

should not be required to pay a user fee provided the seller does not access the registry for other reasons.”<sup>17</sup>

The Commission agrees that sellers engaged solely in calls to persons with whom they have an established business relationship or from whom they have obtained express written agreement to call, and who do not otherwise want to access the national registry, should not have to pay an annual fee. As a result, the Commission is amending Section 310.8(a) to make clear that sellers do not have to pay for access to the National Do Not Call Registry if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to the exemptions set forth in Amended TSR §§ 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose. A similar change is being made to Section 310.8(b), regarding telemarketer access to the national registry.

Some commenters requested clarification that sellers exempt from the Amended TSR are not required to access the National Do Not Call Registry and pay the annual fee.<sup>18</sup> With the adoption of the FCC Rules, the list of sellers exempt from the requirements of the National Do Not Call Registry under federal law is considerably narrowed. Any such exempt seller, however, is not required to access the national registry or pay the annual fee. For example, solicitations to induce charitable contributions via outbound telephone calls are not covered by the National Do Not Call Registry requirements of the TSR.<sup>19</sup> As a result, sellers involved only in such solicitations would not be required to pay a fee or access the national registry. In addition, entities engaged solely 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.<sup>20</sup> Similarly, political fund raising is not “telemarketing” and is not covered.<sup>21</sup> Of course, any of those

entities may access the national registry if they voluntarily wish to prevent calling telephone numbers that are on the registry, or if they are required by other laws or regulations to gain such access.

DMA stated that nonprofit organizations voluntarily accessing the national registry to avoid calling potential donors who do not want to receive telemarketing calls should not be charged for such access.<sup>22</sup> The Commission agrees that such charges are unwarranted. Section 310.8(c) is amended to provide that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the national registry without being required under this Rule, the FCC Rules, or any other federal law.<sup>23</sup> Such persons must provide all information required of other entities accessing the registry, must certify, under penalty of law, that they are accessing the registry solely to prevent telephone calls to telephone numbers on the registry, and must further certify that they are accessing the registry without being required under this Rule, the FCC Rules, or any other federal law. Affording these persons such access to the registry will enable them to abide by consumers’ choices not to be called by commercial telemarketers. At the same time, the certification requirement—under penalty of law—will enable the Commission to take appropriate steps against those who misuse the registry.

The Commission also proposed in the Revised Fee NPRM that telemarketers who are not also sellers—*i.e.*, entities that engage in telemarketing only on behalf of others—would not have to pay a separate fee for their access to the national registry. Similarly, list brokers or other service providers 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, such telemarketers and service providers 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, or providing services, on their behalf. Telemarketers and service providers would gain this assurance by obtaining and using the seller’s unique account number to access the national registry.

the FCC Rules to access the national registry and pay for such access. See FCC Rules at ¶ 27.

<sup>22</sup> See DMA-Revised Fee at 15–16.

<sup>23</sup> Such persons consist solely of entities engaged in outbound telephone calls to consumers to induce charitable contributions, for political fund raising, or to conduct surveys.

DMA opposed this “seller pays” model for the National Do Not Call Registry.<sup>24</sup> Instead, DMA suggested that the FTC “should leave the issue of who pays for the List to the contractual provisions between service bureaus and sellers.”<sup>25</sup> IMC stated that a “more workable proposal would be to require each calling entity, third party or seller using in house callers to purchase and implement the list. Thus, IMC could purchase access to the registry once and call on behalf of all its clients.”<sup>26</sup> The Commission does not believe such a system would equitably spread the fees for the national registry among all entities that engage in telemarketing. As the Commission explained in the Revised Fee NPRM, sellers are the ultimate beneficiaries of telemarketing campaigns, and covered sellers must gain access to the information in the national registry to remain in compliance with the “do-not-call” provisions of the Amended TSR. As a result, all such sellers should pay an appropriate fee for that access. Moreover, by charging only telemarketers for access to the national registry, and charging them only once for their access on behalf of multiple clients, IMC’s proposed fee structure would inequitably benefit those sellers that employ a telemarketer with multiple clients. This inequitable advantage is created because those sellers would bear less of the cost of access to the same information than sellers that engage in their own telemarketing without hiring a telemarketer. Thus, the Commission will require sellers, and not their telemarketers or service providers, to pay for access to the national registry.<sup>27</sup>

The FCC Rules recognize that allowing telemarketers and others to share the information obtained from the national registry “would threaten the financial support for maintaining the database.”<sup>28</sup> In fact, the FCC Rules specifically prohibit any entity that accesses the national registry from “participat[ing] in any arrangement to share the cost of accessing the national

<sup>24</sup> See DMA-Revised Fee at 7–8.

<sup>25</sup> *Id.*

<sup>26</sup> IMC-Revised Fee at 5.

<sup>27</sup> The FCC Rules require all entities “making telephone solicitations (or on whose behalf telephone solicitations are made)” to “purchase[] access to the relevant do-not-call data from the administrator of the national database.” 47 CFR 64.1200(c)(2)(i)(E), amended July 3, 2003. The Commission will deem all telemarketers or service providers who are not also sellers to have “purchased access” to the national registry by providing the unique account number of the seller on whose behalf the telemarketer or service provider is gaining access.

<sup>28</sup> FCC Rules at ¶ 32, n.129.

<sup>17</sup> VISA-Revised Fee at 1–2.

<sup>18</sup> See FSR-Revised Fee at 1–2; VISA-Revised Fee at 1–2.

<sup>19</sup> 16 CFR 310.6(a). See also 47 CFR 64.1200(f)(9)(iii), amended July 3, 2003 (FCC Rules defining a “telephone solicitation” as not including a call or message “by or on behalf of a tax-exempt nonprofit organization.”)

<sup>20</sup> The Amended TSR defines “telemarketing” 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).

<sup>21</sup> Sellers that engage solely in intrastate telemarketing, or that engage in businesses outside of the jurisdictional limitations of the FTC, are not required by the Amended TSR to access the National Do Not Call Registry or pay for such access. However, such companies are required by