

“deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.”¹⁰²⁸ Other amendments, relating to the solicitation of charitable contributions through telemarketing, are made pursuant to the USA PATRIOT Act.¹⁰²⁹

B. Summary of the Significant Issues.

The public comments on the proposed Rule are discussed above throughout the SBP, as are the changes that have been made in response to comments indicating that the costs of some of the proposed amendments would be excessive. Many of the commenters did not focus specifically on the costs faced by small businesses relative to those that would be borne by other firms. Rather, they argued that the costs to be borne by all firms—including small firms—would be excessive. In response to these comments, the Commission has made a number of modifications in the amended Rule. These changes should significantly reduce the burden on all businesses, including small businesses.

Calls permitted where there is an existing business relationship.

One proposal that commenters contended would impose particularly great costs on small businesses was the proposed national “do-not-call” registry. Commenters were particularly concerned with the requirement that businesses could only call consumers who had put their telephone numbers on the “do-not-call” registry if they had obtained the consumer’s express verifiable authorization to make calls to that consumer. For example, Community Bankers expressed the concern that its members would be unable to use outside telemarketers to contact their existing customers. This would, they suggested, force community banks to do their own telemarketing, at higher cost, because calls made by third party telemarketing bureaus would be covered by FTC regulations.¹⁰³⁰ Another commenter noted that small firms may not have the recording equipment that would be needed to establish that they had obtained the consumer’s express verifiable authorization to accept calls from that seller.¹⁰³¹

Furthermore, many small businesses may not keep their customer records in

a form that would permit them to economically compare the telephone numbers of their customers with those on the national “do-not-call” registry and avoid calling those numbers that appear on the registry.¹⁰³² According to NRF, converting their customer lists to a form that can be feasibly compared to the numbers on the national “do-not-call” registry could cost small businesses up to \$1.00 per name. Furthermore, even after the records are converted, the NRF reports that the cost of eliminating names that appear on the “do-not-call” registry would be higher for small firms than for larger ones. Whereas, it might cost \$0.01 per name to purge a large list, the cost for a small list is put at \$0.10 to \$0.15 per name.¹⁰³³

As discussed above in the SBP, the Commission has decided to alter the “do-not-call” provision proposed in the NPRM. One of the changes is to create an exemption that will allow a seller and its telemarketer to call consumers with whom the seller has an established business relationship, even if the consumer has placed his or her telephone number on the “do-not-call” registry.¹⁰³⁴ The effect of this change will be that businesses—and in particular small businesses—will not need to check their lists of existing customers against the national “do-not-call” registry. There will also be no need to obtain express verifiable permission before calling someone with whom the business has an established business relationship. Thus, most, if not all, of the costs described above will not be faced by small businesses.¹⁰³⁵

Quarterly access to “do-not-call” registry.

In addition, as discussed above, the Commission has decided not to require

sellers and telemarketers to scrub their calling lists against the national “do-not-call” registry on a monthly basis. Instead, such updating will only be required on a quarterly basis.¹⁰³⁶ Commenters argued that this change was necessary to reasonably limit the costs imposed by the “do-not-call” registry.¹⁰³⁷ It should significantly reduce the expense associated with complying with the “do-not-call” requirements since firms will not need to scrub their lists twelve times per year at an expense that has been estimated at around \$100 per seller or telemarketer each time its lists must be scrubbed.¹⁰³⁸

Harmonization with state “do-not-call” regulations.

Many industry representatives argued that in order to avoid imposing an undue burden on business, particularly small businesses, it was essential that the proposed national “do-not-call” registry not simply be added on to the existing set of state “do-not-call” lists. Rather, in the view of industry, the national registry should incorporate existing and any future state lists and all of the lists should operate under a single, unified set of regulations.¹⁰³⁹ While many industry representatives argued that the way to achieve the necessary level of coordination between the state and federal lists was for the Commission to preempt inconsistent state regulations, the Commission has declined to do so at this time. Instead, as discussed above in the SBP, the Commission is engaged in a process of active consultation with the states that have enacted “do-not-call” statutes and with the FCC in order to develop procedures that will result in one harmonized “do-not-call” registry.¹⁰⁴⁰ Once fully effectuated, this harmonization should substantially reduce the burden of having to scrub against a large number of separate lists.

For-profit fundraisers exempted from national “do-not-call” registry compliance.

The burden placed on small charities by the “do-not-call” requirements has also been significantly reduced. As discussed above, the Commission has determined that for-profit firms that make fundraising calls on behalf of

¹⁰²⁸ 15 U.S.C. 6102.

¹⁰²⁹ Pub. L. 107-56 (Oct. 26, 2001).

¹⁰³⁰ Community Bankers-User Fee at 3.

¹⁰³¹ AmEx-NPRM at 2. One small company reported that in order to comply with Oregon’s “do-not-call” requirements, they had been forced to spend \$12,500 to get a computer program written and have hired two additional employees at a cost of approximately \$800 per week. (Celebrity Prime Foods-User Fee at 1).

¹⁰³² See, e.g., Ameriquest-NPRM at 9.

¹⁰³³ NRF-NPRM at 4-5. ERA placed the cost of comparing a company’s calling lists against the “do-not-call” registry at \$3 to \$5 per 1,000 names, while CCC suggested that the cost would be in the neighborhood of \$50 per hour and that it would take two hours for the average firm to compare their calling lists to the national “do-not-call” registry and delete from the company’s lists any numbers that appear on the “do-not-call” registry. ERA-NPRM at 36; Miller Study at 11-12.

¹⁰³⁴ See discussion of § 310.4(b)(1)(iii) above.

¹⁰³⁵ While small businesses that wish to telemarket their products to consumers who are not existing customers will still have to check their calling lists against the “do-not-call” registry, they will not necessarily have to perform this work themselves. It is the Commission’s understanding that small businesses often find it more economical to employ telemarketing bureaus who make such calls on the behalf of these businesses. A seller that employs a telemarketing bureau can arrange to have the telemarketer compare the names and/or telephone numbers on its lists against the “do-not-call” registry.

¹⁰³⁶ Amended Rule § 310.4(b)(3).

¹⁰³⁷ Household Bank-User Fee at 2.

¹⁰³⁸ Miller Study at 11-12.

¹⁰³⁹ See, e.g., Household Bank-User Fee at 2-3; ARDA-User Fee at 1; Ameriquest-User Fee at 9-10; ICIA-User Fee at 1; NEMA-User Fee at 4.

¹⁰⁴⁰ This approach is consistent with the recommendation of the Small Business Administration (“SBA”), Office of Advocacy. See SBA-User Fee at 5-6.