

B. Original Rule.

The FTC adopted the original Rule on August 16, 1995.⁸ The Rule, which became effective on December 31, 1995, requires that telemarketers promptly tell each consumer they call several key pieces of information: (1) the identity of the seller; (2) the fact that the purpose of the call is to sell goods or services; (3) the nature of the goods or services being offered; and (4) in the case of prize promotions, that no purchase or payment is necessary to win.⁹ Telemarketers must, in any telephone sales call, also disclose cost and other material information before consumers pay.¹⁰ In addition, the original Rule requires that telemarketers have consumers' express verifiable authorization before using a demand draft (or "phone check") to debit consumers' bank accounts.¹¹ The original Rule prohibits telemarketers from calling before 8:00 a.m. or after 9:00 p.m. (in the time zone where the consumer is located), and from calling consumers who have said they do not want to be called by or on behalf of a particular seller.¹² The original Rule also prohibits misrepresentations about the cost, quantity, and other material aspects of the offered goods or services, and the terms and conditions of the offer.¹³ Finally, the original Rule bans telemarketers who offer to arrange loans, provide credit repair services, or recover money lost by a consumer in a prior telemarketing scam from seeking payment before rendering the promised services,¹⁴ and prohibits credit card laundering and other forms of assisting and facilitating fraudulent telemarketers.¹⁵

The Rule expressly exempts from its coverage several types of calls, including calls where the transaction is completed after a face-to-face sales presentation, calls subject to regulation under other FTC rules (e.g., the Pay-Per-Call Rule,¹⁶ or the Franchise Rule),¹⁷ calls initiated by consumers that are not in response to any solicitation, calls initiated by consumers in response to direct mail, provided certain disclosures are made, and calls initiated by consumers in response to advertisements in general media, such

as newspapers or television.¹⁸ Lastly, catalog sales are exempt, as are most business-to-business calls, except those involving the sale of non-durable office or cleaning supplies.¹⁹

C. Rule Review and Request for Comment.

The Telemarketing Act required that the Commission initiate a Rule Review proceeding to evaluate the Rule's operation no later than five years after its effective date of December 31, 1995, and report the results of the review to Congress.²⁰ Accordingly, on November 24, 1999, the Commission commenced the mandatory review with publication of a **Federal Register** notice announcing that Commission staff would conduct a forum on January 11, 2000, limited to examination of issues related to the "do-not-call" provision of the Rule, and soliciting applications to participate in the forum.²¹

On February 28, 2000, the Commission published a second notice in the **Federal Register**, broadening the scope of the inquiry to encompass the effectiveness of all the Rule's provisions. This notice invited comments on the Rule as a whole and announced a second public forum to discuss the provisions of the Rule other than the "do-not-call" provision.²² In response to this notice, the Commission received 92 comments from representatives of industry, law

enforcement, and consumer groups, as well as from individual consumers.²³

The commenters generally praised the effectiveness of the TSR in combating the fraudulent practices that had plagued the telemarketing industry before the Rule was promulgated. They also strongly supported the Rule's continuing role as the centerpiece of federal and state efforts to protect consumers from interstate telemarketing fraud. Commenters consistently stressed that it is important to retain the Rule. However, commenters were less sanguine about the effectiveness of the Rule's provisions dealing with consumers' right to privacy, such as the "do-not-call" provision and the provision restricting calling times. They also identified a number of areas of continuing or developing fraud and abuse, as well as the emergence of new technologies that affect telemarketing for industry members and consumers alike. Commenters identified several changes in the marketplace that had occurred in the five years since the Rule was promulgated and that threatened the Rule's effectiveness. Those changes included increased consumer concern about personal privacy,²⁴ the development of novel payment methods,²⁵ and the increased use of

²³ A list of the commenters and the acronyms used to identify each commenter who submitted a comment in response to the February 28 Notice is attached hereto as Appendix A. Appendix B is a list of the commenters and the acronyms used to identify each commenter who submitted a comment in response to the Notice of Proposed Rulemaking ("NPRM"), discussed below, including supplemental comments and comments submitted on the user fee proposal. References to comments are cited by the commenter's acronym followed by the appropriate page designation. "RR" after the commenter's acronym indicates that the comment was received in response to the Rule Review. "NPRM" after the commenter's acronym indicates that the comment was received in response to the NPRM. "Supp." after the commenter's acronym indicates that the comment was received as a Supplemental Comment. "User Fee" after the commenter's acronym indicates the comment was submitted in response to the request for comments on the Commission's user fee proposal.

²⁴ The past several years have seen a greater public and governmental focus on the "do-not-call" issue. Related to the "do-not-call" issue is the proliferation of technologies, such as caller identification service, that assist consumers in managing incoming calls to their homes. Similarly, privacy advocates have raised concerns about technologies used by telemarketers (such as predictive dialers and deliberate blocking of caller identification information) that hinder consumers' attempts to screen calls or make requests to be placed on a "do-not-call" list.

²⁵ The growth of electronic commerce and payment systems technology has led, and likely will continue to lead, to new forms of payment and further changes in the way consumers pay for goods and services they purchase through telemarketing. In addition, billing and collection systems of telephone companies, utilities, and mortgage lenders are becoming increasingly available to a

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⁸ 60 FR at 43842 (codified at 16 CFR 310 (1995)).

⁹ 16 CFR 310.4(d).

¹⁰ 16 CFR 310.3(a)(1).

¹¹ 16 CFR 310.3(a)(3).

¹² 16 CFR 310.4(c), and 310.4(b)(1)(ii).

¹³ 16 CFR 310.3(a)(2).

¹⁴ 16 CFR 310.4(a)(2)-(4).

¹⁵ 16 CFR 310.3(b) and (c).

¹⁶ Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 ("Pay-Per-Call Rule"), 16 CFR Part 308.

¹⁷ 16 CFR 310.6(a)-(c).

¹⁸ 16 CFR 310.6(d)-(f).

¹⁹ 16 CFR 310.2(u) (pursuant to 15 U.S.C. 6106(4) (catalog sales)); 16 CFR 310.6(g) (business-to-business sales). In addition to these exemptions, certain entities including banks, credit unions, savings and loans, common carriers engaged in common carrier activity, non-profit organizations, and companies engaged in the business of insurance regulated by state law are not covered by the Rule because they are specifically exempt from coverage under the FTC Act. 15 U.S.C. 45(a)(2); *but see* discussion below concerning the USA PATRIOT Act amendments to the Telemarketing Act. Finally, a number of entities, and individuals associated with them, that sell investments and are subject to the jurisdiction of the Securities and Exchange Commission or the Commodity Futures Trading Commission are exempt from the Rule. 15 U.S.C. 6102(d)(2)(A); 6102(e)(1).

²⁰ 15 U.S.C. 6108.

²¹ 64 FR 66124 (Nov. 24, 1999). Comments regarding the Rule's "do-not-call" provision, § 310.4(b)(1)(ii), as well as the other provisions of the Rule, were solicited in a later **Federal Register** notice on February 28, 2000. *See* 65 FR 10428 (Feb. 28, 2000). Seventeen associations, individual businesses, consumer groups, and law enforcement agencies were selected to engage in the forum's roundtable discussion ("Do-Not-Call" Forum), which was held on January 11, 2000, at the FTC offices in Washington, D.C. References to the "Do-Not-Call" Forum transcript are cited as "DNC Tr." followed by the appropriate page designation.

²² 65 FR 10428 (Feb. 28, 2000) (the "February 28 Notice"). The Commission extended the comment period from April 27, 2000, to May 30, 2000. 65 FR 26161 (May 5, 2000).