Supporting Statement for
Information Collection Provisions of
The Telemarketing Sales Rule
16 C.F.R. Part 310
(OMB Control No. 3084-0097)

(1) Necessity for Collecting the Information

The Federal Trade Commission ("FTC" or "Commission") promulgated the Telemarketing Sales Rule ("TSR" or "Rule") in 1995. The Rule was issued in accordance with the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"),[1] which sought to prevent deceptive or abusive telemarketing practices by requiring the Commission to promulgate rules regarding such telemarketing practices, by enhancing the enforcement of those rules, and by increasing the consumer fraud enforcement tools available to the FTC.[2]

The Telemarketing Act required that the Commission initiate a rule review proceeding no later than five years after the Rule's effective date of December 31, 1995.[3] The Commission engaged in this rule review from November 1999 to January 2003. Moreover, in October 2001, President Bush signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"),[4] amending the Telemarketing Act in ways that significantly impacted the TSR.[5] Accordingly, based on the Commission's rule review process and the requirements of the USA PATRIOT Act, the Commission amended the TSR in January 2003, to include certain new disclosure requirements and to expand the Rule's parameters in

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[1] Public Law No. 103-297, 15 U.S.C. §§ 6101-6108.

[2] The Telemarketing Act specified that telemarketing sales rules issued by the Commission must include: (1) requirements prohibiting unsolicited telephone calls that reasonably might be considered to be coercive or abusive to the consumer's right to privacy; (2) restrictions on the hours when unsolicited telephone calls may be made; (3) requirements that the telemarketer promptly and clearly disclose the purpose of the call, as well as make any other disclosures the Commission deems appropriate, including the nature and price of the goods and services; and (4) provisions defining and prohibiting deceptive telemarketing practices. The Telemarketing Act also directed the Commission to consider recordkeeping requirements in promulgating the Rule.

[3] 15 U.S.C. § 6108.

[4] Pub. L. 107–56, 115 Stat. 272 (Oct. 26, 2001).

[5] Specifically, Section 1011 of the USA PATRIOT Act amended the Telemarketing Act to extend coverage of the TSR beyond the marketing of goods or services to charitable fundraising conducted by for-profit telemarketers for or on behalf of charitable organizations. Section 1011(b)(3) of the USA PATRIOT Act amended the definition of "telemarketing" that appears in the Telemarketing Act, 15 U.S.C. § 6106(4), expanding it to cover any "plan, program, or campaign which is conducted to induce . . . a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones and which involves more than one interstate telephone call . . . ." Moreover, Section 1011(b)(2) added a new section to the Telemarketing Act directing the Commission to include new requirements in the "abusive telemarketing acts or practices" provisions of the TSR. Finally, Section 1011(b)(1) amended the "deceptive telemarketing acts or practices" provision of the Telemarketing Act, 15 U.S.C. 6102(a)(2), by specifying that "fraudulent charitable solicitation" was to be included as a deceptive practice under the TSR.

other ways as of March 31, 2003.[6] Specifically, the Rule was amended to cover upsells[7] (not only in outbound calls, but also in inbound calls) and to include additional transactions under the Rule's purview. For example, the Rule was extended to the telephone solicitation of charitable donations in response to the mandate of the USA PATRIOT Act. Finally, the National Do Not Call Registry ("National Registry") was established, permitting consumers to register, via either a toll-free telephone number or the Internet, their preference not to receive certain telemarketing calls.[8] Accordingly, under the TSR, most telemarketers are required to refrain from calling consumers who have placed their numbers on the National Registry.[9] Moreover, such telemarketers must periodically access the National Registry to remove from their telemarketing lists the telephone numbers of those consumers who have registered.[10]

The Telemarketing Act's general requirement that the Commission prescribe rules prohibiting deceptive and abusive telemarketing acts or practices contains a provision specifically directing the Commission to include in the TSR "a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."[11] Amendments to the TSR adopted by the Commission in 2003 accordingly included several provisions designed to protect consumer privacy, including a prohibition against abandoning calls answered in person by a consumer.[12] Because this prohibition specifies that a call is "abandoned" if a telemarketer does not pick up the call within two seconds after it is answered by a consumer, the prohibition implicitly prohibited all calls that deliver a prerecorded message.

In order to protect consumers' privacy from the excesses of prerecorded calls, as directed by the Telemarketing Act, the Commission recently adopted a prerecorded call amendment that makes explicit the implicit call abandonment prohibition of such calls. The prohibition does not apply if: (1) the seller on whose behalf a prerecorded call is made has first obtained the written agreement of the person called to receive prerecorded messages; and (2) each prerecorded message includes an automated interactive telephone keypress or voice-activated opt-out mechanism that is disclosed at the

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[6] See 68 Fed. Reg. 4580 (Jan. 29, 2003).

[7] An "upsell" is the solicitation of the purchase of additional goods or services after an initial transaction occurs during a single telephone call. The solicitation may be made by or on behalf of a seller different from the seller in the initial transaction, regardless of whether the initial transaction and the subsequent solicitation are made by the same telemarketer ("external upsell"). Or, it may be made by or on behalf of the same seller as in the initial transaction, regardless of whether the initial transaction and subsequent solicitation are made by the same telemarketer ("internal upsell").

[8] 68 Fed. Reg. 4580 (Jan. 29, 2003).

[9] 16 C.F.R. § 310.4(b)(1)(iii)(B).

[10] 16 C.F.R. § 310.4(b)(3)(iv). Since January 1, 2005, the ~~Commission recently amended the~~ TSR ~~to~~ has required telemarketers to access the National Registry at least once every 31 days. See 69 Fed. Reg. 16368 (Mar. 29, 2004).

[11] 15 U.S.C. 6102(a)(3)(A).

[12] 16 C.F.R. 310.4(b)(1)(iv) (the call abandonment prohibition); see generally, 16 C.F.R. 310.4(b).

outset of the call,[13] or a toll-free number that can be called to opt-out.[14] When the Commission adopted this amendment, it deferred the compliance date of the express agreement requirement to September 1, 2009 in order to give sellers a full year to prepare for it. The Commission deferred required compliance with the opt-out provision until December 1, 2008.

The Commission also adopted an amendment to the TSR's call abandonment prohibition.[15] That prohibition is coupled with a safe harbor[16] designed to permit the use of predictive dialers that increase the efficiency and reduce the cost of live telemarketing calls by placing calls in anticipation that a sales agent will be available to take the call if it is answered. Because predictive dialers rely on projections based on statistical sampling of the percentage of calls actually answered by a consumer, their use results in the abandonment of some calls. The safe harbor adopted in 2003 accordingly specified that the abandonment rate could not exceed "3 percent per day" to protect consumers from abandoned calls.[17] The amendment relaxed the method for calculating the call abandonment rate from "3 percent per day" to "3 percent per 30-days" because the record showed that the "per day" requirement had the unanticipated effect of preventing the use of predictive dialers with small calling lists, thereby making the efficiencies and cost savings they provide unavailable to small businesses.

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[13] 73 Fed. Reg. 51164 (Aug. 29, 2008). The prerecorded call amendment provides the first ever explicit authorization in the TSR for sellers and telemarketers to place prerecorded telemarketing calls to consumers. Such calls had been permitted under an enforcement "forbearance policy" announced by the Commission when it began consideration of a petition seeking an amendment expressly permitting prerecorded calls. 69 Fed. Reg. 67287 (Nov. 17, 2004). In response to overwhelming consumer opposition to that proposed amendment, the Commission decided not to pursue it, and instead proposed an amendment that would have done no more than make explicit the TSR's implicit prohibition of prerecorded calls. 71 Fed. Reg. 58716 (Oct. 4, 2006). Public comment on that proposal persuaded the Commission to expand its scope and alter the terms of the amendment ultimately adopted.

[14] 16 C.F.R. § 310.4(b)(1)(v)(B)(ii)(A)-(B). A voice or keypress-activated automated interactive opt-out mechanism is required if the call could be answered in person by a consumer, and a toll-free telephone number that connects to the same opt-out mechanism is required if the call is picked up by an answering machine. This alternative is provided to reduce any compliance burden because technology exists that can distinguish between calls answered in person or by an answering machine.

[15] 73 Fed. Reg. at 51164.

[16] 16 C.F.R. 310.4(b)(4).

[17] 16 C.F.R. 310.4(b)(4)(i).

The Commission has also amended the TSR several times in order to impose fees on entities that must pay for access to the National Registry.[18] Commission staff has concluded in each case that the fee amendments do not change the TSR's PRA burden.

(a) Recordkeeping

The Rule expressly requires that certain records be kept by covered entities. Specifically, records evidencing various aspects of each covered transaction must be kept for a period of 24 months.[19] These records include marketing material, telemarketing scripts, identifying information for prize recipients, identifying information for customers and the goods or services that customers purchased, identifying information for employees engaged in telemarketing, and documents evidencing customers' authorization to be billed.

When the written agreement requirement of the prerecorded call amendment takes effect on September 1, 2009, it will substitute the means of compliance both under the Commission's forbearance policy[20] and the recordkeeping requirements of the TSR – which now require a record of an established business relationship ("EBR")[21] – with a record of a consumer's agreement to receive prerecorded calls.[22]

(b) Disclosures

The TSR deems the failure to make certain disclosures in covered transactions to be a deceptive act or practice. Among the Rule's provisions that require covered entities to make disclosures, for example, are failing to disclose the "total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer,"[23] failing to disclose "[a]ll material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer,"[24] failing to disclose "[a]ll material costs or conditions to receive or

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[18] The Do-Not-Call Implementation Act enacted by Congress shortly after the Commission amended the TSR authorized the Commission to ''promulgate regulations establishing fees sufficient to implement and enforce the provisions relating to the 'do-not-call' registry of the [TSR].'' Pub. L. 108–10, 117 Stat. 557 (2003) at § 2. The Commission has conducted amendment proceedings to set and adjust National Registry access fees several times since receuvung that authority. See 68 Fed. Reg. 45134 (July 31, 2003); 69 Fed. Reg. 45580 (July 30, 2004); 70 Fed. Reg. 43273 (July 27, 2005); 71 Fed. Reg. 43040 (July 31,2006). Most recently, the Commission has reduced the access fees, in compliance with the Do-Not-Call Registry Fee Extension Act of 2007, Pub. L. 110–188, 122 Stat. 63573. See 73 Fed. Reg. 43354 (July 25, 2008).

[19] 16 C.F.R. § 301.5(a).

[20] 69 Fed. Reg. at 67288-62790; see supra note 13.

[21] 16 C.F.R. § 310.2(n) (defining an EBR); 16 C.F.R. § 310.5(a)(3) (EBR recordkeeping requirement).

[22] 16 C.F.R. § 310.5(a)(5) (written agreement recordkeeping requirement).

[23] 16 C.F.R. § 310.3(a)(1)(i).

[24] 16 C.F.R. § 310.3(a)(1)(ii).

redeem a prize that is the subject of the prize promotion,"[25] and failing to disclose all material conditions related to negative option offers.[26] The TSR also requires two disclosures in solicitations for charitable contributions, namely: (1) that the call is to solicit a charitable contribution; and (2) the identity of the charitable organization on whose behalf the call is being made.

For the first of two prerecorded call disclosures, the Commission has set out acceptable, optional language that sellers may use to obtain consumers' agreements to receive prerecorded calls, while emphasizing that the required agreements may be obtained electronically pursuant to the Electronic Signatures In Global and National Commerce Act (''E–SIGN Act'' or ''E–SIGN'').[27] The Commission is also permitting sellers, during a one-year phase-in period before the written agreement requirement takes effect, to obtain the required agreement by means of a keypress on a telephone keypad in response to a prerecorded message disclosure and request. Compliance will thereby require only a one-time recording of such a message and/or a one-time revision of any existing credit card applications or other printed forms, or of any web page or email forms that sellers may wish to use for the required disclosure and agreement.

The second prerecorded call disclosure incorporates a requirement of the enforcement forbearance policy that permitted prerecorded calls during the pendency of the amendment proceeding.[28] The Federal Communications Commission ("FCC") has required a similar disclosure for all prerecorded calls to consumers since 1993.[29] The amendment requires that prerecorded calls answered by a consumer disclose at the outset of the message the required interactive means by which the consumer can place his or her number on the seller's company-specific do-not-call list (*e.g.*, "Press 1 to opt-out"), or if the prerecorded message is left on an answering machine, a toll-free number to call to opt-out.[30] Any incremental burden from substituting the amendment's disclosure requirement for that of the prior forbearance policy and the FCC requirement will be *de minimis*.

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[25] 16 C.F.R. § 310.3(a)(1)(v).

[26] 16 C.F.R. § 310.3(a)(1)(vii).

[27] Pub. L. No. 106–229, 114 Stat. 464 (2000) codified at 15 U.S.C. § 7001 et seq.

[28] 69 Fed. Reg. at 67290 (extending the policy pending completion of the amendment proceeding). The enforcement forbearance policy permitted prerecorded calls if they provided either: (1) a telephone keypad mechanism a consumer can use to opt-out of future calls from the seller, or (2) a toll-free telephone number a consumer can call to opt-out. In October 2006, when the Commission proposed to require a prior written agreement for prerecorded calls, it also proposed to terminate the forbearance policy as of January 4, 2007, but was persuaded by several industry petitions to preserve the status quo until the conclusion of the amendment proceeding. 71 Fed. Reg. 77634, at 77635 (Dec. 27, 2006). The enforcement forbearance policy terminated, and was replaced by the final amendment's disclosure requirement, on December 1, 2008. 73 Fed. Reg. at 51164.

[29] 47 C.F.R. 64.1200(b)(2) (requiring disclosure of a telephone number "[d]uring or after the message" that consumers who receive a prerecorded message call can use to assert a company-specific do-not-call request).

[30] Technology exists that permits telemarketers to detect when an answering machine or voice mail service picks up, thus permitting sellers and telemarketers to reduce their compliance burden by tailoring the opt-out disclosure to provide either a keypress or a toll-free number opt-out option.

(2) Use of the Information

(a) Recordkeeping

The primary purpose of the recordkeeping requirements is to maintain evidence of compliance with the Rule. The Rule requires the production of records on a case-by-case basis, and the records are used to establish whether the company or persons affiliated with the company have violated the Rule. In addition, the FTC, other governmental agencies, or private litigants may use the records as evidence in administrative or court proceedings, to identify witnesses, and to identify consumers who may be entitled to redress in connection with any law enforcement actions. Without the required records, it would be difficult to ensure that entities are complying with the Rule's requirements and to redress injury that may have resulted from violations of the Rule.

(b) Disclosures

The Rule's disclosure requirements for live telemarketing calls assist in preventing deceptive or abusive telemarketing acts or practices by ensuring that consumers are informed about the purpose of the call and the terms and conditions of the potential sale or solicitation. Consumers use the disclosed information in making purchasing decisions. The Rule's disclosure requirements are also intended to prevent fraud by making it more difficult for telemarketing companies to mislead consumers and easier for law enforcement officials to identify and take action against those engaged in deceptive or abusive telemarketing practices.

The disclosure requirements for prerecorded telemarketing calls protect consumer privacy by ensuring that consumers have the same ability as in a live telemarketing call to ask to be placed on a seller's company-specific do-not-call list and terminate the call. The prerecorded call amendment therefore required, as of December 1, 2008, that all prerecorded calls disclose at the outset of the message the key to press or what to say to terminate the call and be placed automatically on the seller's do-not-call list. The other disclosure required by the amendment is designed to ensure that consumers who are asked to agree to receive prerecorded calls clearly understand the agreement they are making.

(3) Consideration of Using Improved Information Technology to Reduce Burden

The TSR's recordkeeping provisions permit sellers and telemarketers to keep records in whatever form, manner, format, or location they choose. Accordingly, the Rule's recordkeeping provisions are consistent with the requirements of the Government Paperwork Elimination Act ("GPEA").[31] The disclosures required by the TSR for the most part are made orally and, secondarily, by direct mail. Thus, electronic disclosures for purposes of implementing the provisions of the GPEA are either inapplicable or impracticable.

Neither of the two recent amendments altered the TSR's recordkeeping requirements, and both are designed to encourage the use of electronic means of compliance. As previously noted, the prerecorded call amendment expressly permits the use of electronic means to record the written

[31] 44 U.S.C. § 3504 note.

agreements required by the amendment, as well as the use of electronic media for making required disclosures.

(4) Efforts to Identify Duplication

The TSR's recordkeeping requirements involve the preparation and retention of records demonstrating compliance with the Rule. Other federal and state government agencies may also require the retention of some records that the TSR requires to be retained (e.g., personnel, sales, or donation information). The prerecorded call amendment creates an obligation under the TSR's existing recordkeeping requirements for sellers to retain electronic or other records of consumers' written agreements to receive such calls, and the scripts used in such calls.[32] Staff is not aware of any other federal or state requirement that may entail the retention of any records required by either the prerecorded call amendment or the call abandonment rate calculation amendment, except for FCC requirements mandating the disclosure in prerecorded messages of a telephone number for opt-out requests,[33] and FCC and some state law requirements for the calculation of call abandonment rates.[34] To the extent that the recordkeeping requirements of the TSR may duplicate the information collection requirements of other federal or state government agencies, the TSR does not require that a duplicate set of records be maintained.

Many state laws require the same or similar disclosures the TSR mandates. Staff knows of no instance, however, under which the TSR (including the two recent amendments) and any other law or regulation governing telemarketing requires that a specific disclosure be made in duplicative ways to satisfy the Rule's requirements and a parallel law or regulation's requirements.

(5) Efforts to Minimize Burden on Small Businesses

The TSR's disclosure and recordkeeping requirements are generally consistent with the business practices that most telemarketing organizations would choose to follow, regardless of legal requirements. Moreover, the Rule was designed to minimize the burdens on all business entities, including small businesses. For example, the Rule contains an exemption that allows a seller and its telemarketer to place live telemarketing calls to consumers with whom the seller has an EBR, even if the consumer has placed his or her telephone number on the National Registry. The effect of this exemption is that businesses—and in particular small businesses—do not need to check their lists of existing customers against the National Registry for live telemarketing calls. In addition, the burden placed on small charities is minimized by the fact that for-profit firms that make fundraising calls on behalf of charitable organizations are not required to ensure that they exclude consumers who have

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[32] 16 C.F.R. 310.5(a)(1) and (5). No specific recordkeeping requirement in the TSR applies to any other provision of the prerecorded call amendment. Telemarketers will continue to have the burden of proof to establish as an affirmative defense that they have complied with the call abandonment safe harbor, and may keep records showing that their call abandonment rates have not exceeded 3 percent over a 30-day period under the abandonment rate calculation amendment, although this is not expressly required by the TSR.

[33] 47 C.F.R. 64.1200(b)(2).

[34] 47 C.F.R. 64.1200(a)(6); *e.g.*,California Public Utilities Commission, Interim Opinion, Rulemaking 02-02-020 (June 27, 2002) at 20.

placed their telephone numbers on the National Registry.[35] Rather, they only have to honor individual consumer requests not to be called by the particular charity.[36] Furthermore, the TSR permits all entities accessing the National Registry to obtain the first five area codes of data for free, limiting the burden placed on businesses that only require access to a small portion of the National Registry.

The Commission believes that neither the prerecorded call amendment nor the call abandonment rate calculation amendment that it recently adopted is likely to have a significant impact on small business for several reasons. By their nature, most small businesses serve local customers, develop personal relationships with their clientele, and are therefore likely to be able to obtain their customers' agreements to receive useful prerecorded telemarketing messages. Moreover, purely informational prerecorded messages are not covered by the TSR, and the use of such messages to schedule service calls, delivery times, and the like therefore will not be subject to the written agreement requirement. In addition, to the extent that, in this Internet age, small businesses may no longer be strictly local businesses, the option provided by the amendment to obtain written agreements to receive prerecorded message calls pursuant to E-SIGN will place them on an equal footing with other businesses. Finally, as a result of the Commission's decision to defer the effective date of the written agreement requirement for twelve months, until September 1, 2009, small businesses with annual service or other contracts with their customers will have ample time to revise those contracts and seek their customers' permission to receive prerecorded telemarketing messages.

For these same reasons, the Commission believes that small business telemarketers providing prerecorded call services to such small business sellers are unlikely to be significantly affected by the prerecorded call amendment. In addition, for more than two years, small and large telemarketers alike, as well as sellers that conduct their own telemarketing, have been governed by the Commission's enforcement forbearance policy for prerecorded messages answered by a consumer, which has mandated an up-front disclosure to consumers of how to opt-out, and encouraged the use of an interactive opt-out mechanism. During that time, according to the comments, many of which came from small business telemarketers, the industry had transitioned to automated interactive message systems that are now affordable and widely available. Consequently, the Commission had no reason to believe that the 90 days it allowed until December 1, 2008, for sellers and telemarketers to provide automated interactive opt-out mechanisms disadvantaged either small or large business telemarketers or sellers. Although prerecorded message calls placed on answering machines or voicemail services were not subject to the Commission's enforcement forbearance policy, there was nothing in the record to suggest that application of the requirement of an automated interactive opt-out mechanism to such calls could not be accomplished within the phase-in period, or would disadvantage either small or large business telemarketers or sellers. Notably, the Commission received no requests to extend the compliance deadline before the requirement took effect on December 1, 2008.

The Commission also believes that the amendment adjusting the method for measuring the permissible call abandonment rate by predictive dialers in live telemarketing campaigns is not likely to have a significant impact on small business. If anything, the change in the standard from a "per day" to a "per-30-day" calculation should lead to a reduction in the cost of live telemarketing campaigns for

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[35] 16 C.F.R. § 310.6(a).

[36] 16 C.F.R. § 310.4(b)(1)(iii).

both small and large businesses, for the reasons previously stated, and likely will encourage the use of such calls to customers by small and large businesses alike. In fact, small business sellers and telemarketers are likely to derive the greatest benefit from the amendment because the smaller size of their calling lists had prevented full realization of the efficiencies of predictive dialers under the prior measurement standard, an unintended consequence that the amendment has corrected.

Accordingly, the Commission believes that the two amendments to the TSR will not have a significant or disproportionate impact on the costs of small business.

(6) Consequences of Conducting the Collection Less Frequently

(a) Recordkeeping

The TSR requires specified records to be retained for 24 months.[37] A record retention period of less than two-years would frustrate many investigations under the FTC's enforcement program. Consumers who complain to the FTC about transactions covered by the Rule often do not do so immediately. Therefore, there may already be a substantial "lag time" between the time the alleged rule violations occur and the time the FTC learns of the alleged violations. A two-year record retention period allows Commission staff to gather the information needed to pursue enforcement actions and to identify those persons who have most recently suffered injury from the alleged deceptive or abusive telemarketing practices.

(b) Disclosures

All of the disclosures required by the Rule provide consumers with information necessary to make informed purchasing decisions or are essential to protect their privacy. Moreover, the Rule's disclosure requirements specific to sales transactions (e.g., disclosures regarding negative option offers, credit card loss protection plan offers, and prize promotions) address specific areas of recurring deception or abuse in telemarketing, and have been narrowly crafted to address the specific problems identified in these transactions through law enforcement efforts by the states and the FTC. In addition, the minimal disclosure requirements of section 310.4(e) of the Rule,[38] crafted in furtherance of the USA PATRIOT Act mandate, are material to consumers' decision making -- in this case, whether to make a charitable contribution over the telephone -- and provide needed protection against emerging areas of fraud and abuse. To require less than this would defeat the purpose of the Telemarketing Act, as amended by the USA PATRIOT Act, which is to ensure that each consumer is provided with the material disclosures necessary to properly evaluate a particular sales offer or donation solicitation.

One of the two disclosures required by the prerecorded call amendment likewise ensures that consumers can make informed decisions by mandating a clear and conspicuous disclosure when sellers seek a consumer's agreement to receive prerecorded calls that the agreement authorizes the seller to place prerecorded calls to them. The other disclosure required by the amendment is essential to enable consumers to protect their privacy. It requires a disclosure at the outset of all prerecorded calls

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[37] 16 C.F.R. § 310.5.

[38] 16 C.F.R. § 310.4(e) requires the following disclosures: (1) that the call is to solicit a charitable contribution; and (2) the identity of the charitable organization on whose behalf the call is being made.

informing consumers how to place their telephone numbers on the seller's company-specific do-not-call list. Preparation of these brief disclosures, whether in print or electronic media, including voice recording, need only be a one-time event, because the disclosure may be used unchanged thereafter either to seek consumer consent to receive prerecorded messages or to disclose the opt-out option at the outset of each prerecorded message. Compared to the modest cost and burden these disclosures may impose, omitting either one when required by the amendment would defeat the purpose of the amendment, which is to protect consumer privacy as mandated by the Telemarketing Act.

(7) Circumstances Requiring Collection Inconsistent With OMB Guidelines

The collection of information in this proposed Rule is consistent with all applicable guidelines contained in 5 C.F.R. § 1320.5(d)(2).

(8) Consultation Outside the Agency

Since the original Rule became effective, Commission staff has consulted with affected entities regarding questions about compliance assistance and the Commission's law enforcement activities. In those discussions, affected businesses generally did not express particular concern regarding the cost or time burdens associated with the Rule's recordkeeping or disclosure requirements.

As noted above, in connection with the Commission's required rule review, the TSR was amended in January 2003 to include certain new disclosure requirements and to expand the Rule's parameters in other ways.[39] During the 2003 rule review, representatives of the industry informed the FTC that the information collection burdens the Rule imposes are minimal and that some have even lessened over time as technology has improved. During this time, Commission staff also met with federal, state, and local law enforcement agencies to determine, among other things, whether the Rule's recordkeeping requirements were sufficient to facilitate effective enforcement of the Rule.

The Commission twice sought comment from interested parties on both the prerecorded call amendment and the amendment to revise the method for calculating the call abandonment rate before adopting these amendments in 2008. In response to industry requests, the Commission first sought comment on a proposed amendment to permit prerecorded messages when a business had an EBR with a consumer, so long as each message included a keypress mechanism or toll-free telephone number to opt-out that was disclosed at the outset of the call.[40] The same request for comments also asked for input on an industry proposal to modify the method for calculating the call abandonment rate. While industry comments generally supported both proposals, and a few consumer comments even supported the call abandonment rate calculation amendment, well over 13,000 consumer comments vociferously opposed the proposed amendment to permit prerecorded calls.

In response to those comments, the Commission in 2006 reversed course and requested comment from interested parties on a proposed amendment making explicit the implicit prohibition on prerecorded calls in the TSR's call abandonment provision, and permitting such calls only if the seller

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[39] See Section 1 of this Supporting Statement.

[40] 69 Fed. Reg. 67287 (Nov. 17, 2004).

had first obtained in writing the express agreement of a consumer to receive prerecorded calls.[41] The Federal Register notice also sought comment on a proposed amendment to revise the calculation of the call abandonment rate from a 3 percent "per day" to a "per 30-day" standard because the "per day" standard was preventing small businesses from using predictive dialers, which are too inaccurate with small calling lists to ensure compliance with the 3 percent requirement.

The Commission received some 229 additional comments from individual consumers and nine consumer advocacy organizations supporting the revised proposed prerecorded call amendment and largely opposing the "3 percent per 30-day" amendment. Sellers, telemarketers, their trade associations and technology providers submitted 73 comments supporting the "3 percent per 30-day" amendment and opposing the "opt-in" approach of the proposed prerecorded call amendment.[42]

The industry comments generally objecting to the amendment's written agreement requirement assumed incorrectly that the agreement had to be obtained on paper, notwithstanding similar provisions in the TSR that expressly authorize the use of electronic signatures that comply with the E-SIGN Act.[43] In response, the Commission added a footnote to the amendment that expressly authorizes the use of electronic signatures under E-SIGN in order to make fully clear that nothing in the amendment requires the creation or retention of paper records.[44] This clarification will minimize any paperwork burden in creating and retaining the written agreements the amendment requires.

The one comment directly addressing the PRA, which also assumed incorrectly that agreements on paper were required, objected that the Commission's analysis in the Notice of Proposed Rulemaking ignored the initial cost sellers would incur in reprinting credit card and loyalty applications and revising systems and procedures to obtain the required agreements from existing and new customers.[45] While there will be some small initial burden in converting from EBR records to agreement records, which staff has included in revised burden estimates below, the Commission has taken two additional steps designed to reduce that burden significantly. First, the Commission provided a phase-in that defers the written agreement requirement for one year, until September 1, 2009, to give sellers time to solicit agreements to receive prerecorded calls from their customers. Second, during that phase-in period, sellers may continue to place low-cost prerecorded calls to their customers that may include an option

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[41] 71 Fed. Reg. 58716 (Oct. 6, 2006).

[42] Many of the industry comments argued that the Commission instead should permit prerecorded calls so long as they provided an interactive opt-out mechanism.

[43] Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. § 7001 et seq.).

[44] For this reason, if a seller nonetheless elects to use paper records, any attendant cost or other burden is self-imposed, rather than imposed by the amendment.

[45] Comment by SmartReply, Inc., # 525547-00106, at 18-19 (Nov. 1, 2006), *available at* http://www.ftc.gov/os/comments/tsrrevisedcallabandon/index.shtm (Comment No. 511 of 631). The Commission's one-year deferral of the compliance date of the written agreement requirement sought to minimize any such costs and burdens by allowing time to exhaust existing suppies of revised credit card and other applications, the orderly phase-in of revised forms, and the implementation and use of systems and procedures to obtain the required agreements from existing and new customers.

to agree to receive prerecorded calls in the future simply by pressing a designated key on their telephone keypad.

After adopting the two amendments, the Commission provided a detailed analysis of the PRA burden they would impose and sought additional public comment in connection with an emergency PRA clearance request.[46] No public comments were received in response.

As discussed above in Section 1, the Commission also has amended the TSR several times since 2003 in order to revise the fees imposed on entities that must pay to access the National Registry. Staff determined during each proceeding that the revised fees did not impose any new information collection requirements.[47] Nonetheless, in two of these Notices, Commission staff revised its previous PRA burden estimates regarding the underlying Rule given updated data for the number of entities accessing the National Registry.[48] No comments were received concerning those PRA burden estimates.

More recently, Commission staff sought public comment in connection with its latest PRA clearance request for the TSR, in accordance with 5 CFR 1320.8(d).[49] See 60 Fed. Reg. 11952 (Mar. 20, 2009). In response, the Commission received one public comment, from the National Automobile Dealers Association ("NADA") (http://www.ftc.gov/os/comments/tsrpra60day/index.shtm).[50] NADA generally asserts that the estimated average annual recordkeeping burden for the telemarketing call provisions of the TSR is significantly understated, but does not provide any alternate suggested estimates to those used by the FTC in the notice seeking public comment. Staff has carefully considered NADA's arguments, but has concluded that they lack sufficient specificity to support any revisions of its prior estimates.

Specifically, regarding live telemarketing calls, NADA contends, first, that the FTC staff estimates fail to account for the recordkeeping cost of creating and maintaining compliance policies, and training its employees consistent with those policies in order to show that its members qualify for the safe harbor provided in section 310.4(b)(3)(i)-(ii) of the Rule. NADA provides no specific

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[46] 73 Fed. Reg. 52049 (Sept. 8, 2008).

[47] See 69 Fed. Reg. 23701 (April 30, 2004); 69 Fed. Reg. 45580 (July 30, 2004); 70 Fed. Reg. 20848 (April 22, 2005); 70 Fed. Reg. 43273 (July 27, 2005); 71 Fed. Reg. 43040 (July 31,2006); 73 Fed. Reg. 43354 (July 25, 2008).

[48] See 69 Fed. Reg. at 23704; 69 Fed. Reg. at 45585.

[49] See 74 Fed. Reg, 11952 (Mar. 20, 2009).

[50] After checking for comments the day after the close of the comment period and finding none, FTC staff submitted the required 30-day notice to the Federal Register stating that no comments were received. It was not until three days after the close of the comment period that the FTC's Commentworks contractor informed staff that a comment had been received late in the final day of the 60-day comment period. Upon learning of the comment, staff was able to obtain from the Office of the Federal Register permission to make simple correction to the notice acknowledging that a comment was received (and providing readers with a weblink to the comment), but was unable to otherwise substantively revise the notice for publication prior to expiration of the Rule's existing clearance. Staff's response to the comment, however, is posted with it at the weblink shown above.

information on the time or cost associated with drafting written policies or training. Any such burden is not a "recordkeeping" burden for purposes of the PRA, however, because these provisions of the TSR describe a defense from liability. Neither the recordkeeping requirements set out in section 310.5 nor any other provision of the TSR requires that sellers or telemarketers routinely create or maintain the records NADA identifies.

Secondly, NADA argues that the FTC staff estimates understate the costs of complying with safe harbor section 310.4(b)(3)(iv), either because of the "single look-up" option for access to the National Registry or because the National Registry must be checked at least every 31 days. Since all sellers may download five area codes for free, it is difficult to conceive that any NADA member would instead use the "single look-up" option, and NADA has provided no evidence that any of its member local car dealers need access to more than five area codes, or even make use of the "single look-up" option. If, instead, the download option is used, 12 monthly downloads can easily be completed within staff's estimate of one hour a year.

Additionally, NADA challenges staff's conclusion that non-labor capital and start-up costs for recordkeeping in connection with live telemarketing calls are "de minimis" because most entities would maintain the records required by the TSR in the ordinary course of business. NADA concedes that some records are retained in the ordinary course of business, but contends that a majority of the records required by section 310.5 of the TSR are retained solely for purposes of compliance with the TSR -- without identifying the types of records to which it is referring or providing an alternative estimate of the costs of retaining those records. NADA goes on to assert that, notwithstanding the fact that section 310.5(b) of the TSR permits sellers to keep required records "in any form," including electronic form, "many" of its members still retain paper records, often must store them off-site, and thus that a portion of the expenses related to collecting, transporting, and storing these records results directly from the TSR recordkeeping requirements. However, since nothing in the TSR requires that records be created or maintained on paper, these costs are not recordkeeping costs imposed by the TSR

NADA further faults FTC staff estimates on the cost of complying with the prerecorded call amendment, arguing, first, that new databases will have to be created to show compliance with the amendment's written agreement requirement that takes effect on September 1, 2009. The NADA comment appears to acknowledge, however, that its members maintain customer databases in the ordinary course of business; thus, electronic evidence of a customer's agreement to receive prerecorded calls would require only the addition of a single field to the member customer databases to record such agreements, as staff's estimates assume. While NADA also objects that an unspecified number of member car dealers still maintain paper records, notwithstanding the fact that dealer service departments typically keep computerized records of customer service visits, nothing in the prerecorded call amendment requires dealers to maintain paper records of agreements to receive prerecorded calls. On the contrary, in providing a one-year phase-in for the written agreement requirement, the Commission expressly permitted the use during that period of prerecorded calls to existing customers to obtain the required agreements electronically via a keypress or voice response, and emphasized that after the requirement takes effect, the required agreements could be solicited and obtained using forms provided in emails or on websites, in addition to paper or electronic sales or service agreements or receipts.

Finally, NADA disputes FTC staff's estimate of the cost of any legal advice sellers might wish to obtain in connection with the prerecorded call amendment, on the ground that its small business

members do not have in-house counsel, and would have to hire outside counsel for any such advice. The Commission went to unusual lengths in issuing the amendment to provide a sample form for obtaining written agreements, in order to minimize, if not eliminate, the need for advice of counsel. The staff estimate for legal and other managerial/professional services was not "$32 per hour," as NADA asserts, but $42 per hour. This estimate accounts not only for the unusually detailed guidance provided by the Commission, but also for the likelihood that trade associations likewise would provide compliance advice to their members.

For the foregoing reasons, there is insufficient evidence in the record upon which to base any alteration in staff's estimates.

Consistent with 5 C.F.R. 1320.12(c), the FTC is providing an additional opportunity for public comment contemporaneous with this submission. See 74 Fed. Reg. 25540 (May 28, 2009).

(9) Payments or Gifts to Respondents

Not applicable.

(10) & (11) Assurances of Confidentiality/Matters of a Sensitive Nature

The collection of information in this proposed Rule is consistent with all applicable guidelines contained in 5 C.F.R. § 1320.5(d)(2). To the extent that information covered by a recordkeeping requirement of the Rule is collected by the Commission for law enforcement purposes, the confidentiality provisions of Sections 6(f) and 21 of the Federal Trade Commission Act, 15 U.S.C. §§ 46(f) and 57b-2, will apply.

(12) Burden Estimate

Estimated annual hours burden: 1,634,347 hours

The estimated burden for recordkeeping is 22,772 hours for all industry members affected by the Rule. The estimated burden for the disclosures that the Rule requires for both the live telemarketing call provisions of the TSR and the prerecorded call amendments is 1,611,575 hours for all affected industry members. Thus, the total PRA burden is 1,634,347 hours. These estimates are explained below.

Number of Respondents: As a preliminary matter, only telemarketers and sellers, not telefunders (third-party telemarketers soliciting contributions on behalf of charities), are subject to the National Registry provisions of the Rule, and only sellers, not telemarketers or telefunders, are subject to the new express agreement obligations attributable to the prerecorded call amendments.[51] The National Registry data does not separately account for telefunders; they are a subset of the overall number of telemarketing entities known to access the National Registry for any given year. Thus, past

[51] Telemarketers and telefunders must comply, however, with the abandoned call provisions of the TSR, and the opt out provisions of the 2008 amendments.

FTC estimates that separately accounted for telefunders over-counted them.[52] The following estimates have been adjusted accordingly.

In calendar year 2008, 50,245 telemarketing entities accessed the National Registry. Of these entities, 1,158 were "exempt" entities obtaining access to data.[53] By definition, none of the exempt entities are subject to the TSR. In addition, 38,815 sellers and 10,272 telemarketers accessed the National Registry. Of those, however, 34,752 telemarketing entities (27,574 sellers and 7,178 telemarketers) with independent access to the National Registry obtained data for just one state. Staff assumes that these entities are operating solely intrastate, and thus would not be subject to the TSR.[54] Applying this National Registry data, staff estimates that 14,335 telemarketing entities (50,245 - 1,158 - 34,752) are currently subject to the TSR, of which 11,241 (38,815 - 27,574) are sellers and 3,094 (10,272 - 7,178) are telemarketers.[55]

Absent information to the contrary, staff retains its prior estimate that 25 new-entrant telefunders per year would need to set up recordkeeping systems that comply with the TSR.

Recordkeeping:

A. Live Telemarketing Call Provisions of the TSR

Staff estimates that the above-noted 14,335 telemarketing entities subject to the Rule each require approximately 1 hour per year to file and store records required by the TSR for an annual total of 14,335 burden hours. The Commission staff also estimates that 75 new entrants per year would need to spend 100 hours each developing a recordkeeping system that complies with the TSR for an annual total of 7,500 burden hours. These figures, based on prior estimates, are consistent with staff's current knowledge of the industry. Thus, the total estimated annual recordkeeping burden for new and existing telemarketing entities, including the effects of the prerecorded call amendment, is 21,835 hours.

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[52] For the sake of simplicity and to err conservatively, FTC staff's burden estimates for provisions less likely to be applicable to telefunders (e.g., prize promotion disclosure obligations for outbound live calls, under 16 CFR 310.4(d)) will not be reduced by a separate estimate for the subset of telemarketers that are telefunders. Conversely, estimates of the number of new-entrant telemarketer**s** will incorporate new-entrant telefunders.

[53] An exempt entity is one that, although not subject to the TSR, chooses to voluntarily scrub its calling lists against the data in the National Registry.

[54] These entities would nonetheless likely be subject to the FCC's Telephone Consumer Protection Act regulations, including the requirement that entities engaged in intrastate telephone solicitations access the National Registry.

[55] Staff assumes, for purposes of these calculations, that those telemarketers that make prerecorded calls download telephone numbers listed on the National Registry, rather than conduct online searches, as the latter may consume considerably more time. Other telemarketers not placing the high-volume of automated prerecorded calls may elect to search online, rather than to download.

B. Prerecorded Call Amendment

As noted above, after September 1, 2009, no prerecorded call may be placed by or on behalf of a seller unless the seller has obtained a written agreement from the person called to receive such calls. Thus, the recordkeeping obligations of the prerecorded call amendment fall on sellers rather than telemarketers.[56]

In view of its phase-in and the prerecorded call amendment's clarification allowing written agreements to be created and maintained electronically pursuant to the Electronic Signatures In Global and National Commerce Act (commonly, "E-SIGN"), any initial burden caused by the transition from the previously required records of an established business relationship to the newly required records of a written agreement should not be material. Once the necessary systems and procedures are in place, any ongoing incremental burden to create and retain electronic records of agreements by new customers to receive prerecorded calls should be minimal.[57] Accordingly, staff estimates that existing sellers subject to the prerecorded call amendment will require approximately 1 hour to prepare and maintain records required by the amendment, and an estimated 75 new entrant-telemarketers (including telefunders) per year would require the same. This reflects a one-time modification of existing customer databases to include an additional field to record consumer agreements.

Most of the 11,241 existing sellers, however, in anticipation of the September 1, 2009 compliance deadline, presumably will have set up already the necessary systems and procedures by or before the May 31, 2009 expiration of the PRA clearance for the TSR. At that point, sellers will have had 9 months' advance notice, with just 3 months remaining between the expiring clearance and the compliance deadline. Allowing for this apportionment, 2,810 remaining existing sellers (i.e., 3/12 of the 11,241 existing sellers) would still be setting up compliant systems between May 31,2009 and the September 1, 2009 compliance deadline, with no further set-up burden thereafter.[58] Thus, annualized for an "average" year over the prospective 3-year PRA clearance (May 31, 2009 - May 31, 2012), this amounts to 937 hours per year.

Disclosures:

A. Live Telemarketing Call Provisions of the TSR

Staff believes that in the ordinary course of business a substantial majority of sellers and telemarketers make the disclosures the Rule requires because to do so constitutes good business

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[56] Although telemarketers that place prerecorded telemarketing calls on behalf of sellers must capture and transmit to the seller any requests they receive to place a consumer's telephone number on the seller's entity-specific do-not-call list, this *de minimis* obligation extends both to live and prerecorded telemarketing calls, and is subsumed within the PRA estimates shown above.

[57] If it is not feasible to obtain a written agreement at the point of sale after the written agreement requirement takes effect, sellers could, for example, obtain a customer's email address and request an agreement via email to receive prerecorded calls.

[58] Staff has already attributed 100 hours for each new-entrant seller to develop a recordkeeping system compliant with the TSR, which would also factor in the time to create and retain electronic records of agreements by customers to receive prerecorded calls.

practice. To the extent this is so, the time and financial resources needed to comply with disclosure requirements do not constitute "burden." 16 CFR 1320.3(b)(2). Moreover, many state laws require the same or similar disclosures as the Rule mandates. Thus, the disclosure hours burden attributable solely to the Rule is far less than the total number of hours associated with the disclosures overall. As when the FTC last sought 3-year OMB clearance for this Rule, staff estimates that most of the disclosures the Rule requires would be made in at least 75 percent of telemarketing calls even absent the Rule.[59]

Based on previous assumptions, staff estimates that of the 14,335 telemarketing entities noted above, 7,342 conduct inbound telemarketing.[60] Inbound calls from consumers in response to direct mail solicitations that make certain required disclosures are exempt from the TSR.[61] Although inbound calls are generally exempt from the Rule, the Commission believes it is likely that industry members who choose to make the requisite disclosures in direct mail solicitation may do so in an effort to qualify for the exemption as well. Thus, Commission staff believes it is appropriate to include in the relevant burden hour calculation both the burden for compliance with the Rule's oral disclosures and the burden incurred by entities that make written disclosures in order to qualify for the inbound direct mail exemption. Accordingly, staff estimates that, of the 7,342 entities that conduct inbound telemarketing, approximately one-third (2,447) will choose to incorporate disclosures in their direct mail solicitations that exempt them from complying with the Rule.

Staff necessarily has made additional assumptions in estimating burden. From the total volume of outbound and inbound calls, staff first calculated disclosure burden for initial transactions that resulted in sales, derived from external data and/or estimates drawn from a range of calendar years (2001-2008). Staff recognizes that disclosure burdens may still be incurred regardless of whether or not a call results in a sale. Conversely, a substantial percentage of outbound calls result in consumers hanging up before the seller or telemarketer makes the required disclosure(s). However, because the requirements in § 310.3(a)(1) for certain disclosures before a consumer pays for a telemarketing purchase apply only to sales, early call cessation (i.e., consumers hanging up pre-disclosure or before full disclosure) is excluded from staff's burden estimates for § 310.3(a)(1).

For transactions in which a sale is not a precursor to a required disclosure, *i.e.*, the upfront disclosures required in all outbound telemarketing calls and outbound or inbound "upsell" calls by § 310.4(d) , staff has calculated burden for initial transactions based on estimates of the total volumes of outbound and inbound calls, discounted for anticipated early hang-ups. For transactions in which a

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[59] Accordingly, staff has continued to estimate that the hours burden for most of the Rule's disclosure requirements is 25 percent of the total hours associated with disclosures of the type the TSR requires.

[60] While staff does not have information directly stating the number of inbound telemarketers, it notes that, according to the DMA 21% of all direct marketing in 2007 was by inbound telemarketing and 20% was by outbound telemarketing. See DMA Statistical Fact Book (30th ed. 2008) at p. 17. Accordingly, based on such relative weighting, staff estimates that the number of inbound telemarketers is approximately 7,342 (14,335 x 21 ÷ (20 + 21)).

[61] Some exceptions to this broad exemption exist, including solicitations regarding prize promotions, investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, advertisements involving goods or services described in §310.3(a)(1)(vi), advertisements involving goods or services described in §310.4(a)(2)-(4); and any instances of upselling included in such telephone calls.

sale is a precursor to required disclosure, *i.e.,* § 310.3(a)(1), the calculation is based on the volume of direct sales.

Based on the most recently available applicable industry data and further FTC extrapolations, staff estimates that 2.9 billion outbound calls are subject to FTC jurisdiction and attributable to direct orders, that 570 million of these calls result in direct sales,[62] and that there are 2.8 billion inbound sales from inbound calls subject to FTC jurisdiction. Staff retains its longstanding estimate that, in a telemarketing call involving the sale of goods or services, it takes 7 seconds[63] for telemarketers to disclose the required outbound call information orally plus 3 additional seconds[64] to disclose the information required in the case of an upsell. Staff also retains its longstanding estimates that at least 60 percent of sales calls result in "hang-ups" before the telemarketer can make all the required disclosures and that "hang-up" calls consume only 2 seconds.[65]

Staff bases all ensuing upsell calculations on the volume of additional sales after an initial sale, with the assumption that a consumer is unlikely to be predisposed to an upsell if he or she rejects an initial offer -- whether through an outbound or an inbound call. Using industry information, staff assumes an upsell conversion rate of 40% for inbound calls as well as outbound calls.[66] Moreover, staff assumes that consumers who agree to an upsell will not terminate an upsell before the seller or telemarketer makes the full required disclosures.

Based on the above inputs and assumptions, staff estimates that the total time associated with these disclosure requirements is 1,086,389 hours per year [(2.9 billion outbound calls x 40% lasting the duration x 7 seconds of full disclosures = 2,255,556) + (2.9 billion outbound calls x 60% terminated after 2 seconds of disclosures = 966,667) + (570 million outbound calls resulting in direct sales x 40% upsell conversions x 3 seconds of related disclosures = 190,000) + (2.8 billion inbound calls x 40% upsell conversions x 3 seconds = 933,333) x an estimated 25% of affected entities not already making such disclosures independent of the TSR[67] = 1,086,389 hours].

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[62] For staff's PRA burden calculations, only direct orders by telephone are relevant. That is, sales generated through leads or customer traffic are excluded from these calculations because such sales are not subject to the TSR's recordkeeping and disclosure provisions. The direct sales total of 570 million is based on an estimated 1.9 billion sales transactions from outbound calls being subject to FTC jurisdiction reduced by an estimated 30 percent attributable to direct orders. This percentage estimate is drawn from DMA published data last appearing in the DMA Statistical Fact Book (2001), at p. 301.

[63] See, e.g., 60 FR 32682, 32683 (June 23, 1995); 63 FR 40713, 40714 (July 30, 1998); 66 FR 33701, 33702 (June 25, 2001); 71 FR 28698, 28700 (May 17, 2006).

[64] 71 FR 3302, 3304 (Jan. 20, 2006); 71 FR 28698, 28700.

[65] See, e.g., 60 FR at 32683.

[66] This assumption originated with industry response to the Commission's 2003 Final Amended TSR. See 68 FR 4580, 4597 n.183 (Jan. 29, 2003). Although it was posited specifically regarding inbound calls, FTC staff will continue to apply this assumption to outbound calls as well, barring the receipt of any information to the contrary.

[67] See supra note 59 and accompanying text.

The TSR also requires further disclosures in telemarketing sales calls before the customer pays for goods or services. These disclosures include the total costs of the offered goods or services; all material restrictions; and all material terms and conditions of the seller's refund, cancellation, exchange, or repurchase policies (if a representation about such a policy is a part of the sales offer). Additional specific disclosures are required if the call involves a prize promotion, the sale of credit card loss protection products or an offer with a negative option feature.

Staff estimates that the general sales disclosures require 472,562 hours annually. This figure includes the burden for written disclosures [(2,447 inbound telemarketing entities estimated to use direct mail[68] x 10 hours[69] per year x 25% burden) = 6,118 hours], as well as the figure for oral disclosures [(570 million outbound calls x 8 seconds x 25% burden = 316,667 hours) + (570 million outbound calls x 40% (upsell conversion) x 20% sales conversion x 25% burden x 8 seconds = 25,333 hours) + (2.8 billion inbound calls x 40% upsell conversion x 20% sales conversion x 25% burden x 8 seconds) = 124,444 hours].[70]

Staff also estimates that the specific sales disclosures require 48,160 hours annually [(570 million calls x 5% [estimate for outbound calls involving prize promotions[71]] x 3 seconds x 25% burden = 5,938 hours) + (570 million calls x .1% [estimate for outbound calls involving credit card loss protection ("CCLP")] x 4 seconds x 25% burden = 158 hours) + (570 million calls x 40% upsell conversions x 20% sales conversions x .1% [estimate for outbound calls involving CCLP upsells[72]] x 4 seconds x 25% burden = 13 hours) + (2.8 billion inbound calls x 40% upsell conversion x 20% sales conversion x .1% [estimate for inbound calls involving CCLP upsells] x 4 seconds x 25% burden = 62 hours) + (570 million calls x 10% [estimate for outbound calls involving negative options] x 4 seconds x 25% burden = 15,833 hours) + (570 outbound million calls x 40% upsell conversion x 20% sales conversions x 10% [estimate for outbound calls involving negative option upsells] x 4 seconds x 25% burden = 1,267 hours) + (2.8 billion inbound calls x 40% upsell conversions x 20% sales conversions x 10% [estimate for inbound calls involving negative option upsells] x 4 seconds x 25% burden) = 6,222 hours] + (2.8 billion inbound calls x .3% [estimate for inbound calls involving business opportunities[73]] x 8 seconds = 18,667 hours).

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[68] See the discussion in the text immediately following note 61.

[69] FTC staff believes a typical firm will spend approximately 10 hours per year engaged in activities ensuring compliance with this provision of the Rule; this, too, has been stated in prior FTC notices inviting comment on PRA estimates. No comments were received, and staff continues to believe this estimate remains reasonable.

[70] The percentage and unit of time measurements are FTC staff's estimates.

[71] Since the purpose of prize promotions is to induce an initial sale, staff believes such promotions are unlikely to occur in upsells. Accordingly, the ensuing estimates do not provide for prize promotion upsells.

[72] It is staff's understanding and belief that CCLP sales rarely, if ever, prompt inbound calls, but instead may occur as upsells after an inbound call for another transaction.

[73] The estimate for § 310.3(a)(1) disclosures in outbound calls involving business opportunities is subsumed in the overall figure for outbound telemarketing call disclosures. Staff does not believe that business opportunities would likely be offered as upsells; at most, their incidence would be very infrequent and, accordingly, the associated disclosure burden *de minimis*.

The total annual burden for all of the sales disclosures is 520,722 hours (472,562 general + 48,160 specific sales disclosures) or, by rough approximation (allowing that some entities conducting inbound telemarketing will be exempt from oral disclosure if making certain written disclosures), 36 hours annually per firm (520,724 hours ÷ 14,335).

Finally, any entity that accesses the National Registry, regardless whether it is paying for access, must submit minimal identifying information to the operator of the National Registry. This basic information includes the name, address, and telephone number of the entity; a contact person for the organization; and information about the manner of payment. The entity also must submit a list of the area codes for which it requests information and certify that it is accessing the National Registry solely to comply with the provisions of the TSR. If the entity is accessing the National Registry on behalf of other seller or telemarketer clients, it has to submit basic identifying information about those clients, a list of the area codes for which it requests information on their behalf, and a certification that the clients are accessing the National Registry solely to comply with the TSR.

As it has since the Commission's initial proposal to implement user fees under the TSR, FTC staff estimates that affected entities will require no more than two minutes for each entity to submit this basic information, and anticipates that each entity will have to submit the information annually.[74] Based on the number of entities accessing the National Registry that are subject to the TSR, this requirement will result in 478 burden hours (14,335 entities x 2 minutes per entity). In addition, FTC staff continues to estimate that up to one-half of those entities may need, during the course of their annual period, to submit their basic identifying information more than once in order to obtain additional area codes of data. Thus, this would result in an additional 239 burden hours. Accordingly, accessing the National Registry will impose a total reporting burden of approximately 717 hours per year.

Cumulative of the above components, disclosure (1,086,389 + 472,562 + 48,160 = 1,607,111 hours) and reporting burden (717 hours) for the live telemarketing call provisions of the TSR is 1,607,828 hours.

B. Prerecorded Call Amendment

Staff estimates that the 2,810 sellers[75] will require, on average, 4 hours each -- 11,240 hours -- to implement the incremental disclosure requirements mandated by the 2008 TSR amendments. Those amendments require the following tasks: (1) one-time creation, recording, and implementation of a brief telephone script requesting a consumer's agreement via a telephone keypad response;[76] (2) one-

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[74] See 67 FR 37366 (May 29, 2002). The two minute estimate likely is conservative. The OMB regulation defining "information" under the PRA generally excludes disclosures that require persons to provide facts necessary simply to identify themselves, *e.g.*, the respondent, the respondent's address, and a description of the information the respondent seeks in detail sufficient to facilitate the request. See 5 CFR 1320.3(h)(1).

[75] See supra text accompanying note 58. As noted above, only sellers, not telemarketers, will have compliance obligations attributable to the 2008 TSR amendments.

[76] During the initial three months of overall PRA clearance sought that will overlap with the remaining phase-in period (May 31 - August 31, 2009) before the written agreement requirement takes effect, the Commission will permit sellers to use prerecorded message calls made to existing customers to secure their agreements to

(continued...)

time modification of or newly created electronic forms to obtain agreements to receive prerecorded calls for use in emails to consumers or on a website[77] (3) one-time revision of any existing paper forms (*e.g.*, credit card or loyalty club forms, or printed consumer contracts) to include a request for the consumer's agreement to receive prerecorded calls;[78] and (4) related legal consultation, if needed, regarding compliance. Annualized for an "average" year over the prospective 3-year PRA clearance (May 31, 2009 - May 31, 2012), this amounts to 3,747 hours per year.

The required opt-out disclosure for all prerecorded calls mandated by the 2008 amendments would not require any greater time increment, and arguably less, than the pre-existing FCC disclosure provision.[79] In any event, because the "opt-out" disclosure applies only to prerecorded calls, which are fully automated, no additional manpower hours would be expended in its electronic delivery.

Estimated annual labor cost burden: $21,498,863

Recordkeeping:

A. Live Telemarketing Call Provisions of the TSR

Assuming a cumulative burden of 7,500 hours/year to set up compliant recordkeeping systems for new telemarketing entities (75 new entrants/year x 100 hours each), and applying to that a skilled labor rate of $25/hour,[80] labor costs would approximate $187,500 yearly for all new telemarketing entities. As indicated above, staff estimates that existing telemarketing entities require 14,335 hours, cumulatively, to maintain compliance with the TSR's recordkeeping provisions. Applying a clerical wage rate of $14/hour, recordkeeping maintenance for existing telemarketing entities would amount to an annual cost of approximately $200,690.

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[76] (...continued)
receive prerecorded calls by pressing a key on their telephone keypad. Once a script is written and recorded, it can be used in all calls made by or on behalf of the seller to obtain the required agreements. Sellers will be able to include the request for the agreement in their regular prerecorded calls, thus making the time necessary to request the required agreements, and the cost of doing so, *de minimis* during the year-long phase-in that will partly overlap with the final year of the current PRA clearance.

[77] This figure includes both the minimal time required to create the electronic form and the time to encode it in HTML for the seller's website.

[78] The Commission has provided suggested language for this purpose that should minimize the time required to modify any paper disclosures. 73 FR at 51181.

[79] The FCC has required a similar disclosure for all prerecorded calls to consumers since 1993. 47 CFR 64.1200(b)(2) (requiring disclosure of a telephone number "[d]uring or after the message" that consumers who receive a prerecorded message call can use to assert a company-specific do-not-call request).

[80] This rounded figure is derived from the mean hourly earnings shown for computer support specialists found in the National Compensation Survey: Occupational Earnings in the United States 2007, U.S. Department of Labor released August 2008, Bulletin 2704, Table 3 ("Full-time civilian workers," mean and median hourly wages). See http://www.bls.gov/ncs/ncswage2007.htm.

Thus, estimated labor cost for recordkeeping associated with the TSR for both new and existing entities, including the prerecorded call amendment, is $388,190.

B. Prerecorded Call Amendment

As noted above, staff estimates that 2,810 existing sellers that make use of prerecorded calls will require 937 hours, cumulatively, on an annualized basis projected over the anticipated future term of PRA clearance, to comply with the amendment's recordkeeping requirements. Staff assumes that the aforementioned tasks will be performed by managerial and/or professional technical personnel, at an hourly rate of $42.[81] Accordingly, incremental labor cost on an annualized basis would total $39,354.

Disclosures:

A. Live Telemarketing Call Provisions of the TSR

The estimated annual labor cost for disclosures for all telemarketing entities is $20,901,764. This total is the product of applying an assumed hourly wage rate of $13[82] to the earlier stated estimate of 1,607,828 hours pertaining to general and specific disclosures in initial calls, upsells, and supplying basic identifying information to the National Registry operator.

B. Prerecorded call amendment

Staff estimates that approximately 75% of the disclosure-related tasks previously noted would be performed by managerial and/or professional technical personnel, again, at an hourly rate of $42, with 25% allocable to legal staff, at an hourly rate of $55.[83]

Thus, of the 3,747 total estimated disclosure burden hours, 2,810 hours would be attributable to managerial and/or professional technical personnel, with the remaining 937 hours attributable to legal staff. This yields $118,020 and $51,535, respectively, in labor costs – in total, $169,555.

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[81] This hourly wage is based on http://www.bls.gov/ncs/ncswage2007.htm (National Compensation Survey: Occupational Earnings in the United States 2007, U.S. Department of Labor released August 2008, Bulletin 2704, Table 3 ("Full-time civilian workers," mean and median hourly wages), and reflects a blending of mean hourly earnings for various managerial subcategories (operations, advertising, marketing, sales) and computer systems analysts.

[82] This rounded figure is derived from the mean hourly earnings shown for telemarketers found in the National Compensation Survey: Occupational Earnings in the United States 2007, U.S. Department of Labor released August 2008, Bulletin 2704, Table 3 ("Full-time civilian workers," mean and median hourly wages). See http://www.bls.gov/ncs/ncswage2007.htm.

[83] This rounded figure is derived from the mean hourly earnings shown for lawyers found in the National Compensation Survey: Occupational Earnings in the United States 2007, U.S. Department of Labor released August 2008, Bulletin 2704, Table 3 ("Full-time civilian workers," mean and median hourly wages). See http://www.bls.gov/ncs/ncswage2007.htm.

Thus, cumulatively for the live telemarketing call provisions of the TSR and the prerecorded call amendment, total labor costs are $21,498,863 ($388,190 + $39,354 + $20,901,764 + $169,555).

(13) Capital and Other Non-labor Cost Estimate

Estimated annual non-labor cost burden: $6,502,350

Recordkeeping:

A. Live Telemarketing Call Provisions of the TSR

Staff believes that the capital and start-up costs associated with the TSR's information collection requirements are *de minimis*. The Rule's recordkeeping requirements mandate that companies maintain records, but not in any particular form. While those requirements necessitate that affected entities have a means of storage, industry members should have that already regardless of the Rule. Even if an entity finds it necessary to purchase a storage device, the cost is likely to be minimal, especially when annualized over the item's useful life. The Rule's disclosure requirements require no capital expenditures.

Affected entities need some storage media such as file folders, computer diskettes, or paper in order to comply with the Rule's recordkeeping requirements. Although staff believes that most affected entities would maintain the required records in the ordinary course of business, staff estimates that the approximately 14,335 telemarketers subject to the Rule spend an annual amount of $50 each on office supplies as a result of the Rule's recordkeeping requirements, for a total recordkeeping cost burden of $716,750.

B. Prerecorded Call Amendment

Other than the initial recordkeeping costs, the amendment's written agreement requirement will impose *de minimis* costs, as discussed above. The one possible exception that might arise involves credit card or loyalty program agreements that retailers revise to request agreements from consumers to receive prerecorded calls. Retailers might have to replace any existing supplies of such agreements. Staff believes, however, that the one-year phase-in of the written agreement requirement will allow retailers to exhaust existing supplies of any such preprinted forms, so that no material additional cost would be incurred to print revised forms.

Disclosures:

A. Live Telemarketing Call Provisions of the TSR

Oral disclosure estimates, discussed above, and totaling 1,607,111 hours, applied to a retained estimated commercial calling rate of 6 cents per minute ($3.60 per hour), amounts to $5,785,600 in phone-related costs.[84] This excludes the 717 hours of reporting hour burden applicable to entities

[84] Staff believes that remaining non-labor costs would largely be incurred by affected entities, regardless, in (continued...)

submitting identifying information to access the Registry, which is done online and, for which, non-labor costs would be *de minimis*.

Staff believes that the estimated 2,447 inbound telemarketing entities choosing to comply with the Rule through written disclosures incur no additional capital or operating expenses as a result of the Rule's requirements because they are likely to provide written information to prospective customers in the ordinary course of business. Adding the required disclosures to that written information likely requires no supplemental non-labor expenditures.

B. Prerecorded Call Amendment

The amendment requires sellers seeking written agreements from consumers to disclose clearly and conspicuously that the purpose of the agreement is to authorize the seller to place prerecorded calls to them. Other than the initial recordkeeping costs, this disclosure requirement will impose *de minimis* costs, for the reasons discussed above.

Similarly, staff has no reason to believe that the amendment's requirement of an automated interactive opt-out mechanism will impose other than *de minimis* costs, for the reasons discussed above. The industry comments on the amendment uniformly support the view that automated interactive keypress technologies are now affordable, cost-effective, and widely available.[85] Moreover, most, if not all of the industry telemarketers who commented, including many small business telemarketers, said they are currently using interactive keypress mechanisms. Thus, it does not appear that this requirement will impose any material capital or other non-labor costs on telemarketers.

Thus, cumulatively for the live telemarketing call provisions of the TSR and the prerecorded call amendment, total capital and other non-labor costs are $6,502,350 (office supplies and phone-related costs).

(14) Estimated Cost to the Federal Government

In the Do-Not-Call Registry Fee Extension Act of 2007, Congress directed the FTC to make a moderate reduction in the TSR's fees for access to the National Registry, and to expand the definition of "exempt" entities eligible to access the National Registry without charge.[86] Accordingly, as

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[84] (...continued)
the ordinary course of business and/or marginally be above such costs.

[85] See, e.g., Comment by IAC/InterActiveCorp & HSN LLC, #525547-00600 (Dec. 18, 2006), at 3, *available at* http://www.ftc.gov/os/comments/tsrrevisedcallabandon/index.shtm (Comment No. 278 of 631).

[86] Pub. L. 110–188, 122 Stat. 635 (2007). Under the Act, National Registry access fees are to be increased after fiscal year 2009 by the amount by which the average monthly Consumer Price Index for urban consumers for the most recently ended 12-month period ending on June 30 exceeds the CPI for the 12 month period ending June 30, 2008, provided the increase is at least one percent.

discussed above in Section 1, the Commission amended its Final Amended Fee Rule to comply with that directive.[87]

Notwithstanding the recent access fee reduction, staff estimates that there will be no annualized net cost to the Federal Government to implement and enforce the TSR during the three year period for which clearance is sought because all such costs will be offset by access fee collections.

(15) Adjustments

The current cumulative burden estimate of 1,634,347 hours is reduced from the FTC's prior cleared burden estimate in 2006 of 2,500,000 (and, incremental to that in 2008, the additional 82,865 hours for the prerecorded call amendments). Estimated non-labor cost is reduced from $12,575,000 to $6,502,350. These reductions are largely attributable to staff's reduced estimates for the number of telemarketing entities subject to the TSR (from 15,000 to 14,335), based on updated National Registry data, a correction to how the estimated number of inbound telemarketers was extrapolated from that overall estimate,[88] the eliminated prior double-counting of telefunders in staff's burden estimates,[89] and a reduced estimate of the number of direct initial sales from inbound calls subject to FTC jurisdiction (2.8 billion versus 3.3 billion previously).

(16) Statistical Use of Information

There are no plans to publish any information for statistical use.

(17) Exceptions for the Display of the Expiration Date for OMB Approval

Not applicable.

(18) Exceptions to the "Certification for Paperwork Reduction Act Submissions"

Not applicable.

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[87] 73 Fed. Reg. 43354 (July 25, 2008) *amending* 16 C.F.R. §§ 310.8(c)-(d).

[88] In 2006, staff applied to its overall estimate of 15,000 affected entities an erroneous ratio of 27/32 to derive the portion of the population consisting of inbound telemarketers, thereby overstating associated calculations regarding them. The apportionment should have been 27/59. The apportionment stated in the instant submission, based on updated DMA data, is 21/41, as explained supra in note 60.

[89] See supra note 52 and accompanying text for further explanation.