OFFICE OF THE
CHAIRWOMAN

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

December 8, 2016

The Honorable David Vitter
Chairman
Committee on Small Business and Entrepreneurship
United States Senate
Washington, DC 20510

Dear Chairman Vitter:

We submit this ninth annual report in accordance with Section 212(a)(6) of the amended Small Business Regulatory Enforcement Fairness Act (the "Act").[1] This statute requires agencies to publish guides to assist small entities in complying with rules that significantly affect them. The Federal Trade Commission ("Commission" or "FTC") has a longstanding and effective business education program,[2] and only a small fraction of our business education library is discussed in this report.

From July 1, 2015 to July 1, 2016, the FTC issued no final rules that are subject to Section 212 of the Act.[3] Over that time period, the Commission also certified to the Small Business Administration that certain other final regulations issued would not have a significant economic impact on a substantial number of small business entities. Nonetheless, the Commission has either made available or is preparing updated compliance materials for small businesses for several of these rulemakings, although not required to do so by the Act. Some examples are set out below:

- **Telemarketing Sales Rule ("TSR"), 16 C.F.R. § 310**: Following a public comment period, the Commission amended the TSR to define and prohibit the use of certain payment methods in all telemarketing transactions; expand the scope of the advance fee ban for recovery services; and clarify certain provisions of the Rule. 80 Fed. Reg. 77,520 (Dec. 14, 2015). Some amendments were effective on February 12, 2016, with the others effective on June 13, 2016. The Commission updated its guidance "Complying with the Telemarketing Sales Rule" in June 2016 (enclosed).

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[1] 5 U.S.C. § 601 note.

[2] From FY2002-FY2015, the FTC's "Compliance Assistance" under the Act was rated an "A" by the Small Business Administration's National Ombudsman. We anticipate the same grade when the National Ombudsman submits its FY2016 Report for all agencies.

[3] Section 212 requires agencies to publish a "small entity compliance guide" for any new rule for which an agency is required to prepare a final regulatory flexibility analysis under section 3(a) of the Regulatory Flexibility Act, which is codified at 5 U.S.C. § 604.

- **Automotive Fuel Ratings, Certification and Posting Rule ("Fuel Rating Rule"), 16 C.F.R. § 306**: First issued in 1979, the Fuel Rating Rule enables consumers to buy gasoline with an appropriate octane rating and establishes standard procedures for determining, certifying, and posting octane ratings. On January 14, 2016, the Commission published final amendments requiring that fuel marketers rate and certify all ethanol blends with ethanol content ranging from above 10 percent to 83 percent and that retailers post labels with ethanol percentage disclosures and with the statement: "Use only in Flex-Fuel Vehicles/May Harm Other Engines." 81 Fed. Reg. 2,054. The amendments were effective on July 14, 2016. The Commission updated its guidance "Complying with the FTC Fuel Rating Rule" in October (enclosed).

- **Consumer Warranty Rules, 16 C.F.R. §§ 701-703**: On July 20, 2015, the Commission concluded its review of the Interpretations, Rules, and Guides under the Magnuson-Moss Warranty Act and announced it would keep the Rules and Guides in their present form (Rules at 16 CFR §§ 701-703; Guides at 16 C.F.R. § 239) while modifying the Interpretations (16 C.F.R. §§ 700.10, 700.11 (a)). *See* 80 Fed. Reg. 42,710 (July 20, 2015) (Final Rule); 76 Fed. Reg. 52,596 (Aug. 23, 2011) (Rule Review; Request for Comments). The Commission revised Part 700.10 of the Interpretations to clarify that implied tying – warranty language that implies to a consumer that warranty coverage is conditioned on the use of select parts or service – is deceptive. It also revised Part 700.10 to state that, to the extent that the Warranty Act's service contract provisions apply to the insurance business, they are effective if they do not interfere with state laws regulating the business of insurance. Finally, the Commission also updated the citation format in the Interpretations and Rules. The Commission updated its guidance "Businessperson's Guide to Federal Warranty Law" in May 2015 (enclosed).

For many years, the FTC has had a highly effective program of providing compliance assistance to small businesses.[4] We plan to continue to refine and improve these efforts. If you have any questions, please contact Christian S. White, the Deputy General Counsel for Ethics and Professional Responsibility and Small Business Coordinator at the Commission, at (202) 326-2476.

Respectfully,

/signed/
Edith Ramirez
Chairwoman

Enclosures

cc: The Honorable Steve Chabot
Chairman
Committee on Small Business
U.S. House of Representatives
Washington, D.C. 20515

[4] The Commission also considers the specific and unique circumstances of a case when enforcing business obligations. Section 223 of the Act requires that agencies establish policies to reduce or waive penalties for small entities in appropriate circumstances. In 1997, the Commission issued a small business leniency policy statement that describes factors that may result in a reduction or waiver of penalties. *See* 62 Fed. Reg. 16,809 (Apr. 8, 1997) (issuing policy); 62 Fed. Reg. 46,363 (Sept. 2, 1997) (responding to comment received). As such cases arise, the Commission considers these leniency factors whenever a civil penalty may be assessed against a small business.

In addition, and beyond the Act's requirements, the Commission established corporate leniency policies for violations of the Textile and Wool Rules, 67 Fed. Reg. 71,566 (Dec. 2, 2002), the Funeral Rule (through the Funeral Rule Offender Program), and the Franchise Rule (through the Franchise Rule Alternative Law Enforcement Program) that have helped in fostering a more collaborative regulatory environment for small entities. These policies have helped increase overall compliance with the rules while minimizing the burden on business of correcting certain minor or inadvertent errors that are not likely to injure consumers.

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FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Complying with the Telemarketing Sales Rule

TAGS: Telemarketing

RELATED RULE: Telemarketing Sales Rule

If your business or organization uses telemarketing, this in-depth guide is a "must read." Review the dos and don'ts to make sure you're up on the law, including the ban on most prerecorded robocalls.

Your Opportunity to Comment

Introduction

The Federal Trade Commission (FTC) amended the Telemarketing Sales Rule (TSR) in 2003, 2008, 2010 and 2015. Like the original TSR issued in 1995, the amended Rule gives effect to the Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFPA). This legislation gives the FTC and state attorneys general law enforcement tools to combat telemarketing fraud, gives consumers added privacy protections and defenses against unscrupulous telemarketers, and helps consumers tell the difference between fraudulent and legitimate telemarketing. This guide describes the types of organizations and activities that are subject to the TSR and explains how to comply.

Certain key provisions:

- require disclosures of specific information
- prohibit misrepresentations
- limit when telemarketers may call consumers
- require transmission of Caller ID information
- prohibit abandoned outbound calls, subject to a safe harbor
- prohibit unauthorized billing
- apply to all upsells, even in unsolicited calls from a consumer
- set payment restrictions for the sale of certain goods and services
- require that specific business records be kept for two years

In addition:

- in August 2008, the Commission adopted additional amendments to the TSR that directly address the use of prerecorded messages in telemarketing calls.
- in August 2010, the Commission further amended the TSR to address deceptive and abusive practices associated with debt relief services.
- in December 2015, the Commission further amended the TSR to prohibit the use of remotely created payment orders and checks, cash-to-cash money transfers, and cash reload mechanisms in both outbound and inbound telemarketing. The amendments also expanded the TSR's prohibition of recovery services to apply to losses in any prior transaction, not just prior telemarketing transactions, and clarified a number of Do Not Call and other TSR provisions.

All of these amendments are explained in this guide.

If your telemarketing campaigns involve any calls across state lines — whether you make outbound calls or receive calls in response to advertising — you may be subject to the TSR's provisions.

The Federal Communications Commission (FCC) enforces the Telephone Consumer Protection Act (TCPA), which also regulates telemarketing. For more information about the TCPA, contact the FCC at fcc.gov. Many states also have laws regulating telemarketing. For information about a particular state's laws, contact the state attorney general's office or another state consumer protection agency.

Who Must Comply with the TSR?

The TSR regulates "telemarketing" — defined in the Rule as "a plan, program, or campaign . . . to induce the purchase of goods or services or a charitable contribution" involving more than one interstate telephone call. (The FCC regulates both intrastate and interstate calling.) With some important exceptions, any businesses or individuals that take part in "telemarketing" must comply with the TSR. This is true whether, as "*telemarketers*," they initiate or receive phone calls to or from consumers, or as "*sellers*," they provide, offer to provide, or arrange to provide goods or services to consumers in exchange for payment. It makes no difference whether a company makes or receives calls using low-tech equipment or the newest technology. Similarly, it makes no difference whether the calls are made from outside the United States; so long as they are made to consumers in the United States. Those making the calls, unless otherwise exempt, must comply with the TSR's provisions. If the calls are made to induce the purchase of goods, services, or a charitable contribution, the company is engaging in "telemarketing."

Certain sections of the TSR apply to individuals or companies *other* than "sellers" or "telemarketers" if these individuals or companies provide substantial assistance or support to sellers or telemarketers. The Rule also applies to individuals or companies that help telemarketers gain unauthorized access to the credit card system by using another merchant's account to charge consumers, a practice known as credit card laundering.

Charities and For-Profit Telemarketers Calling on Their Behalf

Although tax exempt non-profit charities that conduct their own telemarketing are not covered by the TSR, the USA PATRIOT Act, passed in 2001, brought charitable solicitations by for-profit telemarketers within the scope of the TSR. As a result, most of the TSR's provisions now are applicable to "telefunders" — telemarketers who solicit charitable contributions on behalf of non-profit charities.

Telefunders must:

- make certain prompt disclosures in every outbound call.
- get express verifiable authorization if accepting payment by methods other than credit or debit card.
- maintain records for 24 months.
- comply with the entity-specific Do Not Call requirements, but are exempt from the National Do Not Call Registry provision.
- include a prompt keypress or voice-activated opt-out mechanism in any prerecorded message call on behalf of a non-profit organization to a member of, or previous donor to, the non-profit.

Telefunders may not:

- make a false or misleading statement to induce a charitable contribution.
- make any of several specific prohibited misrepresentations.
- engage in credit card laundering.
- place "cold" calls that deliver prerecorded messages.
- engage in acts defined as abusive under the TSR, such as calling before 8 a.m. or after 9 p.m., disclosing or receiving consumers' unencrypted account information, and denying or interfering with a consumer's right to be placed on a Do Not Call list.

Exemptions from the TSR

Some Types of Businesses and Individuals

Some types of businesses, individuals, and activities are outside the FTC's jurisdiction, and not covered by the TSR. Certain calls or callers also are completely or partially exempt from the Rule's provisions. The following sections explain the coverage of the Rule and the exemptions.

The FCC's jurisdiction extends to some entities and activities that are not subject to regulation by the FTC. For more information about the FCC's rules, visit fcc.gov.

Some types of businesses are not covered by the TSR even though they conduct telemarketing campaigns that may involve some interstate telephone calls to sell goods or services. These three types of entities are not subject to the FTC's jurisdiction, and are not covered by the TSR:

- banks, federal credit unions, and federal savings and loans.
- common carriers — such as long-distance telephone companies and airlines — when they are engaging in common carrier activity.
- non-profit organizations — those entities that are not organized to carry on business for their own, or their members', profit.

Nevertheless, any individual or company that contracts with one of these three types of entities to provide telemarketing services must comply with the TSR.

Examples:

- A non-bank company that contracts with a bank to provide telemarketing services on the bank's behalf is covered.
- A non-airline company that contracts with an airline to provide telemarketing services on behalf of the airline is covered.
- A company that is acting for profit is covered by the TSR if it solicits charitable contributions on behalf of a non-profit organization.

Sellers of Certain Investments

Under the Telemarketing Act, a number of entities and individuals associated with them that sell investments and are subject to the jurisdiction of the Securities and Exchange Commission or the Commodity Futures Trading Commission are not covered by the TSR — even if they engage in a plan, program, or campaign to sell through interstate telephone calls. However, these entities and individuals **are** covered by the FCC's telemarketing rules.

These entities are: brokers, dealers, transfer agents, municipal securities dealers, municipal securities brokers, government securities brokers, and government securities dealers (as those terms are defined in Section 202(a)(11) of the Investment Advisers Act of 1940); and futures commission merchants, including brokers, commodity trading advisers, commodity pool operators, leverage transaction merchants, floor brokers, or floor traders (as those terms are defined in Section 6(1) of the Commodity Exchange Act).

The Business of Insurance

The McCarran-Ferguson Act provides that the FTC Act, and by extension, the TSR, are applicable to the business of insurance to the extent that such business is not regulated by state law. Whether the McCarran-Ferguson exemption removes insurance-related telemarketing from coverage of the TSR depends on the extent to which state law regulates insurance telemarketing. If state law regulates the telemarketing at issue and enforcement of the TSR would conflict with and effectively supersede those statelaws, then the TSR would not apply. Unlike the jurisdictional exemptions for banks and non-profit organizations, which do not extend to third-party telemarketers making calls on their behalf, in the case of the telemarketing of insurance products and services, the TSR does not necessarily apply simply because the campaign is conducted by a third-party telemarketer.

Some Types of Calls

Some types of calls also are not covered by the Rule, regardless of whether the entity making or receiving the call is covered. These include:

- unsolicited calls from consumers.
- calls placed by consumers in response to a catalog.
- business-to-business calls unless they involve retail sales of nondurable office or cleaning supplies, or solicit sales or charitable contributions from employees.
- calls made in response to general media advertising (with some important exceptions).
- calls made in response to direct mail advertising (with some important exceptions).

Exemptions Explained

Unsolicited Calls from Consumers

Any call from a consumer that is not placed in response to a solicitation by the seller, charitable organization, or telemarketer is exempt from coverage. Because the consumer initiates the call without any inducement from the seller or telemarketer, the call is not considered part of a telemarketing plan, program, or campaign conducted to sell goods or services or to induce a charitable contribution. Some examples include calls to:

- make hotel, airline, car rental, or similar reservations.
- contact a department store or charity without prompting from an advertisement or solicitation.

Calls are not considered “unsolicited” when placed by consumers in response to a prerecorded call. If a seller or telemarketer “upsells” a consumer during an unsolicited call initiated by the consumer, the upsell is covered by the TSR.

Calls Made in Response to a Catalog

Generally, the TSR does not apply to calls placed by consumers in response to a mailed catalog if the catalog:

- contains a written description or illustration of the goods or services offered for sale;
- includes the business address of the seller;
- includes multiple pages of written material or illustrations;
- has been issued at least once a year; and
- the catalog seller doesn’t solicit consumers by phone, but only receives calls initiated by consumers in response to the catalog, and during the calls, only accepts orders without additional solicitation. The catalog seller may give the consumer information about — or attempt to sell the consumer — other items in the same catalog that prompted the consumer’s call or in a similar catalog.

If a telemarketer offers goods or services that are not in the catalog that prompted the consumer’s call — or in a substantially similar catalog — the sales transaction is covered by the TSR. Regardless of the TSR’s application to a particular sale, catalog merchandise sales also are covered by the FTC’s Mail or Telephone Order Merchandise Rule (16 C.F.R. Part 435).

Business-to-Business Solicitation Calls, Unless They Involve the Sale of Nondurable Office or Cleaning Supplies, or Solicit Sales or Charitable Contributions from Employees

Most phone calls between a telemarketer and a business are exempt from the TSR. However, business-to-business calls to induce the retail sale of nondurable office or cleaning supplies are not exempt and must comply with the TSR. Examples of nondurable office or cleaning supplies include paper, pencils, solvents, copying machine toner, and ink — in short, anything that, when used, is depleted, and must be replaced. Goods like software, copiers, computers, mops, and buckets are considered durable because they can be used again.

Although sellers and telemarketers involved in telemarketing sales to businesses of nondurable office or cleaning supplies must comply with the TSR’s requirements and prohibitions, the TSR specifically exempts them from the recordkeeping requirements and from the National Do Not Call Registry provisions. These sellers and telemarketers do not have to create or keep any particular records, or purge numbers on the National Do Not Call Registry from their call lists to comply with the TSR.

In addition, telemarketing calls that solicit consumers at their work — that is, calls to business lines that solicit individual employees to buy products or services for their own use or make personal charitable contributions — also are not business-to-business solicitations and are not exempt from the TSR.

Calls Made in Response to General Media Advertising

The TSR generally does not apply to calls consumers make in response to general media advertising, such as TV commercials; infomercials; home shopping programs; radio ads; print ads in magazines, newspapers, the Yellow Pages, or online directories; and banner ads and other forms of mass media advertising and solicitation. Telemarketers receiving these kinds of inbound calls from consumers nevertheless have to comply with **three important requirements:**

First, the prohibitions on certain payment methods, namely the use of remotely created payment orders and remotely created checks, cash-to-cash money transfers, and cash reload mechanisms, apply to inbound calls in response to general media advertising. If a seller or telemarketer uses remotely created payment orders or checks, or accepts cash-to-cash money transfers or cash reload mechanisms, it will violate the TSR.

- **Remotely created payment orders and checks** are electronic checks that merchants can create after obtaining a consumer’s bank account number. These are different from paper checks that consumers write and sign.

- **Cash-to-cash money transfers** are made electronically from one person to another in a different location by money transfer providers like MoneyGram and Western Union.
- **A cash reload mechanism** is an authorization code PIN number or other security measure that allows consumers to convert cash into an electronic form.

Sellers and telemarketers that comply with these prohibitions in inbound telemarketing remain exempt from the TSR requirements if they otherwise qualify for the general media exemption. Therefore, they are covered by the TSR only if they violate the prohibition.

Second, if a seller or telemarketer "upsells" a consumer during a call initiated by the consumer, the upsell is covered by the TSR.

Third, the TSR **does** cover calls from consumers in response to general media advertisements relating to:

- franchises not covered by the FTC's Franchise Rule,
- business opportunities not covered by the FTC's Business Opportunity Rule,
- credit card loss protection,
- credit repair,
- recovery services,
- advance-fee loans,
- investment opportunities, or
- debt relief services

An investment opportunity is anything that is offered, offered for sale, sold, or traded based on representations about past, present, or future income, profit, or appreciation. Examples of investment opportunities include art, rare coins, oil and gas leases, precious or strategic metals, gemstones, or FCC license or spectrum lottery schemes. In addition, business ventures that are not covered by the FTC's Franchise Rule are investment opportunities.

Calls Made in Response to Direct Mail Advertising

Direct mail advertising includes, but is not limited to, postcards, flyers, door hangers, brochures, "certificates," letters, email, faxes, or similar methods of delivery sent to an identified person or family urging them to call a specified phone number about an offer of some sort. For purposes of the TSR, "direct mail" is not limited to messages sent by conventional mail delivery or private couriers. The exemption for calls responding to direct mail advertising is available both to telemarketers soliciting sales of goods or services and to telefunders soliciting charitable contributions.

Sales solicitations: Generally, consumer calls in response to a direct mail solicitation that clearly, conspicuously, and truthfully makes the disclosures required by the TSR are exempt from the TSR. These disclosures are:

- cost and quantity;
- material restrictions;
- limitations or conditions;
- any "no-refund" policy; and
- if the offer includes a prize promotion, credit card loss protection, or a negative option feature, the information about any of those elements of the offer required by the TSR.

If you are a seller or telemarketer who uses direct mail, you may use this exemption only if your direct mail solicitation messages make the disclosures required by Section 310.3(a)(1) of the TSR clearly, conspicuously, and truthfully.

Charitable solicitations: Consumer calls in response to direct mail messages that solicit charitable contributions are exempt, provided they contain no material misrepresentation about:

- the nature, purpose, or mission of the entity on whose behalf the contribution is requested;
- the tax deductibility of any contribution;

- the purpose for which the contribution will be used;
- the percentage or amount of the contribution that will go to a charitable organization or program;
- any material aspect of a prize promotion; or
- a charitable organization or telemarketer's affiliations, endorsements, or sponsorships.

There is no exemption for calls responding to any direct mail advertising that relates to credit card loss protection, credit repair, recovery services, advance-fee loans, investment opportunities, prize promotions, debt relief services, franchises not covered by the FTC's Franchise Rule, or business opportunities not covered by the FTC's Business Opportunity Rule. This is regardless of whether the advertisement makes the disclosures required by the TSR and contains no misrepresentations.

In addition, as with the general media exemption, it is a violation of the TSR for a seller or telemarketer engaged in direct mail solicitation to accept remotely created payment orders or checks, cash-to-cash money transfers, or cash reload mechanisms. However, sellers and telemarketers that comply with these prohibitions in inbound telemarketing remain exempt from the TSR's requirements. Therefore, they are covered by the TSR only if they violate the prohibition.

Lastly, **"upselling" is not exempt.** Upselling occurs when a seller or telemarketer tries to sell additional goods or services during a single phone call, after an initial transaction. Any instances of upselling following an exempt transaction are covered by the TSR.

Even if the initial transaction is exempt because it's an unsolicited call from a consumer, a response to a general media advertisement or certain direct mail solicitations, or an outbound non-sales call (say, a customer service call), any upsell following the initial transaction is subject to all relevant provisions of the TSR.

Examples:

A consumer calls a department store to ask about the price of a microwave oven. Because the call is not the result of a solicitation by the seller, the initial inquiry is exempt from the Rule. If the seller tries to upsell a refrigerator during the same call, the upsell transaction is subject to the TSR.

A consumer calls in response to an infomercial advertising a home gym product for sale. If the home gym product is the only item offered during the call, the call is exempt. But if the telemarketer offers a free-trial offer to a cookbook series after the sales pitch for the home gym, the cookbook offer constitutes a separate transaction and is an upsell covered by the TSR. If both the home gym product and the cookbook series are prominently featured in the general media advertisement, transactions involving either or both products fall within the general media exemption. But if the cookbook is visible on the set of the infomercial, mentioned only in passing, or mentioned as an afterthought, pitching the cookbook during the a consumer's call about the home gym product is considered an upsell and is not exempt from the TSR.

Partial Exemptions

Some calls are exempt from most provisions of the TSR, but not all. These include:

- calls relating to the sale of 900-Number pay-per-call services.
- calls relating to the sale of franchises and business opportunities.
- calls that are part of a transaction that involves a face-to-face sales presentation.

Calls Relating to the Sale of 900-Number Services

The sale of 900-Number pay-per-call services, which is subject to the FTC's 900-Number Rule, is exempt from most provisions of the TSR. Still, to comply with the TSR, sellers of pay-per-call services must not:

- call any number on the National Do Not Call Registry or on that seller's Do Not Call list.
- deny or interfere with a person's right to be placed on any Do Not Call Registry.

- call outside permissible calling hours.
- place robocalls to consumers who have not agreed to accept them.
- abandon calls.
- fail to transmit Caller ID information.
- threaten or intimidate a consumer or use obscene language.
- cause any telephone to ring or engage a person in conversation with the intent to annoy, abuse, or harass the person called.

Partial coverage under the TSR does not affect the obligation of sellers and providers of 900-Number Services to comply with the 900-Number Rule (16 C.F. R. Part 308).

Calls Relating to the Sale of Franchises and Business Opportunities

Calls relating to the sale of franchises that are covered by the FTC's Franchise Rule (16 C.F.R. Part 436) and business opportunities subject to the Business Opportunities Rule (16 C.F.R. Part 437) are exempt from most provisions of the TSR but not all. Sellers and telemarketers selling franchises subject to the Franchise Rule or business opportunities subject to the Business Opportunities Rule must not:

- call numbers that are on the National Do Not Call Registry or on that seller's Do Not Call list.
- deny or interfere with a person's right to be placed on any Do Not Call Registry.
- call outside permissible calling hours.
- place robocalls to consumers who have not agreed to accept them.
- abandon calls.
- fail to transmit Caller ID information.
- threaten or intimidate a consumer or use obscene language.
- cause any telephone to ring or engage a person in conversation with the intent to annoy, abuse, or harass the person called.

Partial coverage under the TSR does not affect the obligation of franchisors to comply with the Franchise Rule or the Business Opportunity Rule.

Calls that are Part of a Transaction Involving a Face-to-Face Sales Presentation

The TSR generally does not cover telephone transactions where the sale of goods or services or a charitable contribution is not completed until after a face-to-face presentation by the seller or charitable organization, and the consumer is not required to pay or authorize payment until then. This exemption is for transactions that begin with a face-to-face sales presentation and are completed in a phone call, as well as those that begin with a phone call and are completed in a face-to-face sales presentation.

The key to the face-to-face exemption is the direct, substantive and personal contact between the consumer and seller. The goal of the TSR is to protect consumers against deceptive or abusive practices that can arise when a consumer has no direct contact with an invisible and anonymous seller other than the telephone sales call. A face-to-face meeting provides the consumer with more information about — and direct contact with — the seller, and helps limit potential problems the TSR is designed to remedy.

Nevertheless, even in transactions where there is a face-to-face meeting, telemarketers must not:

- call numbers on the National Do Not Call Registry or on that seller's Do Not Call list.
- deny or interfere with a person's right to be placed on any Do Not Call Registry.
- call outside permissible calling hours.
- place robocalls to consumers who have not agreed to accept them.
- abandon calls.
- fail to transmit Caller ID information.
- threaten or intimidate a consumer or use obscene language.
- cause any telephone to ring or engage a person in conversation with the intent to annoy, abuse, or harass the person called.

If the transaction is completed in a face-to-face meeting at the consumer's home or away from the seller's place of business, the seller must comply with the FTC's Cooling Off Rule (16 C.F.R. Part 429).

Requirements for Sellers and Telemarketers

Sellers and Telemarketers Must Disclose Material Information

The TSR requires sellers and telemarketers, whether making outbound calls to consumers or receiving inbound calls from consumers, to provide certain material information before the consumer pays for the goods or services that are the subject of the sales offer. **Material** information is information that would likely affect a person's choice of goods or services or the person's decision to make a charitable contribution. More simply, it is information a consumer needs to make an informed decision about whether to buy goods or services or make a donation. Sellers and telemarketers may provide the material information either orally or in writing. Failure to provide any of the required information truthfully and in a **"clear and conspicuous"** manner, before the consumer pays for the goods or services offered, is a deceptive telemarketing act or practice that violates the TSR and subjects a seller or telemarketer to a civil penalty of $40,000 for each violation.

Clear and Conspicuous: Clear and conspicuous means that information is presented in a way that is difficult to miss and that ordinary consumers will easily notice and understand, so that required disclosures are communicated as effectively as the sales message.

When **written,** clear and conspicuous information must be printed in the same language(s) as the sales offer(s) in a type size that a consumer can readily see and understand; that has the same emphasis and degree of contrast with the background as the sales offer; and that is not buried on the back or bottom, or in unrelated information that an ordinary consumer wouldn't think important enough to read. When a seller or telemarketer makes required disclosures in a written document that is sent to a consumer and follows up with an outbound sales call to the consumer, the disclosures are considered clear and conspicuous only if they are sent close enough in time to the call so that the consumer associates the call with the written disclosures.

When disclosures are **oral**, clear and conspicuous means at an understandable speed and pace, and in the same language(s)and in the same tone and volume as the sales offer(s) so that ordinary consumers can easily hear and understand it. When making outbound calls, a telemarketer must promptly disclose certain types of information to consumers orally in the sales presentation. For purposes of the TSR, **"promptly"** means before any sales pitch is given and before any charitable solicitation is made. Required information about a prize promotion must be given before or when the prize offered is described.

Before a Consumer Consents to Pay: Sellers and telemarketers must give a consumer the information required by Section 310.3(a)(1) of the TSR before:

- Getting a consumer's consent to buy — or persuading a consumer to send full or partial payment by check.
- Asking for any credit card, bank account or other payment information.
- Requesting, arranging for, or asking a consumer to request or arrange for a courier to pick up payment for the goods or services offered. Couriers include Federal Express, DHL, UPS, agents of the seller or telemarketer, or any other person who will go to a consumer's home or other location to pick up payment for the goods or services being offered.

When sellers and telemarketers have pre-acquired account information, they must provide the required disclosures before the customer provides express informed consent. Pre-acquired account information is any information that enables you to cause a charge against a consumer's account without obtaining the account number directly from the consumer during the transaction for which the consumer will be charged.

What Information Must Sellers and Telemarketers Provide to Consumers?

When sellers and telemarketers offer to sell goods or services, they must provide the consumer with material information about the offered goods or services necessary to avoid misleading consumers. The term **material** means likely to affect someone's choice of goods or services or decision to make a charitable contribution, or someone's conduct with regard to a purchase or donation.

The TSR specifies seven broad categories of material information that sellers and telemarketers must give consumers:

1. Cost and Quantity

The TSR requires sellers and telemarketers to disclose the total cost to buy, receive, or use the offered goods or services. While disclosing the total number of installment payments and the amount of each payment satisfies this requirement, the number and amount of such payments must correlate to the billing schedule that will be implemented. For example, the TSR's requirements would not be met if you were to state the product's cost per week if the consumer has to pay installments on a monthly or quarterly basis. The TSR also requires you to tell a consumer the total quantity of goods the consumer must pay for and receive. You must provide both these items of material information to the consumer before the consumer pays for the goods or services that are the subject of the sales offer. You may provide this material information orally or in writing, as long as the information is clear and conspicuous.

Sometimes, the total cost and quantity are not fixed when the initial transaction takes place, but, instead, are determined over time. For example, in a **negative option plan**, like those offered by some book clubs, the consumer may agree to buy a certain number of items over a specified time period. The consumer gets periodic announcements of the selections; each announcement describes the selection, which will be sent automatically and billed to the consumer unless the consumer tells the company not to send it. Similarly, a **continuity plan** is a type of negative option plan that offers subscriptions to collections of goods. During the course of the plan, the consumer can choose to purchase some or all the items offered in the collection. Consumers who agree to buy an introductory selection also agree to receive additional selections on a regular schedule until they cancel their subscription to the plan.

Both negative option and continuity plans are structured to give consumers the opportunity to buy a series of products over time. The cost of the plan as a whole is determined by the number and type of items the consumer decides to accept in the series, and at the time of the initial sales offer, neither the seller nor the consumer necessarily knows how much product the consumer will purchase, or the total cost of the products.

To comply with the TSR, a seller or telemarketer offering a negative option or a continuity plan must disclose the total costs and quantity of goods or services that are part of the initial offer; the total quantity of additional goods or services that a consumer must purchase over the duration of the plan; and the cost, or range of costs, to purchase each additional good or service separately. You may provide this material information orally or in writing, as long as the information is clear and conspicuous. In addition, some negative option plans are subject to the FTC's Negative Option Rule (16 C.F.R. Part 426).

Cost and Quantity Disclosure in the Marketing of Credit Products: If sellers and telemarketers are offering credit products subject to the Truth in Lending Act (TILA) or Regulation Z, compliance with the credit disclosure requirements and the timing of the disclosures mandated by TILA or Regulation Z constitute compliance with the total cost and quantity disclosure requirements of the TSR with respect to the credit instrument. Nevertheless, the **cost and quantity** of any goods or services purchased with that credit also must be disclosed.

2. Material Restrictions, Limitations, or Conditions

The TSR requires sellers and telemarketers to disclose all material restrictions, limitations, or conditions to purchase, receive, or use goods or services that they are offering to the consumer. Material information is information that a consumer needs to make an informed purchasing decision. A material restriction, limitation, or condition is one that, if known to the consumer, would likely affect the decision to purchase the goods or services offered; to purchase them at the offered price; to purchase them from that particular seller; or to make a charitable contribution. Examples of material information that must be disclosed include:

- in the case of an offer of a credit card, a requirement that a consumer make a deposit in order to receive and use the card (that is, that the credit card is a secured card).
- in the case of a vacation certificate, a restriction, limitation, or condition that prevents a purchaser from using the certificate during the summer; or that requires a purchaser to make reservations a year in advance to travel using the certificate; or that requires the consumer to incur expenses beyond the price of the certificate to redeem the certificate for a vacation.
- the underlying illegality of goods or services, such as the illegality of foreign lottery chances.

Sellers and telemarketers may disclose orally or in writing information about material restrictions, limitations, or conditions to purchase, receive, or use the goods or services being offered, as long as the information is clear and conspicuous and disclosed before the consumer pays.

3. No-Refund Policy

If there's a policy of honoring requests for refunds, cancellations of sales or orders, exchanges, or re-purchases, sellers and telemarketers must disclose information about the policy only if they make a statement about the policy during the sales presentation. If the sales presentation includes a statement about such a policy, it also must include a clear and conspicuous disclosure of all terms and conditions of the policy that are likely to affect a consumer's decision on whether to buy the goods or services offered.

If the seller's policy is that "all sales are final" — that is, no refunds, cancellations of sales or orders, or exchanges or re-purchases are allowed — the TSR requires you to let consumers know before they pay for the goods or services being offered. You may give this information to consumers orally or in writing, as long as the information is clear and conspicuous.

4. Prize Promotions

A *prize promotion* includes any sweepstakes or other game of chance, and any representation that someone has won, has been selected to receive, or may be eligible to receive a prize or purported prize. A *prize* is anything offered and given to a consumer by chance.

For the element of chance to be present, all that is necessary under the TSR is that if the consumer is guaranteed to receive an item, at the time of the offer the telemarketer does not identify the specific item that the person will receive. For example, say you send a solicitation promising recipients that they will receive one of four or five listed items but you do not tell recipients which of the listed items they will receive. In that case, any item the consumer receives is a prize, and the solicitation is a prize promotion.

A seller or telemarketer that offers a prize promotion must provide consumers with several items of information before the consumer pays for any goods or services being offered. This information may be given to consumers orally or in writing, as long as the information is clear and conspicuous. You must tell consumers:

- the odds of winning the prize(s). If the odds can't be calculated in advance because they depend on the number of people who enter the promotion, for example, you must tell that to consumers, along with any other factors used to calculate the odds.
- that they can participate in the prize promotion or win a prize without buying anything or making any payment, and that any purchase or payment will not increase the chances of winning. When offering a prize promotion in outbound calls, you must disclose this information orally and promptly. A legitimate prize promotion does not require any purchase or payment of money for a consumer to participate or win. If a purchase or payment of money is required for eligibility for a prize, it is not a prize promotion; it is a lottery, which is generally unlawful under federal and state lottery laws.
- how they can enter the prize promotion without paying any money or purchasing any goods or services. This disclosure must include instructions on how to enter, or an address or local or toll-free telephone number where consumers can get the no-purchase/no-payment entry information.
- any material costs or conditions to receive or redeem any prize. For example, if one of the offered prizes is a "vacation," but the recipient must pay for her own accommodations, that's a cost or condition that is likely to affect the consumer's response to the offer and therefore, must be disclosed.

5. Credit Card Loss Protection

A seller or telemarketer offering a credit card loss protection plan — one that claims to protect, insure, or otherwise limit a consumer's liability in the event of unauthorized use of a customer's credit card — must disclose the limits on a cardholder's liability under federal law for unauthorized use of a credit card (15 U.S.C. § 1643). Since the law limits cardholder liability for unauthorized use — for example, when a credit card is lost or stolen — to no more than $50, disclosure of this information to consumers will help ensure that they have the material information necessary to decide whether the protection plan offered is worth the cost.

6. Negative Option Features

The term "negative option feature" is used in the TSR. This occurs when the seller interprets the consumer's silence, or failure to take an affirmative action to reject goods or services or cancel an agreement, as acceptance of the offer. One type of negative option offer is a "free-to-pay conversion" offer (also known as a "free-trial offer"), where customers receive a product or service for free for an initial period and then have to pay for it if they don't take some affirmative action to cancel before the end of the period. Other types of negative option features include continuity plans and other arrangements where consumers automatically receive and incur charges for shipments in an ongoing series unless they take affirmative action to stop the shipment.

Under the TSR, any seller or telemarketer whose offer of a product or service involves a negative option feature must truthfully, clearly, and conspicuously disclose three pieces of information:

1. the fact that the customer's account will be charged unless he or she takes an affirmative action — such as canceling — to avoid the charge.

2. the date(s) on which the charge(s) will be submitted for payment.

3. the specific steps the customer must take to avoid the charges.

While the best practice is to provide an actual date on which payment will be submitted, it is acceptable to give an approximate date if you don't — or can't — know the actual date, provided the approximate date gives the consumer reasonable notice of when to expect the debit or charge. As for disclosing how the consumer can avoid charges, it is not sufficient under the TSR to say that a consumer would have to call a toll-free number to cancel without giving the number.

7. Debt Relief Services

The TSR defines a "debt relief service" as a program that claims directly, or implies, that it can renegotiate, settle, or in some way change the terms of a person's debt to an unsecured creditor or debt collector. That includes reducing the balance, interest rates or fees a person owes.

Under the TSR, any seller or telemarketer of a debt relief service must truthfully, clearly, and conspicuously disclose five pieces of information:

- how much the service costs as well as any material restrictions, limitations or conditions on the debt relief service. If the sales presentation includes a statement about the refund policy, you must also include a clear and conspicuous disclosure of all terms and conditions of the policy;
- how long it will take the consumer to achieve the represented results based on a good faith estimate;
- how much money a customer must save before you'll make a settlement offer to creditors;
- the possible consequences if the customer fails to make timely payments to creditors; and
- the customer's rights regarding dedicated accounts if you ask or require your customers to set aside funds in a dedicated account.

Prompt Oral Disclosures in Outbound Sales Calls and Upselling Transactions

An **outbound call** is a call initiated by a telemarketer to a consumer. The TSR requires that a telemarketer making an outbound sales call **promptly** disclose, before any sales pitch is given, the following four items of information truthfully, clearly, and conspicuously:

1. **The identity of the seller.** The seller is the entity that provides goods or services to the consumer in exchange for payment. The identity of the telemarketer, or person making the call, need not be disclosed if it is different from the identity of the seller. If the seller commonly uses a fictitious name that is registered with appropriate state authorities, it is fine to use that name instead of the seller's legal name.
2. **That the purpose of the call is to sell goods or services.** The TSR requires that the purpose of the call be disclosed truthfully and promptly to consumers. How you describe or explain the purpose of the call is up to you, as long as your description is not likely to mislead consumers. For example, it would be untruthful to state that a call is a "courtesy call" if it's a sales call.
3. **The nature of the goods or services being offered.** This is a brief description of items you are offering for sale.
4. **In the case of a prize promotion, that no purchase or payment is necessary to participate or win, and that a purchase or payment does not increase the chances of winning.** If the consumer asks, you must disclose — without delay — instructions on how to enter the prize promotion without paying any money or purchasing any goods or services.

These same disclosures must be made in an **upselling** transaction if any of the information in these disclosures is different from the initial disclosures (if the initial transaction was an outbound call subject to the TSR) or if no disclosures were required in the initial transaction, like a non-sales customer service call. For example, in an **external upsell,** where the second transaction in a single telephone call involves a second seller, you must tell the consumer the identity of the second seller — the one on whose behalf the upsell offer is being made. On the other hand, in an **internal upsell,** where additional goods or services are offered by the same seller as the initial transaction, no new disclosure of the seller's identity is necessary because the information is the same as that provided in the initial transaction.

Prompt Oral Disclosures in Outbound Calls to Solicit Charitable Contributions

Telefunders must make two clear and conspicuous oral disclosures promptly before any charitable solicitation is made:

1. **The identity of the charitable organization on whose behalf the solicitation is being made.** The charitable organization is the

entity on whose behalf a charitable contribution is sought. The identity of the telemarketer, or person making the call, need not be disclosed. If the charitable organization commonly uses a fictitious name that is registered with appropriate state authorities, that name may be disclosed instead of the charitable organization's legal name.

2. **That the purpose of the call is to solicit a charitable contribution.** The TSR requires that the purpose of the call be disclosed promptly to consumers. How the purpose of the call is described or explained is up to you, as long as your description or explanation is not likely to mislead consumers.

How does a for-profit company that telemarkets for a non-profit organization make the required oral disclosures? When a for-profit company makes interstate calls to solicit charitable contributions for a non-profit organization, the for-profit telemarketer must make the required prompt disclosures for charitable solicitation calls. The company must identify the entity on behalf of which the charitable solicitation is made, and state that the purpose of the call is to solicit a charitable contribution. However, if a for-profit company solicits charitable contributions on behalf of a charity and offers goods or services that are of more than nominal value — a book, magazine subscription, or perhaps a membership — to induce donations, the required oral disclosures for both sales **and** charitable contributions must be made. "Nominal" means a value less than the amount of any contribution being solicited. In a situation where the goods or services offered are of nominal value, stating the name of the non-profit organization on whose behalf the call is being made is sufficient.

Examples:

"I am calling on behalf of [name of non-profit organization] to offer you a subscription to the organization's newsletter, which [description of newsletter], and to ask for a donation to help support the work of [name of non-profit organization]."

"I am calling for [name of non-profit organization] to seek your support. For a donation of $25 or more, [name of non-profit organization] will extend to you a one-year membership, which entitles you to [description of the membership]. Your donation will help us to continue the [non-profit organization's] important work . . ."

Multiple Purpose Calls. Some calls have more than one purpose. They may involve the sale of goods or services and another objective, like conducting a prize promotion or determining customer satisfaction. They may involve a charitable solicitation combined with a prize promotion. In any multiple purpose call where the seller or telemarketer is planning to sell goods or services in at least some of the calls, the four sales disclosures above must be made promptly — that is, during the first part of the call before the non-sales portion of the call. Similarly, in any multiple purpose call where the telemarketer is planning to solicit charitable contributions in at least some of the calls, the two charitable solicitation disclosures must be made promptly — that is, during the first part of the call, before the noncharitable solicitation part of the call.

Example:

A seller calls a consumer to determine whether he or she is satisfied with a previous purchase and then plans to move into a sales presentation if the consumer is satisfied. Since the seller plans to make a sales presentation in at least some of the calls (the seller plans to end the call if the consumer is not satisfied), the four sales disclosures above must be made promptly during the initial portion of the call and before inquiring about customer satisfaction.

However, a seller may make calls to welcome new customers and ask whether they are satisfied with goods or services they recently purchased. If the seller doesn't plan to sell anything to these customers during any of these calls, the four oral sales disclosures are not required. That's the case even if customers ask about the sellers' other goods or services, and the seller responds by describing the goods or services. Because the seller has no plans to sell goods or services during these calls, the disclosures are not required.

Misrepresentations are Prohibited

The TSR prohibits sellers and telemarketers from making false or misleading statements to induce anyone to pay for goods or services or make a charitable contribution. For example:

- you cannot falsely claim that you need a consumer's bank account number or credit card number only for identification purposes, when, in fact, you will use the number as payment for the goods or services offered.
- a seller of precious metals cannot induce anyone to invest by falsely claiming that the seller offers the metals at or near wholesale price.
- it would be illegal under the TSR to solicit a charitable contribution by claiming that 100 percent of the funds collected would benefit the stated charity, when only 30 percent of the money goes to the charity.

In addition, the TSR prohibits sellers and telemarketers from misrepresenting specific categories of information about a telemarketing transaction that are likely to affect a consumer's decision to purchase the goods or services offered. The TSR also prohibits both express and implied misrepresentations. Sellers and telemarketers cannot circumvent the TSR by creating a false impression in a consumer's mind through the artful use of half-truths or misleading or incomplete information.

In sales transactions, the TSR prohibits misrepresentations about the following:

1. Cost and Quantity

The TSR prohibits sellers and telemarketers from misrepresenting the total costs to purchase, receive, or use the goods or services offered, or the quantity of goods or services offered at the stated price. For example, you may not tell consumers that they may purchase a magazine subscription for three years at $1.50 a month, when that rate is an introductory rate that will expire after the first year.

2. Material Restrictions, Limitations, or Conditions

The TSR prohibits sellers and telemarketers from misrepresenting any material restriction, limitation, or condition to purchase, receive, or use goods or services offered to the consumer. For example, you may not falsely claim that a hotel certificate may be used any time at any major hotel chain in the country, when it can be used only at certain times or at a limited number of hotels.

3. Performance, Efficacy, or Central Characteristics

The TSR prohibits sellers and telemarketers from misrepresenting any material aspect of the performance, efficacy, nature, or central characteristics of the goods or services offered to the consumer. For example, it's a violation of the TSR to falsely claim that:

- a water processor offered for sale can eliminate all known contaminants from tap water.
- a service offered by the seller can improve a person's credit rating.
- a machine will operate properly without maintenance.
- precious metals outperform other types of investments.
- a seller can recover money lost by the consumer in a previous transaction.
- a purchaser of a business venture can earn "more money in a week than you now earn in a year" or achieve specific levels of income.

4. Refund, Repurchase, or Cancellation Policies

The TSR prohibits sellers and telemarketers from misrepresenting any material aspect — one that likely would have an effect on the consumer's purchasing decision — of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies. For example, the TSR prohibits you from claiming that "our policy is to make our customers happy — if at any time you're not absolutely delighted, just send the merchandise back," if there are time limits, "restocking" charges, or other important restrictions on the return of the goods. It also prohibits sellers and telemarketers from claiming that tickets may be cancelled any time up to the date of an event when such cancellation requests would not be honored.

5. Material Aspects of Prize Promotions

The TSR prohibits sellers and telemarketers from misrepresenting any material aspect of a prize promotion: you may not lie about any aspect of a prize promotion that is likely to affect a consumer's decision to buy any goods or services offered in conjunction with a prize promotion, to buy them at the offered price, or to buy them from you. For example, you may not misrepresent:

- the odds of being able to receive a prize (for example, falsely saying that everyone who enters is guaranteed to win a prize, or falsely claiming that a particular person is “the top winner in the entire state”).

- the nature or value of a prize (for example, falsely claiming a prize is an “expensive genuine diamond tennis bracelet,” when the prize has only nominal value or doesn’t contain any diamonds).
- that a purchase or payment is required to win a prize or participate in a prize promotion (for example, falsely claiming that a consumer must buy magazine subscriptions to enter a prize promotion).

6. Material Aspects of Investment Opportunities

The TSR prohibits sellers and telemarketers from misrepresenting any material aspect of an investment opportunity. You may not make any false or misleading statements about an investment opportunity that are likely to affect a prospective purchaser’s decision to invest. You may not misrepresent any information needed to make an informed investment decision. Examples of material aspects of an investment opportunity include: the risk involved in the investment, the liquidity of the investment, or the earnings potential or profitability of the investment. Depending on the nature of the investment opportunity, other material aspects may include markup over acquisition costs; past performance, marketability, or value of an investment; or fees charged in credit-financed purchases of precious metals.

7. Affiliations, Endorsements, or Sponsorships

The TSR prohibits sellers and telemarketers from misrepresenting affiliations with — or endorsements or sponsorships by — any person, organization, or government entity. For example, you cannot falsely claim that you’re a member of the Better Business Bureau or the local chamber of commerce, or that you’re affiliated with the local police or some national charity. Neither can you create the impression in a consumer’s mind that the postal permit number displayed on a mail solicitation is a sign that the U.S. Postal Service has approved a promotion. In addition, sellers and telemarketers cannot falsely claim or create the impression in a consumer’s mind that they are related to or affiliated with a company with which the consumer usually does business.

8. Credit Card Loss Protection

The TSR prohibits sellers and telemarketers from misrepresenting that any customer needs offered goods or services to receive protection against unauthorized charges that he or she already has under federal law (15 U.S.C. § 1643). For example, you cannot falsely claim that a consumer who doesn’t buy the credit card loss protection you’re offering might be liable for thousands of dollars in unauthorized charges should a credit card be stolen. In fact, the law caps a customer’s liability for unauthorized charges on her credit card at $50.

9. Negative Option Features

The TSR prohibits sellers and telemarketers from misrepresenting any material aspect of a negative option feature of an offer, including: the fact that the consumer’s account will be charged unless the consumer takes an affirmative action to avoid the charges, the dates the charges will be submitted for payment, and the specific steps the customer must take to avoid the charges. For example, the TSR prohibits you from representing that to avoid being charged, the consumer need only call a toll-free number to cancel if, in fact, the number is never answered. In this case, you would be misrepresenting the specific steps the customer must take to avoid the charge, because the steps described wouldn’t achieve that purpose.

10. Debt Relief Services

The TSR prohibits sellers and telemarketers from misrepresenting any material aspect of a debt relief service, either explicitly or by implication, including: the amount of money or the percentage of the debt someone may save by using your service; the amount of time necessary to get the results you represent; the amount of money or the percentage of each outstanding debt the customer must accumulate before you'll begin your attempts to negotiate, settle or modify the terms with creditors; the amount of money or the percentage of each outstanding debt the customer must accumulate before you’ll make a bona fide offer to negotiate, settle or modify the terms with creditors; the effect of your service on the customer’s creditworthiness; the effect of your service on the collection efforts of any creditors or debt collectors; the percentage or number of customers who have gotten the results you represent; and whether your business is a bona fide nonprofit entity.

In charitable solicitation calls, the TSR prohibits misrepresentations about:

1. The Nature, Purpose, or Mission of the Entity on Whose Behalf the Solicitation is Made

The TSR prohibits telefunders from misrepresenting the nature, purpose, or mission of any entity on whose behalf a charitable contribution is being solicited. It would violate the TSR for a telefunder to claim, expressly or by implication, that a charitable contribution is being requested on behalf of a charity that seeks to protect endangered species if the purpose of the charity is to support a local petting zoo of barnyard animals. And a telefunder may not represent that a charitable organization engages in cancer research if the organization simply educates the public about cancer through its fundraising calls.

2. Tax Deductibility

Whether a contribution is tax deductible — or an organization is tax exempt — may be an important consideration when potential donors are deciding whether or how much to contribute. The TSR therefore prohibits telefunders from misrepresenting, expressly or by implication, that any charitable contribution is partly or fully tax deductible, or falsely implying that an organization on whose behalf a contribution is solicited is "tax exempt."

3. Purpose of a Contribution

The TSR prohibits telefunders from misrepresenting how the requested contribution will be used. This includes not only how a donation will be spent, but also the locality where the direct effect of the donation will be felt. The purpose for which a contribution is sought usually is important to a donor, and any misrepresentations about that would be likely to mislead a consumer. It would violate the TSR for you to state or imply that a donation will benefit sick children in the local area if the money collected is not spent to benefit sick children or is not spent to benefit sick kids in the donor's local area. You also cannot claim that a donation will be used to pay for bullet-proof vests for local law enforcement officers if the money goes to some other purpose. The charitable purpose described to potential donors may not be peripheral or incidental to the primary purpose for which the donation will be used.

4. Percentage or Amount of Contribution that Goes to the Charitable Organization or Program

The TSR prohibits telefunders from misrepresenting the percentage or amount of the contribution that goes to a charitable organization or program. This prohibition covers statements made in response to the questions of potential donors, as well as unprompted standalone statements. Even though the TSR does not require you to affirmatively disclose the percentage or amount of the contribution that goes to a charitable organization or program, if a potential donor raises the question, you must answer truthfully and must not misrepresent this information in any way.

5. Material Aspects of Prize Promotions

The TSR prohibits telefunders from misrepresenting any material aspects of a prize promotion in conjunction with a charitable solicitation. You may not make a false statement about any aspect of a prize promotion that could affect a donor's decision to make a charitable contribution in conjunction with the prize promotion.

6. Affiliations, Endorsements, or Sponsorship

The TSR prohibits telefunders from misrepresenting their own or a charitable organization's affiliation with, or endorsement or sponsorship by, any person, organizations, or government entity. For example, you cannot falsely claim that the organization on whose behalf you are calling is affiliated with, sponsored by, endorsed by, or otherwise approved by any other entity or organization. Nor could you falsely claim to be endorsed or "approved by" the local police. In addition, you cannot falsely claim — or create the impression — that you are related to or affiliated with a charity that the donor has heard of or contributed to in the past.

Payment Methods Other than Debit and Credit Cards

The TSR requires "express verifiable authorization" when the payment is made by a method other than a credit card (subject to the Truth in Lending Act and Regulation Z), or a debit card (subject to the Electronic Fund Transfer Act (EFTA) and Regulation E). Because many novel payment methods lack protection against unauthorized charges and dispute resolution rights should the customer be unhappy with the goods or services, the TSR requires that when customers in telemarketing transactions pay by such methods, sellers and telemarketers must meet a higher standard for proving authorization. This provision, the prohibition on sharing unencrypted account numbers, and the requirement that a consumer's express informed consent be obtained in every telemarketing transaction, are in place to protect consumers from unauthorized charges.

What about remotely created payment orders, remotely created checks, cash-to-cash money transfers, and cash reload mechanisms? The use of these four payment methods in both inbound and outbound telemarketing is prohibited by the TSR. Remotely created payment orders and checks create an unreasonable risk of consumer loss by allowing fraudulent merchants to create unsigned checks that debit a consumer's bank account without authorization. Cash-to-cash money transfers and cash reload mechanisms likewise allow anonymous fraudsters to disappear with money paid by consumers for undelivered goods and services.

What about cash, checks, and money orders? The "express verifiable authorization" requirement does not apply to conventional checks that the consumer writes, signs, and mails, or to payments by postal money order, cash, gift certificates, or direct billing (where the customer or donor receives a written bill or statement before having to pay). These payment methods have been used for years, and consumers are familiar with the advantages and relative risks of each. But there are payment methods that consumers may be unfamiliar with and that lack fundamental protections. In the latter instance, the TSR requires more proof of authorization to protect consumers from unauthorized charges: If payment is made by mortgage or utility billing (where goods or services other than the mortgage or utility payment is billed on these accounts), or a similar unconventional method, a telemarketer must obtain the customer or donor's "express verifiable authorization."

Who is responsible for obtaining verifiable authorization? Under the TSR, sellers and telemarketers that receive payment by methods other than credit or debit cards are responsible for obtaining verifiable authorization in those transactions. Even if you use the services of a third party to process or submit billing information other than credit or debit card information, you are responsible for ensuring that the disclosure requirements of the TSR for verifying authorization are met. Under the TSR, a third party also can be held liable for violating the TSR if the third party substantially assists a seller or telemarketer and knows — or consciously avoids knowing — that the seller or telemarketer is violating the TSR by failing to obtain verifiable authorization.

Processing and submitting account information constitutes substantial assistance to a seller or telemarketer. Therefore, if a third party is processing account information for a seller or telemarketer, the third party should ensure that whoever is obtaining consumers' account information obtains verifiable authorization in accordance with the TSR's requirements. A third party who processes and submits bank account information cannot avoid liability by not asking questions about whether authorization procedures comply with the TSR. Indeed, a third party can be held liable under the TSR if it knows that the authorization procedures do not comply with the TSR and it processes or submits account information for payment anyway.

Does the TSR apply if I only supply the software to process or submit bank account information for payment? Maybe. Providing the means to submit a consumer's account information for payment constitutes substantial assistance to a seller or telemarketer. If the seller or telemarketer who is using the software is violating the TSR, a law enforcement agency may ask about the extent to which the software provider ensured that authorization procedures were in place to comply with the TSR. A software provider cannot sell its product with its "eyes closed" to the business practices used by the software purchaser, consciously avoiding any knowledge of the wrongdoing. Deceptive telemarketers favor novel payment methods, like remotely created payment orders or checks. Therefore, third parties should know who they're doing business with — and whether the people they do business with are complying with the TSR.

Under the TSR, authorization is considered verifiable if it is obtained in one of three ways:

- advance written authorization from the consumer;
- an audio recording of the consumer giving express oral authorization; or
- written confirmation of the transaction sent to the consumer before you submit the charge for payment.

Here are the requirements for each type of authorization.

Written Authorization

Any form of written authorization from a consumer is acceptable, as long as it has the consumer's signature. For example, a consumer may transmit written authorization to the seller or telemarketer by facsimile or may send a "voided" signed check as written authorization. An electronic signature also is valid, provided it would be recognized as a valid signature under applicable federal or state contract law.

Oral Authorization

Any audio recording of an oral authorization payment must clearly demonstrate that the consumer has received each of eight specific pieces of information about the transaction and that the consumer has authorized that funds be taken from (or charged to) his or her account based on the required disclosures by the seller or telemarketer. A general question like, "Do you understand all the terms of the sale?" followed by a consumer's "uh-huh" or "yeah" is not enough to demonstrate authorization. The tape recording must show that the consumer received each piece of information below and that, based on this information, the consumer understood and acknowledged each term of the transaction and authorized the transaction.

State laws vary on permitting the recording of telephone conversations and the requirements to obtain consent of the recorded party.

Consult an attorney for guidance on these issues.

The seller or telemarketer must clearly and conspicuously state, and the consumer must acknowledge:

- the goods and services being purchased, or the charitable contribution for which payment authorization is sought.
- the number of debits, charges, or payments (if more than one).
- the date the debits, charges, or payments will be submitted for payment.
- the amount of the debits, charges, or payments.
- the customer or donor's name.
- the customer or donor's billing information, identified in specific enough terms that the consumer understands which account will be used to collect payment for the transaction.
- a telephone number that is answered during normal business hours by someone who can answer the consumer's questions.
- the date of the consumer's oral authorization.

The TSR also requires that the audio recording of the oral authorization must be made available upon request to the customer or donor, as well as to the customer or donor's bank or other billing entity.

The Electronic Fund Transfer Act (EFTA)

Other laws, such as the EFTA (15 U.S.C. § 1693 *et seq.*), may impose different obligations about obtaining a consumer's authorization of a charge. It is the responsibility of each seller and telemarketer to determine how to comply with all applicable laws and rules. Compliance with the TSR requirements for obtaining authorization does not eliminate the obligation to comply with EFTA and other applicable laws.

Authorization by Written Confirmation

If sellers and telemarketers choose verifiable authorization through written confirmation, they must send the confirmation to the consumer via first class mail — and identify it clearly and conspicuously as confirmation of payment — **before** submitting the consumer's billing information for payment. That does not mean that you must wait to submit this information until a consumer **receives** the confirmation: The TSR requires only that you **send** it before you submit the billing information for payment.

The written confirmation must contain all the information required in an audio recording of an oral authorization. In addition, if you choose to use the written confirmation method of authorization, you must have a refund policy in place and must disclose in the written confirmation how to obtain a refund if the consumer disputes the written confirmation. The TSR's prohibition on misrepresenting a refund policy applies in the context of obtaining verifiable authorization by means of written confirmation.

The TSR leaves it to sellers and telemarketers to determine what procedures are necessary to ensure that confirmations are sent prior to submission, to put these procedures in place, and to ensure that records are generated and maintained to document that confirmations are sent at the appropriate time and required refunds are provided.

Note: In transactions involving pre-acquired account information combined with a free-to-pay conversion, sellers and telemarketers may not use the written confirmation method of obtaining authorization. In these transactions, written confirmation does not constitute "express verifiable authorization."

Date the debit, charge, or payment will be submitted for payment

This disclosure ensures that consumers know when to expect the charge or debit. To comply with this requirement, it makes good sense to provide an actual date on which payment will be submitted: "This debit from your checking account will occur on April 14, 2016." However, it is acceptable for you to disclose an approximate date if you don't — or can't — know the actual date, provided the approximate date gives the consumer reasonable notice of when to expect the debit or charge. For example, you could tell a consumer, "The charge will appear on your next mortgage statement," or "Your account will be charged within two weeks from today."

Similarly, in a transaction involving a continuity plan, it would be sufficient for you to note when any initial charge will be submitted for payment, and then at what intervals each successive payment would be submitted, should the customer opt not to decline to purchase additional goods or services. For example, in a book club plan, you could tell a customer that the initial $4.95 charge would be debited from his or her bank account on May 15, and that each month after that, his or her account will be billed one week from the date of each successive shipment.

Billing information in specific enough terms that the consumer understands what account will be used to collect payment for the transaction

To identify the account with sufficient specificity for the customer or donor to understand what account will be charged, you must state the name of the account and enough other distinguishing information about the account to ensure that the customer understands which account will be charged.

For example, telling the consumer that the charge will be placed on his mortgage account is not specific enough information. It would be necessary to identify the account further, perhaps by the name of the lender and the property address, or a reference to some portion of the account number or expiration date. It is your obligation to ensure that the consumer knows specifically what account will be charged for the goods or services.

Assisting and Facilitating Sellers or Telemarketers Who Violate the TSR is Prohibited

It is a violation of the TSR to substantially assist a seller or telemarketer while knowing — or consciously avoiding knowing — that the seller or telemarketer is violating the TSR. Therefore, taking deliberate steps to ensure one's own ignorance of a seller or telemarketer's TSR violations is an ineffective strategy to avoid liability. To violate the TSR, the assistance that a third-party provides must be more than just a casual or incidental dealing with a seller or telemarketer that is unrelated to a violation of the TSR. For example, cleaning a telemarketer's office, delivering lunches to the telemarketer's premises, or engaging in some other activity with little or no relation to the conduct that violates the TSR would not be enough to support liability as an assistor or facilitator.

Third parties who do business with sellers and telemarketers should be aware that their dealings may provide a factual basis to support an inference that they know — or deliberately remain ignorant of — the TSR violations of these sellers and telemarketers. For example, a third party who provides sellers or telemarketers with mailing lists, helps in creating sales scripts or direct mail pieces, or furnishes any other substantial assistance while knowing or deliberately avoiding knowing that the seller or telemarketer is engaged in a TSR violation may be violating the TSR.

Credit Card Laundering is Prohibited

Credit card laundering is the misuse of a "merchant account" with a financial institution. A merchant account is a kind of bank account: it is what a seller or telemarketer needs to gain access to a credit card collection and payment system and to get cash for goods and services sold. Obtaining access to the credit card system through another's merchant account without the authorization of the financial institution is credit card laundering. This practice violates the TSR, and is a criminal offense under federal law and the laws of some states.

Here's how the system works for companies that make legitimate use of the credit card system: To be able to accept payment from a consumer who wants to charge the price of goods or services to a credit card, a seller or telemarketer must have a "merchant account" with a financial institution that is a member of a credit card system (for example, Visa or MasterCard) that issued the consumer's credit card. When the consumer pays by credit card, the merchant generates a credit card sales draft. The seller then deposits the draft into the seller's merchant account, and obtains the cash amount of the deposited draft. The financial institution sends the credit card sales draft through the particular credit card system, which posts a corresponding charge to the consumer's credit card account.

In credit card laundering, sellers and telemarketers who are unable to establish a merchant account with a financial institution sometimes use the unlawful services of a launderer. A launderer opens a "back door" into the credit card system by providing access to a merchant account — and the whole credit card collection and payment system — without the authorization of the financial institution or the credit card system. Except as expressly permitted by a credit card system, it is a TSR violation for anyone:

- with a merchant account to deposit into the credit card system any credit card sales draft generated by a telemarketing transaction that is not the result of a sale to the buyer by the person who has the merchant account.
- to use or solicit someone who has a merchant account (or an employee, representative, or agent of someone who has a merchant account) to deposit into the credit card system any credit card sales draft generated by a telemarketing transaction that is not the result of a sale to the buyer by the person who has the merchant account.
- to obtain access to the credit card system through a business relationship or an affiliation with a merchant, when the access is not

authorized under the terms of the merchant account or by the applicable credit card system.

Unauthorized Billing

It is a violation of the TSR to cause billing information to be submitted for payment — directly or indirectly — without the express **informed consent** of the customer or donor. The TSR requires that in any telemarketing transaction, sellers and telemarketers obtain the express informed consent of the customer or donor to be charged a specific amount on a particular identified account to pay for the goods or services offered, or to make a charitable contribution.

Express Informed Consent Is Required in Every Telemarketing Transaction

The TSR contains no specific requirements for how sellers and telemarketers must obtain express informed consent in transactions where they do not use **pre-acquired account information.** As a practical matter, however, in these transactions it would be necessary for you to get the account number to be charged from the consumer, because the information isn't available any other way. In obtaining this information from the consumer, you must get her express agreement to be charged for the goods or services being offered and to be charged using the account number she provides. Any false or misleading statement to induce someone to divulge her account information to pay for goods or services or to make a charitable contribution is an additional TSR violation.

What is express informed consent? Under the TSR, consent is **express** if it is affirmatively and unambiguously articulated by the consumer. Silence is not express consent, nor is an ambivalent response like, "Well, maybe . . .," "Gee, I don't know about that . . .," or a non-commital "uh-huh." For consent to be **informed,** a consumer, prior to giving consent, must receive all the disclosures required by the TSR.

For example, consent would not meet the requirement that it be "informed" if the consumer does not receive all the TSR's required material disclosures — both the prompt oral disclosures for outbound calls and the disclosures of all material information required in all telemarketing transactions. **Consent** is an affirmative statement that the consumer agrees to purchase the goods or services (or to make the charitable contribution) and is aware that the charges will be billed to a particular account.

Obtaining Express Informed Consent in Telemarketing Transactions Involving Pre-acquired Account Information

Pre-acquired account information is any information that enables sellers and telemarketers to place a charge against a consumer's account without getting the account information directly from the consumer during the transaction for which the account will be charged. The use of pre-acquired account information radically changes the usual dynamic in sales transactions, which requires that a telemarketer obtain the customer's acceptance of the offer, as well as the customer's account number to be charged. Telemarketers using pre-acquired account information are able to cause a charge to a consumer's account without getting the account number from the consumer during the transaction. The TSR establishes safeguards to protect consumers in all telemarketing transactions in which sellers and telemarketers have pre-acquired account information.

The TSR establishes separate requirements for pre-acquired account information transactions involving **"free-to-pay conversion"** offers. That's because when used together with free-to-pay conversion offers, pre-acquired account information has resulted in significant numbers of unauthorized charges to consumers who think they can't be charged at the end of a free trial because they haven't provided their account information. The TSR specifies what sellers and telemarketers must do to prevent this from occurring and to get a consumer's express informed consent.

Free-to-pay conversion offers, sometimes known as "free-trial offers," are offers or agreements where customers receive a product or service for free for an initial period and then incur an obligation to pay unless they take affirmative action to cancel before the end of the period.

When pre-acquired account information is used and the offer includes a free-to-pay conversion feature, telemarketers must:

- obtain from the customer at least the last four digits of the account number to be charged.
- obtain the customer's express agreement to be charged for the goods or services and to be charged using the account number for which the customer has provided at least the last four digits.
- make and maintain an audio recording of the entire telemarketing transaction.

Obtaining the last four digits from the customer: To meet the requirement that sellers and telemarketers "obtain from the customer" at least the last four digits of the account number to be charged, you must ask the customer to provide this information, and the customer must provide it to demonstrate an understanding that by doing so, she is agreeing to make a purchase. You must inform the customer that you have the customer's account number or the ability to charge the account without getting the full account number from the consumer. Reading the information to the customer and asking for confirmation of the digits is not complying with the TSR. Neither is it sufficient to read the digits to the customer, and then ask the customer to recite them back. In addition, it is not adequate to reuse digits that a customer may have provided for identification purposes during another portion of the call — such as in an inbound call where you ask the customer to provide his or her account number by pressing digits on the telephone keypad.

Express Agreement to be Charged: To meet the requirement that telemarketers get a customer's express agreement to be charged for the goods and services — and to be charged using the account number for which she has provided at least four digits — you must ensure that the consumer expressly and unambiguously agrees both to the purchase and the means of payment. The four digits the customer provides must actually be the last four digits of the account to be charged. If the four digits the customer provides aren't the last four digits of the account, the customer hasn't expressly agreed to be charged, and the transaction is void for lack of express verifiable authorization.

This is **not** to be interpreted as mandating that a seller or telemarketer have the unencrypted last four digits of a customer's account number to compare the digits the customer provides to the actual account number. **Rather, the agencies that issued rules under the Gramm-Leach-Bliley Act caution financial institutions against sharing the unencrypted last four digits of a customer's account with a telemarketer, even to ensure that the customer has provided these digits accurately in giving express informed consent.** The meaning here is simply that a charge cannot be processed unless the four digits provided by the customer are in fact the last four digits of the account to be charged. One way to ensure that the four digits match is to perform a real-time inquiry to verify that the leading digits of the pre-acquired account number plus the four provided by the customer are a valid account. There are other ways to do this; the TSR does not require any particular method.

Audio Recording of the Transaction: In a transaction where sellers and telemarketers have pre-acquired account information and are offering goods or services on a free-to-pay conversion basis, the entire telemarketing transaction must be recorded on audio. The audio recording must capture the material terms provided to the consumer, as well as the context and manner in which the offer is presented, because this can be critical to demonstrate that a consumer's consent is both express and informed. In a single-transaction call, this means taping the entire call; in a multi-purpose call it means recording the entirety of each transaction using pre-acquired account information coupled with a free-to-pay conversion offer.

In a situation where telemarketers are bound by state law to obtain consent to record the transaction, they may ask permission to tape before beginning to record; this is the only portion of the call that may be conducted without recording. If it is necessary to explain the purpose of the call or to identify the seller to obtain the customer's permission to record, telemarketers must reiterate this information once the recording begins to demonstrate that the required prompt disclosures were made in the outbound call.

When pre-acquired account information is used but the offer does not include a free-to-pay conversion feature, telemarketers must:

- at a minimum, identify the account to be charged with enough specificity for the customer or donor to understand.
- obtain the customer or donor's express agreement to be charged for the goods or services and to be charged using the account number the seller or telemarketer has identified.

The TSR's requirements for obtaining express informed consent in these transactions are less strict than when a free-to-pay conversion feature is involved. That's because while pre-acquired account information itself can lead to unauthorized billing, the record shows this is less likely when there's no free-to-pay conversion offer.

Identifying the Account with Sufficient Specificity: A telemarketer must state the name of the account and enough other distinguishing information about the account to ensure that the customer understands which account will be charged. For example, it is not good enough to tell the consumer only that a charge will be placed on his Visa credit card. You must identify the card more precisely, either by stating the name of the issuing bank, or some portion of the account number. As the telemarketer, you are obligated to ensure that the consumer knows exactly which account will be charged for the goods or services. The underlying intention of the TSR is that the telemarketer expressly inform the customer that the seller or telemarketer already has the number of the customer's specifically identified account or has the ability to charge that account without getting the account number from the consumer.

Express Agreement to be Charged: The TSR does not specify a particular procedure for sellers and telemarketers to follow when using pre-acquired account information without a free-to-pay conversion so you can demonstrate that the customer has expressly agreed to be charged. To comply with this requirement, you must elicit an affirmative and unambiguous statement from the consumer that demonstrates his intention to agree to be charged, and to be charged on a specific account. Silence is not a substitute for such a statement, nor are ambivalent or non-commital responses like, "Well, maybe . . ." or "uh-huh."

Protecting Consumers' Privacy

The TSR prohibits sellers and telemarketers from engaging in certain abusive practices that infringe on a consumer's right to be let alone. The TSR's privacy protections include prohibitions on:

- calling a person whose number is on the National Do Not Call Registry or a person who has asked not to get telemarketing calls from a particular company or charity.
- misusing a Do Not Call list.
- denying or interfering with a person's Do Not Call rights.
- calling outside the permissible hours.
- abandoning an outbound telephone call.
- placing an outbound telephone call delivering a prerecorded message to a person without that person's express written agreement to receive such calls, and without providing an automated interactive opt-out mechanism.
- failing to transmit Caller ID information.
- using threats, intimidation, or profane or obscene language.
- causing any telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass.

The Do Not Call Provisions

The original TSR contained a provision prohibiting calls to any consumer who previously asked not to get calls from or on behalf of a particular seller. Amendments to the TSR retain that provision, and also prohibit calls to any numbers consumers have placed on the National Do Not Call Registry maintained by the FTC.

The Entity-Specific Do Not Call Provision

It is a TSR violation to call any consumer who has asked not to be called again (the "entity-specific Do Not Call" provision). A telemarketer may not call a consumer who previously has asked not to receive any more calls from or on behalf of a particular seller or charitable organization. It also is a TSR violation for a seller that has been asked by a consumer not to call again to cause a telemarketer to call that consumer. Sellers and telemarketers are responsible for maintaining their individual Do Not Call lists of consumers who have asked not to receive calls placed by, or on behalf of, a particular seller. Calling a consumer who has asked not to be called potentially exposes a seller and telemarketer to a civil penalty of $40,000 for each violation.

What if a consumer asks a specific division of a corporation not to call? Does a call from a different division violate the TSR?
Distinct corporate divisions generally are considered separate sellers under the TSR. Factors relevant to determining whether distinct divisions of a single corporation are treated as separate sellers include whether there is substantial diversity between the operational structure of the divisions and whether the goods or services sold by the divisions are substantially different from each other. If a consumer tells one division of a company not to call again, a distinct corporate division of the same company may make another telemarketing call to that consumer. Nevertheless, a single seller without distinct corporate divisions may not call a consumer who asks not to be called again, even if the seller is offering a different good or service for sale.

On the question of charitable solicitations, telefunders must maintain individual Do Not Call lists for charities on whose behalf they make telemarketing calls. Calling someone who has asked not to be called on behalf of a charitable organization potentially exposes the telefunder that places the call to a civil penalty of $40,000 for each violation.

Example:

Charity A is a non-profit charitable organization not covered by the TSR. Charity A engages Telefunder 1, a for-profit service bureau subject to the TSR, to conduct fundraising telephone campaigns on its behalf. Charity A uses Telefunder 1 to conduct a fundraising campaign for six months, then uses Telefunder 2, another for-profit service bureau, for the next six months. It will violate the TSR for Telefunder 2 to initiate an outbound telephone call on behalf of Charity A to a person who has already asked not to be called on behalf of Charity A. It is the responsibility of Telefunder 2 to get the Do Not Call list relating to Charity A compiled and maintained by Telefunder 1, and to keep from placing calls to anyone on that list when calling on behalf of Charity A.

If Telefunder 2 also conducts a fundraising campaign for Charity B, Telefunder 2 may call potential donors on behalf of Charity B even if they're on Charity A's Do Not Call list. But when calling on behalf of Charity B, Telefunder 2 may not call potential donors on Charity B's Do Not Call list.

The National Do Not Call Registry Requirements

The FTC's National Do Not Call Registry has been accepting registrations from consumers who choose not to receiving telemarketing sales calls since June 27, 2003. Consumers can place their telephone numbers on the National Registry online or by calling a toll-free number. Only phone numbers are included in the National Registry. This means that all household members who share a number will stop receiving most telemarketing calls after the number is registered. Consumers may register both their residential "land line" telephone numbers and their wireless phone numbers.

Sellers, telemarketers, and their service providers have been able to access the Registry through a dedicated website since September 2003. It is a TSR violation to make any covered calls without having accessed the Registry. Sellers and telemarketers must update their call lists — that is, delete all numbers in the National Do Not Call Registry from their lists — at least every 31 days.

Sellers and telemarketers are prohibited from calling any consumer whose number is in the database. Violators will be subject to civil penalties of up to $40,000 for each violation, as well as injunctive remedies.

Scope of the Registry Prohibition — What calls are covered? The Do Not Call provisions of the TSR cover any plan, program, or campaign to sell goods or services involving interstate phone calls. This includes calls by telemarketers who solicit consumers, often on behalf of third-party sellers. It also includes sellers who are paid to provide, offer to provide, or arrange to provide goods or services to consumers. However, sellers and telemarketers should also be aware that the FCC regulates telemarketing calls. See fcc.gov.

What types of calls are not covered by the National Do Not Call Registry? The Do Not Call provisions do not cover calls from political organizations, charities, telephone surveyors, or companies with which a consumer has an existing business relationship. Some sellers are exempt from the FTC's Rules but are required to access the National Registry under the FCC's Rules. Other sellers (charities and political organizations) are exempt from accessing the National Registry under both agencies' rules. These exempt sellers still may access the National Registry voluntarily and do not have to pay a fee for that access. They must, however, submit appropriate certification information to gain access to the National Registry. See fcc.gov.

The prohibition on calls to numbers on the Registry does not apply to business-to-business calls or calls to consumers from or on behalf of charities. Still, telefunders calling to solicit charitable contributions must honor a donor's request not to be called on behalf of a particular charitable organization.

If a call includes a telephone survey and a sales pitch, is it covered? Yes. Callers purporting to take a survey, but also offering to sell goods or services, must comply with the Do Not Call provisions. But if the call is for the sole purpose of conducting a survey, it is exempt. However, sellers and telemarketers should also be aware that the FCC regulates telemarketing calls. See fcc.gov.

How the National Do Not Call Registry Works

Accessing the Registry

Who can access the National Registry? Access to the National Registry is limited to sellers, telemarketers, and other service providers.

Sellers are companies that provide, offer to provide, or arrange for others to provide goods or services to a customer in return for some type of payment as part of a telemarketing transaction. Telemarketers are companies that make telephone calls to consumers on behalf of sellers. Service providers are companies that offer services to sellers engaged in telemarketing transactions, such as providing lists of telephone numbers to call, or removing telephone numbers from the sellers' lists.

Can I use numbers on the National Registry for any purpose other than preventing telemarketing calls? No. The National Registry may not be used for any purpose other than preventing telemarketing calls to the telephone numbers on the Registry. Any entity that accesses the National Registry will be required to certify, under penalty of law, that it is accessing the Registry solely to comply with the TSR or to prevent calls to numbers on the Registry.

How can I access the National Registry? The FTC has a fully automated and secure website — telemarketing.donotcall.gov — to provide members of the telemarketing industry with access to the National Registry's database of telephone numbers, sorted by area code. The first time you access the National Registry, you must provide identifying information about yourself and your company. If you are a telemarketer or service provider accessing the National Registry on behalf of your seller-clients, you will be required to identify your seller-clients and provide their unique account numbers. The only consumer information available from the National Registry is telephone numbers. After you (or the company telemarketing on your behalf) have accessed the National Registry the first time, you'll have the option of downloading only changes in the data that have occurred since the last time you accessed the Registry.

What information must I provide to access the National Registry? The first time you access the system, you will be asked to provide certain limited identifying information, such as your company name and address, contact person, and the contact person's telephone number and email address. If you are accessing the National Registry on behalf of a seller-client, you also will have to identify that seller-client.

How often will I have to access the National Registry and remove numbers from my calling list? You must synchronize your lists with an updated version of the National Registry every 31 days.

How often may I download data from the National Registry? You will be able to access data as often as you like during the course of your annual period for those area codes for which you have paid. However, to protect system integrity, you may download data files from the National Registry only once in any 24-hour period.

What information can I access from the National Registry? The only consumer information that companies receive from the National Registry is registrants' telephone numbers. The numbers are sorted and available by area code. Companies may access as many area codes as desired (and paid for), by selecting, for example, all area codes within a certain state. Of course, companies may access the entire National Registry.

May I check just a few numbers at a time to see if they are registered? Companies that have provided the required identification information and certification and paid the appropriate fee (if they want to access more than five area codes) may check a small number of telephone numbers (10 or less) at a time via interactive Internet pages. This permits small volume callers to comply with the Do Not Call requirements of the TSR without having to download a potentially large list of all registered telephone numbers within a particular area.

What format does the National Registry use? Data is available from the National Registry using Internet-based formats and download methods that serve both small and large businesses. Data also is available in three different sets: full lists, change lists, and small list look-ups. Full lists and change lists are available as flat files or XML tagged data files. You can indicate your preference for flat files or XML tagged data files as part of your profile.

With a web browser, you can access a secure webpage that allows you to select the download set that you prefer. For the small list look-up, you will be asked to enter from one to 10 telephone numbers on an online form. After entering the numbers and clicking on a button, the National Registry will display the list of numbers you entered and whether each number is in the Registry.

You are limited to the numbers in the area code(s) to which you have subscribed. The full list contains just 10-digit telephone numbers, with a single number on each line. For the change list in flat file format, each line of the file contains a telephone number, the date of the change, and an "A" (for Added) or "D" (for Deleted). The change list data is fixed-width fields.

For those who select XML tagged data, the XML tags include: a login and encrypted password; the name and email address of the company contact person; certification that access to the National Registry is solely to comply with the provisions of the TSR; the account number(s) for which the download is being performed; and whether a full list or change list is to be downloaded.

For both flat files and XML tagged data, if you select a change list, you will be provided all telephone numbers that have been added to, or deleted from, the National Registry since the date of your previous access. Change lists, for both flat files and XML tagged data, are available to provide changes on a daily basis (representing the additions and deletions from the day before).

To assist in automating the download process, the National Registry offers the option to set up Web services for requesting change lists in XML tagged data format.

Paying for Access

How much does it cost to access the Registry? Under the Do-Not-Call Registry Fee Extension Act of 2007, the annual fees for accessing the Registry are increased at the rate of change of the consumer price index, unless the change is less than 1 percent, in which case the fees will not be adjusted. For fiscal year 2017, beginning October 1, 2016, the annual fee is $61 for each area code of data accessed or $16,714 for access to every area code in the registry, whichever is less. The first 5 area codes of data may be accessed at no charge. Certain exempt organizations may access all data at no charge.

How often will I have to pay a fee? The fee must be paid annually. Payment of the fee provides access to the data for an “annual period,” which is defined as the twelve months following the first day of the month in which the seller paid the fee. For example, a seller who pays its annual fee on September 15, 2015, has an “annual period” that runs from September 1, 2015 through August 31, 2016.

Who must pay the fee? All sellers covered by the TSR must pay the appropriate fee for an area code of data before they call, or cause a telemarketer to call, any consumer within that area code, even those consumers whose telephone numbers are not on the National Registry. The only exceptions are for sellers that call only consumers with which they have an existing business relationship or written agreement to call, and do not access the National Registry for any other purpose. Charities and political organizations that voluntarily want to suppress calls to consumers whose numbers are on the Registry may access the Registry at no cost.

Telemarketers and service providers may access the National Registry, at no cost, through the use of their seller-client’s unique account number. Even though they are not required by law to do so, telemarketers and service providers may gain access to the National Registry on their own behalf, but they must pay a separate fee for that ability. But before placing calls on behalf of a seller-client, telemarketers are required to ensure that their seller-client has paid the appropriate annual fee.

How can I pay the fee? Fees are payable via credit card (which permits the transfer of data in the same session, if the payment is approved) or electronic fund transfer (EFT). EFT requires you to wait approximately three days for the funds to clear before data access can be provided. You must pay the fee prior to gaining access to the National Registry. Sellers and exempt entities can pay the fee directly or through their telemarketers or service providers (to which the seller or exempt entity has provided the necessary authority).

What if I pay for a small number of area codes, and then later in the year expand my business to call more area codes? Will I have to pay twice? If you need to access data from more area codes than you initially selected, you may do so, but you will have to pay for access to those additional area codes. For fiscal year 2017, beginning October 1, 2016, obtaining additional data from the National Registry during the first six months of your annual period will require a payment of $61 for each new area code. During the second six-month period, the charge to obtain data from each new area code is $30. Payment for additional data provides you with access to the additional data for the remainder of your annual period.

What happens after I pay for access? After payment is processed, you will be given a unique account number and permitted access to the appropriate portions of the National Registry. Using that account number in future visits to the website will speed the time needed for access. On subsequent visits to the website, you will be able to download either a full updated list of numbers from your selected area codes or a more limited list, consisting of changes to the National Registry (both additions and deletions) that have occurred since the day of your last download. This limits the amount of data that you need to download during each visit. The change file will consist of each phone number that has changed, whether it was added or deleted, and the date of the change.

What if I want to share the cost of the fee with another seller? The TSR flatly prohibits sharing the fee for Registry access. If sharing were permitted, fees would have to be much higher to cover the cost of maintaining the Registry.

If I’m a telemarketer or service provider working for a seller, can I use the seller’s account number to access the National Registry? A telemarketer or other service provider working on behalf of a seller may access the National Registry directly or through the use of its seller-client’s unique account number. If access is gained through its seller-client’s account number, the telemarketer or service provider will not have to pay a separate fee for that access. The extent of its access will be limited to the area codes requested and paid for by its seller-client. The telemarketer or service provider also will be permitted to access the National Registry at no additional cost, once the annual fee has been paid by its seller-client. Of course, sellers or telemarketers must use a version of the National Registry that's no more than 31 days old before they make any telemarketing calls.

If a telemarketer or service provider is accessing the National Registry directly — that is, if a telemarketer or service provider decides to obtain the information on its own behalf — it will have to pay a separate fee and comply with all requirements placed on sellers accessing the Registry. Such a telemarketer or service provider will be provided an account number that can be used only by that company. In other words, that account number is not transferrable.

What if a seller uses one telemarketer at the beginning of the year and switches to another later in the year? Will the seller have to pay twice? No. Each seller will have a unique account number that it can give to the telemarketers and service providers who may access the National Registry on the seller's behalf.

Compliance

What happens to companies that don't pay for access to the National Registry? A company that is a seller or telemarketer could be liable for placing any telemarketing calls (even to numbers NOT on the National Registry) unless the seller has paid the required fee for access to the Registry. Violators may be subject to fines of up to $40,000 per violation. Each call may be considered a separate violation. However, sellers and telemarketers should also be aware that the FCC regulates telemarketing calls. See fcc.gov.

What if I call a number that's not on the National Registry without checking the Registry first? It's against the law to call (or cause a telemarketer to call) any number on the National Registry (unless the seller has an established business relationship with the consumer whose number is being called, or the consumer agreed in writing to receive calls placed by or on behalf of the seller). But it's also against the law for a seller to call (or cause a telemarketer to call) any person whose number is within a given area code unless the seller first has paid the annual fee for access to the portion of the National Registry that includes numbers within that area code.

In addition, it's against the law for a telemarketer, calling on behalf of a seller, to call any person whose number is within a given area code unless the seller has first paid the annual fee for access to the portion of the National Registry that includes numbers within that area code. Telemarketers must make sure that their seller-clients have paid for access to the National Registry before placing any telemarketing calls on their behalf. However, sellers and telemarketers should also be aware that the FCC regulates telemarketing calls. See fcc.gov.

What's my liability if my company inadvertently calls a number on the National Registry? The TSR has a "safe harbor" for inadvertent mistakes. If a seller or telemarketer can show that, as part of its routine business practice, it meets all the requirements of the safe harbor, it will not be subject to civil penalties or sanctions for mistakenly calling a consumer who has asked for no more calls, or for calling a person on the National Registry. However, sellers and telemarketers should also be aware that the FCC regulates telemarketing calls. See fcc.gov.

How do the registries operated by the FTC, the, FCC, and the various states fit together? Since June of 2003, the FTC and the FCC jointly and cooperatively have enforced a single National Do Not Call Registry. Together, the FTC and the FCC have jurisdiction over nearly all sales calls placed to U.S. consumers.

Some thirteen states still administer their own do not call registries. The TSR does NOT preempt state law, so sellers, telemarketers, and others who do telemarketing will have to check with various states to determine what is required for compliance at the state level. See fcc.gov. A full copy of the FCC's regulations can be found at: https://www.law.cornell.edu/cfr/text/47/64.1200.

Troubleshooting

What if I have problems when I try to access the National Registry? Visit telemarketing.donotcall.gov for help during regular business hours via a secure electronic form.

How does the National Registry impact small, home-based direct sellers?

FTC staff does not contemplate enforcing the National Do Not Call Registry provisions against individuals who make sales calls out of their own homes to personal friends, family members, or small numbers of personal referrals. In fact, most of the calls made by such small direct sellers probably would be local or "intrastate" calls, and therefore not covered by the TSR. The TSR applies to telemarketing campaigns that involve more than one interstate call.

Nevertheless, small home-based direct sellers should be aware that the Do Not Call regulations of the FCC cover intrastate calls. The FCC regulations exempt "personal relationship" calls — where the party called is a family member, friend, or acquaintance of the telemarketer making the call.

As a matter of goodwill, small direct sellers may want to avoid contacting a person whose number is on the Registry.

Where can I get more information about compliance? The best source of information about complying with the Do Not Call provisions of the TSR is ftc.gov/donotcall. It includes business information about the National Registry.

It's important that sellers and others involved in telemarketing recognize that both the FTC and the FCC regulate telemarketing practices. Those involved in telemarketing should review regulations put in place by both agencies. The FCC's regulations can be found at: https://www.law.cornell.edu/cfr/text/47/64.1200.

Do Not Call Safe Harbor

If a seller or telemarketer can establish that as part of its routine business practice, it meets the following requirements, it will not be subject to civil penalties or sanctions for erroneously calling a consumer who has asked not to be called, or for calling a number on the National Registry:

- the seller or telemarketer has established and implemented written procedures to honor consumers' requests that they not be called.
- the seller or telemarketer has trained its personnel, and any entity assisting in its compliance, in these procedures.
- the seller, telemarketer, or someone else acting on behalf of the seller or charitable organization has maintained and recorded an entity-specific Do Not Call list.
- the seller or telemarketer uses, and maintains records documenting, a process to prevent calls to any telephone number on an entity-specific Do Not Call list or the National Do Not Call Registry, provided that the process involves using a version of the National Registry downloaded no more than 31 days before the date any call is made.
- the seller, telemarketer, or someone else acting on behalf of the seller or charitable organization monitors and enforces compliance with the entity's written Do Not Call procedures.
- the call is a result of error.

What happens if a consumer is called after he or she has asked not to be called? If a seller or telemarketer calls a consumer who has:

- placed his number on the National Registry
- not given written and signed permission to call
- either no established business relationship with the seller, or has asked to get no more calls from or on behalf of that seller . . .

the seller and telemarketer may be liable for a TSR violation. If an investigation reveals that neither the seller nor the telemarketer had written Do Not Call procedures in place, both will be liable for the TSR violation. If the seller had written Do Not Call procedures, but the telemarketer ignored them, the telemarketer will be liable for the TSR violation; the seller also might be liable, unless it could demonstrate that it monitored and enforced Do Not Call compliance and otherwise implemented its written procedures. Ultimately, a seller is responsible for keeping a current entity-specific Do Not Call list, either through a telemarketing service it hires or its own efforts.

What does "error" mean? If a seller or telemarketer has and implements written Do Not Call procedures, it will not be liable for a TSR violation if a subsequent call is the result of error. But it may be subject to an enforcement investigation, which would focus on the effectiveness of the procedures in place, how they are implemented, and if all personnel are trained in Do Not Call procedures. If there is a high incidence of "errors," it may be determined that the procedures are inadequate to comply with the TSR's Do Not Call requirements, the safe harbor is not fulfilled, and the calls violate the TSR. On the other hand, if there is a low incidence of "errors," there may not be a TSR violation. The determination of whether an excusable "error" occurs is based on the facts of each case. A safe rule of thumb to ensure that adequate Do Not Call procedures are implemented is to test periodically for quality control and effectiveness.

Exemptions to the National Do Not Call Registry Requirements

The Established Business Relationship Exemption

Sellers and telemarketers may place live telemarketing calls from a sales agent (but not automated calls or robocalls) to a consumer with whom a seller can demonstrate it has an established business relationship, provided the consumer has not asked to be on the seller's entity-specific Do Not Call list. The TSR states that there are two kinds of established business relationships. One is based on the consumer's purchase, rental, or lease of the seller's goods or services, or a financial transaction between the consumer and seller, within 18 months preceding a telemarketing call. The 18-month period runs from the date of the last payment, transaction, or shipment between the consumer and the seller. The other is based on a consumer's inquiry or application regarding a seller's goods or services, and exists for three months starting from the date the consumer makes the inquiry or application. This enables sellers to return calls to interested prospects even if their telephone numbers are on the National Registry.

Examples:

A magazine seller may make a live telemarketing call to a customer whose number is on the National Registry for 18 months after the date of the customer's last payment for magazines or for 18 months after the seller's last shipment date of magazines, whichever is later.

A consumer calls a company to ask for more information about a particular product. If the company returns the consumer's call within three months from the date of the inquiry, whether the consumer's telephone number is on the National Registry is immaterial. But after that three month period, the company would need either the consumer's express agreement to get more calls or a transaction-based established business relationship to support more calls.

To whom does the established business relationship apply? An established business relationship is between a seller and a customer; it is not necessarily between one of the seller's subsidiaries or affiliates and that customer. The test for whether a subsidiary or affiliate can claim an established business relationship with a sister company's customer is: would the customer expect to receive a call from such an entity, or would the customer feel such a call is inconsistent with having placed his or her number on the National Do Not Call Registry?

Factors to be considered in this analysis include the nature and type of goods or services offered and the identity of the affiliate. Are the affiliate's goods or services similar to the seller's? Is the affiliate's name identical or similar to the seller's? The greater the similarity between the nature and type of goods sold by the seller and any subsidiary or affiliate and the greater the similarity in identity between the seller and any subsidiary and affiliate, the more likely it is that the call would fall within the established business relationship exemption.

Examples:

A consumer who purchased aluminum siding from "Alpha Company Siding," a subsidiary of "Alpha Corp.," likely would not be surprised to receive a call from "Alpha Company Kitchen Remodeling," also a subsidiary of "Alpha Corp." The name of the seller and the subsidiary are similar, as are the type of goods or services offered — home repair and remodeling.

If a consumer buys a computer with peripherals — printer, keyboard, speakers — from a local retail store, the consumer will have an established business relationship with that store for 18 months from the date of purchase. In addition, the consumer may have an established business relationship with the computer manufacturer and possibly the manufacturer of the peripherals, as well as the operating system manufacturer, as long as the customer has a contractual relationship with any of these entities. If the printer comes with a manufacturer's written warranty, the manufacturer of the printer has an established business relationship with the customer. If the operating system comes with a manufacturer's written warranty, the manufacturer of the system has an established business relationship with the customer, too.

However, if a consumer buys a subscription to a magazine from a magazine publisher that happens to be owned by a corporation with diverse holdings, the customer's established business relationship would exist only with the magazine publisher, not the corporate parent or any other corporate subsidiaries.

The Written Permission to Call Exemption

The TSR lets sellers and telemarketers call any consumer they can demonstrate has expressly agreed, in writing, to receive calls by or on behalf of the seller, even if the consumer's number is in the National Do Not Call Registry. The consumer's express agreement must be in writing and must include the number to which calls may be made and the consumer's signature. The signature may be a valid electronic signature, if the agreement is reached online.

If a seller seeks a consumer's permission to call, the request must be clear and conspicuous, and the consumer's assent must be affirmative. If the request is made in writing, it cannot be hidden; printed in small, pale, or non-contrasting type; hidden on the back or bottom of the document; or buried in unrelated information where a person would not expect to find such a request. A consumer must provide consent affirmatively, such as by checking a box. For example, a consumer responding to an email request for permission to call would not be deemed to have provided such permission if the "Please call me" button was pre-checked as a default.

In the FTC's enforcement experience, sweepstakes entry forms often have been used in a deceptive manner to obtain "authorization" from a consumer to incur a charge or some other detriment. Authorization or permission obtained through subterfuge is ineffective. The FTC scrutinizes any use of such sweepstakes entry forms as a way to get a consumer's permission to place telemarketing calls to her number.

Other Provisions Relating to Do Not Call

Selling or Using a Do Not Call List for Purposes Other than Compliance

It's a violation of the TSR for anyone to sell, rent, lease, buy, or use an entity-specific Do Not Call list or the National Registry for any purpose other than complying with the Rule's Do Not Call provisions or preventing calls to numbers on such lists. This provision applies to list brokers, third-party services, and others, in addition to sellers and telemarketers. It is intended to ensure that consumers' phone numbers on Do Not Call lists and the National Registry are not misused. It is a violation of this provision for a seller to market its own entity-specific Do Not Call list to another entity for use as a "do call" list.

Sellers and telemarketers (on behalf of sellers) must purchase access to the relevant Do Not Call data from the National Registry database. The TSR prohibits participating in any arrangement to share the cost of accessing the National Registry database. A telemarketer may not divide the costs to access the National Registry database among various client sellers; access for each client seller must be purchased separately. Similarly, a telemarketer may not access the National Registry to obtain Do Not Call data and transfer the data to or share it with another telemarketer.

Denying or Interfering with Someone's Do Not Call Rights

It's a TSR violation to deny or interfere with someone's right to be placed on the National Do Not Call Registry or on any entity-specific Do Not Call list. This provision prohibits a telemarketer from refusing to accept a consumer's entity-specific Do Not Call request, including harassing any person who makes such a request, hanging up on that person, failing to honor the request, requiring the person to listen to a sales pitch before accepting the request, assessing a charge or fee for honoring the request, requiring the person to call a different number to submit the request, or requiring the person to identify the seller making the call or on whose behalf the call is made. In addition, if a seller or telemarketer fails to diligently capture information about a consumer's Do Not Call request and add it to the appropriate entity-specific Do Not Call list, it will lose the benefit of the TSR's safe harbor for inadvertent violations. It would also violate this part of the TSR for any person to purport to accept telephone numbers or other information for entry into the National Do Not Call Registry. No data from third parties is accepted into the National Do Not Call Registry.

Calling Time Restrictions

Unless a telemarketer has a person's prior consent to do otherwise, it's a violation of the TSR to make outbound telemarketing calls to the person's home outside the hours of 8 a.m. and 9 p.m. local time at the location called.

Call Abandonment (and Safe Harbor)

The TSR expressly prohibits telemarketers from abandoning any outbound telephone call, but has an alternative that allows some flexibility while enabling you to avoid liability under this provision.

Abandoned calls often result from telemarketers' use of predictive dialers to call consumers. Predictive dialers promote telemarketers' efficiency by simultaneously calling multiple consumers for every available sales representative. This maximizes the amount of time telemarketing sales representatives spend talking to consumers and minimizes representatives' "downtime." But it also means some calls are abandoned: consumers are either hung up on or kept waiting for long periods until a representative is available.

Under the TSR's definition, an outbound telephone call is "abandoned" if a person answers it and the telemarketer does not connect the call to a sales representative within two seconds of the person's completed greeting. **The use of prerecorded message telemarketing, where a sales pitch begins with or is made entirely by a prerecorded message, violates the TSR because the telemarketer is not connecting the call to a sales representative within two seconds of the person's completed greeting.**

The abandoned call safe harbor provides that a telemarketer will **not** face enforcement action for violating the call abandonment prohibition if the telemarketer:

- uses technology that ensures abandonment of no more than three percent of all calls answered by a live person, measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.
- allows the telephone to ring for 15 seconds or four rings before disconnecting an unanswered call.
- plays a recorded message stating the name and telephone number of the seller on whose behalf the call was placed whenever a live sales representative is unavailable within two seconds of a live person answering the call.
- maintains records documenting adherence to the three requirements above.

To take advantage of the safe harbor, a telemarketer must first ensure that a live representative takes the call in at least 97 percent of the calls answered by consumers. Calls answered by machine, calls that are not answered at all, and calls to non-working numbers do not count in this calculation. (Note that calls that are answered by machine and that deliver prerecorded messages raise other concerns. See "Telemarketing Calls That Deliver Prerecorded Messages.")

The "per calling campaign" measure

A telemarketer running simultaneous campaigns (on behalf of the same or different sellers) cannot average the abandonment rates for all campaigns, offsetting for example, a six percent abandonment rate for one campaign with a zero percent abandonment rate for another. Each separate campaign is subject to a maximum abandonment rate of three percent measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.

A telemarketer also must eliminate "early hang-ups" by allowing an unanswered call to ring either four times or for 15 seconds before disconnecting the call. This element of the safe harbor ensures that consumers have a reasonable time to answer a call and are not subjected to "dead air" after one, two, or three rings.

In addition, in the small permissible percentage of calls in which a live representative may not be available within two seconds of the consumer's completed greeting, the telemarketer must play a recorded message. The message must state the name and telephone number of the seller responsible for the call, enabling the consumer to know who was calling and, should the consumer wish, to return the call. The Rule expressly states that sellers and telemarketers still must comply with relevant state and federal laws, including, but not limited to, the Telephone Consumer Protection Act (47 U.S.C. § 227) and FCC regulations at 47 C.F.R. Part 64.1200. The FCC regulations prohibit such recorded messages from containing a sales pitch, but, like the TSR provision discussed here, require that the message state "only the name and telephone number of the business, entity, or individual on whose behalf the call was placed and that the call was for 'telemarketing purposes.'" The recorded message must not contain a sales pitch. The number on the recorded message must be one to which a consumer can call to place an entity specific Do Not Call request.

Finally, a telemarketer wishing to avail itself of the safe harbor for abandoned calls must keep records that document its compliance with the first three safe harbor components in accordance with the recordkeeping provision of the TSR (Section 310.5). The records must establish that the abandonment rate has not exceeded three percent and that the ring time and recorded message requirements have been fulfilled.

Telemarketing Calls That Deliver Prerecorded Messages

In August of 2008, the FTC adopted amendments to the TSR that directly address the use of prerecorded messages in telemarketing. Under those amendments, the TSR expressly prohibits outbound telemarketing calls that deliver a prerecorded message unless the seller has obtained the call recipient's prior signed, written agreement to receive such calls from that seller. The prohibition applies to prerecorded message calls regardless of whether they are answered by a person or by an answering machine or voice mail service. With certain exceptions (explained below), the prohibition applies to all calls that deliver a prerecorded message, regardless of whether the number called is listed on the National Do Not Call Registry.

Moreover, even when the seller has the call recipient's prior agreement to receive prerecorded message calls, the message must provide an automated interactive opt-out mechanism that is announced and made available at the outset of the message (right after the required prompt disclosures described above). The opt-out mechanism must remain available throughout the duration of the call. If a call delivering a prerecorded message possibly might be answered "live" by a consumer, the message must include a voice-activated or telephone keypress automated mechanism that will automatically add the number called to the seller's entity-specific Do Not Call list and then immediately terminate the call. If a call possibly might be picked up by an answering machine, or voicemail service, then the message must include a toll-free number that, when called, will connect a caller to the same automated opt-out mechanism, which must be available "24/7" for the duration of the calling campaign.

In addition, sellers or telemarketers placing calls that deliver a prerecorded message must also comply with three additional requirements that mirror those of the abandoned call prohibition. Specifically, they must:

- allow the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;
- play the prerecorded message within two seconds after the recipient of the call completes his or her greeting; and
- comply with all other requirements of the TSR and other applicable federal and state laws.

The Written Agreement Requirement

Calls delivering a prerecorded message may be placed only to individuals who have provided the seller with a signed, written agreement to receive such calls. Therefore, prerecorded message calls are prohibited if the seller does not possess a written agreement from the individual to whom such a call is placed to receive such calls. The existence of an "established business relationship" does not does not permit a seller or telemarketer to place a prerecorded message call.

The TSR requires that the seller have a written agreement with the called party for all calls delivering prerecorded messages, with the two exceptions discussed below. The written agreement is required regardless of whether the number called is on the National Do Not Call Registry. Nor does it matter whether a call delivering a prerecorded message is answered "live" by a person or by an answering machine or voicemail service. In all cases, the seller must have the call recipient's prior written agreement to receive prerecorded message calls at the number called.

What must the written agreement contain?

A written agreement need only contain:

- unambiguous evidence that a call recipient is willing to receive telephone calls that deliver a prerecorded message by or on behalf of a specific seller;
- the telephone number to which such messages may be delivered; and
- the call recipient's signature.

Although no particular form or language is required, an acceptable model is provided here.

I would like to receive telephone calls that deliver prerecorded messages from [ABC Co.] that provide special sales offers such as ____________ _________________at this telephone number: (_____)____________.	
Yes	No
________[Signature]________	

Does a consumer's written agreement to receive prerecorded message calls from a seller permit others, such as the seller's affiliates or marketing partners, to place such calls? No. The TSR requires that the written agreement identify the single "specific seller" authorized to deliver prerecorded messages. The authorization does not extend to other sellers, such as affiliates, marketing partners, or others.

Are there specific procedures for obtaining a consumer's written agreement to receive calls that deliver prerecorded messages? There are three essentials:

1. Before the consumer agrees, the seller must **clearly and conspicuously disclose the consequences** of agreeing — namely, that the agreement will result in the seller delivering prerecorded messages to the consumer via telemarketing calls;
2. The seller may **not** require, directly or indirectly, that a consumer agree to receive prerecorded message calls as a precondition for purchasing or receiving any good or service; and
3. The seller must give the consumer an opportunity to designate the telephone number to which the calls may be placed.

Sellers bear the burden of demonstrating that these prerequisites have been met, and that they possess the required written agreements from consumers to receive prerecorded calls for all such calls that they place.

Is there a particular medium or format the seller must use in obtaining a consumer's written agreement to receive calls that deliver prerecorded messages? A seller need not obtain or retain the consumers agreement in paper form. The TSR expressly permits sellers to use electronic records that comply with the Electronic Signatures In Global and National Commerce Act ("E-SIGN"). Therefore, a seller may use a written agreement that is both created and retained in electronic form, so long as the seller can demonstrate that the seller's procedures comply with E-SIGN, and conform to the TSR's written agreement requirements. Thus, consumers' express agreements to receive prerecorded message calls could be obtained by means of email, a website form, a telephone keypress during a live call with a sales agent, or a voice recording.

The Requirement that Prerecorded Telemarketing Messages Include an Automated Interactive Opt-Out Mechanism

Calls that deliver a prerecorded message must include an automated interactive opt-out mechanism that is announced and made available for the call recipient to use at the outset of the message. The opt-out must follow immediately after the initial disclosures — explained in the section on *Prompt Disclosures in Outbound Telemarketing Calls* — that the TSR imposes on all telemarketing calls.

- In the case of a prerecorded message to induce the purchase of a good or service, the opt-out mechanism must be announced and made available to use immediately after the mandatory disclosures — the seller's identity, that the purpose of the call is to sell goods or services, the nature of the goods or services, and, if a prize promotion is offered, the fact that no purchase or payment is necessary to participate.
- In the case of a prerecorded message call placed by a telefunder to solicit charitable contributions on behalf of a non-profit organization, the opt-out mechanism must be announced and made available to use immediately after the mandatory disclosure of the identity of the charitable organization on behalf of which the call is made, and the fact that the purpose of the call is to solicit a charitable contribution.

Sellers and telemarketers using prerecorded telemarketing calls must employ automated technology capable of automatically placing a consumer's telephone number on the seller's Do Not Call list in response either to spoken words, or the pressing of a specified key on the telephone keypad.

If it is possible that a prerecorded telemarketing call may be answered by a consumer in person, the message must disclose at the outset (as discussed above) how to use the required voice-or-keypress-activated interactive opt-out mechanism to add the consumer's number to the seller's entity-specific Do Not Call list. Moreover, the opt-out mechanism must:

- be available for call recipients to use at any time during the message;
- when invoked, automatically add the call recipient's number to the seller's entity-specific Do Not Call list; and
- after the call recipient's number has been added to the seller's internal Do Not Call list, immediately disconnect the call.

By contrast, if it's possible that a prerecorded telemarketing call may be picked up by an answering machine or voice mail service, the message must disclose at the outset a toll-free number that, when called, connects the caller directly to the same type of voice-or-keypress-activated interactive opt-out mechanism that will add the number called to the seller's Do Not Call list. The opt-out mechanism provided must:

- be accessible at any time throughout the telemarketing campaign, including non-business hours;

- automatically add the call recipient's number to the seller's entity-specific Do Not Call list; and
- immediately thereafter disconnect the call.

When would both a voice or keypress activated mechanism and a toll-free number be required? Both would be required whenever a seller or telemarketer cannot be certain that no consumer will answer the call in person.

May the opt-out mechanism transfer an opt-out request to an operator or sales representative? No, the opt-out provision specifies that the mechanism must "automatically add the number called to the seller's entity-specific Do Not Call list." This means the mechanism must work in a way that does not require human intervention. The additional requirement that the opt-out mechanism "once invoked, immediately disconnect the call" after adding the call recipient's telephone number to the seller's Do Not Call list bars the intervention of an operator or sales representative.

May the opt-out mechanism require a repeat confirmation of the opt-out request before adding a number to the seller's Do Not Call list? No, the provision specifies that the opt-out mechanism must "automatically add" the number called to the seller's entity-specific Do Not Call list."

May the opt-out mechanism connect to a menu that includes the required opt-out option? No, the opt-out mechanism, once invoked, must "automatically add" the number called to the seller's entity-specific Do Not Call list, then immediately terminate the call.

If a recipient of a call delivering a prerecorded message calls the toll-free number provided in the message, must the call recipient's number automatically be added to the seller's internal Do Not Call list? Yes. All calls to the toll free number must "connect directly" to an opt-out mechanism that "automatically adds" the number originally called to the seller's entity-specific Do Not Call list. The provision assumes that the recipient of the prerecorded message call will call back the number provided on the same line on which she received the prerecorded call. As a practical matter, ANI (automatic number identification) may be used to capture the telephone number that calls into the toll-free number. This is the "number called" to which the prerecorded message was delivered.

Must the toll-free number provided in a prerecorded telemarketing message, regardless of when it receives a return call from a consumer, connect the return call to an automated opt-out mechanism? Yes. The TSR specifies that the opt-out mechanism must be "accessible at any time throughout the duration of the telemarketing campaign." This means that both the toll-free number and the opt-out mechanism itself be operational "24/7" so that regardless of the day or time that a consumer listens to a prerecorded message on his or her answering machine or voice mail service, the consumer, if he or she wishes, can immediately exercise the right to opt-out of future calls.

If a prerecorded telemarketing campaign lasts only a short time (for example, one or two days), how long must the toll-free number provided in the prerecorded message be accessible?The toll-free number must be available for the "duration of the telemarketing campaign." In the case of a short one or two-day campaign, the toll-free number should be available for a reasonable time thereafter to permit consumers to exercise their opt-out rights after listening to the message.

Calls that Deliver Purely "Informational" Prerecorded Messages

The TSR amendments prohibiting prerecorded messages in telemarketing do not apply to calls delivering prerecorded messages that are purely informational — for example, flight cancellation messages. Purely informational calls — as opposed to calls soliciting sales or charitable contributions — do not fall within the Rule's definition of "telemarketing" — "a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution." Thus, the prohibition on prerecorded telemarketing messages does not apply to purely informational messages. The following are examples of purely informational messages:

- a reminder of a single appointment previously scheduled at the call recipient's request;
- reminders of a series of recurring appointments previously scheduled at the call recipient's request (for example, weekly dance class reminders; quarterly pest control service reminders);
- an update on a prior sales transaction (for example, a notification of order status, shipping information, delivery dates and times, or overdue payments); or
- a recall notification.

"Mixed" Messages: Any prerecorded informational message that includes a sales or solicitation component to induce, directly or indirectly, a purchase of goods or services or a charitable contribution is prohibited, unless the seller has obtained the call recipient's prior written agreement to receive prerecorded message calls. If a call delivers a prerecorded message that includes any content tending to induce a consumer to purchase a good or service (whether or not the good or service is related to a prior purchase), or to alter the terms of a prior transaction, then the call is not purely informational. Instead, such a call is a telemarketing message that is prohibited, unless agreed to in advance. Examples of informational messages that are prohibited because they are combined with a telemarketing message include messages that provide any information about:

- the availability of any product or service, whether or not the message provides a means for purchasing it;
- the availability of additional options or upgrades for a previously purchased product or service;
- the availability of alternative terms or conditions for a previously purchased product or service; and
- the availability of an extended warranty (or service contract) on a previously purchased product or service.

Exemptions from the Prerecorded Call Requirements

Two general types of prerecorded message calls that would otherwise be prohibited by the TSR are nevertheless expressly exempted from coverage. First, the amendments completely exempt certain prerecorded healthcare message calls. Second, the amendments partially exempt prerecorded message calls placed on behalf of a non-profit charitable organization by a for-profit telemarketer to members of, or previous donors to, the charitable organization on behalf of which the calls are being placed. The paragraphs immediately below explain these exemptions in greater detail.

Healthcare Message Exemption

This exemption is limited to calls permitted under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), pursuant to regulations issued by the Department of Health and Human Services. The only healthcare calls that are exempt are those “made by, or on behalf of, a covered entity or its business associate, as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.”

The HIPAA Privacy Rule permits only three types of calls, whether “live” or prerecorded, by a healthcare provider or its business associates without a patient’s prior authorization – namely:

- calls to describe a health-related product or service that is provided by, or included in a plan of benefits of, the covered entity making the communication;
- calls for treatment of the individual; and
- calls for case management or care coordination for the individual, or to direct or recommend alternative treatments, therapies, health care providers, or settings of care to the individual.

Only these three categories of prerecorded healthcare message calls are exempt from the TSR prohibition of telemarketing calls that deliver a prerecorded message. Some examples of exempt healthcare-related HIPAA calls are prerecorded messages calls made by or on behalf of a:

- pharmacy to provide prescription refill reminders;
- medical provider to provide medical appointment or other reminders (for example, availability of flu shots or mammograms);
- durable medical equipment supplier to document that a patient has used his or her current supply (for example, of insulin needles or respiratory supplies) before sending additional supplies; and
- case manager to check on a patient’s condition.

Prerecorded messages involving products or services not prescribed by a doctor or other healthcare provider as part of a plan of treatment, and therefore not within the healthcare exemption would include, for example prerecorded message calls made by or on behalf of a provider of:

- vitamins, minerals, or alternative medical therapies;
- gym or health club memberships; or
- weight loss products or programs.

Charitable Fundraising Messages Exemption

As noted above, non-profit organizations — those entities that are not organized to carry on business for their own, or their members’ profit — are not covered by the TSR because the FTC Act specifically exempts them from the FTC’s jurisdiction. As explained above, however, the USA PATRIOT Act, passed in 2001, brought charitable solicitations by for-profit telemarketers within the scope of the TSR.

As a result, most of the TSR's provisions are applicable to "telefunders" — telemarketers who solicit charitable contributions.

Nevertheless, the FTC has partially exempted certain calls placed by telefunders from the prerecorded message prohibition. Under this exemption, telefunders may place calls delivering prerecorded messages to prior donors and members of the charity on behalf of which the calls are placed, even if the charity does not have the call recipients' express written agreement to receive such calls.

This is only a partial exemption because telefunders still must comply with the other requirements of the prohibition, including the automated interactive opt-out requirements and the three additional requirements that mirror those of the abandoned call prohibition. Specifically:

- to allow the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;
- to play the prerecorded message within two seconds after the recipient of the call completes his or her greeting; and
- to comply with all other requirements of the TSR and other applicable federal and state laws.

The partial exemption only relieves telefunders from complying with the written agreement requirement.

Transmitting Caller ID Information

It is a violation of the TSR to fail to transmit or cause to be transmitted the phone number, and, when available by the telemarketer's phone company, the name of the telemarketer to any consumer's caller identification service.

To comply with this requirement, a telemarketer may transmit its own number and, where available, its own name, to consumers' caller identification services. The TSR also allows a substitution of the name of the seller (or charitable organization) on whose behalf the telemarketer is calling, and the seller's (or charitable organization's) customer (or donor) service telephone number, which is answered during regular business hours. The TSR allows a service bureau calling on behalf of many client-sellers to transmit a client-seller's customer service number (or the donor service number of a charitable organization client) as well as the names of these entities, if the service bureau's phone company has the capacity to transmit this information.

There may be situations when a consumer who subscribes to a Caller ID service does not receive a telemarketer's transmission of Caller ID information despite the fact that the telemarketer has arranged with its carrier to transmit this information in every call. This can happen if the Caller ID information is dropped somewhere between the telemarketer's call center and the consumer's telephone. Telemarketers who can show that they took all available steps to ensure transmission of Caller ID information in every call will not be liable for isolated inadvertent instances when the Caller ID information fails to make it to the consumer's receiver. Nevertheless, a telemarketer's use of calling equipment that is not capable of transmitting Caller ID information is no excuse for failure to transmit the required information.

The FCC's telemarketing regulations under the TCPA also include provisions governing the transmission of Caller ID (47 C.F.R. § 64.1200).

Threats, Intimidation, and Profane or Obscene Language

Sellers and telemarketers are prohibited from using threats, intimidation, and profane or obscene language in a telemarketing transaction. This prohibition covers all types of threats, including threats of bodily injury, financial ruin, and threats to ruin credit. It also prohibits intimidation, including acts that put undue pressure on a consumer, or that call into question a person's intelligence, honesty, reliability, or concern for family. Repeated calls to an individual who has declined to accept an offer also may be viewed as an act of intimidation.

Calling Consumers Repeatedly or Continuously, with the Intent to Annoy, Abuse or Harass

A consumer asks to be placed on a company's Do Not Call list. If the telemarketer who receives that request decides to dial the consumer's number repeatedly, hanging up each time or making obnoxious or offensive remarks to the consumer in retaliation, the calls would violate this provision of the TSR. Repeated calls urging a consumer to take advantage of an offer also would violate this provision, provided they are made with the intent to annoy, abuse or harass.

Fraudulent Telemarketing Operations

Several distinct practices occur in fraudulent telemarketing operations. The TSR takes specific aim at these practices.

Disclosing or Receiving Unencrypted Account Numbers for Consideration

Along with the provisions on express verifiable authorization and unauthorized billing, another provision is designed to ensure that consumers are not charged without their consent. Basically, the TSR makes it illegal to disclose or receive unencrypted account numbers for consideration, unless the disclosure or receipt is to process a payment for a transaction the consumer has consented to after receiving all necessary disclosures and other protections the TSR provides. Other than processing a transaction to which the consumer has consented, there is no legitimate purpose for disclosing or receiving a consumer's unencrypted account number. Because of the likelihood that people illicitly trading in unencrypted account numbers will misuse the information by placing unauthorized charges against consumers' accounts, this practice is deemed abusive and is prohibited under the TSR.

The term "unencrypted" means not only complete, visible account numbers, whether provided in lists or singly, but also encrypted information with a key to decrypt. "Consideration" can take a variety of forms, all of which are aimed at compensating the provider of the account number information. Forms of consideration include cash or other forms of payment for the list up front or after the sale, and payment of a percentage of each "sale" made using the account numbers, among others.

Payment Restrictions on Sales of Credit Repair Services

Credit repair services promise consumers with a bad credit history that they can remove negative information from, or otherwise improve, a consumer's credit history, credit record or credit rating, regardless of whether the information is accurate.

The TSR prohibits sellers and telemarketers from requesting or receiving payment for credit repair services before two events occur:

- One, the time frame during which the seller has promised services will be provided must have expired. Sellers can represent the time frame for the delivery of the services either orally or in writing, including in the contract for the services. If there's a discrepancy between the various representations by the credit repair seller, the longest time frame represented determines when payment may be requested or received.
- Two, the seller must provide the consumer with evidence that the improvement promised in the consumer's credit record has been achieved. The evidence must be a consumer report from a consumer reporting agency, issued more than six months after the results were achieved. Nothing in the TSR affects the requirement in the Fair Credit Reporting Act (FCRA) that a consumer report may be obtained only for a specific permissible purpose.

This prohibition is directed at the deceptive marketing and sale of bogus credit repair services; it is not directed at the non-deceptive telemarketing of secured credit cards or legitimate credit monitoring services. No one can permanently remove or "erase" negative entries on a consumer's credit report if the information is accurate and current. Deceptive credit repair services may be able to cause negative credit information to disappear from a consumer's credit report temporarily by flooding a credit bureau with letters disputing the accuracy of the negative entries. But once the credit bureau verifies with creditors that the negative items are accurate, they will reappear on a consumer's credit report and stay there for up to seven years and, in the case of a bankruptcy, for 10 years. If an item is inaccurate, incomplete, or more than seven or 10 years old, consumers can remove or correct the information themselves at no charge if they follow the dispute procedures in the FCRA. Consumers do not need the services of a third party to correct an inaccurate or out-of-date credit report. No one can do anything to "repair" a bad credit report that is accurate and up to date.

Payment Restrictions on Sales of Recovery Services

So-called "recovery services" target consumers who have already been victimized by fraud. In these operations, a deceptive telemarketer calls a consumer who has lost money or failed to receive a promised prize in a previous scam. The recovery room telemarketer falsely promises to recover the lost money or the promised prize, in exchange for a fee paid in advance. But even after the fee is paid, the services promised are not provided. Typically, the consumer never hears from the telemarketer again.

The TSR prohibits any recovery service from asking for or accepting payment for any goods or services claiming to help a consumer recover funds paid in a previous transaction — or to recover anything of value promised to a consumer in a previous transaction — until seven business days after the funds or other items recovered are delivered to the consumer. It doesn't matter whether the previous transaction was a telemarketing transaction or a transaction that took place in other media, like online.

The TSR's restriction on when recovery rooms can ask for and accept payment does not apply to services provided by licensed attorneys.

This prohibition does not cover debt collection services. In fact, debt collection services are not covered by the TSR in general, because they are not "conducted to induce the purchase of goods or services" — a prerequisite for TSR coverage as dictated by the TSR's definition of "telemarketing." Debt collectors must comply with the FTC's Fair Debt Collection Practices Act (FDCPA).

Payment Restrictions on Sales of Advance-Fee Loans

In advance-fee loan schemes, a telemarketer, in exchange for a fee paid in advance, promises to get a loan or a credit card for a consumer or represents a high likelihood of success in getting or arranging a loan or other extension of credit for a consumer, regardless of the consumer's credit history or credit record. After the consumer pays the fee, he or she typically doesn't receive the promised loan or other extension of credit. Advance-fee loans generally are marketed to consumers who have bad credit histories or difficulty getting credit for other reasons. The Rule prohibits sellers and telemarketers who guarantee or represent a high likelihood of success in obtaining or arranging a loan or other extension of credit from asking for or accepting payment until a consumer gets the extension of credit promised.

This prohibition on advance fees for loans or other extensions of credit applies only if sellers and telemarketers guarantee or represent a high likelihood of success in obtaining or arranging for a loan or other extension of credit. Legitimate creditors may offer various extensions of credit through telemarketing and may require an application fee or appraisal fee in advance. There must be no guarantee or representation of a high likelihood that the consumer will obtain the extension of credit. This prohibition in the TSR does not apply to firm, "pre-approved" offers of credit by creditors who properly use a "pre-screened" list in accordance with the FTC staff commentary on the FCRA.

Payment Restrictions on Sales of Debt Relief Services

A debt relief service is a program that claims directly, or implies, that it can renegotiate, settle, or in some way change the terms of a person's debt to an unsecured creditor or debt collector. That includes reducing the balance, interest rates or fees a person owes. These services include debt settlement, debt negotiation, and credit counseling.

The TSR prohibits sellers and telemarketers from requesting or receiving payment for providing debt relief services until three requirements are met:

- You must have renegotiated, settled, reduced or otherwise changed the terms of at least one of the customer's debts.
- Your customer must agree to the settlement agreement, debt management plan, or other result reached with the creditor due to your service. According to the TSR, the agreement from the creditor must be in writing, although your customer may agree to it orally. You can't take your fee in advance by getting your customer to agree to a blanket "pre-approval" of any settlement you might be able to negotiate in the future.
- Your customer must have made at least one payment to the creditor or debt collector as a result of the agreement you negotiated.

It's illegal to front-load your fees. If your customer has multiple debts enrolled in your program and you've settled one of them, you may collect a portion of your full fee — as long as you also have completed the three required steps in connection with that debt. The TSR gives you two options for calculating your fee if your customer has enrolled multiple debts:

- **Proportional fee.** According to the TSR, your fee must "bear the same proportional relationship to the total fee for renegotiating, settling, reducing, or altering the terms of the entire debt balance as the individual debt amount bears to the entire debt amount." The "individual debt amount" and the "entire debt amount" refer to what your customer owed at the time she enrolled the debt in the service. So if you settle a proportion of a customer's total debt enrolled with you, you may get that same proportion of your total fee.
- **Percentage of savings.** If you base your fee on a percentage of what your customer saved as a result of your service (often called a contingency fee), the percentage you charge must be the same for each of a customer's debts. Further, the amount saved must be based on the difference between the amount of debt enrolled in the program and the amount of money required to satisfy the debt.

Under the TSR, you may require your customers to set aside your fee and funds to pay debts in a dedicated account as long as:

- the account is held at an insured financial institution;
- the customer owns the funds (including any interest accrued), controls them, and can withdraw them at any time;
- you don't own or control the company administering the account or have any affiliation with it;
- you don't split fees with the company administering the account; and

- the customer can stop working with you at any time without penalty. If the customer decides to end the relationship with you, you must return the money in the account to the customer within seven business days (minus any fees you've earned from the account in compliance with the TSR).

The independent company that administers the account may charge the customer a reasonable fee, but it may not transfer any of the customer's funds to you — directly or indirectly — until you have renegotiated, settled, reduced, or otherwise changed the terms of at least one of your customer's debts and met all the related requirements in the TSR.

It's illegal to provide "substantial assistance" to another company if you know they're violating the TSR, or if you remain deliberately ignorant of their actions. To avoid liability for facilitating violations of the TSR, companies that administer dedicated accounts should review the policies, procedures and operations of the debt relief providers to ensure they're complying with the advance fee ban provision of the TSR, including the provision relating to dedicated accounts. As they continue to administer dedicated accounts, companies also should investigate consumer complaints and disputed payments. Some companies administering dedicated accounts may not be subject to the FTC's jurisdiction, but laws enforced by other government agencies may apply to them.

Recordkeeping Requirements

The TSR requires most sellers and telemarketers to keep certain records that relate to their telemarketing activities. The Rule's recordkeeping requirements do not apply to sellers and telemarketers of nondurable office and cleaning supplies. The following records must be maintained for two years from the date that the record is produced:

- advertising and promotional materials
- information about prize recipients
- sales records
- employee records
- all verifiable authorizations or records of express informed consent or express agreement.

Advertising and Promotional Materials

Sellers and telemarketers must keep at least one specimen copy of all substantially different advertising, brochures, telemarketing scripts, and promotional materials. It's not necessary to keep copies of documents that are virtually identical except for immaterial variations or minor alterations. Obviously, if no scripts or advertising or promotional materials are used in connection with the telemarketing activity, no materials need to be retained.

Information about Prize Recipients

The TSR requires sellers and telemarketers to maintain the name and last known address of each prize recipient, as well as the prize awarded, for all prizes represented to be worth at least $25. The value of a prize is determined by what you directly state or imply to a consumer. If you represent to a consumer — directly or by implication — that a prize is worth $25 or more, you must keep records about the prize recipients, even if the actual value of the prize is less than $25. On the other hand, when there are no direct or implied representations about the value of a prize, you must keep records for prizes that cost you $25 or more to purchase.

Sales Records

The TSR requires sellers and telemarketers to maintain the following information about your sales:

- the name and last known address of each customer;
- the goods or services purchased;
- the date the goods or services were shipped or provided; and
- the amount the customer paid for the goods or services.

Only records relating to actual sales need to be maintained; you are not required to keep records of all customer contacts when customers do not make a purchase.

Consumer credit products: For offers of consumer credit products subject to the TILA and Regulation Z, compliance with the recordkeeping requirements under those regulations is sufficient for compliance with the TSR recordkeeping requirement.

Magazine sales: For the sale of magazines through a fulfillment house — where sellers and telemarketers do not know or have control over the dates of shipment — you may comply with the requirement to keep a record of the shipment date by keeping a record of the date the order was placed with the fulfillment house or the date that the service is to begin.

Employee Records

Sellers and telemarketers must keep employee records for all current and former employees directly involved in telephone sales. These records include the name (and any fictitious name used), the last known home address and telephone number, and the job title(s) of each employee. If fictitious names are used by employees, the TSR requires that each fictitious name be traceable to a specific employee. Businesses must maintain up-to-date information on current employees and last-known information on former employees. Sellers and telemarketers are not required to update information on former employees. In addition, records of individuals not directly involved in telephone sales do not have to be kept for purposes of the TSR. Nevertheless, information like this may be required under other state or federal laws.

Verifiable Authorizations or Records of Express Informed Consent or Express Agreement

When the method of payment is not a credit card (subject to the protections of TILA and Regulation Z), or a debit card (subject to the protections of the EFTA and Regulation E), sellers and telemarketers must obtain a consumer's express verifiable authorization before causing billing information to be submitted for payment. The TSR requires you to maintain a record of all verifiable authorizations that must be provided or received under the TSR. This requirement does not apply to conventional checks, written, signed, and mailed to you by the consumer, or to certain other methods, listed in the section on express verifiable authorization.

Sellers and telemarketers should retain records of the verifiable authorization for each transaction, in any form, manner, or format consistent with the methods of authorization permitted under the TSR. For example, if you obtain a written authorization from the consumer, a copy of it must be maintained; if authorization is by audio recording, a copy of the recording must be maintained. While the recording may be retained in any format, it must include all the information that must be disclosed to the consumer, as well as the consumer's oral authorization. If a consumer gives written confirmation, you must maintain all the information provided in the confirmation.

For records of express informed consent and express agreement (required by the unauthorized billing provision of the TSR [Section 310.4(a)(6)] and the National Do Not Call Registry provision [Section 310.4(b)(1)(iii)(B)(i)]), you must create and maintain records of consent and agreement for each required transaction, and keep them in much the same way you keep such records in the ordinary course of business.

Maintaining Records

The TSR is not intended to impose any new recordkeeping procedures on sellers and telemarketers. You may maintain the records in any manner, format or place that you keep such records in the ordinary course of business, including in electronic storage, on microfiche or on paper.

Who Must Keep Records?

Sellers and telemarketers do not have to keep duplicative records if they have a written agreement allocating responsibility for complying with the recordkeeping requirements. Without a written agreement between the parties, or if the written agreement is unclear as to who must maintain the required records, telemarketers must keep employee records, while sellers must keep the advertising and promotional materials, information on prize recipients, sales records, and verifiable authorizations. In the event of dissolution or termination of the business of a seller or telemarketer, the principal of the business must maintain all records of the business. In the event of a sale, assignment, or other change in ownership of the seller or telemarketer's business, the successor business must maintain the records.

Does the TSR require that other information be maintained concerning the verifiable authorizations? No, but it is sound policy for sellers and telemarketers who use the written confirmation method of authorization for non-debit and credit card payments to maintain records showing that the confirmation was sent to the customer before the customer's billing information was submitted for payment. In addition, you may want to keep records of any refunds you provide to consumers who claim that the written confirmation was inaccurate. If law enforcement authorities get consumer complaints about unauthorized billing, they may ask the seller or telemarketer to produce the information to show that the TSR requirements were followed.

Who Can Enforce the TSR?

The FTC, the states, and private citizens may bring civil actions in federal district courts to enforce the TSR. State attorneys general or any other officer authorized by the state to bring actions on behalf of its residents may bring actions by the states. Private citizens may bring an action to enforce the TSR if they have suffered $50,000 or more in actual damages.

If state officials or private citizens bring a legal action under the TSR, they must provide written notice of their action to the FTC before filing a complaint, if feasible, or immediately upon filing the action. The notice must include a copy of the complaint and any other pleadings to be filed with the court. Private litigants and state officials should send such notices to:

Office of the Director
Attn: Do Not Call Program Manager
Bureau of Consumer Protection
Federal Trade Commission
Washington, D.C. 20580

State officials also may submit electronic notice, and copies of pleadings, through the Consumer Sentinel website.

Penalties for Violating the Rule

Anyone who violates the TSR is subject to civil penalties of up to $40,000 for each violation. In addition, violators may be subject to nationwide injunctions that prohibit certain conduct, and may be required to pay redress to injured consumers.

The FTC has information available about the following topics at business.ftc.gov.

- FTC's Franchise Rule
- FTC's 900-Number Rule
- FTC's Cooling Off Rule
- FTC's Mail or Telephone Order Merchandise Rule
- FTC's Negative Option Rule
- Continuity Plans
- Fair Credit Reporting Act
- FTC's Fair Debt Collection Practices Act
- The Truth in Lending Act

The FCC has information about the TCPA.

Federal Communications Commission
Consumer & Governmental Affairs Bureau
Complaints & Inquiries Division
445 12th Street, S.W.
Washington, D.C. 20554
email:fccinfo@fcc.gov
fcc.gov
fcc.gov/cgb/complaints.html
1-888-CALL-FCC (1-888-225-5322) voice
1-888-TELL-FCC (1-888-835-5322) TTY

[Note: Edited October 1, 2016 to reflect increase in telemarketer fees for the Do Not Call Registry.]

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.

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ftc.gov

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Complying with the FTC Fuel Rating Rule

TAGS: Automobiles | Energy | Gasoline

The FTC prepared this guide to help you comply with the Automotive Fuel Ratings, Certification and Posting Rule, also known as the Fuel Rating Rule. The Rule covers the sale and transfer of liquid automotive fuel.

Introduction

The FTC prepared this guide to help you comply with the Automotive Fuel Ratings, Certification and Posting Rule, also known as the Fuel Rating Rule. The Rule covers the sale and transfer of liquid automotive fuel.

The Rule does not affect a producer's and marketer's ability to develop and blend fuels that are consistent with U.S. Environmental Protection Agency and original equipment manufacturer requirements. The Rule is designed to ensure that producers and marketers give consumers the information they need to make smart liquid fuel-purchasing decisions.

This guide summarizes the Fuel Rating Rule and answers commonly-asked questions.

What the Rule Requires

If you are a fuel refiner, importer, producer, distributor, or retailer of liquid automotive fuel (with the exception of diesel fuels that contain less than 5 percent biodiesel and less than 5 percent bio-mass based diesel)), you must comply with the Rule's rating determination, certification, posting, and recordkeeping requirements.

Who Must Comply

Refiners, importers, producers, distributors, and retailers of automotive fuel must comply with the Fuel Rating Rule.

How Penalties are Assessed

The FTC can sue violators of the Fuel Rating Rule in Federal court. The court can impose civil penalties of up to $40,000 for each violation. The court also can issue an order prohibiting further violations, and other relief, including redress.

What Automotive Fuels are Covered?

The Rule covers liquid fuels distributed for use in motor vehicles. The automotive fuels covered by the Rule include, but are not limited to:

Gasoline

- Gasohol
- Reformulated gasoline
- Oxygenated gasoline

Alternative Liquid Automotive Fuels

- Ethanol Flex Fuels, meaning gasoline and ethanol mixtures of more than 10% but not greater than 83% ethanol by volume
- Biodiesel and biodiesel blends containing more than 5% biodiesel by volume
- Biomass-based diesel and biomass-based diesel blends containing more than 5% biomass-based diesel by volume
- Methanol, denatured ethanol, and other alcohols
- Mixtures containing 85% or more by volume of methanol, denatured ethanol, and/or other alcohols (or such other percentage as determined by the Secretary of the U.S. Department of Energy to provide for requirements relating to cold starts, safety, or vehicle functions), with gasoline or other fuels
- Liquefied natural gas
- Liquefied petroleum gas
- Coal-derived liquid fuels

Is Diesel Fuel Covered?

Generally, the Rule does not cover petroleum-derived diesel fuel. However, the Rule does cover biodiesel and biomass-based diesel as well as biodiesel blends and biomass-based diesel blends that contain more than 5 percent by volume of biodiesel or biomass-based diesel.

The Automotive Fuel Rating

The automotive fuel rating differs for different types of fuel. For:

- **gasoline**, the automotive fuel rating is the octane rating.
- **ethanol flex fuels**, it is a disclosure of the ethanol content, expressed as a percentage of volume. It is accompanied by the text "Use Only in Flex-Fuel Vehicles/May Harm Other Engines."
- **biomass-based diesel, biodiesel, biomass-based diesel blends** with more than 5% biomass-based diesel, and biodiesel blends with more than 5% percent biodiesel, the rating is a disclosure of the biomass-based diesel or biodiesel component, expressed as the percentage by volume.
- an **alternative liquid automotive fuel**, it is the commonly-used name of the fuel along with a disclosure of the amount, expressed as a minimum percentage by volume, of the principal component of the fuel. A disclosure of other components, expressed as a minimum percentage by volume, may be included on the dispenser label, if desired. For example, a blend of 85 % methanol and 15 % gasoline, may have a rating of "M-85, Minimum 85% Ethanol."

How to Comply

The Fuel Rating Rule is divided into sections based on industry categories, including refiner, distributor, or retailer. The following summary is divided by similar headings. See section 306.2 of the FTC Fuel Rating Rule for more information.

Refiners, Importers, and Producers of Automotive Fuel

If you are a refiner, importer or producer, you must determine the automotive fuel rating of all automotive fuel **before** you transfer it.

Rating Determination

To determine the automotive fuel rating of **gasoline** (the octane rating), add the research octane number and the motor octane number and divide by two. This is explained by the American Society for Testing and Materials in ASTM D4814, *Standard Specifications for Automotive Spark-Ignition Engine Fuel*.

To determine automotive fuel ratings for **alternative liquid automotive fuels**, you must have a reasonable basis, consisting of competent and reliable evidence, for the percentage by volume of the component of the alternative liquid automotive fuel that you must disclose. You also must have a reasonable basis for the minimum percentages by volume of other components that you choose to disclose.

The FTC recognizes that consensus specifications that define alternative liquid automotive fuels, which include test methods to determine whether the fuels comply with the specifications, do not exist for many of the liquid alternative fuels. Therefore, the FTC is not requiring the use of specific test methods for determining their ratings. The FTC will review, on a case-by-case basis, any questions concerning what may constitute a reasonable basis for determining the automotive fuel ratings of alternative liquid automotive fuels.

Rating Certification

In each transfer of automotive fuel you make to anyone other than a consumer, you must certify the automotive fuel rating of the fuel consistent with your determination. You may certify by including a delivery ticket with each transfer or with a letter of certification or another written statement. If you transfer automotive fuel to a common carrier, you must certify the automotive fuel rating to the common carrier on a delivery ticket, certification letter, or other paper.

A **delivery ticket** may be an invoice, bill of lading, bill of sale, terminal ticket, delivery ticket, or any other written proof of transfer. It must contain the following items:

- your name;
- the name of the person to whom the automotive fuel is transferred;

- the date of the transfer; and
- the automotive fuel rating.

A **certification letter** must include the following items:

- the date;
- your name;
- the other person's name; and
- the automotive fuel rating of any automotive fuel you will transfer to that person from the date of the letter onward.

Generally, a letter of certification is good until you transfer automotive fuel with a lower automotive fuel rating. However, a letter certifying the fuel rating of biomass-based diesel, biodiesel, a biomass-based diesel blend, a biodiesel blend, or an ethanol flex fuel will be good only until you transfer those fuels with a different automotive fuel rating. When you need to certify a new automotive fuel rating, provide a new delivery ticket or certification letter.

Recordkeeping

You must keep records for one year on how you determined automotive fuel ratings. These records must be available for inspection by FTC staff or other authorized persons.

Distributors of Automotive Fuel

If you are a distributor of automotive fuel, you must certify the automotive fuel rating of the automotive fuel in each transfer you make to anyone other than a consumer.

Rating Certification

You may certify either by including a delivery ticket with each transfer of automotive fuel or with a certification letter.

If you don't blend gasoline with other gasoline, or if you don't blend alternative liquid automotive fuels, you must certify with the automotive fuel rating certified to you when you received the fuel. If you blend, section 306.8 of the Rule explains how to determine the automotive fuel ratings that you certify for the blends. Even if you don't blend, you may choose to certify the automotive fuel rating of the fuel consistent with your own determination of the rating according to the methods in section 306.5 of the Rule.

When you transfer automotive fuel to a common carrier, you must certify the automotive fuel rating of the fuel to the common carrier. When you receive automotive fuel from a common carrier, the common carrier must give you a certification of the automotive fuel rating.

Recordkeeping

For one year, you must keep any delivery tickets or letters of certification on which you based your automotive fuel rating certifications, and records of any automotive fuel rating determinations you made in accordance with section 306.5 of the Rule. These records must be available for inspection by FTC staff or other authorized persons.

Retailers of Automotive Fuel

If you are a retailer of automotive fuel, you must post the automotive fuel rating of all automotive fuel you sell to consumers.

Rating Posting

You must post at least one label on the face of each dispenser through which you sell automotive fuel. If you sell two or more kinds of automotive fuel with different automotive fuel ratings from a single dispenser, you must put separate labels for each kind of fuel on each face of the dispenser. You **do not** need to post a label for **ethanol flex fuels** containing no more than 15% ethanol if you have labeled the dispenser in accordance with the EPA's E15 labeling requirements at 40 CFR 80.1501.

The label must appear on the face of the dispenser as near as possible to the price per unit of the automotive fuel. The label must be in full view of consumers. You also must maintain and replace labels as needed to make sure that consumers can easily see and read them. If labels are defaced or are unusable, you may post a temporary label.

If you don't blend gasoline with other gasoline, or if you do not blend alternative liquid automotive fuels, you must post the automotive fuel rating certified to you or determine the rating according to the methods in section 306.5 of the Rule. If you blend, section 306.10 of the Rule explains how to determine the automotive fuel ratings that you post for the blends.

When you receive automotive fuel from a common carrier, the common carrier must give you a certification of the automotive fuel rating.

Recordkeeping

For one year, you must keep any delivery tickets or letters of certification on which you based your posting of automotive fuel ratings, and records of any automotive fuel rating determinations you made in accordance with section 306.5 of the Rule. The records may be kept at the retail station or at reasonably-close location. These records must be available for inspection by FTC staff or other authorized persons.

Labels

The standard gasoline and alternative liquid automotive fuel labels are 3 inches wide by 2 1/2 inches long. The size, typestyle, and dimensions of the labels are specified in section 306.12 of the Rule. All labels must be able to withstand extreme weather conditions for at least one year. They must be resistant to automotive fuel, oil, grease, solvents, detergents, and water. Labels should look like these examples, except the black print should be on the appropriately colored background.

Gasoline

Gasoline labels must be printed in black on a yellow background, and disclose the minimum octane rating.

Ethanol Flex Fuels

Labels for ethanol flex fuel must be printed in black on an orange background. For ethanol flex fuels of 50% or less ethanol, the labels must disclose the exact percentage volume of ethanol, for example, "24% Ethanol," **or** the percentage volume rounded to the nearest ten, for example, "30% Ethanol." For ethanol flex fuels above 50%, but no more than 83% ethanol, the labels may contain the exact percentage volume, the percentage rounded to the nearest ten, or the text "51%-83% Ethanol." Therefore, the Rule does not permit labeling a fuel as "E85." In addition, all ethanol flex fuel labels must contain the text "Use Only in Flex-Fuel Vehicles/May Harm Other Engines."

Biodiesel, Biomass-Based Diesel, and Their Blends

Labels for biodiesel and biomass-based diesel and their blends must be printed in black on a light blue background.

For biodiesel blends above 5%, but no more than 20%, the label must disclose the percentage volume of biodiesel followed by the term "Biodiesel Blend," for example, "B-20 Biodiesel Blend," **or** simply state "Biodiesel Blend." Either way, the label also must state "contains biomass-based diesel or biodiesel in quantities between 5 and 20%."

For biodiesel blends above 20%, the label must disclose the percentage volume of biodiesel followed by the term "Biodiesel Blend," for example, "B-70 Biodiesel Blend." The label also must state "contains more than 20% biomass-based diesel or biodiesel."

For 100% Biodiesel, the label must state "B-100 Biodiesel" or "contains 100% biodiesel."

For biomass-based diesel blends above 5% but no greater than 20%, the label must disclose the volume percentage of the biomass-based diesel followed by the term "Biomass-Based Diesel Blend," for example, "20% Biomass-Based Diesel Blend," **or** simply state "Biomass-Based Diesel Blend." Either way, the label must also state "contains biomass-based diesel or biodiesel in quantities between 5 and 20%."

For biomass-based diesel blends above 20%, the label must state the percentage volume of biomass-based diesel followed by the term "Biomass-Based Blend," for example, "70% Biomass-Based Diesel Blend." The label also must state "contains more than 20% biomass-based diesel or biodiesel."

For 100% Biomass-Based Diesel Blends, the label must state "100% Biomass-Based Diesel" **and** "Contains 100% biomass-based diesel."

Other Alternative Liquid Automotive Fuels

Other alternative liquid automotive fuel labels must be printed in black on an orange background. The labels must disclose the commonly-used name of the fuel and the minimum percentage volume of the principal component of the fuel.

If you are covered by the Fuel Rating Rule and want to change the dimensions of the label to accommodate a longer fuel descriptor or additional fuel components, you must file a petition with the FTC for an exemption from the Rule. You also must state the size and contents of the label you wish to use, and the reasons you want to use it.

Preemption

Section 306.4 of the Rule contains the preemption language found in the Petroleum Marketing Practices Act (PMPA). This section preempts any provision of any local or state regulation that is not the same as an applicable provision of the Rule. However, states or their political subdivisions are authorized to use whatever investigative and enforcement action they deem necessary to enforce state laws that require the certification and posting of automotive fuel ratings.

Commonly Asked Questions

The following questions and answers may help you comply with the Fuel Rating Rule.

Q. According to the Rule, automotive fuel means a liquid fuel distributed for use in any motor vehicle. For purposes of the Rule, what is a "motor vehicle?"

A. As defined by the Petroleum Marketing Practices Act, "motor vehicle" means any self-propelled four-wheeled vehicle of less than 6,000 pounds gross vehicle weight, which is designed primarily for use on public streets, roads and highways.

Q. According to the Rule, the term "automotive fuel" includes liquefied natural gas. Is compressed natural gas (CNG) also covered by the Rule?

A. No. The Rule applies only to liquid automotive fuels and does not cover CNG. The term "automotive fuel" includes, but is not limited to, the liquid fuels listed in section 306.0(i) of the Rule.

Q. Some of the new alternative liquid automotive fuels covered by the Rule, like the liquefied petroleum gases propane and butane, often are not sold for automotive use. Are these sales covered by the Rule?

A. No. Only automotive fuels transferred for use as fuels in motor vehicles are covered by the Rule.

Q. Is the FTC requiring a minimum or a maximum automotive fuel rating level for automotive fuels?

A. No. The FTC's Rule is designed to require that adequate disclosures are made to consumers to enable them to make the best fuel selections for their cars. Of course, you also are responsible for compliance with all other applicable laws and rules.

Q. Can automotive fuel rating certification be accomplished with documents that only identify fuels by code numbers or fuel names and do not include the fuel's rating?

A. No. To comply with the Rule's fuel rating certification requirement, delivery tickets or certification letters that accompany transfers of fuel must include, among other things, the fuel's automotive fuel rating. Descriptive names, like regular or premium, or code numbers are not sufficient.

Q. If I sell fuel to customers who use it only for their own fleets, and not for resale to the general public, do I have to certify the fuel's rating to those customers?

A. No. The Rule requires certification of the automotive fuel rating to anyone other than a consumer of the fuel. Customers who buy fuel for their own fleets are consumers of the fuel under the Rule's definitions.

Q. Do common carriers have to comply with the Rule's certification requirements?

A. No. Common carriers do not fall within the scope of the Rule. The Rule, however, requires covered industry members to give certification documents to, and receive certification documents from, common carriers in the chain of distribution. Accordingly, the FTC believes that common carriers will voluntarily pass on the certifications they receive as they play their part in the chain of automotive fuel distribution.

Q. How long do I have to keep automotive fuel rating certification records?

A. Refiners, producers, importers, distributors and retailers of automotive fuel must keep records of delivery tickets, certification letters, or tests upon which they based the automotive fuel rating that they certified or posted for one year, These records must be available for inspection by FTC staff or other authorized persons.

Q. Where can I report Rule violations or any allegedly fraudulent activity regarding the sale of automotive fuel?

A. If you suspect non-compliance, contact your state or local weights and measures office. In addition, please file a report online at ftc.gov/complaint. FTC attorneys and investigators – and hundreds of other law enforcement agencies – use complaints to bring cases against companies and people that violate the law. For more information, contact the FTC's Division of Enforcement, Bureau of Consumer Protection at 202-326-2996.

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.

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FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Businessperson's Guide to Federal Warranty Law

TAGS: Advertising and Marketing | Advertising and Marketing Basics | Appliances | Automobiles

Do your product warranties comply with law? This guide explains the Magnuson-Moss Warranty Act, the federal law governing warranties on consumer products.

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Introduction

This manual is intended as a businessperson's guide to the basic features of the Magnuson-Moss Warranty Act, the federal law governing warranties on consumer products. The text provides citations to specific sections of the law—the Warranty Act itself, the Rules the Federal Trade Commission (FTC) adopted under the Act, and the FTC's Warranty Advertising Guides. For reference purposes, a supplement to this manual containing the Act, the Rules, and the Guides is available from the FTC's Consumer Response Center. See Additional Sources of Information.

This manual also addresses some basic points of state law that you need to know to understand the requirements and prohibitions of the Magnuson-Moss Act. However, because state law varies, you may need to contact a private attorney or the offices of the attorneys general in the states where you do business to get specific state law information. The manual is intended as a tool for you to use in consultation with your attorney, not as a substitute for your attorney's advice.

The names of the companies in the examples in this manual are fictitious; any resemblance between them and the names of actual companies is completely coincidental.

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Understanding Warranties

Your warranty is a contract that commits you to stand behind your product.

Generally, a warranty is your promise, as a manufacturer or seller, to stand behind your product. It is a statement about the integrity of your product and about your commitment to correct problems when your product fails.

The law recognizes two basic kinds of warranties—implied warranties and express warranties.

Implied Warranties

Section 2-314 of the Uniform Commercial Code, which is law in every state but Louisiana, covers the implied warranty of merchantability.

Implied warranties are unspoken, unwritten promises, created by state law, that go from you, as a seller or merchant, to your customers. Implied warranties are based upon the common law principle of "fair value for money spent," There are two types of implied warranties that occur in consumer product transactions. They are the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

Basically, your product is "merchantable" if it does what it is supposed to do.

The implied warranty of merchantability is a merchant's basic promise that the goods sold will do what they are supposed to do and that there is nothing significantly wrong with them. In other words, it is an implied promise that the goods are fit to be sold. The law says that merchants make this promise automatically every time they sell a product they are in business to sell. For example, if you, as an appliance retailer, sell an oven, you are promising that the oven is in proper condition for sale because it will do what ovens are supposed to do—bake food at controlled temperatures selected by the buyer. If the oven does not heat, or if it heats without proper temperature control, then the oven is not fit for sale as an oven, and your implied warranty of merchantability would be breached. In such a case, the law requires you to provide a remedy so that the buyer gets a working oven.

Section 2-315 of the Uniform Commercial Code covers the implied warranty of fitness for a particular purpose.

The **implied warranty of fitness for a particular purpose** is a promise that the law says you, as a seller, make when your customer relies on your advice that a product can be used for some specific purpose. For example, suppose you are an appliance retailer and a customer asks for a clothes washer that can handle 15 pounds of laundry at a time. If you recommend a particular model, and the customer buys that model on the strength of your recommendation, the law says that you have made a warranty of fitness for a particular purpose. If the model you recommended proves unable to handle 15-pound loads, even though it may effectively wash 10-pound loads, your warranty of fitness for a particular purpose is breached.

Implied warranties deal with the product at the time it is purchased.

Implied warranties are promises about the condition of products at the time they are sold, but they do not assure that a product will last for any specific length of time. (The normal durability of a product is, of course, one aspect of a product's merchantability or its fitness for a particular purpose.) Nor does the law say that everything that can possibly go wrong with a product falls within the scope of implied warranties. For example, implied warranties do not cover problems such as those caused by abuse, misuse, ordinary wear, failure to follow directions, or improper maintenance.

Generally, customers have four years to enforce an implied warranty claim.

Generally, there is no specified duration for implied warranties under state laws. However, the state statutes of limitations for breach of either an express or an implied warranty are generally four years from date of purchase. This means that buyers have four years in which to discover and seek a remedy for problems that were present in the product at the time it was sold. It does not mean that the product must last for four years. It means only that the product must be of normal durability, considering its nature and price.

Merchants of used goods also give implied warranties.

A special note is in order regarding implied warranties on *used* merchandise. An implied warranty of merchantability on a *used product is* a promise that it can be used as expected, given its type and price range. As with new merchandise, implied warranties on used merchandise apply only when the seller is a merchant who deals in such goods, not when a sale is made by a private individual.

You can sell without implied warranties—"as is"—in most states.

If you do not offer a written warranty, the law in most states allows you to disclaim implied warranties. However, selling without implied warranties may well indicate to potential customers that the product is risky—low quality, damaged, or discontinued—and therefore, should be available at a lower price.

To sell "as is" you must clearly and conspicuously disclaim implied warranties, generally in writing.

In order to disclaim implied warranties, you must inform consumers in a conspicuous manner, and generally in writing, that you will not be responsible if the product malfunctions or is defective. It must be clear to consumers that the entire product risk falls on them. You must specifically indicate that you do not warrant "merchantability," or you must use a phrase such as "with all faults," or "as is." A few states have special laws on how you must phrase an "as is" disclosure. (For specific information on how your state treats "as is" disclosures, consult your attorney.)

You cannot sell "as is" in some states.

You cannot avoid implied warranties if you offer a written warranty on a consumer product.	Some states do not allow you to sell consumer products "as is." At this time, these states are Alabama, Arizona, Connecticut, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Hampshire, Vermont, Washington, West Virginia, and the District of Columbia. In those states, sellers have implied warranty obligations that cannot be avoided. Federal law prohibits you from disclaiming implied warranties on any consumer product if you offer a written warranty for that product (see What the Magnuson-Moss Act Requires) or sell a service contract on it (see Offering Service Contracts).
You cannot avoid responsibility for personal injury caused by a defect in your product, even if you sell "as is."	You should be aware that even if you sell a product "as is" and it proves to be defective or dangerous and causes personal injury to someone, you still may be liable under the principles of product liability. Selling the product "as is" does not eliminate this liability. **Express Warranties** Express warranties, unlike implied warranties, are not "read into" your sales contracts by state law; rather, you explicitly offer these warranties to your customers in the course of a sales transaction. They are promises and statements that you voluntarily make about your product or about your commitment to remedy the defects and malfunctions that some customers may experience.
Section 2-313 of the Uniform Commercial Code covers express warranties.	Express warranties can take a variety of forms, ranging from advertising claims to formal certificates. An express warranty can be made either orally or in writing. While oral warranties are important, only written warranties on consumer products are covered by the Magnuson-Moss Warranty Act.

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Understanding the Magnuson-Moss Warranty Act

The Act improves consumers' access to warranty information.	The Magnuson-Moss Warranty Act is the federal law that governs consumer product warranties. Passed by Congress in 1975, the Act requires manufacturers and sellers of consumer products to provide consumers with detailed information about warranty coverage. In addition, it affects both the rights of consumers and the obligations of warrantors under written warranties.
The Act enables consumers to comparison shop for warranties.	To understand the Act, it is useful to be aware of Congress' intentions in passing it. First, Congress wanted to ensure that consumers could get complete information about warranty terms and conditions. By providing consumers with a way of learning what warranty coverage is offered on a product before they buy, the Act gives consumers a way to know what to expect if something goes wrong, and thus helps to increase customer satisfaction.
The Act encourages warranty competition.	Second, Congress wanted to ensure that consumers could compare warranty coverage before buying. By comparing, consumers can choose a product with the best combination of price, features, and warranty coverage to meet their individual needs.
The Act promotes timely and complete performance of warranty obligations.	Third, Congress intended to promote competition on the basis of warranty coverage. By assuring that consumers can get warranty information, the Act encourages sales promotion on the basis of warranty coverage and competition among companies to meet consumer preferences through various levels of warranty coverage.

Finally, Congress wanted to strengthen existing incentives for companies to perform their warranty obligations in a timely and thorough manner and to resolve any disputes with a minimum of delay and expense to consumers. Thus, the Act makes it easier for consumers to pursue a remedy for breach of warranty in the courts, but it also creates a framework for companies to set up procedures for resolving disputes inexpensively and informally, without litigation.

The Act does not compel you to give a written warranty.

What the Magnuson-Moss Act Does Not Require

In order to understand how the Act affects you as a businessperson, it is important first to understand what the Act does not require.

First, the Act does not require any business to provide a written warranty. The Act allows businesses to determine whether to warrant their products in writing. However, once a business decides to offer a written warranty on a consumer product, it must comply with the Act.

Second, the Act does not apply to oral warranties. Only written warranties are covered.

Third, the Act does not apply to warranties on services. Only warranties on goods are covered. However, if your warranty covers both the parts provided for a repair and the workmanship in making that repair, the Act does apply to you.

Finally, the Act does not apply to warranties on products sold for resale or for commercial purposes. The Act covers only warranties on consumer products. This means that only warranties on tangible property normally used for personal, family, or household purposes are covered. (This includes property attached to or installed on real property.) Note that applicability of the Act to a particular product does *not,* however, depend upon how an individual buyer will use it.

There are three FTC Rules under the Act.

The following section of this manual summarizes what the Magnuson-Moss Warranty Act requires warrantors to do, what it prohibits them from doing, and how it affects warranty disputes.

What the Magnuson-Moss Act Requires

Section 102 of the Act directs how to title your warranty.

The Disclosure Rule {16 C.F.R. Part 701} directs what you must include in your warranty.

The Pre-Sale Availability Rule {16 C.F. R. Part 702} directs how to make your warranty available before sale.

In passing the Magnuson-Moss Warranty Act, Congress specified a number of requirements that warrantors must meet. Congress also directed the FTC to adopt rules to cover other requirements. The FTC adopted three Rules under the Act, the *Rule on Disclosure of Written Consumer Product Warranty Terms and Conditions* (the Disclosure Rule), the *Rule on Pre-Sale Availability of Written Warranty Terms* (the Pre-Sale Availability Rule), and the *Rule on Informal Dispute Settlement Procedures* (the Dispute Resolution Rule). In addition, the FTC has issued an interpretive rule that clarifies certain terms and explains some of the provisions of the Act. This section summarizes all the requirements under the Act and the Rules.

The Act and the Rules establish three basic requirements that may apply to you, either as a warrantor or a seller.

1. As a warrantor, you must designate, or title, your written warranty as either "full" or "limited."
2. As a warrantor, you must state certain specified information about the coverage of your warranty in a single, clear, and easy-to-read document.
3. As a warrantor or a seller, you must ensure that warranties are available where your warranted consumer products are sold so that consumers can read them before buying.

If you give a written warranty on a consumer product, Section 108 of the Act prevents you from eliminating or restricting implied warranties.

The titling requirement, established by the Act, applies to all written warranties on consumer products costing more than $10. However, the disclosure and pre-sale availability requirements, established by FTC Rules, apply to all written warranties on consumer products costing more than $15. Each of these three general requirements is explained in greater detail in the following chapters.

What the Magnuson-Moss Act Does Not Allow

There are three prohibitions under the Magnuson-Moss Act. They involve implied warranties, so-called "tie-in sales" provisions, and deceptive or misleading warranty terms.

Disclaimer or Modification of Implied Warranties

The Act prohibits anyone who offers a written warranty from disclaiming or modifying implied warranties. This means that no matter how broad or narrow your written warranty is, your customers always will receive the basic protection of the implied warranty of merchantability. This is explained in Understanding Warranties.

With some exceptions, Section 102 (c) of the Act prohibits you from including a tie-in sales provision in your warranty.

There is one permissible modification of implied warranties, however. If you offer a "limited" written warranty, the law allows you to include a provision that restricts the duration of implied warranties to the duration of your limited warranty. For example, if you offer a two-year limited warranty, you can limit implied warranties to two years. However, if you offer a "full" written warranty, you cannot limit the duration of implied warranties. This matter is explained in Titling Written Warranties as "Full" or "Limited".

These are examples of prohibited tie-in sales provisions.

If you sell a consumer product with a written warranty from the product manufacturer, but you do not warrant the product in writing, you can disclaim your implied warranties. (These are the implied warranties under which the seller, not the manufacturer, would otherwise be responsible.) But, regardless of whether you warrant the products you sell, as a seller, you must give your customers copies of any written warranties from product manufacturers.

"Tie-In Sales" Provisions

Generally, tie-in sales provisions aren't allowed. That's a provision that requires a consumer to buy an item or service from a particular company to keep their warranty coverage. Here is an example of prohibited tie-in sales provisions.

This is an example of a permissible warranty provision to use instead of a tie-in.

> To keep your new Plenum Brand Vacuum Cleaner warranty in effect, you must use genuine Plenum Brand Filter Bags. Failure to have scheduled maintenance performed, at your expense, by the Great American Maintenance Company, Inc., voids this warranty.

However, a warrantor can require a consumer to use select items or service if they're provided free of charge under the warranty.

Your warranty can disclaim warranty coverage only for defects or damage caused by the use of parts or service you didn't provide. Here is an example of a permissible provision in that circumstance:

Section 110(c) (2) of the Act prohibits deceptive warranties.

> Necessary maintenance or repairs on your AudioMundo Stereo System can be performed by any company. Improper or incorrectly performed maintenance or repair that causes damage to your product may void this warranty.

One exception to the general ban on tie-in provisions is that a warrantor may include a tie-in provision if it has received a waiver from the FTC. To get a waiver, you must prove to the FTC's satisfaction that your product won't work properly without a specified item or service. Contact the warranty staff of the FTC's Bureau of Consumer Protection for information on how to apply for a waiver.

Section 110(d) of the Act makes breach of warranty a violation of federal law, and enables consumers to recover attorneys' fees.

Deceptive Warranty Terms

Obviously, warranties must not contain deceptive or misleading terms. You cannot offer a warranty that appears to provide coverage but, in fact, provides none. For example, a warranty covering only "moving parts" on an electronic product that has no moving parts would be deceptive and unlawful. Similarly, a warranty that promised service that the warrantor had no intention of providing or could not provide would be deceptive and unlawful.

How the Magnuson Moss Act May Affect Warranty Disputes

Two other features of the Magnuson-Moss Warranty Act are also important to warrantors. First, the Act makes it easier for consumers to take an unresolved warranty problem to court. Second, it encourages companies to use a less formal, and therefore less costly, alternative to legal proceedings. Such alternatives, known as dispute resolution mechanisms, often can be used to settle warranty complaints before they reach litigation.

Dispute Settlement Mechanisms use conciliation, mediation, or arbitration to resolve disputes. For more information, an FTC publication *Handling Customer Complaints, is* available from the Government Printing Office.

Consumer Lawsuits

The Act makes it easier for purchasers to sue for breach of warranty by making breach of warranty a violation of federal law, and by allowing consumers to recover court costs and reasonable attorneys' fees. This means that if you lose a lawsuit for breach of either a written or an implied warranty, you may have to pay the customer's costs for bringing the suit, including lawyer's fees.

Because of the stringent federal jurisdictional requirements under the Act, most Magnuson-Moss lawsuits are brought in state court. However, major cases involving many consumers can be brought in federal court as class action suits under the Act.

Although the consumer lawsuit provisions may have little effect on your warranty or your business, they are important to remember if you are involved in warranty disputes.

If you require your customers to use a dispute settlement mechanism before suing under the Act, your mechanism must comply with the FTC's Dispute Resolution Rule {16 C.F.R. Part 703}.

A mechanism that does not meet the standards of the Dispute Resolution Rule may still be a valuable tool for you.

Alternatives to Consumer Lawsuits

Although the Act makes consumer lawsuits for breach of warranty easier to bring, its goal is not to promote more warranty litigation. On the contrary, the Act encourages companies to use informal dispute resolution mechanisms to settle warranty disputes with their customers. Basically, an informal dispute resolution mechanism is a system that works to resolve warranty problems that are at a stalemate. Such a mechanism may be run by an impartial third party, such as the Better Business Bureau, or by company employees whose only job is to administer the informal dispute resolution system. The impartial third party uses conciliation, mediation, or arbitration to settle warranty disputes.

The Act allows warranties to include a provision that requires customers to try to resolve warranty disputes by means of the informal dispute resolution mechanism before going to court. (This provision applies only to cases based upon the Magnuson-Moss Act.) If you include such a requirement in your warranty, your dispute resolution mechanism *must* meet the requirements stated in the FTC's *Rule on Informal Dispute Settlement Procedures* (the Dispute Resolution Rule). Briefly, the Rule requires that a mechanism must:

- Be adequately funded and staffed to resolve all disputes quickly;
- Be available free of charge to consumers;

- Be able to settle disputes independently, without influence from the parties involved;
- Follow written procedures;
- Inform both parties when it receives notice of a dispute;
- Gather, investigate, and organize all information necessary to decide each dispute fairly and quickly;
- Provide each party an opportunity to present its side, to submit supporting materials, and to rebut points made by the other party; (the mechanism may allow oral presentations, but only if both parties agree);
- Inform both parties of the decision and the reasons supporting it within 40 days of receiving notice of a dispute;
- Issue decisions that are not binding; either party must be free to take the dispute to court if dissatisfied with the decision (however, companies may, and often do, agree to be bound by the decision);
- Keep complete records on all disputes; and
- Be audited annually for compliance with the Rule.

It is clear from these standards that informal dispute resolution mechanisms under the Dispute Resolution Rule are not "informal" in the sense of being unstructured. Rather, they are informal because they do not involve the technical rules of evidence, procedure, and precedents that a court of law must use.

Currently, the FTC's staff is evaluating the Dispute Resolution Rule to determine if informal dispute resolution mechanisms can be made simpler and easier to use. To obtain more information about this review, contact the FTC's warranty staff.

As stated previously, you do not have to comply with the Dispute Resolution Rule if you do not require consumers to use a mechanism before bringing suit under the Magnuson-Moss Act. You may want to consider establishing a mechanism that will make settling warranty disputes easier, even though it may not meet the standards of the Dispute Resolution Rule.

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REQUIREMENT I: SECTION 102 OF THE MAGNUSON-MOSS ACT.

Written warranties must be titled "full" or "limited" As explained on p. 5, this requirement applies to warranties on products costing more than $10.

Titling Written Warranties as "Full" or "Limited"

The Magnuson-Moss Warranty Act requires that every written warranty on a consumer product that costs more than $10 have a title that says the warranty is either "full" or "limited" (The Act calls these titles "designations.") The title is intended to provide consumers, at a glance, with a key to some of the important terms and conditions of a warranty.

The title "full warranty" is a shorthand message to consumers that the coverage meets the Act's standards for comprehensive warranty coverage. Similarly, the title "limited warranty" alerts consumers that the coverage does not meet at least one of the Act's standards, and that the coverage is less than "full" under the Act.

What the Terms "Full" and "Limited" Mean

"Full Warranty" means the coverage meets the federal minimum standards for comprehensive warranties, while "Limited Warranty" means the coverage does not.

Determining whether your warranty is a "full" or a "limited" warranty is not difficult. If each of the following five statements is true about your warranty's terms and conditions, it is a "full" warranty:

1. You do not limit the duration of implied warranties.
2. You provide warranty service to anyone who owns the product during the warranty period; that is, you do not limit coverage to first purchasers.
3. You provide warranty service free of charge, including such costs as returning the product or removing and reinstalling the product when necessary.
4. You provide, at the consumer's choice, either a replacement or a full refund if, after a reasonable number of tries, you are unable to repair the product.
5. You do not require consumers to perform any duty as a precondition for receiving service, except notifying you that service is needed, unless you can demonstrate that the duty is reasonable.

You must be able to demonstrate that any duties you impose are reasonable. Requiring customers to return a registration card is an unreasonable duty that is not allowed in a full warranty 116 C.FR. §700.ó(b)}.

If any of these statements is not true, then your warranty is "limited".

You are not required to make your entire warranty "full" or "limited" If the statements above are true about the coverage on only some parts of your product, or if the statements are true about the coverage during only one part of the warranty period, then your warranty is a multiple warranty that is part full and part limited.

Examples of Full Warranties, Limited Warranties, and Multiple Warranties

This is an example of a full warranty. It specifies that the customer has a right to a replacement or a refund if repairs are not possible. Notice that this full warranty does not cover every type of defect in the product.

Counterpoint Carpet Corp.
Full Five Year Warranty

What is Covered This warranty covers any defects in materials or workmanship, including installation, with the exceptions stated below.

How Long Coverage Lasts

This warranty runs for five years from the date your carpet is installed.

What is not covered

This warranty does not cover fading or discoloration caused by exposure to sunlight or chemicals such as ammonia, laundry detergent, or household bleach. (For information on how to prevent fading or discoloration, consult our manual "Care Tips From Counterpoint Carpet," available free from your Counterpoint dealer.)

What Counterpoint Will Do

Counterpoint will repair any carpet that proves to be defective in materials or workmanship. In the event repair is not possible, Counterpoint will either replace your carpet with new carpet of similar composition and price, or refund the full purchase price of your carpet, whichever you prefer.

How To Get Service

Contact any Counterpoint dealer, listed in the Yellow Pages under "Carpet,"or contact Counterpoint at 800-987-6543. A service representative will come to your home and take any necessary action to correct problems covered by this warranty.

How State Law Applies

This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

When you decide on your warranty's terms and conditions, consider eliminating unnecessary restrictions. Rather than adopting warranty terms just because they are common in your industry, let your experience guide you. For example, a limit on the duration of implied warranties may be the only provision that would prevent your written warranty from being "full" If your experience indicates that you do not really need this restriction, you may wish to consult your attorney and eliminate it.

Also, remember that the distinctions between a "full" and a "limited" warranty are specified by law, and that the legal meanings of the words "full" and "limited" in written consumer product warranties are far more narrow and specific than they are in ordinary usage. Avoid confusing the legal and ordinary meanings.

This is an example of a limited warranty. It is limited because there are requirements that the customer pay labor and postage charges, and that the customer return a registration card.

Magnifisound Corporation Limited Warranty

What Does This Warranty Cover? This warranty covers any defects or malfunctions in your new Magnifisound hearing aid.

How Long Does The Coverage Last? This warranty lasts as long as you own your Magnifisound aid. Coverage terminates if you sell or otherwise transfer the aid.

What Will Magnifisound Do? Magnifisound will replace any defective or malfunctioning part at no charge. You must pay any labor charges.

What Does This Warranty Not Cover? Batteries, or any problem that is caused by abuse, misuse, or an act of God (such as a flood) are not covered. Also, consequential and incidental damages are not recoverable under this warranty. Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.

How Do You Get Service? In order to be eligible for service under this warranty you **MUST** return the warranty registration card attached below within 30 days of purchasing the aid.

If something goes wrong with your aid, send it postage paid with a brief written description of the problem to:

Magnifisound Corp.
Box 10000
Auditory, Ohio

We will inspect your aid and contact you within 72 hours to give the results of our inspection and an estimate of the labor charges required to fix the aid. If you authorize repairs, we will return the repaired aid to you COD within 72 hours. You must pay any labor charges upon receipt of the repaired aid.

If you inform us that you wish us to provide necessary parts to you but you wish to have repairs performed elsewhere, we will return the aid and replacement parts to you within 72 hours.

There is no charge for inspection.

How Does State Law Apply? This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

This is a multiple warranty that is part full and part limited. The initial two-year full warranty spells out that the customer has a right to a refund or a replacement. The remainder of the warranty is limited because it covers only parts and not labor.

Full Two Year Warranty on The Black Star 2001 Clothes Washer

What is covered: Any defect in your 2001 Clothes Washer.

For How Long: Two years after the date you bought your 2001 Clothes Washer.

What Black Star Will Do: Repair, or if repair is not possible, either replace your 2001 Clothes Washer, or refund the purchase price, whichever you prefer.

Limited Warranty on Parts for the Third through Fifth Years

What is covered: Any defect in your 2001 Clothes Washer.

For How Long: From the start of the third year after you bought your 2001 Clothes Washer until the end of the fifth year.

What Black Star Will Do: Provide free new or rebuilt replacement parts, but not labor to install the parts. Any servicer you choose can do service during this period.

How to Get Service: Contact any Black Star Dealer or any Authorized Black Star Service Center. See the Yellow Pages under "Appliance Repair" for the name of a Black Star Servicer near you, or call 800-111-1111.

Your Rights Under State Law: This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

This part full and part limited multiple warranty is a pro rata warranty-- one which provides a refund or credit that decreases during the life of the product according to a formula. Notice that the formula is carefully spelled out. The warranty specifies that during the initial period of full coverage the customer has a right to a

Treadwell Tire Full Warranty During First 20% of Usable Tread Life

If a defect in materials or workmanship appears in your Treadwell Tire before 20% of the tread is worn away, Treadwell Corporation will provide, at your choice, replacement or a refund. The remainder of the warranty is limited because the customer can get only a partial credit.

either free replacement of the same model number Treadwell Tire or a complete refund of the original purchase price.

Limited Warranty During Remaining 80% of Usable Tread Life

If a defect in, materials or workmanship appears in your Treadwell Tire after 20% of the tread is worn away and before the remainder of the tread is worn away, Treadwell Corporation will provide you with a credit good for the purchase of any Treadwell Tire of the same model number. The credit will drop by 10% of the original purchase price for each additional 10% of the tread that is worn away when the defect appears.

How to Get Service
Just bring the defective tire to any Treadwell Dealer. The address of the dealer near you is listed on the other side of this document

How State Law Relates to this Warranty
This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

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REQUIREMENT II: THE DISCLOSURE RULE {16 C.ER. PART 701}·

Written warranties must include specified information. As explained on p. 5, this requirement applies to warranties on products costing more than $15.

Stating Terms and Conditions of Your Written Warranty

The FTC's *Rule on Disclosure of Written Consumer Product warranty Terms and Conditions* (the Disclosure Rule) requires a written warranty on a consumer product that costs more than $15 to be clear, easy to read, and contain certain specified items of information about its coverage.

To help you comply with the law and to make your warranty clear and easy to read, you may wish to refer to *Writing Readable Warranties*, an FTC manual that is available from the Government Printing Office.

The information you must disclose in your warranty is explained in the remainder of this chapter. This information includes basic information about aspects of warranty coverage common to all written warranties, and specific information that is required only when your warranty contains certain optional terms and conditions.

The five basic questions about warranty coverage can be used as headings for organizing your warranty.

Say what your warranty covers.

Basic Information Required for All Warranties

Under the FTC's Disclosure Rule, there are five basic aspects of coverage that your warranty must describe. It is useful to think of these as five questions which your warranty must answer:

1. What does the warranty cover/not cover? Answering this question is quite simple when the warranty covers every type of malfunction or defect that may appear in all parts of the product. However, if not all parts or not all types of defects are covered, as

State how long your warranty lasts.

in the "Counterpoint Carpet" example on page 11 you should clearly describe the scope of coverage.

2. What is the period of coverage? If coverage begins at some point in time other than the purchase date, your warranty must state the time or event that begins the coverage. In the "Counterpoint Carpet" example on page 11, warranty coverage begins when the product is installed, which may be different from when the product is purchased.

Also, you must make it clear when coverage ends if some particular event would terminate it. In the limited warranty example on page 12, coverage lasts until the first purchaser transfers the product to someone else.

Tell what you will or will not do.

3. What will you do to correct problems? This requires an explanation of the remedy you offer under the warranty. This could be repair or replacement of the product, a refund of the purchase price, or a credit toward subsequent purchases.

If necessary for clarity, you must also explain what you will not do. This requires a description of the types of expenses, if any, that you will not cover. These might include, for example, labor charges, consequential damages (the costs of repairing or replacing other property that is damaged when the warranted product fails, such as food spoilage when a refrigerator breaks down), or incidental damages (the costs a consumer incurs in order to obtain warranty service, such as towing charges, telephone charges, time lost from work, transportation costs, and the cost of renting a product tempo~arily to replace the warranted product).

Give a step-by-step guide to getting service.

4. How can the customer get warranty service? Your warranty must tell customers who they can go to for warranty service and how to reach those persons or companies. This means that the warranty needs to include the name and address of your company, and any person or office customers should contact. If they can call you locally or toll-free, you can give the telephone number instead of the address. If you want customers to contact your local or regional service centers first, explain how this should be done. See the examples on pages 11-13 and 18.

Use the FTC "boilerplate" disclosure about state law rights in your warranty.

5. How will state law affect your customer's rights under the warranty? Your warranty must answer this question because implied warranty rights and certain other warranty rights vary from state to state. Rather than require a detailed explanation about this on a state-bystate basis, the FfC adopted the following "boilerplate" disclosure to address this issue. It must be included in every consumer product warranty:

> This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

This disclosure about state law must be included in every written warranty on a consumer product.

Specific Information Required When Your Warranty Contains Certain Optional Terms and Conditions

Generally, if you wish to impose on your customers any obligations other than notifying you that they need service, you must state these obligations in your warranty. Also, if you wish to establish any other conditions, limitations, or terms that you intend to enforce, you must state them in your warranty; you cannot have "hidden" requirements. An example of such a condition or limitation would be a provision voiding the warranty if the serial number on the product is defaced.

If you wish to impose other conditions or limitations that are not covered by the five basic questions about coverage, you must state these conditions or limitations in

There are also a number of other disclosures you must make in your warranty if it contains certain optional terms and conditions. These requirements are explained in the your warranty.

following paragraphs.

If your warranty contains a provision that restricts the duration of implied warranties, the Disclosure Rule requires you to include a statement that state law may override such restrictions. This is required because some states prohibit any restrictions on implied warranties. The requirement applies only to limited warranties, because only in limited warranties can you restrict the duration of implied warranties. This is discussed on page 10. To tell consumers that state law may not permit such a restriction, the Disclosure Rule requires you to use the following language:

> Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.

Your limited warranty must include this standard disclosure if it limits the duration of implied warranties.

If your warranty contains a provision intended to restrict or eliminate your potential liability for consequential or incidental damages, explained on page 15, you must include a statement that state law may not allow such a provision. To inform consumers that state law may not permit such a restriction, the Disclosure Rule requires that you use the following sentence:

> Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.

Your warranty must include this standard disclosure if it excludes or limits consequential or incidental damages.

If your warranty contains a provision that restricts who has rights under the warranty, you must include a statement explaining specifically who is covered. For example, if your limited warranty is valid only for the first purchaser, your warranty must state that. Note that this applies only to limited warranties. A full warranty must cover anyone who owns the product during the period of coverage, as discussed on page 10.

You must disclose any restrictions on who is eligible for coverage under a limited warranty.

If your warranty contains a provision that requires your customers to use a dispute resolution mechanism before suing under the federal Magnuson-Moss Warranty Act for breach of warranty, you must include:

- a statement informing consumers that they can sue under state law without first using the mechanism, but that before suing under the Magnuson-Moss Act, they must first try to resolve the dispute through the mechanism; and
- information and materials about the dispute mechanism, including the name and address or a toll-free telephone number, or a form for filing a claim.

Of course, if you include a dispute resolution requirement in your warranty, the informal dispute resolution mechanism must comply with the FTC's Dispute Resolution Rule. This is discussed on page 8.

You must discloseinformation about any informal dispute resolution mechanism that you require customers to use.

The example below shows how to make the required disclosures about an informal dispute resolution mechanism that you require customers to use before taking a dispute to court.

Bauhaus Mobile Homes, Inc. Limited Warranty

What This Warranty Covers

This warranty covers substantial defects in materials and workmanship in your new Bauhaus Mobile Home, including the heating, air conditioning, plumbing, and electrical systems, and all original appliances installed in your Bauhaus Mobile Home.

This warranty includes all the necessary disclosures about an informal dispute resolution mechanism that you require your customers to use before taking a dispute to court.

What This Warranty Does Not Cover This warranty does not cover any problems which result from improper transportation or set-up of the home, abuse, accidents, or acts of God, such as hurricane or floods.

How Long The Warranty Lasts
The coverage of this warranty lasts for two years after the date of installation of your new Bauhaus Mobile Home.

How To Get Service
If something goes wrong, contact the Bauhaus dealer from whom you purchased your home. Arrange a mutually convenient time for the dealer's service representative to come to your home and, if possible, correct the problem. In most cases, your dealer will be able to correct the problem, but if he is not able to do so, you should contact Bauhaus directly in writing at the following address:

Bauhaus Mobile Homes, Inc.
Customer Relations Dept.
10101 Factory Blvd.
Manufacturing City, CA.

Bauhaus will send a representative to your home to inspect the problem and to correct it if possible. All service under this warranty will be performed at your home site.

What To Do If You Are Not Satisfied With Service
We believe you will be fully satisfied by the service you receive from your Bauhaus dealer and from Bauhaus. However, because our aim is your complete and lasting satisfaction, Bauhaus adds another feature to your warranty's protection. In the unlikely event that you feel our response to a warranty service request is not satisfactory, Bauhaus offers you an opportunity to air your complaint to an impartial dispute-handling organization. The paragraph below explains how this works.

If you believe your dealer and Bauhaus have not performed as stated in this warranty, you may submit a request for further consideration to the National Reconciliation Board of Home Owners and Producers ("NRBHOP"). You should make any such request by mailing the attached "Request for Dispute Resolution" form to NRBHOP, or by sending a letter specifically demanding such dispute resolution and identifying yourself, Bauhaus, the defect, and-the remedy you seek to this address :

NRBHOP
Box 8613
Redress, OK

Upon receiving your "Request for Dispute Resolution," NRBHOP will notify Bauhaus and ask for a response to your complaint. If Bauhaus disagrees with your complaint, NRBHOP will arrange for informal dispute settlement between you and Bauhaus. See the section of your Owners Manual entitled "The NRBHOP Program" for more detailed information about how the informal dispute settlement process works.

You may not file suit against Bauhaus under the Magnuson-Moss Warranty Act until your claim has been submitted to NRBHOP for informal dispute settlement and a decision has been reached, or you have waited 40 days for a decision following your submission of a Request for Dispute Resolution, whichever comes first. However, you may be entitled to file suit under state laws without waiting.

How State Law Applies
This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

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REQUIREMENT III: THE PRE-SALE AVAILABILITY RULE {16 C.F.R. PART 702}.

Written warranties must be available for customers to read before buying. As explained on page 5, this requirement applies to warranties on products costing more than $15.

You can display warranties any way you choose, or post signs and have the warranties ready to give customers when they ask to see them.

Mail Order and Door-to-Door companies have different modes of compliance from in-store retailers.

Manufacturers must provide warranty materials to their retailers.

Making Warranties Available Prior to Sale

The FTC's Rule on Pre-Sale Availability of Written Warranty Terms requires that written warranties on consumer products costing more than $15 be available to consumers before they buy. The Rule has provisions that specify what retailers, including mail order, catalog, and door-to-door sellers, must do to accomplish this. The Rule also specifies what manufacturers must do so that sellers can meet their obligations under the Rule. These provisions are explained in this section.

What Retailers Must Do

If you sell directly to consumers who come to your place of business to buy, you must make written warranties available at the point of sale. You must do this with all written warranties on the products you sell warranties from manufacturers, as well as any written warranties you extend.

The Pre-Sale Availability Rule requires that sellers make warranties readily available to prospective buyers either by displaying them in close proximity to the warranted products, or by furnishing them upon request prior to sale *and* posting prominent signs to let customers know that warranties can be examined upon request. The Rule does not specify any particular method for fulfilling its requirements. For example, an appliance retailer might post a refrigerator warranty on the front of the appliance, or in the freezer compartment. Or, a retailer of small products, such as watches or electric razors, might keep the warranties readily available behind the counter, or keep them indexed in a binder near the warranted products, and post signs stating their availability. Any of these methods is acceptable.

What Mail Order Companies Must Do

If you accept orders for warranted consumer products through the mail or by telephone, your catalog or other advertising must include either the warranty or a statement telling consumers how to get a copy. This information should be near the product description or clearly noted on a separate page. If you choose the latter, you must provide a page reference to the warranty statement near the product description.

What Door-to Door Sales

Companies Must Do If you sell warranted products to consumers in their homes, or in some place other than your place of business, you must offer the customer copies of the written warranties before the sale is completed.

What Manufacturers Must Do

If you are a manufacturer and offer written warranties, you must provide retailers of your product with the warranty materials they will need to meet their requirements as described above. There are any number of ways to do this, including: providing copies of the warranty to be placed in a binder; providing warranty stickers, tags, signs, or posters; or printing the warranty on your product's packaging. As long as you have provided retailers with the warranty materials they need to comply with the rule, you are not legally responsible if they fail to make your warranties available.

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Advertising Warranties

Deceptive warranty advertising is unlawful.

The Magnuson-Moss Warranty Act does not cover the advertising of warranties. However, warranty advertising falls within the scope of the FTC Act, which generally prohibits "unfair or deceptive acts or practices in or affecting commerce." Therefore, it is a violation of the FTC Act to advertise a warranty deceptively.

The FTC's Guides for the Advertising of Warranties and Guarantees {16 C.FR. Part 239} can advise you on how to advertise your warranty.

To help companies understand what the law requires, the FTC has issued guidelines called the Guides for Advertising Warranties and Guarantees. To obtain a copy, see Additional Sources of Information. However, the Guides do not cover every aspect of warranty advertising, and cannot substitute for consultation with your lawyer on warranty advertising matters.

The Guides cover three principal topics: how to advertise a warranty that is covered by the Pre-Sale Availability Rule; how to advertise a satisfaction guarantee; and how to advertise a lifetime guarantee or warranty.

How to Advertise Warranties Covered by the Pre-Sale Availability Rule

Advertisements for products covered by the Pre-Sale Availability Rule need only state that the warranty can be seen where the product is sold. {16 C.F.R. 239.2}.

In general, the Guides advise that if a print or broadcast ad for a consumer product mentions a warranty, and the advertised product is covered by the Pre Sale Availability Rule (that is, the product is sold in stores for more than $15) the ad should inform consumers that a copy of the warranty is available to read prior to sale at the place where the product is sold. Print or broadcast advertisements that mention a warranty on any consumer product that can be purchased through the mail or by telephone should inform consumers how to get a copy of the warranty.

For advertisements of consumer products costing $15 or less, the Guides do not call for the pre-sale availability disclosure. Instead, the Guides advise that the FTC's legal decisions and policy statements are the sole sources of guidance on how to avoid unfairness or deception in advertising warranties. Consult your attorney for assistance in researching and applying the FTC's case decisions and policy statements.

How to Advertise a Satisfaction Guarantee

The Guides advise that, regardless of the price of the product, advertising terms such as "satisfaction guaranteed" or "money back guarantee" should be used only if the advertiser is willing to provide full refunds to customers when, for any reason, they return the merchandise.

"Satisfaction" and "Money back" guarantees constitute an offer of a full refund for any reason.{16 C.F.R. §239.3}.

The Guides further advise that an ad mentioning a satisfaction guarantee or similar offer should inform consumers of any material conditions or limitations on the offer. For example, a restriction on the offer to a specific time period, such as 30 days, is a material condition that should be disclosed.

How to Advertise a Lifetime Warranty or Guarantee

Clarify what you are talking about when you advertise a "lifetime" warranty. {16 C.F.R. §239.4}.

"Lifetime" warranties or guarantees can be a source of confusion for consumers. This is because it is often difficult to tell just whose life measures the period of coverage. "Lifetime" can be used in at least three ways. For example, a warrantor of an auto muffler may intend his "lifetime" warranty's duration to be for the life of the car on which the muffler is installed. In this case, the muffler warranty would be transferable to subsequent owners of the car and would remain in effect throughout the car's useful life.

Or the warrantor of the muffler might intend a "lifetime" warranty to last as long as the original purchaser of the muffler owns the car on which the muffler is installed. Although commonly used, this is an inaccurate application of the term "lifetime."

Finally, "lifetime" can be used to describe a warranty that lasts as long as the original purchaser of the product lives. This is probably the least common usage of the term.

The Guides advise that to avoid confusing consumers about the duration of a "lifetime" warranty or guarantee, ads should tell consumers which "life" measures the warranty's duration In that way, consumers will know which meaning of the term "lifetime" you intend.

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Section 106 of the Act deals with service contracts.

Offering Service Contracts

Service contracts, unlike warranties, are purchased separately from a product.

A service contract is an optional agreement for product service that customers sometimes buy. It provides additional protection beyond what the warranty offers on the product. Service contracts are similar to warranties in that both concern service for a product. However, there are differences between warranties and service contracts.

Warranties come with a product and are included in the purchase price. In the language of the Act, warranties are "part of the basis of the bargain" Service contracts, on the other hand, are agreements that are separate from the contract or sale of the product. They are separate either because they are made some time after the sale of the product, or because they cost the customer a fee beyond the purchase price of the product.

The Act includes very broad provisions governing service contracts that are explained in the following sections.

Statement of Terms and Conditions

If you offer a service contract, the Act requires you to list conspicuously all terms and

Section 108 (a) of the Act prohibits you from disclaiming. warranties on a product if you sell a service contract on it.

conditions in simple and readily understood language. However, unlike warranties, service contracts are *not* required to be titled "full" or "limited,' or to contain the special standard disclosures. In fact, using warranty disclosures in service contracts could confuse customers about whether the agreement is a warranty or a service contract.

The company that makes the service contract is responsible for ensuring that the terms and conditions are disclosed as required by law. This is not the responsibility of the seller of the service contract, unless the seller and the maker are the same company.

Disclaimer or Limitation of Implied Warranties

Sellers of consumer products who make service contracts on their products are prohibited under the Act from disclaiming or limiting implied warranties. (Remember also that sellers who extend written warranties on consumer products cannot disclaim implied warranties, regardless of whether they make service contracts on their products.) However, sellers of consumer products that merely sell service contracts as agents of service contract companies *and* do not themselves extend written warranties can disclaim implied warranties on the products they sell.

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Additional Sources of Information

For a supplement to this booklet containing texts of the Magnuson-Moss Warranty Act, the related FTC Rules, and the FTC Warranty Advertising Guides, write:

Federal Trade Commission
Consumer Response Center
Washington, D.C. 20580

The FTC works to prevent fraudulent, deceptive and unfair business practices in the marketplace and to provide information to help consumers spot, stop and avoid them. To file a complaint or get free information on consumer issues, visit ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. Watch a new video, How to File a Complaint, at ftc.gov/video to learn more. The FTC enters consumer complaints into the Consumer Sentinel Network, a secure online database and investigative tool used by hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency’s responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.

"Tie-In Sales" Provisions updated May 2015

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ftc.gov