

outbound telephone call on its behalf are violations of the Amended TSR, and subject the seller and telemarketer to all remedies available for such violations.

E. Corporate Divisions, Subsidiaries, and Affiliates

In the Revised Fee NPRM, the Commission proposed to treat each separate division, subsidiary, or affiliate of a corporation as a separate seller for purposes of Section 310.8. The Commission rejected comments suggesting that separate subsidiaries, divisions, or affiliates of the same corporation be treated as a single seller, stating that such treatment could greatly diminish the number of entities that will pay for access to the national registry, provide an unjust advantage to larger, multi-divisional corporations, and potentially increase the fees required to be paid by smaller, less complex corporate entities.

NCL agreed with the Commission's proposal, stating that allowing separate subsidiaries, divisions, and affiliates "to be considered as one seller, even though they would likely be conducting telemarketing campaigns for quite different products or services, would create an inequitable situation for smaller companies and threaten the financial viability of the registry."⁴⁶ On the other hand, this proposal was significantly criticized by industry commenters.⁴⁷ They noted that companies organize into affiliated entities for tax, regulatory and historical reasons, often beyond their control.⁴⁸ For example, SBC noted that due to statutory and regulatory requirements, it would be required to pay over 44 separate annual fees, even though the services provided by its separate subsidiaries and affiliates are similar and consumers have a reasonable expectation that they are dealing with one company.⁴⁹ West stated that the proposal would cause it problems, since telemarketers such as itself would need to understand the corporate divisional structure of their seller-clients, which is not always clear.⁵⁰ In addition, a number of commenters noted that this proposal appeared contrary to the Commission's assertion, stated in the

Revised Fee NPRM, that the agency did not want to charge the same company multiple times for access to the national registry.⁵¹

Many commenters suggested, as an alternative, that the Commission should use the "consumer expectation" factors set forth in the Amended TSR Statement of Basis and Purpose that apply to the established business relationship exemption to determine whether separate divisions, subsidiaries, or affiliates must pay the annual fee; namely, would consumers reasonably perceive the entity as a single seller based on the nature and type of goods or services sold and the identity of the division, subsidiary or affiliate.⁵² On the other hand, another commenter noted that such factors do not provide sufficient notice as to whether any particular division would be required to separately purchase access to the national registry, and that the final rule must provide "a more definitive definition of the circumstances that would subject multiple divisions to separate fee obligations."⁵³

The Commission agrees that, for purposes of assessing a fee, the test to determine who must pay must be more specific and clear cut than the "consumer expectation" test established for the established business relationship exemption. The "consumer expectation" test works for determining whether a company has violated the established business relationship exemption because it is consumers themselves who will state, in their complaints, that they did not believe the company that called was related to the company with which they had done business in the past. There will be no such consumer arbiters to determine who should pay the fee. The Commission does agree, however, that those factors are appropriate ones to consider in determining which divisions, subsidiaries, or affiliates should pay a fee.

To develop a more bright line test for which entities must pay, while taking the consumer expectation factors into consideration, the Commission will require separate divisions, subsidiaries, or affiliates to pay a separate annual fee for access to the national registry under the following circumstances: (1) The entity is separately incorporated or, for a non-corporate entity such as a partnership, is a similarly distinct legal entity; and (2) the entity has or markets

under a different name. If the name difference reflects only a geographic distinction, that will not be sufficient to require the entity to pay a separate fee for access. For example, "ABC Marketer of Oklahoma, Inc." would not be considered a separate seller, for purposes of the Fee Rule, from its affiliate, "ABC Marketer of Texas, Inc." On the other hand, if the name difference reflects some other distinction, such as product or service, then the separately-incorporated entity would be required to pay a separate fee for access. For example, "John's Books and Games, Inc." would be considered a separate seller from its subsidiary, "John's Computers, Inc."⁵⁴

IV. Calculation of Fees

A. Number of Entities Accessing the National Registry

The first step in establishing the appropriate fees to charge entities that access consumer telephone numbers included in the national registry is to estimate the number of such entities that would be required to pay the fee. In both the User Fee NPRM and the Revised Fee NPRM, the Commission acknowledged that this step is among the most difficult, given the dearth of information about the number of companies currently in the marketplace who make outbound telemarketing calls to consumers.⁵⁵ In the User Fee NPRM, the Commission determined, after examining relevant industry literature and the record in this and past TSR rulemaking proceedings, that the most pertinent information for determining the number of firms that would be required to pay the proposed user fee would be the number of firms that access state do-not-call registries. At that time, the most telemarketing firms that accessed any individual state registry was 2,932. Thus, to propose a realistic fee structure that would ensure sufficient funds would be collected to cover the costs of a national registry, the Commission estimated in the User Fee NPRM that 3,000 entities would pay for access to the information in the national registry. The Commission sought comment and evidence to determine

⁴⁶ NCL-Revised Fee at 2.

⁴⁷ See, e.g., ARDA-Revised Fee at 4; BOA-Revised Fee at 2; DMA-Revised Fee at 11-12; ERA-Revised Fee at 5-6; Household-Revised Fee at 2; IMC-Revised Fee at 5; MPA-Revised Fee at 3-4; SBC-Revised Fee at 2-4; Verizon-Revised Fee at 1-4; VISA-Revised Fee at 2.

⁴⁸ See BOA-Revised Fee at 2; SBC Revised Fee at 2-4; VISA-Revised Fee at 2.

⁴⁹ SBC-Revised Fee at 2. See also Verizon-Revised Fee at 1-4 (Verizon includes roughly two dozen separate corporations that engage in telemarketing).

⁵⁰ West-Revised Fee at 3.

⁵¹ See, e.g., MPA-Revised Fee at 3-4; SBC-Revised Fee at 2-4.

⁵² ARDA-Revised Fee at 4; ERA-Revised Fee at 5-6; MPA-Revised Fee at 3-4; SBC-Revised Fee at 2-4.

⁵³ BOA-Revised Fee at 2.

⁵⁴ The Commission does not believe these changes to the treatment of corporate subsidiaries and affiliates warrant any change to the estimate of the number of entities that will pay for access to the national registry, discussed below. There is no evidence on the record to indicate that the types of subsidiaries and affiliates which no longer will be considered separate sellers under the Final Fee Rule are numerous or widespread throughout the telemarketing industry.

⁵⁵ See User Fee NPRM, 67 FR at 37363-64, Revised Fee NPRM, 68 FR at 16241.