales Calls; Consumer Activist's Initiative Would Bar Unwanted E-mail*,

Telemarketing, The San Francisco Examiner, p.B–1 (Dec. 21, 1999). See also the discussion below of the proposed revision to the "do-not-call" provision, § 310.4(b)(1)(iii).

³⁹ See, e.g., DNC Tr. at 83–130. See also, Donna Halvorsen, *Home defense against telemarketing: Consumers reaching out to services that screen telemarketers*, Star Tribune (Minneapolis), p. 1A (July 17, 1999); Stephanie N. Mehta, *Playing Hide-and-Seek by Telephone*, Wall Street Journal, p. B–1 (Dec. 13, 1999); Stanley A. Miller II, *Privacy Manager Thwarts Telemarketers. Ameritech says 7 out of 10 "junk" calls do not get through to customers*, Milwaukee Journal, p. 1 (Aug. 10, 1999); and Ed Russo, *Phone Devices Put Chill on Cold Calls Screening, ID Altering Telemarketing*, Omaha World-Herald, p. 1a (Sept. 26, 1999).

⁴⁰ See NCL at 5. A more complete discussion of these new payment methods is included below in the section discussing express verifiable authorization, § 310.3(a)(3).

⁴¹ *Id.*; NAAG at 10; Rule Tr. 111; 254–257.

⁴² The Fair Credit Billing Act, 15 U.S.C. 1666 *et seq.* provides customers with dispute resolution rights when they believe a credit card charge is inaccurate. Debit cards are not similarly protected

seller or telemarketer already has received the consumer's billing information, either from the consumer or from another source. When the consumer is unaware that the seller or telemarketer already has his or her billing information, or that this billing information will be used to process a charge for goods or services offered in an "up-sell," the most fundamental tool consumers have for controlling commercial transactions—*i.e.*, withholding the information necessary to effect payment unless and until they have consented to buy—is ceded, without the consumers' knowledge, to the seller before the sales pitch ever begins.

Cognizant of these changes to the marketplace, and their potentially deleterious effect on consumers, the Commission proposes to amend the TSR.

B. Summary of Proposed Changes to the Rule

The highlights of the Commission's proposal to amend the TSR are summarized below. In brief, the Commission proposes:

- To supplement the current company-specific "do-not-call" provision with an additional provision that will empower a consumer to stop calls from all companies within the FTC's jurisdiction by placing his or her telephone number on a central "do-not-call" registry maintained by the FTC;
- To permit a consumer who places his or her telephone number on the central "do-not-call" registry to receive telemarketing sales calls from an individual company to whom the consumer has provided his or her express verifiable authorization to make telemarketing calls to his or her telephone.
- To modify § 310.3(a)(3) to require express verifiable authorization for all transactions in which the payment method lacks dispute resolution protection or protection against unauthorized charges similar or comparable to those available under the Fair Credit Billing Act and the Truth in Lending Act.
- To delete § 310.3(a)(3)(iii), the provision allowing a telemarketer to obtain express verifiable authorization by sending written confirmation of the transaction to the consumer prior to submitting the consumer's billing information for payment;
- To require, in the sale of credit card protection, the disclosure of the legal limits on a cardholder's liability for unauthorized charges;
- To prohibit misrepresenting that a consumer needs offered goods or

services in order to receive protections he or she already has under 15 U.S.C. 1643 (limiting a cardholder's liability for unauthorized charges on a credit card account);

- To mandate, explicitly, that all required disclosures in § 310.3(a)(1) and § 310.4(d) be made truthfully;
- To expand upon the current prize promotion disclosures to include a statement that any purchase or payment will not increase a consumer's chances of winning;
- To prohibit the practices of receiving any consumer's billing information from any third party for use in telemarketing, or disclosing any consumer's billing information to any third party for use in telemarketing;
- To prohibit additional practices: blocking or otherwise subverting the transmission of the name and/or telephone number of the calling party for caller identification service purposes; and denying or interfering in any way with a consumer's right to be placed on a "do-not-call" list;
- To narrow certain of the Rule's exemptions;
- To clarify that facsimile transmissions, electronic mail, and other similar methods of delivery are direct mail for purposes of the direct mail exemption; and
- To modify various provisions throughout the Rule to effectuate expansion of the Rule's coverage to include charitable solicitations, pursuant to Section 1011 of the USA PATRIOT Act.

III. Analysis of Comments and Discussion of Proposed Revisions

The proposed amendments to the Rule do not alter § 310.7 (Actions by States and Private Persons), or § 310.8 (Severability).

A. Section 310.1—Scope of Regulations in This Part

The amendment of the Telemarketing Act by section 1011 of the USA PATRIOT Act is reflected in this section of the TSR. Section 310.1 of the proposed Rule states that "this part of the CFR implements the Telemarketing Act,⁴⁶ as amended by the USA PATRIOT Act."

During the comment period that occurred prior to enactment of the USA PATRIOT Act, several commenters recommended that the Rule's reach be expanded or clarified.⁴⁷ The impact of

the USA PATRIOT Act amendments on the scope of coverage of the TSR, the commenters' proposals, and the Commission's reasoning in accepting or rejecting the commenters' proposals, are discussed below.

Effect of the USA PATRIOT Act. As noted above, section 1011(b)(3) of the USA PATRIOT Act amends the definition of "telemarketing" that appears in the Telemarketing Act, 15 U.S.C. 6306(4), by inserting the underscored language:

The term "telemarketing" means a plan, program, or campaign which is conducted to induce purchases of goods or services or a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones and which involves more than one interstate telephone call * *

In addition, Section 1011(b)(2) adds a new section to the Telemarketing Act requiring the Commission to include in the "abusive telemarketing acts or practices" provisions of the TSR:

a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.

Finally, section 1011(b)(1) amends the "deceptive telemarketing acts or practices" provision of the Telemarketing Act, 15 U.S.C. 6102(a)(2), by inserting the underscored language:

The Commission shall include in such rules respecting deceptive telemarketing acts or practices a definition of deceptive telemarketing acts or practices which *shall include fraudulent charitable solicitations and which may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering.*

Notwithstanding its amendment of these provisions of the Telemarketing Act, neither the text of section 1011 nor its legislative history suggest that it amends Sections 6105(a) of the Telemarketing Act—the provision which incorporates the jurisdictional limitations of the FTC Act into the Telemarketing Act and, accordingly, the TSR. Section 6105(a) states:

Except as otherwise provided in sections 6102(d) (with respect to the SEC), 6102(e) (Commodity Futures Trading Commission), 6103 (state attorney general actions), and 6104 (private consumer actions) of this title, this chapter shall be enforced by the Commission under the Federal Trade Commission Act (15 U.S.C. § 41 et seq.).

⁴⁶ 15 U.S.C. 6101–6108. The Telemarketing Act was amended by the USA PATRIOT Act on October 25, 2001. Pub. L. 107–56 (Oct. 25, 2001).

⁴⁷ See, e.g., DMA at 4; KTW at 4; LSAP at 1; NAAG at 19; NACAA at 2; NCL at 5, 7, 10; Telesource at 4.

Consequently, no activity which is outside of the jurisdiction of that Act shall be affected by this chapter. (Emphasis added.)⁴⁸

One type of "activity which is outside the jurisdiction" of the FTC Act, as interpreted by the Commission and federal court decisions, is that of non-profit entities. Sections 4 and 5 of the FTC Act, by their terms, provide the Commission with jurisdiction only over persons, partnerships or "corporations organized to carry on business for their own profit or that of their members."⁴⁹

Reading the amendments to the Telemarketing Act effectuated by section 1011 of the USA PATRIOT Act together with the unchanged sections of the Telemarketing Act compels the conclusion that for-profit entities that solicit charitable donations now must comply with the TSR, although the Rule's applicability to charitable organizations themselves is unaffected.⁵⁰ The USA PATRIOT Act brings the Telemarketing Act's jurisdiction over charitable solicitations in line with the jurisdiction of the Commission under the FTC Act, by

expanding the Rule's coverage to include not only the sale of goods or services but also charitable solicitations by for-profit entities on behalf of nonprofit organizations.⁵¹

Commenters' Proposals. A number of commenters urged the expansion of the Rule's scope beyond its current boundaries. For example, LSAP strongly suggested that the Commission amend the Rule to provide additional protection for consumers in light of the convergence of the banking, insurance, and securities industries, noting that this phenomenon has resulted in increased sharing of information between these entities, including customers' billing information.⁵² Similarly, NCL noted that distinctions between common carriers and other vendors are becoming less relevant as deregulation, detariffing, and mergers have led to increased competition among all types of entities to provide similar products and services.⁵³ NCL urged that consumers receive the same protections in all commercial telemarketing, regardless of the type of entity involved.⁵⁴

The jurisdictional reach of the Rule is set by statute, and the Commission has no authority to expand the Rule beyond those statutory limits. Thus, absent amendments to the FTC Act, the Commission is limited with regard to any additional protections it might provide in response to acts and practices resulting from the convergence of entities that are otherwise exempt from the Commission's jurisdiction.

In a similar vein, some commenters urged the Commission to clarify the Rule's applicability to non-profit

entities.⁵⁵ As explained above, although section 1011 of the USA PATRIOT Act expanded the reach of the TSR by enlarging the definition of "telemarketing" to encompass not only calls made to induce purchases of goods or services, but also those to solicit charitable contributions, it did not change the fact that the Telemarketing Act and the TSR do not apply to activities excluded from the FTC's reach by the FTC Act.

It should be noted, however, that although the Commission's jurisdiction is limited with respect to the entities exempted by the FTC Act, the Commission has made clear that the Rule does apply to any third-party telemarketers those entities might use to conduct telemarketing activities on their behalf.⁵⁶ As the Commission stated when it promulgated the Rule, "[t]he Final Rule does not include special provisions regarding exemptions of parties acting on behalf of exempt organizations; where such a company would be subject to the FTC Act, it would be subject to the Final Rule as well."⁵⁷

NACAA suggested that the Commission clarify that the Rule applies to international calls made by telemarketers located outside the United States who call consumers within the United States. The Commission believes that its enforcement record leaves no doubt that sellers or telemarketers located outside the United States are subject to the Rule if they telemarket their goods or services to U.S. consumers.⁵⁸

NCL and KTW suggested that the complementary use of the Internet and telephone technologies necessitates

⁴⁸ Section 6105(b) reinforces the point made in Section 6105(a), as follows:

The Commission shall prevent any person from violating a rule of the Commission under section 6102 of this title in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this chapter. Any person who violates such rule shall be subject to the penalties and entitled to the same privileges and immunities provided in the Federal Trade Commission Act in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this chapter. (Emphasis added.)

⁴⁹ Section 5(a)(2) of the FTC Act states: "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a)(2). Section 4 of the Act defines "corporation" to include: "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members * * *" 15 U.S.C. 44 (emphasis added).

⁵⁰ A fundamental tenet of statutory construction is that "a statute should be read as a whole, * * * and that provisions introduced by the amendatory Act should be read together with the provisions of the original section that were * * * left unchanged * * * as if they had been originally enacted as one section." *Sutherland Stat. Constr.* § 22.34, p. 297 (5th ed.), citing, *inter alia*, *Brothers v. First Leasing*, 724 F.2d 789 (9th Cir. 1984); *Republic Steel Corp. v. Costle*, 581 F.2d 1228 (6th Cir. 1978); *American Airlines, Inc., v. Remis Indus., Inc.*, 494 F.2d 196 (2d Cir. 1974); *Kirchner v. Kansas Turnpike Auth.*, 336 F.2d 222 (10th Cir. 1964); *National Center for Preservation Law v. Landrieu*, 496 F. Supp. 716 (D. SC. 1980); *Conoco, Inc. v. Hodel*, 626 F. Supp. 287 (D. Del. 1986); *Palardy v. Horner*, 711 F. Supp. 667 (D. Mass. 1989). Thus, in constructing a statute and its amendments, "[e]ffect is to be given to each part, and they are to be interpreted so that they do not conflict." *Id.*

⁵¹ While First Amendment protection for charities extend to their for-profit solicitors, *e.g.*, *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781 (1988), this narrowly tailored proposed rule furthers government interests that justify the regulation. One such interest is prevention of fraud. *E.g.*, *Sec. of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 969 n.16 (1984); *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1231, 1232 (4th Cir. 1989), *cert. denied*, 495 U.S. 904 (1990). Another is protection of home privacy. *See, e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (targeted picketing around a home); *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, Ohio*, 240 F.3d 553 (6th Cir.), *cert. granted on other grounds*, ___ U.S. ___ (2001) (upholding law, based on both privacy and fraud grounds, forbidding canvassing of residents who filed a No Solicitation Form with mayor's office).

⁵² *See* LSAP at 1.

⁵³ *See* NCL at 4-5, 7, 15.

⁵⁴ *Id.* at 5, 15. NCL also raised concerns about "cramming," which refers to the practice of placing unauthorized charges on a telephone subscriber's telephone bill. *Id.* at 7. This practice is being considered in connection with the review of the Commission's Pay-Per-Call Rule, *see*, 63 FR 58524, (Oct. 30, 1998); thus, it need not be treated in the context of the TSR.

⁵⁵ NAAG at 19; NACAA at 2; NFN at 1.

⁵⁶ For example, although the Rule does not apply to the activities of banks, savings and loan institutions, certain federal credit unions, or to the business of insurance to the extent that such business is regulated by State law, any non-exempt telemarketer calling on behalf of one of these entities would be covered by the Rule. *See* 60 FR at 43843; FTC/Direct Mktg. Ass'n., *Complying with the Telemarketing Sales Rule* (Apr. 1996), p. 12.

⁵⁷ 60 FR at 43843. This discussion also addresses NACAA's request that the Commission clarify that it has jurisdiction over telemarketing activities involving the switching of consumers' long-distance service. NACAA at 2. The TSR covers the telemarketing of long-distance service to the extent that the telemarketing is conducted by entities that are subject to the FTC Act.

⁵⁸ *See, e.g.*, *FTC v. Win USA*, No. C98-1614Z (W.D. Wash. filed Nov. 13, 1998); *FTC v. Pacific Rim Pools Int'l*, No. C97-1748, (W.D. Wash. filed Nov. 7, 1997) (Order for Permanent Injunction and Final Judgment entered on Jan. 12, 1999); *FTC v. The Tracker Corp. of America*, No. 1:97-CV-2654-JEC (N.D. Ga. filed Sept. 11, 1997); *FTC v. 9013-0980 Quebec, Inc.*, No. 1:96 CV 1567 (N.D. Ohio filed July 18, 1996); and *FTC v. Ideal Credit Referral Svcs., Ltd.*, No. C96-0874, (W.D. Wash. filed June 5, 1996).

broadening the scope of the Rule to cover online solicitations.⁵⁹ In the original rulemaking, the Commission stated that it lacked sufficient information to support coverage of online services under the Rule,⁶⁰ but noted that such media were subject to the Commission's jurisdiction under the FTC Act. Indeed, since 1995, the Commission has brought more than 200 actions against entities who have used the Internet to defraud consumers.⁶¹

The Commission believes that the issue of whether there is a need for standards for Internet or online advertising and marketing is distinct from the issues relevant to telemarketing. E-commerce issues are best considered within the specific context of business practices in the realm of electronic commerce. In fact, the Commission has begun considering these issues by conducting an inquiry on how to apply its rules and guides to online activities, and issuing a staff working paper that provides guidelines for appropriate disclosures when marketing online.⁶² The Commission believes that the body of case law that has been developed on Internet fraud and deception, coupled with its published business education

materials⁶³ for online advertising disclosures, provide a developing source of guidance for promoting and marketing on the Internet.

B. Section 310.2—Definitions

The Commission received comments on several of the Rule's definitions. Each suggested change and the Commission's reasoning in accepting or rejecting that change is discussed below.

The proposed Rule retains the following definitions from the original Rule unchanged, apart from renumbering: "acquirer," "attorney general," "cardholder," "Commission," "credit," "credit card," "credit card sales draft," "credit card system," "customer," "investment opportunity," "person," "prize," "prize promotion," "seller," and "State."

In addition, as discussed in detail below, the Commission proposes modifying the definition of "outbound telephone call," and also proposes adding several new definitions: "billing information," "caller identification service," "express verifiable authorization," "Internet services," and "Web services."

Further, in order to implement the amendments to the Telemarketing Act made by section 1011 of the USA PATRIOT Act, the Commission proposes adding certain definitions to the Rule, and modifying others. Section 1011(b)(3) of the USA PATRIOT Act amends the definition of "telemarketing" in the Telemarketing Act, 15 U.S.C. 6306(4), by inserting the underscored language:

The term "telemarketing" means a plan, program, or campaign which is conducted to induce purchases of goods or services or a *charitable contribution, donation, or gift of money or any other thing of value*, by use of one or more telephones and which involves more than one interstate telephone call * * * (emphasis added).

The proposed Rule's definition of "telemarketing" incorporates this change. To fully implement this definitional change, the proposed Rule adds definitions of the terms "charitable contribution" and "donor," discussed below. In addition, the existing definition of "telemarketer" requires modification to reflect the expanded reach of the Rule to cover telephone solicitations of charitable contributions pursuant to the USA PATRIOT Act. Accordingly, the definition of "telemarketer" now includes the analogous phrase "or donor" following each appearance of the term "customer" or "consumer." Similarly, in two of the

new proposed definitions, "billing information," and "express verifiable authorization," the analogous phrase "or donor" has also been included following each appearance of the terms "customer" or "consumer."

Another proposed global change necessitated by the USA PATRIOT Act is the modification of several of the Rule's existing definitions to reflect the expansion of the Rule's coverage to include the solicitation via telemarketing of "charitable contributions." The affected definitions, "material," "merchant," "merchant agreement," and "outbound telephone call," now include the analogous phrase "or charitable contributions" following each occurrence of the phrase "goods or services."

Section 310.2(c)—"Billing information"

The Commission proposes adding a definition of "billing information." This term comes into play in proposed § 310.3(a)(3), which would add "billing information" to the items that must be recited in obtaining a consumer's express verifiable authorization. It is also implicated in proposed § 310.4(a)(5), which would prohibit the abusive practices of receiving any consumer's billing information from any third party for use in telemarketing, or disclosing any consumer's billing information to any third party for use in telemarketing.

As explained further below, in the section discussing proposed changes to § 310.3(a)(3), the Commission proposes to require that "billing information" be recited as part of the process of obtaining a consumer's or donor's express verifiable authorization. Under the original Rule, if the telemarketer opted to seek oral authorization for a demand draft, the Rule required that the telemarketer tape record the customer's oral authorization, as well as the provision of the following information: the number, date(s) and amount(s) of payments to be made, the date of authorization, and a telephone number for customer inquiry that is answered during normal business hours. The proposed Rule would expand the express verifiable authorization requirement to other payment methods, and would add to this list of disclosures "billing information," *i.e.*, the identification of the consumer's or donor's specific account and account number to be charged in the particular transaction, to ensure that consumers and donors know which of their accounts will be billed. A definition of "billing information" would clarify sellers' and telemarketers' obligations under this proposed revision.

⁵⁹ See KTW at 4; NCL at 7.

⁶⁰ 60 FR at 30411.

⁶¹ Included among the FTC's enforcement actions against Internet fraud and deception are cases attacking unfair and deceptive use of "dialer programs." NCL expressed concern about these programs, which are downloadable software programs that consumers access via the Internet. Once a dialer program is downloaded, it disconnects a consumer's computer modem from the consumer's usual Internet service provider, dials an international phone number in a country with a high per-minute telephone rate, and reconnects the consumer's modem to the Internet from some overseas location, typically opening at an adult website. Line subscribers—the consumers responsible for paying phone charges on the telephone lines—then begin incurring charges on their phone lines for the remote connection to the Internet, typically at the rate of about \$4.00 per minute. The charges for the Internet-based adult entertainment are represented on the consumer's phone bill as international telephone calls. Under its Section 5 authority, the Commission has brought cases against videotext providers who use these dialer programs in an unfair or deceptive manner. See, e.g., *FTC v. Hillary Sheinkin*, No. 2–00–3636–18 (D.S.C. filed Nov. 18, 2000); *FTC v. Ty Anderson*, No. C00–1843P (W.D. Wash. filed Oct. 27, 2000); *FTC v. Verity Int'l, Ltd.*, No. 7422 (S.D.N.Y. filed Oct. 2, 2000); *FTC v. Audiotex Connection, Inc.*, No. 97–0726 (E.D.N.Y. filed Feb. 13, 1997).

⁶² 63 FR 24996 (May 6, 1998) (public comments and the workshop transcript for the proceeding are available at www.ftc.gov/bcp/rulemaking/elecmedia/index.html); *FTC, Dot Com Disclosures: Information About Online Advertising* (Staff Working Paper, May, 2000). See also, *FTC, Advertising and Marketing on the Internet: Rules of the Road* (September, 2000), a guide to complying with FTC rules and guides when advertising and marketing on the Internet.

⁶³ See *FTC, Dot Com Disclosures*; *FTC, Advertising and Marketing on the Internet*.

As explained in the section discussing proposed § 310.4(a)(5)—which would prohibit receiving from any person other than the consumer or donor for use in telemarketing any consumer's or donor's "billing information," or disclosing any such "billing information" to any person for use in telemarketing—the inclusion of this provision banning trafficking in "billing information" makes it necessary to provide in the Rule a definition of that term. The proposed Rule defines "billing information" as any data that provides access to a consumer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card. The Commission intends this term to include information such as a credit or debit card number and expiration date, bank account number, utility account number, mortgage loan account number, customer's or donor's date of birth or mother's maiden name, and any other information used as proof of authorization to effect a charge against a person's account.

Section 310.2(d)—“Caller Identification Service”

The Commission proposes adding a definition of "caller identification service." As described, below, in the discussion of § 310.4(a)(6), the Commission proposes specifying that it is an abusive practice to block, circumvent, or alter the transmission of, or direct another person to block, circumvent, or alter the transmission of, the name and/or telephone number of the calling party for caller identification service purposes, provided that it shall not be a violation to substitute the actual name of the seller and the seller's customer service number, which is answered during regular business hours, for the phone number used in making the call. In order to clarify what is prohibited under this proposed provision, the Commission has defined "caller identification service" as "a service that allows a telephone subscriber to have the telephone number and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone." The Commission intends the proposed definition of "caller identification service" to be sufficiently broad to encompass any existing or emerging technology that provides for the transmission of calling party information during the course of a telephone call.

Section 310.2(f)—“Charitable Contribution”

The Commission proposes adding a definition of "charitable contribution." Section 1011 of the USA PATRIOT Act amends the Telemarketing Act to specify as an abusive practice the failure of "any person engaged in telemarketing for the solicitation of *charitable contributions, donations, or gifts of money or any other thing of value*" to make certain prompt and clear disclosures. The Commission has determined that the single term "charitable contribution," defined for the purposes of the Rule to mean "any donation or gift of money or any other thing of value" succinctly captures the meaning intended by Congress. Therefore, the Commission proposes to add this definition to the Rule.

The Commission has also determined that this definition should explicitly clarify that the definition and, accordingly, the entire Rule, is inapplicable to political contributions, including contributions to political parties and candidates. Calls to solicit such contributions are outside the scope of the Rule because they involve neither purchases of goods or services nor solicitations of charitable contributions, donations or gifts, and thus fall outside the statutory definition of "telemarketing." 15 U.S.C. 6106(4). Thus, the Commission proposes to exclude from the definition of "charitable contribution" any contributions to "political clubs, committees, or parties."⁶⁴ Additionally, as a matter of policy, and following the example of many state laws, the Commission also proposes to exclude from the definition contributions to constituted religious organizations or groups affiliated with and forming an integral part of the organization where no part of the net income inures to the direct benefit of any individual, and which has received a declaration of current tax exempt status from the United States government.⁶⁵ The Commission believes that the risk of actual or perceived infringement on a paramount societal value—free and unfettered religious discourse—likely outweighs the benefits of protection from fraud and abuse that might result from including contributions to such organizations within the scope of the definition.

⁶⁴ Similarly, a number of state statutes regulating charitable solicitations exempt political organizations. *E.g.*, Fla. Stat. ch. 496.403 (2000). Ill. Rev. Stat. ch. 23 para. 5103(2000).

⁶⁵ *See, e.g.*, Ga. Code Ann. Sec. 43–17–2(2); Ill. Rev. Stat. ch. 14 para. 54 (2000).

Section 310.2(m)—“Donor”

As part of its implementation of section 1011 of the USA PATRIOT Act, the Commission proposes adding a definition of "donor." This Act's expansion of the TSR's coverage to encompass charitable solicitations necessitates the inclusion of a term in the Rule to denote a person solicited to make a charitable contribution. Throughout the original Rule, the terms "customer" and "consumer" are used to refer to those subject to a solicitation to purchase goods or services by a seller or telemarketer. The meaning of these terms cannot reasonably be stretched to include persons being asked to make a charitable contribution. Therefore, the Commission proposes adding to the Rule an analogous term—"donor"—for use in the context of charitable solicitations. Under the proposed definition, a person need not actually make a donation or contribution to be a "donor." He or she need only be solicited to make a charitable contribution. (In this respect, the definition tracks the definition of "customer"—"any person who is or may be required to pay for goods or services * * *".)

Section 310.2(n)—“Express Verifiable Authorization”

The Commission proposes adding a definition of "express verifiable authorization" because the proposed Rule expands the use of the term beyond its meaning in the original Rule. The term "express verifiable authorization" comes into play in the proposed Rule in two distinct provisions: § 310.3(a)(3), requiring the express verifiable authorization of a customer or donor to a charge when certain payment methods are used; and § 310.4(b)(1)(iii)(b), which makes it a violation of the Rule to call any consumer or donor who has placed himself or herself on the national "do-not-call" list absent that consumer's or donor's express verifiable authorization. In order to ensure clarity, the term "express verifiable authorization" has been defined to mean "the informed, explicit consent of a consumer or donor, which is capable of substantiation." The specific means of obtaining express verifiable authorization for a charge are listed in § 310.3(a)(3)(i)–(ii) and the specific means of obtaining express verifiable authorization to place a call to a consumer or donor who is on the national "do-not-call" list is found in § 310.4(b)(1)(iii)(B)(1)–(2).

Section 310.2(m)—“Internet Services”

The Commission also proposes adding a definition of “Internet services” because of the proposed modification of the business-to-business exemption, § 310.6(g), to make the exemption unavailable to telemarketers of Internet services, a line of business that is increasingly pursued by fraudulent telemarketers. Thus, the Commission proposes that the term “Internet services” be defined as “the provision, by an Internet Service Provider, or another, of access to the Internet.” The Commission intends for this term to encompass the provision of whatever is necessary to gain access to the Internet, including software and telephone or cable connection, as well as other goods or services providing access to the Internet. Specifically, the term includes provision of access to the Internet, or any component thereof, such as electronic mail, the World Wide Web, websites, newsgroups, Internet Relay Chat or file transfers.

Section 310.2(r)—“Outbound Telephone Call”

The Commission proposes modifying the Rule’s definition of “outbound telephone call”⁶⁶ to clarify the Rule’s coverage in two situations: (1) When, in the course of a single call, a consumer or donor is transferred from one telemarketer soliciting one purchase or charitable contribution to a different telemarketer soliciting a different purchase or contribution, such as in the case of “up-selling,”⁶⁷ and (2) when a single telemarketer solicits purchases or contributions on behalf of two separate sellers or charitable organizations (or some combination of the two). Under the proposed definition, when a call, whether originally initiated by a consumer/donor or by a telemarketer, is transferred to a separate telemarketer or seller for the purpose of inducing a purchase or charitable contribution, the transferred call shall be considered an “outbound telephone call” under the Rule. Similarly, if a single telemarketer solicits for two or more distinct sellers or charitable organizations in a single call, the second (and any subsequent) solicitation shall be considered an “outbound telephone call” under the Rule.

The Commission proposes this change in response to evidence in the Rule review record that the practice of “up-selling” is becoming increasingly common.⁶⁸ The Commission believes

that in external up-selling, when calls are transferred from one seller or telemarketer to another, or when a single telemarketer solicits on behalf of two distinct sellers, it is crucial that consumers or donors clearly understand that they are dealing with separate entities. In the original Rule, the Commission determined that a disclosure of the seller’s identity was necessary in every outbound call to enable the customer to make a fully-informed purchasing decision.⁶⁹ In the case of a call transferred by one telemarketer to another to induce the purchase of goods or services, or one in which a single telemarketer offers the goods or services of two separate sellers, it is equally important that the consumer know the identity of the second seller, and that the purpose of the second call is to sell goods or services. Such information is equally material to a donor’s decision in the context of solicitations for charitable contributions. The Commission has determined that treating the transferred call as a separate outbound call will ensure that consumers receive the disclosures required by § 310.4(d) and that donors receive the disclosures proposed by § 310.4(e),⁷⁰ thereby clarifying the nature of the transaction for the consumer or donor, and providing him or her with material information necessary to make an informed decision about the solicitation(s) being made.⁷¹

⁶⁹ The Act specified that the Commission include in the Rule a requirement that the telemarketer “promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods and services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services.” 15 U.S.C. 6102(a)(3)(c). In the original rulemaking, the Commission determined that two additional disclosures were necessary: (1) The identity of the seller, and (2) that no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered. 16 CFR 310.4(d)(1) and (4). Section 310.4(e)(1) of the proposed Rule imposes an analogous requirement to disclose the identity of the charitable organization on behalf of whom an outbound telemarketing call is being made to solicit charitable contributions.

⁷⁰ In particular, consumers and donors need to understand that they are dealing with more than one seller or charitable organization, and the identity of each. It is also important that consumers understand that the purpose of the second transaction is to solicit sales goods or services, or charitable contributions (whichever is applicable).

⁷¹ Additionally, the disclosures in § 310.3(a)(1) (or of proposed § 310.3(a)(4) as to charitable solicitations) would, of course, also have to be made by each telemarketer. In fact, as discussed, below, in the discussion of § 310.3, the Commission believes that even when a single telemarketer acts on behalf of two sellers or charitable organizations, it is necessary for these transactions to be treated as separate for the purposes of complying with the TSR. Therefore, in such an instance, the telemarketer should take care to ensure that the

In addition, the Commission wishes to clarify that a transferred call or a solicitation by a single telemarketer on behalf of a separate seller or charitable organization is, for the purposes of the Rule, a separate transaction. Because it is a separate transaction, it will be covered by the Rule if the separate seller or charitable organization is subject to the Commission’s jurisdiction. Thus, if an initial inbound call is exempt from the Rule’s coverage—for example, under the § 310.6(e) exemption for calls in response to general media advertising—but the consumer or donor is transferred to another seller or telemarketer, or if a second (or subsequent) seller’s or charitable organization’s solicitation is made by a single telemarketer, the transaction with the second solicitation will *not* be exempt under the general media exemption. On the contrary, the Commission will consider this to be a separate transaction and will make a separate determination whether that second seller or telemarketer falls within the FTC’s jurisdiction and thus is subject to all of the Rule’s requirements.

Section 310.2(aa)—“Telemarketing”

As explained above, the USA PATRIOT Act’s amended definition of “telemarketing” has been incorporated into the definition of “telemarketing” in the Rule.

Section 310.2(bb)—“Web Services”

The Commission proposes adding a definition of “Web services” because of the proposed amendment to the business-to-business exemption, § 310.6(g), to make it unavailable to sellers and telemarketers of Web services, a line of business demonstrated by the Commission’s recent law enforcement experience to be an area of particular abuse by fraudulent telemarketers. The Commission proposes that the term “Web services” be defined as “designing, building, creating, publishing, maintaining, providing, or hosting a website on the Internet.” The Commission intends for this term to encompass any and all services related to the World Wide Web.

customer/donor is provided with the necessary disclosures for the primary solicitation, as well as any further solicitation. Similarly, express verifiable authorization for each solicitation, when required, would be necessary. Of course, even absent the Rule’s requirement to obtain express verifiable authorization, telemarketers must always take care to ensure that consumers’ or donors’ explicit consent to the purchase or contribution is obtained.

⁶⁶ The definition of “outbound telephone call” is in § 310.2(n) of the original Rule.

⁶⁷ See n.45 for an explanation of this term.

⁶⁸ See Rule Tr. at 95–99, 107–111, 176–177.

Other Recommendations by Commenters Regarding Proposed Definitions

Credit terms. NCL recommended that changes in the way consumers pay for goods and services they purchase via telemarketing may necessitate changes in the Rule.⁷² NCL further suggested that, if the Rule were amended to address telephone billing and other new forms of electronic payment, the definitions of “credit card,” “merchant,” and “merchant agreement” might need to be changed to ensure coverage of these new or alternative billing methods.⁷³ The Commission agrees that consumers need additional protection in certain telemarketing sales situations, but has effected these protections through proposed changes to the express verifiable authorization provision.⁷⁴ Therefore, the definitions of “credit card,” “merchant,” and “merchant agreement” are retained unchanged.

Telemarketing. DSA recommended that the definition of “telemarketing” be changed to make the Rule applicable only when more than one telephone is used in conducting a plan, program, or campaign to induce the purchase of goods or services.⁷⁵ The Commission’s definition of telemarketing, which states that telemarketing occurs when *one or more* telephones are used to induce the purchase of goods or services, tracks verbatim the Telemarketing Act.⁷⁶ Even if it is assumed that the Commission has authority to deviate from the very specific definition mandated by the statute, the Commission believes that there is no justification to do so. Limiting the definition as DSA proposed would unnecessarily restrict the application of the Rule, which currently governs interstate calls which are part of a plan, program or campaign to induce the purchase of goods or services or to induce charitable contributions, even if only a single phone is used to place or receive calls. Therefore, the Commission has determined not to modify the definition in this manner.

Transactions Involving “Preacquired Account Telemarketing.” LSAP recommended that new definitions be added for the terms “account,” “account holder,” “inbound telephone call,” and “preacquired account number,” to address the practice of preacquired

account telemarketing.⁷⁷ The Commission agrees that a definition of something like “account” would be helpful in clarifying the Rule’s coverage, but has determined that the broader term “billing information” better serves the purpose. As set forth above, the definition of “billing information” is designed to ensure that sellers and telemarketers understand their new obligations under proposed § 310.4(a)(5), which prohibits as an abusive practice the receipt for use in telemarketing from any person other than the consumer or donor any consumer’s or donor’s billing information, and further prohibits disclosure of any consumer’s or donor’s billing information to any person for use in telemarketing.⁷⁸ Therefore, because it has addressed concerns about preacquired account telemarketing in other ways, the Commission believes that it is unnecessary to add definitions of “account holder,” “inbound telephone call” and “preacquired account number.”

Online solicitation. NCL recommended that the scope of the Rule be expanded to cover online solicitations (discussed above in the section addressing proposed revisions to § 310.1), and that a definition of “online solicitation” be added to the Rule. For the reasons discussed above, the Commission has decided not to expand the Rule’s coverage to online solicitations. Therefore, a definition of “online solicitation” is not necessary.

Free Trial Offers. NCL recommended that the Commission include definitions of “free offer” and “trial offer” if the Rule were amended to include specific requirements for sellers and telemarketers who make such offers. Several commenters noted that the practice of making a free trial offer has generated significant numbers of consumer complaints when those offers are coupled with preacquired-account telemarketing.⁷⁹ The Rule review record and the enforcement experience of the Commission and other law enforcement agencies confirm that consumers are often confused about their obligations when a product or service is offered to them for a trial period at no cost and the seller or telemarketer already possesses the consumer’s billing information.⁸⁰

As noted by NAAG, in many preacquired account telemarketing solicitations, products and services (often buyers’ clubs) are marketed through the use of free trial offers, which are presented to consumers as “low involvement marketing decisions.”⁸¹ Consumers are asked merely to consent to the mailing of materials about the offer. Consumers frequently do not realize that the seller or telemarketer already has their billing information in hand and, instead, mistakenly believe they must take some action before they will be charged—*i.e.*, that they are under no obligation unless they take some additional affirmative step to consent to the purchase. When such free trial offers are coupled with preacquired account telemarketing, telemarketers often use the preacquired billing information to charge the consumers at the end of the trial period, even when consumers have taken no additional steps to assent to a purchase or authorize the charge, and have never provided any billing information themselves.⁸²

The proposed Rule addresses concerns about free trial offers that are marketed in conjunction with preacquired-account telemarketing by banning the receipt of the consumer’s billing information for use in telemarketing from any source other than the consumer.⁸³ The ban on the receipt of customer billing information from any source other than the consumer should curtail abuses that have occurred when free trial offers are made in conjunction with preacquired account telemarketing by effectively eliminating the trade in preacquired billing information. Free trial offers that are made to consumers via telemarketing, but absent the use of preacquired billing information, would, of course, remain subject to the Rule’s requirements, including the disclosure requirements in § 310.3(a)(1) and § 310.4(d), and the prohibition on misrepresentations in § 310.3(a)(2). Pursuant to these provisions, any seller or telemarketer offering goods or services on a free trial basis would be required to disclose, among other things, the total cost and quantity of the goods or services and that the customer’s account will be automatically charged or debited at the end of the free trial period, if such is the

⁷² See NCL at 9.

⁷³ *Id.*

⁷⁴ § 310.3(a)(3). A complete analysis of the proposed revisions to this section can be found below in the discussion of § 310.3(a)(3).

⁷⁵ See DSA at 6.

⁷⁶ 15 U.S.C. 6106(4). At the end of the definition, however, the Rule adds a clarifying sentence not present in the statute.

⁷⁷ See LSAP at 2–3.

⁷⁸ See the section discussing § 310.4(a)(5), below, for a complete analysis of this provision.

⁷⁹ See NACAA at 2; NAAG at 11–12, 16–17; NCL at 5–6.

⁸⁰ See, e.g., *FTC v. Triad Discount Buying Service, Inc.* (S.D. Fla. No. 01–8922 CIV ZLOCH complaint and stipulated order filed Oct. 23, 2001); *New York v. Memberworks*, Assurance of Discontinuance (Aug. 2000); *Minnesota v. Memberworks, Inc.*, No.

MC99–010056 (4th Dist. MN June, 1999); *Minnesota v. Damark Int’l, Inc.*, No. C8–99–10638, Assurance of Discontinuance (Ramsey County Dist. Ct. Dec. 3, 1999); *FTC v. S.J.A. Society, Inc.*, No. 2:97 CV472 (E.D. Va. filed May 31, 1997).

⁸¹ See NAAG at 11.

⁸² *Id.* at 11–12.

⁸³ Proposed Rule, § 310.4(a)(5).

case. Adherence to these Rule requirements will afford consumers the protections needed when accepting goods or services on a free trial basis.

"Promptly." As described in detail below in the discussion of § 310.4(d), NACAA and Texas suggested defining the term "prompt" as used in § 310.4(d) of the Rule, suggesting that the term be defined to mean "at the onset" of a call.⁸⁴ The Commission believes that the Rule's Statement of Basis and Purpose makes clear that "prompt" means "at once or without delay,"⁸⁵ and that further clarification is unnecessary.

C. Section 310.3—Deceptive Telemarketing Acts or Practices

Section 310.3 of the Rule sets forth required disclosures that must be made in every telemarketing call; prohibits misrepresentations of material information; requires that a telemarketer obtain a customer's express verifiable authorization before obtaining or submitting for payment a demand draft; prohibits false and misleading statements to induce the purchase of goods or services or, pursuant to the USA PATRIOT Act amendments, to induce charitable contributions; holds liable anyone who provides substantial assistance to another in violating the Rule; and prohibits credit card laundering in telemarketing transactions. During the Rule review, the Commission received a large number of comments addressing various provisions of this section, the substance of which are discussed in turn below.

Section 310.3(a)(1)—Required Disclosures

Section 310.3(a)(1) requires the disclosure by a seller or telemarketer of five types of material information before a customer pays for goods and services. That information includes: the total cost and quantity of the goods offered; all material restrictions, limitations, or conditions to purchase, receive, or use the offered goods or services; information regarding the seller's refund policy if the seller has a policy of not making refunds or if the telemarketer makes a representation about such a policy; certain information relating to the odds involved in prize promotions; and all material costs or conditions to receive or redeem a prize.

Most of the comments about this section expressed support for the required disclosures,⁸⁶ and some

recommended that additional disclosures be added to the Rule. MPA noted that the inclusion of the required disclosures in the Rule has been beneficial both for industry and consumers by providing clear guidelines for good business practices, and by establishing a standard that helps consumers to distinguish between legitimate and fraudulent telemarketing practices.⁸⁷ NASAA noted that the disclosure provisions also have been helpful in protecting investors from "bait and switch" scams where stockbrokers claim to be selling blue chip investments, but deliver only high-risk, little-known stocks.⁸⁸

The Commission received no comments addressing the provisions regarding disclosure of refund policies (§ 310.3(a)(1)(iii)), or the disclosure of material costs or conditions to receive a prize (§ 310.3(a)(1)(v)). Moreover, the Commission's enforcement experience with these provisions does not suggest that there are deficiencies or omissions that need to be addressed through amendments. Therefore, these sections are included in the proposed Rule without change.

Several commenters suggested additional disclosures or other changes to § 310.3(a)(1), which they felt would enhance the consumer protections provided by this section. Each recommendation and the Commission's reasons for accepting or rejecting it are set forth below.

Section 310.3(a)(1)(i)—Disclosure of Total Costs

Some commenters suggested that the Commission clarify that, in the case of sales involving monthly installment payments, the total cost to be disclosed should be the total cost of the entire contract, not just the amount of the monthly installment.⁸⁹ These commenters noted that it is typical in magazine subscription sales for a telemarketer to state the weekly price for a subscription without giving the total cost for the entire term of the subscription period. For example, a magazine telemarketer might state that a consumer would be charged \$3.45 per week for 48 months, rather than stating that the consumer's ultimate liability for the magazines will be more than \$700.⁹⁰

The Commission has already noted that in disclosing total costs it is sufficient for a seller or telemarketer to disclose the total number of installment payments and the amount of each

payment.⁹¹ The Commission recognizes, however, that it is possible to state the cost of an installment contract in such a way that, although literally true, obfuscates the actual amount that the consumer is being asked to pay. Such a statement of cost would not meet the relevant "clear and conspicuous" standard for disclosures under the Rule.⁹² Particularly in long-term, high-cost contracts, where it may be advantageous to the seller or telemarketer to break the cost down to weekly or monthly amounts, and for the customer to pay over time, the disclosure of the number of installment payments and the amount of each must correlate to the billing schedule that will actually be implemented. Therefore, to comply with the Rule's total cost disclosure provision, it would be inadequate to state the cost per week if the installments are to be paid monthly or quarterly.

The Commission believes that the current total cost disclosure provision provides a customer with the necessary material information with which to make a purchasing decision when a seller discloses either the overall total cost, or, in the case of installment payments, the total number of payments and the amount of each. Therefore, the provision's language is retained in the proposed Rule without change.

Section 310.3(a)(1)(ii)—Disclosure of Material Restrictions

NAAG opined that the material information that a seller or telemarketer must disclose to a consumer in a telemarketing transaction includes the illegal nature of any goods and services offered. For example, NAAG noted that several cross-border telemarketing cases have involved the sale of foreign lottery chances to citizens of the United States, a practice which is illegal under U.S. law.⁹³ NAAG expressed the concern that

⁹¹ 60 FR at 43847; *Complying With the Telemarketing Sales Rule* at 16.

⁹² 16 CFR 310.3(a)(1). The Commission believes that the best practice to ensure the clear and conspicuous standard is met is to "do the math" for the consumer wherever possible. For example, where the contract entails 24 monthly installments of \$8.99 each, the best practice would be to disclose that the consumer will be paying \$215.76. In open-ended installment contracts it may not be possible to "do the math" for the consumer. In such a case, particular care must be taken to ensure that the cost disclosure is easy for the consumer to understand.

⁹³ NAAG at 15. Law enforcement actions against telemarketers selling foreign lottery chances to U.S. citizens include: *FTC v. Win USA Ltd.*, No. C98-1614Z (W.D. Wash. filed Nov. 13, 1998) (brought by the FTC, the State of Arizona, and the State of Washington); and *FTC v. Windermere Big Win Int'l, Inc.*, No. 98CV 8066, (N.D. Ill. filed Dec. 16, 1998). Federal law prohibits the importing and transmitting of lottery materials by mail and otherwise, 18 U.S.C. 1301-1302; such schemes may

⁸⁴ See NACAA at 2; Texas at 2.

⁸⁵ 60 FR at 43856, n. 150.

⁸⁶ See, e.g., MPA at 5; ARDA at 2 (asserting that immediate disclosures benefit consumers "[w]ithout placing an unreasonable burden on telemarketers").

⁸⁷ See MPA at 5.

⁸⁸ See NASAA at 3.

⁸⁹ See NAAG at 8; Texas at 2.

⁹⁰ NAAG at 8.

some courts may construe the term "material" narrowly, so as not to require a disclosure of the inherent illegality of such offers.

The Commission believes that the definition of "material" contained in the Rule, which comports with the Commission's Deception Statement and established Commission precedent,⁹⁴ is sufficiently clear and broad enough to encompass the illegality of goods or services offered. Therefore, no change is proposed with respect to this provision.

Section 310.3(a)(1)(iv)—Disclosures Regarding Prize Promotions

Section 310.3(a)(1)(iv) requires that, in any prize promotion, a telemarketer must disclose the odds of being able to receive the prize, that no purchase or payment is required to win a prize or participate in a prize promotion, and the no purchase/no payment method of participating in the prize promotion. NCL suggested adding a disclosure that making a purchase will not improve a customer's chances of winning,⁹⁵ noting that this disclosure would be consistent with the requirements for direct mail solicitations under the Deceptive Mail Prevention and Enforcement Act ("DMPEA").⁹⁶ The Commission has determined to add such a disclosure requirement, both in § 310.3(a)(1) (governing all telemarketing calls), and in § 310.4(d) (governing outbound telemarketing).

The Commission believes that this disclosure will ensure that consumers are not deceived. The legislative history of the DMPEA suggests that without such a disclosure, many consumers reasonably interpret the overall presentation of many prize promotions to convey the message that making a

purchase will enhance their chances of winning the touted prize.⁹⁷ This message is likely to influence these consumers' purchasing decisions, inducing them to purchase a product or service they are otherwise not interested in purchasing just so they can become winners. For this reason, it is important that entities using these promotions take particular care to dispel deception by disclosing that a purchase will not enhance the chance of winning.

Section 310.3(a)(1)(vi)—Disclosures in the Sale of Credit Card Protection

The current TSR does not address telemarketing of credit card protection. NCL recommended that the Commission amend the Rule to do so, specifically to prohibit worthless credit card loss protection plans.⁹⁸ NCL reports that fraudulent solicitations for credit card loss protection plans ranked 9th among the most numerous complaints to the NFIC in 1999.⁹⁹ The Commission's complaint-handling experience is consistent with that of NCL. Credit card loss protection plans ranked 12th among the most numerous complaints received by the Commission during fiscal year 2000 (October 1, 1999–September 30, 2000). NCL's statistics also showed that these schemes disproportionately affected older consumers: over 71% of the complaints about these schemes

were from consumers over 50 years of age.¹⁰⁰

Telemarketers of credit card loss protection plans represent to consumers that they will protect or otherwise limit the consumer's liability if his or her credit card is lost or stolen,¹⁰¹ but frequently misrepresent themselves as being affiliated with the consumer's credit card issuer, or misrepresent either affirmatively or by omission that the consumer is not currently protected against credit card fraud, or that the consumer has greater potential legal liability for unauthorized use of his or her credit cards than he or she actually does under the law.¹⁰² Both the Commission and the State Attorneys General have devoted major resources to bringing cases that challenge the deceptive marketing of credit card loss protection plans as violations of the Rule.¹⁰³

To address the deception that frequently characterizes the sale of credit card loss protection plans, the Commission believes consumers need disclosure of information about existing protections afforded by Federal law. Deception occurs if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.¹⁰⁴ Unscrupulous sellers and telemarketers of credit card protection create the impression, by omission and

also violate anti-racketeering laws relating to gambling, 18 U.S.C. 1952–1953, 1084.

⁹⁴ *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165, appeal dismissed sub nom., *Koven v. F.T.C.*, No. 84–5337 (11th Cir. 1984); *Thompson Medical Co.*, 104 F.T.C. 648 (1984), *aff'd* 791 F.2d 189 (D.C. Cir. 1986).

⁹⁵ See NCL at 9. Although this suggestion was made with respect to § 310.4(d), governing oral disclosures required in outbound telemarketing calls, the rationale and purpose of the proposed disclosure applies with equal force to all telemarketing, as covered by § 310.3(a). See also the discussion, below, in the section on sweepstakes disclosures within the analysis of § 310.4(d).

⁹⁶ *Id.* The Deceptive Mail Prevention and Enforcement Act of 1999 is codified at 39 U.S.C. 3001(k)(3)(A)(II). In this regard, it is noteworthy that the Direct Marketing Association's Code of Ethics advises that "[n]o sweepstakes promotion, or any of its parts, should represent * * * that any entry stands a greater chance of winning a prize than any other entry when this is not the case." "The DMA Guidelines for Ethical Business Practice," revised Aug. 1999, accessible online at <http://www.the-dma.org/library/guidelines/dotherightthing.shtml#23> (Article #23, Chances of Winning).

⁹⁷ Moreover, Publishers Clearing House ("PCH") recently agreed to settle an action brought by 24 States and the District of Columbia alleging, among other things, that the PCH sweepstakes mailings deceived consumers into believing that their chances of winning the sweepstakes would be improved by buying magazines from PCH. As part of the settlement, PCH agreed to include disclaimers in its mailings stating that buying does not increase the recipient's chances of winning (and to pay \$18.4 million in redress). In 2001, PCH agreed to pay \$34 million in a settlement with the remaining 26 States. See, e.g., *Missouri ex rel. Nixon v. Publishers Clearing House*, Boone County Circuit Court, No. 99 CC 084409 (2001); *Ohio ex rel. Montgomery v. Publishers Clearing House*, Franklin County Court of Common Pleas, No. 00CVH–01–635 (2000). Similarly, in 1999, American Family Publishers ("AFP") settled several multi-state class actions that alleged the AFP sweepstakes mailings induced consumers to buy magazines to better their chances of winning a sweepstakes. The original suit, filed by 27 States, was settled in March 1998 for \$1.5 million, but was reopened and expanded to 48 States and the District of Columbia after claims that AFP violated its agreement. The State action was finally settled in August 2000 with AFP agreeing to pay an additional \$8.1 million in damages. See, e.g., *Washington v. American Family Publishers*, King County Superior Court, No. 99–09354–2 SEA (2000). See also, U.S. Senate, "Deceptive Mail Prevention and Enforcement Act," (1st Sess. 1999), Sen. Rep. No. 106–102; and U.S. House of Representatives, "Deceptive Mail Prevention and Enforcement Act," (1st Sess. 1999), H. Rep. No. 106–431.

⁹⁸ NCL at 10.

⁹⁹ NCL at 10.

¹⁰⁰ NCL at 16.

¹⁰¹ Credit card loss protection plans are distinguished from credit card registration plans, in which consumers pay a fee to register their credit cards with a central party, and that party agrees to contact the consumers' credit card companies if the consumers' cards are lost or stolen.

¹⁰² NCL at 10. See, e.g., *FTC v. Universal Mktg. Svcs., Inc.*, No. CIV–00–1084L (W.D. Okla. filed June 20, 2000); *FTC v. NCCP Ltd.*, No. 99 CV–0501 A(Sc) (W.D.N.Y. filed July 22, 1999); *South Florida Business Ventures*, No. 99–1196–CIV–T–17F (M.D. Fla. filed May 24, 1999); *Tracker Corp. of America*, No. 1:97–CV–2654–JEC.

¹⁰³ See, e.g., *FTC v. Consumer Repair Svcs., Inc.*, No. 00–11218 (C.D. Cal. filed Oct. 23, 2000); *FTC v. Forum Mktg. Svcs., Inc.*, No. 00 CV 0905C (W.D.N.Y. filed Oct. 23, 2000); *FTC v. 1306506 Ontario, Ltd.*, No. 00 CV 0906A (SR) (W.D.N.Y. filed Oct. 23, 2000); *FTC v. Advanced Consumer Svcs.*, No. 6–00–CV–1410–ORL–28–B (M.D. Fla. filed Oct. 23, 2000); *Capital Card Svcs., Inc.* No. CIV 00 1993 PHX ECH (D. Ariz. filed Oct. 23, 2000); *FTC v. First Capital Consumer Membership Svcs., Inc.*, Civil No. 00–CV–0905C(F) (W.D.N.Y. filed Oct. 23, 2000); *Universal Mktg. Svcs., Inc.*, No. CIV–00–1084L; *FTC v. Liberty Direct, Inc.*, No. 99–1637 (D. Ariz. filed Sept. 13, 1999); *FTC v. Source One Publications, Inc.*, No. 99–1636 PHX RCP (D. Ariz. filed Sept. 14, 1999); *FTC v. Creditmart Fin. Strategies, Inc.*, No. C99–1461 (W.D. Wash. filed Sept. 13, 1999); *NCCP Ltd.*, No. 99 CV–0501 A(Sc); *South Florida Business Ventures*, No. 99–1196–CIV–T–17F; *FTC v. Bank Card Sec. Ctr., Inc.*, No. 99–212–Civ–Orl–18C (M.D. Fla. filed Feb. 26, 1999); *Tracker Corp. of America*, No. 1:97–CV–2654–JEC.

¹⁰⁴ *Cliffdale Assocs.*, 103 F.T.C. at 165.

affirmative misrepresentation, that without the protection they offer, consumers' liability for unauthorized purchases is unlimited. In fact, Federal law limits this liability to \$50.¹⁰⁵ This is obviously a material fact, since consumers would not likely purchase protection that duplicates free protection the law already provides them. Yet laypersons may be unaware of this feature of Federal law, and are not unreasonable to interpret the sales pitch of unscrupulous sellers and telemarketers of credit card protection to mean that unless they purchase this protection, a cardholder is exposed to unlimited liability. Therefore, omission of this material information in the context of a sales pitch for such protection is deceptive, and violates section 5 of the FTC Act.

Thus, based on the record compiled in this proceeding and on its law enforcement experience, the Commission believes that credit card loss protection plans—like prize promotions, advance fee loan offers, recovery services, and credit repair—are so commonly the subject of telemarketing fraud complaints and have caused such substantial injury to consumers, particularly the elderly, that it is warranted to modify the Rule to include specific provisions to address this problem.¹⁰⁶ Therefore, the Commission proposes to add new § 310.3(a)(1)(vi), which would require the seller or telemarketer of such plans to disclose, before the customer pays, the \$50 limit on a cardholder's liability for unauthorized use of a credit card

pursuant to 15 U.S.C. 1643. The requirement that sellers of such plans provide consumers with the material information about statutory limitations on a cardholder's liability for unauthorized charges will ensure that consumers have the information necessary to evaluate the worth of the plan and provide law enforcement with the necessary tools to identify and combat fraudulent credit card protection plans.

Other Recommendations by Commenters Regarding Disclosure Requirements

Several commenters addressed issues related to the timing of disclosures.¹⁰⁷ In general, the commenters agreed that disclosures are most meaningful if customers receive them in time to make a "truly informed buying decision."¹⁰⁸ This premise was endorsed by the Commission in the initial rulemaking when it noted that the intent of the Rule was to have disclosures given "so as to be meaningful to a customer's purchase decision."¹⁰⁹ In this regard, the Commission noted that, when a seller or telemarketer chooses to use written disclosures, "any outbound telephone call made after written disclosures have been sent to customers must be made sufficiently close in time to enable the customer to associate the telephone call with the written document."¹¹⁰

Commenters raised three specific concerns regarding the timing of disclosures: the appropriate timing of required disclosures in preacquired account telemarketing; situations where disclosures are made only in the verification portion of a call, rather than in the earlier sales pitch; and the appropriate timing of required disclosures in dual or multiple purpose calls. The first of these concerns—the appropriate timing of disclosures in preacquired account telemarketing—is addressed in the discussion of proposed § 310.4(a)(5), which bans the receipt of a consumer's billing information from any source other than the consumer. The other two concerns regarding the timing of disclosures—disclosures during the verification portion of the call and disclosures in multiple purpose calls—are each discussed below, as is the recommendation, advanced by some commenters, that the Commission allow some disclosures to be made in writing.

Disclosures in the Sales and Verification Portions of Calls. NAAG

¹⁰⁷ See, e.g., AARP at 3–4; NAAG at 9–10; NACAA at 2.

¹⁰⁸ AARP at 4.

¹⁰⁹ 60 FR at 43846.

¹¹⁰ *Id.*

expressed concern about the failure of some telemarketers to make the disclosures required by § 310.3(a)(1)—especially the disclosure of total cost—during the sales portion of the call, instead making these disclosures during the verification portion of the call, after payment information has already been discussed and assent to the transaction has already occurred.¹¹¹ NAAG noted that when telemarketers make disclosures only during the verification portion of the call, consumers are deprived of the opportunity to receive meaningful disclosures at an appropriate time.¹¹² NAAG and Texas recommended that the total cost be disclosed before any payment information is discussed, and that the total cost be stated during both the sales and verification portions of the call.¹¹³

As discussed above, the Rule requires that the disclosures in § 310.3(a)(1) be made before the customer pays, which means before the telemarketer comes into possession of the customer's billing information.¹¹⁴ The disclosures required by § 310.3(a)(1), including disclosure of the total cost of the goods or services offered, must be made *before* the telemarketer receives information that will enable him or her to bill charges to the consumer. These disclosures would logically occur during the sales portion of the call, before the consumer has assented to the purchase by providing billing information. A verification process is precisely what the term implies: corroboration of a contract that has already been formed—of the consumer's assent to the purchase. It is an opportunity to ensure that the billing

¹¹¹ See NAAG at 10; Texas at 2. In the original rulemaking, the initially proposed Rule included a requirement that a telemarketer repeat certain disclosures if verification occurred. 60 FR 8313, 8331 (Feb. 14, 1995) (citing the original proposed Rule § 310.4(d)(2)). The Commission later deleted this requirement after receiving numerous comments from industry representatives who argued that such a requirement would be "unnecessary and unduly burdensome, requiring duplicative disclosures that would add to the cost of the call and annoy potential customers." 60 FR 30406, 30419 (June 8, 1995). The Commission finds nothing in the Rule review record to contradict its earlier determination, and therefore, declines to propose a requirement to make a second disclosure of total cost in the verification portion of the call. Of course, there is nothing in the Rule that would preclude a seller or telemarketer from making the required disclosures in the sales portion of the call and then voluntarily repeating those disclosures during the verification process.

¹¹² See NAAG at 9.

¹¹³ See *id.* at 8, 10 (noting that the failure to disclose the total cost of the contract is common in magazine subscription sales when a telemarketer states only the weekly price for a subscription, rather than the total cost for the entire term); Texas at 2.

¹¹⁴ 60 FR at 43846.

¹⁰⁵ Under § 133 of the Consumer Credit Protection Act, the consumer's liability for unauthorized charges is limited to \$50. 15 U.S.C. 1643.

¹⁰⁶ The Commission has not proposed to prohibit as an *abusive* practice the requesting or receiving of payment for credit card protection before delivery of the offered protection—the approach adopted in the original TSR with respect to advance fee loan offers, recovery services, and credit repair. The Commission took that approach because there are no disclosures that could effectively remedy the problems that arise from the telemarketing of those illusory services; the harm to consumers could be averted only by specifying that the seller's performance of any of these three services must precede payment by the consumer. In the case of credit card protection, such a remedy seems unworkable, because the protection would come into play only upon a purchaser's loss of his or her card and/or inurrence of unauthorized charges. More importantly, in such an event, federal law would provide the protection at issue, regardless of whether the offered protection did or not. Moreover, since it is possible that a seller could non-deceptively offer—and consumers could wish to purchase—credit card protection that provides more than that which federal law provides, the Commission is reluctant to ban outright the sale of credit card protection. Thus, requiring disclosure of material information seems the appropriate remedy to cure the deception, coupled with a prohibition in proposed § 310.3(a)(2)(viii) against misrepresenting such protection.

information received from the consumer is correct. It is *not* the appropriate time for disclosure of additional material information that a consumer needs to make a decision whether to enter into the transaction in the first place. Disclosure of previously undisclosed information in a “verification” comes too late for it to be of value to consumers, or to satisfy the requirements of the Rule. Thus, a telemarketer or seller who does not make the required disclosures until the verification portion of the call has violated the Rule.

Dual or Multiple Purpose Calls. In a dual or multiple purpose telemarketing call, there are both sales and non-sales objectives, such as when a telemarketer calls to inquire about a customer’s satisfaction with a particular good or service already purchased, and then proceeds to offer additional goods or services.¹¹⁵ Both NACAA and NAAG suggested that the Rule be clarified to require that, in such dual or multiple purpose calls, the required oral disclosures be made in the initial portion of the call, and that total cost also be disclosed in that initial portion.¹¹⁶ These recommendations are considered below in the discussion of proposed changes to § 310.4(d).

Written versus oral disclosures. In its Request for Comment on the Rule, the Commission asked for information regarding the burdens, if any, the disclosure requirements have placed on sellers and telemarketers.¹¹⁷ Reese noted that “(d)isclosures associated with sales increase the length of a sales presentation by factors ranging from 10% to 50%,” and suggested that the burden on industry could be reduced by allowing timely written disclosures to complement shorter oral disclosures under the Rule.¹¹⁸ On the other hand, ARDA expressed the view that the current disclosures are not unreasonably burdensome.¹¹⁹

In response to the recommendation that written disclosures be allowed, the Commission notes that the Rule’s requirement that disclosures regarding material terms of the offer be made before the customer pays does not preclude a telemarketer from providing these disclosures in writing, should the telemarketer choose to do so.¹²⁰ In the

Statement of Basis and Purpose, the Commission noted in this regard that “[t]hese disclosures may be made either orally or in writing.”¹²¹ Therefore, there is no need to modify this provision of the Rule in this regard.

Section 310.3(a)(2)—Prohibited Misrepresentations in the Sale of Goods and Services

Section 310.3(a)(2) prohibits a seller or telemarketer from misrepresenting certain material information in a telemarketing transaction involving the sale of goods or services. These include: Total cost, any material restrictions, and any material aspect of the performance, efficacy, nature, or central characteristics of the goods or services offered; any material aspect of the seller’s refund policy; any material aspect of a prize promotion; any material aspect of an investment opportunity; and a seller’s or telemarketer’s affiliation with, or endorsement by, any governmental or third-party organization.¹²²

MPA, the only commenter who directly addressed this section in its comment, stated that it “wholeheartedly supports” the provision, noting that it is in the best interests of legitimate firms that all telemarketing calls include full and accurate disclosures.¹²³ Therefore, the only proposed modification to § 310.3(a)(2) is two minor wording changes necessitated by the amendments to the Telemarketing Act contained in section 1011 of the USA PATRIOT Act. First, the phrase “in the sale of goods or services” has been added to § 310.3(a)(2) to clarify the intended scope of that provision. Newly proposed § 310.3(d) lists prohibited misrepresentations in the context of the solicitation of charitable contributions. Second, the language in § 310.3(a)(2)(vii) has been modified to read: “A seller’s or telemarketer’s affiliation with, or endorsement or sponsorship by, any person or government entity” to conform with the new analogous provision proposed in § 310.3(d)(8).

is to sell goods or services; (3) the nature of the goods or services; and (4) disclosures about any prize promotion being offered. § 310.4(d).

¹²¹ 60 FR at 43846. The Commission further noted that it intends, by requiring “clear and conspicuous” disclosures, that “any outbound telephone call made after written disclosures have been sent to consumers must be made sufficiently close in time to enable the customer to associate the telephone call with the written document.” *Id.*

¹²² 16 CFR 310.3(a)(2).

¹²³ MPA at 7–8.

Section 310.3(a)(2)(viii)—Credit Card Loss Protection Plans

The current TSR does not include prohibitions regarding the sale of credit card protection. As discussed above, NCL, citing the numerous complaints it receives, recommended that the Commission revise the Rule to address the telemarketing of credit card loss protection plans.¹²⁴ The Commission’s complaint-handling and law enforcement experience confirms the points made in NCL’s comments. Telemarketers of credit card loss protection plans represent to consumers that they will protect or otherwise limit the consumer’s liability if his or her credit card is lost or stolen, but frequently misrepresent themselves as being affiliated with the consumer’s credit card issuer,¹²⁵ or misrepresent either affirmatively or by omission that the consumer is not currently protected against credit card fraud, or that the consumer has greater potential legal liability for unauthorized use of his or her credit cards than he or she actually does under the law.

In addition to the new requirement proposed in § 310.3(a)(1)(vii) to disclose material information about existing protections afforded by federal law, the Commission proposes to add to the Rule a prohibition against misrepresenting that any customer needs offered goods or services to provide protections a customer already has pursuant to section 133 of the Consumer Credit Protection Act, 15 U.S.C. section 1643, which limits a cardholder’s liability for unauthorized charges to \$50.¹²⁶

Deception occurs if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.¹²⁷ Unscrupulous sellers and telemarketers of credit card protection frequently misrepresent, either expressly or by implication, that without the protection they offer, consumers’ liability for unauthorized purchases is unlimited. This is obviously a material fact, since consumers would not likely purchase

¹²⁴ NCL at 10.

¹²⁵ This practice violates § 310.3(a)(2)(vii), which prohibits misrepresenting a seller’s or telemarketer’s affiliation with any third-party organization.

¹²⁶ This approach parallels the TSR’s treatment of cost and quantity of goods (§§ 310.3(a)(1)(i) and 310.3(a)(2)(i)), material restrictions, limitations, or conditions (§§ 310.3(a)(1)(ii) and 310.3(a)(2)(ii)), refund policy (§§ 310.3(a)(1)(iii) and 310.3(a)(2)(iv)), and prize promotions (§§ 310.3(a)(1)(iv) & (v) and 310.3(a)(2)(v)). In each case, material facts must be disclosed, and misrepresentations are prohibited.

¹²⁷ *Cliffdale Assocs.*, 103 F.T.C. at 165.

¹¹⁵ This sales practice was identified and explained in the original Rule’s Statement of Basis and Purpose. 60 FR at 43856.

¹¹⁶ See NAAG at 6–8; NACAA at 2.

¹¹⁷ 65 FR 10428, 10431; Question 10(f).

¹¹⁸ Reese at 5.

¹¹⁹ See ARDA at 2.

¹²⁰ Nevertheless, in outbound telemarketing calls, four prompt oral disclosures must be made: (1) The identity of the seller; (2) that the purpose of the call

protection that duplicates free protection the law already provides them. Yet laypersons may be unaware of this feature of federal law, and reasonably interpret the sales pitch of unscrupulous sellers and telemarketers of credit card protection to mean that unless they purchase this protection, a cardholder is exposed to unlimited liability. Therefore, this is a material misrepresentation, and is deceptive, in violation of section 5 of the FTC Act. Accordingly, the Commission proposes to add new § 310.3(a)(2)(viii), which would prohibit misrepresenting that any customer needs offered goods or services in order to have protections provided pursuant to 15 U.S.C. 1643.

Section 310.3(a)(3)—Express Verifiable Authorization

Section 310.3(a)(3) of the Rule requires that a telemarketer obtain express verifiable authorization in sales involving payment by demand drafts or similar negotiable paper, and provides that authorization will be deemed verifiable if any of three specified means are employed to obtain it: (1) Express written authorization by the customer, including signature; (2) express oral authorization that is tape recorded and made available upon request to the customer's bank; or (3) written confirmation of the transaction, sent to the customer before submission of the draft for payment. If the telemarketer chooses to use the taped oral authorization method, the Rule requires the telemarketer to provide tapes evidencing the customer's oral authorization, including an explanation of the number, date(s) and amount(s) of payments to be made, date of authorization, and a telephone number for customer inquiry that is answered during normal business hours.¹²⁸

The Commission proposes to amend the express verifiable authorization provision. The proposed Rule retains the concept that it is a deceptive practice and a rule violation to obtain or submit for payment a check, draft, or other form of negotiable paper drawn on a person's checking, savings, share, or similar account, without that person's express verifiable authorization; however, the proposed Rule extends the provision to specify that is a deceptive practice and a Rule violation to submit *billing information* for payment without the customer's express verifiable authorization when the method of payment does not have the protections

provided by, or comparable to those available under, the Fair Credit Billing Act ("FCBA") and the Truth in Lending Act ("TILA") (such as is the case with checks, drafts, or other forms of negotiable paper). By expanding the express verifiable authorization provision to cover billing methods besides demand drafts, the Rule would provide protections for consumers in a much larger class of transactions where an unauthorized charge is likely to present a particular hardship to the consumer because of the lack of TILA and FCBA protections.

In addition to expanding the scope of § 310.3(a)(3) to require express verifiable authorization for additional payment methods, the proposed Rule also requires that the customer must receive additional information in order for authorization to be deemed verifiable: the name of the account to be charged (e.g., "Mastercard," or "your XYZ Mortgage statement") and the account number, which must be recited by either the consumer or the telemarketer.

The Commission also proposes to delete § 310.3(a)(3)(iii), which allows a seller or telemarketer to obtain express verifiable authorization by confirming a transaction in writing, provided the confirmation is sent to the customer prior to the submission of the customer's billing information for payment. This change would leave the two other methods of authorization—written authorization before a charge is placed and taped oral authorization—available for use by sellers and telemarketers.

Finally, pursuant to section 1011 of the USA PATRIOT Act, the Commission proposes a global revision throughout § 310.3(a)(3)—specifically, in every instance where the word "customer" (including the possessive form) occurs, the phrase "or donor" (again, including the possessive form, where appropriate) has been added. This change brings within the coverage of the express verifiable authorization requirement all situations where a telemarketer accepts payment of a solicited charitable contribution through a payment method that does not impose a limitation on liability for unauthorized charges nor provide for dispute resolution procedures pursuant to, or comparable to, those available under the FCBA and the TILA.

The Commission received several comments regarding § 310.3(a)(3), and discussed the topic of express verifiable authorization extensively at the July 2000 Forum.¹²⁹ MPA stated that this

provision strikes an appropriate balance, allowing telemarketers to compete fairly with other point-of-sale providers while still protecting customers' checking accounts.¹³⁰ Law enforcement agencies and consumer protection groups, however, recommended several changes to the provision. Each recommendation and the Commission's reasoning for accepting or rejecting it is discussed below.

Express Verifiable Authorization When Using Novel Payment Methods. Some commenters suggested that the TSR be amended to ensure that consumers are protected when using any of the ever-increasing array of payment methods to pay for telemarketing transactions.¹³¹ NCL suggested that emerging payment methods may necessitate Rule changes to safeguard consumers using these methods from unauthorized charges.¹³² NAAG expressed concern that, given the increasing number of available payment options, consumers' authorization extend not only to the amount of the charge, but also to the payment method to be used.¹³³

As examples of emerging payment methods, commenters and attendees of the July Forum cited the increasing prevalence and use of debit cards,¹³⁴ the development of electronic payment systems,¹³⁵ and the growing use, by

¹³⁰ MPA at 8.

¹³¹ See NCL at 5; NAAG at 20.

¹³² See NCL at 5 (suggesting the Rule be expanded to "protect consumers from abuses and provide better oversight of vendors who participate in new electronic payment systems").

¹³³ See NAAG at 20 (recommending that "consumers' agreement to any participant form of payment be expressly demonstrated and subject to verification").

¹³⁴ See NCL at 5 ("Debit cards accounted for one percent of the fraudulent telemarketing transactions reported to the NFIC in 1999 and this form of payment is likely to grow as more customers are issued debit cards and grow more comfortable using them."); Rule Tr. at 132–133 (NCL noting a "dramatic increase in debit card usage in the last several years;" and that debit cards accounted for three percent of the fraudulent telemarketing transactions reported to NFIC in the first half of 2000.). See also, John Reosti, *Debit Cards Seen as No Threat to Credit Card Revenues*, *The American Banker*, (June 29, 2000), p. 11A (noting that the popularity of debit cards is increasing, with some predicting that debit cards will outpace credit cards as a payment method by 2005).

¹³⁵ See, e.g., NCL at 5 (noting that the growth in electronic commerce has led to the development of new forms of payment, such as "cyberwallets"). "Cyberwallets" provide secure access to a customer's existing bank or credit card accounts via the Internet, and are now offered by many companies, such as Visa and Mastercard. See www.visa.com/pd/ewallet/main.html; www.mastercard.com/shoponline/e-wallets/. Other new electronic access devices include stored value cards (SVCs) and smartcards, which allow customers to purchase goods or services using money "loaded" onto the cards, which contain

¹²⁸ Section 310.3(a)(3)(iii)(A) requires that all information required to be included in a taped oral authorization be included in any written confirmation of the transaction.

¹²⁹ See generally LSAP at 4; MPA at 8; NAAG at 20; NCL at 5, 10–11, 13; Rule Tr. at 131–190.

unrelated vendors, of the billing and collection systems of mortgage or utility companies to bill and collect for telemarketing purchases.¹³⁶ When asked to predict what additional payment methods might likely emerge in the coming years, industry representatives at the July Forum noted that new technologies have already expanded the range of payment options. For example, the DMA representative noted that a small percentage of DMA telemarketer members already offer to accept payment via the Internet.¹³⁷ Another Forum participant predicted "the continued growth of debit mechanisms," including not only debit cards, but electronic benefit transfer cards that would, for example, enable recipients of Social Security benefits to make payments using an access card tied to those benefits.¹³⁸ Still another participant noted the development of technology that would enable a consumer to purchase goods and services advertised on television with a simple click of a remote control device, with the resulting charge billed to the subscriber's cable account.¹³⁹

In advancing their argument, those commenters who advocated expanding the express verifiable authorization provision to cover novel payment methods suggested that consumers may not be aware that they can be billed for a telemarketing purchase via some of these methods (such as on their utility and mortgage bills). This concern is analogous to the concerns articulated about deception in the use of demand drafts in the original rulemaking—concerns which led the Commission to determine that consumers' unfamiliarity

with demand drafts could lead them unwittingly to provide their bank account numbers to a telemarketer without realizing that funds could be withdrawn in the absence of a signed check.¹⁴⁰ Unaccustomed to this new type of transaction, consumers had no reason to expect that funds could be debited from their checking accounts unless they wrote and signed a check. But telemarketers, through omissions or affirmative misrepresentations, were inducing consumers to divulge their checking account numbers, with the result that funds were debited from their accounts. Thus, the Commission determined that to dispel consumers' false expectations about their checking account numbers, disclosure of material facts about how telemarketers would use the account information they were being asked to divulge was necessary. Thus, § 310.3(a)(3) of the original TSR provides that it is a deceptive practice and a rule violation to obtain or submit for payment a check, draft, or other form of negotiable paper drawn on a person's checking, savings, share, or similar account, without that person's express verifiable authorization.¹⁴¹ Section 310.3(a)(3) also established "safe harbor" disclosure procedures to use in obtaining express verifiable authorization.

The Commission believes that the increased availability and use of new payment methods necessitates expanding the Rule's express verifiable authorization provision to cover those new methods. The emergence of novel and, for the consumer, unexpected billing and collection systems for telemarketing purchases has brought an attendant rise in consumer complaints about unauthorized charges for telemarketing purchases on, among other things, mortgage accounts and utility bills. The Commission believes that deception is occurring in connection with telemarketers' use of new billing and collection systems. The rationale which supported the original requirement for express verifiable authorization in the use of demand drafts pertains with equal force to other unconventional payment methods not covered by the TILA and FCBA.

Consumers have no reason to anticipate that their accounts can be debited or charged without their signature, and they may be induced to divulge their billing information on the basis of this

misperception. To obviate deception on this issue, consumers need disclosure of material facts about how telemarketers will use the billing information they are being asked to divulge. Finally, an additional factor supporting the expanded coverage of the express verifiable authorization provision to novel payment systems is that many of the emerging payment systems cited by commenters in this proceeding lack chargeback protection and dispute resolution rights, as well as limited customer liability in the event of unauthorized charges. As was the case with demand drafts, the Commission believes that express verifiable authorization for novel payment systems will ensure that such systems are only used when consumers clearly agree to that use.

The Commission believes that requiring express verifiable authorization when novel payment systems are used to bill and collect for a telemarketing purchase will remedy the deceptive practices often associated with the growth of new payment systems. Therefore, the Commission proposes to amend § 310.3(a)(3) to require that the consumer's express verifiable authorization be obtained when payment is to be made by any method that "does not impose a limitation on the customer's liability for unauthorized charges nor provide for dispute resolution procedures pursuant to, or comparable to those available under, the Fair Credit Billing Act and the Truth in Lending Act, as amended."

The proposed Rule retains the safe harbor that calls for the customer receiving the following information as evidence of oral authorization: the number, date(s) and amount(s) of payments, a telephone number for customer inquiry, and the date of the customer's oral authorization. In addition, the proposed Rule would call for another piece of information to be included in any taped oral authorization: Specific identification or recitation of the name of the specific account and the account number to be charged in the particular transaction. This material information will ensure that consumers are aware of the specific account against which the charge or debit will be placed.

The proposed Rule deletes the term "draft" to reflect the expanded application of the provision to forms of payment other than demand drafts; and, for the same reason, the term "payor" has been replaced by the term "customer."

Finally, the proposed Rule eliminates § 310.3(a)(3)(iii), which deemed verifiable any authorization obtained by

embedded microchips to track the cards' value. See Janine S. Hiller and Don Lloyd Cook, *From Clipper Ships to Clipper Chips: The Evolution of Payment Systems For Electronic Commerce*, J.L. & Com., Fall, 1997, p. 53, 79-81. Visa Cash is one example of a stored value card that can be used in lieu of cash for purchases. See www.visa.com/pd/cash/main.html. Mastercard offers a smartcard product. See www.mastercard.com/ourcards/smartcard/. "Electronic cash" services, using prepaid accounts that can be drawn against for making online purchases, are also under development. See Stacy Collett, "New Online Payment Options Emerging," www.cnn.com/2000/TECH/computing/02/03/pay.online.options.idg.

¹³⁶ See LSAP at 4; NAAG at 10, 20; NCL at 5, 10. For example, buyers' club programs can be billed to customers' mortgage statements or telephone or electricity bills. The growth of this type of non-traditional billing has led to complaints regarding unauthorized charges from customers unfamiliar with such billing arrangements.

¹³⁷ Rule Tr. at 180.

¹³⁸ *Id.* at 183.

¹³⁹ *Id.* at 185. Such a transaction could occur without any telephone contact between the seller and customer, thus making it outside the scope of this Rule. However, this technology could also be used in conjunction with telemarketing, and thus merits inclusion here.

¹⁴⁰ 60 FR at 43850.

¹⁴¹ The Commission was persuaded that verifiable authorization was necessary for demand drafts because demand drafts lacked chargeback protection and dispute resolution rights, and because of the risk that a consumer's bank account could be drained by unauthorized charges.

written confirmation of the transaction, sent to the customer before submission of the draft for payment. Commenters and participants at the July Forum made clear that written confirmation prior to the submission of a customer's billing information for payment is seldom, if ever, used as a method of express verifiable authorization.¹⁴² Moreover, the Commission's law enforcement record provides ample evidence that when this method is used, it is subject to abuse.¹⁴³ Given that the method of authorization in § 310.3(a)(3)(iii) is used infrequently, and that complaints received by the Commission suggest that it has been subject to abuse by those telemarketers who employ it, the Commission proposes to delete this provision from the Rule.

In proposing to expand the coverage of the express verifiable authorization provision to include novel payment methods beyond demand drafts, the Commission has considered the effect this change would have on telemarketing businesses. Although the proposed change might be expected to result in additional costs to some telemarketers, the record reflects that telemarketers already commonly tape the customer's oral authorization in all calls in which a sale is made.¹⁴⁴ Given the apparent prevalence of taping, the Commission believes that any additional burden on telemarketers will be minimal.

Other Recommendations by Commenters Regarding Authorization

Some commenters suggested that the Rule restrict the allowable methods of authorization in certain circumstances. For example, some commenters recommended requiring written authorization when funds will be withdrawn from a customer's bank account or when a telemarketer has preacquired billing information.¹⁴⁵

¹⁴² See Reese at 5; Rule Tr. 116–118; 122.

¹⁴³ See, e.g., *FTC v. S.J.A. Society, Inc.*, No. 2:97cv472 (E.D. Va. filed May 12, 1997) (defendants sent consumers written "confirmation" of unauthorized debit payments). See also *FTC v. Diversified Mktg. Serv. Corp.*, No. 96–388 (W.D. Okla. filed Mar. 13, 1996); *FTC v. Winward Mktg., Ltd.*, et al., No. 96–cv–0615–FWH (N.D. Ga. filed Mar. 12, 1996).

¹⁴⁴ See Reese at 5 (stating that it is "standard practice * * * to ask the buyer's permission to record all or part of a sale on tape, as a mutual protection and to allow for post-sale independent verification"); Rule Tr. at 116–118 ("* * * 100% of sales calls are taped, and not the call, the portion in which the agreement to purchase goods and services and the terms for that purchase are tape recorded. I don't have a client that doesn't insist on it right now."), 122 (noting an increase in taping to ensure that consent has been provided and for use in any law enforcement investigation).

¹⁴⁵ AARP at 4; NAAG at 20 (suggesting that the Rule require written authorization when funds are

These commenters assert that written authorization is necessary when a consumer's bank account is being accessed by a telemarketer because consumers have limited recourse when funds are misappropriated from their bank accounts.¹⁴⁶

Requiring Written Authorization for Preacquired Account Telemarketing. Some commenters expressed the view that in situations when the telemarketer possesses preacquired billing information, the Rule should require the telemarketer to obtain the consumer's written authorization. In this way, the consumer would have a readily recognizable means to signal assent to a purchase.¹⁴⁷ NAAG argued that such a means of ensuring the customer's assent is particularly necessary where an imbalance of information exists because the telemarketer, often unbeknownst to the consumer, has the means to charge the customer's account without ever seeking permission to do so.¹⁴⁸

As outlined below, in the discussion of § 310.4(a)(5), the Commission proposes to prohibit as an abusive practice the receipt of a consumer's billing information from any source other than from the consumer. Therefore, the Commission declines to require written authorization in instances of preacquired account telemarketing.

Requiring Written Authorization to Withdraw Funds From a Customer's Checking Account. Some commenters urged the Commission to amend the Rule to prohibit any telemarketer from debiting a customer's bank account without the customer's written authorization.¹⁴⁹ In the original rulemaking, the Commission declined to adopt such a position, stating that:

Requiring such prior written authorization could be tantamount to eliminating this emerging payment alternative. Moreover, the Commission believes that it would be inconsistent to impose upon demand drafts a more stringent authorization mechanism than that imposed on electronic funds transfers under the EFTA and Reg. E.¹⁵⁰

The Commission reaffirms its reluctance to impose on demand drafts more stringent requirements than those imposed on electronic funds

withdrawn from bank account); *Id.* at 13 (suggesting that the Rule require written authorization when a telemarketer has preacquired billing information).

¹⁴⁶ AARP at 4; NAAG at 20.

¹⁴⁷ See AARP at 4; NAAG at 10.

¹⁴⁸ NAAG at 10.

¹⁴⁹ AARP at 4; NAAG at 20 (citing laws in Vermont and Kentucky that already require written authorization before a customer's bank account can be debited).

¹⁵⁰ 60 FR at 43851.

transfers.¹⁵¹ Moreover, the Commission believes that the oral authorization alternative provided in § 310.3(a)(3)(ii) has proven sufficient to protect consumers against unauthorized access to their bank accounts, except, perhaps, in those cases where a fraudulent telemarketer has resorted to altering verification tapes, or has flouted the requirement of the provision altogether. The Commission believes that even a written authorization requirement would not solve such problems because a telemarketer willing to alter verification tapes might also be inclined to forge signatures, and one ignoring the current oral authorization procedure would be no more likely to follow a more stringent one. Therefore, the Commission rejects this proposal.

Section 310.3(a)(4)—Prohibition of False and Misleading Statements to Induce the Purchase of Goods or Services or a Charitable Contribution

Only MPA commented on this provision of the Rule, noting that its broad prohibition against false or misleading statements to induce the purchase of goods or services provided flexibility for law enforcement to address fraud, regardless of the method of payment used. The Commission has used this provision extensively in cases it has brought under the Rule and has determined that the provision should be retained unchanged.¹⁵²

Pursuant to section 1011 of the USA PATRIOT Act, the Commission proposes to expand the coverage of this prohibition to encompass misrepresentations "to induce a charitable contribution." No other revision is proposed.

Section 310.3(b)—Assisting and Facilitating

Section 310.3(b) prohibits a person from providing substantial assistance or support to any seller or telemarketer

¹⁵¹ In this regard, the TSR's express verifiable authorization provision is also consistent with the NACHA Operating Rules, which govern payments made through the Automated Clearing House system. See NACHA at 2; Rule Tr. at 131–186.

¹⁵² The Commission has brought over eighty cases that included allegations under § 310.3(a)(4) since the Rule was enacted. See, e.g., *FTC v. Pacific Rim Pools Int'l*, No. C97–1748, (W.D. Wash. filed Nov. 7, 1997) (Order for Permanent Injunction and Final Judgment entered on Jan. 12, 1999); *FTC v. National Business Distribs. Co., Inc.*, No. 96–4470 (Mcx) JGD, (C.D. Cal. filed June 26, 1996) (Final Judgment and Order for Permanent Injunction entered on Jan. 24, 1997); *FTC v. Ideal Credit Referral Svcs. Ltd.*, No. C96–0874, (W.D. Wash. filed June 5, 1996) (Default Judgment and Order for Permanent Injunction and for Monetary Relief entered on Apr. 16, 1997); *FTC v. USA Credit Svcs., Inc.*, No. 96–639 J LSP, (S.C. Cal. filed Apr. 10, 1996) (Final Judgment and Order for Permanent Injunction and Other Equitable Relief entered on Mar. 20, 1997).

when that person knows or consciously avoids knowing that the seller or telemarketer is violating certain provisions of the Rule. Comments about this provision of the Rule were mixed. MPA asserted that the assisting and facilitating standard “struck exactly the right balance,”¹⁵³ while law enforcement and consumer advocacy groups were critical, reiterating many of the concerns they raised during the original rulemaking about the difficulty in meeting the Rule’s scienter standard.¹⁵⁴

The critics of the provision argued that the Rule’s current standard—which requires showing that the individual or entity knew or consciously avoided knowing about the law violations—sets the standard too high, and should be changed to a “knew or should have known” standard.¹⁵⁵ They opined that the “conscious avoidance” standard is not used in other areas of enforcement and is a departure from legal authority under many State consumer protection statutes and under the FTC Act, where the “knew or should have known” standard is commonly accepted.¹⁵⁶ They further argued that a “knew or should have known” standard would make it easier for law enforcement to challenge the support system for cross-border fraud.¹⁵⁷

The Commission has considered the recommendation to change the standard, but believes that the “conscious avoidance” standard is appropriate because the Rule creates potential liability to pay redress or civil penalties based on another person’s violation of the Rule. The “knew or should have known” standard is appropriate where an alleged wrongdoer is liable to be placed under an administrative cease-and-desist order or conduct injunction in a district court order based on his or her own direct violation of the Rule. As noted in the Rule’s Statement of Basis and Purpose, “in a situation where a person’s liability to pay redress or civil penalties for a violation of this Rule depends on the wrongdoing of another person, the “conscious avoidance” standard is

correct.”¹⁵⁸ However, the Commission invites additional comment on, and proposals for alternatives to, this provision in Section IX.

Section 310.3(c)—Credit Card Laundering

Section 310.3(c) prohibits credit card laundering. The few comments received concerning this section expressed strong support for the provision. ATA noted that the bright line this provision draws between legitimate and illegitimate business has made the Rule successful.¹⁵⁹ MPA stated that this provision strictly targets bad actors because legitimate companies would be able to establish relationships with credit card companies, leaving only illegitimate companies to violate this provision.¹⁶⁰ ATA agreed with MPA on this point, noting that stricter guidelines adopted by credit card companies for acceptable chargeback rates have further separated good from bad actors.¹⁶¹

The Commission’s enforcement experience has demonstrated that § 310.3(c) can be a useful tool in pursuing fraudulent telemarketers and those who provide them credit card laundering services.¹⁶² However, the Commission believes the provision’s usefulness may be unduly restricted by the phrases “(e)xcept as expressly permitted by the applicable credit card system,” in the preamble to § 310.3(c), and “when such access is not authorized by the merchant agreement or the applicable credit card system” in § 310.3(c)(3). In the initial rulemaking proceeding, Visa and Mastercard urged that these limiting phrases be adopted to ensure that the Rule did not unduly restrict legitimate activity. In its enforcement activities, however, the Commission has sometimes met with unwillingness on the part of overseas affiliates or branches of credit card system operators, such as Visa and Mastercard, to corroborate whether the conduct of specific telemarketers and others providing assistance to telemarketers is allowable under the rules of the credit card system or the specific terms of the telemarketer’s merchant agreement. The absence of such cooperation has, in some

instances, hobbled law enforcement efforts to bring fraudulent telemarketers to justice.

As a result of concern about the enforceability of the original provision in the absence of the full cooperation of credit card system operators, the Commission has requested comment in Section IX on possible changes to this provision that would better facilitate law enforcement efforts.

The Commission proposes no changes to the text of § 310.3(c) pursuant to section 1011 of the USA PATRIOT Act. The proposed Rule, however, expands coverage of the § 310.3(c) prohibition on credit card laundering through modification of the definition of a key term used in this provision—“merchant.” As discussed, the proposed definition would encompass persons authorized to honor or accept credit card payment, not only for the purchase of goods or services, but also for the payment of charitable contributions. The Telemarketing Act, as originally enacted, specifically identified as appropriate for rule coverage “acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering.” 15 U.S.C. 6102(a)(2). Neither the text nor the underlying rationale of section 1011 of the USA PATRIOT Act suggest that this provision should not be extended to reach instances where credit card laundering occurs in connection with charitable solicitations.

Section 310.3(d)—Prohibited Deceptive Acts or Practices in the Solicitation of Charitable Contributions, Donations, or Gifts

Section 1011(b)(1) of the USA PATRIOT Act mandates that the Commission include “fraudulent charitable solicitations” in the deceptive practices prohibited by the TSR. Accordingly, the Commission proposes a new section, 310.3(d), prohibiting specific material misrepresentations that have been alleged in Commission enforcement actions or those brought by FTC counterparts on the state level, or that have been prohibited by statute in one or more states. The new provision would prohibit misrepresentations of the following:

- The nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested;¹⁶³

¹⁶³ See, e.g., *FTC v. Baylis Co., Inc.*, No. 94-0017-S-LmB (D.C. Idaho filed Jan. 19, 1994) (misrepresented non-profit status); *FTC v. Marketing Twenty-One*, No. CV-S-94-00624-LDG (LRL) (D.C. Nev. filed July 13, 1994).

Continued

¹⁵³ MPA at 8.

¹⁵⁴ See NAAG at 6; NACAA at 2; Texas at 2.

¹⁵⁵ *Id.* Despite the high standard of proof set by the “conscious avoidance” standard, the Commission has successfully used the provision in a number of cases. See, e.g., *FTC v. Woofert Inv. Corp.*, No. CV-S-97-00515-LDG (RLH), (D. Nev. filed May 12, 1997) (Stipulated Order for Permanent Injunction and Final Judgment entered on Dec. 28, 1998); *FTC v. Ideal Credit Referral Svcs. Ltd.*, No. C96-0874, (W.D. Wash. filed June 5, 1996) (Default Judgment and Order for Permanent Injunction and for Monetary Relief entered on Apr. 16, 1997).

¹⁵⁶ See NAAG at 5-6; Texas at 2.

¹⁵⁷ See NACAA at 2; NAAG at 6; Texas at 2.

¹⁵⁸ 60 FR at 43852 (citations omitted).

¹⁵⁹ ATA at 4-5.

¹⁶⁰ MPA at 9.

¹⁶¹ ATA at 4-5.

¹⁶² See, e.g., *FTC v. Windermere Big Win Int’l, Inc.*, No. 98CV 8066, (N.D. Ill. filed Dec. 16, 1998); *FTC v. Pacific Rim Pools Int’l*, No. C97-1748, (W.D. Wash. filed Nov. 7, 1997) (Order for Permanent Injunction and Final Judgment entered on Jan. 12, 1999); *FTC v. Woofert Inv. Corp.*, No. CV-S-97-00515-LDG (RLH), (D. Nev. filed May 12, 1997) (Stipulated Order for Permanent Injunction and Final Judgment entered on Dec. 28, 1998).

- That any charitable contribution is tax deductible in whole or in part;¹⁶⁴
- The purpose for which any charitable contribution will be used;¹⁶⁵
- The percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program after any administrative or fundraising expenses are deducted;¹⁶⁶
- Any material aspect of a prize promotion including, but not limited to: the odds of being able to receive a prize; the nature or value of a prize; or that a charitable contribution is required to win a prize or to participate in a prize promotion;¹⁶⁷

(misrepresented purpose as soliciting contributions for non-existent entity named "For the Children"); *FTC v. Voices for Freedom*, No. 92-1542-A (E.D. Va., filed Oct. 21, 1991) (falsely obtained IRC 501(c)(3) status and misrepresented mission as assisting soldiers in Operation Desert Storm). See also Fla. Stat. ch. 496.415(7) (2000); Ariz. Rev. Stat. § 6561(3) (2001).

¹⁶⁴ See, e.g., *FTC v. Thadow, Inc.*, No. CV-S-95-75-HDM (LRL) (D.C. Nev. filed Jan. 25, 1995); *FTC v. United Holdings Group, Inc.*, No. CV-S-94-331-LDG (RLH) (D.C. Nev., filed April 5, 1994); *Marketing Twenty-One*, No. CV-S-94-00624-LDG (LRL). See also Minn. Stat. Ann. § 309.556(1)(b) (West 2000).

¹⁶⁵ The Commission intends that term "purpose" be interpreted broadly to include, among other things, whether the charitable contribution would benefit any particular individual, group, or locality, as well the way in which these entities would be helped, such as by the provision of food, shelter, etc. See, e.g., *FTC v. Gold*, No. CV 99-2895 CBM (RZx) (C.D. Calif. filed Nov. 9, 1998) (misrepresenting that contributions would *inter alia*, support local firefighters, buy wheelchairs for veterans or fund parties for hospitalized children); *FTC v. Image Sales & Consultants, Inc.* No. 1:97 DV 0131 (N.D. Ind., filed Apr. 7, 1997); *FTC v. Saja*, No. CIV-97-0666 PHX sm (D.C. Ariz. filed Mar. 31, 1997) (misrepresenting that contributions would buy necessary equipment or fund death benefits for firefighters or law enforcement officers in the donors' local communities); See also Ariz. Rev. Stat. § 4406561(4), (5) (2001); Fla. Stat. ch. 496.415(3), (4) (2000); Md. Code Ann. Business Regulations § 6-609, 611 (2000). See also *California v. Jewish Educ. Ctr.*, No. 987396 (Super. Ct. Cal. filed Nov. 14, 1997) (misrepresenting that funds raised through car donations would support needy immigrant families). See also Ariz. Rev. Stat. § 6561(3) (2001); Ind. Code Ann. § 23-7-8-7 (Michie 2001); Md. Code Ann., Business Regulations § 6-610 (2000); N.M. Stat. Ann. § 57-22-6.3 (Michie 2001); N.Y. Exec. Law § 172-d (Consol. 2001).

¹⁶⁶ See, e.g., *Voices for Freedom*, No. 92-1542-A; *Gold*, No. SACV 98-968 LHM (EEx); *Baylis*, No. 94-0017-S-LmB; *Marketing Twenty-One*. See also *California v. Jewish Educ. Ctr.* See also Fla. Stat. ch. 496.415(8); N.Y. Exec. Law § 172-d(4) (Consol. 2001); Pa. Stat. Ann. tit. 10 § 162.15(A)(9) (West 2000).

¹⁶⁷ See, e.g., *United Holdings Group, Inc.*, No. CV-S-94-331; *Marketing Twenty-One* (misrepresented value of prizes being offered in exchange for contributions of \$700 to \$1500); *FTC v. NCH, Inc.*, No. CV-S-94-00138-LDG (LRL) (D.C. Nev. filed July 13, 1994) (misrepresented that donors would receive a specific prize in return for their contribution); *FTC v. International Charity Consultants, Inc.*, No. CV-S-94-00195-DWH (LRL) (D.C. Nev. filed Mar. 1, 1994) (misrepresented odds of winning valuable prizes purportedly offered in exchange for contributions).

- In connection with the sale of advertising, the purpose for which the proceeds from the sale of advertising will be used; that a purchase of advertising has been authorized or approved by any donor; that any donor owes payment for advertising; or the geographic area in which the advertising will be distributed;¹⁶⁸ or

- A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government.¹⁶⁹

Each of these misrepresentations is an appropriate addition to the list of defined deceptive telemarketing practices prohibited in § 310.3 of the TSR, and inclusion of each in the TSR is necessary to prevent consumers solicited for charitable contributions from being deceived. Deception occurs if there is a representation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances and the representation, omission, or practice is material.¹⁷⁰ Where fundraising telemarketers falsely represent any of the matters enumerated in the proposed provision, donors are likely to be misled. False representations of material facts are likely to mislead.¹⁷¹ This is so in the context of purchases of goods or services or other commercial transactions, and there is no material distinction that would render this principle any less valid in the context of charitable solicitations. Moreover, it is reasonable to interpret a fundraising telemarketer's representations about any of these matters to mean what they seem on their face to mean. Finally, in the Commission's enforcement experience, often such representations are express,

¹⁶⁸ See, e.g., *FTC v. Southwest Mktg. Concepts*, No. H-97-1070 (S.D. Texas filed Apr. 1, 1997); *Saja*; *FTC v. Dean Thomas Corp.*, No. 1:97 CV 0129 (N.D. Ind. filed Apr. 7, 1997); *FTC v. The Century Corp.*, No. 1:97 CV 0130 (N.D. Ind. filed Apr. 7, 1997); *Image Sales & Consultants*, No. 1:97 CV 0131; *FTC v. Omni Advertising*, No. 1:98 CV 0301 (N.D. Ind. filed Oct. 5, 1998); *FTC v. T.E.M.M. Mktg., Inc.*, No. 1:98 CV 0300 (N.D. Ind. filed Oct. 5, 1998); *FTC v. Tristate Advertising Unlimited, Inc.*, No. 1:98 CV 302 (N.D. Ind. filed Oct. 5, 1998); *Gold*; *Eight Point Communications*, No. 98-74855 (D.C. Mich. filed Nov. 10, 1998). See also Pa. Stat. Ann. tit. 10 § 162.15(A)(11) (West 2000).

¹⁶⁹ See, e.g., *FTC v. Eight Point Communications* (telemarketers misrepresented affiliation with local police and fire departments); *FTC v. Gold*, No. SACV 98-968 LHM (EEx) (C.D. Calif. filed Nov. 9, 1998) (telemarketers falsely identified selves as members of local law enforcement); *Saja* (telemarketers falsely claimed to be firefighters or police officers). See also *Commonwealth v. Ranick Enters., Inc.*, No. 1997-06464-E (Super. Ct. Ma., filed June 26, 2001) (telemarketers misrepresented affiliation with local police and fire departments).

¹⁷⁰ *Cliffdale Assocs.*, 103 F.T.C. at 165.

¹⁷¹ *Thompson Medical Co.*, 104 F.T.C. 648, 818 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

and therefore presumptively material.¹⁷² Even where the misrepresentations are implied, they would still likely influence a prospective donor's decision whether to make a contribution. Thus, misrepresentation of any of these seven categories of material information is deceptive, in violation of section 5 of the FTC Act.

D. Section 310.4—Abusive Telemarketing Acts or Practices

The Telemarketing Act authorizes the Commission to prescribe rules "prohibiting deceptive telemarketing acts or practices and *other abusive telemarketing acts or practices*."¹⁵ U.S.C. 6102 (a)(1)(emphasis added). The Act does not define the term "abusive telemarketing act or practice." It directs the Commission to include in the TSR provisions addressing three specific "abusive" telemarketing practices, namely, for any telemarketer to: (1) "Undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy;" (2) make unsolicited phone calls to consumers during certain hours of the day or night; and (3) fail to "promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services." 15 U.S.C. 6102(a)(3). The Act does not limit the Commission's authority to address abusive practices beyond these three practices legislatively determined to be abusive.¹⁷³ Accordingly, the Commission adopted a rule that addresses the three specific practices mentioned in the statute, and, additionally, five other practices that the Commission determined to be abusive under the Act.

Each of the three abusive practices enumerated in the Act implicates consumers' privacy. In fact, with respect to the first of these practices, the explicit language of the statute directs the FTC to regulate "calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." 15 U.S.C.

¹⁷² *Cliffdale Assocs.*, 103 F.T.C. at 182.

¹⁷³ See Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* Section 3.2 (3rd ed. 1994) (noting that agencies have the power to "fill any gaps" that Congress either expressly or implicitly left to the agency to decide pursuant to the decision in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984)). It is, therefore, permissible for agencies to engage in statutory construction to resolve ambiguities in laws directing them to act, and courts must defer to this administrative policy decision.

6102(a)(3)(A) (emphasis added).

Similarly, by directing that the Commission regulate the times when telemarketers could make unsolicited calls to consumers in the second enumerated item, 15 U.S.C. 6102(a)(3)(B), Congress recognized that telemarketers' right to free speech is in tension with and encroaches upon consumers' right to privacy within the sanctity of their homes; the calling times limitation protects consumers from telemarketing intrusions during the late night and early morning, when the toll on their privacy from such calls would likely be greatest. The third enumerated practice, 15 U.S.C. 6102(a)(3)(C), also bears a relation to privacy, in that it requires the consumer be given information promptly that will enable him or her to decide whether to allow the infringement on his or her time and privacy to go beyond the initial invasion. Congress provided authority for the Commission to curtail these practices that impinge on consumers' right to privacy but are not likely deceptive under FTC jurisprudence. This recognition by Congress that even non-deceptive telemarketing business practices can seriously impair consumers' right to be free from harassment and abuse and its directive to the Commission to reign in these tactics, lie at the heart of § 310.4 of the TSR.

The practices not specified as abusive in the Act, but determined by the Commission to be abusive and prohibited in the original rulemaking are: (1) Threatening or intimidating a consumer, or using profane or obscene language; (2) "causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person;" (3) requesting or receiving payment for credit repair services prior to delivery and proof that such services have been rendered; (4) requesting or receiving payment for recovery services prior to delivery and proof that such services have been rendered; and (5) "requesting or receiving payment for an advance fee loan when a seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit."

The first two of these are directly consistent with the Act's emphasis on privacy protection, and with the intent, made explicit in the legislative history, that the TSR address these particular practices.¹⁷⁴ In the Statement of Basis

and Purpose for the Rule, the Commission stated, with respect to the prohibition on threats, intimidation, profane and obscene language, that these tactics "are clearly abusive in telemarketing transactions." 60 FR 30415. The Commission also noted that the commenters supported this view, and specifically cited the fact that "threats are a means of perpetrating a fraud on vulnerable victims, and that many older people can be particularly vulnerable * * *." *Id.*

The remaining three abusive practices identified in the Rule—relating to credit repair services, recovery services, and advance fee loan services—were included in the rule under the Telemarketing Act's grant of authority for the Commission to prescribe rules prohibiting other unspecified abusive telemarketing acts or practices. The Act gives the Commission broad authority to identify and prohibit additional abusive telemarketing practices beyond the specified practices that implicate privacy concerns,¹⁷⁵ and gives the Commission discretion in exercising this authority.¹⁷⁶

As noted above, some of the practices previously prohibited as abusive under the Act flow directly from the Telemarketing Act's emphasis on protecting consumers' privacy. When the Commission seeks to identify practices as abusive that are less distinctly within that parameter, the Commission now thinks it appropriate and prudent to do so within the purview of its traditional unfairness analysis as developed in Commission jurisprudence¹⁷⁷ and codified in the

Committee intends that the Commission's rulemaking will include proscriptions on such inappropriate practices as threats or intimidation, obscene or profane language, refusal to identify the calling party, continuous or repeated ringing of the telephone, or engagement of the called party in conversation with an intent to annoy, harass, or oppress any person at the called number. The Committee also intends that the FTC will identify other such abusive practices that would be considered by the reasonable consumer to be abusive and thus violate such consumer's right to privacy." H.R. Rep. No. 20, 103rd Congress, 1st Sess. (1993) at 8.

¹⁷⁵ 15 U.S.C. 6102(a)(1).

¹⁷⁶ The ordinary meaning of "abusive" is (1) "wrongly used; perverted; misapplied; catagorical;" (2) "given to or tending to abuse," (which is in turn defined as "improper treatment or use; application to a wrong or bad purpose"). Webster's International Dictionary, Unabridged 1949.

¹⁷⁷ See Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, appended to *International Harvester Co.*, 104 F.T.C. 949, 1064 (1984); Letter from the FTC to Hon. Bob Packwood and Hon. Bob Kasten, Committee on Commerce, Science and Transportation, United States Senate,

FTC Act.¹⁷⁸ This approach constitutes a reasonable exercise of authority under the Telemarketing Act, and provides an appropriate framework for several provisions of the original rule as well as for the proposed prohibition on the transfer of preacquired billing information, as discussed below. Whether privacy-related intrusions or concerns might independently give rise to a Section 5 violation outside of the Telemarketing Act's purview is not addressed or affected by this analysis.

The abusive practices relating to credit repair services, recovery services, and advance fee loan services each meet the criteria for unfairness. An act or practice is unfair under Section 5 of the FTC Act if it causes substantial injury to consumers, if the harm is not outweighed by any countervailing benefits, and if the harm is not reasonably avoidable.¹⁷⁹ An important characteristic common to credit repair services, recovery services, and advance fee loan services is that in each case the offered service is fundamentally bogus. It is the essence of these schemes to take consumers' money for services that the seller has no intention of providing and in fact does not provide. Each of these schemes had been the subject of large numbers of consumer complaints and enforcement actions. Thus, each caused substantial injury to consumers. Amounting to nothing more than outright theft, these practices conferred no potentially countervailing benefits. Finally, having no way to know these offered services were illusory, consumers had no reasonable means to avoid the harm that resulted from accepting the offer. Thus, these practices meet the statutory criteria for unfairness, and accordingly, the remedy imposed by the Rule to correct them is to prohibit requesting or receiving payment for these services until after performance of the services is completed.

Section 310.4(a)—Abusive Conduct Generally

Section 310.4(a) of the Rule sets forth specific conduct that is considered to be an "abusive telemarketing act or practice" under the Rule. MPA was the only commenter to address § 310.4 specifically, expressing its support for this section as a whole and noting that the practices listed as "abusive" clearly fall outside the practices of legitimate

reprinted in FTC Antitrust & Trade Reg. Rep. (BNA) No. 1055, at 568-70 (Mar. 5, 1982); *Orkin Exterminating Company, Inc. v. FTC*, 849 F.2d 1354, 1363-68, *reh'g denied*, 859 F.2d 928 (11th Cir. 1988), *cert. denied*, 488 U.S. 1041 (1989).

¹⁷⁸ 15 U.S.C. 45(n).

¹⁷⁹ *Id.*

¹⁷⁴ "With respect to the bill's reference to 'other abusive telemarketing activities' * * * the

companies.¹⁸⁰ None of the comments recommended that changes be made to the current wording of § 310.4(a)(1)–(3); nor has the Commission's enforcement experience revealed any difficulty with these provisions that would warrant amendment. Therefore, the language in these provisions remains unchanged in the proposed Rule.¹⁸¹

It is important to note, however, that Rule amendments mandated by the USA PATRIOT Act expand the reach of § 310.4(a) to encompass the solicitation of charitable contributions. The section begins with the statement "It is an abusive telemarketing act or practice and a violation of this Rule for any seller, or any telemarketer to engage in [the conduct specified in subsections (1) through (6) of this provision of the Rule.]" Because the proposed Rule modifies the definitions of "telemarketing" and "telemarketer" to encompass the solicitation of charitable contributions, § 310.4(a) now applies to telemarketers engaged in the solicitation of charitable contributions, and each of the prohibitions in § 310.4(a) will therefore now apply to those telemarketers soliciting on behalf of either sellers or charitable organizations. It is unlikely that §§ 310.4(a)(1)–(4) will have any significant impact on telemarketers engaged in the solicitation of charitable contributions, since those sections all deal with practices that are commercial in nature and not associated with charitable solicitations. Section 310.4(a)(5) & (6) however, address practices that are not necessarily confined to telemarketing to induce purchases of goods or services, and therefore may have an impact upon telemarketers engaged in the solicitation of charitable contributions.

Commenters did suggest changes to § 310.4(a)(4) (which addresses telemarketing of advance fee loans) and identified other telemarketing practices that should be declared "abusive telemarketing acts or practices."¹⁸²

¹⁸⁰ See MPA at 9.

¹⁸¹ Section 310.4(a)(1) prohibits as an abusive practice "threats, intimidation, or the use of profane or obscene language." Section 310.4(a)(2) prohibits requesting advance payment for so-called "credit repair" services. NCL noted that the level of complaints about such bogus credit repair services, relative to other products and services, has remained relatively low since the Rule was promulgated, annually ranking 23rd or 24th on the list of the most frequent complaints since 1995. NCL at 11. Section 310.4(a)(3) prohibits requesting advance payment for the recovery of money lost by a consumer in a previous telemarketing transaction. NCL reported that the number of complaints about such fraudulent "recovery" services declined dramatically after the Rule was promulgated, from ranking 3rd in 1995 to 25th in 1997. *Id.*

¹⁸² See, e.g., AARP at 5 (ban use of courier pickups); Jordan, generally (ban use of prisoners as

Each of those suggestions, and the Commission's reasoning in accepting or rejecting it, will be discussed in more detail below.

Section 310.4(a)(4)—Advance Fee Loans

Section 310.4(a)(4) prohibits requesting advance payment for obtaining a loan or other extension of credit when the seller or telemarketer has represented a high likelihood that the consumer will receive the loan or credit. NCL reported that the number of complaints it received about such advance fee loan schemes has risen steeply in the five years since the Rule was promulgated.¹⁸³ In 1995, advance fee loan complaints ranked 15th in volume; in 1997, they had risen to number two.¹⁸⁴ NCL speculates that one reason for the increased number of complaints about fraudulent advance fee loans is that consumers may be confused about whether and under what circumstances fees are legitimately required for different types of loans, and thus may have an increased vulnerability to fraudulent advance fee loan schemes.¹⁸⁵

As a primary example of such consumer confusion, NCL reports that it receives numerous complaints about advance fee credit cards.¹⁸⁶ NCL states that, unlike the deposits requested for legitimate secured credit cards, these offers request an advance fee for "processing" or for an "annual fee" for a "guaranteed" credit card. Moreover, NCL's complaints show that consumers either do not receive the cards at all or receive a card that is good only for purchasing items from the card-issuer's catalog.¹⁸⁷ NCL suggested that consumers often do not understand that legitimate credit card companies do not require a fee from a consumer in advance of providing a non-secured credit card.¹⁸⁸ NCL recommended that § 310.4(a)(4) of the Rule be modified specifically to prohibit advance fees for credit cards, suggesting that such a ban would make it easier for consumers to distinguish between legitimate and fraudulent credit card offers.¹⁸⁹

The Commission believes that the language of § 310.4(a)(4) already prohibits such advance fee credit card

telemarketers); NAAG at 19–20 (ban targeting vulnerable groups and ban sale of lists of victims); NCL at 12 (ban advance fees for credit cards).

¹⁸³ FTC complaint data mirrors that provided by NCL, with advance fee loan complaints rising during the period from 1995 to 2000.

¹⁸⁴ NCL at 11.

¹⁸⁵ See NCL at 11; Rule Tr. at 378–380.

¹⁸⁶ NCL at 12; Rule Tr. at 297–298, 376.

¹⁸⁷ NCL at 12; Rule Tr. at 297–298, 377.

¹⁸⁸ Rule Tr. at 377–378.

¹⁸⁹ NCL at 12; Rule Tr. at 297–299, 376–380.

offers via telemarketing.¹⁹⁰ In fact, both the Commission and the State Attorneys General have brought cases challenging advance fee credit card offers as violations of the Rule.¹⁹¹ Therefore, the provision's language remains unchanged in the proposed Rule.

Section 310.4(a)(5)—Preacquired Account Telemarketing

A major concern identified by many commenters was "preacquired account telemarketing," a phrase coined to describe those instances when a telemarketer already possesses information necessary to bill charges to a consumer at the time a telemarketing call is initiated. Typically, the preacquired billing information is a credit card number (and related information),¹⁹² acquired from a

¹⁹⁰ See Rule Tr. at 297–299, 377–380. Even where the advance fee credit card offers described by NCL do not make promises about a "high likelihood of success" in obtaining the card, thus falling outside the parameters of § 310.4(a)(4), the offers, in most cases, would still violate the Rule because they fail to make the disclosures of material information required by § 310.3(a)(1), make one or more misrepresentations in violation of § 310.4(a)(2), and/or make false or misleading statements to induce payment in violation of § 310.4(a)(4). Of course, these provisions apply only to credit card offers made by individuals or entities not exempt from coverage under the FTC Act, and so would not apply to advance fee credit cards marketed by a financial institution that is exempt from the Commission's jurisdiction under Section 5 of the FTC Act. 15 U.S.C. 45(a)(2).

¹⁹¹ Rule Tr. at 378. To date, the Commission and the State Attorneys General have launched five law enforcement "sweeps" targeting corporations and individuals that promise loans or credit cards for an advance fee, but never deliver them. A recent sweep was announced June 20, 2000, and involved five cases filed by the FTC, 13 actions taken by State officials, and three cases filed by Canadian law enforcement authorities. See, "FTC, States and Canadian Provinces Launch Crackdown on Outfits Falsely Promising Credit Cards and Loans for an Advance Fee," FTC press release dated June 20, 2000. Among the most recent FTC cases targeting advance fee loans, four involved advance fee credit card schemes: *FTC v. Financial Svcs. of North America*, No. 00–792 (GEB) (D.N.J. filed June 9, 2000); *FTC v. Home Life Credit*, No. CV00–06154 CM (Ex) (C.D. Cal. filed June 8, 2000); *FTC v. First Credit Alliance*, No. 300 CV 1049 (D. Conn. filed June 8, 2000); and *FTC v. Credit Approval Svc.*, No. G–00–324 (S.D. Tex. filed June 7, 2000). In addition, another case against a fraudulent credit card loss protection seller also included elements of illegal advance fee credit card fees. *FTC v. First Capital Consumer Membership Svcs., Inc.*, Civil No. 00–CV–0905C(F) (W.D.N.Y. filed Oct. 23, 2000).

¹⁹² See Rule Tr. at 100–101, which cites a press release issued by the Minnesota Attorney General on the lawsuit that Minnesota brought against U.S. Bancorp for selling customer information. In that case, Minnesota alleged that U.S. Bancorp transferred large amounts of sensitive customer information to Memberworks, Inc., a telemarketing firm, for \$4 million, plus commissions on any completed sales. The customer information transferred from U.S. Bancorp to Memberworks included, in addition to account number, the customer's medical status, homeowner status, occupation, Social Security number, date of birth, and payment history data, among other things. See

financial institution or some other third party. However, sellers and telemarketers also obtain other types of billing information in advance of initiating a telemarketing campaign, including debit card account numbers, checking account numbers, mortgage account numbers and the like.¹⁹³ Usually, the acquisition of preacquired billing information occurs through a joint marketing agreement or other arrangement in which, for example, Seller A provides access to its customer billing information to Seller B for the purposes of marketing Seller B's goods or services, in exchange for a percentage of each sale.¹⁹⁴ Telemarketers and sellers increasingly rely on such affinity relationships to up-sell goods and services to the customers of companies with which they have developed a business relationship, often transferring billing information as well as contact information.¹⁹⁵ There are, however, a variety of scenarios in which preacquired account telemarketing may occur. Enhanced database technology has also made it practical for sellers to retain and reuse the billing information of customers with whom they have an ongoing business relationship, yielding yet another source of preacquired billing information—the seller's own files.¹⁹⁶

The issue of the use in telemarketing of preacquired billing information was

addressed by a number of commenters, and also was the subject of extensive discussion at the July Forum.¹⁹⁷ Record evidence presented by businesses and industry representatives indicates that the use of preacquired billing information is quite common,¹⁹⁸ and that it allegedly saves time during telemarketing calls,¹⁹⁹ presumably saving money as well. In the context of up-selling and affinity marketing, which were noted as increasingly common forms of marketing at the July Forum, the use of preacquired billing information is universal and “very important” to telemarketers.²⁰⁰

Comments from law enforcement representatives, consumer advocacy groups, and consumers criticized the use of preacquired billing information by telemarketers for two specific reasons. First, NAAG suggested that the practice “presents inherent opportunities for abuse and deception,” including the billing of unauthorized charges to the customer's account.²⁰¹ According to NAAG, this practice “generates a significant number of vehement consumer complaints about unauthorized account charges,”²⁰² a position with which NCL concurred at the July Forum.²⁰³ LSAP echoed these concerns in its comments, observing that, “(a)s a result of (the) ability to preacquire such accounts, (the State of) Minnesota is seeing * * * telemarketers charge customers' accounts with questionable or complete lack of consumer authorization.”²⁰⁴

These commenters noted the particular dangers for consumers that arise when preacquired billing information is used in combination with free trial offers and/or negative option plans. NAAG cited club membership programs sold on a free trial basis as an example of why this combination is troubling. Often consumers consent to having additional information about an offered club membership mailed for their review, incorrectly assuming that since they have not provided their

billing information, they will not be charged unless they affirmatively take some action to accept the offer.²⁰⁵ Many consumers who complain about such free trial club membership programs claim to have been told neither that they would be charged, nor that the telemarketer already had their billing information.²⁰⁶ When they find they have been charged, many consumers are shocked and mystified, wondering how the telemarketer obtained their billing information.²⁰⁷

The second criticism of the use in telemarketing of preacquired billing information that commenters identified is that when the seller avoids the necessity of persuading the consumer to demonstrate her consent by divulging her billing information, the usual sales dynamic of offer and acceptance is inverted.²⁰⁸ One commenter suggested that “(a) typical telemarketing sale not involving preacquired accounts requires that the consumer provide his or her credit card or other account number to the telemarketer, or that the consumer send a check or sign a contract in a later transaction. * * * (By contrast, t)he pre-acquired account telemarketer not only establishes the method by which the consumer will provide consent, but also decides whether the consumer actually consented.”²⁰⁹ Thus, the most fundamental tool consumers have for controlling commercial transactions— withholding the information necessary to effect payment unless and until they have consented to buy—is ceded, without the consumers' knowledge, to the seller before the sales pitch ever begins.²¹⁰

In their comments, various law enforcement representatives and consumer advocacy groups offered potential solutions to the deception they view as resulting from the use of preacquired billing information. NAAG suggested that the Rule require telemarketers to obtain written consent from any customer before charging a preacquired account.²¹¹ LSAP recommended expanding the express verifiable authorization provision of § 310.3(a)(3) to credit card purchases, and requiring that where preacquired account telemarketing occurs, express

also, Lornet Turnbull, “Credit-card Issuer Settles Charges of Violating Consumer Privacy Laws,” *The Columbus Dispatch*, (Sept. 26, 2000), p. 1E.

¹⁹³ Consumers have reported to various law enforcement agencies, including the Commission, that unauthorized charges due to preacquired account telemarketing have appeared on mortgage statements, checking accounts, and telephone bills. See, e.g., LSAP at 2; NAAG at 10.

¹⁹⁴ Rule Tr. at 89–90; AARP at 4.

¹⁹⁵ See Rule Tr. at 95–96, 176.

¹⁹⁶ For example, a customer who places quarterly orders for contact lenses by calling a particular lens retailer may provide her billing information in an initial call, with the understanding and intention that the telemarketer will retain it so that, in any subsequent call, the retailer has access to this billing information. As was observed by participants in the July Forum, there may be certain benefits that accrue to consumers from the retention of their billing information by retailers with whom they have a continuing relationship, provided that customers understand the nature of their relationship with the particular seller, as well as the nature of any transaction for which their billing information may be used by that seller. During the July Forum, one commenter gave a non-telemarketing example of the possible benefits that might be enjoyed by a consumer who uses a website such as Priceline.com, to which she provides her credit card number and related information, with the intention that it be retained as a convenience to her in her ongoing business relationship with the company. Rule Tr. at 91–92. As another commenter pointed out, the key to this transaction is the fact that the consumer makes the decision to supply the billing information to the seller, and understands and expects that the information will be retained and that the account may be charged in the future, should the consumer authorize another purchase. *Id.* at 102.

¹⁹⁷ See generally Hollingsworth at 1; LSAP at 1–4; NAAG at 10–13; Texas at 1–2; Rule Tr. at 87–129, 311.

¹⁹⁸ See *Id.* at 88, 95–96.

¹⁹⁹ See *Id.* at 90.

²⁰⁰ MPA stated that the use of preacquired account information is “very important” in affinity marketing campaigns. Rule Tr. at 176–177.

²⁰¹ NAAG at 10.

²⁰² *Id.* at 11.

²⁰³ Rule Tr. at 91 (“The National Consumers League is really concerned about what we see as the growing use of preacquired account information, and it's not only credit card accounts. It's bank accounts. This pops up in complaints that we receive about buyer's clubs, about credit card loss protection plans and certain other telemarketing fraud categories.”), 113–114.

²⁰⁴ LSAP at 2.

²⁰⁵ See NAAG at 11–12.

²⁰⁶ See Hollingsworth at 1; Rule Tr. at 113–114.

²⁰⁷ *Id.*

²⁰⁸ See NAAG at 10.

²⁰⁹ *Id.* at 10–11.

²¹⁰ *Id.* at 10 (“Other than a cash purchase, providing a signature or an account number is a readily recognizable means for a consumer to signal assent to a deal. Preacquired account telemarketing removes these short-hand methods for the consumer to control when he or she has agreed to a purchase.”).

²¹¹ *Id.* at 13.

authorization be obtained in the form of an oral or written statement from the account holder disclosing the last four digits of the account number to be charged.²¹² Texas opined that the Rule should require telemarketers to disclose: (a) That the telemarketer is already in possession of the consumer's billing information; (b) the anticipated billing date; and (c) the total amount that the consumer is agreeing to pay.²¹³

Third-party sharing of preacquired billing information is an abusive practice. The TSR, as originally adopted, implicitly condemned the then-unknown practice of using preacquired billing information in telemarketing, and the Statement of Basis and Purpose expressly so stated.²¹⁴ Nevertheless, the record developed in this proceeding indicates that the problematic trafficking in and use of consumers' billing information has become prevalent in the marketplace. Therefore, the Commission believes the Rule must address this in a more explicit and straightforward fashion.

The Commission is persuaded from the record evidence and its own law enforcement experience that receiving from any person other than the consumer for use in telemarketing any consumer's billing information, or disclosing any consumer's billing information to any person for use in telemarketing constitutes an abusive practice within the meaning of the Telemarketing Act. The practice meets the Commission's traditional criteria for unfairness, in accordance with the Commission's view, set forth above, that the authority under the Telemarketing Act to prohibit "abusive" practices not focusing on consumers' privacy should be exercised within the framework of that more rigorous legal standard. The Commission believes that the sharing of consumers' preacquired billing information causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. 15 U.S.C. 45(n).

In particular, the Commission questions whether benefits to consumers or to competition could accrue from preacquired account

telemarketing sufficient to outweigh the injury that the practice causes or is likely to cause. Although some industry members have claimed that preacquired account information generates efficiencies, the Commission has no data that identify or quantify specific efficiency gains. Moreover, other industry members have maintained that there is no legitimate reason for sharing account information.

Finally, consumers are powerless to avoid the injury that can result from third party sharing of preacquired billing information, since making a specific purchase requires divulging one's account information; there is nothing in such a transaction to suggest that the seller or telemarketer will pass it along to third parties or use it for any purpose other than to bill charges for that particular transaction.²¹⁵

Accordingly, the Commission proposes, in § 310.4(a)(5), to prohibit receiving from any person other than the consumer or donor for use in telemarketing any consumer's or donor's billing information, or disclosing any consumer's or donor's billing information to any person for use in telemarketing. During the comment period that occurred prior to enactment of the USA PATRIOT Act, evidence of abuse of donors' billing information was neither specifically sought, nor received. Nevertheless, pursuant to that Act, the Commission proposes to include the term "donor" in this provision to make it clear that telemarketers engaged in the solicitation of charitable contributions must comply. Nothing in the text or legislative history of the USA PATRIOT Act suggests that Congress intended to exclude telemarketers engaged in the solicitation of charitable contributions from provisions like this that target abusive telemarketing practices. The Commission believes that the harm to donors would be no less than the harm to consumers were a telemarketer to receive from or disclose to third parties the billing information of donors.

Section 310.4(a)(6)—Blocking Caller Identification Service ("Caller ID") Information

Proposed § 310.4(a)(5) would prohibit blocking, circumventing, or altering the transmission of, or directing another person to block, circumvent or alter the transmission of, the name and telephone number of the calling party for purposes of caller identification service ("Caller ID") purposes. The Commission believes this proposed provision is

necessary to protect consumers' privacy under the Telemarketing Act. The proposed provision would include a proviso that it is not a violation to substitute, for the phone number used in making the call, the actual name of the seller or charitable organization, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours.²¹⁶ The scope of this provision extends to cover the solicitation by telemarketers of charitable contributions, pursuant to section 1011 of the USA PATRIOT Act. The Commission believes there to be no meaningful distinction between telemarketers calling on behalf of sellers and telemarketers calling on behalf of charitable organizations that would merit excluding the latter from this provision of the Rule. In fact, the record evidence amassed during the review of the Rule fully supports the proposition that consumers using caller identification technology to screen telemarketers want to know who is calling them, regardless of whether the caller is soliciting them to purchase goods or services or to make a charitable contribution. Moreover, the mandate of the Telemarketing Act regarding the right to privacy of those called by telemarketers, which is in no way altered by the USA PATRIOT Act, supports coverage of the solicitation of charitable contributions under this provision of the Rule.

The Commission received numerous comments from consumers and others about the fact that Caller ID routinely fails to display the names and numbers of telemarketers. These commenters noted that the consumer's Caller ID device often displays only a message that the identity of the caller is "unavailable," the caller is "out of the area," or some similar phrase, depending on the service or device the consumer uses to receive this Caller ID information.²¹⁷ The record also contains extensive discussion of the disparate views as to why Caller ID equipment often does not display the telemarketer's identity and about the technological and economic feasibility of transmitting that information.²¹⁸ Although some commenters argue that some telemarketers deliberately block the

²¹² LSAP at 4.

²¹³ Texas at 1–2. The suggested disclosure that the telemarketer already possesses the customer's billing information was echoed by some of the industry participants during the July Forum. See Rule Tr. at 177.

²¹⁴ "(A) telemarketer or seller who fails to provide the (§ 310.3(a)(1)) disclosures until the consumer's payment information is in hand violates the Rule." 60 FR 43846 (Aug. 23, 1995).

²¹⁵ See Hollingsworth at 1; NAAG at 10–11, 20; Texas at 1–2; Rule Tr. at 102–107.

²¹⁶ For a discussion of the Rule's definition of "caller identification service," see the explanation of § 310.2(d), above.

²¹⁷ See, e.g., Baressi at 1; Bell Atlantic at 8; Blake at 1; Collison at 1; Lee at 1; LeQuang at 1; Mack at 1; Sanford at 1.

²¹⁸ See, e.g., Bell Atlantic at 8; Leshner at 1; DNC Tr. at 46–47, 106–123, 263; Rule Tr. at 19–49.

transmission of Caller ID information,²¹⁹ there is record evidence indicating that it is technically impossible for many telemarketers to transmit Caller ID information because of the type of telephone system they use.²²⁰ Many telemarketers use a large "trunk side" connection (also known as a trunk or T-1 line), which is cost-effective for making many calls, but cannot transmit Caller ID information.²²¹ Calls from these lines will display a term like "unavailable" on a Caller ID device, as described above.

Comments from representatives of the telemarketing industry state that, even if it were possible to transmit a name and telephone number, the information would be of little use to the consumer because the number shown most likely would be the number of the telemarketer's central switchboard or trunk exchange rather than a useful number, such as a customer service number, where the consumer could ask to be placed on a "do-not-call" list.²²²

Caller ID is an important tool for consumers, not only because it allows consumers to screen out unwanted callers, but also because it allows consumers to identify companies to contact to request to be placed on the company's "do-not-call" list.²²³ If the

telemarketer subverts the transmission of its name and telephone number for Caller ID purposes, the telemarketer denies the consumer the means to identify who and where the telemarketer is, and to whom the consumer can assert her "do-not-call" rights.²²⁴ In order to enhance the usefulness of this tool, and to protect consumers' privacy and their right to be placed on a "do-not-call" list, a number of States have passed or are considering legislation regarding transmission of Caller ID information. One State legislative approach requires the seller or telemarketer to disclose its name and telephone number to any Caller ID device.²²⁵ A second approach prohibits the deliberate blocking of Caller ID information.²²⁶ Congress also has examined this issue; the most recent Congressional proposals have taken the same approaches as the States.²²⁷

Based on the record to date, it appears that the current state of technology may limit the ability of some telemarketers to transmit Caller ID information because of the type of phone line they use. However, the Commission recognizes that technology advances at a rapid pace in the telecommunications industry; what is impossible today may be commonplace in the future. Further, if

additional legislation is passed requiring telemarketers to provide full, unmodified Caller ID information, the industry (including PBX vendors, call center solution providers, and other technology suppliers) may be forced to develop the appropriate technology to meet these regulatory mandates. Therefore, in Section IX of this Notice, the Commission requests comment on the following:

- Trends in telecommunications that might permit the transmission of full Caller ID information when the caller is using a trunk line or PBX system;
- How firms currently are meeting the regulatory requirements in those States that have passed such legislation; and
- The costs and benefits of complying with these requirements and with the Commission's proposed Rule provision.

Although current technological limitations may restrict transmission of Caller ID information along some types of phone lines, the Commission believes that there is no reason that a legitimate seller, charitable organization, or telemarketer would choose to subvert the display of information sent or transmitted to consumers' Caller ID equipment.²²⁸

Therefore, the Commission proposes in § 310.4(a)(5) to specify that it is an abusive telemarketing act or practice for a seller, charitable organization, or telemarketer to deliberately block, circumvent, or interfere with the information displayed on Caller ID equipment. The proposed provision states that it is not a violation to substitute the actual name of the seller or charitable organization, and the seller's or telemarketer's customer or donor service number, which is answered during regular business hours, for the phone number used in making the call.

As noted, subverting the transmission of the name or telephone number of the calling party for caller identification service purposes denies the person

²¹⁹ Bell Atlantic at 8; Leshner at 1; DNC Tr. at 46–47.

²²⁰ Bell Atlantic at 8; DNC Tr. 109–110, 112–118, 263.

²²¹ Bell Atlantic at 8; Rule Tr. at 20–47. Bell Atlantic also states, however, that some telemarketers are using "line side" connections that are capable of transmitting Caller ID information, but choose to block its transmission. Bell Atlantic recommends that to the extent that is occurring, the Commission should prohibit telemarketers from blocking Caller ID. Bell Atlantic at 8. In this regard, the FCC has found that some PBX equipment has the capability of transmitting Caller ID information and also has the ability to suppress that information. See *Rules and Policies Regarding Calling Number Identification Service—Caller ID, Third Report and Order, Memorandum Opinion and Order on Further Reconsideration, and Memorandum Opinion and Order on Reconsideration*, FCC 97–103, CC Docket 91–281, 12 FCC Rcd 3867, 3882–84 (1997) ("Third Report and Order"). Among other issues, the Third Report and Order establishes new rules to govern PBX and related systems, requiring them to provide users (*i.e.*, calling parties) with some type of blocking and unblocking capabilities. Since the agency began its rulemaking in 1991, a major focus of the FCC proceeding has been to ensure the privacy of calling parties by providing the ability to block and unblock the transmission of calling party information.

²²² DNC Tr. at 113–114; Rule Tr. at 41–42.

²²³ According to a Bell Atlantic survey of residential customers, three out of four customers buy Caller ID to help stop abusive telephone calls. Laurie Itkin, "Caller ID Privacy Issues," 1 NCSL LegisBriefs (Nov. 1, 1993). Although Caller ID began as a local service, the advent of new switching technology (Signaling System Seven or "SS7" switching technology) has made it possible for Caller ID information to be transmitted with out-of-state calls. See *Report and Order and Further Notice*

of Proposed Rulemaking, FCC 94–59, CC Docket 91–281, 9 FCC Rcd 1764 (1994) ("Report and Order").

²²⁴ LeQuang at 1.

²²⁵ See, *e.g.*, New Hampshire (ch. 14, effective Jan. 1, 1999) and Texas (Tex. Utilities Code Ann. § 55.1065), which require that, if a marketer leaves a message on an answering machine or uses an automatic dialing device (ADAD), the Caller ID display must include a telephone number at which the marketer may receive calls.

²²⁶ See, *e.g.*, Alabama (Ala. Code § 8–19C–5(b)); Arizona (Ariz. Rev. Stat. § 44–1278 subsection B, paragraph 1); Georgia (Ga. Code Ann. § 46–5–27); Kansas (Kan. Stat. Ann. § 50–670(c)); Kentucky (Ky. Rev. Stat. Ann. § 367.46955(9)); Michigan (Mich. Comp. Laws § 484.125, section 25(2)(b)); New Hampshire (N.H. Rev. Stat. Ann. § 359–E:5a); New York (NY General Business Law § 399–p); Tennessee (Tenn. Code Ann. § 65–4–403); Texas (Tex. Utilities Code Ann. § 55.1065); Utah (Utah Code Ann. § 13–25a–103(6)).

²²⁷ H.R. 90 (the "Know Your Caller Act of 2001") (introduced by Rep. Frelinghuysen Jan. 3, 2001 and passed by the House on Dec. 4 2001) would prohibit telemarketers from interfering with or circumventing the consumer's Caller ID service. It also would require that the telemarketer display on the Caller ID equipment the name of the seller on whose behalf the call is being made and a valid, working telephone number the consumer may call to be placed on a "do-not-call" list. (These requirements would be implemented through FCC regulations.) A piece of proposed legislation in the previous Congress, H.R. 3180 (a bill to amend the Telemarketing Act) (introduced by Rep. Salmon) would have prohibited telemarketers from blocking their telephone number to evade a Caller ID device. Similar legislation was introduced in 2001: H.R. 232 ("Telemarketing Victims Protection Act") (introduced by Rep. King); and S. 722 ("Telemarketer Identification Act of 2001") (introduced by Sen. Frist).

²²⁸ The FCC requires common carriers to provide a mechanism by which a line subscriber can block the display of his or her name and telephone number on a Caller ID device. Rule Tr. at 39–40; 47 CFR 64.1601(b). See *Rules and Policies Regarding Calling Number Identification Service—Caller ID, Memorandum Opinion and Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking*, FCC 95–187, CC Docket No. 91–281, 10 FCC Rcd 11700, 11708 (1995) ("Second Report and Order"). However, such a blocking mechanism is intended to ensure the privacy of individual line subscribers, such as those with unlisted numbers, undercover law enforcement investigators, or those calling from battered women's shelters, whose safety might be jeopardized if Caller ID information were displayed when they made outgoing calls. No such privacy concerns pertain when sellers or telemarketers are initiating outbound sales solicitation calls. See Itkin, "Caller ID Privacy Issues."

called the means to know who and where the telemarketer is, and to whom a “do-not-call” demand should be directed. It is beyond cavil that this is the very type of practice Congress had in mind in directing that the Commission should “identify other such abusive practices that would be considered by the reasonable consumer to be abusive and thus violate such consumer’s right to privacy.”²²⁹ As such, the proposed prohibition directly advances the Telemarketing Act’s goal to protect consumers’ privacy. Thus, the practice is abusive under the Telemarketing Act, 15 U.S.C. 6102(a)(1).

Section 310.4(b)—Pattern of Calls

Section 310.4(b)(1)(i) specifies that it is an abusive telemarketing practice to cause any telephone to ring, or to engage any person in telephone conversation, repeatedly or continuously, with intent to annoy, abuse, or harass any person at the called number. None of the comments recommended that changes be made to the current wording of § 310.4(b)(1)(i). Therefore, the language in that provision remains unchanged in the proposed Rule.²³⁰ However, the expansion in scope of the TSR effectuated by the USA PATRIOT Act brings within the ambit of this provision telemarketers soliciting charitable contributions, as well as sellers and telemarketers making calls to induce the purchase of goods and services.

Commenters did suggest changes to § 310.4(b)(1)(ii) (the “do-not-call” provision) and to § 310.4(b)(2) (the “safe harbor” provision). Those suggestions and the Commission’s reasoning in accepting or rejecting the recommendations are discussed in detail below.

Section 310.4(b)(1)(ii)—Denying or Interfering With Rights

Proposed § 310.4(b)(1)(ii) would prohibit a telemarketer from denying or interfering in any way with a person’s right to be placed on a “do-not-call” list, including hanging up the telephone when a consumer initiates a request that he or she be placed on the seller’s list of consumers who do not wish to

receive calls made by or on behalf of that seller. The Commission received numerous comments from individual consumers who recounted experiences in which they had been hung up on when they requested to be placed on a “do-not-call” list. The telemarketers hung up on them without taking their requests, or used other means to hamper or impede these consumers’ attempts to be placed on a “do-not-call” list.²³¹ These comments were echoed by participants in both the “Do-Not-Call” Forum and the July Forum.²³²

Pursuant to section 1011 of the USA PATRIOT Act, the Commission proposes to extend the reach of this provision of the Rule to encompass telemarketers soliciting charitable contributions. Nothing in the text or legislative history of that Act indicates an intention to exclude telemarketers soliciting charitable contributions from Rule provisions that, like this one, are designed to protect consumers’ privacy rights. Moreover, the review of the Rule yielded evidence that, in some instances, telemarketers soliciting charitable contributions are unwilling to honor donors’ do-not-call requests, even when threatened with withdrawal of future support.²³³ For the reasons set forth below, the Commission, therefore, proposes to extend the coverage of this section of the Rule to include telemarketers soliciting charitable contributions or purchases of goods or services.

A seller or telemarketer has an affirmative duty under the Rule to accept a do-not-call request, and to process that request. Failure to do so by impeding, denying, or otherwise interfering with an attempt to make such a request clearly would defeat the purpose of the “do-not-call” provision, and would frustrate the intent of the Telemarketing Act to curtail telemarketers from undertaking unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of the consumer’s right to privacy. 15 U.S.C. 6102(a)(3)(A).

Therefore, the Commission proposes to specify that it is an abusive telemarketing act or practice to deny or interfere in any way with a person’s right to be placed on a “do-not-call” list, including hanging up on the individual when he or she initiates such a request. Proposed § 310.4(b)(1)(ii) would prohibit this practice, and would also prohibit anyone from directing another

person to deny or interfere with a person’s right to be placed on a “do-not-call” list. This aspect of the provision is proposed to ensure that sellers who use third party telemarketers cannot shield themselves from liability under this provision by suggesting that the violation was a single act by a “rogue” telemarketer, where there is evidence that the seller caused the telemarketer to deny or defeat “do-not-call” requests.²³⁴

Section 310.4(b)(1)(iii)—“Do-Not-Call”

Section 310.4(b)(1)(ii) in the original Rule prohibits a seller or telemarketer from calling a person who has previously asked not to be called by or on behalf of the seller whose goods or services were being offered. This provision, as originally promulgated pursuant to the Telemarketing Act before the USA PATRIOT Act amendments, did not reach calls from telemarketers soliciting charitable contributions.

The “do-not-call” provision of the original Rule is company-specific: After a consumer requests not to receive calls from a particular company, that company may not call that consumer. Other companies, however, may lawfully call that same consumer until he or she requests each of them not to call. The effect of this provision is to permit consumers to choose those companies, if any, from which they do not wish to receive telemarketing calls. Each company must maintain its own “do-not-call” list of consumers who have stated that they do not wish to receive telephone calls by or on behalf of that seller. This seller-specific approach tracks the approach that the FCC adopted pursuant to its mandate under the TCPA.²³⁵

The Commission proposes to modify the original Rule to effectuate the USA PATRIOT Act amendments, and to provide consumers with an alternative to reduce the number of telemarketing calls they receive, *i.e.*, to place themselves on a national “do-not-call” registry, maintained by the Commission. The proposed modification of the Rule’s treatment of the “do-not-call” issue would enable consumers to contact one centralized registry to effectuate their desire not to receive telemarketing calls. Telemarketers would be required to “scrub” their lists, removing all consumers who have placed themselves on the FTC’s centralized registry. This

²²⁹ H.R. Rep. No. 20, 103rd Congress, 1st Sess. (1993) at 8.

²³⁰ Section 310.4(b)(1)(i) prohibits as an abusive practice “causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.” NASAA stated that this provision strikes directly at one of the manipulative techniques used in high-pressure sales tactics to coerce consumers into purchasing a product and noted that it advises consumers that one of the “warning signs of trouble” is the “three-call” technique used by fraudulent sellers of securities. NASAA at 2.

²³¹ See, e.g., Conn at 1; Gilchrist at 1; Gindin at 1; Heagy at 1; Kelly at 1; LeQuang at 1; Mack at 1; Runnels at 1.

²³² See, e.g., DNC Tr. 67–68; Rule Tr. at 423–427.

²³³ See Peters at 1.

²³⁴ The USA PATRIOT Act amendments retain the exclusion of non-profit organizations from coverage. Therefore, this language is not intended to reach non-profit charitable organizations.

²³⁵ P.L. 102–243, 105 Stat. 2394, codified at 47 U.S.C. 227. The FCC’s regulations are set out at 47 CFR 64.1200.

proposal directly advances the Telemarketing Acts' goal to protect consumers' privacy.

In addition, the Commission proposes that consumers who have placed themselves on the FTC's national "do-not-call" registry could allow telemarketing calls from or on behalf of specific sellers, or on behalf of specific charitable organizations, by providing express verifiable authorization to the seller, or telemarketer making calls for or on behalf of a seller or charitable organization, that the consumer agrees to accept calls from that seller or telemarketer.²³⁶ The proposed Rule will provide consumers with a wider range of choices than the current Rule provides: They could opt to use the FTC's centralized registry to eliminate *all* telemarketing calls from *all* sellers and telemarketers covered by the TSR; they could eliminate all telemarketing calls from all sellers and telemarketers covered by the TSR by placing themselves on the central registry, but subsequently agree to accept telemarketing calls only from or on behalf of specific sellers, or on behalf of specific charitable organizations, with respect to which they have provided express verifiable authorization; or they could opt to eliminate telemarketing calls only from specific sellers, or telemarketers on behalf of those sellers, or on behalf of charitable organizations, by using the company-specific approach in the current rule provision and the current FCC regulations.²³⁷ The Commission proposes to set up this centralized registry for a two-year trial period, after which the Commission will review the registry's operation to obtain information about the costs and benefits of the central registry, as well as its regulatory and economic impact in

order to determine whether to modify or terminate its operation.

Background. Consumer frustration over unwanted telephone solicitations is not a new phenomenon. State and federal legislators and regulators have been examining the issue since the 1960's.²³⁸ What is new is the strength of the response to that frustration, as evidenced by, among other things, the number of States that have passed or are considering legislation to establish statewide "do-not-call" lists.²³⁹ Another

indication of the intensity of consumer discontent on this issue is the number of people who have placed themselves on "do-not-call" lists.²⁴⁰ In June, 2001, the DMA reported that the number of names registered with the DMA's Telephone Preference Service ("TPS") has grown to 4 million, up 1 million since June of 2000.²⁴¹ States report that consumers are responding in such overwhelming numbers to the State "do-not-call" statutes that some States' telephone systems have crashed.²⁴²

²³⁸ As early as 1965, the California Public Utilities Commission investigated the question of unsolicited telephone calls, rejecting the idea of a telephone directory symbol which would indicate whether the subscriber wished to receive commercial and charitable solicitations. *McDaniel v. Pacific Telephone and Telegraph Co.*, 60 PUR 3d 47 (1965). Federal legislators also began to examine the "do-not-call" issue a number of years ago, with proposals such as the "Telephone Privacy Act" (H.R. 2338), which was introduced in 1973. The FCC first examined the issue of unsolicited telephone calls in 1978, but concluded that, at that time, it was not in the public interest to subject telephone solicitation to federal regulation. *Memorandum and Order*, FCC 80-235, cc Docket No. 78-100, 77 FCC 2d 1023 (May 22, 1980). The FCC's action in this regard subsequently was superseded by Congress' enactment of the TCPA.

²³⁹ DNC Tr. at 16, 137, 157-158. As of January, 2002, twenty (20) States had passed "do-not-call" statutes. Florida established the first State "do-not-call" list in 1987. (Fla. Stat. Ann. § 501.059.) Oregon and Alaska followed with "do-not-call" statutes in 1989, although, instead of a central registry, they opted to require telephone companies to place a black dot by the names of consumers who do not wish to receive telemarketing calls. (1999 Ore. Laws 564; Alaska Stat. Ann. § 45.50.475) In 1999, Oregon replaced its "black dot" law with a "no-call" central registry program. (Or. Rev. Stat. § 464.567) See also, article regarding Oregon law in 78 *BNA Antitrust & Trade Reg. Report* 97 (Feb. 4, 2000). After those three States adopted their statutes, there was little activity at the State level for about a decade. Then, in 1999, a new burst of legislation occurred as five more States passed "do-not-call" legislation—Alabama (Ala. Code § 8-19C); Arkansas (Ark. Code Ann. § 4-99-401); Georgia (Ga. Code Ann. § 46-5-17; see also, rules at Ga. Comp. R. & Regs. r. 515-14-1); Kentucky (Ky. Rev. Stat. Ann. § 367.46955(15); and Tennessee (Tenn. Code Ann. § 65-4-401; see also, rules at Tenn. Comp. R. & Regs. Chap. 1220-4-11). During 2000, six more States enacted "do-not-call" statutes—Connecticut (Conn. Gen. Stat. Ann. § 42-288a); Idaho (Idaho Code § 48-1003); Maine (Me. Rev. Stat. § 4690-A); Missouri (Mo. Rev. Stat. § 407.1098); New York (NY General Business Law § 399-z; see also, rules at NY Comp. R. & Regs. tit. 12 § 4602); and Wyoming (Wyo. Stat. Ann. § 40-12-301). As of January, 2002, another six States had joined the ranks—California (S.B. 771, to be codified at Cal. Bus. & Prof. Code § 17590); Colorado (H.B. 1405, to be codified at Col. Rev. Stat. § 6-1-901); Indiana (H.B. 1222, to be codified at Ind. Code Ann. § 24.4.7); Louisiana (H.B. 175, to be codified at La. Rev. Stat. 45:844.11); Texas (H.B. 472, to be codified at Tex. Bus. & Com. Code Ann. § 43.001); and Wisconsin (2001 S.B. 55, to be codified at Wis. Stat. § 100.52). In addition, numerous States are considering laws that would create State-run "do-not-call" lists, including Maryland, New Jersey, South Carolina, South Dakota, Utah, Vermont, and Washington. William Raney, *Proactive Stance May Affect Pivotal Bills*, DM News (Feb. 21, 2000), p. 50; Sara Marsh, *Residents Want No-call List to Stop Telemarketers*, The Capital (Annapolis, MD) (Sept. 24, 1999), p. B1;

and Mark Hamstra, *New York Senate, Assembly Pass Telemarketing Bills*, DM News (June 19, 2000) (www.dmnews.com/articles/2000-06-19/8937.html). The "do-not-call" issue has also drawn the attention of federal legislators, who have introduced several bills aimed at addressing consumers' concerns. For example, in the 106th Congress, H.R. 3180 (introduced by Rep. Salmon) would have required telemarketers to tell consumers that they have a right to be placed on either the DMA's "do-not-call" list or on their State's "do-not-call" list. This proposal also would have required all telemarketers to obtain and reconcile the DMA and State "do-not-call" lists with their call lists. Similar legislation was introduced in the 107th Congress by Rep. King (H.R. 232, "Telemarketing Victim Protection Act"). In addition, on Dec. 20, 2001, Sen. Dodd introduced S.1881, the "Telemarketing Intrusive Practices Act of 2001," which would require the FTC to establish a national "do-not-call" registry.

²⁴⁰ See, e.g., Letter dated Jan. 21, 2000, from James Bradford Ramsay, NARUC, to Carole Danielson, FTC, and attached News Release ("More than 40,000 Vermont households are now enrolled in the national telemarketing 'do-not-call' registry as a result of a statewide public awareness effort . . . , a more than five-fold increase over pre-campaign levels.") See also, DNC Tr. at 57-58, 87-89, 94-95 (Florida's list contains 112,568 names; Kentucky has 50,000 people enrolled; Georgia has signed up more than 180,000 people; Oregon has 74,000 names on its list). Telemarketing representatives report that about 2-5% of the consumers they call ask to be placed on a "do-not-call" list. DNC Tr. at 57-58, 87. Connecticut reports that almost half of its households are on a "do-not-call" list. DM News (June 4, 2001). More than 332,000 phone lines were listed on Missouri's "do-not-call" list within a short time of its passage. St. Louis Post Dispatch, p. 8 (April 9, 2001). New York reports more than 1 million households had signed up for its "do-not-call" list by the time it took effect on April 1, 2001. NY Times (Metropolitan Section), Section 1, p. 31 (April 1, 2001).

²⁴¹ Scott Hovanyetz, *DMA: Telemarketing Still Tops, but Problems Loom*, DM News (June 29, 2001) (http://www.dmnews.com/cgi-bin/artprevbot.cgi?article_id=15954) Rule Tr. at 409. The TPS is a list of consumers who do not wish to receive outbound telemarketing calls. Although not advertised, it was established in 1985 and has been administered by DMA, which subsidizes the cost. DMA does not charge a fee to consumers to place their names on the TPS. DMA requires consumers to submit their request in writing and, at this time, does not permit consumers to submit their names by telephone or by electronic mail. DMA requires its members to adhere to the list; the penalty for non-compliance is expulsion from the association. Sellers and telemarketers that are not members of DMA may purchase the TPS for a fee.

²⁴² DNC Tr. at 88-89. A representative from the Kentucky Attorney General's Office reported: "There has been nothing in the 200 years-plus of Kentucky's history that the Attorney General's Office has ever seen that equaled the public

Continued

²³⁶ The proposed Rule lists two specific means of obtaining the express verifiable authorization of a consumer to receive telemarketing calls despite their inclusion on the national "do-not-call" list: written authorization including the consumer's signature; and oral authorization that is recorded and authenticated by the telemarketer as being made from the telephone number to which the consumer is authorizing access. The Commission expects that written authorization will be necessary in most instances because once on the national "do-not-call" list, a consumer could not be contacted by an outbound call to request oral authorization of future calls. Oral authorization could be obtained, however, if the consumer were to place an inbound call, and was asked by the telemarketing sales representative during that call whether he or she would consent to further telemarketing solicitations from the party called.

²³⁷ Even if the Commission were to delete the company-specific "do-not-call" requirement of the original Rule, sellers and telemarketers would still be required to comply with the very similar requirements promulgated by the FCC under the TCPA.

Consumer commenters unanimously expressed their strong dislike of telemarketing and their desire to be free of telemarketing calls, citing the intrusiveness and inconvenience of those calls.²⁴³ Not a single consumer comment championed telemarketing.²⁴⁴ Several consumers noted that telemarketing has caused many people to change their living habits (e.g., by screening calls) in order to avoid telemarketing calls.²⁴⁵ Studies also have shown that consumers feel angry about the number of telemarketing calls they receive. NCL reported that in a survey conducted in 1999, 49% of consumers who responded rated telemarketing at the top of the scale of activities that bothered them.²⁴⁶ A 1999 poll conducted by the State of Kentucky showed 80% of respondents found telemarketing calls to be annoying and

response to the no-call list . . . It literally—and I mean literally—fried our telephone systems. It knocked our telephone line out . . . [Tennessee's] telephone lines have been broken down because of the overwhelming response, and their list is not even ready . . . to be implemented . . . [Georgia] had exactly the same response, that there was truly a tidal wave of people who were seeking to be on the list. When told this . . . isn't going to stop everybody from calling, people will almost inevitably say, "If it keeps one person from calling me, I'm better off."

²⁴³ See, e.g., Bennett at 1; Card at 1; Conway at 1; Dawson at 1; Gilchrist at 1; Gindin at 1; Heagy at 1; Hickman at 1; Johnson at 3; Kelly at 1; Lee at 1; Mack at 1; Manz at 1; McCurdy at 1; Nova53 at 1; Reynolds at 1; Runnels at 1; Schmied at 1; Ver Steegt at 1.

²⁴⁴ Only two consumer comments even approached acceptance of the notion that consumers might value telemarketing calls or wish to preserve telemarketer access to their home telephone—provided telemarketers changed their practices. Johnson at 1 (Could be effective and accepted if telemarketers were not verbally abusive, did not argue when listener said not interested, and did not lie.) See also, Runnels at 1 ("Up until past year or two, we were always willing to answer calls from telemarketers, and asked them to put on DNC list. . . . [We] typically received polite response. . . . [But] in the past 2 years, we have received calls from telemarketers unlike anything previous.")

²⁴⁵ See, e.g., Bennett at 1; Runnels at 1 ("We miss the days before telemarketers when we could invite calls from the public; we feel that the rise of telemarketing has thus had a negative impact on our relations with the community at large.")

²⁴⁶ Letter dated Jan. 20, 2000, from Susan Grant, NCL, to Carole Danielson, FTC. ("[C]onsumers were asked to rate seven everyday experiences on a scale from 1 to 10 in terms of what bothered them the most. A designation of 1 meant 'not bothered at all'; 10 indicated 'completely fed up.' Telemarketing came in third, with 49% of the respondents giving it a top score of 10.") The tabulation attached to NCL's letter also shows that only 14% of the respondents gave telemarketing a rating of less than 5. *Id.* The other everyday experiences rated and the percentage rated as a 10 by respondents were: Junk mail (59%); dialing a company and being answered with "press 1 for . . ." (54%); fine print and codes making bills difficult to understand (41%); credit card fees (40%); bank fees and ATM charges (34%); and intrusiveness of advertising and commercialism (30%). *Id.*

intrusive, and only 10% found them to be helpful and informative.²⁴⁷ Similarly, a 1999 survey by the Vermont Department of Public Service concerning telemarketing found only 2.7% of respondents had no objection to receiving telemarketing calls, whereas almost 88% stated that they would like all telemarketing calls to stop.²⁴⁸

Efficacy of the "do-not-call" provision. Industry generally supported the Rule's current company-specific approach, stating that it provides consumer choice and satisfies the consumer protection mandate of the Telemarketing Act while not imposing an undue burden on industry.²⁴⁹ Several consumer commenters also stated that the current scheme works most of the time, although it does not work in every case.²⁵⁰

The vast majority of individual commenters, however, joined by consumer advocates and State law enforcement, claimed that the TSR's company-specific "do-not-call" provision is inadequate to prevent unwanted telemarketing calls.²⁵¹ They cited several problems with the current "do-not-call" scheme as set out in the FTC and FCC regulations: the company-specific approach is extremely burdensome to consumers, who must repeat their "do-not-call" request with every telemarketer that calls;²⁵² consumers' repeated requests to be placed on a "do-not-call" list are ignored;²⁵³ consumers have no way to verify that their names have been taken off a company's list;²⁵⁴ consumers find that using the TCPA's private right of action²⁵⁵ is a very complex and time-

consuming process, which places an evidentiary burden on the consumer who must keep detailed lists of who called and when;²⁵⁶ and finally, even if the consumer wins a lawsuit against a company, it is difficult for the consumer to enforce the judgment.²⁵⁷

Some of the criticisms of the efficacy of the current "do-not-call" scheme will be addressed by other proposed amendments to the Rule. For example, many commenters complained that they cannot exercise their private right of action because telemarketers do not identify themselves and hang up when consumers try to assert their "do-not-call" rights.²⁵⁸ This problem is addressed through the proposed new prohibition in § 310.4(b)(1)(ii) against denying or interfering in any way with consumers' right to be placed on a "do-not-call" list.²⁵⁹

Proposed "do-not-call" provision. The Commission is mindful of the criticism that the company-specific approach in the current Rule's "do-not-call" provision is cumbersome and burdensome for those consumers who do not wish to receive any telemarketing calls at all. The Commission believes that the current approach is inadequate to fulfill the mandate in the Telemarketing Act that the Commission should prohibit telemarketers from undertaking "a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."²⁶⁰ As such, the proposed modification of the Rule promotes the

or receive \$500 in damages for each violation, whichever is greater. If the court finds that a company willfully or knowingly violated the FCC's "do-not-call" rules, it can award treble damages. 47 U.S.C. 227(b)(3).

²⁵⁶ See Kelly at 1; NAAG at 17–19; NACAA at 2; NCL at 13–14.

²⁵⁷ See Kelly at 1.

²⁵⁸ See, e.g., Gindin at 1; Haines at 1; Heagy at 1; Hecht at 1; Holloway at 1; Kelly at 1; LeQuang at 1; Mack at 1; Manz at 1; Merritt at 1; Runnels at 1; Sanford at 1; Schiber at 1; Thai at 1; see also Rule Tr. at 422–427. Some hang-ups occur when the consumer answers the telephone only to hear a "click" as the phone disconnects. These hang-ups are due to the use of predictive dialers, a problem that is discussed in greater detail in connection with the oral disclosures required by § 310.4(d).

²⁵⁹ Other consumers complained that many companies require the consumer to use "magic words" in asserting their "do-not-call" rights. See, e.g., Gilchrist at 1 (company said it did not keep a "do-not-call" list, but only a "no contact" list and would not accept consumer's request unless consumer asked to be placed on "no contact" list); Weltha at 1. The Commission was very clear in the Statement of Basis of Purpose that any form of "do-not-call" request is sufficient, and no "magic words" are necessary to provide notice: "Any form of request that the consumer does not wish to receive calls from a seller will suffice. An oral statement as simple as 'Do not call again' is effective notice." 60 FR at 43855.

²⁶⁰ 15 U.S.C. 6102(a)(3)(A).

²⁴⁷ 1999 Kentucky Spring Poll, submitted to FTC by Kentucky Office of Attorney General, Feb. 4, 2000.

²⁴⁸ Letter dated Jan. 21, 2000, from James Bradford Ramsay, NARUC, to Carole Danielson, FTC, attaching Vermont survey.

²⁴⁹ ARDA at 2; ATA at 8–10; Bell Atlantic at 4; DMA at 2; ERA at 6; MPA at 16; NAA at 2; NASAA at 4; PLP at 1; see also, DNC Tr. at 132–180.

²⁵⁰ See, e.g., Bennett at 1; Brass at 1; Hickman at 1; Runnels at 1.

²⁵¹ See, e.g., Anderson at 1; Bennett at 1; Card at 1; Conway at 1; Garbin at 1; A. Gardner at 1; Gilchrist at 1; Gindin at 1; Harper at 1; Heagy at 1; Johnson at 1; McCurdy at 1; Menefee at 1; Mey generally; Mitchelp at 1; Nova53 at 1; Peters at 1; Rothman at 1; Vanderburg at 1; Ver Steegt at 1; Worsham at 1; NAAG at 17–19; NCL at 13–14. See also, DNC Tr. at 132–180.

²⁵² See Garbin at 1; NAAG at 17; Ver Steegt at 1.

²⁵³ See Harper at 1; Heagy at 1; Holloway at 1; Johnson at 1; Menefee at 1; Mey generally; Nova53 at 1; Nurik at 1; Peters at 1; Rothman at 1; Runnels at 1; Schiber at 1; Schmied at 1; Vanderburg at 1.

²⁵⁴ See McCurdy at 1; Schiber at 1.

²⁵⁵ The TCPA permits a person who receives more than one telephone call in violation of the FCC's "do-not-call" rules to bring an action in an appropriate State court to enjoin the practice, to receive money damages, or both. The consumer may recover actual monetary loss from the violation

Act's privacy protections. These consumers would benefit from a national registry they could contact to request to receive no telemarketing calls from or on behalf of any seller, or on behalf of any charitable organization, whatsoever. In fact, many commenters supported the concept of a national "do-not-call" database.²⁶¹ Consumers and State law enforcement representatives stated that a national "do-not-call" list would provide a "one-stop" method of allowing consumers to reach many telemarketers quickly and would enhance consumers' ability to assert their "do-not-call" rights.²⁶²

Some industry representatives also supported a national "do-not-call" list, stating that it would be preferable to a patchwork of 50 different State "do-not-call" laws.²⁶³ Industry representatives generally expressed concern about the proliferation of State telemarketing laws, including "do-not-call" statutes, indicating that complying with myriad State laws imposes significant economic costs to business.²⁶⁴ The Commission recognizes that this is very important, and requests comment on the interplay between the national registry and State "do-not-call" schemes and poses a number of questions in Section IX of this Notice specifically designed to elicit information on this issue.

A national registry would eliminate many of the burdens to consumers of the company-specific approach. They would only have to register once in order to make their preferences known to all telemarketers under the FTC's jurisdiction, instead of having to make the same request to many companies. Moreover, this proposed revision addresses industry's suggestion that consumers may not desire an all-or-nothing approach to telemarketing calls. Consumers who wish to receive telemarketing calls only from specific companies could place themselves on the national registry, but provide express verifiable written authorization to specific sellers in which they agree to accept telemarketing calls from those sellers. Alternatively, consumers who do not object to telemarketing calls

generally but do not want such calls from or on behalf of specific sellers or on behalf of specific charitable organizations would still be able to choose to use the company-specific approach set up by the FCC, also embodied in § 310.4(b)(1)(iii)(A) of the proposed Rule.

Industry representatives expressed skepticism about the need to strengthen the "do-not-call" provisions of the Rule. In this regard, they advanced two arguments. First, they asserted that sellers and telemarketers covered by the Rule generally comply with the "do-not-call" provisions, and that non-covered entities—*e.g.*, banks, non-profit organizations, and companies engaged in common carrier activity—are the primary source of consumer complaints about "do-not-call" requests being ignored.²⁶⁵ The extension of TSR coverage, pursuant to the USA PATRIOT Act amendments, to encompass telemarketing calls to solicit charitable contributions will increase the range of covered calls and presumably decrease complaints about do-not-call compliance. Industry's second argument is that although many consumers may broadly express the view that they would prefer not to receive any telemarketing calls, when it comes down to particulars, their true wishes may be somewhat different.²⁶⁶ The same consumers who say they would like to stop receiving telemarketing calls may actually welcome certain types of telemarketing calls—for example, special sale price offers from companies with which they have previously transacted business. The proposed Rule addresses this concern because consumers could selectively agree to receive calls from specific companies, or from telemarketers on behalf of specific charitable organizations, or could still choose the company-specific approach set up by the FCC's regulations.

Taking all the record evidence into account, the Commission proposes to amend the Rule to provide consumers with the option to contact a national registry maintained by the Commission to indicate that they do not wish to receive any telemarketing calls, and, in addition, to provide express verifiable written authorization to a seller or charitable organization in which they

agree to accept telemarketing calls from or on behalf of that seller or on behalf of that charitable organization.

Relationship to FCC regulations. The Commission's proposed amendment to its "do-not-call" provision is consistent with the FCC's regulations. Companies can comply with both regulations. The Commission intends that its proposed "do-not-call" provision not be construed to permit any conduct that is precluded or limited by FCC regulations. For example, the FTC does not intend that anything in the TSR or this Notice provide any basis to argue that the FCC is precluded from requiring that a "do-not-call" list be maintained for a specific period of time, or for a period of time that may be greater than may be required under the FTC's Rule. Similarly, nothing in the TSR or this Notice provides any support for an assertion that the FCC cannot require a company's written "do-not-call" policy be provided to consumers upon request.

In this respect, several industry commenters pointed out that the FCC has issued an interpretation stating that the TCPA does not require companies to accept "do-not-call" lists from third-party organizations.²⁶⁷ These commenters asked the Commission to clarify whether the TSR requires them to accept "do-not-call" lists from third parties. The Commission believes that its proposed national registry will obviate industry members' uncertainty about whether to accept "do-not-call" lists from third parties. The Commission believes that the proposed "do-not-call" provision is sufficiently simple and accessible for consumers that they are unlikely to turn to third-party alternatives.

Related to this issue is the question of whether the national registry might be presented with consumer "do-not-call" requests compiled by third parties. The Commission recognizes that third-party lists, if presented, may not provide either the level of accuracy or consumer choice of call preferences available through the national registry. Moreover, to ensure that only the consumers who actually wish to be on the "do-not-call" registry are placed there, it is anticipated that enrollment on the national registry will be required to be made by the individual consumer from the consumer's home telephone. The Commission, therefore, requests comment on what the costs and/or benefits might be to the incorporation or refusal of third-party consumer lists by certified registries. In addition, the

²⁶¹ See, *e.g.*, ARDA at 4; Bennett at 1; Card at 1; Collison at 1; Conway at 1; Dawson at 1; A. Gardner at 1; Gibb at 1; Gilchrist at 1; Gindin at 1; McCurdy at 1; Mey at 2; NAAG at 18; NACAA at 2; NCL at 14; NFN at 2–3; Schmied at 1.

²⁶² See, *e.g.*, Bennett at 1; Card at 1; Collison at 1; Conway at 1; Dawson at 1; A. Gardner at 1; Gibb at 1; Gilchrist at 1; Gindin at 1; McCurdy at 1; NAAG at 17–19; NACAA at 2; NCL at 14; Schmied at 1.

²⁶³ See, *e.g.*, ARDA at 4; NFN at 2–3.

²⁶⁴ See, *e.g.*, ARDA at 2–4; ATA at 6–8; Bell Atlantic at 4–7; DMA at 6–7; Gannett at 1; KTW at 3–4; MPA at 11, 16; NFN at 2; Reese at 3, 11–12; Verizon at 2–3.

²⁶⁵ DMA at 4–5; ERA at 4; DNC Tr. 96–99, 132–133. The Commission notes that, although certain entities such as non-profit organizations, companies engaged in common carrier activity, and banks may be exempt from the FTC Act, any third-party telemarketer hired by an exempt entity to conduct its telemarketing activities would be covered by the TSR. See 60 FR at 43843.

²⁶⁶ See, *e.g.*, DNC Tr. 108, 164.

²⁶⁷ See DMA at 7–8; NAA at 4; and Letter dated Aug. 19, 1998, from Geraldine A. Matisse, FCC to James T. Bruce, Wiley, Rein & Fielding.

Commission requests comment on whether verification should occur and, if so, what form the verification should take.

Finally, several industry representatives asked the Commission to set a single national standard for how long a company may take to place a consumer on its "do-not-call" list.²⁶⁸ With regard to company-specific lists, the Commission declines to second-guess the FCC's ruling. There is insufficient evidence in the record to justify such action that would introduce the specter of inconsistency between the two sets of regulations. With regard to the national registry, under proposed § 310.4(b)(2)(iii), a seller or telemarketer will not be held liable for violating the "do-not-call" requirements of §§ 310.4(b)(1)(ii) and (iii) if, among other things, it obtains and reconciles on no less than a monthly basis the names and/or telephone numbers of those persons who have been placed on the national registry.

Section 310.4(b)(3)—Commission Review

Proposed § 310.4(b)(3) sets out the Commission's intention to review the operation of its national registry after two years. During that review, the Commission will obtain information about the costs and benefits of the central registry, as well as its regulatory and economic impact. Based on the information received, the Commission will determine whether to modify aspects of the registry's operation or whether to terminate the registry's operation.

Section 310.4(b)(2)—"Do-Not-Call Safe Harbor"

Section 310.4(b)(2) provides sellers and telemarketers with a limited safe harbor from liability for violating the "do-not-call" provision found in proposed § 310.4(b)(1)(iii). During the original rulemaking, the Commission determined that sellers and telemarketers should not be held liable for calling a person who previously asked not to be called if they had made a good faith effort to comply with the Rule's "do-not-call" provision and the call was the result of error. The Rule established four requirements that a seller or telemarketer must meet in order to avail itself of the safe harbor: (1) It must establish and implement written procedures to comply with the "do-not-call" provision; (2) it must train its personnel in those procedures; (3) it must maintain and record lists of persons who may not be contacted; and

(4) any subsequent call must be the result of error.

These criteria tracked the FCC's regulations, which set forth the minimum standards that companies must follow to comply with the TCPA's "do-not-call" provision.²⁶⁹ Proposed § 310.4(b)(2) contains three additional requirements that must be met before sellers or telemarketers may avail themselves of the "safe harbor": (1) Sellers and telemarketers must obtain and reconcile on not less than a monthly basis the names and/or telephone numbers of persons who have been placed on the Commission's national registry; (2) for those consumers whose telephone numbers are in the national registry but who have agreed to accept telemarketing calls from or on behalf of the seller, or on behalf of a specific charitable organization, the seller and telemarketer must maintain the consumers' express verifiable authorizations to call; and (3) sellers and telemarketers must monitor compliance and take disciplinary action for non-compliance. Although these criteria are not among the minimum standards contained in the FCC's regulations for the TCPA company-specific "do-not-call" regime, the additional criteria in the proposed Rule do not conflict with the FCC regulations. As discussed above, the FCC regulations are silent as to any requirement to reconcile names or numbers from a national registry because the FCC regulations relate only to company-specific lists.²⁷⁰ Therefore, any FTC requirement about obtaining and reconciling telephone numbers placed in a national registry would not conflict with the FCC's regulations. Similarly, the FCC regulations are silent as to the requirement to monitor compliance and take action to correct any non-compliance, or to maintain evidence of express verifiable written authorization to accept telemarketing calls. Thus, the proposed Rule would not conflict with the FCC's regulations. As discussed more fully below, the Commission believes that it is necessary for the proposed Rule to diverge from the FCC regulations by imposing a monitoring requirement in the "safe

harbor" provision in order to clarify the applicability of the safe harbor.

Commenters generally supported the safe harbor, stating that strict liability is inappropriate where a company has made a good faith effort to comply with the Rule's requirements and has implemented reasonable procedures to do so.²⁷¹ NASAA noted that it was good public policy to reward firms that have been proactive in attempting to comply with the Rule, and that such a safe harbor provides guidelines for industry "best practices."²⁷² The same rationale applies with equal force to allowing telemarketers that solicit charitable contributions to avail themselves of the safe harbor.

The Commission continues to believe that the Rule should contain a safe harbor provision for violations of its "do-not-call" provision. Sellers or telemarketers who have made a good faith effort to provide consumers or donors with an opportunity to exercise their "do-not-call" rights should not be liable for violations that result from error.²⁷³ The Commission believes the same rationale applies to potential violations of proposed § 310.4(b)(1)(ii), and therefore proposes to modify the introductory sentence of § 310.4(b)(2) to provide a safe harbor for violations of *both* proposed §§ 310.4(b)(1)(ii) and (iii). Section 310.4(b)(1)(ii) prohibits a seller or telemarketer from denying or interfering with a person's right to be placed on a "do-not-call" list, whereas § 310.4(b)(1)(iii) prohibits calling a person who has previously requested to be placed on such a list. The original Rule provided safe harbor protection only for violations of the "do-not-call" provision. The proposed Rule would expand that safe harbor protection to violations of the provision that prohibits denying or interfering with the consumer's or donor's right to be placed on a "do-not-call" list.

However, while expanding the scope of the safe harbor provision, the Commission also proposes to tighten it by requiring sellers and telemarketers to monitor compliance and take disciplinary action for non-compliance in order to be eligible for the safe harbor. Proposed § 310.4(b)(2)(vi)

²⁷¹ See ARDA at 4; ERA at 6; NASAA at 3.

²⁷² NASAA at 3.

²⁷³ The Commission recognizes that the implementation of proposed national "do-not-call" list will present logistical challenges such as a viable means of purging from the list telephone numbers which have been, subsequent to their inclusion on the national "do-not-call" list, reassigned to new customers. The Commission has included, in Section IX of this Notice, questions about how best to accomplish this, as well as whether to include in the Rule safe harbor provisions addressing calls made to such numbers.

²⁶⁹ 47 CFR 64.1200(e)(2).

²⁷⁰ The FCC regulations require companies to reconcile "do-not-call" requests for company-specific lists on a continuing or ongoing basis. Specifically, 47 CFR 64.1200(e)(2)(iii) requires the seller or telemarketer to record the consumer's "do-not-call" request and place the consumer's name and telephone number on the company's "do-not-call" list at the time the request is made. The TSR is silent as to how frequently a company must reconcile "do-not-call" requests for company-specific lists.

²⁶⁸ See DMA at 5–6; KTW at 5; NFN at 1–2.

requires the seller or telemarketer to monitor and enforce compliance with the procedures established in § 310.4(b)(2)(i).

Numerous commenters described the problems they had encountered in attempting to assert their “do-not-call” rights and with companies that continued to call after the consumer asked not to be called.²⁷⁴ This anecdotal evidence indicates that some entities may not be enforcing employee compliance with their “do-not-call” policies. In fact, one consumer reported that telemarketers for two different companies told her that it was not necessary that a company’s “do-not-call” policy be effective, only that such a policy exist.²⁷⁵

To clarify this apparent misconception about the Rule’s requirements, proposed § 310.4(b)(2)(iii) would require that, in order to avail themselves of the safe harbor provision, sellers and telemarketers must be able to demonstrate that, in the ordinary course of business, they monitor and enforce compliance with the written procedures required by § 310.4(b)(2)(i). For example, it is not enough that a seller or telemarketer has written procedures in place; the company must be able to show that those procedures have been and *are implemented* in the regular course of business. Thus, a seller or telemarketer cannot take advantage of the safe harbor exemption in § 310.4(b)(2) unless it can demonstrate that it actually trains employees in implementing its “do-not-call” policy, and enforces that policy.

Section 310.4(c)—Calling Time Restrictions

Section 310.4(c) prohibits telemarketing calls before 8:00 a.m. and after 9:00 p.m. local time at the called person’s location. Several commenters suggested that the Commission change the calling time restrictions in § 310.4(c), stating that unwanted telemarketing calls are particularly abusive when received during the hours around dinner time.²⁷⁶ One commenter suggested that only the consumer should be allowed to determine what are convenient calling times, while others suggested other restrictions, such

as permitting calls only between 9 a.m. and 5 p.m.²⁷⁷ The Commission believes the current calling time restrictions provide reasonable protections for the consumer’s privacy while not unduly burdening industry. Moreover, the current provision is consistent with the FCC’s regulations under the TCPA.²⁷⁸ As the Commission discussed in the Rule’s Statement of Basis and Purpose, by altering the permitted calling hours under the Rule, the Commission would introduce a conflict in the federal regulations governing telemarketers.²⁷⁹ The record on this issue has not provided any new evidence that would warrant a change that would produce such a result. However, the Commission has posed questions in Section IX of this Notice asking whether it might be workable to allow consumers to select to receive telemarketing calls only on certain days or during certain hours. The Commission poses the questions about the costs and benefits of selective day and time opt out to provide similar flexibility for consumers and telemarketers in developing a schedule for telemarketing that would be mutually agreeable.

Pursuant to Section 1011 of the USA PATRIOT Act, the Commission proposes to expand the coverage of this prohibition to encompass calls made by telemarketers, whether on behalf of sellers or charitable organizations, that are made outside the permissible hours set forth in this provision.

Section 310.4(d)—Required Oral Disclosures To Induce Purchases of Goods or Services

Section 310.4(d) sets out certain oral disclosures that telemarketers must promptly make in any outbound telephone call made to induce the purchase of goods or services. Commenters generally supported this provision, but suggested several modifications or clarifications. Those suggestions and the Commission’s reasoning in accepting or rejecting them are discussed in detail below. In summary, the Commission has determined to retain the wording of § 310.4(d) with two relatively minor modifications. First, the Commission proposes to insert, after the phrase “in an outbound telephone call,” the phrase “to induce the purchase of goods or services.” This will clarify that

§ 310.4(d) applies only to telemarketing calls made to induce sales of goods or services (in contrast to proposed new § 310.4(e), which contains an analogous phrase clarifying that § 310.4(e) will apply to calls made “to induce a charitable contribution”). Second, the Commission proposes to modify § 310.4(d)(4) to require that the telemarketer disclose that a purchase will not enhance a customer’s chances of winning a prize or sweepstakes.

Section 310.4(d)(4)—Sweepstakes Disclosure

The Telemarketing Act directed the Commission to include in the TSR provisions addressing specific “abusive” telemarketing practices, including the failure to “promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services.”²⁸⁰ Section 310.4(d)(4) requires that a telemarketer promptly disclose that no purchase or payment is necessary to be eligible to win a prize or participate in a prize promotion if a prize promotion is offered. In the original rulemaking, the Commission determined, based on its extensive law enforcement experience, that fraudulent telemarketers had frequently used sweepstakes promotions to disguise the fact that the purpose of the call is to sell goods or services.²⁸¹

NCL recommended that this provision be modified to require the telemarketer to disclose that making a purchase will not improve a customer’s chances of winning.²⁸² NCL noted that this disclosure would be consistent with the requirements for direct mail solicitations under the DMPEA.²⁸³

Since the original rulemaking, law enforcement experience and the legislative history of the DMPEA strongly suggest that many consumers, particularly the elderly, get the impression, based on the overall presentation of a prize promotion, that purchasing something enhances their chances of winning.²⁸⁴ Creating such an impression undermines one of the protections the Telemarketing Act intended to provide: keeping the purpose of a telemarketing call—to sell goods or services—clearly in the

²⁷⁴ See, e.g., Bennett at 1; A. Gardner at 1; Gilchrist at 1; Gindin at 1; Harper at 1; Heagy at 1; Johnson at 3; McCurdy at 1; Menefee at 1; Mey, generally; Nova53 at 1; Peters at 1; Runnels at 1.

²⁷⁵ Mey at 2.

²⁷⁶ See, e.g., Conway at 1; Garbin at 1; Hickman at 1; McCurdy at 1; Nurik at 1. NASAA indicated that it supports this provision, which has also been adopted by the National Association of Securities Dealers (“NASD”) in their Telemarketing Conduct Rule 2211(a), because it prevents and limits abusive and high-pressure sales tactics. NASAA at 2.

²⁷⁷ See Conway at 1; Hickman at 1; Garbin at 1; McCurdy at 1.

²⁷⁸ 47 CFR 64.1200(e)(1): “No person or entity shall initiate any telephone solicitation to a residential telephone subscriber before the hour of 8:00 a.m. or after 9:00 p.m. (local time at the called party’s location).”

²⁷⁹ 60 FR at 43855.

²⁸⁰ 15 U.S.C. 6102(a)(3)(C).

²⁸¹ 60 FR 43857.

²⁸² See NCL at 9.

²⁸³ *Id.* 39 U.S.C. 3001(k)(3)(A)(II).

²⁸⁴ See discussion above regarding proposed changes to § 310.3(a)(1)(iv).

forefront from the start of the call.²⁸⁵ Therefore, the Commission proposes that § 310.4(d)(4) be amended to require that a telemarketer in an outbound call disclose promptly and in a clear and conspicuous manner to the customer receiving the call that making a purchase will not improve the customer's chances of winning. This disclosure would clarify for consumers that any sweepstakes or prize promotion is separate from the sale of the product and thus is consistent with the Act's mandate to prohibit telemarketers from failing to disclose the purpose of the call, as well as the nature and price of the goods and services to be sold.

Section 310.4(e)—Required Oral Disclosures To Induce Charitable Contributions

Section 1011(b)(2)(D) of the USA PATRIOT Act mandates that the Commission include in the TSR provisions that address abusive practices:

a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.

Accordingly, the Commission proposes to add new section 310.4(e), specifying that "it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution, to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call * * * (1) the identity of the charitable organization on behalf of which the request is being made; and (2) that the purpose of the call is to solicit a charitable contribution."

A TSR provision requiring disclosure of the purpose of the call is mandated by section 1011(b)(2)(D). Proposed TSR § 310.4(e)(2) therefore, requires that disclosure. In addition, pursuant to the discretionary authority under § 1011(b)(2)(D) to require other prompt and clear disclosures (including the charitable organization's name), proposed TSR § 310.4(3)(2) would also require disclosure of the identity of the charitable organization. Prompt disclosure of this information is the minimum necessary for a prospective donor to know whether he or she wishes

to allow the solicitation to continue—and ultimately, whether he or she wishes to donate.²⁸⁶

As noted, the statute specifically mentions a charitable organization's mailing address as another disclosure within the Commission's discretion to require. The statute, however, does not require the Commission to adopt such a requirement, and accordingly, the Commission does not propose to do so. Such a requirement may impose costs on charities and telemarketers but produce few if any benefits—although possibly considerable annoyance—on the part of individuals interested only in abbreviating the call. In Section IX of this notice the Commission therefore has included questions on this issue specifically designed to elicit information as to whether such a disclosure would be appropriate or necessary. For example, the Commission asks whether the purposes of the USA PATRIOT Act could best be served by requiring prompt disclosure of this information only when the donor is interested enough to ask for it. In such a case, non-disclosure could possibly result in consumer harm, since absent a TSR requirement to disclose this information, consumers would likely have little alternative means to obtain it as a starting point in verifying the *bona fides* of a purported charitable organization requesting a donation. The Commission specifically seeks additional comment and information on this issue.

Other Recommendations by Commenters Regarding Allegedly Abusive Practices

Commenters raised additional issues related to abusive practices, urging the Commission to add to the list of practices prohibited by the TSR as abusive. These commenters were concerned about several practices: The use of predictive dialers; prison-based telemarketing; telemarketers' use of courier services to pick up payments from consumers; telemarketers' targeting of vulnerable groups; and the sale of victim lists. In addition, several commenters asked the Commission to define the word "promptly" in § 310.4(d). A number of commenters also asked the Commission to clarify when the disclosures required by that provision should be given in the case of

multiple purpose calls and recommended that § 310.4(d) be amended to address multiple purpose calls by requiring that telemarketers promptly disclose the cost of the product or service before mentioning any sweepstakes or other purpose of the call. Finally, one commenter recommended that the Commission amend § 310.4(d) to require that telemarketers disclose the address and telephone number of the telemarketer. Each of these recommendations, and the reasoning behind the Commission's response to them, are discussed in detail below.

Predictive Dialers. A predictive dialer is an automatic dialing software program that, through a complex set of algorithms, automatically dials consumers' telephone numbers in a predetermined manner and at a predetermined time such that the consumer will answer the phone at the same time that a telemarketer is free to take the call.²⁸⁷ These software programs are set up to predict when a telemarketer will be free to take the next call, in order to minimize the amount of downtime for the telemarketer.²⁸⁸ In some instances, however, when a consumer answers the phone, there is no telemarketer free to take the call. In those instances, the predictive dialer disconnects the call and the consumer either hears nothing ("dead air") or hears a click as the dialer hangs up.²⁸⁹

A major theme throughout the comments has been consumer frustration with the "hang-ups" and dead air associated with the industry's use of predictive dialers.²⁹⁰ In fact, a representative from one Washington, DC area consumer protection agency reported that the problem of dead air calls due to the use of predictive dialers is the single largest complaint his organization receives regarding telemarketing.²⁹¹

²⁸⁷ See DNC Tr. at 34, 46.

²⁸⁸ See DNC Tr. at 34.

²⁸⁹ Another cause of dead air is slow connect times that create a delay between the consumer saying "hello" and the agent getting a tone in his or her ear. The agent does not hear the initial "hello." The consumer who hears only dead air after saying "hello" generally hangs up the phone after a few seconds. Clifford G. Hurst, *Will We Kill the Goose?* 11 Teleprofessional, Nov. 1998, at 70.

²⁹⁰ See, e.g., Bishop at 1; Braddick at 1; Croushore at 1; Dawson at 1; Haines at 1; Hecht at 1; Mack at 1; Manz at 1; McCurdy at 1; Merritt at 1; Nova53 at 1; Sanford at 1; Strang at 1. See also DNC Tr. at 21, 39–40; Rule Tr. at 10, 52–55, 61–62.

²⁹¹ See Rule Tr. at 55–56 ("During the last two or three years, we've conducted numerous seminars * * * for senior citizens, and the single biggest complaint in all of those seminars without fail has been [what is referred to as] dead ringers, senior citizens who go and answer the phone, there's nobody there. They either think they're being stalked or they * * * may think [a relative who is

²⁸⁶ The Commission is mindful that under *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781 (1988), the range of affirmative disclosures that can be required, consistent with strong First Amendment protection of charitable fundraising, is strictly constrained. However, the Commission believes such a narrowly tailored disclosure is permitted by the First Amendment. See *id.* at 799 n.11.

²⁸⁵ 15 U.S.C. 6102(a)(3)(C).

Consumer commenters expressed extreme frustration and anger at having to drop whatever they may be doing and race to the telephone only to be met with dead air.²⁹² This inconvenience can be particularly troublesome for the elderly or infirm who must struggle just to get to the telephone, only to find no one on the line when they answer. These consumers often feel frightened, threatened, or harassed over these experiences, since there is no way for the consumer to tell whether such calls are placed by a telemarketer or by some sinister caller, such as a stalker, or a burglar to determine if someone is home.²⁹³ In addition, when the predictive dialer disconnects the call, the consumer often has no effective way to determine from whom the call originated and thus to whom he or she should direct a "do-not-call" request; or, if the consumer has placed his or her name or number on a "do-not-call" list or registry, the consumer often has no effective way to determine which company is ignoring the consumer's "do-not-call" request.²⁹⁴ Thus, predictive dialers can thwart consumers' attempts to protect their rights to privacy by placing themselves on a "do-not-call" list.

Predictive dialers are not a new phenomenon. The telemarketing industry has used these devices for many years.²⁹⁵ However, their use has increased dramatically in the past

ill) tried to call them, and they actually place calls to emergency personnel saying, "Can you go check on my sister or my aunt or uncle" because of the fact that there's nobody there on the line.").

²⁹² See, e.g., Bishop at 1; Braddick at 1; Croushore at 1; Dawson at 1; Haines at 1; Hecht at 1; Mack at 1; Manz at 1; McCurdy at 1; Merritt at 1; Nova53 at 1; Sanford at 1; Strang at 1; DNC Tr. at 21, 39–40; Rule Tr. at 10, 52–55. See also, Martha McKay, "Nuisance Calls Hit New High: Now Telemarketers Hang Up," Bergen (Co. NJ) Record (Jan. 30, 2000), at A1.

²⁹³ See, e.g., Bishop at 1; Haines at 1; Hecht at 1; Manz at 1; McCurdy at 1; Rule Tr. at 52–56, 61–62. Private Citizen related an incident involving one consumer who had 400 abandoned calls in a one-year period and, thinking it was a stalker, put an alarm system on her house and quit her job to watch her children. The abandoned calls turned out to have come from a telemarketer using a predictive dialer. Rule Tr. at 52–53. See also, Mark Hamstra, *DMA to Explore Predictive Dialer Abandon Rates*, DM News (Feb. 21, 2000), at 1 (DMA reports some consumers saying they thought they were being stalked or harassed.).

²⁹⁴ As discussed earlier with regard to blocking of caller identification information, many telemarketers use lines that cannot transmit caller identification. Thus, consumers have no way of knowing who called because the consumer's Caller ID device displays only a message that the identity of the caller is "unavailable" or some similar phrase.

²⁹⁵ By the mid-1980's, call center technology was fairly simple, with only a few software applications and predictive dialer manufacturers to choose from. Rich Tehrani, "Oh, What Changes Time Hath Wrought," 6 Call Ctr. Solutions, Dec. 1, 1999 at 18.

decade.²⁹⁶ Predictive dialers have become prevalent in the telemarketing industry because a dialer reputedly can significantly increase a telemarketer's productivity as measured by the amount of downtime between calls.²⁹⁷ Each telemarketing company can set its predictive dialer software for a predetermined abandonment rate, i.e., the percentage of hang-up calls the system will allow—the higher the abandonment rate, the higher the number of hang-up calls. High abandonment rates can ensure that each telemarketing sales representative will spend the maximum possible number of minutes per hour talking with customers. However, the more rapidly the dialer places calls, the more probable it is that the telemarketers will still be on previously placed calls and not be available when the consumer picks up the phone. When no telemarketer is available, the predictive dialer disconnects the call.²⁹⁸

The industry acknowledges the validity of consumer objections to the negative effects of predictive dialers and has attempted to be responsive to the increasing consumer frustration over the "hang-ups" and dead air calls. In January 1999, the DMA established guidelines for its members which recommend an abandonment rate as close to zero as possible, with a maximum acceptable abandonment rate of no greater than 5 percent of answered calls per day in any campaign.²⁹⁹ The DMA guidelines also limit the number of times a marketer can abandon a consumer's telephone number in one month. According to the DMA

²⁹⁶ Hurst, *Will We Kill the Goose?* at 70 ("In just eight years, predictive dialers have come to dominate outbound telemarketing.").

²⁹⁷ Predictive dialer manufacturers claim that dialers can triple the time a telemarketer spends talking on the telephone and increase productivity by 200 to 300 percent. See McKay, "Nuisance Calls," at A1. According to one manufacturer's representative, "[w]hen people dial manually, they can talk for maybe 15 minutes out of an hour; a predictive dialer can increase talk time up to 45 minutes per hour. *Id.* (quoting Rosanne Desmone, spokeswoman for Virginia-based EIS International Inc., a maker of predictive dialing systems). See also, Hamstra, *DMA to Explore Predictive Dialer Abandon Rates*, at 1 (stating that telemarketing agents can be twice as productive in a predictive dialer call center, spending an average of 45 minutes of each hour talking with customers compared to 22 minutes or less in a center that uses manual dialing).

²⁹⁸ McKay, *Nuisance Calls*, at A1; Hamstra, *DMA to Explore Predictive Dialer Abandon Rates* at 1. See also, Rule Tr. at 50–51; 57–58.

²⁹⁹ See DMA, "The DMA Guidelines for Ethical Business Practice," revised August, 1999, available at: www.the-dma.org/library/guidelines/ethics/guidelines.shtml#6 (Article #38, Use of Predictive Auto Dialing Equipment); Rule Tr. at 60. See also, Hamstra, *DMA to Explore Predictive Dialer Abandon Rates* at 1.

guidelines, if a marketer has abandoned a call to a particular number twice in one month, the marketer should not call that person again unless the call is placed manually by a sales representative.³⁰⁰ However, these guidelines are voluntary and some critics of the telemarketing industry claim that some companies have abandonment rates that are substantially higher than the recommended 5 percent.³⁰¹

As a result of increased consumer outrage over the number of abandoned calls, the DMA is considering reducing the maximum recommended abandonment rate from 5 percent to some lower number.³⁰² Theoretically, the dialer could be set to a zero abandonment rate, where a telemarketer would be available for each call answered by a consumer. Industry members claim, however, that a zero abandonment rate would lose any efficiencies that are gained by the use of a predictive dialer.³⁰³ They argue that at a zero abandonment rate, they might as well have telemarketers manually dialing telephone numbers.³⁰⁴

The Commission in no way condones a practice that enables industry to shift some of its operational costs to

³⁰⁰ See "The DMA Guidelines for Ethical Business Practice," Article #38. See also Rule Tr. at 60–61.

³⁰¹ McKay, *Nuisance Calls*, at A1 (quoting Robert Bulmash of Private Citizen, who estimates that some telemarketers set the abandonment rate as high as 40 percent). See also, Hamstra, *DMA to Explore Predictive Dialer Abandon Rates* at 1 (explaining that DMA's Ethics Committee meets with members who fail to abide by the guidelines, and a member who continues to be noncompliant may have its membership terminated).

³⁰² See Hamstra, *DMA to Explore Predictive Dialer Abandon Rates* at 1. See also Rule Tr. at 61. State legislators also have taken note of consumer dissatisfaction with abandoned calls. Although several States, including California, Maryland, Minnesota and Kansas, have considered legislation prohibiting or restricting the use of predictive dialers, only Kansas and California have passed such legislation. The Kansas bill, which was possibly the first to address the dead air issue, took effect June 1, 2000, and requires that either a "live" operator or a recorded message be available within 5 seconds of the call's connection with a Kansas consumer. Technically, this statute prohibits abandoned calls. See Kan. Stat. Ann. § 50–670(b)(6) (1999 Supp.) The California bill, which was signed on October 10, 2001, prohibits making a telephone connection for which no person is available for the person called. The bill directs the California Public Utilities Commission to establish an acceptable error rate, if any, before July 1, 2002. See, A.B. 870 (to be codified at Cal. Pub. Utilities Code § 2875.5). See also, C. Tyler Prochnow, *Keeping an Eye on Outbound Calling*, DM News, Sept. 18, 2000, p. 48; and *Telemarketer Fight a Real Call to Arms*, LA Times, Part A, Part 1, page 1 (September 9, 2001). See also, Hamstra, *DMA to Explore Predictive Dialer Abandon Rates* at 1.

³⁰³ See Rule Tr. at 56–57.

³⁰⁴ Rule Tr. at 50–51, 56–58, 60–61. See also, Hamstra, *DMA to Explore Predictive Dialer Abandon Rates* at 1.

consumers, who receive in return little, if any, benefit. The Commission, however, recognizes the tension between consumer privacy on the one hand and industry productivity on the other. In general, the Commission seeks to avoid unnecessary burdens on industry while maximizing consumer protections. In this instance, however, regardless of the increased productivity that predictive dialers provide to the telemarketing industry, the harm to consumers is very real and falls squarely within the areas of abuse that the Telemarketing Act explicitly aimed to address. Using predictive dialers in a way that produces many abandoned calls is a practice that clearly "the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."³⁰⁵ In this regard, moreover, one fact is clear: Telemarketers who abandon calls are violating § 310.4(d) of the Telemarketing Sales Rule. Section 310.4(d) requires that a telemarketer promptly and clearly dispose specified information to the person receiving the call. The Commission intends for the phrase "receiving the call" to mean when the consumer answers the telephone. Once the consumer answers the telephone, the consumer has "received the call" for purposes of the Rule; the required disclosures must then be made. Once the consumer has answered the telephone, the telemarketer violates § 310.4(d) if the telemarketer disconnects the call without providing the required disclosures.

Section 310.4(d) rests on an essential balancing of the interests of telemarketers and those of consumers. In exchange for permitting what is in effect the seller's unsolicited intrusion upon a consumer's privacy and an encroachment on her time, the Rule requires only that the seller expeditiously provide the consumer with information she needs to efficiently and quickly reach a decision as to whether she will extend the conversation and allow a greater imposition on her time and her privacy, based on her interest in the offer. This balance goes seriously awry when telemarketers, in their own self-interest, employ a practice that provides consumers with only dead air yet imposes the same, if not greater, costs on consumers as does a call that actually allows them to learn who is offering to sell them something, and what is being offered. Abandoned calls rob consumers of the benefit of actually being able to consider an offer that might have made worthwhile the

intrusion on their privacy and the encroachment on their time. The balance is further distorted by the fact that an abandoned call provides no opportunity for the consumer to assert a "do-not-call" request; and, thus, no opportunity to exercise any sovereignty whatsoever over future such intrusions on her privacy and encroachments on her valuable time.

The Commission seeks recommendations regarding alternative approaches to the use of predictive dialers. For example, should the Commission mandate a maximum setting for abandoned calls, and, if so, what should that setting be? Would it be feasible to limit the use of predictive dialers to only those telemarketers who are able to transmit Caller ID information, including a meaningful number that the consumer could use to return the call? Would providing consumers with this information alleviate the injury consumers are now sustaining as a result of predictive dialer practices? Section IX sets out questions to elicit suggestions for regulatory alternatives to the Commission's proposed action regarding predictive dialers.

Use of prisoners as telemarketers. The Commission received several comments describing the problems that can occur when sellers or telemarketers use prison inmates to telemarket goods or services, and recommending that the Commission ban the use of prisoners as telemarketers or, in the alternative, tightly regulate the use of such labor, including requiring that inmates disclose their status as prisoners when they make calls to, or receive calls from, the public.³⁰⁶ In addition, this issue received considerable attention during the July Forum.³⁰⁷

Prison inmates often are used by federal and State governments, as well as private firms, to handle inbound calls to call centers or to make outbound telemarketing calls.³⁰⁸ About 72,000 prisoners nationwide are employed in

inmate work programs, including about 2,500 prisoners who work for private subcontractors in 38 States.³⁰⁹ Supporters maintain that the programs provide a variety of benefits: to inmates, by providing job training; to the prison system, because a portion of the wages goes to offset the costs of incarceration; to taxpayers, because inexpensive labor is used to handle certain government jobs (e.g., handling tourist bureau calls); and to private companies, because they gain a supply of inexpensive labor.³¹⁰

There have been a number of publicized incidents in recent years in which inmates have abused the data and resources to which they had access through these programs to make improper, invasive, and illegal contact with members of the public.³¹¹ These events have raised public concern about the type of personal information available to inmates who do data entry and telemarketing.³¹² The commenters point out that while working as telemarketers, inmates inevitably gain access to personal information about individuals, including minors, that may endanger the lives and safety of those they call.³¹³

In her written comment and in her testimony at the July Forum on the TSR, April Jordan described how an inmate working as a telemarketer selling family

³⁰⁹ See Light, "Look for that Prison Label" at 21. Since the Prison Industry Enhancement Act was passed in 1979 (P.L. 96-157, § 827, 93 Stat 1215), State prison systems may contract with private firms to provide prison labor as long as the prison systems are authorized to do so by State law and the program is certified by the U.S. Department of Justice's Bureau of Justice Assistance.

³¹⁰ See Brian Hauck, "RECENT LEGISLATION: Prison Labor," 37 *Harvard Journal on Legislation*, 279 (Win. 2000). See also, Gordon Lafer, "America's Prisoners as Corporate Workforce," *The American Prospect* (Sept.-Oct. 1999), p. 66.

³¹¹ For example, in its 1997 report to Congress on the privacy implications of individual reference services, the FTC cited an example where a prison inmate (and convicted rapist), who was employed as a data processor, used his access to a database containing personal information to compose and send a threatening letter to an Ohio grandmother. See FTC, *Individual Reference Services: A Report to Congress* (Dec. 1997), at p. 16.

³¹² Several States, including Wisconsin, Nevada, and Massachusetts, have considered legislation that would require their Departments of Correction to restrict prisoners' access to personal information about persons who are not prisoners and/or to require prisoners conducting telephone solicitations or answering inbound calls to identify themselves as prisoners. The Utah State Prison stopped using inmates as telemarketers after conceding that they could not ensure that prisoners would not misuse personal information they obtain. See "Prison to End Telemarketing By Inmates," *Salt Lake Tribune* (June 1, 2000) p. B1. In addition, DMA noted that it had supported legislation banning the use of inmates in remote sales situations because these sales require the telemarketer to get personal information from the consumer. See Rule Tr. at 371-372.

³¹³ See generally Jordan, Gardner, Warren, and Budro.

³⁰⁶ See generally Jordan, S. Gardner, Budro, and Warren.

³⁰⁷ See Rule Tr. at 220-245, 367-375, 443-447.

³⁰⁸ For example, TWA uses prisoners to make airline reservations. See Julie Light, "Look for that Prison Label: Inmate work programs raise human rights concerns," 64 *The Progressive* 21 (June 1, 2000). In Wisconsin, inmates have been used to solicit pledges for the Leukemia Society, to answer State lottery calls, and to give advice on avoiding highway construction zones. See Sam Martino, "Using inmates to staff phones rekindles debate," *Milwaukee Journal Sentinel*, (Apr. 12, 1998), p. 5. Although these examples involve activities that fall outside the coverage of the FTC Act, other prison-based telemarketing can involve products and services that are within the Commission's jurisdiction. See, e.g., Jordan (use of prisoners to telemarket family films).

³⁰⁵ 15 U.S.C. 6102(a)(3)(A).

films engaged in an improper conversation with her minor daughter and was able to manipulate the youngster into revealing a great deal of personal information, including her address and physical description.³¹⁴ In addition, Attachment VI of Ms. Jordan's comment includes newspaper and television reports describing other instances where inmates misused personal information they had received while doing data entry or working as telemarketers.

The Commission is extremely concerned about the misuse of the access to consumers that prisoners have when they work as telemarketers, and in the potential misuse of personal information and abusive telemarketing activity that has occurred in connection with prison-based telemarketing. Nevertheless, the Commission believes that some public benefit may be provided by inmate work programs that entail telemarketing. The record complied to date contains insufficient information upon which to base a proposal regarding prisoner-telemarketing or to assess the costs and benefits of such a proposal.

Possible regulatory approaches under consideration to address prison-based telemarketing abuses. The Commission could propose disclosure requirements or screening and monitoring requirements to govern prisoner-based telemarketing. It is not clear, however, that such requirements are workable, or if workable, whether they would adequately protect consumers from misuse of personal information in this context. The Commission notes that even the most stringent screening and monitoring procedures instituted by those using inmate work programs have not prevented prisoners from misusing the personal information to which they have access. Telemarketing, by its very nature, is an interactive medium in which the prisoner will be talking directly with a potential customer. Even if prisoners are given scripts to use during the solicitation, nothing short of 100% monitoring can ensure that they adhere to the script and do not digress into "personal" conversations with consumers.³¹⁵ Moreover, even a list

containing only the names and telephone numbers of consumers can provide valuable personal information about consumers that can be abused. Sellers and telemarketers frequently use lists that target particular types of consumers for their solicitations. Thus, a telemarketer may be able to deduce important personal information about a particular consumer simply by virtue of the fact that the consumer's name and telephone number appear on a list for a particular sales campaign. For example, a campaign to sell children's videos presumably would target households with young children. The Commission is not now convinced that any approach short of banning prison-based telemarketing as an abusive practice would ensure sufficient protection for consumers against misuse of their personal information, or other abuses associated with this form of telemarketing.

Therefore, the Commission is considering whether prison-based telemarketing ought to be banned as an abusive practice. Clearly the consumer privacy concerns that in no small measure prompted Congress to enact the Telemarketing Act are implicated by this activity. Although it seems clear that prison-based telemarketing may cause significant unavoidable consumer injury, similar risks may occur from telemarketing employees who are not in prison (e.g., former convicts). Prison-based telemarketing is presumably employed because it is less costly than alternatives, which constitutes a countervailing benefit to consumers or to competition that might outweigh the harm. Moreover, a ban on prisoner telemarketing would only affect sellers and telemarketers that are subject to the Rule. Individuals and entities outside the scope of the FTC Act would not be affected in their telemarketing activities. Therefore, in this notice, the Commission seeks more information from commenters, particularly on the costs to consumers and the measurable benefits to consumers or to competition of prison-based telemarketing, to enable it to determine the most appropriate Commission action with regard to this activity.

Courier pickups. AARP recommended that the Commission ban the use of couriers to pick up payments unless the consumer has an opportunity to inspect

any goods before payment is collected.³¹⁶ AARP noted that, in the initial TSR rulemaking in 1995, both the Commission and State law enforcement agencies recognized that courier pickups were disproportionately associated with fraudulent telemarketing.³¹⁷ AARP pointed out that courier pickups are commonly used in fraudulent prize and sweepstakes promotions because the courier collects the payment before the consumer has had a chance to change his or her mind, and because the contest seems more "official" if a "bonded courier" comes to pick up the payment.³¹⁸ AARP also stated that fraudulent businesses that target low-income consumers also often use courier pickups.³¹⁹

In its 1995 rulemaking to promulgate the TSR, the Commission initially proposed prohibiting any seller or telemarketer from providing for or directing a courier to pick up payment from a customer.³²⁰ However, the Commission deleted that ban from the subsequent revised proposed Rule and, ultimately, from its final Rule after determining that such a ban was unworkable.³²¹ In this regard, the Commission stated:

There is nothing inherently deceptive about the use of couriers by legitimate business, and * * * legitimate businesses use them. While fraudulent telemarketers often use couriers to obtain quickly the spoils of their deceit, such telemarketers engage in other acts or practices that clearly are deceptive or abusive, and that are prohibited by this Rule. Thus, the prohibition of courier use is unnecessary * * *³²²

Based on the comments it had received, Commission staff raised the issue of banning courier pickups at the July Forum.³²³ However, the discussion did not provide any evidence indicating that the conclusion the Commission drew in 1995 is now invalid. Absent record evidence to the contrary, the Commission declines to modify the TSR to prohibit the use of courier pickups for payments.

Sale of victim lists. NAAG recommended that the Commission ban

³¹⁶ See AARP at 5; Rule Tr. at 382–383.

³¹⁷ AARP at 5 (*citing* "Comments of the Federal Trade Commission, Public Hearing on Telemarketing Sales Rule, Chicago, Illinois, April 1995" and "Comments and Recommendations of the Telemarketing Fraud Task Force of the Consumer Protection Committee of the National Association of Attorneys General in the Matter of the Proposed Telemarketing Sales Rule. FTC File No. R411001 (1995), pp. 18–19").

³¹⁸ AARP at 5; Rule Tr. at 382–383.

³¹⁹ *Id.*

³²⁰ Initially proposed Rule § 310.4(a)(2). 60 FR at 8330.

³²¹ 60 FR at 30415.

³²² *Id.*

³²³ See Rule Tr. at 382–383.

³¹⁴ See generally Jordan and Rule Tr. at 220–245, 443–447.

³¹⁵ In the case involving the Utah prisoner who engaged in inappropriate conversations with minors, there were numerous safeguards to protect against abuse. First, once the main computer system dialed a number and someone answered, the call would be transferred to an inmate telemarketer. The only information the inmate saw was the name the phone number was listed under and the name of the person who gave the referral. If the consumer expressed interest in the product, the call was switched to a civilian representative who worked

outside the prison; that representative gathered additional information in connection with the transaction. Second, two separate systems had been set up to randomly monitor the prisoners' conversations with consumers, including built-in "alerts" that notified the security personnel if a call lasted over 15 minutes. Abuses occurred despite all of these precautions. See Jordan, Attachment III.

as an abusive act or practice the sale of “sucker” lists (lists of known victims of telemarketing scams); its recommendation was echoed by several participants at the July Forum.³²⁴

In its 1995 rulemaking to promulgate the TSR, the Commission initially proposed prohibiting any person from selling, renting, publishing, or distributing any list of customer contacts when that person is subject to a federal court order for violations of certain provisions of the TSR.³²⁵ However, the Commission deleted that ban from the subsequent revised proposed Rule and, ultimately, from its final Rule after determining that such a ban was best left to the discretion of law enforcement agencies to seek in individual law enforcement actions before the courts.³²⁶

Based on the comments it had received, Commission staff raised the issue of banning the sale of victim lists at the July Forum.³²⁷ During the discussion at the forum, participants raised many of the same arguments for and against the prohibition that were raised during the initial rulemaking. Although participants agreed that the sale of “sucker” lists was a pernicious practice that should be stopped, they also agreed that it was extremely difficult to define “victim.” Participants also noted the danger of overbreadth in such a provision, and infringement on a consumer’s sovereignty in the matter of which telemarketing calls he or she might wish to receive, simply because the consumer had once been defrauded.³²⁸ The discussion did not provide any evidence that the conclusion the Commission drew in 1995 was incorrect. Moreover, the Commission believes it is highly likely that any telemarketer attempting to defraud those who have previously been victimized by telemarketing fraud will violate one or more existing provisions of the Rule, and thus be subject to liability without a provision addressing sucker lists. Therefore, the Commission declines to amend the TSR to prohibit the sale of lists of known telemarketing victims.

Targeting vulnerable groups. NAAG recommended that the Commission amend the TSR to prohibit the targeting of vulnerable groups (such as the elderly) in telemarketing schemes that contain any misrepresentation of

material fact.³²⁹ This issue was raised at the July Forum.³³⁰ The results of that discussion have led the Commission to conclude that prohibiting this practice would raise issues similar to those encountered in attempting to prohibit the sale of victim lists, as discussed above. There is nothing inherently harmful about directing sales efforts to a particular segment of the population—even “vulnerable” ones—*provided* the efforts do not entail unfair or deceptive practices. It is these practices, not “targeting” per se, that gives rise to injury. Moreover, these practices independently violate the Rule. Adding targeting as a Rule violation would, at best, provide “makeweight” allegations that serve little purpose. Such a violation, standing alone, would not likely provide a basis for law enforcement action. Moreover, it would be very difficult to define what constitutes a “vulnerable” group without infringing on consumers’ prerogatives to receive offers and information that may be valuable to them, or without unduly hindering legitimate telemarketers from focusing their marketing campaigns.³³¹ As with the sale of victim lists, the Commission believes that combating the practice of targeting vulnerable groups is a challenge best left to the discretion of law enforcement agencies who may seek injunctions and other penalties on a case by case basis in individual law enforcement actions.

Definition of “promptly.” Section 310.4(d) requires that a telemarketer in an outbound call promptly disclose certain information to the person being called.³³² Several commenters urged the Commission to define the term “promptly.”³³³ These commenters suggested that, by failing to define the term, the Rule gives too much latitude to the telemarketer as to when such disclosures should be made.³³⁴ Other commenters supported the current wording, believing the standard strikes the appropriate balance.³³⁵

The wording of this provision adopts the statutory language found in the Telemarketing Act.³³⁶ Furthermore, the Commission believes that its discussion of this term in the Statement of Basis and Purpose of the Rule is absolutely clear that, while industry is allowed some flexibility, the disclosures must occur *at once or without delay, and before any substantive information* about a prize, product, or service is conveyed to the consumer.³³⁷ Although commenters suggested other terms that might be used instead of the word “promptly,”³³⁸ the Commission does not believe that those suggestions provide any greater precision than does the current wording. Therefore, the Commission has determined to retain the current wording of this provision.

Multiple purpose calls. Several commenters noted that there has been a problem with dual purpose calls—*i.e.*, calls that combine selling with some other activity, such as conducting a prize promotion or survey, or assessing whether a customer is satisfied with a recent purchase.³³⁹ These commenters state that the problem has been particularly acute in the outbound sale of magazines, where a prize or sweepstakes offer is used to solicit the purchase of a magazine subscription.³⁴⁰ NAAG states that some telemarketers fail to make the required disclosures up front and, when challenged, contend that the primary purpose of the call is to solicit a sweepstakes entry, not to sell a magazine subscription.³⁴¹ For this reason, NAAG and NACAA recommend that, instead of relying upon language in the Statement of Basis and Purpose (discussed below), the TSR should contain a provision that expressly deals with multiple purpose calls and that the provision should require telemarketers to make the required oral disclosures, including the cost disclosures required by § 310.3(a)(1)(i), before soliciting the consumer to enter a sweepstakes or prize promotion or before mentioning any other purpose of the call.³⁴²

³³⁶ The Telemarketing Act requires the Commission to include in its Rule “a requirement that any person engaged in telemarketing for the sale of goods or services shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make other such disclosures as the Commission deems appropriate.” 15 U.S.C. 6102(a)(3)(C).

³³⁷ 60 FR at 43856, generally and at n.150.

³³⁸ See LSAP at 2 (define as “when a consumer answers an outbound telemarketing call”); NACAA at 2 (define as “immediate and at commencement of the call”); NAAG at 14 (define as “at the onset of the call”); Texas at 2 (define as “prior to making the sales presentation”).

³³⁹ NAAG at 6–8; NACAA at 2.

³⁴⁰ NAAG at 6–7.

³⁴¹ *Id.* at 7.

³⁴² *Id.* at 8; NACAA at 2.

³²⁴ See NAAG at 19. See also Rule Tr. at 354–363.

³²⁵ Initially proposed Rule § 310.4(f); 60 FR at 8332.

³²⁶ 60 FR at 30420.

³²⁷ See Rule Tr. at 354–367.

³²⁸ See Rule Tr. at 355–356, 360–361, 366–367.

³²⁹ NAAG at 20.

³³⁰ See Rule Tr. at 380–382.

³³¹ See Rule Tr. at 380–382.

³³² The Rule requires the telemarketer to disclose promptly the identity of the seller, that the purpose of the call is to sell goods or services, the nature of the goods or services, and that no purchase or payment is necessary to win a prize or participate in a prize promotion. 16 CFR 310.4(d).

³³³ See LSAP at 2; NAAG at 14; NACAA at 2; Texas at 2.

³³⁴ NAAG at 14.

³³⁵ See ARDA at 2; Gannett at 1 (noting that many State laws contain different timing requirements for making the required disclosures to the detriment of the effectiveness of telemarketing); MPA at 9–10; NASAA at 3.

The Commission does not believe that the cost disclosures required by § 310.3(a)(1)(i) should be one of the required oral disclosures that must be given promptly at the beginning of the call. These cost disclosures are more meaningful to the consumer when made in conjunction with the remainder of the disclosures required by § 310.3(a)(1). So long as the disclosures that are required by § 310.4(d) are made promptly, consumers will be put on notice that, at some point during the call, they will be offered the chance to purchase a good or service. In addition, the prompt disclosures serve as an obstacle to those telemarketers who would seek to mischaracterize a sales transaction as something else (e.g., as a survey or as a contest).

The Commission also believes that its position with respect to multiple purpose calls is clear. In the Rule's Statement of Basis and Purpose, the Commission stated:

[T]he Commission believes that in any multiple purpose call where the seller or telemarketer plans, in at least some of those calls, to sell goods or services, the disclosures required by this section of the Rule must be made "promptly," during the first part of the call, before the non-sales portion of the call takes place. Only in this manner will the Rule assure that a sales call is not being made under the guise of a survey research call, or a call for some other purpose.³⁴³

The Commission believes that this language leaves no room for doubt that the sale of goods or services does not have to be the *primary* purpose of the call; it only has to be *one* of the purposes in order to trigger the required oral disclosures. Thus, in any call in which one of the purposes is to sell goods or services, the required disclosures must be made "promptly" before any discussion of any sweepstakes, survey, or other non-sales purpose. Therefore, because the Commission made its intention so clear in the Statement of Basis and Purpose regarding when disclosures must be made in a multiple purpose call, it is unnecessary to amend the Rule to deal expressly with those types of calls.

Number and address of telemarketer. NASAA recommended that the Rule be modified to track the language of the NASD Rule that requires the telemarketer to disclose the telephone number and address at which the *telemarketer* can be contacted.³⁴⁴ NASAA contends that this would expand the definition of "identity of the seller" and provide the consumer with important information that could be used to identify the telemarketer to the

consumer or to regulatory agencies should the consumer have a complaint.³⁴⁵ The Commission agrees that the identity of the telemarketer is often helpful to law enforcement agencies when investigating fraudulent telemarketing activities. However, from the consumer's perspective, the identity of the seller continues to be the most vital piece of information that consumers must capture when a telemarketer calls, since it is the seller to which the consumer would direct complaints, requests for refund, as well as "do-not-call" requests under the Rule. In addition, the Commission believes that the initial oral disclosures should be succinct in order to avoid confusing consumers with an overload of information. Therefore, the Commission declines to adopt NASAA's recommendation.

E. Section 310.5—Recordkeeping

Section 310.5 of the Rule describes the types of records sellers or telemarketers must keep, and the time period for retention.³⁴⁶ Specifically, this provision requires that telemarketers must keep for a period of 24 months: all substantially different advertising, brochures, scripts, and promotional materials; information about prize recipients; information about customers, including what they purchased, when they made their purchase, and how much they paid for the goods or services they purchased; information about employees; and all verifiable authorizations required by § 310.3(a)(3).

Commenters generally favored the recordkeeping provisions, noting that they have not been unduly burdensome³⁴⁷ and that they have provided necessary guidance to industry members about what records must be kept and for how long.³⁴⁸ In particular, MPA noted with approval the requirement in § 310.5(a)(1) that only substantially different advertising materials need be retained under the Rule, which equitably balances the needs of businesses with those of consumers.³⁴⁹

Reese was the only commenter who found the cost of recordkeeping burdensome,³⁵⁰ suggesting that the

Commission could alleviate this burden either by allowing that such records be kept for a shorter time, such as 90 days from the time of sale, delivery, or presentment of charges in writing, or that the length of time for record retention vary depending on the value of the purchase made by telephone, with longer record storage requirements for more expensive sales.³⁵¹ Bell Atlantic suggested that the record retention period be reduced to only 12 months for companies that offer money back guarantees, which would reduce the burden on such companies and create an incentive in the marketplace to offer such guarantees.³⁵²

The Commission declines to reduce the record retention period for telemarketing transactions. As the Commission noted in its discussion of the recordkeeping provision in the Rule's Statement of Basis and Purpose, the 24-month record retention period "is necessary to provide adequate time for the Commission and State law enforcement agencies to complete investigations of noncompliance."³⁵³ The Commission further noted that the burden on business in keeping records for 24 months was carefully balanced by designating that those records to be kept were those already routinely maintained by businesses in the ordinary course of business. Nothing in the Rule review record suggests that a shorter time period for retention would meet the needs of law enforcement, and the Commission finds no compelling evidence in the Rule review record that such a change is necessary to alleviate any undue burden on industry.

The Commission also rejects the proposal to tie the duration of record retention to either the value of the goods or services sold or to the refund policy of the seller. As to the former, the Commission has numerous examples in its law enforcement experience of telemarketing frauds where large numbers of consumers have been bilked out of small amounts of money.³⁵⁴ While the injury per consumer may have been small in such cases, the cumulative injury was substantial. Consequently, the Commission believes that eliminating the 24-month retention requirement for transactions below a

event of disputes' and that the cost of this adds 2% to operating costs).

³⁵¹ *Id.*

³⁵² Bell Atlantic at 7.

³⁵³ 60 FR at 43857.

³⁵⁴ See, e.g., *FTC v. Progressive Media, Inc.*, No. C96-1723WD (W.D. Wash. July 23, 1997) (employment opportunities, scholarships/ financial aid for \$39.95 to \$69.95); *FTC v. Ed Boehlke*, No. CIV96-0482-E-BLW (D. Idaho, filed Nov. 4, 1996) (work-at-home kits for \$38.95).

³⁴³ 60 FR at 43856.

³⁴⁴ NASAA at 3.

³⁴⁵ *Id.*

³⁴⁶ The Telemarketing Act expressly authorizes the Commission to require recordkeeping in the TSR. 15 U.S.C. 6102(a).

³⁴⁷ See ARDA at 4 (noting that, independent of State law requirements for recordkeeping, particularly for "do-not-call" requests, the TSR has not been burdensome on ARDA members).

³⁴⁸ MPA at 10.

³⁴⁹ *Id.*

³⁵⁰ Reese at 8 (stating that "[i]ndustry practice is to store audiotapes of sales for 2-3 years to satisfy FTC record keeping and for future retrieval in the

certain dollar threshold would be detrimental to consumers. Similarly, the Commission rejects the proposal to shorten the record retention period for companies offering money back guarantees. Although a money back guarantee can be beneficial for consumers, the guarantee is only as good as the company that offers it. The Commission's law enforcement experience is replete with examples of companies engaging in fraud or deception, including misrepresentations regarding their money back guarantees.³⁵⁵ Law enforcement would still require a 24-month period of records in order to complete investigations of noncompliance.

Finally, pursuant to section 1011 of the USA PATRIOT Act, the recordkeeping provisions of the Rule will now be applicable to telemarketers who solicit charitable contributions, as well as to those who attempt to induce the purchase of goods and services. Therefore, telemarketers now will be required to adhere to § 310.5, regardless of whether they are attempting to induce the purchase of goods or services or a charitable contribution.³⁵⁶ The only explicit modification proposed to § 310.5 is made to extend the provision's coverage to include charitable solicitations in a non-sales context. Specifically, in § 310.5 (a)(4), the phrase "employees directly involved in telephone sales" is now directly followed by the phrase "or solicitations of charitable contributions."

F. Section 310.6—Exemptions

Section 310.6 exempts certain telemarketing activities from the Rule's coverage.³⁵⁷ The exemptions to the Rule

were designed to ensure that legitimate businesses are not unduly burdened by the Rule, and each is justified by one of four factors: (1) Whether Congress intended a particular activity to be exempt from the Rule; (2) whether the conduct or business in question is already the subject of extensive federal or State regulation; (3) whether the conduct at issue lends itself easily to the forms of abuse or deception the Telemarketing Act was intended to address; and (4) whether the risk that fraudulent sellers or telemarketers would avail themselves of the exemption outweigh the burden to legitimate industry of compliance with the Rule.³⁵⁸

The exemptions to the Rule generated a significant number of written comments, and were also the subject of extensive discussion at the July Forum. Law enforcement and consumer groups generally favored limiting the exemptions,³⁵⁹ while the business community generally favored retaining the current exemptions.³⁶⁰

No comments were received recommending changes to § 310.6(d), which exempts "calls initiated by a consumer that are not the result of any solicitation by a seller or telemarketer." The proposed Rule retains this provision unchanged, except for expanding the exemption to charitable solicitations that are not the result of any solicitation. Based on the record in this proceeding, and on its law enforcement experience, the Commission proposes several modifications to other subsections of § 310.6.

First, the Commission proposes modification to §§ 310.6(a), 310.6(b) and 310.6(c) in order to require telemarketers and sellers of pay-per-call services, franchises, and those whose sales involve a face-to-face meeting before consummation of the transaction to comply with the "do-not-call" and certain other provisions of § 310.4.

Second, the Commission proposes to modify the general media exemption to make it unavailable to telemarketers of credit card loss protection plans and business opportunities other than business arrangements covered by the Franchise Rule.

disclose all material information (except solicitations relating to prize promotions, investment opportunities, credit repair, "recovery" or advance fee loan services); and (6) business-to-business telemarketing (except calls involving the retail sale of non-durable office or cleaning supplies).

³⁵⁸ 60 FR at 43859.

³⁵⁹ See FAMSAs at 2; NAAG at 16–17; NACAA at 2; NCL at 5.

³⁶⁰ See ARDA at 5; DSA at 4; ERA at 4; ICFA at 1–2; MPA at 10; Reese at 12.

Third, the Commission proposes modifying the exceptions to the direct mail exemption, § 310.6(f). As in the case of the general media exemption, the direct mail exemption is unavailable to telemarketers of certain goods or services that are particularly susceptible to fraud. The Commission proposes to add to this list of problematic goods or services. Specifically, the direct mail exemption will no longer be available to telemarketers of credit card loss protection plans or business opportunities other than business arrangements covered by the Franchise Rule. In addition, the proposed Rule would make clear that email and facsimile messages are direct mail for purposes of the Rule.

Fourth, pursuant to the USA PATRIOT Act amendment of the Telemarketing Act, the Commission also proposes to expand certain of the exemptions to include charitable solicitations. Thus, the proposed Rule would exempt: charitable solicitation calls that are followed by face-to-face payment, § 310.6(c); prospective donors' inbound calls not prompted by a solicitation, § 310.6(d); charitable solicitation calls placed in response to general media advertising, § 310.6(e); and charitable solicitation calls placed in response to direct mail solicitations that comply with § 310.3(a)(1). In addition, the Commission proposes to make the business-to-business exemption unavailable for charitable solicitation calls (along with calls for the sale of Internet services, Web services, or the retail sale of nondurable office of cleaning supplies), § 310.6(g). The Commission's law enforcement experience demonstrates that fraudulent charitable solicitations directed at businesses are a widespread problem. Consequently, telemarketers that solicit charitable contributions from businesses should not be exempt from complying with the TSR.

Sections 310.6(a), (b) and (c)—Exemptions for Pay-Per-Call Services, Franchising, and Face-to-Face Transactions

Section 310.6(a) of the original Rule exempts from the Rule's requirements those transactions that are subject to the Commission's Pay-Per-Call Rule.³⁶¹ Similarly, § 310.6(b) exempts transactions subject to the Commission's Franchise Rule.³⁶² Section 310.6(c) exempts from the Rule's requirements

³⁶¹ Trade Regulation Rule pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 CFR part 308.

³⁶² Rule Regarding Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 16 CFR part 436.

³⁵⁵ See, e.g., *FTC v. Telebrands Corp. et al.*, FTC Docket No. C-3699; and modified Order, 96-0827-R (Turk), (W.D. Va. Sept. 1, 1999) (products via mail and telephone order); *In the Matter of Gateway 2000, Inc.*, FTC Docket No. C-3844 (1998) (mail order computers); *FTC v. Progressive Media, Inc., et al.*, C96-1723WD (W.D. Wash. July 23, 1997) (employment opportunities, scholarships/financial aid); *FTC v. Ed Boehlke*, No. CIV96-0482-E-BLW; *FTC v. Universal Credit Corp.*, 96-114-LHM(EEEx) (C.D. Calif. Feb. 9, 1996) (credit repair); *FTC v. Environmental Protection Servs.*, No. 89-1498 (S.D. Fla. 1989).

³⁵⁶ When provisions within this section specifically contemplate recordkeeping by "sellers" or only require recordkeeping about "customers," telemarketers soliciting charitable contributions will be exempt from compliance.

³⁵⁷ Specifically, the Rule exempts: (1) Goods and services subject to the Commission's 900-Number Rule and Franchise Rule; (2) telemarketing sales consummated by face-to-face transactions; (3) inbound telephone calls that are not the result of any solicitation by the seller or telemarketer; (4) telephone calls in response to a general media advertisement (except those related to investment opportunities, credit repair, "recovery" or advance fee loan services); (5) inbound telephone calls in response to direct mail solicitations that truthfully

those transactions in which the sale of goods or services is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation by the seller.³⁶³ The Commission proposes to retain the exemptions for pay-per-call services, franchising, and face-to-face transactions set out in §§ 310.6(a)–(c),³⁶⁴ but to require these telemarketers to comply with § 310.4(a)(1) (prohibiting threats, intimidation or use of profane or obscene language), § 310.4(a)(6) (blocking, circumventing, or altering the transmission of the name and/or telephone number of the calling party on Caller ID), § 310.4(b) (prohibiting abusive pattern of calls, and requiring compliance with “do-not-call” provisions), and § 310.4(c) (calling time restrictions).

No comments were received regarding §§ 310.6(a) or (b). Commenters generally favored § 310.6(c), noting that it appropriately excludes from the Rule’s coverage transactions in which the incidence of telemarketing fraud and abuse is lessened by a subsequent in-person meeting between a customer and a seller.³⁶⁵ The Commission continues to believe that the incidence of fraud may be lessened when a transaction is not completed, and payment is not made, until a face-to-face meeting occurs between the buyer and seller. Thus, the proposed Rule would continue to exempt face-to-face transactions from the provisions relating to deceptive practices. For the same reasons, the Commission proposes to expand the “face-to-face” exemption to those charitable solicitations where the donation or payment is made subsequently in a face-to-face setting. Similarly, the Commission continues to believe that the Pay-Per-Call Rule and the Franchise Rule provide protection against deceptive practices for consumers seeking to purchase those goods or services. Thus, the proposed Rule would continue to exempt transactions subject to the Commission’s Pay-Per-Call Rule and Franchise Rule

from the provisions relating to deceptive practices.

On the other hand, the Rule review record makes clear that consumers are increasingly frustrated with unwanted telemarketing calls, including those soliciting for pay-per-call services or sales appointments.³⁶⁶ One consumer who spoke during the public participation portion of the “Do-Not-Call” Forum noted frustration about her inability to invoke her right not to be called again by a company that called her to solicit a sales appointment.³⁶⁷ A number of participants in the July Forum concurred that the “do-not-call” provision of the Rule should also be applicable to calls where a seller attempts to set up an in-person sales meeting at a later date.³⁶⁸

The Telemarketing Act mandates that the Commission’s Rule address abusive telemarketing practices and specifically mandates that the Commission’s Rule include a prohibition on calls that a reasonable consumer would consider coercive or abusive to the consumer’s right to privacy, as well as restrictions on calling times.³⁶⁹ The incidence of fraud may be diminished in face-to-face telemarketing transactions or when the transactions are subject to regulation by other Commission rules, but the Rulemaking record shows that these transactions are not less susceptible to the abusive practices prohibited in § 310.4.³⁷⁰ For this reason, the Commission agrees that telemarketing calls to solicit a face-to-face presentation or to solicit the purchase of pay-per-call services should be subject to certain of the Rule’s provisions designed to limit abusive practices. Because franchise sales generally involve a face-to-face meeting at some point, these transactions are simply another type of face-to-face transaction and thus the telemarketing of franchises should be held to the same standard.

Therefore, the Commission proposes to retain the exemptions for pay-per-call services, franchising, and face-to-face transactions set out in §§ 310.6(a)–(c), but to require that telemarketers making these types of calls comply with §§ 310.4(a)(1) and (6), and §§ 310.4(b) and (c). The proposed Rule would continue to exempt these calls from the requirements of § 310.3 relating to deceptive practices and from the recordkeeping requirements set out in

§ 310.5.³⁷¹ These calls would also continue to be exempt from providing the oral disclosures required by § 310.4(d). Similarly, telemarketers soliciting charitable donations would be exempt from § 310.4(e) when the payment or donation is made subsequently in a face-to-face setting. However, the proposed Rule would require that, even when a call falls within these exemptions, a telemarketer may not engage in the following practices:

- Threatening or intimidating a customer, or using obscene language;
- Blocking Caller ID information;
- Causing any telephone to ring or engaging a person in conversation with intent to annoy, abuse, or harass the person called;
- Denying or interfering with a person’s right to be placed on a “do-not-call” registry;
- Calling persons who have placed themselves on the central “no-call” registry list maintained by the Commission or calling persons who have placed their names on that seller’s “do-not-call” list; and
- Calling outside the time periods allowed by the Rule.

Section 310.6(d)—Exemption for Calls a Customer or Donor That Do Not Result From a Solicitation

As part of the implementation of the USA PATRIOT Act amendments, the Commission proposes to expand this exemption to prevent the Rule from covering calls initiated by a donor that do not result from any solicitation by a charitable organization or telemarketer. In exempting commercial calls that are not the result of any solicitation by a seller, the Commission stated in the Statement of Basis and Purpose for the original TSR, “Such calls are not deemed to be part of a telemarketing ‘plan, program, or campaign * * * to induce the purchase of goods or services.’”³⁷² Similarly, calls placed without the prompting of a solicitation by a charitable organization or telemarketer are not deemed to be part of a “plan, program, or campaign which is conducted to induce * * * a charitable contribution, donation, or gift of money or any other thing of value * * *”, by use of one or more telephones and which involves more than one interstate telephone call.

³⁶³ Face-to-face transactions are also covered by the Commission’s Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR part 429.

³⁶⁴ No modifications to §§ 310.6(a) & (b) are necessary to implement the USA PATRIOT Act amendments, because charitable solicitations are not likely to be combined with pay-per-call or franchise sales. Therefore, there is no need to expressly exempt such an unlikely scenario from TSR coverage. However, modification of § 310.6(c) is proposed in order to exempt charitable solicitations that entail a face-to-face meeting before the donor pays.

³⁶⁵ See ARDA at 5; DSA at 3; ICFA at 2.

³⁶⁶ See generally the text, above, discussing § 310.4(b).

³⁶⁷ See Mey generally; DNC Tr. at 241–246.

³⁶⁸ See Rule Tr. at 291–296.

³⁶⁹ 15 U.S.C. 6102(a)(1) and (3)(A) and (B).

³⁷⁰ See Gindin at 1; Mey generally; DNC Tr. at 241–246; Rule Tr. at 291–295.

³⁷¹ Of course, a seller or telemarketer would have to keep documentation in order to successfully raise the “safe harbor” defense in § 310.4(b)(2) regarding compliance with the proposed Rule’s “do-not-call” requirements.

³⁷² 60 F.R. 43860 (Aug. 23, 1995).

Section 310.6(e)—General Media Advertising Exemption

Section 310.6(e) of the Rule exempts calls initiated by a customer in response to general media advertisements, except for telemarketing calls offering credit repair services, “recovery” services, or advance fee loans. The proposed Rule adds credit card loss protection plans and business opportunities other than business arrangements covered by the Franchise Rule to the list of exceptions to the exemption for general media advertisements. In addition, pursuant to the USA PATRIOT Act amendments, the proposed Rule expands the exemption to exclude from the Rule’s coverage calls initiated by a donor in response to general media advertisements.

ERA and Reese recommended retaining the general media advertising exemption.³⁷⁴ ERA stated that inbound calls in response to most general media advertisements are appropriately excluded from the Rule’s coverage because they are not traditionally subject to the abuses the Act addresses, and because fraudulent general media advertisements can be addressed under Section 5 of the FTC Act.³⁷⁵ These commenters argued that the current exemption is justified because it is less common to find fraudulent offers of products or services promoted via general media advertisements. In addition, they argued that consumers are less susceptible to believing dubious prize promotions when they are presented through general media than when presented as an offer for which they have been “specially selected.”³⁷⁶

Other commenters disagreed with ERA and Reese, recommending that the general media advertising exemption be removed from the Rule entirely. These commenters argued that the general media exemption is inconsistent with the intent of the Telemarketing Act to cover all telemarketing calls except those in response to a catalog solicitation.³⁷⁷ Commenters also noted that there can be little justification for exempting telemarketers from the Rule’s coverage simply because they avail themselves of advertising via television, newspaper, or the Internet, while regulating telemarketers who use direct mail solicitations, which is another form of general media advertising.³⁷⁸

These commenters further argued that the current general media advertising

exemption provides insufficient protection for consumers,³⁷⁹ pointing out that consumer complaints about fraudulent telemarketing schemes are often the result of advertisements placed in general media sources.³⁸⁰ NCL noted that the exemption for such advertisements is especially troubling because the solicitations rarely, if ever, provide enough information for a consumer to make an informed purchasing decision, leaving the consumer to base his or her decision on unregulated representations made in the subsequent inbound telephone call.³⁸¹ NCL recommended creating an exception to the general media advertising exemption that would subject calls in response to such advertisements to the Rule’s requirements unless the initial advertisements contained full information about the offer.³⁸²

When the original Rule was promulgated, the Commission decided to include narrowly-tailored exemptions in order to avoid unduly burdening legitimate businesses and sales transactions that Congress specifically intended not to be covered under the Rule.³⁸³ A review of the legislative history of the Telemarketing Act indicates that the implicit concern behind the Act was with deceptive solicitations that directly target an individual consumer or address (e.g., outbound telephone calls or direct mail solicitations that induce the consumer to call a telemarketer), not with calls prompted by deceptive advertisements in general media such as infomercials, television commercials, home shopping programs, or telephone Yellow Pages that are broadcast to the general public.³⁸⁴ Thus, the Commission believes that the general media exemption is consistent with the Congressional intent and that the exemption should not be removed from the Rule.

Similar reasoning leads the Commission to propose extending this exemption to calls placed by donors in response to general media advertising. Nothing in the Commission’s enforcement experience, or in the text of section 1011 of the USA PATRIOT Act

or its legislative history indicates that these kinds of calls have raised concerns that would warrant coverage by the TSR.

Although general media was exempted from the Rule’s requirements in the original rulemaking, the Commission noted that deceptive telemarketers of certain types of products or services did use mass media or general advertising to entice their victims to call. Those products and services included investment opportunities, credit repair offers, advance fee loan offers, and “recovery” services. Therefore, the Commission made this exemption unavailable to sellers and telemarketers of those specified products and services.

In criticizing the general media exemption, NCL cited work-at-home schemes as an example of a scheme commonly promoted using advertisements in newspapers or magazines, noting that the number one complaint reported to the NFIC in 1999 was such scams.³⁸⁵ The Commission agrees with NCL that an increasing number of telemarketing fraud solicitations for work-at-home schemes and other job opportunities appear in general media advertising. Complaint data show that the single greatest per capita monetary loss category in complaints reported to the FTC is for business opportunities, including work-at-home schemes, and that many of these are advertised through general media.³⁸⁶ The Commission has devoted much of its resources to law enforcement involving business opportunity schemes in general, and work-at-home schemes in particular, over the last several years.³⁸⁷ Of course, the Commission’s Franchise Rule addresses the activities of some business opportunity ventures; however, the Commission’s law enforcement experience and the Rule review record confirm that there are ever-emerging permutations of these business arrangements that are not subject to the Franchise Rule, but that have proven to be popular avenues of fraud in the marketplace, and therefore merit treatment here.

In recognition of the fact that telemarketing fraud perpetrated by the

³⁷³ USA PATRIOT Act, Pub. L. 107–56 (Oct. 25, 2001) § 1011(d).

³⁷⁴ See ERA at 5; Reese at 12.

³⁷⁵ ERA at 5.

³⁷⁶ See ERA at 5; Rule Tr. at 276–281, 287–291.

³⁷⁷ See NAAG at 16; NCL at 15.

³⁷⁸ NAAG at 16. Most solicitations in response to direct mail are exempt from the Rule’s coverage provided that the mailing clearly, conspicuously, and truthfully discloses all material information required by § 310.3(a)(1). 16 CFR 310.6(f).

³⁷⁹ NAAG at 16; NCL at 15.

³⁸⁰ NCL at 15.

³⁸¹ *Id.*

³⁸² NCL at 15. This approach is similar to that adopted in the Rule for direct mail solicitations. See 16 CFR 310.6(f).

³⁸³ 60 FR at 43859.

³⁸⁴ See, e.g., H. Rep. 102–421, 102d Cong., 1st Sess. (1991) (describing the way in which telemarketing schemes work and detailing a wide variety of boiler room and direct mail schemes targeted at specific individuals).

³⁸⁵ See NCL at 15. According to NCL, complaint data show that 24 percent of work-at-home offers were initiated through print advertising, a figure more than double that for offers of other kinds, which originate in print advertising in only 11 percent of the cases.

³⁸⁶ Rule Tr. at 282.

advertising of work-at-home and other business opportunity schemes in general media sources is a prevalent and growing phenomenon, the Commission proposes to make the general media advertising exemption unavailable to sellers and telemarketers of business opportunities other than business arrangements covered by the Franchise Rule or any subsequent Rule covering business opportunities the Commission may promulgate. The proposed Rule also makes this exemption unavailable for sellers and telemarketers of credit card loss protection plans.³⁸⁸ Otherwise, the Commission believes that the proposed Rule's focus on credit card loss protection plans, including new affirmative disclosures and prohibited misrepresentations, may create some incentive for unscrupulous sellers to market these programs via general media advertising specifically to ensure that their efforts are exempt from the Rule's coverage. Therefore, sellers and telemarketers who market these goods and services would be required to abide by the Rule regardless of the medium used to advertise their products and services.

Section 310.6(f)—Direct Mail Exemption

Section 310.6(f) exempts from the Rule's requirements inbound telephone calls resulting from a direct mail solicitation that clearly, conspicuously, and truthfully discloses all material information required by § 310.3(a)(1). The proposed Rule adds language clarifying that the Commission considers advertisements sent via facsimile machine or electronic mail to be forms of direct mail.

In addition, the proposed Rule extends this exemption to inbound telephone calls resulting from direct mail charitable fundraising solicitations that comply with § 310.3(a)(1), and which would otherwise be subject to the Rule pursuant to the modifications mandated by the USA PATRIOT Act amendments.

Commenters suggested that advertisements sent by facsimile machine or electronic mail should be included as categories of direct mail, and therefore be exempt from the Rule's coverage as long as they make the required disclosures required by § 310.3(a)(1) in a clear, conspicuous, and truthful manner.³⁸⁹ The Commission believes that facsimile and

electronic mail advertisements are analogous to traditional direct mail sent through the United States Postal Service or private mail services, such as United Postal Service or Federal Express. Indeed, the Commission has brought law enforcement actions under the Rule against fraudulent telemarketers who used facsimiles or electronic mail to solicit inbound calls.³⁹⁰ Therefore, the Commission proposes to modify § 310.6(f) to clarify that direct mail solicitations include "solicitations via the U.S. Postal Service, facsimiles, electronic mail, and other similar methods" of delivery which directly target potential customers or donors.

The original Rule removed prize promotions, investment opportunities, credit repair services, "recovery" services, and advance fee loan offers from the direct mail exemption. In addition to these, the proposed Rule, for reasons similar to those cited with respect to the modification to the general media exemption, § 310.6(e), also removes from the direct mail exemption both credit card loss protection plans as well as business opportunities other than business arrangements covered by the Franchise Rule or any subsequent Rule covering business opportunities the Commission may promulgate.

Section 310.6(g)—Business-to-Business Exemption

Section 310.6(g) of the original Rule exempts most business-to-business telemarketing from the Rule's requirements; only the sale of nondurable office and cleaning supplies are covered under the Rule. In addition to these, the proposed Rule also makes this exemption unavailable to telemarketers of Internet services or Web services, and telemarketers' solicitations for charitable contributions.

ERA praised the business-to-business exemption, noting that in business-to-business transactions, telemarketers are selling to "uniquely sophisticated" purchasers who are skilled in evaluating and negotiating competing offers.³⁹¹ ERA also noted that business purchasers would "find a seller's rote adherence to the requirements of the TSR annoying and disruptive to ordinary business negotiations."³⁹²

State and local law enforcement officials were less enthusiastic about this Rule exemption, particularly as it

relates to small businesses.³⁹³ Participants at the July Forum also noted that small businesses are increasingly the targets of fraudulent telemarketing schemes.³⁹⁴ Some critics recommended abolishing the business-to-business exemption, while others recommended removing additional products and services from the exemption.³⁹⁵

The Commission believes a business-to-business exemption continues to be appropriate. However, the Commission also is cognizant of the increasing emergence of fraudulent telemarketing scams that target businesses, particularly small businesses, for certain kinds of fraud.³⁹⁶ The Commission receives a high number of complaints about such business-to-business telemarketing frauds,³⁹⁷ and has brought numerous law enforcement actions against them, both under the Rule and section 5 of the FTC Act.³⁹⁸ Currently, the Rule makes the business-to-business exemption unavailable to telemarketers of nondurable office or cleaning supplies. The sale of Internet and Web services to small businesses has emerged as one of the leading sources of complaints about fraud by small businesses.³⁹⁹ The proliferation of sellers of these services has increased dramatically as Internet use has skyrocketed over the past five years.⁴⁰⁰

³⁹³ See, e.g., NAAG at 16–17; NACAA at 2; Texas at 2–3.

³⁹⁴ See generally Rule Tr. at 250–272.

³⁹⁵ See NAAG at 17 (recommending that the exemption be eliminated when telemarketing calls are made to small businesses, or, in the alternative, that the exception be broadened to include the sale of Internet and Web services); NACAA at 2 (recommending that calls to small businesses be covered by the Rule); Texas at 2–3.

³⁹⁶ Rule Tr. at 252–253 (NAAG noting that businesses are "the consumers of choice for fraudulent telemarketers of the 21st century").

³⁹⁷ See *E-Commerce Fraud Targeted at Small Business: Hearings on Web Site Cracking Before the Senate Comm. on Small Bus.* (Oct. 25, 1999) (statement of Jodie Bernstein, Director of the Bureau of Consumer Protection, FTC); *FTC Cracks Down on Small Business Scams: Internet Cracking is Costing Companies Millions*, FTC news release, June 17, 1999, available online at: www.ftc.gov/opa/1999/small9.htm.

³⁹⁸ See, e.g., *FTC v. Shared Network Svcs. LLC*, Case No. S–99–1087–WBS JFM, (E.D. Cal. filed June 12, 2000); *FTC v. U.S. Republic Communications, Inc.*, Case No. H–99–3657, S.D. Tex. (Oct. 21, 1999) (Stipulated Final Order for Permanent Injunction and Other Equitable Relief entered on Oct. 25, 1999); *FTC v. WebViper LLC d/b/a Yellow Web Services*, Case No. 99–T–589–N, (M.D. Ala. June 9, 1999); *FTC v. Wazzu Corp.*, Case No. SA CV–99–762 AHS (ANx), (C.D. Cal. filed June 7, 1999).

³⁹⁹ See NAAG at 16–17; Rule Tr. 250–253, 266, 269–270.

⁴⁰⁰ See, e.g., www.media-awareness.ca/eng/issues/stats/usenet.htm ("In 1997, electronic commerce transactions around the world totalled [sic] about \$4 billion. By 2002, that figure is expected to jump to \$400 billion.") ("Over 83

³⁸⁷ See, e.g., *FTC v. Advanced Public Communications Corp.*, 00–00515 (S.D. Fla. filed Feb. 7, 2000); *FTC v. MegaKing*, No. 00–00513 (S.D. Fla. filed Feb. 7, 2000); and *FTC v. Home Professions, Inc.*, SACV 00–111 AHS(EEEx) (C.D. Cal. filed Feb. 1, 2000).

³⁸⁸ See also, the discussion above regarding

³⁹⁰ See, e.g., *FTC v. Leisure Time Mktg, Inc.*, No. 6:00–Civ–1057–ORL–19–B, (M.D. Fla. filed Aug. 14, 2000).

³⁹¹ ERA at 5.

³⁹² *Id.*

Small businesses have proven eager to join the online revolution, but often are unable to distinguish between offers from legitimate sellers and those extended by fraud artists. Therefore, the proposed Rule also makes the business-to-business exemption unavailable to telemarketers of Internet services and Web services. The Commission believes that this will strengthen the tools available to law enforcement to stop these schemes from proliferating.

Similarly, the Commission's enforcement experience compels the conclusion that charity fraud targeting businesses is a widespread problem, and that small businesses in particular need the TSR's protection from charity fraud.⁴⁰¹ The Commission believes it consistent with the plain language and the legislative history of the USA PATRIOT Act amendments that the TSR should reach this problem.

Other Recommendations by Commenters Regarding Exemptions

Preneed Funeral Goods and Services. FAMSA recommended that the face-to-face exemption not be available to sellers and telemarketers of preneed funeral and cemetery sales. According to FAMSA, Rule coverage is appropriate here because abuses occur when aggressive telemarketing techniques are used to sell funeral goods and services to individuals who are particularly vulnerable because they are grieving the loss of a loved one.⁴⁰² The Commission recognizes that these individuals are a particularly vulnerable group and are deserving of protection. However, the Commission believes that the sale of preneed funeral good and services would be more appropriately addressed in the Funeral Rule, which is currently under review by the Commission.⁴⁰³

Isolated transactions. DSA proposed modifying the definition of "telemarketing" to state that it involves more than one telephone in order to emphasize the "plan, program, or campaign" element of the definition.⁴⁰⁴ DSA stated that most of the phone calls made by direct sellers are made using

the seller's home telephone line to call someone known to the seller, someone referred to the seller by a current customer, or to invite potential guests to a direct selling party.⁴⁰⁵ DSA argued that these types of sellers should be distinguished from telemarketers who use boiler rooms to market their goods and services.

As explained, above, in the section discussing § 310.2 of the Rule, the Rule's definition of "telemarketing" tracks the statutory definition in the Telemarketing Act.⁴⁰⁶ Thus, for purposes of the Rule, telemarketing "means a plan, program, or campaign which is conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call."⁴⁰⁷ Fraudulent telemarketing practices are not limited to boiler room operations. A series of telephone calls by one seller to several consumers would constitute telemarketing if those telephone calls are to induce the purchase of goods or services. Such a situation is as susceptible to fraud as is a boiler room or call center situation. Altering the definition to exclude telemarketers who use only their own phone to solicit customers would unnecessarily limit the scope of the Rule, and provide a potential loophole for fraudulent telemarketers. Individual telemarketers or sellers can engage in fraud regardless of the number of telephones they may use.

DSA also recommended exempting telephone calls where "the solicitation is an isolated transaction and not done in the course of pattern or repeated transactions of like nature."⁴⁰⁸ An isolated transaction would not constitute "a plan, program, or campaign" and thus would not be subject to the Rule's provisions. The Rule already exempts isolated transactions through its definition of "telemarketing" and, therefore, the Commission does not believe it is necessary to amend the Rule to clarify that exclusion.

Prior business or personal relationship. DSA also proposed exempting "telephone calls made to any person with whom the caller has a prior or established business or personal relationship." In advocating for this exemption, DSA noted that most of the phone calls made by direct sellers are to

call someone known to the seller, someone referred to the seller by a current customer, or to invite potential guests to a direct selling party.⁴⁰⁹ In the original rulemaking, the Commission declined to add an exemption for telephone calls made to a consumer with whom a business had a prior business relationship because it determined that such an exemption would be unworkable in the context of telemarketing fraud.⁴¹⁰ A prior business relationship exemption would enable fraudulent telemarketers who were able to fraudulently make an initial sale to a customer to continue to exploit that customer without being subject to the Rule.⁴¹¹ The Commission continues to believe that such an exemption would work to the disadvantage of consumers, and thus declines to accept this recommendation.

G. Section 310.7—Actions by States and Private Persons

The Telemarketing Act grants the States and private persons the authority to enforce the TSR.⁴¹² Section 310.7 details the procedures the States and private persons should follow in bringing actions under the Rule in order to maximize the impact of law enforcement actions by promoting consistency and coordination of effort. The language in this provision tracks the language of the sections of the Telemarketing Act that provide for enforcement of the TSR by the States and private persons. The Commission received no comments recommending changes to this section. Therefore, no change to § 310.7 is proposed.

Although there were no comments specifically on this section, representatives from industry, consumer groups, and State law enforcement praised the dual enforcement scheme that Congress set up in the Telemarketing Act. For example, MPA noted that fraudulent telemarketers' pattern of "run(ning) from state to state to avoid prosecution" has been stymied because under the Rule individual States can obtain nationwide injunctions.⁴¹³ Other commenters also supported the Act's dual enforcement scheme, noting that one factor that has been particularly essential to the Rule's success in curbing telemarketing fraud is the increased enforcement made

million adults, or 40 percent of the US population over 16 are accessing the Internet, up from 66 million in 1998.); www.thestandard.com/research/metrics/display/0,2799,10089,00.html.

⁴⁰¹ See, e.g., *Southwest Marketing Concepts; Saja; Dean Thomas Corp.; Century Corp.; Image Sales & Consultants; Omni Advertising; T.E.M.M. Mktg., Inc.; Tristate Advertising Unlimited, Inc.; Fold; Eight Point Communications*. See also Pa. Stat. Ann. tit. 10 § 162.15(A)(11) (West 2000).

⁴⁰² FAMSA at 2.

⁴⁰³ FTC, Funeral Rule, 16 CFR 453. On May 5, 1999, the Commission published a request for comment in its review of the Funeral Rule. 64 FR 24249 (May 5, 1999). The review is still pending.

⁴⁰⁴ DSA at 3.

⁴⁰⁵ *Id.* at 3–4. 6. DSA represents approximately 200 companies that sell their products and services by personal presentation and demonstration, primarily in the home. DSA at 3.

⁴⁰⁶ 15 U.S.C. 6106(4).

⁴⁰⁷ 16 CFR 310.2(u) (emphasis added).

⁴⁰⁸ DSA at 3.

⁴⁰⁹ DSA at 3–4.

⁴¹⁰ 60 FR at 30423.

⁴¹¹ *Id.*

⁴¹² 15 U.S.C. 6103 (States) and 6104 (private persons).

⁴¹³ MPA at 11.

possible by allowing States to initiate actions under the Rule.⁴¹⁴

State law enforcement officials also expressed strong approval for the Act's enforcement scheme, focusing on the efficiencies that the Act has created in the use of law enforcement resources. These commenters noted that the Act's enforcement scheme allows States to work together, and with the Commission, to jointly sue fraudulent telemarketers in a single action.⁴¹⁵ The Commission's own experience confirms that the dual enforcement provision of the Act has been integral in attacking telemarketing fraud. Working together with States in "sweeps" targeted at specific types of telemarketing scams, such as those touting advance fee loans or travel promotions, the Commission and States have brought over one hundred fifty actions since the Rule took effect.⁴¹⁶

In contrast, the Rule review record regarding the private right of action available under the Act for violations of the TSR indicates two sources of frustration: The \$50,000 monetary harm threshold consumers must meet to be eligible to sue under the Act for violations of the TSR, and the difficulty in identifying those who violate the Rule, particularly when a consumer wishes to enforce those provisions of the Rule aimed not at fraud and deception, but at abusive practices.⁴¹⁷

As to the threshold amount of monetary harm, the Telemarketing Act prescribed that the amount in controversy required for a private person to bring an action under the Rule be \$50,000.⁴¹⁸ Congress, and not Commission, is vested with the authority to alter this amount. Any change in this amount would necessarily be made by Congress through an amendment to the Telemarketing Act.

The Commission agrees that the difficulty of identifying those who violate the Rule has been an impediment to effective enforcement of the Rule, not only by private parties, but by law enforcement as well. While § 310.4(d)(1) of the Rule already requires telemarketers to disclose the identity of the seller promptly in each call, the Commission is persuaded that the Rule should be supplemented to ensure that

consumers receive this important information in additional ways, where feasible. As discussed in detail above in connection with the proposed changes to § 310.4(a), the Commission believes that the enforceability of the Rule will be bolstered by the Commission's proposal to prohibit as an abusive practice any action by a telemarketer to block the calling party's name and telephone number, thus ensuring that, when feasible, consumers receive information about the identity of telemarketers who call them. In addition, the Commission believes that enforcement will be enhanced by its proposal in § 310.4(b)(1)(ii) to prohibit telemarketers from denying or interfering in any way with the consumer's right to be placed on a "do-not-call" list.

IV. Invitation To Comment

All persons are hereby given notice of the opportunity to submit written data, views, facts, and arguments concerning the proposed changes to the Commission's Telemarketing Sales Rule. The Commission invites written comments to assist it in ascertaining the facts necessary to reach a determination as to whether to adopt as final the proposed changes to the Rule. Written comments must be submitted to the Office of the Secretary, Room 159, FTC, 600 Pennsylvania Avenue, NW., Washington, DC 20580, on or before March 29, 2002. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and Commission Rules of Practice, on normal business days between the hours of 9:00 a.m. and 5 p.m. at the Public Reference Section, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580. The Commission will make this Notice and, to the extent possible, all papers or comments received in electronic form in response to this Notice available to the public through the Internet at the following address: www.ftc.gov.

V. Public Forum

The FTC staff will conduct a public forum on June 5, 6, and 7, 2002, to discuss the written comments received in response to this **Federal Register** Notice. The purpose of the forum is to afford Commission staff and interested parties a further opportunity to discuss issues raised by the proposal and in the comments; and, in particular, to examine publicly any areas of significant controversy or divergent opinions that are raised in the written comments. The forum is not intended to achieve a consensus among participants

or between participants and Commission staff with respect to any issue raised in the comments. Commission staff will consider the views and suggestions made during the forum, in conjunction with the written comments, in formulating its final recommendation to the Commission regarding amendment of the Telemarketing Sales Rule.

Commission staff will select a limited number of parties from among those who submit written comments to represent the significant interests affected by the issues raised in the Notice. These parties will participate in an open discussion of the issues, including asking and answering questions based on their respective comments. In addition, the forum will be open to the general public. The discussion will be transcribed and the transcription placed on the public record.

To the extent possible, Commission staff will select parties to represent the following interests: telemarketers, list providers, direct marketers, local exchange carriers, consumer groups, federal and State law enforcement and regulatory authorities, and any other interests that Commission staff may identify and deem appropriate for representation.

Parties who represent the above-referenced interests will be selected on the basis of the following criteria:

1. The party submits a written comment during the comment period.
2. During the comment period the party notifies Commission staff of its interest in participating in the forum.
3. The party's participation would promote a balance of interests being represented at the forum.
4. The party's participation would promote the consideration and discussion of a variety of issues raised in this Notice.
5. The party has expertise in activities affected by the issues raised in this Notice.

6. The number of parties selected will not be so large as to inhibit effective discussion among them.

VI. Communications by Outside Parties to Commissioners or Their Advisors

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

⁴¹⁴ See, e.g., AARP at 2; ATA at 10; NACAA at 1; NCL at 3.

⁴¹⁵ NAAG at 1; Texas at 1.

⁴¹⁶ The vast majority of these targeted sweeps have been accompanied by a media advisory and public education campaign, making them an important tool in raising public awareness of particular types of telemarketing fraud.

⁴¹⁷ See Kelly (1) at 1; DNC Tr. at 103, 106.

⁴¹⁸ See 15 U.S.C. 6104(a).

VII. Paperwork Reduction Act

In this Notice of Proposed Rulemaking, the Commission proposes to alter some collection of information requirements contained in the TSR. As required by the Paperwork Reduction Act of 1995 ("PRA"), 44 U.S.C. 3501–3517, the Commission has submitted a copy of the proposed revisions and a Supporting Statement for Information Collection Provisions of the Telemarketing Sales Rule ("Clearance Submission") to the Office of Management and Budget ("OMB") for its review.

The proposed amendments to the Rule presented in this Notice of Proposed Rulemaking clarify some of the Rule's language, add and change some disclosure items, amend the "do-not-call" requirements, modify some of the current exemptions, and expand the Rule's coverage by mandate of the USA PATRIOT Act. Each of these proposals will impact different industry members differently and, depending on the particular industry member, may reduce, increase, or have no effect on compliance costs and burdens. Several proposals provide new disclosure requirements—some for industry members generally, some for telemarketers soliciting charitable contributions that are now subject to the Rule, and others only in certain specific circumstances. Other proposed amendments clarify existing provisions and should provide an overall benefit to affected respondents without increasing costs. These clarifications, however, do not affect the collections of information contained in the regulation and therefore will not be addressed here. Only those proposals that might change an information collection requirement are discussed below.

Estimated Total Additional Hour Burden: 392,000 hours (rounded to the nearest thousand)

A. Additional Hour Burden for Non-PATRIOT Act proposals: 247,500 burden hours.

The current total public disclosure and recordkeeping burden for collections of information under the Rule is 2,301,000 hours, as stated most recently in the Commission's immediately preceding clearance submission for the TSR,⁴¹⁹ which OMB approved on July 24, 2001 under OMB Control No. 3084–0097 (expiration date July 31, 2004). Consistent with that submission and earlier ones addressing the Rule's issuance and ensuing requests for OMB clearance, Commission staff estimates that

approximately 40,000 industry members make approximately 9 billion calls per year, or 225,000 calls per year per company.

Staff also noted during previous clearance processes, however, that the direct mail exemption in section 310.6(f), which includes all required disclosures under the Rule, would result in about 9,000 firms choosing that marketing method, and thereby become exempt from the remaining TSR requirements. Staff also estimated that the total time expenditure for the 31,000 firms choosing marketing methods that require these oral disclosures was 7.75 million hours, but that, based on the assumption that no more than 25 percent of that time constitutes "burden" imposed solely by the Rule (as opposed to the normal business practices of most affected entities apart from the Rule's requirements),⁴²⁰ the burden subtotal attributable to these basic disclosures is 1,937,500 hours.

The Commission received no comments or other evidence to contradict these estimates during either the initial rulemaking or its subsequent OMB submissions for renewed clearance; thus, Commission staff will continue to use them to conduct the instant analysis under the PRA.

(1) *Proposed amendment to the definition of "outbound call"*. The Commission proposes modifying the Rule's definition of "outbound telephone call" to clarify the Rule's coverage of outbound calls, which includes not only a call initiated by a telemarketer, but also instances when a call: (1) Is transferred to a telemarketer other than the original one; or (2) involves a single telemarketer soliciting on behalf of more than one seller or telemarketer seeking a charitable contribution. Based on its law enforcement experience and the record in this Rule review, the Commission believes the majority of these two additional types of calls will occur after an inbound call by a customer.

According to the DMA's year 2000 Statistical Fact Book, 28 percent of its survey respondents said they used inbound calling as a direct marketing method in 1999.

Based on the DMA data, and assuming broadly that these additional types of calls will occur solely via inbound calls by a customer, staff estimates that of the 40,000 industry

members affected by the Rule generally, approximately 11,200 (28% × 40,000 members) of them may additionally be subject to the Rule under the new definition of "outbound call." Of those members, staff conservatively estimates, based on its law enforcement experience and industry research, that approximately one-third of telemarketers' calls, or around 75,000 calls per year per firm, involve a suggested transfer or further solicitation by a single telemarketer on behalf of a second entity. Staff also estimates that of the calls in which a transfer is suggested to the consumer or in which a second solicitation is attempted, 60% will be successfully transferred or "upsold" (versus an estimated 40% response rate for traditional outbound calls). Assuming, as staff has in the past that sales occur in 6 percent of all calls, that it takes 7 seconds to make the required disclosures, and that these proposed revisions will impose a paperwork burden only about 25% of the time,⁴²¹ staff estimates that the proposed amendment to the definition of "outbound call" will yield an increase of 245,000 burden hours.

(2) *Changes to the Express Verifiable Authorization Provision*. The Commission has proposed no changes to the Rule's recordkeeping requirements per se. However, because of the proposed changes to the express verifiable authorization provision, § 310.3(a)(3), the § 310.5(a)(5) mandate that sellers and telemarketers keep all verifiable authorizations required to be provided or received under the Rule suggests that additional records must be retained. Nonetheless, as noted above in the discussion of the express verifiable authorization provision of the Rule, the Rule review record indicates that virtually all telemarketers already keep such records in the ordinary course of business. Thus, there should be minimal or no incremental recordkeeping burden resulting from the contemplated Rule changes.

The recordkeeping provision, however, now also applies to telemarketers soliciting charitable contributions, pursuant to the change in the definition of "telemarketing" made in the USA PATRIOT Act. Staff estimates that approximately 2,500 telemarketers are solely engaged in the solicitation of charitable contributions, and that no more than 2% of

⁴²⁰ OMB does not view as "burden" the time, effort, and financial resources necessary to comply with a collection of information that would normally be incurred by persons in the normal course of their activities to the extent that the activities are usual and customary. 5 CFR 1320.3(b)(2).

⁴²¹ See, e.g., 63 FR 40713 (1998), 66 FR 33701 (2001), in which the Commission assumed that sales occurred in 6 percent of all outbound calls, that it took 7 seconds to make the required disclosures, and that about 75% of affected entities already are making these disclosures. See also 60 FR 32682 (1995).

⁴¹⁹ 66 Fed. Reg. 33,701 (June 25, 2001).

telemarketers of goods or services also engage in such activities. Staff conservatively estimates that this provision will account for no more than one hour of recordkeeping burden per entity engaged solely in the solicitation of charitable contributions. Those entities conducting telemarketing campaigns in both sales and solicitations of charitable contributions are already subject to the Rule regarding their sales activities, and, to the extent that they are compliant with the Rule, already perform recordkeeping pursuant to it. Consequently, staff anticipates that incremental recordkeeping burden for those entities would be de minimis. Accordingly, the total increase in recordkeeping burden attributable to this provision is approximately 2,500 (2,500 telemarketers engaged solely in soliciting charitable contributions $\times$ 1 hour each for recordkeeping under the Rule).

(3) *Adoption of a national "do-not-call" registry.* As discussed with regard to § 310.4(b)(1)(iii), the Commission proposes to amend the original Rule to provide consumers the option of placing themselves on a national "do-not-call" registry, maintained by the Commission. Telemarketers would be required, at least monthly, to obtain the Commission's registry in order to update their own call lists, ensuring that consumers who have requested inclusion on the Commission's registry will be deleted from telemarketers' call lists. Staff believes that the incremental PRA effects would be minimal and, possibly, lead to reduced burden for telemarketers. Many affected entities, whether telemarketing for commercial or charitable organizations, already have in place procedures either for scrubbing their own lists (to the extent that they maintain such lists) or for inputting into their automatic dialing systems the numbers of persons who have requested not to be called. Moreover, it is possible that some states may partially rescind their own provisions with regard to interstate calls in favor of the instant proposed rule. The effect of such centralization would be to simplify the process for telemarketers as well as consumers and thereby reduce cumulative burden.

B. Additional Hour Burden for PATRIOT Act proposals: 144,375 burden hours.

As noted above, section 1011 of the USA PATRIOT Act amended the Telemarketing Act to extend the Act's coverage to solicitations for charitable contributions. Specifically, section 1011(b)(2) of the PATRIOT Act adds a new section to the Telemarketing Act mandating that the Commission include

new requirements in the "abusive telemarketing acts or practices" provisions of the TSR. The proposed Rule, therefore, includes proposed § 310.4(e), which requires telemarketers soliciting on behalf of charitable organizations to make two oral disclosures in the course of the telephone solicitation.

Based on analysis of data from a sampling of states requiring registration of professional fundraisers, including telemarketers, staff conservatively estimates that there are approximately 2,500 telemarketing firms potentially subject to the proposed amendments of the Rule specific to the PATRIOT Act. Additionally, staff estimates that approximately 2% of the telemarketers currently subject to the Rule also solicit charitable contributions, and thus will now be subject to additional disclosure requirements. Thus, the total number of entities staff estimates will be affected by these additional requirements is approximately 3,300.

Proposed § 310.4(e) requires telemarketers soliciting charitable contributions to make two prompt and clear disclosures at the start of each call. This provision was drafted to mirror current § 310.4(d), which includes four required disclosures, and which staff previously estimated would take 7 seconds to make in the course of each telemarketing call. Given that there are half as many disclosures required of telemarketers under proposed § 310.4(e), staff estimates that these disclosures will take approximately 4 seconds per call. As with commercial telemarketing calls, staff's estimate anticipates that at least 60% of calls result in "hang-ups" before the telemarketer has the opportunity to make all of the required oral disclosures (resulting in, approximately, a 2-second call). Finally, as is the case with telemarketing of goods or services, the Commission believes that telemarketers already are making the required disclosures in the majority of telemarketing transactions subject to these provisions under the USA PATRIOT Act amendments. Accordingly, staff estimates that the proposed provision will yield an added PRA burden in only 25% of affected transactions. Applying these assumptions and estimates, staff concludes that the new disclosure requirements will result in an additional burden of 144,375 hours. ((225,000 calls/year $\times$ 60% hang-ups after 2 seconds) + (225,000 calls/year $\times$ 40% with 4-seconds full disclosure)) $\times$ 3,300 firms $\times$ 25% of them making these additional disclosures solely due to the Rule revisions.)

Thus, total estimated annual hour burden for the TSR will be 2,693,000 hours, including the effects of the proposed Rule changes.

Estimated Total Additional Cost Burden: \$1,402,000 (rounded to the nearest thousand).

(1) *Non-PATRIOT Act proposals:* \$882,000.

The current estimate of the cost to comply with the Rule's information collection requirements is \$10,022,000.⁴²² With regard to its proposed additional disclosure requirements, the Commission recognizes, as it did during the initial rulemaking, that telemarketing firms may incur additional costs for telephone service, assuming that the firms spend more time on the telephone with customers given the proposed disclosure requirements. As noted above, staff estimates that the proposed amendment to the definition of "outbound call" will yield an increase of 245,000 burden hours. Assuming all calls to customers are long distance and a commercial calling rate of 6 cents per minute (\$3.60 per hour), affected entities as a whole may incur up to \$882,000 in associated telecommunications costs.

(2) *PATRIOT Act proposals:* \$519,750.

The Commission recognizes that telemarketing firms now subject to the Rule after the PATRIOT Act amendments may incur additional costs for telephone service, assuming that the firms spend more time on the telephone with customers due to the proposed disclosure requirements specific to the solicitation of charitable contributions. As noted above, staff estimates that the proposed amendments arising from this Act will result in 144,375 additional burden hours. Assuming all calls to customers are long distance and a commercial calling rate of 6 cents per minute (\$3.60 per hour), affected entities as a whole may incur up to \$519,750 in associated telecommunications costs.

Thus, total estimated annual cost burden for the TSR will be \$11,424,000, including the effects of the proposed Rule changes.

Request for Comments

The Commission invites comment that will enable it to:

1. Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;

⁴²² See 66 FR at 33,702.

2. Evaluate the accuracy of the staff's estimates of the burdens of the proposed collections of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and validity of the information to be collected; and

4. Minimize the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical or other technological collection techniques or other forms of information technology.

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act provides for analysis of the potential impact on small entities of rules proposed by federal agencies.⁴²³ In publishing the originally proposed TSR, the Commission certified, subject to subsequent public comment, that the proposed Rule, if promulgated, would not have a significant economic impact on a substantial number of small entities.⁴²⁴ After receiving public comment, the Commission determined that this projection was correct, and certified this fact to the Small Business Administration.⁴²⁵ In issuing this Notice proposing amendments to the TSR, the Commission similarly certifies that these Rule amendments, if adopted, will not have a significant economic impact on a substantial number of small entities.⁴²⁶

In originally promulgating the TSR, which applied to sellers and telemarketers engaged in the interstate telemarketing of goods or services, the Commission recognized that the Rule might affect a substantial number of small entities. The amendments now proposed may also affect a substantial number of small entities. Nevertheless, the Commission believes that the proposed amendments—including expansion of the definition of “outbound call,” expansion of the scope of the express verifiable authorization provisions to cover additional payment methods, and the formulation of a national do-not-call registry—would not have a significant economic impact on such entities. As explained above in the discussion of each proposed amendment and the PRA analysis, the amendments proposed in this NPRM reflect changes to the existing Rule, intended to better effectuate the mandate of the Telemarketing Act. They would not have a significant economic

impact on small entities because they reflect practices that already are being implemented or utilized by most telemarketing firms, are already required of them by state statutes, or impose a minimal burden on these entities.

In addition, the Commission believes that the amendments required by the USA PATRIOT Act, which apply to telemarketing firms conducting telemarketing campaigns on behalf of charitable organizations, are not likely to affect a substantial number of small entities. The Commission's understanding is that most such telemarketing firms are not small businesses. However, even if the amendments would affect a substantial number of small entities, the Commission believes that the proposed amendments will not have a significant economic impact upon such entities. The disclosure requirements proposed in the NPRM mirror the requirements already in effect regarding telemarketers of goods and services, and, in fact, are fewer in number, imposing even less burden on solicitors of charitable contributions under the proposed amendments. Moreover, as with the sale of goods or services, most telemarketers soliciting charitable contributions already are making such disclosures in the ordinary course of business, either voluntarily or pursuant to state statute. Similarly, the Commission tailored the recordkeeping requirements that would be applicable to these firms to be the least burdensome possible to effectuate the goals of the TSR. Also, the kinds of records that would be required by an amended TSR are kept by most firms in the ordinary course of business. Finally, the establishment of a national do-not-call registry will have no significant impact on such entities, since most are already subject to similar state-mandated do-not-call regulations.

However, to ensure that the agency is not overlooking any possible substantial economic impact, the Commission is requesting public comment on the effect of the proposed regulations on the costs to, profitability and competitiveness of, and employment in small entities. Subsequent to the receipt of public comments, the Commission will determine whether the preparation of a final regulatory flexibility analysis is warranted. Accordingly, based on available information, the Commission hereby certifies under the Regulatory Flexibility Act, 5 U.S.C. 605(b), that the proposed regulations will not have a significant economic impact on a substantial number of small entities. This Notice also serves as certification

to the Small Business Administration of that determination.

IX. Questions for Comment on the Proposed Rule

The Commission seeks comment on various aspects of the proposed Rule. Without limiting the scope of issues on which it seeks comment, the Commission is particularly interested in receiving comments on the questions that follow. In responding to these questions, include detailed, factual supporting information whenever possible.

General Questions for Comment

Please provide comment, including relevant data, statistics, consumer complaint information, or any other evidence, on each different proposed change to the Rule. Regarding each proposed modification commented on, please include answers to the following questions:

(a) What is the effect (including any benefits and costs), if any, on consumers?

(b) What is the impact (including any benefits and costs), if any, on individual firms that must comply with the Rule?

(c) What is the impact (including any benefits and costs), if any, on industry?

(d) What changes, if any, should be made to the proposed Rule to minimize any cost to industry or consumers?

(e) How would each suggested change affect the benefits that might be provided by the proposed Rule to consumers or industry?

(f) How would the proposed Rule affect small business entities with respect to costs, profitability, competitiveness, and employment?

Questions on Proposed Specific Changes

In response to each of the following questions, please provide: (1) Detailed comment, including data, statistics, consumer complaint information and other evidence, regarding the problem referred to in the question; (2) comment as to whether the proposed changes do or do not provide an adequate solution to the problems they were intended to address, and why; and (3) suggestions for additional changes that might better maximize consumer protections or minimize the burden on industry.

A. Scope

1. Has the Internet affected the way telemarketing companies conduct business? If so, what has the effect been? What, if any, changes have occurred in telemarketing as a result of the Internet? Have consumers lost any protections against deceptive or abusive acts or

⁴²³ U.S.C. 603–604.

⁴²⁴ 60 FR at 8322.

⁴²⁵ 60 FR at 43863.

⁴²⁶ 5 U.S.C. 605(b).

practices in telemarketing as a result of this development?

2. Does the Rule's coverage of for-profit telemarketers working on behalf of sellers outside the FTC's jurisdiction affect the business relationships created between those telemarketers and those sellers? If so, how do these changes in business relationships affect consumer protections provided by the Rule?

3. Do the Commission's proposals to expand the scope of the TSR to cover solicitation of charitable contributions by for-profit telemarketers, but not by non-profit charitable organization, achieve the Congressional purpose of section 1011 of the USA PATRIOT Act? Has the Commission proposed all changes to the text necessary to effectuate that Act? Are all proposed changes consistent and workable? What are the relative costs and benefits of coverage of calls placed by for-profit telemarketers, but not by non-profit charitable organizations?

B. Definitions

1. Is the proposed definition of "billing information" broad enough to capture any information that can be used to bill a consumer for goods or services or a charitable contribution? Is the definition too broad?

2. Is the definition of "caller identification services" broad enough to capture all devices and services that now or may in the future provide a telephone subscriber with the name and telephone number of the calling party?

3. Is the definition of "charitable contribution" appropriate and sufficient to effectuate section 1011 of the USA PATRIOT Act? If not, how can it be improved upon? Are the exclusions of political clubs and certain religious organizations appropriate? Should there be other exclusions? If so, why and on what basis?

4. Is the proposed definition of "donor" appropriate and sufficient to effectuate section 1011 of the USA PATRIOT Act? What, if any, changes could be made to improve it?

5. Is the proposed definition of "express verifiable authorization" adequate? What, if any, changes could be made to improve it?

6. Does the proposed definition of "Internet services" accurately define the scope of Internet-related services offered to customers through telemarketing?

7. Is the proposed definition of "outbound telephone call" adequate to address up-selling situations where the call is transferred from one telemarketer to another? If not, why not? Is the definition adequate to address situations where a single telemarketer in the initial part of the call is selling on behalf of

one seller, and subsequently during the call begins selling on behalf of another seller? If not, why not? What are the benefits to consumers and the burdens to telemarketers and sellers of this definition?

a. In what circumstances do telemarketers currently transfer a call from one telemarketer to another? In what circumstances does a single telemarketer start a call promoting the products or services of one seller, and subsequently during the call sells on behalf of one or more other sellers? What are the benefits of these practices? What abusive or deceptive practices are associated with them?

b. Should calls made by a customer directly to a telemarketer be treated differently from calls transferred to a telemarketer by another person? If so, what differences in treatment by the Rule are appropriate? If not, why not?

c. What would be the benefits to consumers of treating calls made by a customer directly to a telemarketer differently from calls transferred to a telemarketer by another person?

d. What burdens, if any, would treating a transferred telemarketing call the same as an outbound telemarketing call place on sellers and telemarketers?

e. How has the increased prevalence of up-selling since the Rule was promulgated affected telemarketing and the effectiveness of the Rule?

8. Is the proposed definition of "Web services" sufficiently broad to encompass the range of Internet-related services offered to consumers, particularly businesses, through telemarketing?

C. Deceptive Telemarketing Acts or Practices

1. The proposed Rule would prohibit misrepresentations regarding seven enumerated topics in connection with solicitations by telemarketers for charitable contributions. Is each of these prohibitions necessary? Is each sufficiently widespread to justify inclusion in the Rule? What are the relative costs to consumers and burdens to industry of prohibiting these practices? Are there changes that could be made to lessen the burdens without harming donors? Are there other widespread misrepresentations that the TSR should prohibit?

2. Under the Rule, if a seller will bill charges to a consumer's account at the end of a free trial period unless the consumer takes affirmative action to prevent that charge, that fact must be disclosed as a material restriction, limitation, or condition under § 310.3(a)(1)(ii). Does this provision adequately protect consumers against

unanticipated and unauthorized charges associated with free trial offers? If not, what additional protections are needed? What benefits does this provision provide to consumers, sellers or telemarketers? What costs does this requirement impose on affected businesses?

3. Under the proposed Rule, sellers and telemarketers would no longer have the option of providing written confirmation as a method of express verifiable authorization. What are the costs and benefits to consumers and industry of eliminating this option of providing authorization?

4. The proposed Rule requires that any credit card loss protection plan must provide consumers with information about the consumers' potential liability under the Consumer Credit Protection Act. Does the proposed provision adequately address the problems associated with the sale of credit card loss protection plans?

a. What are the costs and benefits of this provision to industry? to consumers?

b. Does the proposed provision differentiate clearly between legitimate credit card registration plans and fraudulent credit card loss protection plans? If not, how should the Rule be changed to accomplish this?

c. How should the disclosure be given? In writing? Orally? What costs would a writing requirement impose on industry? What, if any, benefits? What would be the costs and benefits to consumers?

5. What are the implications of the new Electronic Signature ("E-Sign") law for telemarketing? Is the requirement that any signature be "verifiable" adequate to protect consumers? If not, what other protections are necessary?

6. What changes, if any, to the *scienter* requirement in the assisting and facilitating provision, § 310.3(b), would be appropriate to better ensure effective law enforcement?

7. What changes, if any, to the credit card laundering provision, § 310.3(c), would be appropriate to better ensure effective law enforcement? Is it appropriate for this provision to cover telemarketers engaged in the solicitation of charitable contributions?

D. Abusive Telemarketing Acts or Practices

1. In order to address the problems associated with preacquired account telemarketing, the proposed Rule prohibits a seller or telemarketer from receiving from any person other than the consumer or donor, or disclosing to any other person, a consumer's or donor's billing information. The only

circumstance in which the proposed Rule would allow receipt of a consumer's or donor's billing information from, or disclosure of the consumer's or donor's billing information to, another party is when the information is used to process a payment in a transaction where the consumer or donor has disclosed the billing information and authorized its use to process that payment.

a. How will this provision interplay with the requirements of the Gramm-Leach-Bliley Act?

b. Will this proposed change adequately address the problems resulting from preacquired account telemarketing? Will this action adequately protect consumers from being billed for unauthorized charges?

c. If not, what changes to the Rule would provide better protection to consumers?

d. What additional provisions, if any, should be included to protect customers from unauthorized billing?

e. What specific, quantifiable benefits to sellers or telemarketers result from preacquired account telemarketing?

f. Is extension of this provision to cover telemarketers soliciting on behalf of charitable organizations appropriate to effectuate the USA PATRIOT amendments to the Telemarketing Act? If not, why not?

2. How do the credit card chargeback rates and error rates for telemarketers that use preacquired billing information compare with the chargeback rates and error rates for telemarketers that do not use preacquired billing information?

3. The proposed Rule prohibits blocking or altering the transmission of caller identification ("Caller ID") information, but allows altering the Caller ID information to provide the actual name of the seller or charitable organization and the seller's or charitable organization's customer or donor service number.

a. What costs would this provision impose on sellers? On charitable organizations? On telemarketers? Are these costs outweighed by the benefits the provision would confer on consumers and donors?

b. Have significant numbers of consumers used Caller ID information to contact sellers, telemarketers, or charitable organizations to make "do-not-call" requests?

c. What, if any, trends in telecommunications technology might permit the transmission of full Caller ID information when the caller is using a trunk line or PBX system?

d. How are telemarketing firms currently meeting the regulatory requirements in States that have passed

legislation requiring the transmission of full caller identification information by telemarketers?

e. If Caller ID information is transmitted in a telemarketing call, should the information identify the seller (or charitable organization) or should it identify the telemarketer? Is it technologically feasible for the calling party to alter the information displayed by Caller ID so that the seller's name and customer service telephone number or the charitable organization's name and donor service number, are displayed rather than the telemarketer's name and the telephone number from which the call is being placed? If not currently feasible, is such substitution of the seller's or charitable organization's information for that of the telemarketer likely to become feasible in the future?

f. Would charitable organizations likely make use of the option to transmit Caller ID information that provides the charitable organization's name and a "donor service" number? What would be the costs and benefits to charitable organizations of doing this?

g. Would it be desirable for the Commission to propose a date in the future by which all telemarketers would be required to transmit Caller ID information? If so, what would be a reasonable date by which compliance could be required? If not, why not?

h. Does the proposed Rule provide adequate protection against misleading or deceptive information by allowing for alteration to provide beneficial information to consumers, *i.e.*, the actual name of the seller and the seller's customer service number, or the charitable organization and the charitable organization's donor service number? What would be the costs and benefits if the Rule were simply to prohibit any alteration of Caller ID information that is misleading? Should the proposed Rule make any exception to the prohibition on altering Caller ID information?

4. The proposed Rule would prohibit a seller, or a telemarketer acting on behalf of a seller or charitable organization, from denying or interfering with the consumer's right to be placed on a "do-not-call" list or registry. Is this proposed provision adequate to address the problem of telemarketers hanging up on consumers or otherwise erecting obstacles when the consumer attempts to assert his or her "do-not-call" rights? What alternatives exist that might provide greater protections?

5. The proposed Rule would establish a national "do-not-call" registry maintained by the Commission.

a. What expenses will sellers, and telemarketers acting on behalf of sellers or charitable organizations, incur in order to reconcile their call lists with a national registry on a regular basis? What changes, if any, to the proposed "do-not-call" scheme could reduce these expenses? Can the offsetting benefits to consumers of a national do-not-call scheme be quantified?

b. Is the restriction on selling, purchasing or using the "do-not-call" registry for any purposes except compliance with §§ 310.4(b)(1)(iii) adequate to protect consumers? Will this provision create burdens on industry that are difficult to anticipate or quantify? What restrictions, if any, should be placed on a person's ability to use or sell a "do-not-call" database to other persons who may use it other than for the purposes of complying with the Rule?

c. Would a list or database of telephone numbers of persons who do not wish to receive telemarketing calls have any value, other than for its intended purpose, for sellers and telemarketers?

d. How long should a telephone number remain on the central "do-not-call" registry? Should telephone numbers that have been included on the registry be deleted once they become reassigned to new consumers? Is it feasible for the Commission to accomplish this? If so, how? If not, should there be a "safe harbor" provision for telemarketers who call these reassigned numbers?

e. Who should be permitted to request that a telephone number be placed on the "do-not-call" registry? Should permission be limited to the line subscriber or should requests from the line subscriber's spouse be permitted? Should third parties be permitted to collect and forward requests to be put on the "do-not-call" registry? What procedures, if any, would be appropriate or necessary to verify in these situations that the line subscriber intends to be included on the "do-not-call" registry?

f. What security measures are appropriate and necessary to ensure that only those persons who wish to place their telephone numbers on the "do-not-call" registry can do so? What security measures are appropriate and necessary to ensure that access to the registry of numbers is used only for TSR compliance? What are the costs and benefits of these security measures?

g. Should consumers be able to verify that their numbers have been placed on the "do-not-call" registry? If so, what form should that verification take?

h. Should the "do-not-call" registry allow consumers to specify the days or time of day that they are willing to accept telemarketing calls? What are the costs and benefits of allowing such selective opt-out/opt-in?

i. Should the "do-not-call" registry be structured so that requests not to receive telemarketing calls to induce the purchase of goods and services are handled separately from requests not to receive calls soliciting charitable contributions?

j. Some states with centralized statewide "do-not-call" list programs charge telemarketers for access to the list to enable them to "scrub" their lists. In addition, some of these states charge consumers a fee for including their names and/or phone numbers on the statewide "do-not-call" list. Have these approaches to covering the cost of the state "do-not-call" list programs been effective? What have been the problems, if any, with these two approaches?"

6. What should be the interplay between the national "do-not-call" registry and centralized state "do-not-call" requirements? Would state requirements still be needed to reach intrastate telemarketing? Would the state requirements be pre-empted in whole or in part? If so, to what degree? Should state requirements be pre-empted only to the extent that the national "do-not-call" registry would provide more protection to consumers? Will the national do-not-call registry have greater reach than state requirements with numerous exceptions?

7. What procedures could ensure that telephone numbers placed on the "do-not-call" registry by consumers who subsequently change their numbers do not stay on the registry? Can information be obtained from the local exchange carriers or other telecommunications entities that would enable this to be done, and if so, how? If not, why not?

8. What procedures could be established to update numbers in the "do-not-call" registry when the area codes associated with those numbers change?

9. The proposed Rule would permit consumers or donors who have placed their names and/or telephone numbers on the central "do-not-call" registry to provide to specific sellers or charitable organizations express verifiable authorization to receive telemarketing calls from those sellers or telemarketers acting on behalf of those sellers or charitable organizations.

a. What are the costs and benefits of providing consumers or donors an

option to agree to receiving calls from specific entities?

b. What are the costs and benefits to sellers and telemarketers of providing consumers and donors with this option? What expenses will sellers and telemarketers incur to ensure that they have the authorization of the consumer or donor to call? What, if any, expenses will they incur in reconciling these authorizations against the central registry?

c. How will this requirement affect those entities with which a consumer (or donor) has a preexisting business (or philanthropic) relationship (such as bookstores and the like)?

d. Does the proposed Rule's express verifiable authorization provision for agreeing to receive calls from specific sellers, or telemarketers acting on behalf of those sellers or on behalf of specific charitable organizations, provide sufficient protection to consumers?

e. Does the proposed Rule provide sufficient guidance to business on what information is sufficient to evidence a consumer's express verifiable authorization to opt in to receiving calls from a specific seller, or a telemarketer acting on behalf of that seller or on behalf of a specific charitable organization? Is there additional information that should be required in order to evidence the consumer's express verifiable authorization?

10. Is the Commission's position regarding the timing of disclosures in multiple purpose calls sufficiently clear? If not, what additional clarification is needed?

11. Is the fact that, in the Commission's view, telemarketers who abandon calls are violating § 310.4(d) sufficient to curtail abuses of this technology? Is there additional language that could be added to the Rule that would more effectively address this problem?

a. Should the Commission mandate a maximum setting for abandoned calls, and, if so, what should that setting be? How could such a limit be policed? What are the benefits and costs to consumers and to industry from such an approach?

b. Would it be feasible to limit the use of predictive dialers to only those telemarketers who are able to transmit Caller ID information, including a meaningful number that the consumer could use to return the call? Would providing consumers with this information alleviate the injury consumers are now sustaining as a result of predictive dialer practices? What would be the costs and burdens to sellers, charitable organizations, and telemarketers of such action?

c. Would it be beneficial to businesses and charitable organizations to allow them to play a tape-recorded message when the use of a predictive dialer results in a shortage of telemarketing agents available to take calls? What would be costs and benefits to consumers if such tape-recorded messages were permitted?

12. Proposed § 310.4(e) requires telemarketers soliciting charitable contributions to promptly, clearly and truthfully disclose that the purpose of the call is to solicit a charitable contribution and the identity of the charitable organization on behalf of which the call is being made.

a. Are the proposed disclosures sufficient to effectuate the purposes of the USA PATRIOT Act amendments?

b. Absent other disclosures, are donors likely to suffer an invasion of privacy or incur substantial unavoidable injury that is not outweighed by countervailing benefits? If so, what are these disclosures, and would they be permissible under leading First Amendment decisions, such as *Riley v. Nat'l Fed. of Blind*?

c. Should this provision of the TSR require disclosure of the mailing address of the charitable organization on behalf of which a telemarketer is soliciting a contribution? Should such disclosure be required only upon some triggering event, such as the donor's inquiry, or the donor's assent to contribute? What would be the costs to charitable organizations and telemarketers to require mailing address disclosure? What benefits to consumers would result from such a requirement?

13. The Commission is concerned about the misuse of personal information in connection with the use of prisoners as telemarketers.

a. To what extent does the telemarketing industry use inmate work programs? What are the costs and benefits of the use of prison-based telemarketing to industry? To charitable organizations? To the public? Is this a practice more appropriate to address at the federal level rather than through State legislatures or State regulatory agencies?

b. Are there alternatives to banning prison-based telemarketing that would provide adequate protection to the public against misuse of personal information and abusive telemarketing by prisoner-telemarketers? For example, are any monitoring systems available that would prevent abuses by prison-based telemarketers? If so, would the cost of these systems be prohibitively high for telemarketers? Would a disclosure requirement (*i.e.*, disclosure to the consumer that the caller is a

prisoner) provide adequate protection for consumers? Would a ban provide sufficient protection?

c. To what extent, if any, do charitable organizations make use of prison-based telemarketing?

E. Exemptions

1. What costs and burdens will be placed on industry by the proposed requirement that firms that are exempt from the Rule under §§ 310.6(a)—(c) comply with the requirements of §§ 310.4(a)(1) and (6) and §§ 310.4(b) and (c)? What benefits would this proposed change provide to consumers?

2. What are the costs and burdens imposed upon industry by the proposed modifications to the general media exemption? What benefits to the public will these proposed changes provide? Are there alternative proposals that would provide the necessary protection for consumers while minimizing the burden on industry? Are there additional products and services that should be excepted from the general media exemption? What benefits and burdens would accrue from excluding from the exemption any calls in response to general media advertisements where disclosures required by § 310.3(a)(1) were not made either in the advertisement or in the call?

3. What are the costs and burdens imposed upon industry by the proposed modifications to the direct mail exemption? What benefits to the public will these proposed changes provide? Are there alternative proposals that would provide the necessary protection for consumers while minimizing the burden on industry? Does the proposed Rule sufficiently clarify the types of mail transmission methods that will be considered "direct mail" for purposes of the Rule? Are there additional methods of solicitation that should be included within the term "direct mail"?

4. What costs and burdens to industry will be imposed by the proposed modification to the business-to-business exemption? What benefits to the public will this proposed change provide? Are there alternative methods that would provide the necessary protections to the public while minimizing burdens on industry? Is it appropriate to exclude from the coverage of this exemption telemarketing calls made on behalf of charitable organizations? If not, why?

Questions Relating to the Paperwork Reduction Act

The Commission solicits comments on the reporting and disclosure requirements above to the extent that they constitute "collections of

information" within the meaning of the PRA. The Commission requests comments that will enable it to:

1. Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected, and;

4. Minimize the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses).

X. Proposed Rule

List of Subjects in 16 CFR Part 310

Telemarketing, Trade practices.

Accordingly, it is proposed that part 310 of title 16 of the Code of Federal Regulations, be revised to read as follows:

PART 310—TELEMARKETING SALES RULE

Sec.

310.1 Scope of regulations in this part.

310.2 Definitions.

310.3 Deceptive telemarketing acts or practices

310.4 Abusive telemarketing acts or practices.

310.5 Recordkeeping requirements.

310.6 Exemptions.

310.7 Actions by States and private persons.

310.8 Severability.

Authority: 15 U.S.C. 6101–6108.

§ 310.1 Scope of regulations in this part.

This part implements the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101–6108, as amended.

§ 310.2 Definitions.

(a) *Acquirer* means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.

(b) *Attorney General* means the chief legal officer of a State.

(c) *Billing information* means any data that provides access to a consumer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account or debit card.

(d) *Caller identification service* means a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone.

(e) *Cardholder* means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.

(f) *Charitable contribution* means any donation or gift of money or any other thing of value; provided, however, that such donations or gifts of money or any other thing of value solicited by or on behalf of the following shall be excluded from the definition of charitable contribution for the purposes of this Rule:

(1) Political clubs, committees, or parties; or

(2) Constituted religious organizations or groups affiliated with and forming an integral part of the organization where no part of the net income inures to the direct benefit of any individual, and which has received a declaration of current tax exempt status from the United States government.

(g) *Commission* means the Federal Trade Commission.

(h) *Credit* means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(i) *Credit card* means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(j) *Credit card sales draft* means any record or evidence of a credit card transaction.

(k) *Credit card system* means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.

(l) *Customer* means any person who is or may be required to pay for goods or services offered through telemarketing.

(m) *Donor* means any person solicited to make a charitable contribution.

(n) *Express verifiable authorization* means the informed, explicit consent of a consumer or donor, which is capable of substantiation.

(o) *Internet services* means the provision, by an Internet Service Provider, or another, of access to the Internet.

(p) *Investment opportunity* means anything, tangible or intangible, that is offered, offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation.

(q) *Material* means likely to affect a person's choice of, or conduct regarding,

(1) Goods or services; or

(2) A charitable contribution.

(r) *Merchant* means a person who is authorized under a written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(s) *Merchant agreement* means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(t) *Outbound telephone call* means any telephone call to induce the purchase of goods or services or to solicit a charitable contribution, when such telephone call:

(1) Is initiated by a telemarketer;

(2) Is transferred to a telemarketer other than the original telemarketer; or

(3) Involves a single telemarketer soliciting on behalf of more than one seller or charitable organization.

(u) *Person* means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(v) *Prize* means anything offered, or purportedly offered, and given, or purportedly given, to a person by chance. For purposes of this definition, chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.

(w) *Prize promotion* means:

(1) A sweepstakes or other game of chance; or

(2) An oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.

(x) *Seller* means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.

(y) *State* means any State of the United States, the District of Columbia,

Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(z) *Telemarketer* means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

(aa) *Telemarketing* means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: Contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

(bb) *Web services* means designing, building, creating, publishing, maintaining, providing or hosting a website on the Internet.

§ 310.3 Deceptive telemarketing acts or practices.

(a) *Prohibited deceptive telemarketing acts or practices.* It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Before a customer pays ¹ for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer; ²

¹ When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment.

² For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226, compliance with the disclosure requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with § 310.3(a)(1)(i) of this Rule.

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

(iii) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the customer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and, if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning; and the no purchase/no payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate;

(v) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(vi) In the sale of any goods or services represented to protect, insure, or otherwise limit a customer's liability in the event of unauthorized use of the customer's credit card, the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. 1643;

(2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

(ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;

(iii) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;

(iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

(v) Any material aspect of a prize promotion including, but not limited to, the odds of being able to receive a prize, the nature or value of a prize, or that a purchase or payment is required to win a prize or to participate in a prize promotion;

(vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability;

(vii) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity; or

(viii) That any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. 1643;

(3) Submitting billing information for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization when the method of payment used to collect payment does not impose a limitation on the customer's or donor's liability for unauthorized charges nor provide for dispute resolution procedures pursuant to, or comparable to those available under, the Fair Credit Billing Act and the Truth in Lending Act, as amended. Such authorization shall be deemed verifiable if either of the following means are employed:

(i) Express written authorization by the customer or donor, which includes the customer's or donor's signature;³ or

(ii) Express oral authorization which is recorded and made available upon request to the customer or donor, and the customer's or donor's bank, credit card company or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods and services that are the subject of the sales offer and the customer's or donor's receipt of all of the following information:

(A) The number of debits, charges or payments;

(B) The date of the debit(s), charge(s), or payment(s);

(C) The amount of the debit(s), charge(s), or payment(s);

(D) The customer's or donor's name;

(E) The customer's or donor's specific billing information, including the name of the account and the account number, that will be used to collect payment for the goods or services that are the subject of the sales offer;

(F) A telephone number for customer or donor inquiry that is answered during normal business hours; and

(G) The date of the customer's or donor's oral authorization;

(4) Making a false or misleading statement to induce any person to pay

for goods or services or to induce a charitable contribution; or

(b) *Assisting and facilitating.* It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a) or (c), or § 310.4.

(c) *Credit card laundering.* Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for:

(1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;

(2) Any person to employ, solicit, or otherwise cause a merchant or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

(3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.

(d) *Prohibited deceptive acts or practices in the solicitation of charitable contributions, donations, or gifts.* It is a fraudulent charitable solicitation, a deceptive telemarketing act or practice and a violation of this Rule for any telemarketer soliciting charitable contributions to misrepresent, directly or by implication, any of the following material information:

(1) The nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested;

(2) That any charitable contribution is tax deductible in whole or in part;

(3) The purpose for which any charitable contribution will be used;

(4) The percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program after any administrative or fundraising expenses are deducted;

(5) Any material aspect of a prize promotion including, but not limited to: The odds of being able to receive a

prize; the nature or value of a prize; or that a charitable contribution is required to win a prize or to participate in a prize promotion;

(6) In connection with the sale of advertising: The purpose for which the proceeds from the sale of advertising will be used; that a purchase of advertising has been authorized or approved by any donor; that any donor owes payment for advertising; or the geographic area in which the advertising will be distributed; or

(7) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.

§ 310.4 Abusive telemarketing acts or practices.

(a) *Abusive conduct generally.* It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Threats, intimidation, or the use of profane or obscene language;

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:

(i) The time frame in which the seller has represented all of the goods or services will be provided to that person has expired; and

(ii) The seller has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Nothing in this Rule should be construed to affect the requirement in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose;

(3) Requesting or receiving payment of any fee or consideration from a person, for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney;

(4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or

³ For purposes of this Rule, the term "signature" shall include a verifiable electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

arranging a loan or other extension of credit for a person;

(5) Receiving from any person other than the consumer or donor for use in telemarketing any consumer's or donor's billing information, or disclosing any consumer's or donor's billing information to any person for use in telemarketing; provided, however, this paragraph does not apply to the transfer of a consumer's or donor's billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction in which the consumer or donor has disclosed his or her billing information and has authorized the use of such billing information to process such payment for goods or services or a charitable contribution.

(6) Blocking, circumventing, or altering the transmission of, or directing another person to block, circumvent, or alter the transmission of, the name and/or telephone number of the calling party for caller identification service purposes; provided that it shall not be a violation to substitute the actual name of the seller or charitable organization and the customer or donor service telephone number of the seller or charitable organization which is answered during regular business hours, for the phone number used in making the call.

(b) *Pattern of calls.*

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

(i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

(ii) Denying or interfering in any way, directly or through an intermediary, or directing another person to deny or interfere in any way, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls established to comply with § 310.4(b)(1)(iii); or

(iii) Initiating any outbound telephone call to a person when that person previously has:

(A) Stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or the charitable organization on whose behalf a charitable contribution is being requested; or

(B) Placed his or her name and/or telephone number on a do-not-call registry, maintained by the Commission,

of persons who do not wish to receive outbound telephone calls, unless the seller or charitable organization has obtained the express verifiable authorization of such person to place calls to that person. Such authorizations shall be deemed verifiable if either of the following means are employed:

(1) Express written authorization by the consumer or donor which clearly evidences his or her authorization that calls made by or on behalf of a specific seller or charitable organization may be placed to the consumer or donor, and which shall include the telephone number to which the calls may be placed and the signature of the consumer or donor; or

(2) Express oral authorization which is recorded and which clearly evidences the authorization of the consumer or donor that calls made by or on behalf of a specific seller or charitable organization may be placed to the consumer or donor; provided, however, that the recorded oral authorization shall only be deemed effective when the telemarketer receiving such authorization is able to verify that the authorization is being made from the telephone number to which the consumer or donor, as the case may be, is authorizing access.

(iv) Selling, purchasing or using a certified registry for any purposes except compliance with §§ 310.4(b)(1)(iii).

(2) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(ii) and (iii) if it can demonstrate that, in the ordinary course of business:

(i) It has established and implemented written procedures to comply with § 310.4(b)(1)(ii) and (iii);

(ii) It has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to § 310.4(b)(2)(i);

(iii) The seller or a telemarketer or another person acting on behalf of the seller or a charitable organization uses a process to prevent telemarketing calls from being placed to any telephone number included on the Commission's do-not-call registry, employing a version of the do-not-call registry obtained from the Commission not more than 30 days before the calls are made, and maintains records documenting this process;

(iv) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded lists of persons the seller or charitable organization may not contact, in compliance with § 310.4(b)(1)(iii)(A) and (B);

(v) The seller or a telemarketer or another person acting on behalf of the

seller or charitable organization, has maintained and recorded the express verifiable authorization of those persons who have agreed to accept telemarketing calls by or on behalf of the seller or charitable organization, in compliance with § 310.4(b)(1)(iii)(B);

(vi) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to § 310.4(b)(2)(i); and

(vii) Any subsequent call otherwise violating § 310.4(b)(1)(ii) or (iii) is the result of error.

(3) Within two years following the effective date of this Rule, the Commission shall review the implementation and operation of the registry established pursuant to § 310.4(b)(1)(iii)(B).

(c) *Calling time restrictions.* Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location.

(d) *Required oral disclosures in the sale of goods or services.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion.

(e) *Required oral disclosures in charitable solicitations.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the charitable organization on behalf of which the request is being made; and

(2) That the purpose of the call is to solicit a charitable contribution;

§ 310.5 Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

(1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of \$25.00 or more;

(3) The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;⁴

(4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales or solicitations; provided, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

(5) All verifiable authorizations required to be provided or received under this Rule.

(b) A seller or telemarketer may keep the records required by § 310.5(a) in any form, and in the manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by § 310.5(a) shall be a violation of this Rule.

(c) The seller or the telemarketer calling on behalf of the seller or may, by written agreement, allocate responsibility between themselves for the recordkeeping required by this section. When a seller or a telemarketer have entered into such an agreement, the terms of that agreement shall govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, the seller shall be responsible for complying with §§ 310.5(a)(1)–(3) and (5); the

telemarketer shall be responsible for complying with § 310.5(a)(4).

(d) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer shall maintain all records as required under this section. In the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business shall maintain all records required under this section.

§ 310.6 Exemptions.

The following acts or practices are exempt from this Rule:

(a) The sale of pay-per-call services subject to the Commission's "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992," 16 CFR Part 308, provided, however, that this exemption does not apply to the requirements of § 310.4(a)(1) and § 310.4(a)(6), (b), and (c);

(b) The sale of franchises subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 16 CFR Part 436, provided, however, that this exemption does not apply to the requirements of § 310.4(a)(1) and § 310.4(a)(6), (b), and (c);

(c) Telephone calls in which the sale of goods or services or charitable solicitation is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation by the seller or charitable organization, provided, however, that this exemption does not apply to the requirements of § 310.4(a)(1) and § 310.4(a)(6), (b), and (c);

(d) Telephone calls initiated by a customer or donor that are not the result of any solicitation by a seller, charitable organization, or telemarketer;

(e) Telephone calls initiated by a customer or donor in response to an advertisement through any medium, other than direct mail solicitation; provided, however, that this exemption does not apply to calls initiated by a customer or donor in response to an advertisement relating to investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule or any subsequent rule covering business opportunities the Commission may promulgate, or advertisements involving goods or services described in § 310.3(a)(1)(vi) or § 310.4(a)(2)–(4);

(f) Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including

solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully disclose all material information listed in § 310.3(a)(1), for any goods or services offered in the direct mail solicitation or any requested charitable contribution; provided, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule or any subsequent rule covering business opportunities the Commission may promulgate, or goods or services described in §§ 310.4(a)(2)–(4); and

(g) Telephone calls between a telemarketer and any business, except calls to induce a charitable contribution, and those involving the sale of Internet services, Web services, or the retail sale of nondurable office or cleaning supplies; provided, however, that § 310.5 Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies, Internet Services, or Web services.

§ 310.7 Actions by States and private persons.

(a) Any attorney general or other officer of a State authorized by the State to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, shall serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580, and shall include a copy of the State's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the State or private person shall serve the Commission with the required notice immediately upon instituting its action.

(b) Nothing contained in this section shall prohibit any attorney general or other authorized State official from proceeding in State court on the basis of an alleged violation of any civil or criminal statute of such State.

§ 310.8 Severability.

The provisions of this rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the

⁴ For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with § 310.5(a)(3) of this Rule.

remaining provisions shall continue in effect.

By direction of the Commission.

Donald S. Clark,
Secretary.

Note: This Appendix is published for informational purposes only and will not be codified in Title 16 of the Code of Regulations.

Appendix A—List of Commenters and Acronyms, February 28, 2000: Notice and Comment; Telemarketing Sales Rule Review

Acronym/Commenter

AARP—AARP
Alan—Alan, Alicia
ARDA—American Resort Development Association
ATA—American Teleservices Association
Anderson—Anderson, Wayne
Baressi—Baressi, Sandy
Bell Atlantic—Bell Atlantic
Bennett—Bennett, Douglas H.
Biagiotti—Biagiotti, Mary
Bishop—Bishop, Lew & Lois
Blake—Blake, Ted
Bowman—Kruhm—Bowman-Kruhm, Mary
Braddick—Braddick, Jane Ann
Brass—Brass, Eric
Brosnahan—Brosnahan, Kevin
Budro—Budro, Edgar
Card—Card, Giles S.
Collison—Collison, Doug
Conn—Conn, David
Conway—Conway, Candace
Croushore—Croushore, Amanda
Curtis—Curtis, Joel
Dawson—Dawson, Darcy
DMA—Direct Marketing Association
DSA—Direct Selling Association
Doe—Doe, Jane
ERA—Electronic Retailing Association
FAMSA—FAMSA—Funeral Consumers Alliance, Inc.
Gannett—Gannett Co., Inc.
Garbin—Garbin, David and Linda
A. Gardner—Gardner, Anne
S. Gardner—Gardner, Stephen
Gibb—Gibb, Ronald E.
Gilchrist—Gilchrist, Dr. K. James
Gindin—Gindin, Jim
Haines—Haines, Charlotte
Harper—Harper, Greg
Heagy—Heagy, Annette M.
Hecht—Hecht, Jeff
Hickman—Hickman, Bill and Donna
Hollingsworth—Hollingsworth, Bob and Pat
Holloway—Holloway, Lynn S.
Holmay—Holmay, Kathleen
ICFA—International Cemetery and Funeral Association
Johnson—Johnson, Sharon Coleman
Jordan—Jordan, April
Kelly—Kelly, Lawrence M.
KTW—KTW Consulting Techniques, Inc.
Lamet—Lamet, Jerome S.
Lee—Lee, Rockie
LSAP—Legal Services Advocacy Project
LeQuang—LeQuang, Albert
Leshner—Leshner, David
Mack—Mack, Mr. and Mrs. Alfred
MPA—Magazine Publishers of America, Inc.

Manz—Manz, Matthias
McCurdy—McCurdy, Bridget E.
Menefee—Menefee, Marcie
Merritt—Merritt, Everett W.
Mey—Mey, Diana
Mitchelp—Mitchelp
NACHA—NACHA—The Electronic Payments Association
NAAG—National Association of Attorneys General
NACAA—National Association of Consumer Agency Administrators
NCL—National Consumers League
NFN—National Federation of Nonprofits
NAA—Newspaper Association of America
NASAA—North American Securities Administrators Association
Nova53—Nova53
Nurik—Nurik, Margy and Irv
PLP—Personal Legal Plans, Inc.
Peters—Peters, John and Frederickson, Constance
Reese—Reese Brothers, Inc.
Reynolds—Reynolds, Charles
Rothman—Rothman, Iris
Runnels—Runnels, Mike
Sanford—Sanford, Kanija
Schiber—Schiber, Bill
Schmied—Schmied, R. L.
Strang—Strang, Wayne G.
TeleSource—Morgan-Francis/Tele-Source Industries
Texas—Texas Attorney General
Thai—Thai, Linh Vien
Vanderburg—Vanderburg, Mary Lou
Ver Steegt—Ver Steegt, Karen
Verizon—Verizon Wireless
Warren—Warren, Joshua
Weltha—Weltha, Nick
Worsham—Worsham, Michael C., Esq.

Concurring Statement of Commissioner Orson Swindle in *Telemarketing Sales Rule Review*, File No. R411001

Telemarketing calls can provide consumers with valuable information about goods and services. On the other hand, telemarketing calls also can be deceptive or can be an unwanted intrusion into the homes of consumers—an intrusion that many consumers find difficult to prevent or remedy. The challenge for government, therefore, is to strike a balance that allows consumers, if they wish, to receive telemarketing calls with useful information without being deceived or abused.

In 1994, Congress passed the Telemarketing Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”), giving the Commission the authority to promulgate rules to prohibit “deceptive” or “abusive” telemarketing practices. In 1995, the Commission issued the Telemarketing Sales Rule (“TSR”), which declared a number of telemarketing practices to be deceptive or abusive. In light of technological developments and changes in the marketplace since 1995 as well as our law enforcement experience with telemarketing fraud, the Commission

now proposes to declare additional practices to be deceptive or abusive. I wholeheartedly support the proposed changes to the TSR, because they appear to strike the right balance by protecting consumers without unduly restricting the practices of legitimate telemarketers.

I want to emphasize two points concerning the Telemarketing Act and the TSR, however. The first point is that the Commission’s regulatory scheme would be more effective if it covered the entire spectrum of entities engaged in telemarketing.¹ Under the Telemarketing Act and the TSR, however, the Commission lacks jurisdiction in whole or in part over the calls of entities such as banks, telephone companies, airlines, insurance companies, credit unions, charities,² political campaigns, and political fund raisers. In addition, the Commission also proposes to exempt from the TSR calls made on behalf of certain religious organizations.

A major objective of the Telemarketing Act and the TSR is to protect consumers’ “right to be let alone” in their homes, which is the “most comprehensive of rights and the right most valued by civilized men.” *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). From the perspective of consumers, their right to be let alone is invaded just as much by an unwanted call from an exempt entity (e.g., a bank or a telephone company) as it is by such a call from a covered entity (e.g., a sporting goods manufacturer). The Commission’s regulatory scheme would be more effective in protecting the right of consumers to be let alone if the Telemarketing Act and the TSR covered the entire spectrum of entities that make telemarketing calls to consumers.

Covering the entire spectrum of entities also would result in a more

¹ I have expressed concern in the past that the Commission’s effectiveness in regulating telemarketing is significantly limited by our inability to reach the practices of entities that are exempt in whole or in part from the Telemarketing Act and the TSR. See Concurring Statement of Commissioner Orson Swindle in Miscellaneous Matters—Director (BCP), File No. P004101 (June 13, 2000) (statement issued in conjunction with Commission testimony on The Telemarketing Victims Protection Act (H.R. 3180) and The Know Your Caller Act (H.R. 3100), before the Subcommittee on Telecommunications, Trade and Consumer Protection of the Committee on Commerce, United States House of Representatives).

² As discussed in the Notice of Proposed Rulemaking, Congress recently enacted the USA PATRIOT Act of 2001, which gives the Commission new authority to regulate (under the Telemarketing Act and the TSR) for-profit companies that make telephone calls seeking charitable donations. I applaud Congress for taking this important step to protect consumers.

equitable regulatory scheme. For example, telephone companies currently are exempt in whole or in part from the Telemarketing Act and the TSR because they are common carriers, yet some vendors that compete with them apparently are not exempt from these regulatory requirements, *see* Notice of Proposed Rulemaking at 16, which may confer a competitive advantage in marketing on telephone companies. It would be more equitable if companies that compete with each other had to comply with the same regulatory requirements when they engage in telemarketing.

The second point that I want to raise concerns how the Commission determines whether a practice is "abusive" under the Telemarketing Act. For the most part, the Commission has used the examples of abusive practices that Congress provided in the Telemarketing Act and principles drawn from these examples to determine whether we can declare a practice to be abusive. I think that this is an

appropriate means of determining the metes and bounds of abusive practices.

The Commission, however, also concludes that the transfer of pre-acquired account information and certain other telemarketing practices are "abusive" for purposes of the Telemarketing Act and the TSR, because they meet the Commission's standards for "unfairness" under section 5 of the FTC Act. The Commission's interjection of unfairness principles into the determination of which telemarketing practices are abusive is designed to provide greater certainty and to limit the scope of what will be considered abusive. Although these are laudable objectives, I have reservations about using unfairness principles under Section 5 to determine what is abusive for purposes of the Telemarketing Act. Nothing in the language of the Telemarketing Act or its legislative history indicates that Congress intended the Commission to use unfairness principles to determine which practices are abusive. Given that it amended the FTC Act to define unfairness the same

year that it passed the Telemarketing Act, Congress presumably would have given some indication if it wanted us to employ unfairness principles to decide which telemarketing practices are abusive.³

Accordingly, I would ask for public comment addressing the legal, factual, and policy issues implicated by the use of unfairness principles under Section 5 of the FTC Act to determine whether telemarketing practices are abusive for purposes of the Telemarketing Act. I would also seek comment specifically addressing whether the transfer of pre-acquired account information meets the standard for unfairness under Section 5 of the FTC Act.

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³ In fact, when the Commission issued the TSR in 1995, it did not use unfairness principles to determine whether telemarketing practices are abusive under the Telemarketing Act. Statement of Basis and Purpose, Prohibition of Deceptive and Abusive Telemarketing Practices; Final Rule, 60 FR 43842 (Aug. 23, 1995).