

FEDERAL TRADE COMMISSION

RIN: 3084-0098

16 CFR Part 310

Telemarketing Sales Rule

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this document, the Federal Trade Commission (“FTC” or “Commission”), pursuant to a directive in the Consolidated Appropriations Act of 2004, seeks comment on amendment of the Telemarketing Sales Rule (“TSR”) to require sellers and telemarketers, in complying with the Do Not Call provisions of the TSR, to use a version of the National Do Not Call Registry obtained from the Commission no more than thirty (30) days prior to the date any call is made.

DATES: Written comments will be accepted until February 26, 2004. **Due to the time constraints of this rulemaking procedure, the Commission does not contemplate any extensions of this comment period or any additional periods for written comments or rebuttal comment. Comments that are not timely submitted and directly responsive to the specific questions set forth in Section G of this document may not be considered.**

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to “Monthly Registry Access, Project No. R411001” to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on

the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room 159-H (Annex D), 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Comments containing confidential material must be filed in paper form, as explained in the Supplementary Information section. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

An electronic comment can be filed by (1) clicking on <http://www.regulations.gov>; (2) selecting “Federal Trade Commission” at “Search for Open Regulations;” (3) locating the summary of this Notice; (4) clicking on “Submit a Comment on this Regulation;” and (5) completing the form. For a given electronic comment, any information placed in the following fields -- “Title,” “First Name,” “Last Name,” “Organization Name,” “State,” “Comment,” and “Attachment” -- will be publicly available on the FTC Web site. The fields marked with an asterisk on the form are required in order for the FTC to fully consider a particular comment. Commenters may choose not to fill in one or more of those fields, but if they do so, their comments may not be considered.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at www.ftc.gov. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments

on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

FOR FURTHER INFORMATION CONTACT: Catherine Harrington-McBride, (202) 326-2452, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION:

Section A. Background

On January 23, 2004, the President signed into law the Consolidated Appropriations Act of 2004. In enacting this legislation, Congress, *inter alia*, mandated that “not later than 60 days after the date of enactment of this Act, the Federal Trade Commission shall amend the Telemarketing Sales Rule to require telemarketers subject to the Telemarketing Sales Rule to obtain from the Federal Trade Commission the list of telephone numbers on the ‘do-not-call’ registry once a month.”¹ Accordingly, the Commission proposes to amend the TSR’s Do Not Call safe harbor provision, 16 CFR 310.4(b)(3)(iv), to substitute the phrase “no more than thirty (30) days prior to the date any call is made” for the phrase that currently appears in that provision, which is “no more than three (3) months prior to the date any call is made.” This proposed amendment would change, from quarterly to every thirty (30) days, the frequency with which telemarketers and sellers will have to purge from their calling lists numbers appearing on the National Do Not Call Registry. It also would enable a consumer to assert a valid Do Not

¹ Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 188 Stat. 3. The requirement is in Division B, Title V.

Call complaint thirty (30) days after entering his or her number on the Registry, rather than waiting three months, as is currently the case. The text of Section 310.4(b)(3)(iv) incorporating the proposed amendment appears at the end of this notice. This proposal is made pursuant to the directive of the Appropriations Act, and the Commission's authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act,² and the Do Not Call Implementation Act.³

Section B. Discussion

The Commission seeks comment on two specific issues relating to the proposed amendment. First, the proposal employs the phrase "thirty (30) days," rather than the term used in the statute, "monthly." Second, the Commission seeks input on the appropriate effective date for the proposed amendment.

1. Thirty (30) Days

The Commission believes that the term "thirty (30) days" achieves greater clarity and precision in effectuating Congress's twofold intent in the Appropriations Act – to shorten from quarterly to monthly the interval for telemarketers and sellers to purge registered telephone numbers from their calling lists, and to enable consumers to assert valid Do Not Call complaints thirty (30) days after entering their numbers on the Registry rather than having to wait three months.

The "thirty (30) days" language removes the ambiguity inherent in the term "monthly." This language would obviate questions such as whether a provision using the term "monthly" requires sellers and telemarketers to purge Registry numbers from their call lists every calendar

² 15 U.S.C. 6102.

³ Pub. L. No. 108-10, 117 Stat. 557.

month, whether “scrubbing” every 30 days would comply even if one did not scrub in February, and whether scrubbing in each calendar month without regard to the interval since the last scrub would comply. This clarification should provide a brighter line for industry, making compliance easier to effectuate. Moreover, it will prevent subverting the intent of the Registry by such stratagems as downloading the Registry at 11:00 PM on the last day of one calendar month and again at 12:01 AM on the first day of the next, thereby technically complying with the requirement, but effectively “scrubbing” only bi-monthly.

2. Effective Date

The second issue on which the Commission seeks comment is the appropriate effective date for this amendment. Modifying the Commission’s established Registry system to account for increased download traffic and logic changes will take some time. The Commission believes that sellers and telemarketers similarly may need an extended period to make the necessary modifications in their systems and procedures to be able to comply with this amended provision. In this regard, the Commission notes that because of similar issues present in the Amended TSR’s requirement for sellers and telemarketers to transmit Caller ID information, it established an effective date for that requirement of one year after the Amended Rule was promulgated, and ten months after the effective date of most of the other Amended TSR provisions.⁴ Similarly, on petition from industry, the Commission postponed, for similar periods, the original effective dates of certain other provisions, including the provision to use a recorded message when the consumer could not be connected to a live sales representative within two seconds of answering

⁴ 68 FR 4664 (Jan 29, 2003).

a telemarketing call.⁵ The Commission requests factual information regarding the amount of time it reasonably will take sellers and telemarketers to modify their business procedures and systems to be able to comply with the amended provision.

Section C. Invitation to Comment

All persons are hereby given notice of the opportunity to submit written data, views, facts, and arguments addressing the issues raised by this Notice. **The Commission notes that the Appropriations Act provides no discretion in the matter of whether to amend the TSR as described above. Comment going to that issue would not be responsive to this notice and will not be considered.** Written comments must be submitted on or before February 26, 2004. Comments should refer to “Monthly Registry Access, Project No. R411001” to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room 159-H (Annex D), 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled “Confidential.”⁶ The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because

⁵ 68 FR 16414 (Apr. 4, 2003).

⁶ Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission’s General Counsel, consistent with applicable law and the public interest. See Commission Rule 4.9(c), 16 CFR 4.9(c).

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The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at www.ftc.gov. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC’s privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

Section D. Communications by Outside Parties to Commissioners or Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record. See 16 CFR 1.26(b)(5).

Section E. Paperwork Reduction Act

The information collection requirements contained in the TSR were reviewed by OMB under the Paperwork Reduction Act and cleared on July 24, 2003, under OMB Control Number 3084-0097. The proposed rule amendment, as discussed above, changes the interval at which entities covered by the TSR must obtain data from the National Do Not Call Registry from every three (3) months to every thirty (30) days. Thus, the proposed rule amendment does not impose any new, or affect any existing, record submission, recordkeeping, or public disclosure requirement that would be subject to review and approval by the Office of Management and Budget pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501-3520.

Section F. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601-612, requires an agency to provide an Initial Regulatory Flexibility Analysis ("IRFA") with a proposed rule and a Final Regulatory Flexibility Analysis ("FRFA") with the final rule, if any, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 603-605.

As discussed above, the Appropriations Act expressly mandates the modification, and, therefore, any associated economic impact. Nonetheless, the Commission has determined that it is appropriate to publish an IRFA in order to inquire into the impact of the proposed rule on small entities. Therefore, the Commission has prepared the following analysis.

1. Reasons for the proposed rule.

The proposed modification of the TSR, discussed above, is pursuant to the directive of the Appropriations Act of 2004, which mandates that “not later than 60 days after the date of enactment of th[at] Act, the Federal Trade Commission shall amend the Telemarketing Sales Rule to require telemarketers subject to the Telemarketing Sales Rule to obtain from the Federal Trade Commission the list of telephone numbers on the ‘do-not-call’ registry once a month.”⁷

2. Statement of objectives and legal basis.

The objectives of the proposed rule are discussed above. The legal basis for the proposed rule is the Appropriations Act of 2004, as discussed in F.1., above.

3. Description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.

This proposed rule will primarily impact sellers that make interstate telephone calls to consumers (outbound calls) in an attempt to sell their products or services. Also affected may be firms that provide telemarketing services to others on a contract basis. In the proceedings to amend the TSR to include National Do Not Call Registry provisions, the Commission sought public comment and information on the number of small business sellers and telemarketers that would be impacted by those amendments.⁸ In its requests, the Commission noted the lack of publicly available data regarding the number of small entities. As the Commission received no

⁷ Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 188 Stat. 3. The requirement is in Division B, Title V.

⁸ See 68 FR 4580, 4667 (Jan. 29, 2003); 68 FR 45134, 45143 (July 31, 2003) (noting, in the final amended rules, that comment was requested, but not received, regarding the number of small entities subject to the National Do Not Call Registry provisions of the amended TSR).

further information in response to this request, the number of firms making outbound calls cannot be reliably estimated.⁹

4. Description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement of obtaining data from the National Do Not Call Registry every thirty (30) days and the type of professional skills that will be necessary to comply.

The proposed rule does not impose any new, or affect any existing, reporting, disclosure, or specific recordkeeping requirements within the meaning of the Paperwork Reduction Act. The Commission does not believe that the modification requiring sellers and telemarketers to obtain data from the National Registry at a more frequent interval will create a significant burden on sellers or telemarketers that have already established systems to comply with the requirement in the existing TSR that requires accessing the Registry database on a quarterly basis. There will likely be additional costs, however, incurred to access the Registry every thirty days (effectively twelve (12) times per year) versus the current requirement of every three months (effectively four (4) times per year). As noted in the Statement of Basis and Purpose for the final amended TSR, the cost of accessing the National Do Not Call Registry to purge the numbers it contains from a company's calling list (separate from the fee paid to obtain the list) is around \$100. Given this estimate, sellers and telemarketers seeking to comply with the proposed rule

⁹ 68 FR 4580, 4667 (Jan. 29, 2003) (noting that Census data on small entities conducting telemarketing does not distinguish between those entities that conduct exempt calling, such as survey calling, those that receive inbound calls, and those that conduct outbound calling campaigns. Moreover, sellers who act as their own telemarketers are not accounted for in the Census data.).

modification would pay \$1200 per year (\$100 per scrub x 12 scrubs per year) rather than \$400 per year (\$100 per scrub x 4 scrubs per year).

As noted below, the Commission seeks further comment on the professional skills that will be needed to implement the proposed rule, the actual costs or expenditures, if any, of more frequent scrubbing, and the extent to which these costs may differ or vary for small entities.

5. Identification of other duplicative, overlapping, or conflicting federal rules.

The FTC has not identified any other federal statutes, rules, or policies that would conflict with the requirement that sellers and telemarketers employ a version of the National Do Not Call Registry obtained from the Commission no more than thirty (30) days prior to the date any call is made. Although the Federal Communications Commission's ("FCC") rules pursuant to the Telephone Consumer Protection Act closely mirror the existing TSR language requiring scrubbing every three (3) months, they would not be in conflict with the proposed amendment. Rather, entities subject only to the FCC's telemarketing rules would be required to obtain information from the National Registry every three (3) months, while those entities subject to the FTC's rules would have to do so every thirty (30) days.

The Commission is requesting comment about any federal, state, or local statutes or rules that may duplicate, overlap with, or conflict with the proposed rule.

6. Discussion of significant alternatives to the proposed rule that would accomplish the stated objectives of the Appropriations Act and that would minimize any significant economic impact of the proposed rule on small entities.

The Appropriations Act of 2004 provides the Commission no discretion in the matter of whether to amend the TSR as described above. However, as noted above in Section B.2. of this Notice, the Commission requests factual information regarding the amount of time it reasonably will take sellers and telemarketers, including small businesses, to modify their business procedures and systems to be able to comply with the amended provision. Toward that end, the Commission has included in Section G below questions regarding alternatives to minimize the economic impact of the rule on small entities and questions requesting information that would assist it in determining the appropriate effective date for this provision.

Section G. Specific Issues for Comment

The Commission seeks comment on the proposed rule as set forth in this Notice. The Commission is particularly interested in receiving comments on the questions that follow. In responding to these questions, include detailed and factual supporting information whenever possible.

1. Is the term “thirty (30) days” more precise than the term “monthly,” and would the former term serve as a more meaningful guideline for telemarketers and sellers as they seek to comply with this provision?
2. Will use of the term “thirty (30) days” rather than “monthly” prevent sellers and telemarketers from attempting to subvert the intent of the Registry by such stratagems as downloading the Registry and “scrubbing” their call lists on the last day of a month, and then immediately doing it again on the first day of the succeeding month?

3. Does the use of the precise standard, embodied in the phrase “thirty (30) days,” make clear the requisite interval at which data must be obtained from the National Do Not Call Registry? Is there some other standard that would accomplish this better?
4. What, if any, differences exist in the compliance burdens on industry resulting from use of the term “thirty (30) days” rather than “monthly”? Why? What, if any, differences exist in the benefits for consumers resulting from use of the term “thirty (30) days” rather than “monthly”? Why?
5. What should be the effective date of the proposed amendment? Why? What, if any, factors might necessitate a particular amount of lead time for industry to be able to comply with the proposed amendment? With respect to any particular recommended effective date, what are the relative costs and benefits for industry and consumers?
6. Please describe what effect the proposed rule will have on small entities that engage in outbound telemarketing and are not exempt from the National Do Not Call Registry provision of the TSR.
7. Please describe what costs will be incurred by small entities to “implement and comply” with the rule, including expenditures of time and money for: any employee training; acquiring additional professional skills; attorney, computer programmer, or other professional time; and preparing and processing relevant materials.
8. Are there ways the proposed rule could be modified to reduce the costs or burdens for small entities while still being consistent with the mandate of the Appropriations Act?
9. Please identify any relevant federal, state, or local statutes or rules that may duplicate, overlap or conflict with the proposed rule.

H. Proposed Rule

Accordingly, the Commission proposes to amend title 16, Code of Federal Regulations, as follows:

PART 310—TELEMARKETING SALES RULE

1. The authority citation for part 310 continues to read as follows:

Authority: 15 U.S.C. 6101-6108.

2. Amend § 310.4 by revising paragraph (b)(3)(iv) to read as follows:

§ 310.4 Abusive telemarketing acts or practices.

* * * * *

(b) * * *

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to §§ 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the “do-not-call” registry obtained from the Commission no more than thirty (30) days prior to the date any call is made, and maintains records documenting this process; * * *

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By direction of the Commission.

Donald S. Clark

Secretary