

whether this estimate was realistic and appropriate.

Of the 34 comments received in response to the User Fee NPRM, only one commenter provided any information relevant to this inquiry, stating the number of clients for which it would have to obtain access to the national registry. In addition, a second commenter provided some company-specific information. Based on these comments, the Commission proposed a new estimate of the number of firms that will access the national registry, developed through a calculation using the limited information provided in the comments, combined with relevant industry-wide data available and the Commission's knowledge of the industry. Based on this detailed calculation, set out in the Revised Fee NPRM, the Commission estimated that the total number of firms that would access the national registry would be 7,500.<sup>56</sup>

As the Commission stated in the Revised Fee NPRM, this calculation made a number of significant assumptions based on the best information available to the agency at that time. The Commission asked specific questions about each of these assumptions, seeking information as to their reliability. The Commission also asked commenters to provide any information they could about any and all of these assumptions, including company-specific information and data that could help the agency to refine its estimates of the number of firms that will need to access the national registry.

Once again, the Commission received virtually no comments providing information on the validity of the Commission's assumptions. One "leading teleservices company" stated that one of the Commission's assumptions—sellers that use third-party telemarketers on average employ three different telemarketers to make calls to consumers over the course of a year—was "generally accurate."<sup>57</sup> Two telemarketer commenters stated that most of their clients market nationwide.<sup>58</sup> Otherwise, the comments provided no information on this question whatsoever. Instead, the major industry association commenters faulted the Commission's calculations, claiming that they are "largely without empirical foundation,"<sup>59</sup> "speculative and largely

unsupported" and "completely arbitrary."<sup>60</sup>

As previously stated, the Commission's calculations are based on the best information available to the agency at this time. Although the Commission has requested information on this issue on a number of prior occasions, the very entities that have access to such information have rebuffed the agency at every stage. The Commission has no obligation to "conduct a comprehensive study of the telemarketing industry" to determine the proper fees, as suggested by the DMA.<sup>61</sup> In fact, it has reason to doubt such a study would be productive, given the industry's ongoing reticence in this area. The Commission has undertaken substantial efforts to determine the number of entities that will be required to access the national registry. It has scoured industry literature, reviewed and analyzed numerous rounds of comments on this issue, and used its knowledge of the industry to make basic assumptions about its operation. Given this review and analysis, and the limited information provided in the comments, the Commission continues to believe that its original estimate that 7,500 entities will be required to pay for access to the national registry is reasonable and appropriate.

However, given the new FCC Rules, additional entities, originally exempt from the Amended TSR, now will be required to access the national registry. In the Revised Fee NPRM, the Commission estimated that a total of 10,900 firms engage in outbound telemarketing to consumers.<sup>62</sup> The Commission reduced that number to account for firms that are engaged in charitable solicitations, firms that are calling directly from sellers exempt from FTC regulation, and firms that make only intrastate calls. Of that group, after the adoption of the FCC Rules, only firms that engage in charitable solicitations remain exempt from the requirement to access the national registry. The Commission estimates that 900 entities engage exclusively in such charitable solicitations, resulting in our revised estimate that 10,000 entities will be required to access the national registry.

#### **B. Access by Area Code; Small Business Access**

In both the User Fee NPRM and the Revised Fee NPRM, the Commission proposed a fee structure based on the

number of different area codes of data that an entity wished to use annually.<sup>63</sup> The Commission received no comments on this issue in response to the Revised Fee NPRM. As a result, the Commission will continue to charge for access to the national registry based on the number of area codes of information an entity requests.

As for small business access to the national registry, the Commission proposed, in both the User Fee NPRM and the Revised Fee NPRM, to provide free registry access to any firm wishing to obtain data from only one to five area codes.<sup>64</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>65</sup> In the Revised Fee NPRM, the Commission sought 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 well as on the appropriate level of free access.

The Commission received few comments in response to this proposal in the Revised Fee NPRM. NCL found the Commission's proposal "reasonable."<sup>66</sup> S&K, on the other hand, stated that the Commission should grant access to five or maybe even ten area codes for free, and "employ a graduated system that places the majority of the fees on the largest scale sellers or telemarketers, as determined by a mixture of revenues, profits, subsidiaries and overall cost structure."<sup>67</sup> In contrast, ATA contended that the proposed fee was unconstitutional precisely because it would impose differential treatment, shift the burden to certain sellers to pay for fees in excess of the benefits they would receive, and thus target and penalize the largest entities more than simply favor small businesses.<sup>68</sup> ATA

<sup>63</sup> See User Fee NPRM, 67 FR at 37364; Revised Fee NPRM, 68 FR at 16242.

<sup>64</sup> See User Fee NPRM, 67 FR at 37364; Revised Fee NPRM, 68 FR at 16243–44.

<sup>65</sup> See also Section VII, 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>66</sup> NCL-Revised Fee at 2.

<sup>67</sup> S&K-Revised Fee at 2.

<sup>68</sup> ATA-Revised Fee at 10–11.

<sup>56</sup> See Revised Fee NPRM, 68 FR at 16241–42.

<sup>57</sup> IMC-Revised Fee at 1, 4.

<sup>58</sup> Id. at 4–5; West-Revised Fee at 3.

<sup>59</sup> DMA-Revised Fee at 8.

<sup>60</sup> ERA-Revised Fee at 7–8. See also MPA-Revised Fee at 6.

<sup>61</sup> DMA-Revised Fee at 8–10.

<sup>62</sup> See Revised Fee NPRM, 68 FR at 16242.