[Billing Code: 6750-01-P]

FEDERAL TRADE COMMISSION

16 CFR Part 310

RIN 3084-AB19

Telemarketing Sales Rule

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") adopts amendments to the Telemarketing Sales Rule ("TSR") that, among other things, require telemarketers and sellers to maintain additional records of their telemarketing transactions, prohibit material misrepresentations and false or misleading statements in business to business ("B2B") telemarketing calls, and add a new definition for the term "previous donor." These amendments are necessary to address technological advances and to continue protecting consumers, including small businesses, from deceptive or abusive telemarketing practices.

DATES: The amendments are effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. However, compliance with 16 CFR 310.5(a)(2) is not required until [INSERT DATE 180 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. The incorporation by reference of certain material listed in the rule is approved by the Director of the Federal Register as of [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Relevant portions of the record of this proceeding, including this document, are available at https://www.ftc.gov.

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SUPPLEMENTARY INFORMATION: This document states the basis and purpose for the Commission's decision to adopt amendments to the TSR that were proposed and published for public comment in the Federal Register on June 3, 2022 in a Notice of Proposed Rulemaking ("2022 NPRM").[1] After careful review and consideration of the entire record on the issues presented in this rulemaking proceeding, including 26 public comments submitted by a variety of interested parties, the Commission has decided to adopt, with several modifications, the proposed amendments to the TSR that are intended to curb deceptive or abusive practices in telemarketing and improve the effectiveness of the TSR.

I. Background

Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act" or "Act") in 1994 to curb abusive telemarketing practices and provide key anti-fraud and privacy protections to consumers.[2] The Act directed the Commission to adopt a rule prohibiting deceptive or abusive telemarketing practices.[3] The Act also directed the Commission to include, among other provisions, disclosure requirements and to consider recordkeeping requirements in its rulemaking.[4] Pursuant to the Act, the Commission promulgated the TSR on August 23, 1995.[5]

[1] Notice of Proposed Rulemaking ("2022 NPRM"), 87 FR 33677 (June 3, 2022).

[2] Pub. L. 103-297, 108 Stat. 1545 (1997) (codified as amended at 15 U.S.C. 6101-6108).

[3] 15 U.S.C. 6102(a)(1).

[4] 15 U.S.C. 6102(a)(3).

[5] *See* Statement of Basis and Purpose and Final Rule ("Original TSR"), 60 FR 43842 (Aug. 23, 1995).

The Rule prohibits deceptive or abusive telemarketing practices, such as misrepresenting several categories of material information or making false or misleading statements to induce a person to pay for a good or service.[6] The Rule also requires sellers and telemarketers to make specific disclosures and keep certain records of their telemarketing activities.[7] The Commission determined that recordkeeping requirements were necessary to "ascertain whether sellers and telemarketers are complying with the […TSR], identify persons who are involved in any challenged practices, and [] identify customers who may have been injured."[8]

Since 1995, the Commission has amended the Rule on four occasions: (1) in 2003 to create the National Do Not Call ("DNC") Registry and extend the Rule to telemarketing calls soliciting charitable contributions ("charity calls");[9] (2) in 2008 to prohibit prerecorded messages ("robocalls") in sales calls and charity calls;[10] (3) in 2010 to ban the telemarketing of debt relief services requiring an advance fee;[11] and (4) in 2015 to bar the use in telemarketing of certain payment mechanisms widely used in fraudulent transactions.[12]

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[6] *See*, *e.g.,* 16 CFR 310.3(a); *see also* Original TSR, 60 FR at 43848-51.

[7] *See*, *e.g.*, 16 CFR 310.3(a)(1), 310.5; *see also* Original TSR, 60 FR at 43846-48, 43851, 43857.

[8] Original TSR, 60 FR at 43857.

[9] *See* Statement of Basis and Purpose and Final Amended Rule ("2003 TSR Amendments"), 68 FR 4580 (Jan. 29, 2003) (adding Do Not Call Registry, charitable solicitations, and other provisions). The Telemarketing Act was amended in 2001 to extend its coverage to telemarketing calls seeking charitable contributions. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act"), Pub. L. 107-56, 115 Stat. 272 (Oct. 26, 2001) (adding charitable contribution to the definition of telemarketing and amending the Act to require certain disclosures in calls seeking charitable contributions).

[10] *See* Statement of Basis and Purpose and Final Rule Amendments ("2008 TSR Amendments"), 73 FR 51164 (Aug. 29, 2008) (addressing the use of robocalls).

[11] *See* Statement of Basis and Purpose and Final Rule Amendments ("2010 TSR Amendments"), 75 FR 48458 (Aug. 10, 2010) (adding debt relief provisions including a prohibition on misrepresenting material aspects of debt relief services in Section 310.3(a)(2)(x)). The Commission subsequently published technical corrections to Section 310.4 of the TSR. 76 FR 58716 (Sept. 22, 2011).

[12] *See* Statement of Basis and Purpose and Final Rule Amendments ("2015 TSR Amendments"), 80 FR 77520 (Dec. 14, 2015) (prohibiting the use of remotely created checks and payment orders, cash-to-cash money transfers, and cash reload mechanisms).

Despite making significant amendments to the Rule, the Commission has not updated the recordkeeping provisions since the Rule's inception in 1995.[13] Evolutions in technology and the marketplace have made it more difficult for regulators to enforce the TSR, particularly provisions relating to the DNC Registry.[14] As a result, the Commission solicited comment during its regulatory review process on whether it should update the recordkeeping provisions, and subsequently proposed amending them in the 2022 NPRM.[15]

The 2022 NPRM also proposed applying the TSR's prohibitions on deceptive telemarketing to B2B calls.[16] The original TSR generally excluded B2B calls, except those selling office and cleaning supplies, because in the Commission's experience at the time, those calls were "by far the most significant business-to-business problem area."[17] In 2003, the Commission considered extending the TSR's protections to B2B calls selling internet or web services, but decided against doing so for fear of chilling technological innovation.[18] It did, however, note that it would "continue to monitor closely" B2B telemarketing practices in this area and "may revisit the issue in subsequent Rule Reviews should circumstances warrant."[19] Since then, the Commission has continued to see small businesses harmed by deceptive B2B telemarketing, and the 2022 NPRM proposed extending Section 310.3(a)(2)'s prohibition on

[13] When the Commission decided in 2003 and 2010 to make substantive amendments to the TSR, it declined to modify the Rule's recordkeeping provisions. *See* 2003 TSR Amendments, 68 FR at 4645, 4653-54 (declining to implement any of the suggested recordkeeping revisions that were raised in the public comments); 2010 TSR Amendments, 75 FR at 48502.

[14] 2022 NPRM, 87 FR at 33679-81.

[15] The Commission issued the 2022 NPRM after it had embarked on a regulatory review of the TSR in 2014. In that review, it sought feedback on a number of issues, including the existing recordkeeping requirements. *See* 2014 TSR Rule Review, 79 FR 46732, 46735 (Aug. 11, 2014).

[16] 2022 NPRM, 87 FR at 33682-83.

[17] Original TSR, 60 FR at 43867, 43861.

[18] 2003 TSR Amendments, 68 FR at 4663; 2022 NPRM, 87 FR at 33682-83.

[19] 2003 TSR Amendments, 68 FR at 4663; 2022 NPRM, 87 FR at 33682-83.

misrepresentations[20] and Section 310.3(a)(4)'s prohibition on false or misleading statements[21] to B2B calls.[22]

Finally, the 2022 NPRM proposed adding a definition for "previous donor." In 2008 the Commission amended the TSR to prohibit robocalls, but allowed charity robocalls if the recipient is a "member of, or previous donor to, a non-profit charitable organization on whose behalf the call is made."[23] The Commission intended this narrow exemption to apply only to consumers who had previously donated to the soliciting organization,[24] but the Commission did not define "previous donor."[25] The new definition will clarify that telemarketers are prohibited from making charity robocalls unless the call recipient donated to the soliciting non-profit charitable organization ("charity") within the last two years.[26]

II. Overview of the Proposed Amendments to the TSR

A. Recordkeeping

The TSR's recordkeeping provisions, which have remained unchanged since the Rule

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[20] Section 310.3(a)(2) prohibits, among other things, misrepresenting: the total cost to purchase a good or service, material restrictions on the use of the good or service, material aspects of the central characteristics of the good or service, material aspects of the seller's refund policy, the seller's affiliation with or endorsement by any person or government agency, or material aspects of a negative option feature or debt relief service. *See* 16 CFR 310.3(a)(2)(i)-(x).

[21] Section 310.3(a)(4) prohibits making false or misleading statements to induce any person to pay for goods or services or induce a charitable contribution. *See* 16 CFR 310.3(a)(4).

[22] 2022 NPRM, 87 FR at 33682-83. When the Commission issued the 2022 NPRM, it also issued an Advance Notice of Proposed Rulemaking ("2022 ANPR") in which it sought public comment on whether to extend all of the TSR's protections to B2B calls. 2022 ANPR, 87 FR 33662 (June 3, 2022). The Commission addresses the public comments submitted in response to the 2022 ANPR in a Notice of Proposed Rulemaking that the Commission is issuing simultaneously with this Final Rule.

[23] *See* 2008 TSR Amendments, 73 FR at 51185. To qualify for this narrow exemption, sellers and telemarketers must also comply with the provisions of Section 310.4(b)(1)(v)(B).

[24] *Id.*

[25] Pursuant to the USA PATRIOT Act, the Commission amended the TSR in 2003 to extend its coverage to charity calls. 2003 TSR Amendments, 68 FR at 4582. As part of that amendment, the Commission defined "donor" as "any person solicited to make a charitable contribution." *Id.* at 4590.

[26] 2022 NPRM, 87 FR at 33679.

was promulgated in 1995, generally require telemarketers and sellers to keep for a 24-month period records of: (1) any substantially different advertisement, including telemarketing scripts; (2) lists of prize recipients, customers, and telemarketing employees directly involved in sales or solicitations; and (3) all verifiable authorizations or records of express informed consent or express agreement.[27] They may keep the records in any form and in the same manner and format as they would keep such records in the ordinary course of business, and they may allocate responsibilities of complying with the Rule's recordkeeping requirements between the seller and telemarketer.[28]

The telemarketing landscape has changed drastically since 1995. Technological advancements have made it easier and cheaper for unscrupulous telemarketers to engage in illegal telemarketing, resulting in a greater proliferation of unwanted calls.[29] Bad actors hide their identities by using technology to "spoof" or fake a calling number, making it more difficult

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[27] 16 CFR 310.5(a).

[28] 16 CFR 310.5(b) & (c).

[29] *See, e.g.,* Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on Commerce, Science and Transportation: Abusive Robocalls and How We Can Stop Them (Apr. 18, 2018), *available at* https://www.ftc.gov/system/files/documents/public_statements/1366628/p034412_commission_testimony_re_abusive_robocalls_senate_04182018.pdf (last visited Dec. 11, 2023); *see also* Prepared Statement of the Federal Trade Commission: Oversight of the Federal Trade Commission Before the United States Senate Committee on Commerce, Science, and Transportation (Aug. 5, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1578963/p180101testimonyftcoversight20200805.pdf (last visited Dec. 21, 2023).

From 2019 to 2023, the Commission received on average nearly 4 million Do Not Call complaints per year, and the DNC Registry currently has over 249 million active telephone numbers. FTC, Do Not Call Data Book 2023 ("2023 DNC Databook"), at 6 (Nov. 2023), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/Do-Not-Call-Data-Book-2023.pdf (last visited Dec. 11, 2023). By comparison, within one year of its launch, the DNC Registry had over 62 million active telephone numbers registered, and the Commission received over 500,000 Do Not Call complaints. *See* Annual Report to Congress for FY 2003 and 2004 Pursuant to the Do Not Call Implementation Act on Implementation of the National Do Not Call Registry, at 3 (Sept. 2005), *available at* https://www.ftc.gov/sites/default/files/documents/reports/national-do-not-call-registry-annual-report-congress-fy-2003-and-fy-2004-pursuant-do-not-call/051004dncfy0304.pdf (last visited Dec. 11, 2023); National Do Not Call Registry Data Book for Fiscal Year 2009, at 4 (Nov. 2009), *available at* https://www.ftc.gov/sites/default/files/documents/reports_annual/fiscal-year-2009/091208dncadatabook.pdf (last visited Dec. 11, 2023). Conversely, technological advancements have also reduced the burden and costs of recordkeeping. 2022 NPRM, 87 FR at 33685 n.95 and 33690-91.

for the Commission to identify the responsible parties or obtain records of their illegal telemarketing activities.[30] Technology also allows these bad actors to operate from anywhere in the world, posing additional challenges to the Commission's law enforcement efforts.[31]

The primary hurdles in enforcing the TSR in the current telemarketing landscape are in: (1) identifying the telemarketer and seller responsible for the telemarketing campaign; (2) obtaining call detail records; and (3) linking the content of the telemarketing calls with the call detail records to determine which TSR provisions might apply to the telemarketing activity.

As explained in more detail in the 2022 NPRM, to identify the responsible parties and obtain evidence of their telemarketing activities, the Commission often must issue civil investigative demands to multiple voice service providers to trace a call from the consumer to the telemarketer's voice provider.[32] In some instances, by the time the Commission has identified the relevant voice provider, the voice provider may not have retained records of the telemarketing calls such as the date, time, call duration, and disposition of each call, or the phone number(s) that placed and received each call (i.e. "call detail records").[33] As a result, the call detail records either no longer exist or are not available for law enforcement purposes, and the Commission cannot identify the bad actor responsible for the spoofed or otherwise illegal calls.[34]

Call detail records are also necessary to ascertain compliance with certain provisions of

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[30] *See supra* note 29. On June 25, 2019, the FTC announced "Operation Call it Quits," which included 94 actions against illegal robocallers, many of which used spoofing technology. *See* Press Release, FTC, Law Enforcement Partners Announce New Crackdown on Illegal Robocalls (June 25, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/06/ftc-law-enforcement-partners-announce-new-crackdown-illegal (last visited Dec. 11, 2023).

[31] *See supra* note 29.

[32] 2022 NPRM, 87 FR at 33680-81.

[33] *Id*. at 33680. In other instances, voice providers assert it is cost prohibitive to retrieve because they only maintain records in an easily retrievable format for several months before archiving them in the ordinary course of business.

[34] *Id.*

the TSR such as the DNC Registry.[35] And as detailed in the 2022 NPRM, even when the Commission and other law enforcers are successful in obtaining call detail records, the records alone do not contain sufficient information about the content of the calls for regulators to determine whether the telemarketer or seller has violated the TSR.[36]

The proposed amendments to the recordkeeping requirements addressed the challenges identified above. They included new recordkeeping requirements of telemarketing activity that telemarketers or sellers are in the best position to provide.[37] Specifically, the proposed amendments required the retention of the following new categories of information: (1) a copy of each unique prerecorded message, including each call a telemarketer makes using soundboard technology;[38] (2) call detail records of telemarketing campaigns;[39] (3) records sufficient to show a seller has an established business relationship ("EBR") with a consumer;[40] (4) records sufficient to show a consumer is a previous donor to a particular charity;[41] (5) records of the

[35] *Id*. at 33681.

[36] *Id*. at 33680-82.

[37] *Id.*

[38] Soundboard technology is technology that allows a live agent to communicate with a call recipient by playing recorded audio snippets instead of using his or her own live voice. *See* FTC Staff Opinion Letter on Soundboard Technology, at 1 (Nov. 10, 2016), *available at* https://www.ftc.gov/system/files/documents/advisory_opinions/letter-lois-greisman-associate-director-division-marketing-practices-michael-bills/161110staffopsoundboarding.pdf (last visited Dec. 11, 2023).

[39] The proposed amendments stated the call detail records include for each call a telemarketer places or receives, the calling number; called number; time, date, and duration of the call; and the disposition of the call, such as whether the call was answered, dropped, transferred, or connected. If the call was transferred, the record should also include the phone number or IP address that the call was transferred to as well as the company name, if the call was transferred to a company different from the seller or telemarketer that placed the call. 2022 NPRM, 87 FR at 33684.

[40] For each consumer with whom a seller asserts it has an established business relationship, the proposed amendments stated a seller must keep a record of the name and last known phone number of that consumer, the date the consumer submitted an inquiry or application regarding that seller's goods or services, and the goods or services inquired about. A seller may also show it has an established business relationship with a consumer if that consumer purchased, rented, or leased the seller's goods or services or had a financial transaction with the seller during the 18 months before the date of the telemarketing call. Another proposed amendment modifies the existing recordkeeping provisions to state that records of existing customers should also include the date of the financial transaction to establish EBR under these circumstances. *Id.* at 33685.

[41] If a telemarketer intends to assert that a consumer is a previous donor to a particular charity, the Commission

service providers that a telemarketer uses to deliver outbound calls;[42] (6) records of a seller or charitable organization's entity-specific do-not-call registries;[43] and (7) records of the Commission's DNC Registry that were used to ensure compliance with this Rule.[44]

The proposed amendments also required the retention of other new records that help identify the nature and purpose of each call including: (1) the identity of the telemarketer who placed or received each call; (2) the seller or charitable organization for which the telemarketing call is placed or received; (3) the good, service, or charitable purpose that is the subject of the call; (4) whether the call is to a consumer or business, utilizes robocalls, or is an outbound call; and (5) the telemarketing script(s) and the robocall recording (if applicable) that was used in the call.[45] The proposed amendments also required the retention of records regarding the caller ID transmitted if the call was an outbound call, including the name and phone number that was

proposed that for each such consumer the telemarketer must keep a record of that consumer's name and last known phone number, and the last date that consumer donated to the particular charity. The proposed amendments also included a new definition of "previous donor." *Id*. at 33685.

[42] The proposed amendments stated that service providers include, but are not limited to, voice providers, autodialers, sub-contracting telemarketers, or soundboard technology platforms. The Commission did not intend for this provision to include every voice provider involved in delivering the outbound call and limited this provision to the service providers with which the seller or telemarketer has a business relationship. For each such entity, the seller or telemarketer must keep records of any applicable contracts, the date the contract was signed, and the time period the contract is in effect. The proposed amendments also stated that the records should be retained for five years after the contract expires or five years from the date the telemarketing activity covered by the contract ceases, whichever is shorter. *Id*. at 33685-86.

[43] For the entity-specific do-not-call registry, the Commission proposed requiring telemarketers and sellers to retain records of: (1) the consumer's name, (2) the phone number(s) associated with the DNC request, (3) the seller or charitable organization from which the consumer does not wish to receive calls, (4) the telemarketer that made the call; (5) the date the DNC request was made; and (6) the good or service being offered for sale or the charitable purpose for which contributions are being solicited. *Id*. at 33686.

[44] The Commission proposed requiring telemarketers or sellers to keep records of every version of the FTC's DNC Registry the telemarketer or seller downloaded to ensure compliance with the TSR. *Id*. at 33686.

[45] *Id*. at 33684.

transmitted, and records of the telemarketer's authorization to use the phone number and name that was transmitted.[46]

The proposed amendments also modified or clarified existing recordkeeping requirements to delineate more clearly the information telemarketers or sellers must keep to comply with those provisions, and specified what information is required to assert an exemption or affirmative defense to the TSR.[47] Specifically, the proposed amendments modified the recordkeeping provisions to require retention of a customer or prize recipient's last known telephone number and last known physical or email address, and the date a customer bought a good or service.[48] It modified the time period to keep records from two years to five years from the date the record is made, except for advertising materials under Section 310.5(a)(1) and service contracts under Section 310.5(a)(9), which require retention of records for five years from the date the records under those sections are no longer in use.[49]

The proposed amendments clarified that records of verifiable authorizations, express informed consent or express agreement (collectively, "consent") include a consumer's name and phone number, a copy of the consent requested in the same manner and format that it was presented to that consumer, a copy of the consent provided, the date the consumer provided consent, and the purpose for which consent was given and received.[50] The NPRM also proposed that if the telemarketer or seller requested consent verbally, the copy of consent requested did not

[46] *Id.*

[47] *Id*. at 33680-82.

[48] *Id*. at 33686.

[49] *Id.*

[50] *Id*. at 33686-87. The proposed amendment also stated that for a copy of the consent provided under Sections 310.3(a)(3), 310.4(a)(7), 310.4(b)(1)(iii)(B)(1), or 310.4(b)(1)(v)(A), a complete record must include all of the requirements outlined in those respective sections.

require a recording of the conversation. A copy of the telemarketing script would suffice as a complete record of the consent requested. But the NPRM made clear that this proposal only applies to telemarketing calls where no other provision of the TSR requires a recording of consent.[51]

The proposed amendments also included new format requirements for records containing a phone number, time or call duration;[52] clarified that a failure to keep each record required under Section 310.5 in a complete and accurate manner constitutes a violation of the TSR; and created a safe harbor for incomplete or inaccurate call detail records where the omission was temporary and inadvertent.[53] Finally, the Commission proposed modifying the compliance obligations in Section 310.5(e) to obligate both telemarketers and sellers to keep records if they fail to allocate recordkeeping obligations between themselves.[54]

B. B2B Telemarketing

The Original TSR exempted B2B calls other than those selling office and cleaning supplies, which the Commission considered the "most significant business-to-business problem area" at the time.[55] The Commission stated, however, that it would reconsider the B2B

[51] 2022 NPRM, 87 FR at 33686-87.

[52] The proposed amendments required records containing international phone numbers to comport with International Telecommunications Union's Recommendation E.164 format and domestic numbers to comport with the North American Numbering plan. The Commission proposed that records containing time and call duration be kept to the closest whole second, and time must be recorded in Coordinated Universal Time (UTC). *Id*. at 33687.

[53] The Commission proposed a safe harbor for temporary and inadvertent errors in keeping call detail records if the telemarketer or seller can demonstrate that: (1) it has established and implemented procedures to ensure completeness and accuracy of its records under Section 310.5(a)(2); (2) it trained its personnel in the procedures; (3) it monitors compliance and enforces the procedures, and documents its monitoring and enforcement activities; and (4) any failure to keep accurate or complete records under Section 310.5(a)(2) was temporary and inadvertent. *Id*. at 33687.

[54] *Id*. at 33687.

[55] Original TSR, 60 FR at 43861.

exemption if "additional [B2B] telemarking activities become problems."[56] In 2003, the Commission reconsidered the scope of the B2B exemption and proposed requiring B2B calls selling internet or web services to comply with the TSR because they had become an emerging area for fraud.[57] The Commission ultimately decided not to modify the B2B exemption because the Commission wanted to "move cautiously so as not to chill innovation in the development of cost-efficient methods for small businesses to join in the internet marketing revolution."[58] But the Commission again noted that it would "continue to monitor closely" the B2B telemarketing practices in this area and "may revisit the issue in subsequent Rule Reviews should circumstances warrant."[59]

Since 2003, the Commission has continued to see small business harmed by numerous types of deceptive B2B telemarketing schemes,[60] including those selling business directory

[56] *Id.*; *see also* 2002 Notice of Proposed Rulemaking ("2002 NPRM"), 67 FR 4492, 4500 (Jan. 30, 2002); 2014 TSR Rule Review, 79 FR at 46738.

[57] 2002 NPRM, 67 FR at 4500, 4531. "Internet Services" meant any service that allowed a business to access the internet, including internet service providers, providers of software and telephone or cable connections, as well as services that provide access to email, file transfers, websites, and newsgroups. *Id.* "Web services" was defined as "designing, building, creating, publishing, maintaining, providing, or hosting a website on the internet." *Id.* The Commission intended for the term internet services to encompass any and all services related to accessing the internet and the term web services to encompass any and all services related to operating a website. *Id.*

[58] 2003 TSR Amendments, 68 FR at 4663.

[59] *Id.*

[60] A 2018 survey conducted by the Better Business Bureau revealed that the same scams that harm consumers, such as tech support scams and imposter scams, also harm small businesses, and that 57% of scams that impact small businesses are perpetrated through telemarketing. Better Business Bureau, *Scams and Your Small Business Research Report*, at 9-10 (June 2018), *available at* https://www.bbb.org/SmallBizScams (last visited Dec. 11, 2023).

listings,[61] web hosting or design services,[62] search engine optimization services,[63] market-specific advertising opportunities,[64] payment processing services,[65] and schemes that impersonate the government.[66] For example, some of these schemes were the subject of a coordinated FTC-led crackdown on scams targeting small businesses, called "Operation Main Street," announced in June 2018.[67]

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[61] *See, e.g., FTC v. Your Yellow Book Inc.,* No. 14-cv-786-D (W.D. Ok. July 24, 2014), *available at* https://www.ftc.gov/system/files/documents/cases/140807youryellowbookcmpt.pdf (last visited Dec. 11, 2023); *FTC v. OnlineYellowPagesToday.com, Inc.,* No. 14-cv-0838 RAJ (W.D. Wash. June 9, 2014), *available at* https://www.ftc.gov/system/files/documents/cases/140717onlineyellowpagescmpt.pdf (last visited Dec. 11, 2023); *FTC v. Modern Tech. Inc., et al.*, No. 13-cv-8257 (Nov. 18, 2013) *available at* https://www.ftc.gov/sites/default/files/documents/cases/131119yellowpagescmpt.pdf (last visited Dec. 11, 2023); *FTC v. 6555381 Canada Inc. d/b/a Reed Publishing*, No. 09-cv-3158 (N.D. Ill. May 27, 2009) *available at* https://www.ftc.gov/sites/default/files/documents/cases/2009/06/090602reedcmpt.pdf (last visited Dec. 11, 2023); *FTC v. 6654916 Canada Inc. d/b/a Nat'l. Yellow Pages Online, Inc.*, No. 09-cv-3159 (N.D. Ill. May 27, 2009), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2009/06/090602nypocmpt.pdf (last visited Dec. 11, 2023); *FTC v. Integration Media, Inc.,* No. 09-cv-3160 (N.D. Ill. May 27, 2009), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2009/06/090602goamcmpt.pdf (last visited Dec. 11, 2023); *FTC v. Datacom Mktg. Inc., et al.*, No. 06-cv-2574 (N.D. Ill. May 9, 2006), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2006/05/060509datacomcomplaint.pdf (last visited Dec. 11, 2023); *FTC v. Datatech Commc'ns, Inc.,* No. 03-cv-6249 (N.D. Ill. Aug. 3, 2005) (filing amended complaint), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2005/08/050825compdatatech.pdf (last visited Dec. 11, 2023); *FTC v. Ambus Registry, Inc.,* No. 03-cv-1294 RBL (W.D. Wash. June 16, 2003), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2003/07/ambuscomp.pdf (last visited Dec. 11, 2023).

[62] *See FTC v. Epixtar Corp., et al.*, No. 03-cv-8511(DAB) (S.D.N.Y. Nov. 3, 2003), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2003/11/031103comp0323124.pdf (last visited Dec. 11, 2023); *FTC v. Mercury Mktg. of Del., Inc.*, No. 00-cv-3281 (E.D. Pa. Aug. 12, 2003) (filing for an Order to Show Cause Why Defendants Should Not be Held in Contempt), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2003/08/030812contempmercurymarketing.pdf (last visited Dec. 11, 2023).

[63] *See, e.g., FTC v. Pointbreak Media, LLC,* No. 18-cv-61017-CMA (S.D. Fla. May 7, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/matter_1723182_pointbreak_complaint.pdf (last visited Dec. 11, 2023); *FTC v. 7051620 Canada, Inc.* No. 14-cv-22132 (S.D. Fla. June 9, 2014), *available at* https://www.ftc.gov/system/files/documents/cases/140717nationalbusadcmpt.pdf (last visited Dec. 11, 2023).

[64] *See, e.g., FTC v. Prod. Media Co.,* No. 20-cv-00143-BR (D. Or. Jan. 23, 2020), *available at* https://www.ftc.gov/system/files/documents/cases/production_media_complaint.pdf (last visited Dec. 11, 2023).

[65] *See*, *e.g., FTC v. First Am. Payment Sys., LP, et al.,* No. 4:22-cv-00654 (E.D. Tex. July 29, 2022), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/Complaint%20%28file%20stamped%29_0.pdf (last visited Dec. 11, 2023).

[66] *See, e.g., FTC v. DOTAuthority.com,* No. 16-cv-62186 (S.D. Fla. Sept. 13, 2016) *available at* https://www.ftc.gov/system/files/documents/cases/162017dotauthoriity-cmpt.pdf (last visited Dec. 11, 2023); *FTC v. D & S Mktg. Sols. LLC,* No. 16-cv-01435-MSS-AAS (M.D. Fla. June 6, 2016), *available at* https://www.ftc.gov/system/files/documents/cases/160621dsmarketingcmpt.pdf (last visited Dec. 11, 2023).

[67] *See* Press Release, FTC, BBB, and Law Enforcement Partners Announce Results of Operation Main Street:

To address these scams, the 2022 NPRM proposed applying the TSR's prohibitions against misrepresentations, as articulated in Sections 310.3(a)(2) and 310.3(a)(4), to B2B telemarketing. Specifically, sellers and telemarketers would be prohibited from making: (1) several types of material misrepresentations in the sale of goods or services; and (2) false or misleading statements to induce a person to pay for goods or services or to induce a charitable contribution (collectively, "misrepresentations").[68] The 2022 NPRM did not propose applying any other provisions of the TSR to B2B calls, such as recordkeeping, DNC Registry, or DNC fee access requirements.[69]

C. New Definition for "Previous Donor"

The 2022 NPRM proposed adding a new definition for the term "previous donor" to clarify that telemarketers are prohibited from making charity robocalls unless the consumer donated to the soliciting charity within the last two years. When the Commission amended the TSR to prohibit robocalls in 2008,[70] it included a narrow exemption allowing charity robocalls to prior donors, recognizing a charity's strong interest in reaching consumers with "whom the charity has an existing relationship— i.e. members of, or previous donors to[,] the non-profit organization on whose behalf the calls are made."[71] The Commission meant to limit the exemption to consumers with actual relationships to the soliciting organization, because allowing "telefunders to make impersonal prerecorded cold calls on behalf of charities that have no prior

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Stopping Small Business Scams Law Enforcement and Education Initiative (June 18, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/06/ftc-bbb-law-enforcement-partners-announce-results-operation-main (last visited Dec. 11, 2023).

[68] 2022 NPRM, 87 FR at 33682-84.

[69] *Id.*; *see also* 16 CFR 310.5 (recordkeeping requirements); 310.8 (fee for access to the Do Not Call Registry).

[70] 2008 TSR Amendments, 73 FR at 51164.

[71] *Id.* at 51193.

relationship with the call recipients . . . would defeat the amendment's purpose of protecting consumers' privacy."[72] But in creating the exemption, the Commission did not update the definition of "donor" or include a definition of "previous donor." Because "donor" is defined as "any person solicited to make a charitable contribution,"[73] the Commission's 2008 Amendment could be misinterpreted as allowing a telemarketer to send robocalls to any consumer it had previously *solicited* for a donation on behalf of a charity, regardless of whether the consumer donated to or has an existing relationship with that charity.

Adding a definition for "previous donor" makes clear that a seller or telemarketer may only make charity robocalls to a donor who has previously provided a charitable contribution to that particular charity within the last two years.[74]

D. Overview of Public Comments Received in Response to the 2022 NPRM

In response to the 2022 NPRM,[75] the Commission received 26 comments[76] representing

[72] *Id.* at 51194.

[73] 16 CFR 310.2(p). The Commission declined to limit the definition of donor to those who have "an established business relationship with the non-profit charitable organization" because it wanted the term "[to] encompass not only those who have agreed to make a charitable contribution but also any person who is solicited to do so, to be consistent with [the Rule's] use of the term 'customer.'" 2003 TSR Amendments 68 FR at 4590.

[74] The Commission proposed that the definition of "previous donor" be limited to those who donated to a charity within the past two years so that consumers will not receive robocalls in perpetuity from organizations to which they have donated. The Commission chose two years to account for the possibility that consumers who donate annually may not necessarily donate exactly one year apart. 2022 NPRM, 87 FR at 33688.

[75] The Commission also received 114 unique comments in response to the 2014 Rule Review reflecting the opinions of state and federal agencies, consumer advocacy groups, consumers, academics, and industry. 2022 ANPR, 87 FR at 33664. The comments addressing whether the Commission should amend the TSR's recordkeeping provisions are summarized in the 2022 NPRM. 2022 NPRM, 87 FR at 33682.

[76] Many commenters filed one comment in response to the 2022 ANPR or 2022 NPRM that addressed issues raised by both documents. Comments regarding the proposals in the 2022 NPRM will be addressed in this Final Rule. Comments regarding the proposals in the 2022 ANPR will be addressed in the Notice of Proposed Rulemaking that the Commission is issuing concurrently with this Final Rule ("2023 NPRM"). We cite public comments by name of the commenting organization or individual, the rulemaking (ANPR comments were assigned "33" and the NPRM comments were assigned "34"), and the comment number. All comments submitted can be found at www.regulations.gov.

the views of state governments,[77] consumer groups,[78] consumers,[79] industry trade associations,[80] and businesses.[81] The vast majority of the comments focused on the proposed recordkeeping amendments. Commenters on behalf of government, individual consumers, and consumer advocacy groups generally supported amending the recordkeeping requirements but also submitted suggestions for additional amendments.[82] Industry groups and businesses had mixed comments. Some commenters did not support any recordkeeping amendments, citing the burden they would impose, while others were generally supportive or supportive of specific proposed amendments.[83]

Similarly, industry groups and businesses did not support applying the TSR's prohibitions against deceptive telemarketing to B2B calls; while government, individual consumers, and consumer organizations were supportive. Only three comments touched on the proposed amendment to add a new definition of "previous donor." The comments and the basis

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[77] National Association of Attorneys General on behalf of 43 State Attorneys General ("NAAG") 34-20.

[78] World Privacy Forum ("WPF") 34-21; Electronic Privacy and Information Center, National Consumer Law Center (on behalf of its low-income clients), Center for Digital Democracy, Consumer Action, Consumer Federation of America, FoolProof, Mountain State Justice, New Jersey Citizen Action, Patient Privacy Rights, Public Good Law Center, Public Knowledge, South Carolina Appleseed Legal Justice Center, and Cathy Lesser Mansfield (Senior Instructor in Law at Case Western Reserve University School of Law) ("EPIC") 34-23.

[79] Bradley 34-15; Cassady 34-2; Chen 34-9; Kreutzmann 34-5, Yang 34-12, and 4 Anonymous submitters at 34-3, 34-4, 34-7, and 34-11. Four commenters submitted consumer complaints or were not relevant to the proceeding. *See* Anonymous 34-6, 34-8, and 34-16; and Grener 34-10.

[80] Enterprise Communications Advocacy Coalition ("ECAC") 34-22; National Federation of Independent Business 33-4 ("NFIB"); Ohio Credit Union League ("OCUL") 34-19; Professional Association for Customer Engagement 33-15 ("PACE"); Revenue Based Finance Coalition("RBFC") 34-13; Third Party Payment Processors Association ("TPPPA") 34-14; US Chamber of Commerce ("Chamber") 34-24; and USTelecom—The Broadband Association ("USTelecom") 33-14.

[81] Rapid Financial Services, LLC and Small Business Financial Solutions, LLC ("Rapid Finance") 34-17; Sirius XM Radio ("Sirius") 34-18.

[82] Many of the consumer comments generally stated that they supported the recordkeeping amendments because they would help protect consumers from deceptive telemarketing and with enforcing the TSR. *See, e.g.,* Cassady 34-3; Chen 34-9; and Anonymous 34-11 and 34-3. One commenter generally urged more enforcement and larger penalties. Kowalski 33-7.

[83] One anonymous commenter did not support any recordkeeping because it required collection of too much data, which the commenter believed infringed on a consumer's privacy. Anonymous 34-4.

for the Commission's adoption or rejection of the commenters' suggested modifications to the proposed amendments are analyzed in Section III below.

III. Final Amended Rule

The Commission has carefully reviewed and analyzed the record developed in this proceeding.[84] The record, which includes the Commission's law enforcement experience and that of its state and federal counterparts, supports the Commission's view that the proposed amendments in the 2022 NPRM are necessary and appropriate to protect consumers, including small businesses, from deceptive or abusive telemarketing practices and ensure that the Commission and other regulators can effectively and efficiently enforce the TSR.[85]

The Final Rule requires sellers and telemarketers to keep additional records of their telemarketing activities, prohibits misrepresentations in B2B telemarketing, and adds a new definition for previous donor. The Final Rule also implements several other clerical modifications as originally proposed in the 2022 NPRM.[86]

In some instances, the Commission has clarified or made modifications to its original proposal in response to the public comments submitted. The Commission otherwise adopts the amendments proposed in the 2022 NPRM as set forth in Section VII – Congressional Review Act ("Final Rule") below. The primary modifications and clarifications between the proposed rule published in the 2022 NPRM and the Final Rule are:

- The term "prerecorded message" includes telemarketing calls made using "digital

[84] The record includes the 2014 Rule Review, the 2022 NPRM, 2022 ANPR, and the law enforcement cases and experience referenced therein, which are hereby incorporated by reference.

[85] The Commission's decision to amend the Rule is made pursuant to the rulemaking authority granted by the Telemarketing Act to protect consumers, including small businesses, from deceptive or abusive practices. 15 U.S.C. 6102(a).

[86] 2022 NPRM, 87 FR at 33688.

soundboard" rather than "soundboard technology" to make clear that the term includes any digital or sound technologies that sellers or telemarketers use to convey a verbal message to a consumer in telemarketing;

- Telemarketers and sellers will have one hundred and eighty days after the Final Rule is published to implement any new systems, software, or procedures necessary to comply with the new requirement that they keep call detail records under Section 310.5(a)(2);
- Sellers and telemarketers need not retain records of the calling number, called number, date, time, duration, and disposition of telemarketing calls under Sections 310.5(a)(2)(vii) and (x) for any calls made by an individual telemarketer who manually enters a single telephone number to initiate a call to that telephone number. Such sellers and telemarketers, however, must still comply with the other requirements under Section 310.5(a)(2);
- Modified Section 310.4(b)(2) to state that it is also an abusive telemarketing act or practice and a violation of the TSR for any person to sell, rent, lease, purchase, or use any list established to comply with the TSR's recordkeeping requirements under Section 310.5. This modification makes clear that telemarketers and sellers cannot use any consumer lists created for recordkeeping purposes for any other purpose;
- In obtaining written consent to contact a consumer using robocalls on behalf of a "specific seller," the written agreement must identify the "specific seller" by its legal entity name to make clear that any agreement to receive robocalls is limited to that legal entity. The seller or telemarketer obtaining consent from the

consumer must ensure that the consumer understands which legal entity they have authorized to send robocalls;

- Where no provision of the TSR requires a recording of the call, the Final Rule modifies what was proposed in the NPRM and now states that a complete record of consent that is verbally requested must include a recording of the consent requested as well as the consent provided, and that recording must make clear the purpose for which consent was provided;
- Service providers referenced under Section 310.5(a)(9) include any entity that provides "digital soundboard" technology rather than "soundboard technology platforms" to make clear that sellers and telemarketers must retain records of any entity that provides any digital or sound technologies that sellers or telemarketers use to convey a verbal message to a consumer in telemarketing;
- Sellers and telemarketers must retain records of their service providers under Section 310.5(a)(9) for five years from the date the contract expires;
- For records of the entity-specific DNC list under Section 310.5(a)(10), sellers and telemarketers must retain a record of the telemarketing entity that made the call and not the individual telemarketer;
- Under Section 310.5(a)(11), sellers and telemarketers need only retain records of which version of the FTC DNC Registry they used to comply with the TSR rather than the version itself. A record of which version used includes: (1) the name of the entity which accessed the registry; (2) the date the DNC Registry was accessed; (3) the subscription account number that was used to access the registry; and (4) the telemarketing campaign(s) for which it was accessed;

- The new formatting requirements under Section 310.5(b) apply to new records created after the Final Rule goes into effect;
- The safe harbor to retain call detail records under Section 310.5(a)(2) will grant sellers and telemarketers thirty days to correct any inadvertent errors from the date of discovery, if the seller or telemarketer who made the error otherwise complies with the other provisions of the safe harbor; and
- Under Section 310.5(e), sellers who delegate recordkeeping responsibilities to a telemarketer must also retain access rights to those records so that the seller can produce responsive records in the event it has hired a telemarketer overseas.

A. Recordkeeping Requirements

The Final Rule requires sellers and telemarketers to maintain additional records that, in the Commission's law enforcement experience, are difficult for the Commission to obtain but are necessary to ensure compliance with the TSR.[87] The Final Rule also clearly defines the information telemarketers or sellers must retain to comply with existing provisions and specifies the records needed to assert an exemption or affirmative defense to the TSR. In this section, the Commission details the public comments it received in response to each proposed amendment to the recordkeeping requirements, and the Commission's response.

1. Section 310.5(a)(1) – Substantially Different Advertising Materials and Each Unique Prerecorded Message

Section 310.5(a)(1) currently requires sellers and telemarketers to keep records of "all substantially different advertising, brochures, telemarketing scripts, and promotional materials."

[87] The Telemarketing Act authorizes the Commission to include recordkeeping requirements in the Rule. 15 U.S.C. 6102(a)(3).

The 2022 NPRM proposed modifying Section 310.5(a)(1) to require retention of a copy of each unique robocall, including each call that a telemarketer makes using soundboard technology.[88]

The Commission received five public comments addressing this proposal. The Enterprise Communications Advocacy Coalition ("ECAC") and Sirius XM Radio ("Sirius") object to this proposed amendment, stating it would be overly burdensome. Sirius states that requiring the retention of each unique robocall would "generate massive amounts of data that then needs to be searched, analyzed, secured, and retained, and will be extremely burdensome."[89] ECAC claims that robocalls are "typically stored as .wav files that are significantly larger than text files. While storage costs *may* have decreased over time, the expense associated with the storage of these large .wav files will be a significant burden on lawful telemarketers."[90]

The National Association of Attorneys General (on behalf of 43 State Attorneys General) ("NAAG"), Professional Association for Customer Engagement ("PACE"), and World Privacy Forum ("WPF") all state that they generally support this amendment.[91] PACE further states that their members "often keep copies of [each unique robocall] despite the TSR currently not requiring businesses to do so. Retaining these records will protect American consumers, who receive countless prerecorded messages, and protect companies, who will be able to prove compliance with the TSR."[92]

The Commission is not persuaded by ECAC's and Sirius' arguments. In the Commission's experience, robocalls are typically of short duration and the file sizes are minimal.

[88] The 2022 NPRM also proposed changing the records retention period under this provision from two years to five years from the date that the records are no longer in use. *See infra* Section III.A.10 (Time Period to Keep Records).

[89] Sirius 34-18 at 8.

[90] ECAC 34-22 at 2.

[91] NAAG 34-20 at 3-4; PACE 33-15 at 2; WPF 34-21 at 2.

[92] PACE 33-15 at 2.

As ECAC notes, the cost of storage may be decreasing every year. Moreover, the Commission proposed requiring a copy of each *unique* robocall, not *every* robocall used. Finally, as some commenters have stated,[93] businesses typically keep these records in the ordinary course of business. In the FTC's law enforcement experience, records of each unique prerecorded message are necessary for the Commission to ensure compliance with the TSR, and requiring retention of each unique robocall should not impose an undue burden.

With respect to calls utilizing soundboard technology, the Commission sought comment on the burden that may be imposed by requiring sellers or telemarketers to keep each unique prerecorded message involving the use of soundboard technology, including how many telemarketers employ soundboard technology in telemarketing, how many calls they make using soundboard technology, the average duration of each call, and whether the telemarketer typically keeps recordings of such calls in the ordinary course of business.[94] The FTC's law enforcement experience demonstrates that the use of soundboard technology is ongoing. The Commission did not receive any public comments regarding this issue. WPF did note, however, that the Commission should be mindful of using technological language that is broad enough to encompass a variety of digital and other sound technologies and recommended the use of the term "digital soundboard" in lieu of "soundboard technology."[95] In light of this recommendation, the Commission states that the term "prerecorded message" includes telemarketing calls made using "digital soundboard" rather than "soundboard technology" to make clear that the term includes any digital or sound technologies that sellers or telemarketers use to convey a verbal message to a consumer in telemarketing. Some digital soundboard

[93] *See, e.g.*, PACE 33-15 at 2.

[94] 2022 NPRM, 87 FR at 33689.

[95] WPF 34-21 at 2.

technologies allow a seller or telemarketer to mimic or clone the voice of a specific individual and calls using this technology would be subject to this provision of the TSR to the extent that the mimic or cloning creates a prerecorded message that is used in telemarketing.

WPF also "encourage[s] the FTC to require telemarketers to keep a copy of the full range of materials involved in the advertising campaign, including transcripts."[96] The Commission notes that the TSR's recordkeeping provisions already require telemarketers and sellers to retain a copy of each substantially different advertising, brochure, telemarketing script, and promotional material.[97] The 2022 NPRM simply clarified that telemarketing scripts include robocall and upsell scripts, and the failure to keep one substantially different version of each record under Section 310.5(a)(1) is a violation of the TSR.[98]

2. Section 310.5(a)(2) – Call Detail Records

The 2022 NPRM proposed adding Section 310.5(a)(2) to require retention of call detail records, including, for each call a telemarketer places or receives: the calling number; called number; time, date, and duration of the call; and the disposition of the call, such as whether the call was answered, dropped, transferred, or connected. For transfers, the record included the phone number or IP address that the call was transferred to and the company name, if transferred to a company different from the seller or telemarketer that placed the call. The 2022 NPRM also required the retention of other records regarding the nature and purpose of each call including: (1) the telemarketer who placed or received each call; (2) the seller or charity for which the telemarketing call is placed or received; (3) the good, service, or charitable purpose that is the subject of the call; (4) whether the call is to a consumer or business, utilizes robocalls,

[96] *Id.*

[97] 16 CFR 310.5(a)(1).

[98] 2022 NPRM, 87 FR at 33684.

or is an outbound call; and (5) the telemarketing script(s) and robocall (if applicable) that was used in the call. Finally, the 2022 NPRM required retention of records regarding the caller ID transmitted for outbound calls, including the name and phone number transmitted, and records of the telemarketer's authorization to use that phone number and name.

The Commission received eight comments regarding this proposal. ECAC,[99] the National Federation of Independent Businesses ("NFIB"),[100] and Sirius[101] objected, stating that compliance with this provision would impose enormous expense on businesses engaged in lawful telemarketing.[102] ECAC states that its members "make hundreds of millions of calls each year" and "[f]actoring in the size of a CDR file" multiplied by the number of calls its members

[99] ECAC 34-22 at 3.

[100] NFIB 33-4 at 4-5.

[101] Sirius 34-18 at 7.

[102] OCUL also generally objects to the proposed recordkeeping requirements as overly burdensome, stating it would require a significant investment to collect and retain new data points in a constricted time frame. OCUL 34-19 at 2.

Other commenters generally objected to the recordkeeping amendments, arguing that they require telemarketers and sellers to retain more information than they would in the ordinary course of business and are "contrary to data minimization principles" articulated by the Commission elsewhere. *See, e.g.,* Sirius 34-18 at 2, 4-6; NFIB 33-4 at 3-4. The Commission interprets these arguments to refer to the new requirement that sellers and telemarketers retain call detail records. NFIB lists other categories in their comment as examples of burden, such as records of established business relationships, customer lists, consent, and entity-specific DNCs or versions of the FTC's DNC Registry. NFIB 33-4 at 3-4. None of these categories, however, is new, and the TSR has always required telemarketers and sellers to keep these records. *See, e.g.,* 16 CFR 310.5(a)(3) and (5) (requiring records of consent and customer lists); 310.4(b)(3)(iii) and (iv) (requiring records of an entity-specific DNC or a version of the FTC's DNC Registry that a seller or telemarketer used to qualify for the safe harbor provisions); *see also* 2015 TSR Amendments, 80 FR at 77554 (stating the seller or telemarketer bears the burden of demonstrating the seller has an existing relationship with a customer whose number is on the DNC).

The Commission notes that the call detail records primarily reflect sellers' and telemarketers' business practices rather than implicate any consumer information. The only new items of consumer information that sellers and telemarketers are required to retain under the new recordkeeping amendments are a consumer's phone number and the option to retain the consumer's last known email address rather than a physical address. *See* proposed amendments under Sections 310.5(a)(2) (call detail records); (a)(3) (prize recipients); (a)(4) (customer records); and (a)(6) (previous donor). As explained in the 2022 NPRM, the Commission believes that telemarketers and sellers likely retain this information in the ordinary course of business. 2022 NPRM, 87 FR at 33684-85. Furthermore, they must already retain consumers' phone numbers to comply with the entity-specific DNC requirements. As discussed in additional detail in Section III.A.3 – Prize Recipients and Customer Records, the Commission will prohibit use of any records created to comply with the TSR's recordkeeping requirements for any other purpose.

make each year, "the expense associated with this retention . . . would be massive."[103] ECAC also argues that, while its members likely keep information regarding the nature and purpose of the calls in the ordinary course of business, associating particular scripts with a particular call is unworkable because "well-trained telemarketers are able to deviate from scripts or not use them at all" and "scripts are constantly changing and evolving to reflect consumer questions and concerns."[104]

Sirius argues that the Commission's "overly prescriptive" approach would impair a business's ability to adapt to changing market conditions and a company's ability to innovate. It would also impose "significant administrative burdens" and "substantial transactional costs" on sellers and telemarketers to establish contracts and systems to capture the information requested.[105] And NFIB argues that sellers and telemarketers would "incur substantial costs to: (1) establish in-house, or purchase from others, systems designed and built to accomplish the newly-mandated, extraordinarily-detailed recordkeeping, and (2) employ personnel to maintain and operate the systems."[106] At minimum, Sirius requests that the Commission allow a "phase-in" period of a few years to allow companies sufficient time to adjust agreements, implement new systems, and build compliance plans.[107]

The Electronic Privacy and Information Center (on behalf of 13 advocacy groups)

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[103] ECAC 34-22 at 3.

[104] *Id.* at 4. The Commission does not find ECAC's argument persuasive. Even if a telemarketer deviates from a script, fails to use the script, or the company constantly updates the scripts, there is still *a* script associated with a particular call and in the Commission's law enforcement experience, telemarketers typically retain that information in the ordinary course of business.

[105] Sirius 34-18 at 7-8.

[106] NFIB 33-4 at 5.

[107] Sirius 34-18 at 8.

("EPIC"), NAAG, WPF, and an individual consumer, all support the proposed amendments.[108] NAAG echoed the Commission's law enforcement experience and agreed that the amendments are necessary to ensure compliance with the TSR and should not be overly burdensome to create and maintain these records.[109] EPIC stated they "strongly support" the amendment which rectifies "a major weakness in the existing rule" of requiring retention of only "prizes awarded and sales" which are of "little use in identifying violations of the do-not-call rule" without accompanying records of calls.[110] EPIC particularly applauded the amendment requiring retention of any caller ID information transmitted and the telemarketer's authorization to use that caller ID because spoofing has undermined consumers' faith in the U.S. telecommunication system, making it harder for emergency calls to reach consumers.[111] WPF and NAAG also commented that requiring records of call transfers and the identity of the recipient of those transfers is particularly important because it is "otherwise impossible to trace fraudulent activity" when transfers typically appear as a separate inbound call to the recipient in the voice provider's call records.[112] The individual consumer stated that retaining call detail records was necessary to enforce the TSR and "a fair compromise" in comparison to requiring recordings of all telemarketing transactions which would be overly burdensome to small businesses.[113]

PACE notes that some of its members are able to maintain the requested records and already do so in the ordinary course of business, but the proposed amendments may not be technically feasible for all members, particularly those who do not use software to engage in

[108] Cassady 34-2; EPIC 34-23 at 4; NAAG 34-20 at 5; WPF 34-21 at 2.

[109] NAAG 34-20 at 5.

[110] EPIC 34-23 at 4.

[111] *Id.*

[112] WPF 34-21 at 2; NAAG 34-20 at 6.

[113] Cassady 34-2.

telemarketing but use employees in retail locations.[114] PACE members raised particular concerns about the technical capacity to record "the duration of the call, disposition of the call, and to whom the call was transferred."[115]

As explained in the 2022 NPRM, the proposed addition of Section 310.5(a)(2) is necessary for the Commission to determine whether the TSR applies and which sections of the TSR the seller and telemarketer must comply with for a telemarketing campaign.[116] The Commission is cognizant that this amendment will require some administrative costs in establishing a new recordkeeping system. In the 2022 NPRM, the Commission provided an estimate of those costs and invited comment about those estimates,[117] but did not receive any public comment specifically disputing its estimates. Nevertheless, in determining whether to implement the proposed amendments, the Commission considers whether the proposed amendments strike an appropriate balance between the goal of protecting consumers from deceptive or abusive telemarketing and the harm from imposing compliance burdens.

To address the concerns raised by the public comments, the Commission will provide a grace period of one hundred and eighty days from the date Section 310.5(a)(2) is published in the Federal Register for sellers and telemarketers to implement any new systems, software, or procedures necessary to comply with this new provision. Furthermore, the Commission will modify this amendment and provide an exemption for calls made by an individual telemarketer who manually enters a single telephone number to initiate a call. For such calls, the seller or telemarketer need not retain records of the calling number, called number, date, time, duration,

[114] PACE 33-15 at 2.

[115] *Id.*

[116] 2022 NPRM, 87 FR at 33680-82, 33684.

[117] 2022 NPRM, 87 FR at 33690-91.

and disposition of the telemarketing call under Sections 310.5(a)(2)(vii) and (x) but must otherwise comply with the other requirements under Section 310.5(a)(2). Making this modification should alleviate the general concerns commenters have raised regarding the feasibility and burden of creating and retaining call detail records. The Commission is not persuaded that requiring sellers and telemarketers to retain call detail records of their telemarketing campaigns would impose an undue burden if the seller or telemarketer can use automated mechanisms to conduct their campaigns instead of placing calls manually. In those situations, as PACE notes, the seller or telemarketer already maintains similar call detail records in the ordinary course of business.[118]

Nor is the Commission persuaded by Sirius' arguments that the proposed amendments are overly prescriptive and requiring retention of these records would stifle innovation. The proposed amendments merely identify the information sellers and telemarketers must retain. It does not dictate the form or "look and feel" of business records as Sirius' suggests. As discussed in more detail in Section III.A.11 – Format of Records, the Commission believes that the amendment to Section 310.5(a)(2) strikes the appropriate balance between providing specificity about the information sellers and telemarketers are required to keep without prescribing how it must do so.

EPIC and WPF's comments also suggested additional modifications to Section 310.5(a)(2). WPF requested that the Commission consider requiring sellers and telemarketers to retain records of their use of voice biometrics in call centers, including whether voice biometrics recognition or voice emotion analysis software was used, whether a consumer's records were marked with any inferences from any voice biometric analysis, and whether that analysis was

[118] PACE 33-15 at 2.

shared with any other parties.[119] The FTC's Policy Statement on Biometric Information notes significant privacy concerns regarding the collection and use of biometric information and the possibility that such practices may be considered an "unfair" practice under Section 5 of the FTC Act.[120] Furthermore, the collection and use of such information might be considered abusive and violative of a consumer's right to privacy, which Congress gave the Commission the power to regulate with respect to telemarketing.[121] Although the Commission does not believe it has the evidence now either to require the retention of voice biometric recognition data in telemarketing or place restrictions on its use, it will continue to monitor voice biometric use in telemarketing.

EPIC requested that the Commission consider requiring telemarketers and sellers to also retain records of campaign IDs for each call, arguing it is necessary to tie the call detail records to a particular campaign.[122] The Commission recognizes the concern EPIC has raised and addressed it by requiring sellers and telemarketers to retain records that identify, *for each call*, the nature and purpose of that call, such as the seller or soliciting charity for whom the telemarketing call was placed, the good or service sold or the charitable purpose of the call, and the telemarketing script or the robocall recording that was used. This information is at least as comprehensive as a campaign ID. The Commission believes that specifying the substantive information sellers and telemarketers are required to retain, rather than identifying a particular data category such as campaign ID that may be subject to change over time, will more effectively enable the Commission and other regulators to enforce the TSR.

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[119] WPF 34-21 at 2.

[120] FTC, Policy Statement of the Federal Trade Commission on Biometric Information and Section 5 of the Federal Trade Commission Act (May 18, 2023), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/p225402biometricpolicystatement.pdf (last visited Jan 24, 2024).

[121] 15 U.S.C. 6102(a)(1).

[122] EPIC 34-23 at 5.

Finally, EPIC requested that the Commission consider requiring sellers and telemarketers to keep records of the originating or gateway telecommunications provider for each campaign, rather than any service provider that the telemarketer is in a business relationship with, as the NPRM proposes.[123] The Commission believes that requiring retention of the call detail records and records of the seller or telemarketer's service providers strikes an appropriate balance between the Commission's interest in having sufficient information to enforce the TSR and industry's concerns regarding burden.

3. Sections 310.5(a)(3) and (4) – Prize Recipients and Customer Records

The TSR currently requires telemarketers and sellers to retain the "name and last known address" of each prize recipient.[124] The 2022 NPRM proposed requiring sellers and telemarketers to also retain the last known telephone number and physical or email address for each prize recipient. The Commission received three comments regarding this proposal, and all were supportive of the amendment. PACE states it believes this was a "prudent measure, and many telemarketers and sellers that reward prizes likely already comply with this proposal."[125] NAAG agrees, stating that the requirement "reflects current business practices" and telemarketers and sellers "likely keep such information in the regular course of their business."[126] WPF concurs, but also suggests that the Commission consider requiring sellers and telemarketers to retain this data in an encrypted state.[127]

With respect to "Customer Records" under Section 310.5(a)(4), the TSR requires sellers

[123] *Id.*

[124] 16 CFR 310.5(a)(2).

[125] PACE 33-15 at 4.

[126] NAAG 34-20 at 9.

[127] WPF 34-21 at 3.

or telemarketers to retain the "name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services."[128] Similarly, the Commission proposed modifying this provision to account for current business practices and require the retention of the customer's last known telephone number and the customer's last known physical address or email address. The Commission also proposed adding the date the consumer purchased the good or service to account for the new requirement that telemarketers and sellers keep records of each consumer with whom a seller intends to assert it has an EBR.[129]

The Commission received four comments regarding this amendment. NAAG and PACE support this proposal, and agree it is necessary to establish EBR and likely that telemarketers and sellers already retain this information in the ordinary course of business.[130] EPIC and WPF, however, do not support this amendment unless the Commission concurrently passes commensurate privacy protections.[131]

The Commission notes that, as it recognized in the 2022 NPRM, requiring sellers and telemarketers to retain additional personal identifying information (such as consumers' names, phone numbers, and either their physical or email address, in combination with goods or services they purchased) may raise privacy concerns.[132] The Commission emphasizes once more that

[128] 16 CFR 310.5(a)(3).

[129] 2022 NPRM, 87 FR at 33686.

[130] NAAG 34-20 at 9; PACE 33-15 at 5.

[131] EPIC 34-23 at 15; WPF 34-21 at 3. When consumer data is transferred as part of the sale, assignment, or change in ownership, dissolution, or termination of the business, EPIC also urges the Commission to require a successor to acknowledge liability for any TSR violations regarding the calls that those records document. EPIC 34-23 at 15-16. EPIC argues that this will deter a fraudulent seller or telemarketer from shutting their businesses and selling their assets, including customer lists, to a sham successor as a means of evading liability. The Commission does not believe such an amendment is necessary at this time.

[132] 2022 NPRM, 87 FR at 33686.

sellers and telemarketers have an obligation under Section 5 of the FTC Act to adhere to the commitments they make about their information practices and take reasonable measures to secure consumers' data.[133]

But the Commission also recognizes the concerns raised by the comments. It agrees that additional protections, similar to those it incorporated into the TSR when it prohibited the sale or use of any lists established or maintained to comply with the TSR's DNC Registry or entity-specific DNC,[134] should also apply to any lists of consumers that sellers or telemarketers create or maintain in order to comply with the amended recordkeeping provisions.

Thus, the Commission will amend Section 310.4(b)(2) to state that it is also an abusive telemarketing act or practice and a violation of the TSR for any person to sell, rent, lease, purchase, or use any list established to comply with Section 310.5. Amending the TSR to specify that the sale or use of a list created to comply with the recordkeeping provisions is consistent with the Telemarketing Act's emphasis on privacy protection. The Act authorizes the Commission to regulate "calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."[135] The Commission agrees with commenters that consumers would consider it coercive and an abuse of their right to privacy if telemarketers or sellers are allowed to use any consumer information that they collect and maintain under the TSR's recordkeeping provisions for any other purpose.

4. Section 310.5(a)(5) – Established Business Relationship

The 2022 NPRM proposed adding Section 310.5(a)(5) to further clarify what records a

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[133] *See generally* Federal Trade Commission 2020 Privacy and Data Security Update, *available at* https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-2020-privacy-data-security-update/20210524_privacy_and_data_security_annual_update.pdf (last visited Dec. 11, 2023).

[134] 2003 TSR Amendments, 68 FR at 4645.

[135] 15 U.S.C. 6102(a)(3)(A); *see also* 2002 NPRM, 67 FR at 4510-11.

seller must keep to "demonstrate that the seller has an established business relationship" with a consumer. Specifically, for each consumer with whom a seller asserts it has an established business relationship, the seller must keep a record of the name and last known phone number of that consumer, the date the consumer submitted an inquiry or application regarding that seller's goods or services, and the goods or services inquired about.[136]

The Commission received five comments addressing this proposed amendment. EPIC,[137] NAAG, and PACE all support this amendment, agreeing that it is necessary for a seller to establish a business relationship with a consumer and that it is likely that businesses already retain such records.[138] The Ohio Credit Union League ("OCUL") made a general objection stating it was unclear when a credit union member's business relationship begins or ends, while Sirius objected on the grounds "it was unnecessary" since "sellers and telemarketers must already collect information sufficient to demonstrate an established business relationship to use as an affirmative defense."[139]

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[136] A seller may also show it has an established business relationship with a consumer if that consumer purchased, rented, or leased the seller's goods or services or had a financial transaction with the seller during the 18 months before the date of the telemarketing call. The Commission is modifying the existing recordkeeping provisions to state that records of existing customers should also include the date of the financial transaction to support the existence of an EBR under these circumstances. *See* Section III.A.3 (Prize Recipients and Customer Records).

[137] EPIC also urged the Commission to modify the EBR requirements to include consumers who purchased a good or service from the seller. EPIC 34-23 at 14. The Commission does not believe this is necessary since sellers and telemarketers must already keep records of customers, which includes consumers who purchased a good or service from the seller. 16 CFR 310.5(a)(3). Furthermore, as discussed in Section III.A.3 – Prize Recipients and Customer Records above, the Commission is amending the customer records provision to include the date the consumer purchased the good or service to account for the new EBR recordkeeping requirements.

EPIC also urges the Commission to consider clarifying that EBR may only be asserted as an affirmative defense if the seller or telemarketer intentionally called the consumer *because* it has an established business relationship with the consumer. EPIC 34-23 at 15. The TSR does not currently contemplate the use of EBR in this manner but rather allows telemarketers and sellers to call a consumer if the seller can demonstrate it has an EBR with that consumer and otherwise meets other requirements under the TSR. Making any modifications to this framework would require additional consideration.

[138] EPIC 34-23 at 15; NAAG 34-20 at 7; and PACE 33-15 at 2-3.

[139] OCUL 34-19 at 2; Sirius 34-18 at 5.

The Commission is not persuaded by either OCUL's or Sirius's objections. As the Commission noted in its 2022 NPRM, this requirement only applies if a seller intends to assert it has an established business relationship with a consumer.[140] As Sirius notes, sellers must already collect this information in the ordinary course of business and thus the amendment should not impose an additional burden.

5. Section 310.5(a)(6) – Previous Donor

Similar to the EBR requirements described above, the Commission also proposed adding Section 310.5(a)(6) to clarify that, if a telemarketer intends to assert that a consumer is a previous donor to a particular charity,[141] the telemarketer must keep a record, for each such consumer, of the name and last known phone number of that consumer, and the last date that the consumer donated to the particular charity. The Commission received two comments on this proposed amendment. NAAG agreed with this proposed amendment, stating it was akin to the proposed amendment for EBR and should not "impose any undue burden."[142] WPF concurred stating the new recordkeeping provision will "serve to clarify the exemption for charitable donations."[143]

6. Section 310.5(a)(8) – Records of Consent

Section 310.5(a)(5) of the TSR requires sellers or telemarketers to keep records of "[a]ll verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule." The Commission proposed modifying this provision to clarify what constitutes a complete record of consent sufficient for a telemarketer or seller to

[140] 2022 NPRM, 87 FR at 33685.

[141] The Commission also proposed adding a new definition of "previous donor." *See supra* Section II.C.

[142] NAAG 34-20 at 7.

[143] WPF 34-21 at 1.

assert an affirmative defense.[144] It wanted to make clear that common practices previously employed by telemarketers or sellers, such as maintaining a list of IP addresses and timestamps as proof of consent, are insufficient to demonstrate that a consumer has, in fact, provided consent to receive robocalls or receive telemarketing calls when the consumer has registered her phone number on the DNC Registry.[145]

Specifically, the 2022 NPRM proposed that for each consumer from whom a seller or telemarketer states it has obtained consent, sellers or telemarketers must maintain records of that consumer's name and phone number, a copy of the consent requested in the same manner and format that it was presented to that consumer, a copy of the consent provided, the date the consumer provided consent, and the purpose for which consent was given and received.[146] For a copy of the consent provided under Sections 310.3(a)(3), 310.4(a)(7), 310.4(b)(1)(iii)(B)(1), or 310.4(b)(1)(v)(A), a complete record must also include all of the requirements outlined in those respective sections.[147] The 2022 NPRM also stated that if consent were requested verbally, a copy of the telemarketing script of the request would suffice as a copy of the consent requested, and a recording of the conversation was not necessary unless another provision of this Rule required it.[148]

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[144] 2022 NPRM, 87 FR 33686-87.

[145] *Id.* at 33681.

[146] *Id.* at 33686-87.

[147] *Id.* For example, a copy of the consent provided to receive prerecorded sales messages under Section 310.4(b)(1)(v)(A) must evidence, in writing: (1) the consumer's name, telephone number, and signature; (2) that the consumer stated she is willing to receive prerecorded messages from or on behalf of a specific seller; (3) that the seller obtained consent only after clearly and conspicuously disclosing that the purpose of the written agreement is to authorize that seller to place prerecorded messages to that consumer; and (4) that the seller did not condition the sale of the relevant good or service on the consumer providing consent to receive prerecorded messages. The TSR also states that a seller must obtain consent from the consumer, and the Commission reiterates that this means a seller must obtain consent directly from the consumer and not through a "consent farm."

[148] 2022 NPRM, 98 FR at 33686-87.

The Commission received four comments regarding this proposed amendment. EPIC, NAAG, PACE, and WPF all generally support the proposed amendment.[149] PACE states it "welcomes these provisions in order to better ascertain what records are necessary to assert an affirmative defense" and that the proposed records "flow logically from the TSR."[150]

But EPIC, NAAG, and WPF also submitted suggestions on additional amendments arguing that the Commission should implement more stringent requirements. WPF suggests that the Commission consider updating how a consumer "may withdraw or revoke consent, and create responsibilities for telemarketers to provide a clear opportunity to revoke or consent in each communication."[151] EPIC asks the Commission to specify that in identifying the "specific seller" from whom a consumer has provided written express agreement to receive robocalls, the telemarketer or seller must retain records of the "legal name of the seller whose goods [or] services are being promoted."[152] EPIC believes this will "reduce obfuscation" on the "scope of the consumer's consent" and identify the proper defendant if "legal action is necessary."[153]

The Commission believes that WPF's recommendation is primarily applicable to transactions involving a negative option feature[154] where a consumer may wish to cancel a subscription plan and revoke billing authorization. The Commission published a Notice of Proposed Rulemaking regarding the Negative Option Rule ("Negative Option NPRM") on April

[149] *See* EPIC 34-23 at 10-11; NAAG 34-20 at 10; PACE 33-15 at 5; and WPF 34-21 at 3.

[150] PACE 33-15 at 5.

[151] WPF 34-21 at 3.

[152] EPIC 34-23 at 10-13.

[153] *Id*.

[154] A negative option feature is defined as "an offer or agreement to sell or provide any goods or services, a provision under which a customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer." 16 CFR 310.2(w).

24, 2023, which also addresses telemarketing transactions.[155] Because the proposed Negative Option Rule would apply a more comprehensive and consistent framework for negative option transactions regardless of the sales medium, the Commission declines to make any further amendments to the TSR to address WPF's comment at this time.

With respect to EPIC's request regarding the identification of a "specific seller," the Commission stated in the Statement of Basis and Purpose finalizing the TSR amendments prohibiting robocalls that it used the term "specific seller" to "make it clear that prerecorded calls may be placed only by or on behalf of the specific seller identified in the agreement."[156] The Commission wanted to ensure that any agreement to receive robocalls would be limited to the seller identified in the agreement and could not be transferrable to any other party.[157] Requiring companies to use the legal entity name to identify the specific seller in the written agreement is a natural extension of the Commission's intention in using the term "specific seller." Thus, the Commission states now that in identifying the specific seller in any written agreement, the seller should use its legal entity name to make clear that any agreement to receive robocalls is limited to that specific legal entity. The Commission also states that the burden will be on the seller or telemarketer to ensure and prove a consumer understands which specific legal entity would be permitted to send the consumer robocalls. In circumstances where the legal entity's name may not be recognizable to consumers, perhaps because the consumers would recognize a brand or product name but not the legal entity name, the seller or telemarketer may need to take extra steps to ensure that the consumer has knowingly agreed to receive robocalls from the specific seller.

[155] 88 FR 24716 (Apr. 24, 2023).

[156] 2008 TSR Amendments 73 FR at 51186; *see also supra* note 147.

[157] 2008 TSR Amendments 73 FR at 51186.

EPIC also requests that the Commission require sellers and telemarketers to "retain records regarding the owner of the website where consent was purportedly obtained" and a record of "the relevant webform completion, or of some other admissible evidence of the specific consumer providing consent via a specific webpage on a specific date/time."[158] For telemarketers or sellers who obtain consumer consent via a website, the Commission believes the new recordkeeping provision requiring records of "a copy of the request for consent in the same manner and format in which was presented to that consumer" would require a telemarketer or seller to keep a copy of the webpage or webpages that were used to request consent from the consumer. The copy of the webpage could be maintained as screenshots so long as the screenshot accurately reflects what a consumer viewed in providing consent. Sellers and telemarketers who obtain consent via website will also need to keep "a copy of the consent provided" under the new recordkeeping provisions. The Commission believes that a screenshot of the webpage that a consumer completed to provide consent could satisfy this requirement if the screenshot also accurately reflects what a consumer submitted in providing consent. The Commission declines to specify the format that a company must use to keep a copy of consent requested or provided to allow businesses the flexibility of retaining records as they would in the ordinary course of business. Rather, it believes that specifying the categories of information required to adequately reflect consent will provide sufficient guidance. The Commission cautions, however, that an IP address with a timestamp is not sufficient as a record of consent. The Commission does not believe that any additional amendments are necessary at this time.[159]

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[158] EPIC 34-23 at 12.

[159] EPIC also requested that the Commission clarify that the TSR's language regarding consent is similar to the TCPA's language regarding consent or that the consent requirements do not "lower the bar below the current requirements of the TCPA." EPIC 34-23 at 13. The new amendments to the TSR do not alter substantive requirements for consent under the TSR. They merely clarify what records are necessary to maintain proof of consent.

EPIC and NAAG also raised concerns regarding the Commission's statement regarding the records for verbal consent. In the 2022 NPRM, the Commission stated that if a seller or telemarketer requests consent verbally, a telemarketing script would suffice as a record of the consent requested as long as no other provision of the TSR required a recording.[160] EPIC requests that the Commission make clear that the reference to verbal consent only applies to billing authorization under Section 310.4(a)(7), and any authorization required to receive robocalls or to receive telemarketing calls to phone numbers on the DNC Registry must be provided in writing. EPIC also raised concerns over whether the Commission's statement meant that a script is an "acceptable record of the language the caller used to request consent" or if "the Commission is also suggesting that [a script] is an acceptable record of the consumer's grant of consent."[161] If the former, EPIC argues that using a telemarketing script as a record of the request for consent is insufficient when telemarketers often fail to follow the scripts.[162] If the latter, EPIC argues that it would "eviscerate the recordkeeping requirement" when the new consent requirements include "'a copy of the request provided.'"[163] EPIC also argues that allowing a recording of only the consent provided without the actual request for consent would allow the telemarketer or seller to record a series of the "word 'yes,' which would be meaningless without any context."[164] NAAG takes it a step further and urges the Commission to require recordings of the entire telemarketing transaction whenever consent is requested

[160] 2022 NPRM, 87 FR at 33687.

[161] EPIC 34-23 at 11.

[162] *Id.*

[163] *Id.*

[164] *Id.*

verbally.[165]

The 2022 NPRM specifies that, with respect to requests for verbal consent where no provision of the TSR requires a recording, a telemarketing script would be sufficient for a copy of the *request* for consent. It did not propose that a telemarketing script would be sufficient as a record of the consent *provided*. But the Commission recognizes the concerns raised by NAAG and EPIC, that without a recording of the consent requested, a recording of the request provided would be meaningless. Given that industry has stated that scripts are not "set in stone" and "[w]ell-trained telemarketers are able to deviate from scripts or not use them at all,"[166] the Commission states that, for a complete record of consent that is requested verbally and where no provision of the TSR requires a recording, a telemarketer or seller must retain a recording of the consent requested as well as the consent provided to comply with proposed Section 310.5(a)(8). In addition, the recording must make clear the purpose for which consent was provided. The Commission does not believe that requiring a recording of both the consent requested and provided would result in additional burden to businesses since it believes that most businesses would have made a recording of both to comply with the recordkeeping provisions in the ordinary course of business.

In further response to NAAG and EPIC's concern, the Commission does not believe that a recording of the entire telemarketing transaction is necessary if it is not otherwise required by another provision of the TSR. To require a recording of the entire transaction whenever consent is requested would effectively require a recording of all telemarketing transactions that are

[165] NAAG 34-20 at 10. NAAG has also urged the Commission to require a recording whenever a telemarketing call includes a negative option offer. NAAG 34-20 at 6. It also requests that the Commission require a full refund if a consumer complains of unauthorized charges and the seller is unable to provide a recording of the transaction as proof of consent. *Id.* Since the Commission has issued the Negative Option NPRM, the Commission will not address this comment here.

[166] ECAC 34-22 at 4.

subject to the TSR.[167]

The Commission reiterates that sellers and telemarketers remain obligated to comply with all requirements outlined in other consent provisions in the TSR.[168] For transactions involving preacquired account information, telemarketers and sellers must fulfill the requirements of Section 310.4(a)(7)(i) and (ii), which include recording the entire telemarketing transaction if there is a free-to-pay conversion feature. For consent to receive robocalls or calls to phone numbers on the DNC Registry, telemarketers and sellers must abide by the requirements of Sections 310.4(b)(1)(iii)(B)(1) and (b)(1)(v)(A), respectively, which include obtaining a consumer's written consent.[169] And for telemarketing transactions using certain payment methods, telemarketers and sellers must comply with Section 310.3(a)(3), which includes obtaining a consumer's authorization to be billed in writing or, if verbal consent is requested, a recording of the transaction that evidences a consumer has received specific information. The Commission reiterates that this rule amendment does not modify the requirements for consent outlined in the TSR; rather it clarifies what records must be kept to demonstrate compliance with the existing requirements.

7. Section 310.5(a)(9) – Other Service Providers

The Commission proposed requiring sellers and telemarketers to keep records of all service providers that the telemarketer uses to deliver an outbound call in their telemarketing

[167] The TSR states it is an abusive practice to "cause billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor." 16 CFR 310.4(a)(7). This prohibition applies to all telemarketing transactions subject to the TSR. Thus, requiring a recording of every telemarketing call whenever consent is requested would essentially mean that all telemarketing calls subject to the TSR would need to be recorded.

[168] *See* 16 CFR 310.3(a)(3), 310.4(a)(7), 310.4(b)(1)(iii)(B)(1), and 310.4(b)(1)(v)(A).

[169] The Commission reiterates that a seller or telemarketer may not use an oral recording of consent for any provision of the TSR that requires consent to be provided in writing.

campaigns, such as voice providers, autodialers, sub-contracting telemarketers, or soundboard technology platforms. The provision would only apply to the service providers with which the seller or telemarketer has a business relationship, and not to every service provider involved in delivering an outbound call. For each service provider, the seller or telemarketer would keep records of any applicable contracts, the date the contract was signed, and the time period the contract is in effect. The seller or telemarketer would keep such records for five years from the date the contract expires or five years from the date that the telemarketing activity covered by the contract ceases, whichever is shorter.

The Commission received four comments on this proposal. EPIC, NAAG, PACE, and WPF all support the proposed amendment, but also suggested some modifications.[170] WPF repeated its request that the Commission use broader terminology than "soundboard technology platforms" in defining service providers.[171] EPIC repeated its request that the Commission require sellers and telemarketers to also keep records of which service provider they used for each telemarketing campaign to ensure those service providers are also complying with the TSR.[172]

The Commission clarifies that service providers referenced under this provision include any entity that provides "digital soundboard" technology rather than "soundboard technology platforms," to make clear that sellers and telemarketers must retain records of any entity that provides any digital or sound technologies that sellers or telemarketers use to convey a verbal message to a consumer in telemarketing. This includes, for example, service providers that telemarketers or sellers use to mimic or clone the voice of an individual to deliver live and

[170] EPIC 34-23 at 7-8; NAAG 34-20 at 7-8; PACE 33-15 at 3; WPF 34-21 at 2.

[171] WPF 34-21 at 2; *see also* Section III.A.2 (Call Detail Records).

[172] EPIC 34-23 at 8.

prerecorded outbound telemarketing calls. With respect to EPIC's concerns of ensuring that service providers are also complying with the TSR, as discussed above in Section III.A.2 – Call Detail Records, the Commission believes it is not necessary to require records of the service provider used per telemarketing campaign. Requiring retention of all call detail records *and* records of the service providers used in making outbound telemarketing calls would be sufficient for the Commission and other law enforcement agencies to enforce the TSR and strikes an appropriate balance against industry's concerns regarding burden.

PACE requests that the Commission limit this provision to the service providers with which sellers and telemarketers have a direct contractual relationship rather than a "business relationship."[173] PACE argues that it would be unreasonable to expect a seller to maintain records of its telemarketers' voice providers when the contractual relationship is between the telemarketer and voice provider.[174] PACE also asks that the Commission limit the five year retention time period from the date the contract expires rather than when the telemarketing activity covered by the contract ceases.[175] PACE expressed concerned that one party to the contract might cease the telemarketing activity without informing the other party and it would be difficult to identify when the retention period is triggered.[176]

The Commission recognizes the potential for uncertainty in the scenario that PACE raises and will modify the recordkeeping requirements accordingly to require retention of any records under this provision for five years from the date the contract expires.[177] With respect to PACE's

[173] PACE 33-15 at 3.

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] If, after the end of a fixed term contract, a service provider continues to provide services and the telemarketer or seller continues to pay for those services, the Commission will consider the contract extended until performance

request to limit the recordkeeping requirements to those service providers with whom sellers or telemarketers have a direct contractual relationship, the Commission is not persuaded that requiring records of service providers with which they have a business relationship would cause additional burden. As explained in more detail in Section III.A.14 – Compliance Obligation, the Commission will allow sellers and telemarketers to allocate recordkeeping responsibilities between themselves. In the scenario that PACE raises, a seller can simply require their telemarketer to retain records of all the service providers it uses to make outbound telemarketing calls on the seller's behalf.

8. Sections 310.5(a)(10) - Entity-Specific DNC List

The 2022 NPRM also proposed requiring telemarketers and sellers to maintain for five years records related to the entity-specific DNC list and its corresponding safe harbor provision under Section 310.4(b)(3)(iii).[178] Specifically, the Commission proposed requiring telemarketers and sellers to retain records of: (1) the consumer's name, (2) the phone number(s) associated with the DNC request, (3) the seller or charitable organization from which the consumer does not wish to receive calls, (4) the telemarketer that made the call; (5) the date the DNC request was made; and (6) the good or service being offered for sale or the charitable purpose for which contributions are being solicited.

The Commission received four comments on this proposal. NAAG, PACE, and WPF, generally support the provision, noting that businesses likely retain this information in the ordinary course of business, while ECAC raised concerns. [179] ECAC agrees that businesses likely keep most of the data listed in the proposed provision, but stated the requirements should

ceases.

[178] 2022 NPRM, 87 FR at 33686.

[179] ECAC 34-22 at 4; NAAG 34-20 at 8; PACE 33-15 at 3-4; WPF 34-21 at 3.

not include retention of consumer phone numbers or records of the purpose of the call (e.g., the good or service offered for sale or the charitable purpose of contributions solicited) because both are burdensome to retain and irrelevant to the entity-specific TSR provisions.[180] Instead, ECAC argues that the Commission should modify the entity-specific DNC requirements so that it prohibits calls to specific numbers rather than specific people, similar to how the DNC Registry is applied.[181] PACE also requested that the Commission clarify that the new entity-specific DNC recordkeeping provision requires retention of the telemarketing *entity* that made the call rather than the *individual* telemarketer.[182]

The Commission clarifies that the new recordkeeping provision requires retention of the identity of the telemarketing company that made the call and not the individual telemarketer. This requirement is particularly important for sellers or charitable organizations who engage multiple telemarketing entities to sell their good or service or seek a charitable contribution through telemarketing. Sellers or charities already should know which telemarketing entity logged the consumer's request to cease receiving calls on their behalf and ensure that all of their telemarketers abide by that request.

Similarly, when a telemarketer engages in telemarketing on behalf of multiple sellers or charitable organizations, it is important to require the retention of records of the purpose of the call any time a consumer asks a telemarketer to add them to the entity-specific DNC list. Since the entity-specific DNC prohibition is seller or charitable organization specific, telemarketers already should retain this information in the ordinary course of business because telemarketers must keep track of which seller on whose behalf they cannot contact specific consumers.

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[180] ECAC 34-22 at 4.

[181] *Id.*

[182] PACE 33-15 at 4.

With respect to ECAC's concerns that retaining consumer phone numbers is irrelevant and overly burdensome, the Commission notes that the safe harbor provision for the entity-specific DNC list is phone-number based and not based on a consumer's name. Section 310.4(b)(3) states that a seller or telemarketer shall not be liable for violating the entity-specific DNC provisions if, among other things, they maintain and record a "list of telephone numbers the seller or charitable organization may not contact, in compliance with [the entity-specific DNC provision.]"[183] Telemarketers must already retain a consumer's phone number in the ordinary course of business to comply with the TSR; including it in the new recordkeeping provision would not impose additional burden on businesses.

9. Section 310.5(a)(11) – DNC Registry

The 2022 NPRM also proposed requiring telemarketers and sellers to maintain, for five years, records of every version of the FTC's DNC Registry the telemarketer or seller downloaded in implementing the process referenced in the safe harbor provision of Section 310.4(b)(3)(iv).[184]

The Commission received four comments on this provision. NAAG, PACE, and WPF generally support the proposed provision, but also request some clarifications or modifications, while ECAC generally objects to the requirement.[185] WPF notes that it "strongly support[s]" the proposed changes, noting they would ensure the "integrity of the Do Not Call Registry."[186] ECAC argues that the Commission should not require records of every version of the DNC Registry used because it "imposes significant costs and burdens" that "greatly exceed any

[183] 16 CFR 310.4(b)(3)(iii).

[184] 2022 NPRM, 87 FR at 33686.

[185] ECAC 34-22 at 4; NAAG 34-20 at 8; PACE 33-15 at 3-4; WPF 34-21 at 3.

[186] WPF 34-21 at 3.

marginal benefit" to the Commission, particularly when many of its members outsource scrubbing responsibilities to third parties and may never download the DNC Registry in the first place.[187]

WPF requests that the Commission require telemarketers to keep records of how many times they accessed the DNC Registry or parts of the DNC Registry.[188] PACE requests that the Commission clarify how it believes sellers and telemarketers would comply with the proposal that they retain records of "every version of the registry they have downloaded."[189] PACE states that it would be "redundant" if the Commission is requiring businesses to "maintain separate versions of the registry apart from the up-to-date one" since most businesses only "scrub against the current version" of the registry in the ordinary course of business.[190] PACE would support requiring them to "document the version of the registry they used" since doing so would reduce "redundancy and data storage costs associated with keeping expired registries."[191]

Given the objections raised, the Commission will modify this provision to clarify that sellers and telemarketers need not keep every version of the DNC Registry they accessed to comply with the TSR's safe harbor rules. Instead, sellers and telemarketers must retain records of which version they used by keeping records of: (1) the name of the entity which accessed the registry; (2) the date the DNC Registry was accessed; (3) the subscription account number that was used to access the registry; and (4) the telemarketing campaign(s) for which it was accessed. Amending this provision to retain this information will address ECAC's concerns that the seller

[187] ECAC 34-22 at 4.

[188] WPF 34-21 at 3.

[189] PACE 33-15 at 4.

[190] *Id.*

[191] *Id.*

or telemarketer may use a third-party service to access the DNC Registry, and PACE's concern that retaining the actual version of the DNC Registry would be redundant and burdensome. It would also address WPF's request that sellers and telemarketers should keep records of the number of times they access the DNC Registry. Presumably, sellers and telemarketers only access the DNC Registry to ensure compliance with the TSR's DNC prohibitions since accessing the DNC Registry for any other purpose would be a violation of the TSR.[192]

10. Time Period to Keep Records

The Commission proposed changing the time period that telemarketers and sellers must keep records from two years to five years from the date the record is made, except for Sections 310.5(a)(1) and (a)(9),[193] where the Commission proposed requiring retention for five years from the date that records covered by those sections are no longer in use. The Commission received nine comments on this proposal.[194] EPIC, NAAG, and WPF support the proposal, citing as rationales for their support the amount of time necessary to complete an investigation of TSR violations and that telemarketers fail to comply with litigation holds that are issued while investigations are pending.[195] ECAC, NFIB, OCUL, PACE, Sirius, and the US Chamber of Commerce ("Chamber") all object, raising burden concerns.[196] PACE stated the Commission cannot assume its proposal would not be unduly burdensome based on the fact that data storage costs have decreased since 2014.[197] This is particularly true for small businesses, according to

[192] 16 CFR 310.4(b)(2).

[193] The records covered by these two sections include advertising materials and a list of the service providers who assisted in outbound telemarketing. *See supra* Sections III.A.1 (Substantially Different Advertising Materials) and III.A.7 (Other Service Providers).

[194] 2022 NPRM, 87 FR at 33686.

[195] EPIC 34-23 at 4-5; NAAG 34-20 at 8-9; WPF 34-21 at 3.

[196] ECAC 34-22 at 6; NFIB 33-4 at 5; OCUL 34-19 at 2-3; PACE 33-15 at 4; Sirius 34-18 at 3; Chamber 34-24 at 1.

[197] PACE 33-15 at 4.

PACE, when the Commission is simultaneously expanding the number of records that must be retained and the length of time those records must be retained.[198] Sirius and OCUL also argue that the FTC should not require retention of records "beyond the agency's statute of limitations."[199] Sirius argues the appropriate statute of limitations is three years,[200] and OCUL argues that while the TSR does not "specify a statute of limitations," courts will "apply the statute of limitations of the state where the case is filed," which is two years in Ohio.[201]

The Commission is not persuaded by the general burden concerns that commenters have raised. None of the commenters provided any information on what the burden would be and why small businesses would not be able to comply with the new recordkeeping amendments. As mentioned in Section III.A.2 – Call Detail Records, the Commission provided an estimate of the additional cost of complying with the new recordkeeping amendments but did not receive any comment or data on why its estimate is inaccurate.

Additionally, the Commission notes that the statute of limitations for the FTC to seek civil penalties under the TSR is five years and not two or three years, as some commenters argued. Although the statute of limitations to seek *consumer redress* for TSR violations is three years under Section 19 of the FTC Act,[202] the applicable statute of limitations for *civil penalties* is five years under Section 5 of the FTC Act.[203] As such, the Commission believes it is

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[198] *Id.*

[199] Sirius 34-18 at 3.

[200] *Id.*

[201] OCUL 34-19 at 2-3.

[202] 15 U.S.C. 57b(d).

[203] 15 U.S.C. 45(m); 28 U.S.C. 2462; *see also United States v. MyLife.com, Inc.,* 567 F. Supp. 3d 1152, 1166 (C.D. Cal. Oct. 19, 2021) (holding the statute of limitations for civil penalties under the FTC Act is five years); *United States v. Dish Network, LLC*, 75 F. Supp. 3d 942, 1004-05 (C.D. Ill. 2014) (holding the three-year statute of limitations in 15 U.S.C. 57b does not apply to claims for civil penalties under Section 5(m) of the FTC Act, and since Section 5(m) is silent, the applicable statute of limitations is five years under 28 U.S.C. 2462). The statute of limitations for a private right of action under the Telemarketing Act is three years. 15 U.S.C. 6104(a).

appropriate and necessary to require the retention of records for five years. This requirement is particularly important when, as EPIC has noted, not all companies will comply with a litigation hold request while an investigation is pending, potentially leaving law enforcement agencies with no recourse in enforcing the TSR.[204]

11. Section 310.5(b) – Format of Records

The 2022 NPRM proposed modifying the formatting requirements to require records that include phone numbers comport with the International Telecommunications Union's Recommendation E.164 format for international phone numbers and North American Numbering plan for domestic phone numbers.[205] For records that include time and call duration, the 2022 NPRM proposed that industry keep these records to the closest whole second, and record times in Coordinated Universal Time (UTC). The Commission received two comments on this proposal. Both commenters support the amendments, but also requested clarifications or modifications.

PACE asked the Commission to clarify that the new amendments requiring that time be kept in UTC format applies only to new records moving forward.[206] It also requested that the Commission allow businesses a reasonable time to implement the proposed changes since it may require reprogramming software and IT systems.[207] The Commission clarifies that the new formatting requirements apply only to new records created after the proposed amendments go into effect. Additionally, as stated in Section III.A.2 – Call Detail Records, the Commission will allow sellers and telemarketers a one hundred eighty-day grace period to implement any new

[204] EPIC 34-23 at 4-5.

[205] 2022 NPRM, 87 FR at 33687.

[206] PACE 33-15 at 5.

[207] *Id.*

systems, software, or procedures necessary to comply with that new provision. The Commission believes that should provide companies sufficient time to reprogram any software systems necessary to also comport with the new formatting requirements.

EPIC requests that the Commission require companies to maintain records in a format that is easily retrievable and inexpensive to produce and make clear that the regulated party is responsible for the cost of producing the records.[208] EPIC also requests that the Commission impose more specific formatting requirements and require telemarketers and sellers to keep their records in a format that "is commonly used to work with large data sets" and "easily readable" such as "separate columns for separate data points rather than every data point within the same single data field."[209] The Commission considered EPIC's suggestions and declines to impose more specific formatting requirements. Technology is advancing at such a rapid pace that the Commission is concerned more specific formatting requirements might become obsolete in the future. Moreover, in the Commission's experience, companies that use technologies such as an autodialer to make telemarketing calls rather than manual means typically retain records of those calls in an easily retrievable format. The Commission believes that allowing companies to retain records as they would in the ordinary course of business strikes an appropriate balance between law enforcement's interest in obtaining the information necessary to enforce the TSR and industry's concerns about burden. Finally, the Commission does not believe that it is appropriate to require sellers and telemarketers to affirmatively bear the cost of producing records to private litigants regardless of the outcome of their suits as EPIC requests,[210] when Congress already included a provision in the Telemarketing Act that allows a court to award the cost of the suit

[208] EPIC 34-23 at 13.

[209] *Id.*

[210] *Id.*

and any reasonable attorney or expert witness fees to the prevailing party.[211]

12. Section 310.5(c) – Violation of Recordkeeping Provisions

The 2022 NPRM proposed clarifying that the failure to keep each record required by Section 310.5 in a complete and accurate manner constitutes a violation of the TSR.[212] The Commission received five comments on this proposal. EPIC and NAAG support the proposal, stating that it is a "common-sense approach in deterring deceptive telemarketers/sellers from harming consumers"[213] and that "inaccurate or incomplete records are of little use."[214] PACE also supports the proposed clarification, stating that the proposal is "logical and in line with the spirit of the TSR and its accompanying legislation."[215] But PACE raised concerns about the requirement that records be kept in an accurate and complete manner, arguing that companies who fail to keep all or some records in a complete and accurate manner through inadvertent error should not be penalized in the same way as telemarketers and sellers who fail to keep all or some categories of records.[216] Instead, PACE urges leniency for situations where the failure is inadvertent rather than willful and requests that the Commission provide "a 30-day cure period when the alleged violation can be easily corrected."[217]

NFIB and Sirius object to this proposal.[218] Sirius proposes that the Commission "count

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[211] 15 U.S.C. 6104(d).

[212] 2022 NPRM, 87 FR 33687.

[213] NAAG 34-20 at 10.

[214] EPIC 34-23 at 5.

[215] PACE 33-15 at 6.

[216] *Id.*

[217] *Id.* PACE also cites to the example NFIB provided in its comment as an example of why PACE believes the Commission should provide some leniency and an opportunity to cure rather than penalize inadvertent errors.

[218] NFIB 33-4 at 6-7; Sirius 34-18 at 8.

violations by each *type* of record rather than by *each* record, as proposed."[219] NFIB argues that allowing civil penalties for "each erroneous error" is as "perverse as the evil the FTC states it is addressing, for it would allow the FTC to put a seller or telemarketer out of business for a relatively minor mistake that affected many records."[220] NFIB provides an example to illustrate its concerns describing a situation where a company "made the relatively minor mistake of keeping calls in the time zone of the person called, rather than in Coordinated Universal Time (UTC) format."[221] NFIB believes that in this situation the company would be facing astronomically high fines for the hundreds of thousands of calls it makes a year.[222] Instead, NFIB argues that the FTC should provide a reasonable time period to cure these errors once discovered, such as 90 days, and only commence imposing fines for each week after the reasonable period expires.[223] According to NFIB, this would be a more balanced system that "avoids both the extreme that a relatively minor design violation yields an astronomical fine that puts the seller or marketer out of business and the opposite extreme that a violation results in such a small fine that a seller or marketer accepts fines as an annoying but manageable cost of doing business."[224]

The Commission recognizes NFIB's and PACE's concerns regarding inadvertent errors resulting in large penalties and, thus, included a safe harbor provision for call detail records in the proposed amendments. As discussed in Section III.A.13 – Safe Harbor for Incomplete or Inaccurate Records Pursuant to Section 310.5(a)(2) below, the Commission believes that it has

[219] Sirius 34-18 at 8.

[220] NFIB 33-4 at 7.

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.*

provided a reasonable grace period for sellers and telemarketers to cure any inadvertent deficiencies in their recordkeeping system before any civil penalties might apply and that the proposed example that NFIB raises would fall squarely within the safe harbor, provided the company followed the other requirements of the safe harbor.

Regarding Sirius's suggestion that failure to retain each *type* of record equal one violation, the Commission is not persuaded that imposing civil penalties for each type of record would provide sufficient incentive for companies to abide by the recordkeeping provisions given the limited number of categories of records sellers and telemarketers are required to retain.[225]

13. Section 310.5(d) – Safe Harbor for Incomplete or Inaccurate Records Kept Pursuant to Section 310.5(a)(2)

The Commission proposed including a safe harbor provision for temporary and inadvertent errors in keeping call detail records pursuant to Section 310.5(a)(2). Specifically, the 2022 NPRM stated that a seller or telemarketer would not be liable for failing to keep records under Section 310.5(a)(2) if it can demonstrate that: (1) it established and implemented procedures to ensure completeness and accuracy of its records under Section 310.5(a)(2); (2) it trained its personnel in the procedures; (3) it monitors compliance and enforces the procedures, and documents its monitoring and enforcement activities; and (4) any failure to keep accurate or complete records under Section 310.5(a)(2) was temporary and inadvertent.[226]

The Commission received four comments on this proposal. PACE states a "safe harbor for maintaining call detail records is necessary" while Sirius states it would "provide a good

[225] Although Sirius did not provide a definition for what it meant by "type of record," the Commission interprets it to mean the categories the Commission has outlined under the amended Section 310.5(a), which would limit the number of categories to eleven.

[226] 2022 NPRM, 87 FR at 33687.

foundation for seller and telemarketer compliance plans."[227] WPF states it does not "object to the safe harbor proposed" because it was "narrow enough to allow companies to make the kinds of mistakes that occur in day to day business, and provides incentives to correct the errors."[228]

NFIB, however, states that it does not deem the safe harbor sufficient because it is "complex and limited" and does not provide a "great source of comfort to sellers and marketers in its current form."[229] Because the safe harbor would apply in the scenario that NFIB posits above where a company fails to keep call times in UTC format, the Commission believes the safe harbor provides adequate protection against inadvertent and temporary errors. The Commission, however, will revise this provision to provide sellers or telemarketers thirty days to cure an inadvertent error, as PACE suggests.[230]

14. Section 310.5(e) - Compliance Obligations

The Commission proposed modifying the compliance obligations in Section 310.5(e) to state that, in the event the seller and telemarketer failed to allocate responsibility between themselves for maintaining the required records, the responsibility for complying with the recordkeeping requirements would fall on both parties.[231] The Commission received four comments on this proposal. NAAG, PACE, and Sirius supported the proposal.[232] PACE states that "not only do we consider this fair, but we believe it will encourage parties to negotiate their contracts and cease regarding TSR recordkeeping as an afterthought."[233]

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[227] PACE 33-15 at 6; Sirius 34-18 at 8.

[228] WPF 34-21 at 4.

[229] NFBI 33-4 at 8.

[230] PACE 33-15 at 6; *see also* Section III.A.12 (Violation of Recordkeeping Provisions which provides additional discussion about the proposed safe harbor).

[231] 2022 NPRM, 87 FR at 33687.

[232] NAAG 34-20 at 10; PACE 33-15 at 6; Sirius 34-18 at 8.

[233] PACE 33-15 at 6.

EPIC, however, objects to this amendment and strongly urges the Commission to require both telemarketers and sellers to retain records rather than allowing them to allocate responsibilities.[234] Specifically, EPIC raises a concern that a seller may allocate responsibilities to a telemarketer that resides outside the United States and would not be subject to U.S. jurisdiction and process.[235] EPIC argues that if the Commission is inclined to designate only one party, it should be the seller who is responsible because the seller should be accountable for the telemarketers it hires, is less likely to be overseas and undercapitalized compared to telemarketers, and likely receives most of the sales proceeds.[236] But EPIC still believes that the Commission should explicitly require both sellers and telemarketers be responsible for recordkeeping to prevent any gamesmanship where sellers move overseas to avoid liability.[237] In the event the Commission is not persuaded, EPIC also argues that the Commission should require sellers to audit their telemarketers, including reviewing an actual production of preserved records, and require sellers who hire overseas telemarketers to require those telemarketers to have a U.S.-based agent so that their records would be subject to U.S. jurisdiction and process.[238]

The Commission shares EPIC's concerns regarding gamesmanship and the challenges of obtaining records from overseas entities. The Commission is also concerned about sellers hiring unscrupulous telemarketers and disclaiming any responsibility for recordkeeping by allocating the responsibility to those telemarketers. The Commission notes that under the proposed amendment, sellers who allocate recordkeeping responsibilities to their telemarketers would be

[234] EPIC 34-23 at 8-10.

[235] *Id* at 10.

[236] *Id*.

[237] *Id*.

[238] *Id.*

required to "establish and implement practices and procedure to ensure the telemarketer is complying with the [TSR's recordkeeping provisions]."[239] But given the concerns that EPIC has raised, the Commission will modify this provision to also require sellers who allocate recordkeeping responsibilities to their telemarketer to retain access rights to those records so that the seller can produce responsive records in the event it has hired a telemarketer overseas. Requiring sellers to ensure their telemarketers are abiding by the TSR's recordkeeping provisions and retain access to their telemarketer's records of telemarketing activities on the seller's behalf should not impose onerous obligations, and such access may never be necessary. Sellers likely already take such steps in the ordinary course of business, given that telemarketers are acting as their agents and their telemarketers' violations of the TSR could also expose them to liability under the TSR.

15. Authority to Require Recordkeeping

NFIB argues that the new recordkeeping proposals exceed the FTC's statutory authority under the Telemarketing Act.[240] Section 6102(a) of the Telemarketing Act directs the Commission to: (1) prescribe rules prohibiting deceptive or abusive telemarketing acts or practices;[241] (2) include in those rules a definition of deceptive acts or abusive practices that shall include fraudulent charitable solicitations and may include actions that constitute assisting or facilitating such as credit card laundering;[242] and (3) include in those rules a specific list of abusive practices that govern patterns and timing of unsolicited calls, and disclosures of certain

[239] 2022 NPRM, 87 FR at 33694.

[240] NFIB 33-4 at 5-6.

[241] 15 U.S.C. 6102(a)(1).

[242] *Id.* 6102(a)(2).

material information in sales or charity calls.[243] It also states at the end of Section 6102(a) that "[i]n prescribing the rules described in this paragraph, the Commission shall also consider recordkeeping requirements."

NFIB argues that the directive to consider recordkeeping requirements applies only to the specific list of abusive practices under Section 6102(a)(3) and, since the other paragraphs are silent as to recordkeeping, the Act affirmatively prohibits the FTC from requiring recordkeeping.[244] The Commission does not agree. The language of the Act shows that the directive to consider recordkeeping applies to the Act's mandate to promulgate rules addressing deceptive or abusive telemarketing practices and is not limited to the specific abusive practices identified in Section 6102(a)(3).

Section 6102(a) generally requires the Commission to promulgate rules regarding deceptive or abusive telemarketing acts or practices. Section 6102(a)(1) states: "[t]he Commission *shall prescribe rules* prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices."[245] Sections 6102(a)(2) and (a)(3) then identify specific provisions that Congress instructs the Commission to include, or consider including, when it promulgates its rules under Section 6102(a)(1). Section 6102(a)(2) directs the Commission to "*include in such rules* respecting deceptive telemarketing acts or practices" a definition of deceptive telemarketing acts or practices, which may include, among other things, credit card laundering.[246] Section 6102(a)(3) directs the Commission to "*include in such rules* respecting other abusive telemarketing acts or practices" specific requirements including: (1) "a

[243] *Id*. 6102(a)(3).

[244] NFIB 33-4 at 6.

[245] 15 U.S.C. 6102(a)(1) (emphasis added).

[246] *Id.* 6102(a)(2) (emphasis added).

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"; (2) "*restrictions* on the hours of the day and night when unsolicited telephone calls can be made to consumers"; (3) "a *requirement* that any person engaged in telemarketing for the sale of goods or services" make certain disclosures; and (4) "a *requirement* that any person engaged in telemarketing for the solicitation of charitable contributions" make certain disclosures.[247] At the end of Section 6102(a)(3), in a separate unnumbered sentence, the Act states "[i]n *prescribing the rules* described in this paragraph, the Commission shall also consider recordkeeping requirements."[248] Thus, Congress directed the Commission to promulgate rules prohibiting deceptive or abusive telemarketing acts or practices under Section 6102(a)(1), and Sections 6102(a)(2) and (a)(3) merely inform what types of acts or practices the Commission should include, or consider including, when it promulgates those rules.[249]

NFIB's interpretation of Section 6102(a)(3) improperly divorces that provision from the rest of the statute. As discussed, Section 6102(a)(3) contains Congress's specific guidance regarding the types of rules the Commission must adopt or consider adopting to implement Section 6102(a)(1)'s general grant of authority to ban deceptive or abusive telemarketing practices. Section 6102(a)(3) states that when the Commission "prescrib[es] the rules described" by Congress, it "shall also consider recordkeeping requirements." This provision thus authorizes

[247] *Id.* 6102(a)(3) (emphasis added).

[248] *Id.*

[249] The Commission also notes that the official codification of the Telemarketing Act in the United States Code aligns the indentation of the statement "In prescribing the rules described in this paragraph, the Commission shall consider recordkeeping requirements" with Section 6102(a) rather than with Section 6102(a)(3). As such, it supports the Commission's position that the directive to consider recordkeeping refers generally to Section 6102(a) and is not limited to the specific acts and practices listed in Section 6102(a)(3). *See, e.g.*, https://www.govinfo.gov/content/pkg/USCODE-2011-title15/pdf/USCODE-2011-title15-chap87.pdf (last visited November 21, 2023).

the Commission to adopt—or not adopt—recordkeeping requirements and declare violations of such requirements to be an abusive telemarketing practice.

But even if Section 6102(a)(3) did not expressly authorize the Commission to consider recordkeeping requirements, the Commission may still require recordkeeping under Section 6102(a)(1). Congress's purpose in enacting the Telemarketing Act was to prevent deceptive or abusive telemarketing acts or practices.[250] As the Commission has noted over the years, recordkeeping provisions prevent deceptive or abusive telemarketing acts or practices because they are necessary to effectively enforce the TSR.[251] NFIB's assertion that "the rules for recordkeeping do not prevent or address deceptive or other abusive telemarketing acts or practices" is not an accurate assertion[252] and it is undermined by the Commission's law enforcement experience and that of other enforcers.[253]

Even if Section 6102(a)(1) could be read as being silent on recordkeeping, that would not prohibit the Commission from including recordkeeping in any rules the Commission promulgates under this section of the Act. Rather, Congress directed the Commission to prescribe rules prohibiting deceptive telemarketing acts or practices and the Commission is granted authority to issue rules, including recordkeeping provisions, for any deceptive or abusive telemarketing acts or practices it identifies in promulgating the TSR.[254] Congress's silence would make sense given that the Commission had yet to identify these deceptive or abusive acts

[250] H.R. Rep. No. 103-20, 103rd Cong., 1st Sess. ("House Report") at 1; S. Rep. No. 103-80, 103rd Cong., 1st Sess. ("Senate Report") at 1 (stating the purpose of the bill was "to prevent fraudulent or harassing telemarketing practices").

[251] Original TSR 60 FR at 43857; 2003 TSR Amendments, 68 FR at 4653; 2014 TSR Rule Review, 79 FR at 46735.

[252] NFIB 33-4 at 5-6.

[253] *See, e.g.*, NAAG 34-20 at 3-10.

[254] *See. e.g., U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 617-18 (D.C. Cir. 2016) (upholding EPA's authority to require recordkeeping in regulating even though Congress was silent on that issue because "Congress plainly intended EPA to regulate sources burning 'any' solid waste, a goal presumably advanced by the recordkeeping presumption").

or practices in the TSR at the time the Telemarketing Act was passed, and it was unknown whether and what form of recordkeeping would be necessary to ensure compliance.[255] Interpreting the Telemarketing Act to prohibit the Commission from requiring recordkeeping would contradict the Act's stated purpose—to "enact legislation that will offer consumers necessary protection from telemarketing deception and abuse."[256]

Nothing in the text of the Act prevents the Commission from requiring persons to keep records substantiating their compliance with any requirement of the TSR. Nor does NFIB explain why Congress would have intended to deprive the Commission of records essential to the enforcement of the rule. NFIB's interpretation would give telemarketers and sellers a perverse incentive to commit deceptive and abusive practices while destroying any record of those violations.

Finally, even if a court determines that the Act only permits recordkeeping for rules that address the specific acts and practices listed in Section 6102(a)(3), the TSR's recordkeeping provisions meet those criteria. The Final Rule requires recordkeeping for eleven general categories of information: (1) advertisements, including telemarketing scripts and robocall recordings; (2) call detail records; (3) prize recipients; (4) customers; (5) customer information to

[255] Congress has amended the Telemarketing Act numerous times over the years but made no changes to the recordkeeping provision. *See, e.g., supra* note 13. Given that the TSR has always included recordkeeping requirements since its inception in 1995 and the FTC has reported to Congress on its rulemaking efforts at various congressional hearings, Congress's silence on this issue can be interpreted as agreement with the FTC's statutory construction. *See, e.g., Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 50 F.4th 164, 182 (D.C. Cir. 2022) (quoting *Jackson v. Modly*, 949 F.3d 763, 772-73 (D.C. Cir. 2020)).

[256] 15 U.S.C. 6101(5). The Commission's position is also supported by the legislative history, which demonstrates that Congress intended for the Commission to consider recordkeeping requirements more broadly. *See* Senate Report at 7. The Senate Report references Section 3(a)(5) in an earlier version of the Act that directed the Commission to "prescribe rules regarding telemarketing activities" and in prescribing those rules to "consider the inclusion of…(5) recordkeeping requirements." Telemarketing and Consumer Fraud and Abuse Prevention Act, S. 568, 103rd Cong. (1993). At minimum, this legislative history supports the position that the Commission may require recordkeeping for all abusive telemarketing acts or practices it identifies in promulgating the TSR and is not limited to those specific acts or practices listed in Section 6103(a)(3).

establish a business relationship; (6) previous donors; (7) telemarketers' employees; (8) consent; (9) service providers; (10) entity-specific DNC; and (11) versions of the FTC's DNC. Each of these categories is necessary to ensure compliance with the provisions of the TSR that the Commission promulgated to address the specifics acts or practices identified in Section 6102(a)(3).

For example, Section 6102(a)(3)(A) of the Act requires the FTC to prohibit "a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."[257] Accordingly, the Commission promulgated Section 310.4(b) of the TSR to prohibit certain "patterns of calls," [258] including prohibitions against robocalls, calls to consumers who have asked a specific seller to stop calling, and calls to consumers who have registered their phone numbers on the FTC's DNC Registry.[259] As explained in more detail in Section II - Overview of the Proposed Amendments to the TSR above, the Commission needs all eleven categories of information set forth in the Final Rule, including the requirement that sellers and telemarketers retain call detail records to ensure compliance with these prohibitions.[260]

Similarly, Section 6102(a)(3)(B) of the Act requires the FTC to place restrictions on when telemarketers can make unsolicited calls, while Sections 6102(a)(3)(C) and (D) require the

[257] 15 U.S.C. 6102(a)(3)(A).

[258] 16 CFR 310.4(b).

[259] 16 CFR 310.4(b)(1)(iii) and (b)(1)(v). *See also* Original TSR, 60 FR at 43854 (stating the entity-specific DNC provisions are intended to effectuate the requirements of Section 6102(a)(3)(A) of the Telemarketing Act); 2002 NPRM, 67 FR at 4518 (proposing the DNC Registry to "fulfill the mandate in the Telemarketing Act that the Commission should prohibit telemarketers from undertaking 'a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy'") (quoting 15 U.S.C. 6102(a)(3)(A)); 2006 Denial of Petition for Proposed Rulemaking, Revised Proposed Rule With Request for Public Comments, Revocation of Non-enforcement Policy, Proposed Rule ("2006 NPRM"), 73 FR 58716, 58726 (proposing adding an express prohibition against [robocalls] pursuant to Section 6102(a)(3)(A) of the Telemarketing Act).

[260] *See supra* Sections II.A (Recordkeeping) and II.C (New Definition for "Previous Donor").

FTC to mandate certain disclosures. The FTC promulgated Section 310.4(c) of the TSR to prohibit calls to a person's residence outside of certain hours and Sections 310.4(d) and (e) to require telemarketers to disclose the identity of the seller or charity, the purpose of the call, the nature of the good or service being sold, and that no purchase is required to win a prize or participate in a prize promotion. The TSR's existing and amended recordkeeping requirements are necessary to ensure compliance with these provisions of the TSR. For example, call detail records are needed to ensure that telemarketers abide by the call time restrictions, while the requirements to retain records of advertisements, telemarketing scripts, robocalls, consent, customers, prize recipients, and call details regarding the content of the call are required to determine whether a telemarketer has made the necessary disclosures.

B. Modification of the B2B Exemption

The 2022 NPRM proposed narrowing the B2B exemption to require B2B telemarketing calls to comply with Section 310.3(a)(2)'s prohibition on misrepresentations and Section 310.3(a)(4)'s prohibition on false or misleading statements.[261] The Commission received twelve comments on this proposal.[262] Rapid Financial Services, LLC and Small Business Financial Solutions, LLC (collectively, "Rapid Finance"), EPIC, NAAG, USTelecom—The Broadband Association ("USTelecom"), WPF, and three anonymous commenters all support the proposal.[263] EPIC strongly supports the proposal, stating "there is no reason to believe that phone-based attempts to exploit small business victims have diminished since the pandemic

[261] 2022 NPRM, 87 FR at 33687.

[262] The Commission received an additional ten comments addressing whether the Commission should generally repeal the B2B exemption in its entirety. The Commission addresses those comments in the 2023 NPRM, issued this same day.

[263] Anonymous 34-11, 33-11, and 33-13; EPIC 34-23 at 17; NAAG 34-20 at 10; Rapid Finance 34-17 at 3; USTelecom 33-14 at 3-4; WPF 34-21 at 4.

began."[264] NAAG states that "misrepresentations and false or misleading statements, in any form, are harmful to trade and commerce in general."[265] WPF argues "there is no downside to this particular update—the FTC Act already prohibits such activity."[266] The anonymous commenters expressed concern over the harm that businesses suffer from deceptive telemarketing.[267]

USTelecom highlights that small and medium-sized businesses ("SMBs"), in particular, "can be disproportionately impacted by malicious B2B telemarketers" and that scammers primarily use phones as the primary means of contacting SMBs.[268] USTelecom also argues that bad actors hide behind the B2B exemption and other legal ambiguities to avoid accountability, citing to a particularly pernicious example of a high-volume B2B telemarketing robocall campaign purporting to sell services that help SMBs boost their companies' Google listing that tied up the business's phone lines.[269]

Rapid Finance states, as a general matter, that it "does not oppose, and indeed supports the application of the TSR to B2B calls to prohibit material misrepresentations and false or misleading statements in B2B telemarketing transactions, including prohibiting the specific misrepresentations listed in Section 310.3(a)(2)."[270] Rapid Finance explains that its business customers are "often the target of telemarketers seeking to peddle so-called debt settlement

[264] EPIC 34-23 at 17.

[265] NAAG 34-20 at 10.

[266] WPF 34-21 at 4.

[267] Anonymous 34-11, 33-11, and 33-13.

[268] USTelecom 33-14 at 3-4.

[269] *Id.*

[270] Rapid Finance 34-17 at 3.

services to them."[271]

NFIB, Revenue Based Finance Coalition ("RBFC"), Third Party Payment Processors Association ("TPPPA"), and PACE all object to this proposed amendment.[272] RBFC argues that amending the TSR to apply to deceptive B2B telemarketing would "undermine the Supreme Court's interpretation of the FTC's authority to impose penalties," [273] citing *AMG Capital Management, LLC v. FTC*.[274] RBFC's arguments are inapposite because the Supreme Court's decision in *AMG* concerned the FTC's authority to obtain consumer redress under Section 13(b) of the FTC Act;[275] the decision did not address or implicate the Commission's authority to promulgate rules under the Telemarketing Act.

PACE and NFIB argue that applying the TSR to B2B telemarketing exceeds the scope of the FTC's authority under the Telemarketing Act.[276] They claim that the Telemarketing Act is limited to consumer harm because of its "consistent use of consumer-oriented language" and the focus on consumer harm in the statutory text and legislative history. [277] PACE also argues that the Telemarketing Act's directive for the Commission to identify deceptive telemarketing practices is also limited to consumer harm, because the Commission itself has historically

[271] *Id.* Rapid Finance also argues that the amendments will close the gap between how B2B sellers and B2B telemarketers are treated under the TSR. *Id.* at 6-7. Rapid Finance appears to be under the misimpression that the B2B exemption only applies to telemarketers and not to sellers. That is incorrect and the Commission clarifies that the exemption under Section 310.6(a)(7) applies to both sellers and telemarketers. The Commission also notes that Rapid Finance raised other issues that the Commission is not addressing because they are unrelated to the focus of this rulemaking. *Id.* at 6.

[272] NFIB 33-4 at 8-12; RBFC 34-13 at 1-4; TPPPA 34-14 at 2; PACE 33-15 at 7-9.

[273] RBFC 34-13 at 3.

[274] *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

[275] 15 U.S.C. 53(b).

[276] NFIB 33-4 at 11; PACE 33-15 at 7-9.

[277] PACE 33-15 at 8; *see also* NFIB 33-4 at 11 (arguing all five findings in the Telemarketing Act reference consumer harm and not harm to businesses).

conceptualized deception from a consumer perspective in its policy statements.[278]

The Commission disagrees. The Telemarketing Act directs the FTC to promulgate a rule that addresses deceptive and abusive telemarketing practices which, in the Commission's law enforcement experience, includes B2B telemarketing. The language of the Act supports the Commission's position.

First, the Act defines "telemarketing," as "a plan, program, or campaign which is conducted to induce purchases of goods or services…, by use of one or more telephones and which involves more than one interstate telephone call."[279] The Act exempts from the definition of telemarketing "the solicitation of sales through the mailing of a catalog" which meet certain criteria and "where the person making the solicitation does not solicit *customers* by telephone but only receives calls initiated by *customers* in response to the catalog during those calls . . . ."[280] The Act only specifies that "telemarketing" must involve the use of one interstate telephone call but does not identify who must participate in the call. To the extent it identifies any participant, it uses the term *customers*, which includes businesses.[281]

Second, Section 6102(a)(1) directs the Commission to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices."[282]

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[278] PACE 33-15 at 7-9. NFIB raises separate objections to repealing the B2B exemption based on changing market forces described in the Commission's 2022 ANPR. NFIB 33-4 at 9-10. As explained in the 2023 NPRM that the Commission is issuing concurrently with this Final Rule, the Commission declined to move forward with narrowing the B2B exemption as proposed in the 2022 ANPR. As such, the Commission will not address NFIB's argument here since it is not applicable in requiring B2B telemarketing to comply with the TSR's misrepresentation provisions.

[279] 15 U.S.C. 6106(4).

[280] 15 U.S.C. 6106(4) (emphasis added).

[281] *See, e.g., Customer*, MERRIAM-WEBSTER DICTIONARY, *available at* https://www.merriam-webster.com/dictionary/customer (last visited Feb. 1, 2024) (defining customer as "one that purchases a commodity or service").

[282] 15 U.S.C. 6102(a)(1).

Section 6102(a)(2) directs the Commission to include in its rules "a definition of deceptive telemarketing acts or practices which shall include fraudulent charitable solicitations, and which may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering."[283] Congress used broad language, similar to the language of the FTC Act, in directing the FTC to promulgate a rule. The Act does not limit the scope of the rule promulgated under the Act to telemarketing that harms natural persons. Nor does the Act prohibit applying the rule to telemarketing that harms businesses or other organizations.

Third, Sections 6102(a)(3)(C) and (D) direct the Commission to require "any person engaged in telemarketing" to "promptly and clearly disclose to the *person* receiving the call the purpose of the call is to" sell a good or service or solicit a charitable solicitation.[284] Once again, Congress did not specify that the disclosures must be made to a natural person rather than a business. It simply specified that the disclosure be made to the person who received the call.

Although PACE and NFIB argue that the Commission's authority is limited to addressing deceptive or abusive telemarketing practices that harm natural persons because of the Act's liberal use of the term "consumer,"[285] none of the Act's provisions described above uses the word "consumer." Moreover, the Act never defines the term "consumer." Given the Act's broad language, the most logical reading of the term "consumer" is that it encompasses *all*—including businesses—who consume a product or service.

The absence of a definition is notable when Congress *has* defined "consumer" in other contexts, such as when it enacted the Magnuson-Moss Warranty—Federal Trade Commission

[283] 15 U.S.C. 6102(a)(2).

[284] 15 U.S.C. 6102(a)(3)(C) and (D) (emphasis added).

[285] NFIB 33-4 at 11; PACE 33-15 at 7-9.

Improvement Act in 1975 ("Magnuson-Moss").[286] Under Title I of Magnuson-Moss, which extended the Commission's jurisdiction over consumer product warranties, Congress narrowly defined "consumer" to mean a buyer of any "consumer product" which is "normally used for personal, family, or household purposes."[287] Congress also clarified that the narrow definition of consumer was limited to Title I of the Magnuson-Moss Act and did not apply to Title II, which among other things, codified the FTC's ability to seek consumer redress by filing civil actions in federal court.[288] Under Title II, Congress stated that the term "consumer" in the FTC Act should still be construed broadly without the limitations imposed in section 101(3) of title I of S. 356.[289] Here, no such definition exists. If Congress had intended to limit the scope of the Telemarketing Act to those acts and practices directed at individuals rather than businesses, it would have done so.

The Commission's position is also supported by the legislative history. A Senate Report on the Act explained that, in directing the Commission to define "fraudulent telemarketing acts or practices" in its rulemaking, that Congress intended the rule "to encompass the types of unlawful activities that are currently being addressed by the both the FTC and the States in their telemarketing cases."[290] The Report also stated that Congress intends the "rule to be flexible enough to encompass the changing nature of [fraudulent telemarketing] activity while at the

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[286] Title I of that legislation created the Magnuson-Moss Warranty Act ("Magnuson-Moss"), Pub. L. 93-637 (1975) (codified as amended at 15 U.S.C. 2301), extending Commission jurisdiction over consumer product warranties. Title II, separately known as the Federal Trade Commission Improvement Act ("FTCIA"), modernized the FTC Act by expanding the Commission's anti-fraud powers, including power to "redress consumer injury resulting from violations of the [FTC Act]" by filing civil actions in district court. S. Rep. No. 93-151, at 3 (1973). Pub. L. No. 93-637; Pub. L. No. 93-153. p. 2533 (1975) (codified as amended at 15 U.S.C. 45 et seq.).

[287] 15 U.S.C. 2103(1) and (3).

[288] *See supra* note 286.

[289] S. Rep. No. 93-151, at 27.

[290] Senate Report at 7.

same time providing telemarketers with guidance as to the general nature of prohibited conduct."[291] At the time the Telemarketing Act was passed, the Commission's law enforcement experience included cases against deceptive B2B telemarketing.[292] In promulgating the original TSR, the Commission considered exempting all B2B telemarketing but stated, given its "extensive enforcement experience pertaining to deceptive telemarketing directed to businesses," it did not believe that "an across-the-board exemption for business-to-business contacts is appropriate."[293] Instead, the original TSR excluded from the B2B exemption telemarketing schemes that sell nondurable office or cleaning supplies because, in the Commission's law enforcement experience, these B2B schemes "have been by far the most significant business-to-business problem area [that] such telemarketing falls within the Commission's definition of deceptive telemarketing acts or practices."[294] The Commission also stated that it would reconsider the scope of the B2B exemption "if additional business-to-business telemarketing activities become problems after the Final Rule has been in effect."[295] Each time the Commission has considered applying the TSR to other B2B telemarketing, it has done so based on its law enforcement experience in keeping with Congress's directive.[296]

But even if the term "consumer" is construed more narrowly to exclude businesses, the

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[291] *Id.*

[292] *See* Prepared Statement of the Federal Trade Commission before the United States House of Representatives Committee on Small Business (Sept. 28, 1994) (detailing the Commission's law enforcement actions against telemarketers who have harmed small businesses).

[293] Original TSR, 60 FR at 43861-62.

[294] *Id*.

[295] *Id.* at 43862.

[296] 2022 NPRM, 87 FR at 33682-83. Although the Commission's law enforcement efforts have primarily focused on harms to small businesses, the Commission believes that the Telemarketing Act authorizes the Commission to apply the TSR to B2B telemarketing more broadly for the reasons stated here. Similar to the recordkeeping provision, the Commission notes that Congress has amended the Telemarketing Act numerous times but made no changes to prohibit the TSR's application to some B2B telemarketing. Congress's silence here can also be interpreted as agreement with the FTC's statutory construction. *See supra* note 255.

Act's language still supports the Commission's position that the Act allows it to regulate B2B telemarketing. First, one of the Act's findings states that "[c]onsumers and ***others*** are estimated to lose $40 billion a year in telemarketing fraud.[297] The legislative history makes clear that Congress was concerned about telemarketing fraud against small businesses.[298] Second, the Act uses broad language in the definition of telemarketing, in its directives to promulgate rules regarding deceptive or abusive telemarketing under Section 6102(a)(1), and in its directives of what to include in those rules under Sections 6102(a)(2), (a)(3)(C), and (a)(3)(D). These provisions do not contain any reference to a "consumer."[299] If Congress intended to construe consumer narrowly, Congress's *omission* of the term consumer from these provisions of the Act demonstrates that Congress did not intend to limit the TSR to telemarketing that harms only individual consumers.

Finally, RBFC and TPPPA make general objections that prohibiting misrepresentations in B2B telemarketing is unnecessary; that it would "unduly burden legitimate business activities";[300] and would not provide small businesses any additional protections when the FTC has authority already to pursue bad actors that harm businesses under the FTC Act.[301] RBFC also argues that if the Commission were to prohibit misrepresentations in B2B telemarketing, it should only do so in the areas where there is a history of deception such as the top five scams

[297] 15 U.S.C. 6101(3) (emphasis added).

[298] The legislative history supports the Commission's position that, even assuming a narrower definition of consumer, the Telemarketing Act allows the Commission to regulate B2B telemarketing. The Senate Report on the Act explains that telemarketing fraud "affects a cross section of Americans, including small business." Senate Report at 2.

[299] 15 U.S.C. 6102(a) and 6106(4).

[300] TPPPA 34-14 at 2.

[301] RBFC 34-13 at 2-3.

identified in the Better Business Bureau's research report issued in 2018.[302]

The Commission is not persuaded by these arguments. The Commission notes that requiring B2B telemarketers to comply with the TSR's prohibitions against misrepresentations would provide the Commission with additional tools to obtain monetary redress to those harmed by illegal telemarketing and civil penalties against bad actors who violate the law, creating a deterrent effect. Importantly, the proposed amendment refrains from imposing any burdens on B2B sellers and telemarketers, including recordkeeping requirements. And, as commenters have noted, because businesses must already comply with the FTC Act, which prohibits deceptive or unfair conduct, complying with the TSR should not create significant burden.[303] The Commission also does not believe that it should limit the prohibition against misrepresentations to just the five top scams identified in the BBB's 2018 report. The Commission has monitored deceptive telemarketing impacting small businesses since 1995 and has observed not only the increase in deceptive telemarketing but how easily scammers shift tactics and peddle different products or services to small businesses.[304] Given the Commission's extensive law enforcement experience in B2B telemarketing cases—including schemes involving deceptive business directory listings, web hosting or design, search engine optimization services, and government impersonators[305]—the Commission believes that applying the TSR's prohibitions against misrepresentations in Section 310.3(a)(2) and 310.3(a)(4) is appropriate.

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[302] RBFC 34-13 at 3; *see also* Better Business Bureau, Scams and Your Small Business Research Report, at 7-8 (2018), *available at* https://www.bbb.org/content/dam/bbb-institute-(bbbi)/files-to-save/bbb_smallbizscamsreport-final-06-18.pdf (last visited Dec. 11, 2023). RBFC argues that any application of the TSR should be limited to the BBB's top five scams impacting small businesses including: "(1) bank/credit card company imposters, (2) directory listing and advertising services; (3) fake invoice/supplier bills; (4) fake checks; and (5) tech support scams." RBFC 34-13 at 3.

[303] RBFC 34-13 at 2-3; WPF 34-21 at 4.

[304] *See* Section II.B (B2B Telemarketing).

[305] *Id.*

C. New Definition of "Previous Donor"

The 2022 NPRM proposed adding a new definition for the term "previous donor" to identify consumers who have donated to a particular charity within the two-year period immediately preceding the date the consumer receives a robocall on behalf of that charity.[306] The Commission proposed including this new definition to make clear that telemarketers are allowed to place charity robocalls only to consumers who have previously donated to that charity within the last two years.[307]

The Commission received three comments on the new definition. WPF supports the new definition, stating it would "clarify the exemption for charitable donations" and "effectively close what has been a fairly significant loophole."[308] EPIC also supports the new definition and the clarification that the robocall exemption only applies to consumers who have previously donated to the soliciting charity, but it also urges the Commission to emphasize the limited scope of this exemption from the general prohibition against robocalls.[309] One anonymous commenter objected to this new definition, arguing that there should not be an exemption to place robocalls to prior donors in the first place.[310]

The Commission emphasizes that the exemption to allow a telemarketer to place charity robocalls is narrow in scope and amending the TSR to add a new definition of "previous donor" will ensure that the exemption remains narrow. The Commission understands that some consumers do not want to receive any robocalls, including from charities they have supported

[306] 2022 NPRM, 87 FR at 33687-88.

[307] To qualify for this narrow exemption, telemarketers must also comply with the provisions of Section 310.4(b)(1)(v)(B).

[308] WPF 34-21 at 1.

[309] EPIC 34-23 at 16.

[310] Anonymous 34-7.

through a donation. In such cases, the Commission notes that a consumer who does not want to receive such robocalls may request to be added to that charity's do-not-call list. If the consumer has done so, the exemption to place robocalls does not apply and it is a violation of the TSR for a telemarketer to place robocalls to the consumer on behalf of that charity.[311]

D. Corrections to the Rule

In the 2022 NPRM, the Commission proposed the following five corrections to the Rule:

- In all instances where Sections 310.6(b)(1), (b)(2), and (b)(3) cross-reference Sections 310.4(a)(1), (a)(7), (b), and (c), change these citations so that they cross-reference Sections 310.4(a)(1), (a)(8), (b), and (c).
- Modifying the time requirements in the definition of EBR from months to days as follows:
    - Changing the time requirement to qualify for EBR in Section 310.2(q)(1) from 18 months between the date of the telephone call and financial transaction to 540 days.
    - Changing the time requirement to qualify for EBR in Section 310.2(q)(2) from three months between the date of the telephone call and the date of the consumer's inquiry or application to 90 days.
- Adding an email address to Section 310.7 for state officials or private litigants to provide notice to the Commission that they intend to bring an action under the Telemarketing Act.
- Amending Section 310.5(a)(7) so that it is consistent in form with the new

[311] *See* Section 310.4(b)(1)(v)(B)(iii) (requiring sellers and telemarketers to comply with all other requirements of this part, which include the entity-specific do not call provisions).

proposed additions to Section 310.5(a).

- Amending Section 310.5(f) to remove an extraneous word.[312]

The Commission did not receive any comments on the proposed modifications and will implement the amendments as proposed.

The Commission will also make the following additional non-substantive modifications to the Rule:

- Change all references in the TSR from "this Rule" to "this part."
- Renumber the footnotes in the TSR so that the first footnote starts at one.

Finally, as described in Section III.B – Modification of the B2B Exemption, some commenters did not understand that the term "consumer" includes businesses. To address any confusion, the Commission will change references to "consumer" in the amendments of the recordkeeping requirements and definition of EBR to the defined term "person."[313] The Commission will also modify the references to "consumer" and "business" in the new recordkeeping requirement to retain call detail records in Section 310.5(a)(2)(iv) to "individual consumer" and "business consumer." While these modifications do not substantively alter the scope or application of the TSR, the Commission believes they will resolve any remaining uncertainty.

IV. Paperwork Reduction Act

The current Rule contains various provisions that constitute information collection requirements as defined by 5 CFR 1320.3(c), the definitional provision within the Office of Management and Budget ("OMB") regulations implementing the Paperwork Reduction Act

[312] 2022 NPRM, 87 FR at 33688.

[313] 310 CFR 310.2(y).

(PRA). 44 U.S.C. chapter 35. OMB has approved the Rule's existing information collection requirements through October 31, 2025.[314] The 2022 NPRM's proposed amendments made changes in the Rule's recordkeeping requirements that increased the PRA burden as detailed below.[315] Accordingly, FTC staff submitted the 2022 NPRM and the associated Supporting Statement to OMB for review under the PRA.[316] On June 16, 2022, OMB directed the FTC to resubmit its request when the proposed rule is finalized.[317]

None of the public comments submitted addressed the estimated PRA burden included in the 2022 NPRM, but some commenters did raise general burden concerns.[318] Other commenters concurred that sellers and telemarketers likely retained the required records in the ordinary course of business and that the cost of electronic storage is decreasing.[319] The Commission's responses to those concerns are set forth in more detail in Section III - Final Amended Rule, and in some instances the Commission made modifications to the proposed rule to address the concerns and reduce the estimated PRA burden.

The Final Rule contains new recordkeeping requirements and modifications to existing recordkeeping requirements. The new recordkeeping provisions require sellers or telemarketers to retain: (1) a copy of each unique prerecorded message; (2) call detail records of telemarketing campaigns; (3) records sufficient to show a seller has an established business relationship with a

[314] OMB Control No: 3084-0097, ICR Reference No: 202208-3084-001, available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202208-3084-001 (last visited Dec. 11, 2023).

[315] 2022 NPRM, 87 FR at 33690-91.

[316] This PRA analysis focuses only on the information collection requirements created by or otherwise affected by these now final rule amendments.

[317] See OMB Control No. 3084-0097, ICR Reference 202204-3084-004, Notice of Office of Management and Budget Action (June 16, 2022).

[318] *See, e.g.,* ECAC 34-22 at 3; NFIB 33-4 at 4-5; Sirius 34-18 at 7-8.

[319] *See, e.g.,* NAAG 34-20 at 9; PACE 33-15 at 2-5.

consumer; (4) records sufficient to show a consumer is a previous donor to a particular charitable organization; (5) records regarding the service providers that a telemarketer uses to deliver outbound calls; (6) records of a seller or charitable organization's entity-specific do-not-call registries; and (7) records of which version of the Commission's DNC Registry were used to ensure compliance with this Rule. The Final Rule modifies existing recordkeeping requirements by: (1) changing the time-period for retaining records from two years to five years;[320] (2) clarifying the records necessary for sellers or telemarketers to demonstrate that the person it is calling has consented to receive the call; and (3) specifying the format for records that include phone numbers, time, or call duration.

As explained above and in the 2022 NPRM,[321] the Commission believes that for the most part, sellers and telemarketers already generate and retain these records either because the TSR already requires it or because they already do so in the ordinary course of business. For example, to comply with the TSR, sellers and telemarketers must already have a reliable method to identify whether they have a previous business relationship with a customer or whether the customer is a prior donor. They must also access the DNC Registry and maintain an entity-specific DNC registry. Moreover, sellers and telemarketers are also likely to keep records about their existing customers or donors and service providers in the ordinary course of business. The Final Rule now further requires telemarketers and sellers to keep call detail records of their telemarketing campaigns. Specifically, it requires sellers and telemarketers to keep call detail

[320] As described above in Section II.A - Recordkeeping and in the 2022 NPRM, changing industry practice including increased spoofing of Caller ID information has made it more difficult to identify the telemarketers and sellers responsible for particular telemarketing campaigns and has hindered evidence gathering. As a result, two years is no longer always a sufficient amount of time for the Commission to fully complete its investigations of noncompliance and therefore the Commission is increasing the required retention period for recordkeeping under the Rule. Given the decreasing cost of data storage, the Commission does not believe that changing the length of time sellers and telemarketers are required to keep records will be unduly burdensome. 2022 NPRM, 87 FR at 33680-82, 33686.

[321] 2022 NPRM, 87 FR at 33690-91.

records of their telemarketing campaigns because in the Commission's experience, sellers and telemarketers use technologies that can easily generate these records. If a seller or telemarketer does not use such technology, however, and an individual telemarketer must manually enter a single telephone number to initiate a call to that number, then the seller or telemarketer does not need to retain records of the calling number, called number, date, time, duration and disposition of the telemarketing call under Sections 310.5(a)(2)(vii) and (x) of the Final Rule for those calls. The Commission made this modification to reduce the anticipated PRA burden for those sellers and telemarketers who manually place telemarketing calls. However, as a matter of caution, the Commission estimates the anticipated PRA burden will stay roughly the same as what was projected in 2022 NPRM, because that estimate was largely based on the use of automated mechanisms. Further, the Commission's enforcement of the Rule and review of the comments shows that few sellers and telemarketers manually place telemarketing calls.[322] Thus, the anticipated PRA burden could be significantly lower than the estimates set out below.

A. Estimated Annual Hours Burden

The Commission estimates the PRA burden of the Final Rule based on its knowledge of the telemarketing industry and data compiled from the Do Not Call Registry. In calendar year 2022, 10,804 telemarketing entities accessed the Do Not Call Registry; however, 549 were exempt entities obtaining access to data.[323] Of the non-exempt entities, 6,562 obtained data for a single state. Staff assumes that these 6,562 entities are operating solely intrastate, and thus would not be subject to the TSR. Therefore, Staff estimates that approximately 3,693

[322] *See, e.g.,* PACE 33-15 at 2.

[323] *See* National Do not Call Registry Data Book for Fiscal Year 2022 ("Data Book"), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/DNC-Data-Book-2022.pdf (last visited Dec. 11, 2023). An exempt entity is one that, although not subject to the TSR, voluntarily chooses to scrub its calling lists against the data in the Registry.

telemarketing entities (10,804 – 549 exempt – 6,562 intrastate) are currently subject to the TSR. The Commission also estimates that there will be 75 new entrants to the industry per year.

The Commission has previously estimated that complying with the TSR's current recordkeeping requirements requires 100 hours for new entrants to develop recordkeeping systems that comply with the TSR and 1 hour per year for established entities to file and store records after their systems are created, for a total annual recordkeeping burden of 4,385 hours for established entities and 7,500 hours for new entrants who must develop required record systems.[324]

Because the Final Rule contains new recordkeeping requirements, the Commission anticipates that in the first year after the proposed amendments take effect, every entity subject to the TSR would need to ensure that their recordkeeping systems meet the new requirements. The Commission estimates that this undertaking will take 50 hours. This includes 10 hours to verify that the entities are maintaining the required records, and 40 hours to create and retain call detail records. This yields an additional one-time burden of 184,650 hours for established entities (50 hours × 3,693 covered entities).

For new entrants, the Commission estimates that the new requirements will increase their overall burden for establishing new recordkeeping systems by 50 hours per year. This yields a total added burden for new entrants of 3,750 hours (50 hours × 75 new entrants per year) in addition to what OMB has already approved.[325]

B. Estimated Annual Labor Costs

[324] *See* Information Collection Activities; Proposed Collection; Comment Request 87 FR 23177 (Apr. 19, 2022).

[325] See "Recordkeeping for new entrants for live & prerecorded calls" under IC (Information Collection) List, *available at* https://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=202208-3084-001&icID=185985 (last visited Dec. 11, 2023).

The Commission estimates annual labor costs by applying appropriate hourly wage rates to the burden hours described above. The Commission estimates that established entities will employ skilled computer support specialists to modify their recordkeeping systems. Applying a skilled labor rate of $30.97/hour[326] to the estimated 184,650 burden hours for established entities yields approximately $5,718,611 in one-time labor costs during the first year after the amendments take effect.

As described above, the Commission estimates that with the Final Rule new entrants will spend approximately 50 additional hours per year to establish new recordkeeping systems. Applying a skilled labor rate of $30.97/hour to the estimated 3,750 burden hours for new entrants, the Commission estimates that the annual labor costs for new entrants would be approximately $116,138.

C. Estimated Non-Annual Labor Costs

Staff previously estimated that the non-labor costs to comply with the TSR's recordkeeping requirements were *de minimis* because most affected entities would maintain the required records in the ordinary course of business. Staff estimated that the recordkeeping requirements could require $50 per year in office supplies to comply with the Rule's recordkeeping requirements. Because the Final Rule requires retention of additional records, Staff estimates that these requirements will increase to $60 per year in office supplies on average for each of the 3,768 covered entities per year in office supplies. This equates to roughly $226,080 in total for all covered entities.

[326] This figure is derived from the mean hourly wage shown for "Computer Support Specialist." *See* "Occupational Employment and Wages-May 2022" Bureau of Labor Statistics, U.S. Department of Labor, Last Modified April 25, 2023, Table 1 ("National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2022") *available at* https://www.bls.gov/news.release/pdf/ocwage.pdf (last visited October 24, 2023).

The new recordkeeping requirements also require entities to retain call detail records and audio recordings of prerecorded messages used in calls. Staff estimates that the costs associated with preserving these records will also be *de minimis*. The Commission regularly obtains call detail records from voice providers when investigating potential TSR violations, and these records are kept in databases with small file sizes even when the database contains information about a substantial number of calls. For example, the Commission received a 2.9 gigabyte database that contained information about 56 million calls. The Commission also received a 1.2 gigabyte database that contained information about 5.5 million calls. Similarly, audio files of most prerecorded messages will not be very large because prerecorded messages are typically short in duration. Storing electronic data is very inexpensive. Electronic storage can cost $.74 per gigabyte for onsite storage including hardware, software, and personnel costs.[327] Commercial cloud-based storage options are less expensive and can cost around $.20 per gigabyte per year.[328] The Commission estimates that the non-labor costs associated with electronically storing audio files of prerecorded messages and call detail records will cost around $5 a year on average for each of the 3,768 covered entities per year for electronic storage. This equates to roughly $18,840 in total for all covered entities.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires that the Commission conduct an

[327] *See* Gartner, Inc. "IT Key Metrics Data 2020: Infrastructure Measures – Storage Analysis." Gartner December 18, 2019.

[328] Amazon's storage rate for S3 Standard – Infrequent Access storage is $0.0125 per GB per month. *See* https://aws.amazon.com/s3/pricing/?nc=sn&loc=4 (last visited Dec. 11, 2023); Google's storage rate for Archive Storage in parts of North America is $0.0012 per GB per month. *See* https://cloud.google.com/storage/pricing (last visited Dec. 11, 2023).

analysis of the anticipated economic impact of the proposed amendments on small entities.[329] The RFA requires that the Commission provide an Initial Regulatory Flexibility Analysis ("IRFA") with a proposed rule and a Final Regulatory Flexibility Analysis ("FRFA") with the Final Rule unless the Commission certifies that the rule will not have a significant economic impact on a substantial number of small entities.[330]

As discussed in the 2022 NPRM, the Commission did not believe that the proposed amendment requiring additional recordkeeping would have a significant economic impact upon small entities, although it may affect a substantial number of small businesses.[331] In the Commission's view, the proposed amendment would not significantly increase the costs of small entities that are sellers or telemarketers because the proposed amendments primarily require these entities to retain records that they are already generating and preserving in the ordinary course of business. The Commission also did not believe that the proposed amendments requiring small entities that are sellers or telemarketers to comply with the TSR's prohibitions on misrepresentations should impose any additional costs. Therefore, based on available information, the Commission certified that amending the Rule as proposed would not have a significant economic impact on a substantial number of small entities, and provided notice of that certification to the Small Business Administration ("SBA").[332]

Notwithstanding the certification, the Commission also published an IRFA in the 2022 NPRM and invited comment on the impact the proposed amendments would have on

[329] 5 U.S.C. 601-612.

[330] 5 U.S.C. 605.

[331] 2022 NPRM, 87 FR at 33691-92.

[332] 5 U.S.C. 605(b).

small entities covered by the Rule.[333] The Commission did not receive any comments that provided empirical information on the burden the proposed amendments would have on small entities, but some commenters raised general burden concerns, in particular with respect to the recordkeeping requirement that sellers and telemarketers retain call detail records.[334] As discussed in more detail in Section III - Final Amended Rule, the Commission does not believe that the Final Rule would impose significant additional burden since the recordkeeping amendments primarily require small entities that are sellers and telemarketers to retain records that they would keep in the ordinary course of business. The Commission also amended the Final Rule so that entities that do not utilize certain technology are not required to retain certain call detail records, to reduce the burden imposed on those entities.[335] Finally, the FTC Act already requires sellers and telemarketers that are small entities to comply with the Final Rule's prohibition against misrepresentations in telemarketing. Thus, the Commission certifies that the Final Rule would not have a significant economic impact on a substantial number of small entities and provides notice of that certification to the Small Business Administration ("SBA").[336] The Commission has nonetheless deemed it appropriate as a matter of discretion to provide this FRFA.

A. Statement of the Need for, and Objectives of, the Rule

The Final Rule requires telemarketers and sellers to maintain additional records regarding their telemarketing transactions. As described in the 2022 NPRM[337] and in

[333] *Id*.

[334] *See, e.g.,* NFIB 33-4 at 4-5; PACE 33-15 at 2.

[335] *Supra* Section III.A.2 (Call Detail Records).

[336] 5 U.S.C. 605(b).

[337] 2022 NPRM, 87 FR at 33678-84.

Section II - Overview of the Proposed Amendments to the TSR, the Final Rule updates the TSR's existing recordkeeping requirements so that the requirements comport with the substantial amendments to the TSR since the recordkeeping requirements were first made. The requirements are also necessary in light of the technological advancements that have made it easier and cheaper for unscrupulous telemarketers to engage in illegal telemarketing. The Final Rule also requires B2B telemarketers to comply with the TSR's prohibition on misrepresentations. These amendments are necessary to help protect businesses from deceptive telemarketing practices. The Final Rule also amends the definition of "previous donor" to clarify that a seller or telemarketer may not use prerecorded messages to solicit charitable donations on behalf of a charitable organization unless the recipient of the call previously donated to that charitable organization within the last two years.

B. Issues Raised by Public Comments in Response to the IRFA

As stated above, the Commission did not receive any comments relating to the IRFA or that provided empirical information on the burden the proposed amendments would have on small entities, but some commenters raised general burden concerns. The Commission details these concerns and its responses in more detail in Section III - Final Amended Rule.

Commenters stated, in particular, that requiring retention of call detail records and each version of the DNC used for compliance would cause significant burden to businesses. Commenters also argued that changing the time period to retain records from two years to five years would also impose additional burdens.

To address concerns regarding the burden of retaining call detail records, the Final Rule provides an exemption for calls made by an individual telemarketer who manually enters a single telephone number to initiate those calls. For such calls, the seller or

telemarketer does not need to retain records of the calling number, called number, date, time, duration, and disposition of the call. This modification should address burden concerns raised for small businesses which do not employ software or other technology to automate their telemarketing activity and still use manual operations.

The Final Rule also provides a one hundred and eighty-day grace period from the date Section 310.5(a)(2)—which requires retention of call detail records—is published in the Federal Register so sellers and telemarketers can implement any new systems, software, or procedures necessary to comply with this new provision. This modification similarly should alleviate commenters' concerns regarding the time necessary to come into compliance.

The Final Rule also modifies the recordkeeping requirement regarding DNC compliance and now requires records of which version of the DNC rather than each version used for compliance, significantly reducing the burden associated with this requirement. With respect to the time period to retain records, the Commission does not believe that changing the time period to retain records would impose a significant burden because many businesses already retain the necessary records in the ordinary course of business.

C. Estimated Number of Small Entities to Which the Final Rule Will Apply

The Final Rule affects sellers and telemarketers engaged in "telemarketing," defined by the Rule to mean "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."[338] As noted above, staff estimate that 3,693 telemarketing entities are currently subject to the TSR, and that approximately 75 new entrants

[338] 16 CFR 310.2(dd). The Commission notes that, as mandated by the Telemarketing Act, the interstate telephone call requirement in the definition excludes small business sellers and the telemarketers which serve them in their local market area, but may not exclude some small business sellers and telemarketers in multi-state metropolitan markets, such as Washington, DC.

enter the market per year. For telemarketers, a small business is defined by the SBA as one whose average annual receipts do not exceed $25.5 million.[339] Because virtually any business could be a seller under the TSR, it is not possible to identify average annual receipts that would make a seller a small business as defined by the SBA. Commission staff are unable to determine a precise estimate of how many sellers or telemarketers constitute small entities as defined by SBA. The Commission sought comment on this issue but did not receive any information from commenters.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements, Including Classes of Small Entities and Professional Skills Needed to Comply

The Final Rule contains new recordkeeping requirements and modifications to existing recordkeeping requirements. The new recordkeeping requirements would require sellers or telemarketers to retain: (1) a copy of each unique prerecorded message; (2) call detail records of telemarketing campaigns; (3) records sufficient to show a seller has an established business relationship with a consumer; (4) records sufficient to show a consumer is a previous donor to a particular charitable organization; (5) records regarding the service providers that a telemarketer uses to deliver outbound calls; (6) records of a seller or charitable organization's entity-specific do-not-call registries; and (7) records of which version of the Commission's DNC Registry that were used to ensure compliance with this Rule. The proposed modifications to the existing recordkeeping requirements would: (1) change the time period for retaining records from two years to five years; (2) clarify the records necessary for sellers or telemarketers to

[339]Telemarketers are typically classified as "Telemarketing Bureaus and Other contact Centers," (NAICS Code 561422). *See* Table of Small Business Size Standards Matched to North American Industry Classification System Codes, *available at https://www.sba.gov/sites/sbagov/files/2023-06/Table%20of%20Size%20Standards_Effective%20March%2017%2C%202023%20%282%29.pdf* (last visited October 24, 2023).

demonstrate that the person they are calling has consented to receive the call; and (3) specify the format for records that include phone numbers, time, or call duration. The small entities potentially covered by the proposed amendment will include all such entities subject to the Rule. The Commission has described the skills necessary to comply with these recordkeeping requirements in Section IV - Paperwork Reduction Act above.

E. Identification of Duplicative, Overlapping, or Conflicting Federal Rules

The Telephone Consumer Protection Act of 1991, 47 U.S.C. 227, and its implementing regulations, 47 CFR 64.1200 (collectively, "TCPA") contain recordkeeping requirements that may overlap with the recordkeeping requirements proposed by the new rule. For example, the proposed provision requiring sellers or telemarketers to keep a record of consumers who state they do not wish to receive any outbound calls made on behalf of a seller or telemarketer, 16 CFR 310.5(a)(10), overlaps to some degree with the TCPA's prohibition on a person or entity initiating a call for telemarketing unless such person or entity has procedures for maintaining lists of persons who request not to receive telemarketing calls including a requirement to record the request. The Final Rule's recordkeeping requirements do not conflict with the TCPA's recordkeeping requirements because sellers and telemarketers can comply with both sets of requirements simultaneously. Moreover, in the Commission's experience, the recordkeeping requirements under the TCPA do not lessen the need for the more robust recordkeeping requirements the Commission is proposing to further its law enforcement efforts. The Commission invited comment and information regarding any potentially duplicative, overlapping, or conflicting federal statutes, rules, or policies and received one comment about a potential conflict.

OCUL argues that the Commission cannot proceed with the proposed amendments until the Federal Communications Commission ("FCC") has clarified whether it will allow the establishment of a new code that will inform the telemarketer placing the call why its call was blocked.[340] OCUL argues that this would lead to telemarketers and sellers being unable to keep complete or accurate records, subjecting them to violations, if they do not know why a call was blocked.[341] The Commission does not see a conflict between the FCC's ongoing rulemaking and the proposed amendments in the 2022 NPRM. The Final Rule does not require the telemarketer or seller to retain records detailing why a call was blocked. Simply stating that a call was blocked as a record of the disposition of the call will suffice.

F. Description of Steps Taken to Minimize Significant Economic Impact, if Any, on Small Entities, Including Alternatives

The Commission has not proposed any specific small entity exemption or other significant alternatives to the proposed rule. The Commission has made every effort to avoid imposing unduly burdensome requirements on sellers and telemarketers by limiting the recordkeeping requirements to records that are both necessary for the Commission's law enforcement and typically already kept in the ordinary course of business. As detailed above in Sections III - Final Amended Rule and IV- Paperwork Reduction Act, the Commission has made additional modifications to the proposed amendments to further reduce the burden on small entities of complying with the Final Rule. These modifications include exempting sellers or telemarketers from retaining some call detail records for calls that are manually placed, and requiring sellers and telemarketers to retain records of which version of the FTC's DNC Registry

[340] OCUL 34-19 at 3.

[341] *Id.*

they used rather than each version used for compliance.

VI. Incorporation by Reference

Consistent with 5 U.S.C. 552(a) and 1 CFR part 51, the Final Rule incorporates the specifications of the following standard issued by the International Telecommunications Union: ITU-T E.164: Series E: Overall Network Operation, Telephone Service, Service Operation and Human Factors (published 11/2010). The E.164 standard establishes a common framework for how international telephone numbers should be arranged so that calls can be routed across telephone networks. Countries use this standard to establish their own international telephone number formats and ensure that those numbers have the information necessary to route telephone calls successfully between countries.

This ITU standard is reasonably available to interested parties. The ITU provides free online public access to view read-only copies of the standard. The ITU website address for access to the standard is: https://www.itu.int/en/pages/default.aspx.

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated these rule amendments as not a "major rule," as defined by 5 U.S.C. 804(2).

List of Subjects

16 CFR PART 310

Advertising; Consumer protection; Reporting and recordkeeping requirements; Telephone; Trade practices

For the reasons discussed in the preamble, the Federal Trade Commission amends title 16 of the Code of Federal Regulations, part 310, as follows:

PART 310--TELEMARKETING SALES RULE

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

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

2. In § 310.2,

a. Revise paragraph (q);

b. Redesignate paragraphs (aa) through (hh) as follows:

Old section	New section
(aa)	(bb)
(bb)	(cc)
(cc)	(dd)
(dd)	(ee)
(ee)	(ff)
(ff)	(gg)
(gg)	(hh)
(hh)	(ii)

c. Add paragraph (aa);

to read as follows:

§ 310.2 Definitions

* * * * *

(q) *Established business relationship* means a relationship between a seller and a person based on:

(1) the person's purchase, rental, or lease of the seller's goods or services or a financial transaction between the person and seller, within the 540 days immediately preceding the date of a telemarketing call; or

(2) the person's inquiry or application regarding a good or service offered by the seller, within the 90 days immediately preceding the date of a telemarketing call.

* * * * *

(aa) *Previous donor* means any person who has made a charitable contribution to a particular charitable organization within the two-year period immediately preceding the date of the telemarketing call soliciting on behalf of that charitable organization.

* * * * *

3. In § 310.3, redesignate footnote 659 as footnote 1, footnote 600 as footnote 2, footnote 661 as footnote 3, footnote 662 as footnote 4, and footnote 663 as footnote 5.

4. In § 310.4,

a. Redesignate footnote 664 as footnote 1, footnote 665 as footnote 2, and footnote 666 as footnote 3; and

b. Revise § 310.4(b)(2) to read as follows:

§ 310.4 Abusive telemarketing acts or practices.

* * * * *

(b) * * *

(2) It is an abusive telemarketing act or practice and a violation of this part for any person to sell, rent, lease, purchase, or use any list established to comply with §§ 310.4(b)(1)(iii)(A) or 310.5, or maintained by the Commission pursuant to § 310.4(b)(1)(iii)(B), for any purpose

except compliance with the provisions of this part or otherwise to prevent telephone calls to telephone numbers on such lists.

* * * * *

5. In § 310.5,

a. Redesignate footnote 667 as footnote 1; and

b. Revise § 310.5 to read as follows:

§ 310.5 Recordkeeping requirements

(a) Any seller or telemarketer must keep, for a period of 5 years from the date the record is produced unless specified otherwise, the following records relating to its telemarketing activities:

(1) A copy of each substantially different advertising, brochure, telemarketing script, and promotional material, and a copy of each unique prerecorded message. Such records must be kept for a period of 5 years from the date that they are no longer used in telemarketing;

(2) A record of each telemarketing call, which must include:

(i) the telemarketer that placed or received the call;

(ii) the seller or person for which the telemarketing call is placed or received;

(iii) the good, service, or charitable purpose that is the subject of the telemarketing call;

(iv) whether the telemarketing call is to an individual consumer or a business consumer;

(v) whether the telemarketing call is an outbound telephone call;

(vi) whether the telemarketing call utilizes a prerecorded message;

(vii) the calling number, called number, date, time, and duration of the telemarketing call;

(viii) the telemarketing script(s) and prerecorded message, if any, used during the call;

(ix) the caller identification telephone number, and if it is transmitted, the caller identification name that is transmitted in an outbound telephone call to the recipient of the call, and any

contracts or other proof of authorization for the telemarketer to use that telephone number and name, and the time period for which such authorization or contract applies; and

(x) the disposition of the call, including but not limited to, whether the call was answered, connected, dropped, or transferred. If the call was transferred, the record must also include the telephone number or IP address that the call was transferred to as well as the company name, if the call was transferred to a company different from the seller or telemarketer that placed the call;

Provided, however, that for calls that an individual telemarketer makes by manually entering a single telephone number to initiate the call to that number, a seller or telemarketer need not retain the records specified in paragraphs (a)(2)(vii) and (a)(2)(x) of this section.

(3) For each prize recipient, a record of the name, last known telephone number, and last known physical or email address of that prize recipient, and the prize awarded for prizes that are represented, directly or by implication, to have a value of $25.00 or more;

(4) For each customer, a record of the name, last known telephone number, and last known physical or email address of that customer, the goods or services purchased, the date such goods or services were purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;[1]

(5) For each person with whom a seller intends to assert it has an established business relationship under § 310.2(q)(2), a record of the name and last known telephone number of that person, the date that person submitted an inquiry or application regarding the seller's goods or services, and the goods or services inquired about;

[1] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR pt. 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, will constitute compliance with § 310.5(a)(4) of this part.

(6) For each person that a telemarketer intends to assert is a previous donor to a particular charitable organization under § 310.2(aa), a record of the name and last known telephone number of that person, and the last date that person donated to that particular charitable organization;

(7) For each current or former employee directly involved in telephone sales or solicitations, a record of the name, any fictitious name used, the last known home address and telephone number, and the job title(s) of that employee; provided, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee;

(8) All verifiable authorizations or records of express informed consent or express agreement (collectively, "Consent") required to be provided or received under this part. A complete record of Consent includes the following:

(i) the name and telephone number of the person providing Consent;

(ii) a copy of the request for Consent in the same manner and format in which it was presented to the person providing Consent;

(iii) the purpose for which Consent is requested and given;

(iv) a copy of the Consent provided;

(v) the date Consent was given; and

(vi) for the copy of Consent provided under §§ 310.3(a)(3), 310.4(a)(7), 310.4(b)(1)(iii)(B)(1), or 310.4(b)(1)(v)(A), a complete record must also include all information specified in those respective sections of this part;

(9) A record of each service provider a telemarketer used to deliver an outbound telephone call to a person on behalf of a seller for each good or service the seller offers for sale through telemarketing. For each such service provider, a complete record includes the contract for the

service provided, the date the contract was signed, and the time period the contract is in effect. Such contracts must be kept for 5 years from the date the contract expires;

(10) A record of each person who has stated she does not wish to receive any outbound telephone calls made on behalf of a seller or charitable organization pursuant to § 310.4(b)(1)(iii)(A) including: the name of the person, the telephone number(s) associated with the request, the seller or charitable organization from which the person does not wish to receive calls, the telemarketer that called the person, the date the person requested that she cease receiving such calls, and the goods or services the seller was offering for sale or the charitable purpose for which a charitable contribution was being solicited; and

(11) A record of which version of the Commission's "do-not-call" registry was used to ensure compliance with § 310.4(b)(1)(iii)(B). Such record must include: (1) the name of the entity which accessed the registry; (2) the date the "do-not-call" registry was accessed; (3) the subscription account number that was used to access the registry; and (4) the telemarketing campaign for which it was accessed.

(b) A seller or telemarketer may keep the records required by paragraph (a) of this section in the same manner, format, or place as they keep such records in the ordinary course of business. The format for records required by paragraph (a)(2)(vii) of this section, and any other records that include a time or telephone number, must also comply with the following:

(1) The format for domestic telephone numbers must comport with the North American Numbering plan;

(2) The format for international telephone numbers must comport with the standard established in the International Telecommunications Union's Recommendation ITU-T E.164: Series E: Overall Network Operation, Telephone Service, Service Operation and Human Factors (2010);

(3) The time and duration of a call must be kept to the closest second; and

(4) Time must be recorded in Coordinated Universal Time (UTC).

(c) Failure to keep each record required by paragraph (a) of this section in a complete and accurate manner, and in compliance with paragraph (b) of this section, as applicable, is a violation of this part.

(d) For records kept pursuant to paragraph (a)(2) of this section, the seller or telemarketer will not be liable for failure to keep complete and accurate records pursuant to this part if it can demonstrate, with documentation, that as part of its routine business practice:

(1) It has established and implemented procedures to ensure completeness and accuracy of its records;

(2) It has trained its personnel, and any entity assisting it in its compliance, in such procedures;

(3) It monitors compliance with and enforces such procedures, and maintains records documenting such monitoring and enforcement; and

(4) Any failure to keep complete and accurate records was temporary, due to inadvertent error, and corrected within thirty days of discovery.

(e) The seller and the telemarketer calling on behalf of the seller may, by written agreement, allocate responsibility between themselves for the recordkeeping required by this section. When a seller and telemarketer have entered into such an agreement, the terms of that agreement will govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If by written agreement the telemarketer bears the responsibility for the recordkeeping requirements of this section, the seller must establish and implement practices and procedures to ensure the telemarketer is complying with the requirements of this section. These practices and procedures include retaining access to any record the telemarketer creates under

this section on the seller's behalf. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, both the telemarketer and the seller are responsible for complying with this section.

(f) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer must maintain all records required under this section. In the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business must maintain all records required under this section.

(g) The material required in this section is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All approved material is available for inspection at the Federal Trade Commission (FTC) and at the National Archives and Records Administration (NARA). Contact FTC at: FTC Library, (202) 326-2395, Federal Trade Commission, Room H-630, 600 Pennsylvania Avenue, NW, Washington, DC 20580, or by email at *Library@ftc.gov*. For information on the availability of this material at NARA, email *fr.inspection@nara.gov* or go to www.archives.gov/federal-register/cfr/ibr-locations.html. It is available from: The International Telecommunications Union, Telecommunications Standardization Bureau, Place des Nations, CH-1211 Geneva 20; (+41 22 730 5852); https://www.itu.int/en/pages/default.aspx.

(1) Recommendation ITU-T E.164: Series E: Overall Network Operation, Telephone Service, Service Operation and Human Factors, 2010.

(2) [Reserved.]

6. Amend § 310.6 as follows:

a. In § 310.6(b)(1), (b)(2), and (b)(3), remove the words "§§ 310.4(a)(1), (a)(7), (b), and (c)" and add, in their place, the words "§§ 310.4(a)(1), (a)(8), (b), and (c)"; and

b. Revise § 310.6(b)(7) to read as follows:

§ 310.6 Exemptions

* * * * *

(b) * * *

(7) Telephone calls between a telemarketer and any business to induce the purchase of goods or services or a charitable contribution by the business, *provided,* however that this exemption does not apply to:

(i) the requirements of § 310.3(a)(2) and § 310.3(a)(4); or

(ii) calls to induce the retail sale of nondurable office or cleaning supplies; *provided,* however, that §§ 310.4(b)(1)(iii)(B) and 310.5 shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

7. Amend § 310.7 by revising paragraph (a) to read as follows:

§ 310.7 Actions by states and private persons.

(a) Any attorney general or other officer of a state authorized by the state to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, must serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this part. The notice must be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580, at tsrnotice@ftc.gov and must include a copy of the state's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the state or private person must serve the Commission with the required notice immediately upon instituting its action.

* * * * *

8. In addition to the amendments set forth above, in 16 CFR part 310, remove the words "this Rule" and add, in their place, the words "this part" in the following places:

a. Section 310.3(a) introductory text, (b), (c) introductory text, (d) introductory text, footnote 2, and footnote 5.

b. Section 310.4(a) introductory text, (a)(2)(ii), (b)(1), (c), (d) introductory text, (e) introductory text, footnote 1, and footnote 2;

c. Section 310.6(a) and (b) introductory text;

d. Section 310.8(a), (b), and (e); and

e. Section 310.9.

By direction of the Commission.

April J. Tabor,

Secretary