

As discussed in the SBP, the Commission has determined to create a safe harbor to the prohibition on abandoned calls. This safe harbor will allow firms to avoid being cited for violation of this provision of the Rule provided they play a recording that identifies the seller and provides the seller's phone number when a sales representative is not available to handle a call and provided that this occurs in three percent or less of calls that are answered by a consumer. This change should substantially reduce the burden that would have been imposed by a total prohibition on abandoned calls.¹⁰⁵⁶

Regulation of upselling.

Finally, the Commission has eliminated an unintended burden that would have resulted from treating any upsell as a separate outbound telemarketing call. As several people have noted, this would have required telemarketers who receive inbound calls to comply with the "do-not-call" provisions of the Rule as well as the calling hours provision before offering any upsell product.¹⁰⁵⁷ Such a requirement would have imposed substantial burdens on sellers who receive inbound telemarketing calls. However, it was never the intention of the Commission to require compliance with either the "do-not-call" provisions or the calling hour provisions in this context,¹⁰⁵⁸ and this requirement has been eliminated in the amended Rule which provides a separate definition of an upsell and clarifies that these provisions do not apply to an upsell.

C. Description of Small Entities to Which the Rule Will Apply.

This Rule will primarily impact firms that make telephone calls to consumers in an attempt to sell their products or services or entities that make calls to

solicit charitable contributions. That is, the Rule will primarily impact entities that make outbound calls to consumers. Also affected will be firms that provide such services for others on a contract basis. It has been estimated that outbound calls to consumers resulted in total sales of \$274.2 billion in 2001, and that the telemarketing industry that markets to consumers employs 4.1 million workers.¹⁰⁵⁹

The number of firms making such outbound telemarketing calls, and the number that qualify as small entities, cannot be reliably estimated. According to the Office of Advocacy of the SBA, United States Census data shows that there are 2,305 firms that are identified as telemarketing bureaus. Of these, 1,279 are classified as being small businesses because they have sales of less than \$5 million per year.¹⁰⁶⁰ These are firms that provide telemarketing services for other firms. However, not all of these firms will be impacted by the Rule to the same extent. According to NAICS, firms that are classified as telemarketing bureaus include firms that provide "telemarketing services on a contract or fee basis for others, such as (1) promoting clients' products or services by telephone, (2) taking orders for clients by telephone, and (3) soliciting contributions or providing information for clients by telephone."¹⁰⁶¹ Firms that take orders for clients by telephone, as well as some firms that provide information for their clients by telephone, are going to be responding to calls made by consumers and not making calls themselves. Unless such firms are engaging in upselling of products or services that involve a "free-to-pay conversion" feature, they will not be impacted by the proposed Rule to any significant extent.

In addition to firms that provide telemarketing services for others, the Rule will have an effect on firms that use telemarketing as a way to market their own products. These may include, among others, retailers, manufacturers, and financial service providers.¹⁰⁶² The number of such firms—and the number of those that are classified as small businesses—cannot be determined

because such firms generally think of themselves as producers or sellers of particular products and not as telemarketers. Similarly, in the available statistics, these firms will be classified as producers or sellers of particular products and not as telemarketers.¹⁰⁶³

D. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule.

As discussed above in the SBP, the amended Rule alters some collection of information requirements. The effect of those requirements on all businesses is discussed in detail in the PRA section of this Notice. First, the amended Rule requires firms that use preacquired account information in conjunction with a "free-to-pay conversion" feature to tape record all such transactions to show that they have obtained the consumer's express informed consent to charge the consumer's account.¹⁰⁶⁴ Section 310.5(a)(5) requires that the seller or telemarketer maintain copies of such audio recordings for 24 months. Similarly, § 310.5(a)(5) requires that firms retain for 24 months copies of any written express agreements received from consumers permitting the company to call the consumer even though the consumer's phone number is included on the "do-not-call" registry.¹⁰⁶⁵ Finally, the amended Rule extends the recordkeeping requirements of § 310.5 to include charitable solicitations in a non-sales context, as required by the USA PATRIOT Act. All other amendments to the Rule relate to the Rule's disclosures or other compliance requirements and are necessary to prevent telemarketing fraud and abuse.

The classes of small entities affected by the amendments include telemarketers or sellers engaged in acts or practices covered by the Rule. The types of professional skills required to comply with the Rule's recordkeeping, disclosure, or other requirements would include attorneys or other skilled labor needed to ensure compliance.

E. Steps Taken to Minimize Impact on Small Entities.

As discussed above, the Telemarketing Act directs the Commission to enact "rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or

efficiency losses from prohibiting abandoned calls in that the five calls per hour figure is based on the assumption that calls are dialed "manually." This suggests that the estimate may be based on an operation in which the individual sales representative actually dials the number to be called. A requirement not to abandon calls would not require that sales representatives dial their own calls. It would still be possible, if it were cost efficient, to use computer systems to dial the calls, and this could generate some efficiencies relative to manual dialing. What would not be permitted is to dial a call prior to the time a sales representative becomes available or to dial more than one call at a time for each available sales representative.

¹⁰⁵⁶ As CCC testified at the workshop, "[W]hat we found out is that ... below 5 percent or 4 percent or 3 percent [rate of abandonment], you're really beginning to raise costs...." June 2002 Tr. I at 212 (CCC).

¹⁰⁵⁷ See, e.g., June 2002 Tr. I at 210 (CCC); June 2002 Tr. II at 214-15 (DMA).

¹⁰⁵⁸ June 2002 Tr. I at 210-11 (FTC); June 2002 Tr. II at 215 (FTC).

¹⁰⁵⁹ DMA-NPRM at 5. ATA estimates employment in business-to-consumer telemarketing at 5.4 million. ATA-NPRM at 3.

¹⁰⁶⁰ SBA-User Fee at 3. The size of telemarketing bureaus that qualify as being small businesses was increased to \$6 million as of October 2, 2002. See SBA, Small Business Size Standards Matched to North American Industry Classification System (NAICS), <http://www.sba.gov/size/sizetable2002.html>.

¹⁰⁶¹ U.S. Census Bureau, 1997 NAICS Definitions, 561 Administrative and Support Services, <http://www.census.gov/pub/epcd/naics/NDEF561.HTM>.

¹⁰⁶² ATA-User Fee at 2.

¹⁰⁶³ Some commenters suggested that small firms are more likely to rely on telemarketing to sell their products because they cannot afford other, more expensive forms of advertising. See, e.g., Ameriquest-User Fee at 6; ATA-NPRM at 4.

¹⁰⁶⁴ See § 310.4(a)(6)(i)(C).

¹⁰⁶⁵ The provision allowing for such consent is at § 310.4(b)(1)(iii)(B)(i).