

### C. Small Business Access

In the User Fee NPRM, the Commission proposed providing free registry access to any firm wishing to obtain data from only one to five area codes.<sup>44</sup> The Commission proposed such free access to limit the burden placed on small businesses that only require access to a small portion of the national registry. The Commission noted that its proposal was consistent with the mandate of the Regulatory Flexibility Act, 5 U.S.C. 601, which requires that to the extent, if any, a rule is expected to have a significant economic impact on a substantial number of small entities, agencies should consider regulatory alternatives to minimize such impact.<sup>45</sup>

A number of commenters supported this small business exemption.<sup>46</sup> Others opposed it for various reasons. Household stated that any fee should be assessed to all entities obtaining access to the national registry because there is no rational basis to do otherwise, and “telemarketers and sellers should not have to subsidize the telemarketing activities of other telemarketers or sellers, regardless of their size.”<sup>47</sup> ITC stated that the number of area codes purchased is a poor indicator of the extent of actual use, and a structure without exemptions is simpler and easier to administer.<sup>48</sup> TRA stated that “the area or population served by five or fewer area codes could be enormous,” and that all telemarketers should be required to help defray the cost of the national registry.<sup>49</sup> SBSC maintained that the five area code exemption does not provide sufficient protections for small businesses, since many small businesses are located in geographic areas with many area codes, and some small businesses may actually be national in scope.<sup>50</sup> Finally, NASUCA expressed concern that telemarketers may “game” the system to avoid paying for access—especially by treating “distinct corporate divisions of a single corporation” as separate entities, thus allowing each division to gather five area codes and pool the numbers among themselves. NASUCA also stated that there can be variations in the number of customers within an

area code and the number of area codes within a state, creating inconsistencies in the amount of data for which a telemarketer will be paying.<sup>51</sup>

After evaluating these comments, the Commission still believes that it is appropriate to provide access to a small portion of the data in the national registry for free. The Commission agrees with the comments that stated the imposition of fees may be unduly burdensome, and could have a disproportionate impact, on small businesses.<sup>52</sup> The Commission is attempting to alleviate that burden to the greatest extent possible, while still collecting the necessary fees in as equitable manner as possible. By providing free access to a small portion of the national registry, the Commission is attempting to alleviate some of the disproportionately heavier burdens faced by small businesses. The Commission recognizes that not all small businesses will be able to enjoy the benefits of this proposal, since some small businesses may engage in telemarketing in a geographic area larger than five area codes. However, the Commission believes that most entities that will benefit from this proposal will be small businesses. Moreover, providing this free access does not significantly increase the complexity of implementing the national registry.<sup>53</sup>

The Commission also believes its proposal will prevent companies from “gaming” the system to gain free access

on a large scale. It would be a violation of the proposed fee rule for a telemarketer, or a seller to cause a telemarketer, to initiate outbound telephone calls in an area of the country for which it did not pay for access to the national registry. Thus, distinct corporate divisions of the same company that acquire only five area codes of data could not make outbound telephone calls outside of those five area codes without violating the proposed rule. As a practical matter, it is unlikely that any company would organize its divisions by limiting each division’s telemarketing to five area codes, just to avoid the proposed fee. The Commission believes that the costs associated with trying to “game” the system in such a manner would be much larger than the benefits of avoiding the proposed fees.

While the Proposed Rule provides free access to a small portion of the national registry, the Commission continues to seek comment on other alternatives that would balance the burdens faced by small businesses with the need to raise appropriate fees to fund the registry in an equitable manner.

As for the appropriate level of free access, the Commission continues to seek comment on this issue as well.<sup>54</sup> Absent evidence to the contrary, the Commission believes that five area codes is an appropriate compromise between the goals of equitably and adequately funding the national registry, on the one hand, and providing appropriate relief for small businesses, on the other. While the Commission understands that five area codes could provide free access to a significant geographic area, the Commission also is attempting to address those small businesses that work in large metropolitan areas, which often have multiple area codes within a relatively small geographic area. Furthermore, while the Commission is mindful of the possible variations in the number of telephone numbers included in each area code, the Commission believes the only more equitable way to divide access to the national registry, other than by area code, might be by individual telephone number. Such a fine gradation, assuming its feasibility,

<sup>51</sup> NASUCA-User Fee at 3–6.

<sup>52</sup> See ICTA-User Fee at 1–2; Ameriquest-User Fee at 6; Celebrity Prime Foods-User Fee at 1.

<sup>53</sup> In the Commission’s view, an alternative approach that would provide small business with exemptive relief more directly tied to size status would not balance the private and public interests at stake any more equitably or reasonably than the approach currently proposed by the Commission. For example, an across-the-board exemption from all fees for small businesses, no matter how many area codes they access, would shift the entire cost of the registry to larger businesses and require assessing them even higher access fees, while giving the small business community access to the registry without any cost-sharing responsibility whatsoever. Compared to the Commission’s current proposal, which requires small businesses that telemarket beyond five area codes to pay access fees, a categorical small-business exemption would not be as consistent with the general legislative mandate that the Commission recover the registry’s costs from those telemarketing entities obtaining access to the registry. Alternatively, it might be argued that allowing small businesses to pay reduced rates across the entire fee schedule could achieve substantially the same level and balance of exemptive relief and cost recoupment as the current proposal to provide free access to five area codes or fewer. A reduced fee schedule based on small business size, however, would still ultimately require a certification and determination of that status to implement and enforce, and thus would present greater administrative, technical, and legal costs and complexities than the Commission’s current exemptive proposal, which does not require any proof or verification of that status.

<sup>44</sup> See User Fee NPRM at 37364.

<sup>45</sup> But see section IX, below, where the Commission determines that the instant proposed Rule would not have a significant economic impact on a substantial number of small entities.

<sup>46</sup> See, e.g., NCL-User Fee at 1; SBA-User Fee at 1, 4; AARP-User Fee at 2.

<sup>47</sup> Household-User Fee at 3–4.

<sup>48</sup> ITC-User Fee at 6.

<sup>49</sup> TRA-User Fee at 6.

<sup>50</sup> Small Business Survival Committee (“SBSC”)—User Fee at 2.

<sup>54</sup> SBA commented that it had insufficient information to determine whether five area codes is an appropriate level of free access, and recommended that the FTC contact small telemarketers to inquire how many area codes they commonly access in a given year during the course of business. SBA-User Fee at 4. ICTA suggested that the number of area codes of data that could be acquired without paying a fee be increased from five to ten, but provided no rationale for this suggestion. ICTA-User Fee at 1–2.