

FEDERAL TRADE COMMISSION

RIN: 3084-0098

16 CFR Part 310

Telemarketing Sales Rule Fees

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (the “Commission” or “FTC”) is issuing this Final Rule to amend Section 310.8 (“the Final Amended Fee Rule”) of the FTC’s Telemarketing Sales Rule (“TSR”) by revising the fees charged to entities accessing the National Do Not Call Registry (“the Registry”).

EFFECTIVE DATE: Revised Section 310.8 will become effective September 1, 2006.

ADDRESSES: Requests for copies of this Final Fee Rule should be sent to: Public Reference Branch, Federal Trade Commission, Room 130, 600 Pennsylvania Avenue, N.W., Washington, DC 20580. The complete public record of this proceeding is also available at that address.

Copies of this Final Fee Rule are also available on the Internet at:

www.ftc.gov/bcp/rulemaking/tsr/tsrrulemaking/index.htm.

FOR FURTHER INFORMATION CONTACT: John A. Krebs, (202) 326-3747, Division of Planning & Information, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The amended rule increases the annual fee for access to the Registry for each area code of data to \$62 per area code, or \$31 per area code of data during the second six months of an entity’s annual subscription period. The maximum amount that would be charged to any single entity for accessing 280 area codes of data or more is increased to \$17,050. In addition, the amended rule retains the provisions regarding free access by “exempt” organizations, as well as free access to the first five area codes of data by all entities.

STATEMENT OF BASIS AND PURPOSE

I. Background:

On December 18, 2002, the Commission issued final amendments to the Telemarketing Sales Rule, which, *inter alia*, established the National Do Not Call Registry, permitting consumers to register, via either a toll-free telephone number or the Internet, their preference not to receive certain telemarketing calls (“Amended TSR”).¹ Under the Amended TSR, most telemarketers are required to refrain from calling consumers who have placed their numbers on the Registry.² Telemarketers must periodically access the Registry to remove from their telemarketing lists the telephone numbers of those consumers who have registered.³

Shortly after issuance of the Amended TSR, Congress passed The Do-Not-Call Implementation Act (“the Implementation Act”).⁴ The Implementation Act gave the

¹ 68 FR 4580 (Jan. 29, 2003).

² 16 CFR 310.4(b)(1)(iii)(B).

³ 16 CFR 310.4(b)(3)(iv). The Amended TSR requires telemarketers to access the Registry at least once every 31 days, effective January 1, 2005. *See* 69 FR 16368 (Mar. 29, 2004).

Commission the specific authority to “promulgate regulations establishing fees sufficient to implement and enforce the provisions relating to the ‘do-not-call’ registry of the [TSR]. . . . No amounts shall be collected as fees pursuant to this section for such fiscal years except to the extent provided in advance in appropriations Acts. Such amounts shall be available . . . to offset the costs of activities and services related to the implementation and enforcement of the [TSR], and other activities resulting from such implementation and enforcement.”⁵

On July 29, 2003, pursuant to the Implementation Act, Telemarketing Fraud and Abuse Prevention Act (“the Telemarketing Act”),⁶ and the Consolidated Appropriations Resolution, 2003,⁷ the Commission issued a Final Rule further amending the TSR to impose fees on entities accessing the National Do Not Call Registry (“the Original Fee Rule”).⁸ Those fees were based on the FTC’s best estimate of the number of entities that would be required to pay for access to the Registry, and the need to raise \$18.1 million in Fiscal Year 2003 to cover the costs associated with the implementation and enforcement of the “do-not-call” provisions of the Amended TSR. The Commission determined that the fee structure would be based on the number of different area codes of data that an entity wished to access annually. The Original Fee Rule established an annual fee of \$25 for each area code of data requested from the Registry, with the first five area

⁴ Pub. L. No. 108-10, 117 Stat. 557 (2003).

⁵ *Id.*

⁶ 15 U.S.C. 6101-08.

⁷ Pub. L. No. 108-7, 117 Stat. 11 (2003).

⁸ 68 FR 45134 (July 31, 2003).

codes of data provided at no cost.⁹ The maximum annual fee was capped at \$7,375 for entities accessing 300 area codes of data or more.¹⁰

On July 30, 2004, pursuant to the Implementation Act, the Telemarketing Act, and the Consolidated Appropriations Act, 2004,¹¹ the Commission issued a revised Final Rule further amending the TSR and increasing fees on entities accessing the National Do Not Call Registry (“the 2004 Fee Rule”).¹² Those fees were based on the FTC’s experience through June 1, 2004, its best estimate of the number of entities that would be required to pay for access to the Registry, and the need to raise \$18 million in Fiscal Year 2004 to cover the costs associated with the implementation and enforcement of the “do-not-call” provisions of the Amended TSR. The Commission determined that the fee structure would continue to be based on the number of different area codes of data that an entity wished to access annually. The 2004 Fee Rule established an annual fee of \$40 for each area code of data requested from the Registry, with the

⁹ Once an entity requested access to area codes of data in the Registry, it could access those area codes as often as it deemed appropriate for one year (defined as its “annual period”). If, during the course of its annual period, an entity needed to access data from more area codes than those initially selected, it would be required to pay for access to those additional area codes. For purposes of these additional payments, the annual period was divided into two semi-annual periods of six-months each. Obtaining additional data from the Registry during the first semi-annual, six month period required a payment of \$25 for each new area code. During the second semi-annual, six-month period, the charge for obtaining data from each new area code requested during that six-month period was \$15. These payments would provide the entity access to those additional area codes of data for the remainder of its annual period.

¹⁰ 68 FR at 45141.

¹¹ Pub. L. No. 108-199, 118 Stat. 3 (2004).

¹² 69 FR 45580 (July 30, 2004).

first five area codes of data provided at no cost.¹³ The maximum annual fee was capped at \$11,000 for entities accessing 280 area codes of data or more.¹⁴

On July 27, 2005, pursuant to the Implementation Act, the Telemarketing Act, and the Consolidated Appropriations Act, 2005,¹⁵ the Commission issued a revised Final Rule further amending the TSR and increasing fees on entities accessing the National Do Not Call Registry (“the 2005 Fee Rule”).¹⁶ These fees were based on the FTC’s experience through June 1, 2005, its best estimate of the number of entities that would be required to pay for access to the Registry, and the need to raise \$21.9 million in Fiscal Year 2005 to cover the costs associated with the implementation and enforcement of the “do-not-call” provisions of the Amended TSR. The Commission again determined that the fee structure would be based on the number of different area codes of data that an entity wished to access annually. The 2005 Fee Rule established an annual fee of \$56 for each area code of data requested from the Registry, with the first five area codes of data provided at no cost.¹⁷ The maximum annual fee was capped at \$15,400 for entities accessing 280 area codes of data or more.¹⁸

¹³ *Id.* at 45584. The 2004 Fee Rule had the same fee structure as the Original Fee Rule. However, fees were increased from \$25 to \$40 per area code for the annual period and from \$15 to \$20 per area code for the second six-month period.

¹⁴ *Id.*

¹⁵ Pub. L. No. 108-447, 118 Stat. 2809 (2004).

¹⁶ 70 FR 43273 (July 27, 2005).

¹⁷ *Id.* at 43275. The 2005 Fee Rule had the same fee structure as the 2004 Fee Rule, except that the fees were increased from \$40 to \$56 per area code for the annual period and from \$20 to \$28 per area code for the second six-month period.

¹⁸ *Id.*

In the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006 (“the 2006 Appropriations Act”),¹⁹ Congress directed the FTC to collect offsetting fees in the amount of \$23 million in Fiscal Year 2006 to implement and enforce the Amended TSR.²⁰ Pursuant to the 2006 Appropriations Act and the Implementation Act, as well as the Telemarketing Act, the FTC issued a Notice of Proposed Rulemaking to amend the fees charged to entities accessing the Registry (“the 2006 Fee Rule NPR”).²¹

In the 2006 Fee Rule NPR, the Commission proposed revising the fees for access to the Registry in order to raise \$23 million to offset costs the FTC expects to incur in this Fiscal Year for purposes related to implementing and enforcing the “do-not-call” provisions of the Amended TSR. Based on the number of entities that had accessed the Registry through the end of February 2006, the Commission proposed revising the fees to \$62 annually and \$31 during the second six months of an entity’s annual subscription period for each area code of data requested from the Registry, with the first five area codes of data provided at no cost. As a consequence of the increase in the per-area-code charge, the maximum annual fee would increase to \$17,050 for entities accessing 280 area codes of data or more.²²

In the 2006 Fee Rule NPR, the Commission sought comment on the following issues relating to the proposed amendment:

(1) whether entities accessing the Registry should continue to obtain the first five area

¹⁹ Pub. L. No. 109-108, 119 Stat. 2290 (2005).

²⁰ *Id.* at 2330.

²¹ 71 FR 25512 (May 1, 2006).

²² *Id.* at 25514.

codes of data for free;²³

(2) whether “exempt” organizations should continue to be provided with free access to the Registry;²⁴

(3) the number and type of small businesses that may be subject to the revised fees;²⁵ and

(4) whether there are any significant alternatives that would further minimize the impact of the rule on small entities, consistent with the objectives of the Telemarketing Act, the 2006 Appropriations Act, the Implementation Act, and the Regulatory Flexibility Act.²⁶

In response to the 2006 Fee Rule NPR, the Commission received twelve comments.²⁷

The amended rule, comments, and the basis for the Commission’s decision on the various recommendations are analyzed in detail below.

²³ *Id.* at 25514-5.

²⁴ *Id.* at 25515. The 2006 Fee Rule NPR, the 2005 Fee Rule, the 2004 Fee Rule, and the Original Fee Rule stated that “there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the National Do Not Call Registry without being required to under this Rule, 47 CFR 64.1200, or any other federal law.” 16 CFR 310.8(c). Such “exempt” organizations include entities that engage in outbound telephone calls to consumers to induce charitable contributions, for political fund raising, or to conduct surveys. They also include entities engaged solely in calls to persons with whom they have an established business relationship or from whom they have obtained express written agreement to call, pursuant to 16 CFR 310.4(b)(1)(iii)(B)(i) or (ii), and who do not access the National Registry for any other purpose. *See* 71 FR at 25514; 70 FR at 43275; 69 FR at 45585-6; and 68 FR at 45144.

²⁵ 71 FR at 25515.

²⁶ *Id.*

²⁷ A list of the commenters in this proceeding, and the acronyms used to identify each, is attached hereto as an appendix. Comments submitted in response to the 2006 Fee Rule NPR will be cited in this Notice as “[Acronym of Commenter] at [page number].”

II. The Amended Rule

Based on the 2006 Appropriations Act, the Implementation Act, and the Telemarketing Act, as well as its review of the record in this proceeding, and on its law enforcement experience in this area, the Commission has decided to modify the fees required under the TSR Fee Rule. Under the amended rule provisions adopted herein, the annual fee for accessing the Registry will increase from \$56 per area code to \$62 per area code, and from a maximum of \$15,400 to \$17,050 for access to 280 area codes of data or more. The fee for accessing area codes during the second six months of an entity's annual subscription period also will increase, from \$28 to \$31. Further, the Commission has decided to continue to provide all organizations with free access to the first five area codes of data, and has decided to continue to provide "exempt" organizations with free access to the Registry, as well.

III. Discussion of Comments

The Commission received twelve comments in response to the 2006 Fee Rule NPR. Of the twelve comments received, one comment was from a consumer who wanted to be added to the Registry.²⁸ Two comments were from consumers who supported the increase in fees.²⁹ The remaining nine comments were submitted by a mix of business and industry commenters, all of whom were opposed to the increase in fees, but who were divided on whether the Commission should eliminate the number of free area codes provided. In addressing the specific issues posed by the Commission, the commenters submitted only limited data or information that differed from that submitted in connection with earlier fee rulemakings. Instead, the comments primarily

²⁸ See JJ at 1.

²⁹ See BAS at 1, and S at 1.

relied on information provided by the FTC as part of its 2006 Fee Rule NPR, and/or in previous rulemaking proceedings. Similarly, the primary arguments submitted in response to the 2006 Fee Rule NPR's proposal to raise fees have also been considered previously by the Commission.

While most of the comments submitted represented views previously considered, some of the comments raised new points. For example, one commenter stated that the prohibition against entities cooperating and sharing the expense of subscribing to the Registry creates a burden for small businesses.³⁰ Still other commenters raised issues beyond the scope of this Notice, such as the impact of the "do-not-call" provisions of the Amended TSR on local economies, and criticism of the technical operation of the Registry.³¹

The major themes that emerged from the record are summarized below.

A. *Five Free Area Codes of Data*

In the 2006 Fee Rule NPR, the Commission proposed, at least for the next annual period, to continue allowing all entities accessing the Registry to obtain the first five area codes of data

³⁰ See AN at 1. The Commission addressed the issue of entities sharing the cost of accessing the Registry in the Original Fee Rule. 68 FR at 45136-7. The Commission agreed with the FCC that allowing entities to share the information obtained from the Registry would threaten the financial support for maintaining the database. *Id.* at 45136. Moreover, as noted below, the Commission believes that providing all entities with access to five free area codes of data limits the burden placed on small businesses.

³¹ See SW at 1, DMA at 6. According to one commenter, telemarketers reported to the city of Branson, Missouri that because of the no-call lists fewer room nights and show tickets were purchased in 2005 than in 2002. SW at 1. On the technical front, another commenter stated that the Commission should remove telephone numbers from the Registry as soon as they are dropped or abandoned. DMA at 6. The commenter argued that when a telephone number is dropped or abandoned, it should be removed from the Registry promptly so that the new subscriber may receive telemarketing calls. *Id.* According to the commenter, this is the time when new subscribers are most interested in receiving calls regarding, for example, home alarm systems, home insurance, lawn care, and newspaper delivery. *Id.*

for free.³² The Commission proposed to continue allowing such free access in the Original Fee Rule, the 2004 Fee Rule, and the 2005 Fee Rule, “to limit the burden placed on small businesses that only require access to a small portion of the national registry.”³³ The Commission noted, as it has in the past, that such a fee structure was consistent with the mandate of the Regulatory Flexibility Act,³⁴ which requires that to the extent, if any, a rule is expected to have a significant economic impact on a substantial number of small entities, agencies should consider regulatory alternatives to minimize such impact. As stated in the prior fee rules, “the Commission continues to believe that providing access to five area codes of data for free is an appropriate compromise between the goals of equitably and adequately funding the national registry, on one hand, and providing appropriate relief for small businesses, on the other.”³⁵ In addition, requiring over 57,800 entities to pay a small fee for access to five or fewer area codes of data from the Registry would place a significant burden on the Registry, requiring the expenditure of even more resources to handle properly that additional traffic.³⁶

The Commission received four comments that addressed the issue of five free area codes of data. Three of the commenters agreed that defining a small business as one that accesses five area codes or less of data excludes certain small businesses that either operate in a large

³² 71 FR at 25514.

³³ See 68 FR at 45140; 69 FR at 45582; and 70 FR at 43275.

³⁴ 5 U.S.C. 601.

³⁵ See 68 FR at 45141; 69 FR at 45584; and 70 FR at 43275-6.

³⁶ From May 2005 to June 2006, over 57,800 entities accessed five or fewer area codes of data.

metropolitan area or whose business is not limited to a small geographic market area.³⁷ As one commenter put it:

[S]mall businesses . . . often have the need to call a limited number of consumers who reside in a variety of states and/or area codes beyond their primary five area code calling region. . . . It is common for these small businesses to find themselves forced to pay for access to a number of additional area codes in order to research a single phone number in each area code. At the same time, a large company who relies heavily on telemarketing, and makes thousands of calls to consumers but limits these calls to within the five-code area, does not have to pay a fee.³⁸

Another commenter pointed out that a large, publicly traded home product retailer in Colorado may access “the entire state of Colorado in preparation for a telemarketing campaign at no charge, while a truly small business operating in New York City may incur charges to access the fourteen area codes that comprise the State of New York, and this does not include the vicinal area codes of neighboring New Jersey and Connecticut.”³⁹

The commenters, however, differed on how to solve the problem. Two of the commenters supported continuing to allow all entities access to five area codes of data at no cost.⁴⁰ DMA noted that the fact that small businesses are able to access up to five area codes of

³⁷ NAR at 1-2, ATA at 6-7, and DMA at 5.

³⁸ NAR at 1-2.

³⁹ ATA at 7.

⁴⁰ *See* DMA at 5, NADA at 1.

data at no cost encourages their compliance.⁴¹ NADA stated that removing the five area code exemption would disproportionately impact small businesses.⁴² The third commenter supported providing small businesses with free access to the entire Registry.⁴³ The commenter cited information from the Small Business Administration’s Office of Advocacy, which claimed that “very small firms with fewer than 20 employees spend 60 percent more per employee than larger firms to comply with federal regulations.”⁴⁴

The fourth commenter proposed that the Commission impose a modest \$200 flat fee on all entities that subscribe to five or fewer area codes of data in lieu of increasing the fees on all entities that access the Registry.⁴⁵ The commenter argued that allowing entities to obtain the first five area codes of data from the Registry for free is inequitable, as it unfairly benefits those who place the greatest burden on the Registry.⁴⁶ The commenter noted that while the number of entities that have accessed the Registry over the past two years has increased, the number of

⁴¹ DMA at 5.

⁴² NADA at 1.

⁴³ NAR at 2. NAR also opposes any reduction of the number of area codes provided at no cost.

⁴⁴ NAR at 2. *See also* SW at 1 (arguing that the fee increase penalizes small businesses). As stated in the 2006 Fee Rule NPR, this alternative would require entities seeking an exemption from the fees to submit information, such as their annual revenues, to demonstrate that they meet the statutory threshold to be classified a small business and exempt from the fees. 71 FR at 25516.

⁴⁵ ATA at 5. The commenter also recommended that all entities pay \$200 for the first five area codes of data that they access.

⁴⁶ *Id.* at 3.

entities required to pay for access has decreased.⁴⁷ According to the commenter, “[t]his structure permits entities subscribing to five area codes to save \$80 versus the \$280 fee they would incur if they paid \$56 per area code, thereby *minimizing* the effect of the regulation per the Regulatory Flexibility Act’s mandate.”⁴⁸ Assuming that the same number of entities would access five or fewer area codes of data at no cost in Fiscal Year 2006, the commenter contends that by charging these entities a \$200 flat fee, this alternative fee proposal will generate \$11,660,000 in revenue from these entities alone.⁴⁹

After considering all of the comments submitted in this proceeding, the Commission has determined to retain the provision allowing entities to access up to five area codes of data at no cost. Although the Commission continues to recognize that only a small percentage of the total number of entities accessing the Registry pay for that access, these figures also illustrate the large number of businesses – many of them likely small businesses – that likely would be adversely affected by a change in the number of area codes of data provided at no cost. In fact, over 57,800 entities have accessed five or fewer area codes of data from the Registry. It is true that a large seller that operates solely within five area codes may access the Registry at no cost in preparation for a large telemarketing campaign.⁵⁰ However, the Commission continues to believe, as observed in prior fee rules, that most entities accessing five or fewer area codes of data – realtors,

⁴⁷ *Id.*

⁴⁸ *Id.* at 5 (emphasis in original).

⁴⁹ *Id.* at 6. The commenter further points out that by charging entities that access more than five area codes \$200 for the first five area codes of data they access, the Commission can raise an additional \$1,300,000.

⁵⁰ *See* ATA at 7.

car dealers, community-based newspapers, and other small businesses – are precisely the types of businesses that the Regulatory Flexibility Act requires the FTC to consider when adopting regulations.⁵¹ Moreover, the Commission again finds significant the information submitted by commenters discussing the disproportionate impact compliance with the “do-not-call” regulations may have on small businesses. In order to lessen that impact, the Commission believes that retaining the five free area code provision at least for the next annual period is appropriate.

The Commission does not believe that the alternatives suggested would be as effective in minimizing the impact of the “do-not-call” regulations on small businesses, and that these proposed alternatives may create undue burdens that the current system does not impose. For example, the suggestion to eliminate the number of area codes of data provided at no cost would result in tens of thousands of entities – that are likely small businesses – having to pay to access the Registry. While, to some, such a fee might seem modest, it nonetheless would represent an increase in costs to more than 57,800 entities, most of whom already may be disproportionately impacted by other costs of complying with the “do-not-call” regulations. In contrast, the suggestion to charge a flat fee of \$200 on all entities that subscribe to five or fewer area codes of data actually would result in tens of thousands of entities that access less than four area codes of data paying proportionally more per area code for access than other entities.⁵² Alternatively, the

⁵¹ The comments submitted in response to the 2006 Fee Rule NPR do not offer any information or data to contradict this assertion. In fact, two of the commenters that represent these very entities support the provision allowing entities to access up to five area codes of data at no cost. *See* NAR at 1, and NADA at 1.

⁵² The commenters offered no other alternative fee structures.

suggestion to base the fees on the actual size of the entity requesting access would, as noted in prior rulemakings, require all entities to submit sensitive data concerning annual income, number of employees, or other similar factors. It also would require the FTC to develop an entirely new system to gather that information, maintain it in a proper manner, and investigate those claims to ensure proper compliance. As the Commission has previously stated, such a system “would present greater administrative, technical, and legal costs and complexities than the Commission’s current exemptive proposal, which does not require any proof or verification of that status.”⁵³ As a result, the Commission continues to believe that the most appropriate and effective method to minimize the impact of the Rule on small businesses is to provide access to a certain number of area codes of data at no cost.

The comments also do not provide any new information to support a change in the number of area codes provided at no cost. Thus, the Commission does not believe that any change in the current level of five free area codes is necessary or appropriate. The Commission continues to recognize that reducing the number of free area codes would result in slightly lower fees charged to the entities that must pay for access. At the same time, however, as noted previously, such a change also would likely result in increased costs to thousands of small businesses. On the other hand, the Commission is not persuaded that it should increase the number of area codes provided at no cost, although it continues to recognize that some small businesses located in large metropolitan areas or those whose businesses are not limited to small geographic areas may need to make calls to more than five area codes. Obviously, increasing the number of area codes provided at no cost would decrease the pool of paying entities, and further

⁵³ See 70 FR 43277, 69 FR at 45583. See also 68 FR at 16243 n.53.

increase the fees these entities must pay. As a result, the Commission continues to believe that allowing all entities to gain access to the first five area codes of data from the Registry at no cost is appropriate.

B. Exempt Entity Access

In the 2006 Fee Rule NPR, the Commission also proposed to continue allowing “exempt” organizations to obtain free access to the Registry.⁵⁴ The Commission stated its belief that any exempt entity, voluntarily accessing the Registry to avoid calling consumers who do not wish to receive telemarketing calls, should not be charged for such access.⁵⁵ Charging such entities access fees, when they are under no legal obligation to comply with the “do-not-call” requirements of the Amended TSR, may make them less likely to obtain access to the Registry in the future, resulting in an increase in unwanted calls to consumers.⁵⁶

No comments directly addressed this issue.⁵⁷ Accordingly, the Commission continues to believe that if it charged exempt entities for access to the Registry, many, if not most, of those entities would no longer seek access. As a result, as noted in prior fee rules, registered consumers would receive an increase in the number of unwanted telephone calls. Exempt entities are, by definition, under no legal obligation to access the Registry. Many are outside the

⁵⁴ 71 FR at 25515.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ As part of its alternative fee proposal referenced above, ATA stated that it “acknowledges the Commission’s reluctance to impose access charges on exempt entities. Without commenting on the substance of this policy, ATA’s proposal similarly avoids charging these entities for access to the [Registry]. However, future circumstances may dictate that these entities be charged at some point in time.” ATA at 5 n. 17.

jurisdiction of the FTC. They are voluntarily accessing the Registry in order to avoid calling consumers whose telephone numbers are registered. They should be encouraged to continue doing so, rather than be charged a fee for their efforts. The Commission will, therefore, continue to allow such exempt entities to access the Registry at no cost, after they have completed the required certification.

C. Imposition of the Fees and Use of the Funds

While the business and industry member commenters disagreed on whether access to five area codes of data should continue to be provided at no cost, they were unanimous in their opposition to the increase in fees for access to the National Do Not Call Registry.⁵⁸

Generally, these commenters argued that it would be unfair to continue raising fees given the fee increases over the last few years.⁵⁹ One commenter noted that:

The Commission initially indicated its belief that it would cost a few thousand dollars per telemarketer to obtain access to the national registry. By the time the Commission made the registry available, the cost for access had already increased to \$7,250. Less than a year later, the Commission increased fees 68% to \$11,000. The following year, the Commission increased fees by 40% to \$15,400. Now yet again, the Commission proposes an 11% increase to \$17,050.⁶⁰

⁵⁸ As noted above, two consumers supported the increase in fees. *See* BAS at 1, and S at 1.

⁵⁹ *See* TT at 1, NN at 1, AN at 1, ATA at 4-5, DMA at 2, and NAR at 1.

⁶⁰ *See* DMA at 2. *See also* AN at 1. Another commenter argued that the fees are already high enough given that areas are growing and adding new area codes. TT at 1.

The commenter noted that “[o]ther than reflecting the increase in the annual congressional authorization from \$21.9 million to \$23 million, the Commission provides no justification for any increase in these fees.”⁶¹

In the 2006 Fee Rule NPR, the Commission analyzed information available at that time, and issued a proposal that reflected both the amount that needed to be raised,⁶² along with the number of area codes that were projected to be purchased. As a result, the fees that were proposed in the 2006 Fee Rule NPR represented an increase over the fees adopted in the 2005 Fee Rule. The increase in the amount of funding required to cover the cost to implement and enforce the Registry, while a component of the fee increase, is not the only component. As in prior fee rule proceedings, another factor that influenced the increase proposed in the 2006 Fee Rule NPR was the number of area codes of data that were purchased the prior year by entities accessing the Registry. The fees that the Commission proposed in the 2006 Fee Rule NPR reflect both the amount of funds necessary to implement and enforce the Registry, as well as the number of area codes that the Commission assumes will be purchased by entities accessing the Registry, based on the Commission’s current experience.

In addition, two commenters further argued that there is no justification for the fee increase given the costs and economies of scale associated with operating the Registry.⁶³

Another commenter was concerned “that fees are being used for telemarketing enforcement

⁶¹ DMA at 2.

⁶² The Commission views the current Congressional authorization as an instruction regarding the fees to be collected.

⁶³ See DMA at 2-3, and AN at 1. One commenter points out that the Commission’s 2003 contract with AT&T to establish and administer the database was \$3.5 million. DMA at 3.

based on fraud or other violations of the TSR, where there may also be incidental violation of the registry.”⁶⁴ The commenter further contended that “[s]uch enforcement actions should not be funded by registry fees when they otherwise would have been funded from other enforcement budgets prior to the existence of the registry.”⁶⁵ The commenter also noted the Commission’s statements regarding industry’s high rate of compliance, and argued that it is unfair to continue increasing fees and imposing enforcement costs on the very organizations that are most compliant with the rules.⁶⁶

Consistent with the Implementation Act, and as stated in previous fee rules, the Commission has limited the amount of fees to be collected to those needed to implement and enforce the “do-not-call” provisions of the Amended TSR. The amount of fees collected pursuant to this revised rule is intended to offset costs in the following three areas: first, funds are required to operate the Registry. This includes items such as handling consumer registration and complaints, telemarketer access to the Registry, state access to the Registry, and the management and operation of law enforcement access to appropriate information.⁶⁷ Second, funds are

⁶⁴ DMA at 3.

⁶⁵ *Id.*

⁶⁶ *Id.* at 4. DMA further stated their belief that “it is inappropriate for entities that comply with the law to bear the enforcement costs of the FTC. If the do-not-call registry is as successful as the FTC indicates, the FTC itself or Congress should provide any additional necessary funding increases over the current fee structure.” DMA at 4.

⁶⁷ From June 2005 to May 2006, over 43 million phone numbers were added to the Registry, with a total since inception of approximately 124 million registrations. Since inception, the registry has also handled many requests from organizations wishing to access the registry (e.g. telemarketers, states, and law enforcers), including hundreds of thousands of subscription requests, and millions of area code access requests (including downloads and interactive search requests).

required for law enforcement efforts, including identifying targets, coordinating domestic and international initiatives, challenging alleged violators, and consumer and business education efforts, which are critical to securing compliance with the Amended TSR. These law enforcement efforts are a significant component of the total costs, given the large number of ongoing investigations currently being conducted by the agency, and the substantial effort necessary to complete such investigations. Third, funds are required to cover ongoing agency infrastructure and administration costs associated with the operation and enforcement of the registry, including information technology structural supports and distributed mission overhead support costs for staff and non-personnel expenses such as office space, utilities, and supplies.

In addition, one commenter expressed opposition to any increase in fees that might be attributable to the inclusion of wireless telephone numbers on the Registry, stating that:

Telemarketing calls to wireless numbers without consent are prohibited under the FCC's rules implementing the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. §§ 227 *et seq.* Thus, as a legal matter, consumers receive no fewer telemarketing calls by placing their wireless numbers on the registry.

Because such calls already are prohibited in the first instance, there is no basis for allowing such numbers to be placed on the registry.⁶⁸

However, as noted in the 2005 Fee Rule, this commenter overstated the nature of the prohibition enacted by the Federal Communication Commission ("FCC"). The FCC's prohibitions on telemarketing calls placed to wireless telephone numbers proscribe the use of an "automatic

⁶⁸ See DMA at 4-5.

telephone dialing system or an artificial or prerecorded message” to place such calls.⁶⁹ While the Commission recognizes that many telemarketers use automated dialers to contact consumers, not all telemarketers use such technology. In addition, the Amended TSR’s prohibitions concerning fraudulent or abusive telemarketing acts or practices apply to both land line and wireless telephones, and the Registry has never differentiated between the two. At this point, the Commission sees no reason to make such a distinction.

Accordingly, the Commission concludes that an increase in fees is necessary.

IV. Calculation of the Revised Fees

As previously stated, the Commission proposed in the 2006 Fee Rule NPR to increase the fees charged to access the National Do Not Call Registry to \$62 annually for each area code of data requested, with the maximum annual fee capped at \$17,050 for entities accessing 280 area codes of data or more. The Commission based this proposal on the total number of entities that accessed the Registry from March 1, 2005 through February 28, 2006.⁷⁰ The Commission noted, however, that it would adjust the final revised fee to reflect the actual number of entities that had accessed the Registry at the time of issuance of the Final Amended Fee Rule.⁷¹

⁶⁹ See FCC Telemarketing and Telephone Solicitation Rules, 47 CFR 64.1200 (2006).

⁷⁰ At that time, slightly less than 66,200 entities had accessed all or part of the information in the Registry. Approximately 1,300 of these entities were “exempt” and therefore had accessed the Registry at no charge. An additional 58,300 entities had accessed five or fewer area codes of data, also at no charge. As a result, approximately 6,500 entities had paid for access to the Registry, with slightly less than 1,000 entities having paid for access to the entire Registry. 71 FR 25514.

⁷¹ *Id.*

As of June 1, 2006, there have been no significant or material changes in the number of entities that have accessed the Registry since the Commission issued the 2006 Fee Rule NPR. Therefore, based on the figures contained in the 2006 Fee Rule NPR, and the need to raise \$23 million in fees to offset costs it expects to incur in this Fiscal Year for implementing and enforcing the “do-not-call” provisions of the Amended TSR, the Commission is revising the fees to be charged for access to the Registry as follows: the fee charged for each area code of data will be \$62 per year, with the first five area codes provided to each entity at no cost. The fee charged to entities requesting access to additional area codes of data during the second six months of their annual period will be \$31. “Exempt” organizations, as defined by the “do-not-call” regulations, will continue to be allowed access to the Registry at no cost. The maximum amount that will be charged any single entity will be \$17,050, which will be charged to any entity accessing 280 area codes of data or more.

The Commission establishes September 1, 2006, as the effective date for this rule change. Thus, the revised fees will be charged to all entities that renew their subscription account number after that date.

V. Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act,⁷² the Office of Management and Budget (“OMB”) approved the information collection requirements in the Amended TSR and assigned OMB Control Number 3084-0097. The rule amendment, as discussed above, provides for an increase in the fees that are charged for accessing the National Do Not Call Registry. Therefore, the proposed rule amendment does not create any new recordkeeping, reporting, or third-party

⁷² 44 U.S.C. 3501-3520.

disclosure requirements that would be subject to review and approval by OMB pursuant to the Paperwork Reduction Act.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act⁷³ requires the FTC to provide an Initial Regulatory Flexibility Analysis (“IRFA”) with its proposed rule, and a Final Regulatory Flexibility Analysis (“FRFA”) with its final rule, unless the FTC certifies that the rule will not have a significant economic impact on a substantial number of small entities. As explained in the 2006 Fee Rule NPR and this Statement, the Commission hereby certifies that it does not expect that its Final Amended Fee Rule will have the threshold impact on small entities. As discussed above, this amended rule specifically charges no fee for access to one to five area codes of data included in the Registry. As a result, the Commission anticipates that many small businesses will be able to access the Registry without having to pay any annual fee. Thus, it is unlikely that there will be a significant burden on small businesses resulting from the revised fees. Nonetheless, the Commission published an IRFA with the 2006 Fee Rule NPR, and is also publishing a FRFA with this Final Amended Fee Rule below, in the interest of further explaining its determination, even though the Commission believes that it is not required to publish such analysis.

A. Reasons for consideration of agency action

The Final Amended Fee Rule has been considered and adopted pursuant to the requirements of the Implementation Act and the 2006 Appropriations Act, which authorize the Commission to collect fees sufficient to implement and enforce the “do-not-call” provisions of the Amended TSR.

⁷³ 5 U.S.C. 604(a).

B. Statement of Objectives and Legal Basis

As explained above, the objective of the Final Amended Fee Rule is to collect sufficient fees from entities that must access the National Do Not Call Registry. The legal authority for this Rule is the 2006 Appropriations Act, the Implementation Act, and the Telemarketing Act.

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

The Small Business Administration has determined that “telemarketing bureaus” with \$6.5 million or less in annual receipts qualify as small businesses.⁷⁴ Similar standards, *i.e.*, \$6.5 million or less in annual receipts, apply for many retail businesses which may be “sellers” and subject to the proposed revised fee provisions set forth in this Final Amended Fee Rule. In addition, there may be other types of businesses, other than retail establishments, that would be “sellers” subject to this rule.

During the period June 1, 2005 to May 31, 2006, over 57,800 entities have accessed five or fewer area codes of data from the Registry at no charge. While not all of these entities may qualify as small businesses, and some small businesses may be required to purchase access to more than five area codes of data, the Commission believes that this is the best estimate of the number of small entities that would be subject to this Final Amended Fee Rule. In any event, as explained elsewhere in this Statement, the Commission believes that, to the extent the Final Amended Fee Rule has an economic impact on small businesses, the Commission has adopted an approach that minimizes that impact to ensure that it is not substantial, while fulfilling the legal mandate of the Implementation Act and the 2006 Appropriations Act to ensure that the telemarketing industry supports the cost of the National Do Not Call Registry.

⁷⁴ See 13 CFR 121.201.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The information collection activities at issue in this Final Amended Fee Rule consist principally of the requirement that firms, regardless of size, that access the Registry submit minimal identifying and payment information, which is necessary for the agency to collect the required fees. The cost impact of that requirement and the labor or professional expertise required for compliance with that requirement were discussed in section V of the 2004 Fee Rule Notice of Proposed Rule Making. 69 FR 23701, 23704 (April 30, 2004).

As for compliance requirements, small and large entities subject to the revised fee rule will pay the same rates to obtain access to the National Do Not Call Registry in order to reconcile their calling lists with the phone numbers maintained in the Registry. As noted earlier, however, compliance costs for small entities are not anticipated to have a significant impact on small entities, to the extent the Commission believes that compliance costs for those entities will be largely minimized by their ability to obtain data for up to five area codes at no charge.

E. Duplication With Other Federal Rules

None.

F. Discussion of Significant Alternatives

The Commission discussed the proposed alternatives in Section III, above.

List of Subjects in 16 CFR Part 310

Telemarketing, Trade practices.

VII. Final Rule

Accordingly, for the reasons set forth above, the Federal Trade Commission proposes to amend part 310 of title 16 of the Code of Federal Regulations as follows:

PART 310–TELEMARKETING SALES RULE

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

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

2. Amend §§ 310.8(c) and (d) to read as follows:

§ 310.8 Fee for access to the National Do Not Call Registry.

* * * * *

(c) The annual fee, which must be paid by any person prior to obtaining access to the National Do Not Call Registry, is \$62 per area code of data accessed, up to a maximum of \$17,050; *provided*, however, that there shall be no charge for the first five area codes of data accessed by any person, and *provided further*, that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the National Do Not Call Registry without being required under this Rule, 47 CFR 64.1200, or any other federal law. Any person accessing the National Do Not Call Registry may not participate in any arrangement to share the cost of accessing the registry, including any arrangement with any telemarketer or service provider to divide the costs to access the registry among various clients of that telemarketer or service provider.

(d) After a person, either directly or through another person, pays the fees set forth in § 310.8(c), the person will be provided a unique account number which will allow that person to access the registry data for the selected area codes at any time for twelve months following the first day of the month in which the person paid the fee (“the annual period”). To obtain access to additional area codes of data during the first six months of the annual period, the person must first pay \$62 for each additional area code of data not initially selected. To obtain access to

additional area codes of data during the second six months of the annual period, the person must first pay \$31 for each additional area code of data not initially selected. The payment of the additional fee will permit the person to access the additional area codes of data for the remainder of the annual period.

* * * * *

By direction of the Commission.

Donald S. Clark
Secretary

Appendix

List of Acronyms for Commenters to the TSR 2006 Fee Rule Proposal

	<u>Commenter</u>	<u>Acronym</u>
1.	AIMS	AIMS
2.	American Teleservices Association	ATA
3.	Aplus.Net	AN
4.	Barb Sachau	BAS
5.	Direct Marketing Association, Inc.	DMA
6.	Judy Johnson	JJ
7.	National Association of Realtors	NAR
8.	National Automobile Dealers Association	NADA
9.	Nelnet	NN
10.	Solberg	S
11.	Summerwinds LLC	SW
12.	Turnstyles Ticketing	TT