

practices.”¹⁰⁶⁶ Each of the amendments in the amended Rule is intended to better protect consumers from deceptive and abusive telemarketing practices. In order to achieve this end, the Commission believes that it is necessary to enact regulations that cover small and large firms equally. Based on the Commission’s enforcement experience, it is clear that many of the firms that engage in fraudulent telemarketing activities are small firms. A failure to include such small firms within the requirements of the regulations would, therefore, fail to prohibit deceptive practices by the types of firms that account for a significant share of the problems the Commission encounters.

At the same time, as discussed above both in the SBP and in the “Summary of Significant Issues Raised by the Public Comments in Response to the IRFA,” the Commission has sought to minimize as much as possible the burdens imposed on all affected entities, including small businesses. In general, the changes made in response to public comments have further reduced the burdens. The amendments to the disclosure and recordkeeping provisions of the TSR are generally consistent with the business practices that most sellers and telemarketers, regardless of size, would choose to follow, even absent legal requirements.

The Commission has taken care in developing the amendments to the Rule to set performance standards, which establish the objective results that must be achieved by regulated entities, but do not establish a particular technology that must be employed in achieving those objectives. For example, the Commission does not specify the form in which records required by the TSR must be kept. It also allows a seller and a telemarketer making calls on the seller’s behalf to allocate between themselves the responsibility for maintaining required records.

VI. National Environmental Policy Act

Under the Commission’s Rules of Practice implementing the National Environmental Policy Act of 1969 (“NEPA”),¹⁰⁶⁷ no “major action significantly affecting the quality of the human environment will be instituted unless an environmental impact statement (‘EIS’) has been prepared,” if such is required.¹⁰⁶⁸ To determine if such an impact statement is required, the Commission generally prepares an “environmental assessment.” However, such an environmental assessment is

not necessary in every circumstance. For example, in circumstances when the “environmental effects, if any, would appear to be . . . so uncertain that environmental analysis would be based on speculation,” no “environmental assessment” is required.¹⁰⁶⁹ The Commission believes, for the reasons set forth below, that this exception is applicable in the instant case, and that because the environmental effects, if any, of the amended TSR are uncertain and based on speculation, the Commission is not required to prepare an environmental assessment.

The amended TSR would modify the original Rule in several ways. Each of these is outlined above in Section I (F), which summarizes the changes in the amended Rule. However, the only comment that raised the issue of the environmental effects of the Rule did so solely with regard to the national “do-not-call” registry provision. Because the Commission does not believe that any other modification in the amended Rule implicates any impact on the environment, the analysis is confined to this provision.

The “do-not-call” registry provision will establish a centralized means for consumers across the country to notify sellers and telemarketers of their preference not to receive unsolicited outbound telemarketing calls.¹⁰⁷⁰ As discussed in greater detail above, in the section discussing § 310.4(b)(1)(iii), the “do-not-call” registry provision supplements the original Rule’s provision that allows consumers to exercise their “do-not-call” rights on a company-by-company basis. The Commission determined, based on the extensive record evidence from the rulemaking proceeding, that a national “do-not-call” registry is necessary to effectuate the purposes of the Telemarketing Act.¹⁰⁷¹

The comment that addressed the potential environmental impact of the proposed national “do-not-call” registry stated, in relevant part,

For obvious reasons the FTC’s proposed action may drastically reduce the ability to sell goods and services via telemarketing. In addition, and for the reasons stated above [wherein the commenter argues that the national “do-not-call” registry will negatively impact inbound call centers who rely upon a combination of inbound and outbound

calling to survive],¹⁰⁷² consumers’ ability to themselves purchase via catalogs may be compromised as well, as “call centers” are forced to close in the face of insufficient “outbound telemarketing work.” Either event would force consumers to climb into their cars and return to the mall for their wares, a result that itself would increase gas consumption and cause more air pollution.¹⁰⁷³

DeHart concluded, based on its belief that the “do-not-call” registry provision would increase the number of consumers driving to shopping at malls as a result of the implementation of the national “do-not-call” registry provision, that the Commission must prepare an EIS or, at minimum, an environmental assessment.¹⁰⁷⁴

The underlying premise in the DeHart comment, that a national “do-not-call” registry will have a negative impact on call centers that rely in part on inbound telemarketing and in part on outbound telemarketing for their livelihood, is unsupported in the comment. No evidence, other than a mere allusion to a study that purportedly shows that some firms’ cost of providing inbound call center service would increase if their outbound telemarketing load decreased, is provided by DeHart, nor is support for this proposition found in the record as a whole. Therefore, the fundamental assumption on which DeHart’s argument is based is one that appears to be mere speculation.

The Commission believes that speculation, and indeed, logic, could as easily lead to the conclusion that a diminution in outbound calling, resulting from consumers’ decision to place their telephone numbers on the national “do-not-call” registry, could lead sellers to use other channels of distance marketing to sell their products, including channels that would significantly increase inbound telemarketing, such as direct mail, catalog sales, and Internet sales. This would mean that, even if many consumers utilize the “do-not-call” registry, inbound calling may benefit, not suffer, from such a result. Moreover, DeHart cites no authority for the

¹⁰⁷² DeHart-NPRM at 2-3 (although the commenter alludes to a study that corroborates its assertion on this point, no title or citation is provided for such study).

¹⁰⁷³ DeHart-NPRM at 3.

¹⁰⁷⁴ *Id.* The Commission believes that this allegation would constitute, at most, “indirect effects” under the NEPA implementing regulations, or those “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 CFR 1508.8(b). The Commission does not believe that the “do-not-call” registry provision has been or could reasonably be alleged to have “direct effects” or those “caused by the action and occur at the same time and place.” 40 CFR 1508.8(a).

¹⁰⁶⁶ 15 U.S.C. 6102(a)(1).

¹⁰⁶⁷ 42 U.S.C. 4321 *et seq.*

¹⁰⁶⁸ 16 CFR 1.81, 1.82.

¹⁰⁶⁹ 16 CFR 1.83. See also *National Citizens Comm. for Broad. v. FCC*, 567 F.2d 1095, 1098 n.3 (D.C. Cir. 1977).

¹⁰⁷⁰ See discussion of § 310.4(b)(1)(iii) above.

¹⁰⁷¹ 15 U.S.C. 6102(a)(3)(A) (mandating that the Commission include in its Rule “a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy”).