

its clients during that period, scrubbing from all of its calling lists those numbers that were included in the national registry at the time the telemarketer accessed the registry. If the seller-client agrees to allow the telemarketer to use the information already in the telemarketer's files from a prior download from the national registry within the previous three months, there is no rule violation for the telemarketer to do so. In other words, telemarketers and service providers acting on behalf of sellers may use one download from the national registry on behalf of multiple clients, as long as the fee for each of the seller-clients is paid.

The third access issue raised by commenters is an objection to the requirement that telemarketers and list brokers must identify their clients when accessing the national registry. According to DMA, these "contractual relationships are proprietary information and bear no relationship to consumer privacy."⁴⁰ Convergys stated: "For any business, customer identity is inherently sensitive, proprietary data and there is no basis in the record for requiring telemarketers to disclose it routinely and in the absence of substantial complaints or other evidence to suggest there have been violations."⁴¹ The Commission understands the likely proprietary nature of these business relationships, and notes that, to the extent, if any, such information constitutes trade secrets or other confidential or privileged commercial or financial information, it would not be subject to mandatory public disclosure by the Commission.⁴² Nevertheless, this information is critical

consumers register. As a result, telemarketers obtain the most up-to-date list of telephone numbers each time they access the registry. This allows consumers to see a decrease in telemarketing calls from the first day they register, rather than having to wait for their numbers to be published in a quarterly list. This caused some concern for one commenter, West, that stated: "Without a defined update schedule, the potential exists for numbers to be missed in the three-month window. It takes approximately twenty to twenty-four hours to update the West system with a do-not-call registry consisting of one million records because the upload happens on a real time basis. Given this, there is the potential for a number that is added one day after West downloads the do-not-call registry to be missed in the three month window. This would require West to actually download the list more than quarterly to avoid this potential problem." West-Revised Fee at 2. It is up to the individual seller or telemarketer to determine how frequently it must access the national registry to remain in compliance with the requirement that it use a version of the registry obtained from the Commission not more than three months prior to the date any call is made.

⁴⁰ DMA-Revised Fee at 7-8.

⁴¹ Convergys-Revised Fee at 5-6.

⁴² See Freedom of Information Act Exemption 4, 5 U.S.C. 552(b)(4); FTC Act § 6(f), 15 U.S.C. 46(f).

for effective law enforcement of the "do not call" registry provisions of the Amended TSR, as well as for effective collection of the required fees. Typically, consumers reporting "do-not-call" complaints will have only the name of the seller provided to the consumer during the call. As part of the investigation of such complaints, law enforcement may seek to determine whether the seller made that call on its own behalf, or used the services of a telemarketer. Information provided by sellers and telemarketers to gain access to the national registry is highly relevant to law enforcement. Querying the registry is faster, less expensive, and a potentially more reliable method of obtaining that information than traditional discovery tools, which also likely would eventually result in the disclosure of the same proprietary information. Equally important, to ensure that all sellers pay their appropriate share of the registry fees, it is critical to know the identity of each seller that pays the fee, and on whose behalf each telemarketer or service provider is accessing the national registry. Thus, the Commission will continue to require, in § 310.8(e), that if a person is accessing the national registry on behalf of other sellers, that person must identify each of the other sellers.

D. Seller and Telemarketer Liability

In the Revised Fee NPRM, the Commission proposed, in Section 310.8(a) of the Rule, to 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. The Commission also proposed, in Section 310.8(b), to 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 proposed imposing 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.

This proposed liability engendered a wide range of comment. For example, NCL stated: "The FTC's proposal to hold sellers and any entities acting on their behalf directly liable for compliance with the fee requirements is absolutely crucial to prevent abuses in this regard."⁴³ On the other hand, IMC maintained that liability should not

exist unless a seller or telemarketer calls a consumer who had placed their number on the registry. According to IMC, liability for simply failing to purchase the list is unrelated to any consumer privacy interest and is unconstitutional.⁴⁴

As the Commission stated in the Revised Fee NPRM, 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 remains concerned that not all entities that obtain information from the national registry will pay their fair share of the fees for that information, resulting in increased fees for those entities that do pay. The Commission continues to believe that the most effective way to ensure that all covered sellers pay their fair share of the registry fees is to impose direct liability upon them if they initiate, or cause a telemarketer to initiate, a call to a consumer without first paying the appropriate annual fee.

As for telemarketer liability, a number of commenters suggested that "where a service bureau has reasonably relied on evidence that its seller clients have paid for access, the service bureau should not be held liable for the seller's lack of compliance."⁴⁵ The Commission agrees that telemarketers can rely on the registry for proof of payment as long as that reliance is reasonable given the totality of the circumstances. If a telemarketer or list broker accesses the national registry on behalf of a seller-client and presents that seller-client's unique account number, the telemarketer will be able to determine whether the seller's account is paid up to date, and the extent of access allowed by that payment. The telemarketer or service provider may rely on that information as proof of the seller's payment.

Thus, Sections 310.8(a) and (b) continue to impose direct liability on sellers and telemarketers. The failure of a covered 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 covered seller has paid the appropriate fee prior to initiating an

⁴⁴ IMC-Revised Fee at 5-6.

⁴⁵ DMA-Revised Fee at 15. See also IMC-Revised Fee at 6 (suggesting the Final Fee Rule should "allow a telemarketer to legally rely on a seller providing a working access number as conclusive proof that the seller has properly purchased access to the registry"); ARDA-Revised Fee at 3.

⁴³ NCL-Revised Fee at 1-2.