

telemarketers selling these exempted goods and services to comply with § 310.4(a)(1) (prohibiting threats, intimidation, or use of profane or obscene language), § 310.4(a)(7) (requiring transmission of Caller ID), § 310.4(b) (prohibiting abusive pattern of calls and requiring compliance with “do-not-call” provisions), and § 310.4(c) (calling time restrictions).

The NPRM pointed out that the Rule Review record contained ample evidence of consumers’ increasing frustration with unwanted telemarketing calls, including those soliciting for pay-per-call services or sales appointments.<sup>912</sup> A number of participants in the Rule Review Forum concurred that the “do-not-call” provision of the Rule should also be applicable to calls where a seller attempts to set up an in-person sales meeting at a later date.<sup>913</sup> For these reasons, the Commission proposed making face-to-face, franchise, and pay-per-call transactions subject to the “do-not-call,” calling time restriction, and certain other abusive practices provisions in § 310.4.

Consumer and privacy advocates, as well as state regulators, supported the Commission’s proposal to make these transactions subject to the “do-not-call” and certain other provisions of § 310.4.<sup>914</sup> They recommended that, in order to be effective, a “do-not-call” registry should have as few exemptions as possible. PRC pointed out:

[T]elemarketing as a business practice transcends the boundaries of regulated and unregulated industries. So-called “cold calling” is a common marketing technique, used by the most established regulated entity down to the fraudulent “boiler room” that is here today and gone tomorrow. Each type of entity—and all those in between that make unwanted telephone calls to a private home—contribute to privacy invasions, costs for devices to stop the invasions, and the overall annoyance factor

§ 310.6(b)(3) to exempt charitable solicitations that entail a face-to-face meeting before the donor pays.

<sup>912</sup> 67 FR at 4516-18. One consumer who spoke during the public participation portion of the DNC Forum noted frustration about her inability to invoke her right not to be called again by a company that called her to solicit a sales appointment. *See generally* DNC Tr. at 241-46 (Mey). *See also* *FTC v. Access Resource Servs.*, No. 02-60226 CIV GOLD (S.D. Fla. filed Feb. 13, 2002) (regarding Miss Cleo’s psychic services where psychics continued to call consumers despite repeated requests from the consumer to stop calling).

<sup>913</sup> *See* RR Tr. at 291-96.

<sup>914</sup> EPIC-NPRM at 20; PRC-NPRM at 3-4 (there should be no exemptions whatsoever from “do-not-call” registry); FCA-NPRM at 1-2 (intrastate calls should not be exempt); NAAG-NPRM at 57; NFDA-NPRM at 5 (in connection with the face-to-face transaction exemption, telemarketers should also be required to comply with the oral disclosure requirements of § 310.4(d)).

voiced so strongly by the public. For this reason, telemarketing abuses can only be curtailed if the practice itself—rather than the type of business involved—is subject to the Commission’s rules.<sup>915</sup>

The Commission received no comments opposing application of the “do-not-call” and other abusive practices provisions to pay-per-call transactions. With regard to transactions subject to the Commission’s Franchise Rule, industry commenters expressed concern about ambiguities on how the “do-not-call” and calling time restrictions would be applied when inbound calls are converted to outbound calls.<sup>916</sup> The Commission has addressed this issue in its discussions above of the definition of “outbound call” and required disclosures in upsell transactions. IFA also noted that compliance with a national “do-not-call” registry would be costly, particularly if the registry does not contain an exemption for established business relationships and does not preempt state “do-not-call” laws.<sup>917</sup> The Commission has addressed these issues in its discussion above regarding the national “do-not-call” registry.

*Face-to-face transactions:* Industry commenters generally opposed making face-to-face transactions subject to the “do-not-call,” calling time restriction, and certain other abusive practices provisions.<sup>918</sup> These commenters argued that face-to-face transactions should continue to be exempt because their practices are already heavily regulated by the states and by the Commission through other FTC rules and thus are less susceptible to abusive practices.<sup>919</sup> However, the national “do-not-call” registry is not focused on fraud, but rather on consumer privacy. The Commission agrees that the incidence of fraud may be diminished in face-to-face transactions, where the transactions are subject to regulation by other Commission rules or by state regulations. For that reason, the Commission has retained the exemption for face-to-face transactions from the provisions of the Rule that address deceptive or other abusive practices. However, the commenters failed to

<sup>915</sup> PRC-NPRM at 3-4.

<sup>916</sup> Car Wash Guys-NPRM at 51-56; IFA-NPRM at 2; NFC-NPRM at 3.

<sup>917</sup> IFA-NPRM at 2.

<sup>918</sup> *See generally* Craftmatic-NPRM; DSA-NPRM; NAR-NPRM; ICFA-NPRM at 2-3; Insight-NPRM. *See also* June 2002 Tr. III at 157-226. *But see* ARDA-NPRM at 2, 7-9, which supports creation of a national “do-not-call” registry as long as the registry preempts state laws and the Commission provides an exemption for established business relationships.

<sup>919</sup> *See, e.g.* DSA-NPRM at 6-7; NAR-NPRM at 4; June 2002 Tr. III 157-226.

provide arguments showing why they should be exempted from regulations covering the particular abusive practices set forth in the Commission’s proposal—*i.e.*, a national “do-not-call” registry, calling time restrictions, the prohibition against denying or interfering with a consumer’s right to be placed on a “do-not-call” list, the requirement to transmit Caller ID information, and the prohibition against threats and intimidation.

NAR argued that Congress intended the TSR to address abusive, deceptive, and fraudulent telemarketing practices, not to regulate or prohibit a single telephone call from a real estate professional that simply provides information to a consumer.<sup>920</sup> Transactions subject to the Commission’s amended Rule (and thus subject to the national “do-not-call” registry) are those that fall within the definition of “telemarketing,” *i.e.*, “a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call.”<sup>921</sup> A single, isolated telephone call would not be part of a plan, program, or campaign and thus would not fall within the definition of “telemarketing.” Furthermore, it is unlikely that the majority of real estate agents conduct campaigns of outbound calls to solicit potential customers who live out-of-state. Most of the outbound solicitation calls made by real estate agents are probably intrastate calls that would be excluded from the Rule’s coverage. However, if a real estate agent routinely places outbound calls to solicit potential customers in other states, those calls, in the aggregate, would fall within the definition of “a plan, pattern, or campaign” of outbound calls and would be subject to the Rule.

NAR also argued that a call to set up a meeting does not fall within the definition of “telemarketing” because such calls do not involve the inducement to purchase using the telephone, but rather non-deceptive

<sup>920</sup> NAR-NPRM at 1-2. Similarly, DSA notes that many of the calls by direct sellers involve single telephone calls to individuals with whom the seller has a personal relationship. DSA maintains that calls to individuals with whom an on-going commercial or personal relationship exists are reasonable, frequently welcome, and expected by the consumer, and therefore suggests that the Commission provide an exemption for a prior business or personal relationship. DSA-NPRM at 5-8. As discussed above in the section regarding the national “do-not-call” registry, the amended Rule provides an exemption for “established business relationships.”

<sup>921</sup> Amended Rule § 310.2(cc).