

After paying the appropriate fee each annual period,<sup>17</sup> the seller will be provided with a unique account number, and can use that number to gain direct access to the national registry at any time during its annual period. In addition, the seller can provide its account number to any telemarketer or list broker with which it does business, which in turn will permit that telemarketer or list broker to gain access to the information to which the seller has subscribed.<sup>18</sup> The Commission proposes that such a revised fee structure is more appropriate than its original proposal. Under this revised fee structure, each seller would be charged only one time annually for access to the information included in the national registry, and would be allowed to transfer its ability to access the national registry to whatever telemarketers or list brokers it wishes to employ on its behalf.

In a further effort to avoid requiring an entity to pay twice for access to the same information, the Commission now proposes that telemarketers who are not also sellers—*i.e.*, entities that engage in telemarketing only on behalf of others—should not have to pay a separate fee for their access to the national registry.<sup>19</sup>

induce the purchase of goods or services or to solicit a charitable contribution.” 16 CFR 310.2(u). A “telemarketer,” in turn, is “any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.” 16 CFR 310.2(bb). Finally, “telemarketing” is defined as 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.” 16 CFR 310.2(cc). Thus, sellers engaging in a plan, program, or campaign involving only intrastate telemarketing calls would not be required to pay a fee or access the national registry pursuant to the TSR. In addition, solicitations to induce charitable contributions via outbound telephone calls are not covered by the do-not-call requirements of the TSR. 16 CFR 310.6(a). As a result, sellers involved only in such solicitations similarly would not be required to pay a fee or access the national registry. Of course, entities engaged in conducting surveys are not seeking to induce the purchase of goods or services and therefore are not engaged in “telemarketing” nor subject to the TSR. Similarly, political fund raising is not “telemarketing” and is not covered.

<sup>17</sup> The fee that would be charged for access to the national registry is discussed in Section III.D, below. A seller’s “annual period” is discussed in Section IV, below.

<sup>18</sup> VISA suggested a similar type of pricing structure, in which the FTC could “license” the registry to individual sellers, which in turn could employ a telemarketer to use the registry, if they desire, subject to confidentiality and use restrictions. VISA-User Fee at 2.

<sup>19</sup> Similarly, list brokers who develop and/or scrub the calling lists for their seller-clients would not have to pay for their individual access to the national registry. Instead, they also would have to certify that their seller-clients have paid for access to the national registry prior to gaining access to the national registry.

Charging such “pure” telemarketers for access in effect would cause their seller-clients to pay twice for access to the national registry. Instead, under the instant proposal, such telemarketers would be required to ensure that their seller-clients have paid for access to the national do-not-call registry prior to initiating outbound telephone calls on their behalf. Telemarketers would gain this assurance by obtaining and using the seller’s unique account number to the national registry.

As previously stated, the Commission seeks to spread the fee burden equitably across all entities that engage in telemarketing. Sellers are the ultimate beneficiaries of telemarketing campaigns, and all covered sellers must access the national registry to remain in compliance with the do-not-call provisions of the Amended TSR. As a result, all sellers should pay an appropriate fee for that access, but should pay that fee only one time during each annual period. The Commission does not agree with those commenters that suggested the agency should charge only telemarketers, and not their clients, for access to the national registry.<sup>20</sup> By only charging telemarketers for access to the national registry, and charging them only once for their access on behalf of multiple clients, the fee structure would unfairly benefit those sellers that employ a telemarketer with multiple clients, since those sellers would pay less of a fee for access to the same information than sellers that engage in their own telemarketing without hiring a telemarketer. Thus, the Commission is proposing to charge sellers and not telemarketers or list brokers for access to the national registry.<sup>21</sup>

Proposed § 310.8(a) of the Rule would make sellers directly liable for initiating, or causing a telemarketer to initiate, an outbound telephone call without first paying the appropriate fee for access to the national registry. Proposed Section 310.8(b) would make telemarketers

directly liable for initiating an outbound telephone call on behalf of a seller without first ensuring that their seller-clients have paid for up-to-date access to the national do-not-call registry. The Commission proposes to impose this liability under the authority of the Appropriations Act and the Implementation Act, in addition to the Telemarketing Act, which provides the authority for the other portions of the Amended TSR. The Commission believes such direct liability on sellers and telemarketers is necessary to effectuate fairly the mandate of the Appropriations Act and the Implementation Act, which authorize the Commission to collect fees sufficient to cover the costs of implementing and enforcing the do-not-call provisions of the Amended TSR. Without such direct liability, the Commission is concerned that not all entities that obtain information from the national registry will pay their fair share of the fees for that registry, resulting in increased fees for those entities that do pay. As a result of the proposed imposition of this direct liability, the failure of a seller to pay the appropriate fee prior to initiating or causing another entity to initiate an outbound telephone call, and the failure of a telemarketer to ensure that a seller has paid the appropriate fee prior to initiating an outbound telephone call on its behalf, would be a violation of the Amended TSR, subject to all remedies available for such violations.

### *C. Corporate Divisions, Subsidiaries, and Affiliates*

In the User Fee NPRM, the Commission proposed following the compliance guide for the original TSR by requiring that distinct corporate divisions of a single corporation be considered separate sellers for the purposes of payment of the annual fees. Factors used to determine if corporate divisions would be treated as separate sellers would include whether there is substantial diversity between the operational structure of the divisions, and whether the goods or services sold by the divisions are substantially different from each other.

In response to this proposal, some commenters suggested that the Commission treat divisions of the same corporation as one seller and allow the sharing of the registry among them.<sup>22</sup> Another suggested the same treatment for a “family” of affiliated companies.<sup>23</sup> Wells Fargo stated that this treatment would allow a company to purchase a

<sup>20</sup> See, e.g., ABA-User Fee at 3–4; MBNA-User Fee at 3–4; ITC-User Fee at 6.

<sup>21</sup> ABA stated that a single fee to telemarketers would enhance the privacy and security of the national registry by discouraging seller-clients from accessing the national registry individually in order to scrub their calling lists. Instead, sellers would allow their telemarketers to access the registry on their behalf. ABA-User Fee at 3–4. As stated above, the Commission believes that charging only telemarketers would be inequitable. The Commission also believes that the certification required of sellers who access the national registry, as discussed in Section II.A, above, will help to address the security and privacy concerns raised by ABA. Moreover, telemarketers would still be allowed to access the registry on behalf of their seller-clients under the current proposal, using their seller-clients’ account number.

<sup>22</sup> See, e.g., ARDA-User Fee at 5; CBA-User Fee at 4.

<sup>23</sup> Household-User Fee at 2.