

database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers.”²⁹ The Commission agrees with the FCC, and believes such a prohibition is appropriate to include in the Final Fee Rule as well. As a result, the Commission is including similar prohibitory language in Section 310.8(c).³⁰

The Revised Fee NPRM did not permit any entity, other than a seller, to purchase the list of numbers in the national registry. A number of commenters noted that telemarketers calling on behalf of exempt entities would be in the “untenable position” of being required to comply with the “do-not-call” provisions of the Amended TSR, but not having the ability to access the national registry without their exempt seller-clients having paid for access.³¹ To address this potential problem, some commenters suggested allowing telemarketers direct access to the national registry.³² Convergys, a large telemarketer commenter, described a number of other situations when telemarketers may want to subscribe to the national registry although their seller-client is not required to do so, or has already purchased the list. For example, the telemarketer may want to scrub the calling list of a client calling customers with an existing business relationship, or “to help guard against errors or omissions” in the sellers’ lists and to re-verify the accuracy of those lists.³³

For the reasons set forth in these comments, the Commission agrees that allowing independent access to the national registry by telemarketers or other service providers is appropriate. As a result, telemarketers or service providers will be allowed to gain access to the national registry on their own behalf, without being limited solely to the access allowed for their seller-clients. To maintain the fairness of the fee structure, however, telemarketers and service providers will be required to pay the appropriate fee for such independent access. Moreover, covered sellers still will be required to pay the fee prior to engaging in, or causing a telemarketer to engage in, outbound

telephone calls for which access to the “do-not-call” registry is required by the Amended TSR. This “covered seller pays” requirement remains in place regardless of whether the telemarketer or service provider employed by the seller independently and voluntarily pays for access to the national registry. In addition, telemarketers and service providers paying for such independent access must certify that they are accessing the national registry solely to comply with the provisions of the Amended TSR, or otherwise to prevent telephone calls to telephone numbers on the national registry. Finally, such telemarketers or service providers are not permitted to use the information they obtain from the national registry on behalf of any entity, covered seller or exempt, unless that entity has paid the appropriate fee for access to the information or, for exempt sellers, has submitted the appropriate certification to gain access to the national registry.

C. Other Registry Access Issues

Commenters raised three other issues regarding access to the national registry. First, commenters suggested allowing sellers and telemarketers to allocate responsibility among themselves for obtaining access to the national registry. The Revised Fee NPRM anticipated that all covered sellers would initially access the national registry on their own behalf, pay the appropriate fee and acquire an account number, which they could then provide to any telemarketer or service provider that they wish to hire. Commenters noted, however, that telemarketers and service bureaus frequently access state “do-not-call” lists on behalf of their seller-clients.³⁴ These commenters maintained that sellers should be permitted to access the national registry either directly, or permit a third party, such as a telemarketer or list broker, to enroll and access on the seller’s behalf. “In either event, a unique account number could be assigned for each seller, thereby allowing it the flexibility to change telemarketers/service providers, or use multiple telemarketers, once an access fee has been paid on its behalf.”³⁵

The Commission is persuaded that such flexible access is appropriate. Sellers may contract with telemarketers or other service providers to access the national registry on their behalf to satisfy the rule’s requirements. In this way, sellers and their agents can allocate the responsibility for accessing the registry, although the seller remains

ultimately liable for calls made on its behalf, and telemarketers remain liable for ensuring that their covered sellers have paid the appropriate fee. A unique account number still will be provided in the seller’s name, for use by the seller throughout its annual period. As a result, §§ 310.8(a), (b), and (d) are amended to allow sellers to pay the annual fee “either directly or through another person.”

The second issue raised by commenters regarding access to the national registry concerns the frequency of that access. Convergys stated that the fee rule should require telemarketers to access the data quarterly, regardless of the number of new clients they might acquire during that period. Telemarketers could then update their access and their registration information (with identities of new sellers) on a quarterly basis.³⁶ Similarly, DMA stated that it is inefficient to require a service bureau to access the registry separately in the event it signed up a new client, even though it has a current version of the telephone numbers in the registry.³⁷ Convergys also noted that current telemarketer systems are designed to allow telemarketers to access data directly and use it for more than one client. According to Convergys, limiting access to varying levels paid for by various clients would require significant modifications, burdens and costs.³⁸

The Commission never proposed requiring telemarketers or service bureaus to access the national registry or download data separately for each client. There are two requirements in effect that mandate the frequency of access to the national registry. First, § 310.4(b)(3)(iv) of the Amended TSR requires sellers and telemarketers to employ a version of the national registry obtained from the Commission no more than three months prior to the date any call is made. Second, § 310.8(a) of the revised fee rule requires sellers to pay the annual fee prior to initiating, or causing a telemarketer to initiate, outbound telephone calls to persons whose numbers are on the registry. As a result, a telemarketer need only access the national registry once every three months, assuming it can scrub all of its calling lists by using that frequency of access.³⁹ It can call on behalf of all of

²⁹ 47 CFR 64.1200(c)(2)(i)(E), amended July 3, 2003.

³⁰ Inclusion of this prohibition in the Fee Rule also will “maximize consistency” between the FTC and FCC Rules. See Do Not Call Implementation Act, § 3.

³¹ See ABA-Revised Fee at 1–2; BOA-Revised Fee at 1–2; Convergys-Revised Fee at 3–5; FSR-Revised Fee at 1–2.

³² See BOA-Revised Fee at 1–2; Convergys-Revised Fee at 5.

³³ See Convergys-Revised Fee at 2–5.

³⁴ See ERA-Revised Fee at 3–5; MPA-Revised Fee at 4–5; West-Revised Fee at 1–2.

³⁵ ERA-Revised Fee at 4.

³⁶ Convergys-Revised Fee at 6–8.

³⁷ DMA-Revised Fee at 8.

³⁸ Convergys-Revised Fee at 6.

³⁹ The Commission has developed the “do not call” rules to allow sellers and telemarketers to determine when and how frequently they need to access the national registry to remain in compliance. Unlike many state systems, the national registry is continuously updated as