

Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, CG Docket No. 02-278**SUPPORTING STATEMENT****A. Justification**

1. In the 1992 *TCPA Order*, the Federal Communications Commission (Commission) implemented final rules pursuant to the requirements of the Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, Dec. 20, 1991.¹ The TCPA added Section 227 to the Communications Act of 1934, as amended, to restrict the use of automatic telephone dialing systems (autodialers), artificial or prerecorded messages, facsimile machines, or other devices to send unsolicited transmissions.²

The rules prohibit prerecorded message calls to residential lines absent an emergency or the prior express consent of the called party. Exceptions to this prohibition apply if the call: (a) is not made for a commercial purpose; (b) does not transmit an unsolicited advertisement; (c) is made by a calling party with whom the called party has an established business relationship;³ or (d) is made by a tax-exempt nonprofit organization.⁴ In addition, the rules prohibit any call, absent an emergency or the prior express consent of the called party, using an automatic telephone dialing system or a prerecorded voice when calling any emergency telephone line (including any “911” line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency), any telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment, or any telephone numbers assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service or any service for which the called party is charged for the call.⁵

The rules further require that telephone solicitors maintain and use company-specific lists of residential subscribers who request not to receive further telephone calls (company-specific do-not-call lists), thereby affording consumers the choice of which solicitors if any, they will hear from by telephone.⁶ Telephone solicitors also are required to have a written policy for maintaining do-not-call lists, and are responsible for informing and training their personnel of the existence and use of such lists.⁷ Moreover, the rules require that those making telephone solicitations identify themselves to called parties, and that basic identifying information also be included in telephone facsimile transmissions.⁸

With respect to facsimile transmissions, the rules ban the use of a telephone facsimile machine, computer, or other device to send an unsolicited advertisement unless the sender has an

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, 7 FCC Rcd 8752 (1992).

² See 47 U.S.C. § 227.

³ In the *Report and Order* adopted on February 15, 2012, the Commission eliminates the established business relationship exemption beginning twelve (12) months after the publication of the OMB approval of the prior express written consent rule adopted in the same item. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC 12-21 (rel. Feb. 15, 2012), at para. 35.

⁴ 47 C.F.R. § 64.1200(a)(2), (c).

⁵ 47 C.F.R. § 64.1200(a)(1).

⁶ 47 C.F.R. § 64.1200(d)(5).

⁷ 47 C.F.R. § 64.1200(d)(1)-(2).

⁸ 47 C.F.R. §§ 64.1200(d)(4), 68.318(d).

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established business relationship with the recipient and the facsimile number is voluntarily obtained in the course of the established business relationship or the number is obtained from the recipient's public distribution of its facsimile number, and the sender includes certain notification and disclosure information in the transmission.⁹

History:

On March 11, 2003, the Do-Not-Call Implementation Act (DNCIA)¹⁰ was signed into law requiring the Commission to issue a final rule in its ongoing TCPA proceeding within 180 days of March 11, 2003, and to consult and coordinate with the Federal Trade Commission (FTC) to "maximize consistency" with the rule promulgated by the FTC in 2002.¹¹

On July 3, 2003, the Commission released a *Report and Order* (2003 TCPA Order), In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, adopted June 26, 2003, CG Docket No. 02-278, FCC 03-153, revising the current TCPA rules and adopting new rules to provide consumers with several options for avoiding unwanted telephone solicitations.¹² The Commission established a national do-not-call registry for consumers who wish to avoid most unwanted telemarketing calls. This national do-not-call registry supplements the company-specific do-not-call rules for those consumers who wish to continue requesting that particular companies not call them. The Commission also adopted a new provision to permit consumers to provide permission to call to specific companies by an express written agreement. The TCPA rules exempt from the "do-not-call" requirements nonprofit organizations, companies with whom consumers have an established business relationship, and calls to persons with whom the telemarketer has a personal relationship. Any company, which is asked by a consumer, including an existing customer, not to call again must honor that request for five (5) years. The Commission retained the calling time restrictions of 8 a.m. until 9 p.m.

To address the use of predictive dialers, the Commission determined that a telemarketer must not abandon more than three (3) percent of calls answered by a person, must deliver a prerecorded identification message when abandoning a call, and must allow the telephone to ring for 15 seconds or four (4) rings before disconnecting an unanswered call. The rules also require all companies conducting telemarketing, with the exception of tax-exempt nonprofit organizations, to transmit caller identification information, when available, and they prohibit companies from blocking such information. The Commission reversed its earlier determination that an established business relationship constitutes express invitation or permission to send an unsolicited fax and determined that the recipient's express permission must be in writing and include the recipient's signature. The Commission also clarified when fax broadcasters are liable for the transmission of unlawful facsimile advertisements.

On January 23, 2004, the Consolidated Appropriations Act of 2004 was signed into law, mandating that the FTC amend its Telemarketing Sales Rule to require telemarketers subject to the Telemarketing Sales Rule to obtain from the FTC the list of telephone numbers on the do-not-call registry once a month. The FTC shortly thereafter amended its safe harbor provision so that

⁹ 47 C.F.R. 64.1200(a)(3).

¹⁰ Do-Not-Call Implementation Act, Pub. Law 108-10, 117 Stat. 557 (2003).

¹¹ 16 C.F.R. § 310.4(b).

¹² This item is referred to as a *Report and Order* because it is the first order to be adopted in CG Docket No. 02-278.

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telemarketers and sellers would need to purge from their calling lists numbers appearing on the national registry every 31 days.

On September 21, 2004, the Commission released an *Order (2004 Safe Harbor Order)* in CG Docket No. 02-278, FCC 04-204, establishing a limited safe harbor in which persons will not be liable for placing autodialed and prerecorded message calls to numbers ported from a wireline service within the previous 15 days. The Commission also amended its existing national do-not-call registry safe harbor to require telemarketers to scrub their call lists against the do-not-call database every 31 days.

On June 17, 2008, the Commission released an *Order* in CG Docket No. 02-278, FCC 08-147, amending the Commission's rules under the TCPA to require sellers and/or telemarketers to honor registrations with the National Do-Not-Call Registry so that registrations will not automatically expire based on the current five year registration period. Specifically, the Commission modified § 64.1200(c)(2) of its rules to require sellers and/or telemarketers to honor numbers registered on the Registry indefinitely or until the number is removed by the database administrator or the registration is cancelled by the consumer.

On January 22, 2010, the Commission released a *Notice of Proposed Rule Making*, CG Docket No. 02-278, FCC 10-18, proposing changes to its rules applicable to calls placed using automatic telephone dialing systems or prerecorded or artificial voice messages. The proposed changes were, in part, intended to maximize consistency between FCC and FTC rules. Specifically, the Commission proposed to: (1) require sellers and telemarketers to obtain consumers' prior express written consent to receive autodialed or prerecorded calls even when there is an established business relationship between the caller and the consumer; (2) require that prerecorded telemarketing calls include an automated, interactive mechanism by which a consumer may "opt-out" of receiving future prerecorded messages from a seller or telemarketer; (3) exempt certain federally regulated health care-related calls from the general section 227(b)(1)(B) prohibition on prerecorded telemarketing calls to residential telephone lines; and (4) adopt a "per-calling-campaign" standard for measuring the maximum percentage of live telemarketing sales calls that a telemarketer lawfully may drop or "abandon" as a result of the use of autodialing software or other equipment.¹³ The Commission also sought comment on whether harmonizing the FCC and FTC rules would benefit consumers and industry, and the costs of implementing the proposed changes.¹⁴

The following is a synopsis of the rules and requirements associated with the information collections that are currently approved by OMB:

- a) 47 C.F.R. § 64.1200(c)(2) - Pursuant to Section 64.1200(c)(2), a residential telephone subscriber may register his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government. Such do-not-call registrations must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator.

¹³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Notice of Proposed Rulemaking, 25 FCC Rcd 1501, 1502, para. 2. (2010) (2010 TCPA NPRM).

¹⁴ *Id.* at 1502-03, 1511, paras. 2, 23.

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- b) 47 C.F.R. § 64.1200(c)(2)(i) and (ii) - No person may make a telephone solicitation to any residential telephone subscriber who has registered their telephone number on the national do-not-call registry. However, the rules adopt a “safe harbor” for telemarketers that have made a good faith effort to comply with the rules. Under this “safe harbor,” a telemarketer will not be liable for violating the do-not-call rules if:
 - (i) it has established and implemented written procedures to comply with the do-not-call rules;
 - (ii) it has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to the do-not-call rules;
 - (iii) the seller, or telemarketer acting on behalf of the seller, has maintained and recorded a list of telephone numbers the seller may not contact;
 - (iv) the seller or telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to the do-not-call rules employing a version of the do not call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process; and
 - (v) any subsequent call otherwise violating the do-not-call rules is the result of the error.
- c) 47 C.F.R. § 64.1200(d) - Telemarketers must maintain their own company-specific do-not-call lists. The Commission reduced the period of time that businesses must retain company-specific do-not-call requests from 10 years to five (5) years and requires companies to process do-not-call requests within 30 days. Businesses that want to call consumers with whom they have no relationship, but who are listed on the national do-not-call list, may obtain a consumer’s express permission to call, evidenced by a signed, written agreement. Tax-exempt nonprofit organizations are not required to comply with the do-not-call rules, including the national do-not-call registry.
- d) 47 C.F.R. § 64.1200(f)(5) - The “established business relationship,” for purposes of telephone solicitations means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber’s purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the telephone call or on the basis of the subscriber’s inquiry or application regarding products or services offered by the entity within the three (3) months immediately preceding the date of the call, which relationship has not been previously terminated by either party.
 - (i) The subscriber’s seller-specific do-not-call request, as set forth in paragraph (d)(3) of this section, terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.
 - (ii) The subscriber’s established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them

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to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

- e) 47 C.F.R. § 64.1200(g)(1) – Common carriers shall, when providing local exchange service, provide an annual notice, via an insert in the subscriber's bill, of the right to give or revoke a notification of an objection to receiving telephone solicitations pursuant to the national do-not-call database maintained by the federal government and the methods by which such rights may be exercised by the subscriber. The notice must be clear and conspicuous and include, at a minimum, the Internet address and toll-free number that residential telephone subscribers may use to register on the national database.
- f) 47 C.F.R. § 64.1200(g)(2) – Common carriers shall, when providing service to any person or entity for the purpose of making telephone solicitations, make a one-time notification to such person or entity of the national do-not-call requirements, including, at a minimum, citation to 47 CFR 64.1200 and 16 CFR 310. Failure to receive such notification will not serve as a defense to any person or entity making telephone solicitations from violations of this section.

New Information Collection Requirements

On February 15, 2012, the Commission released a *Report and Order* in CG Docket No. 02-278, FCC 12-21, modifying the Commission's rules under the TCPA. Specifically, the Commission: (1) revises its rules to require prior express written consent for all autodialed or prerecorded telemarketing calls to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency), any telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment, or any telephone numbers assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service or any service for which the called party is charged for the call¹⁵ and for all prerecorded telemarketing calls to residential lines, while maintaining flexibility in the form of consent needed for purely informational calls; (2) eliminates the established business relationship exemption for prerecorded telemarketing calls to residential lines;¹⁶ (3) adopts rules applicable to all prerecorded telemarketing calls¹⁷ that allow consumers to opt out of future robocalls during a robocall; and (4) revises its rules to limit permissible abandoned calls on a per-calling campaign basis to discourage intrusive calling campaigns.

¹⁵ In 1992, the Commission concluded that cellular carriers need not obtain additional consent from their cellular subscribers prior to initiating autodialed or prerecorded calls for which the cellular subscriber is not charged. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8774, para. 45 (1992) (1992 TCPA Order). We do not depart from this conclusion. *See supra* para 28.

¹⁶ The portion of the statute the Commission addresses in this Report and Order restricts certain calls to "any telephone number assigned to ... cellular telephone service" and to "any residential telephone line." 47 U.S.C. §§ 227(b)(1)(A)(iii), (B). For ease of reference in this Report and Order and to avoid confusion as to which rules apply to calls directed to a cellular telephone number (wireless) or to a residential telephone line (wireline), we will refer to such calls as being placed to a "wireless number" and to a "residential line," respectively. We also note that the existing "established business relationship" (EBR) exemption in this context applies only to prerecorded or artificial voice telemarketing calls to any residential line. 47 U.S.C. § 227(b)(2)(B); 47 C.F.R. § 64.1200(a)(2)(iv)

¹⁷ Throughout the Report and Order, the Commission uses the term "prerecorded" message or call to refer to "artificial or prerecorded voice" messages or calls.

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Finally, the Commission exempts from TCPA requirements prerecorded calls to residential lines made by health care-related entities governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

The Commission revises the following rules, which now contain new information collection requirements:

- g) 47 C.F.R. § 64.1200(a)(2) - Pursuant to Section 64.1200(a)(2), no person or entity may initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any of the lines or telephone numbers described in paragraphs (a)(1)(i)-(iii) of this section,¹⁸ other than a call made with the prior express written consent of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers a “health care” message made by, or on behalf of, a “covered entity” or its “business associate,” as those terms are defined in the HIPAA Privacy Rule, 45 C.F.R. § 160.103.
- h) 47 C.F.R. § 64.1200(a)(3) - Pursuant to Section 64.1200(a)(3), no person or entity initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call; (i) Is made for emergency purposes; (ii) Is not made for a commercial purpose; (iii) Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing; (iv) Is made by or on behalf of a tax-exempt nonprofit organization; or (v) Delivers a “health care” message made by, or on behalf of, a “covered entity” or its “business associate,” as those terms are defined in the HIPAA Privacy Rule, 45 C.F.R. § 160.103.
- i) 47 C.F.R. § 64.1200(a)(7) - Pursuant to Section 64.1200(a)(7), no person or entity may abandon more than three percent of all telemarketing calls that are answered live by a person, as measured over a 30-day period for a single calling campaign. If a single calling campaign exceeds a 30-day period, the abandonment rate shall be calculated separately for each successive 30-day period or portion thereof that such calling campaign continues. A call is “abandoned” if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting.
 - (i) Whenever a live sales representative is not available to speak with the person answering the call, within two (2) seconds after the called person's completed greeting, the telemarketer or the seller must provide:
 - (A) A prerecorded identification and opt-out message that is limited to disclosing that the call was for “telemarketing purposes” and states the name of the business, entity, or

¹⁸ The lines described in 47 C.F.R. § 64.1200(a)(1)(i)-(iii) are the following: any emergency telephone line (including any “911” line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency); any telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or any telephone numbers assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service or any service for which the called party is charged for the call. 47 C.F.R. § 64.1200(a)(1)(i)-(iii).

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individual on whose behalf the call was placed, and a telephone number for such business, entity, or individual that permits the called person to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; provided, that, such telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges, and

(B) An automated, interactive voice- and/or key press-activated opt-out mechanism that enables the called person to make a do-not-call request prior to terminating the call, including brief explanatory instructions on how to use such mechanism. When the called person elects to opt-out using such mechanism, the mechanism must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call.

(ii) A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line or to any of the lines or telephone numbers described in paragraphs (a)(1)(i)-(iii) of this section after the subscriber to such line has granted prior express written consent for the call to be made shall not be considered an abandoned call if the message begins within two (2) seconds of the called person's completed greeting.

(iii) The seller or telemarketer must maintain records establishing compliance with paragraph (a)(7) of this section.

(iv) Calls made by or on behalf of tax-exempt nonprofit organizations are not covered by paragraph (a)(7) of this section.

j) 47 C.F.R. § 64.1200(b)(3) - Pursuant to Section 64.1200(b)(3), all artificial or prerecorded voice telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated;

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; and

(3) In every case where the artificial or prerecorded voice telephone message includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line or any of the lines or telephone numbers described in paragraphs (a)(1)(i)-(iii), provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism, within two (2) seconds of providing the identification information required in paragraph (b)(1) of this section. When the called person elects to opt out using such mechanism, the mechanism, must

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automatically record the called person's number to the seller's do-not-call list and immediately terminate the call. When the artificial or prerecorded voice telephone message is left on an answering machine or a voice mail service, such message must also provide a toll free number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person's number to the seller's do-not-call list.

The statutory authority for the information collection requirements is found in the Telephone Consumer Protection Act of 1991 (TCPA), Pub. Law 102-243, December 20, 1991, 105 Stat. 2394, which added Section 227 of the Communications Act of 1934, [47 U.S.C. 227] Restrictions on the Use of Telephone Equipment.

2. The information collections primarily apply to commercial telemarketers. The national do-not-call registry and company-specific do-not-call requirements do not apply to tax-exempt nonprofit organizations or to calls made by independent telemarketers on behalf of tax-exempt nonprofit organizations. Prior express written consent is only required for telemarketing calls that use any automatic telephone dialing system or that use artificial or prerecorded voice to wireless numbers, to any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center or fire protection or law enforcement agency, or to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment and for telemarketing calls using artificial or prerecorded voice to residential lines. Likewise, the automated, interactive opt-out provision and the abandoned call measurement rule apply only to telemarketing calls. The data generated by the information collections will be used to determine telemarketers' compliance with the TCPA. Among other things, the data will show whether telemarketers are securing prior express written consent before placing autodialed or prerecorded telemarketing calls to wireless numbers and whether telemarketers are securing prior express written consent before placing prerecorded telemarketing calls to residential lines. Additionally, the data will show whether telemarketers provided consumers an automated, interactive opt-out means to terminate exposure to prerecorded telemarketing calls. Lastly, the data generated by the information collections will be used to determine whether telemarketers limited the number of abandoned calls to three percent (3%) of their telemarketing calls within a single calling campaign for a thirty (30) day period.

The information maintained in the do-not-call database (individuals' telephone numbers) is used to assist telemarketers in complying with the rules and to allow government entities to monitor telemarketers' compliance. The information is necessary for the establishment and enforcement of the do-not-call program. Email addresses used to verify registrations are not disclosed to telemarketers and sellers, and are collected only for purposes of registering, verifying, or deleting a consumer's telephone number from the Registry.

The information collections, which require written consent to transmit autodialed or prerecorded commercial solicitations, are necessary to ensure that autodialed or prerecorded commercial solicitations are received only by those individuals or entities that wish to receive them. In addition, the automated, interactive opt-out mechanism, which must be made available at the outset of the prerecorded telemarketing calls and the outset of the prerecorded calls triggered by telemarketing calls that are abandoned and requires a consumer's telephone number be immediately added to the seller's do-no-call list if the consumer elects to opt-out of the

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telemarketing campaign, are necessary to ensure that prerecorded commercial solicitations are received only by those individuals or entities that wish to receive them. In sum, the automated, interactive opt-out mechanism is necessary for consumers to revoke consent if they previously agreed to receive prerecorded telemarketing calls and stop receipt of unwanted, prerecorded telemarketing calls to which they never consented. Finally, additional information collections, which require telemarketers to limit their abandoned calls to three percent (3%) of their telemarketing calls within a single calling campaign for a thirty (30) day period, are necessary to ensure that telemarketers do not exceed the percentage of abandoned calls allowed. These information collections are necessary for the enforcement of the TCPA.

The collection of information may contain individuals' personally identifiable information (PII).

- (a) The FCC maintains an information system, including both paper files and electronic data, which is covered by a system of records notice (SORN), FCC/CGB-1, "Informal Complaints and Inquiries." The SORN covers the collection, purposes(s), storage, safeguards, and disposal of the PII that individuals (respondents) may submit to the Commission as part of filing informal complaints regarding potential violations of the Commission's TCPA rules.
- (b) As required by OMB Memorandum M-03-22 (September 26, 2003), the FCC completed the Privacy Impact Assessment (PIA)¹⁹ on June 28, 2007, that gives a full and complete explanation of how the FCC collects, stores, maintains, safeguards, and destroys the Personally Identifiable Information (PII), as required by OMB regulations and the Privacy Act, 5 U.S.C. 552a. The PIA may be viewed at: http://www.fcc.gov/omd/privacyact/Privacy_Impact_Assessment.html.
- (c) Furthermore, as required by the Privacy Act, 5 U.S.C. § 552a, the FCC also published a system of records notice (SORN), FCC/CGB-1, "Informal Complaints and Inquiries", in the *Federal Register* on December 15, 2009 (74 FR 66356), which became effective on January 25, 2010.
- (d) A system of records for the do-not-call registry was created by the Federal Trade Commission under the Privacy Act. The FTC originally published a notice in the *Federal Register* describing the system (68 FR 37494, June 24, 2003). The FTC updated its system of records for the do-not-call registry in 2009. (74 FR 17863, April 17, 2009).

3. The Commission has determined that most records will continue to be kept electronically. Telemarketers and sellers are able to access the registry electronically and download information as often as they wish. In addition, information collection requirements associated with written consent agreements can be obtained pursuant to any method allowed under the E-SIGN Act (*e.g.*, email, website form, or telephone keypress) to afford telemarketing entities flexibility in determining the method of "written" consent that is best suited to those entities' marketing plans and business operations.

4. The current information collection requirements are not duplicative of any currently existing federal regulatory obligation. The revised FCC rules reduce the inconsistencies that currently exist between the FCC's rules and the Federal Trade Commission's Telemarketing Sales Rule.

¹⁹ The Commission is in the process of updating the PIA to incorporate various revisions to it as a result of revisions to the SORN.

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The revised FCC rules also remove certain differences in the treatment of entities that operate outside of the FTC's jurisdiction. To the extent that the recordkeeping requirements of these modified rules may duplicate the information collection requirements of other federal or state government agencies, the modified rules do not require that a duplicate set of records be maintained.

5. Although this information collection appears to have a significant economic impact on small businesses to the extent that the proposed written consent requirement may entail additional recordkeeping requirements for covered entities that would be required to obtain and keep records of consumers' written consent to receive autodialed or prerecorded message calls, this impact is mitigated for at least two reasons. First, because a seller or telemarketer placing an autodialed or prerecorded telemarketing call to a wireless number or a prerecorded call to a residential line must be prepared to provide, under the Commission's current requirements, "clear and convincing evidence" that it received prior express consent from the called party, whether consent has been obtained orally or in writing, covered entities already are required to maintain records to demonstrate compliance with the existing express consent requirement. In addition, covered entities currently maintain electronic or other records of the existence of an established business relationship in order to demonstrate compliance with current Commission requirements governing prerecorded message calls to established business relationship residential customers. In place of keeping records of "oral consent" as a precondition for placing autodialed or prerecorded telemarketing calls to wireless numbers, or of keeping records of "oral consent" or "established business relationships" as a precondition for placing prerecorded telemarketing calls to residential lines, the proposed rule change would require covered entities to maintain records of consumers' express written agreement to receive such calls. And, because these agreements may be obtained pursuant to the E-SIGN Act, minimal additional recordkeeping should be necessary. For these reasons, the written consent requirement, as a practical matter, may not result in significant new reporting, recordkeeping or other compliance requirements for sellers and telemarketers, including small entities. With respect to the automated, interactive opt-out mechanism, while some economic impact may be experienced by small businesses, we believe the impact is de minimis. This assessment is supported by the comments filed in this proceeding. Notably, the record in this proceeding does not offer any cost estimates for the provision of an automated, interactive opt-out mechanism. Nor does the record offer any rationale based on economic impact or hardship rationale to oppose this new requirement. We lastly consider the economic impact on small businesses of the information collection associated with the change in how the abandoned call rate is measured. Small businesses will not experience any economic impact from the information collection associated with the modification to the abandoned call rule. Notwithstanding the change in how abandoned calls are measured, the information collection remains the same – a telemarketer must maintain records demonstrating compliance with the abandoned call rule. We note that many entities covered by the new requirements will already have been required to comply with virtually identical FTC requirements that are already effective, thereby limiting any additional costs of compliance with new FCC rules.

6. The information collection is necessary to implement the Telephone Consumer Protection Act and the Do-Not-Call Implementation Act by providing consumers with options for avoiding unwanted telemarketing calls. Without these information collections for the Commission's TCPA rules, consumers would likely receive more unwanted telemarketing calls and would have fewer options for avoiding such calls as required under the TCPA. This information collection also would benefit telemarketers and consumers by harmonizing the Commission's telemarketing rules with those of the FTC.

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7. The collection is not conducted in any manner that is inconsistent with the guidelines in 5 C.F.R. § 1320.6.
8. Pursuant to 5 CFR 1320.8(d), the Commission published a notice in the *Federal Register* on [May 30, 2012] at (77 FR 31850), seeking comments from the public on the information collection requirements contained in this supporting statement. The Commission did not receive any comments in response to the notice.
9. The Commission does not anticipate providing any payment or gift to respondents.
10. Under the current information collections, confidentiality is an issue to the extent that individuals' and households' information is contained in the Commission's operations support for complaint analysis and resolution (OSCAR), consumer information management system (CIMS), and consumer case management system (CCMS) databases, which are covered under the Commission's system of records notice (SORN), FCC/CGB-1, "Informal Complaints and Inquiries."
 - (a) The Commission has requested that individuals (consumers/respondents) submit their names, addresses, and telephone numbers, which the Commission's staff need to process the complaints. A privacy statement is included on all FCC forms accessed through our Internet web site. However, consumers who want to provide sensitive information to the Commission are instructed to submit the form via mail rather than electronically.
 - (b) In addition, respondents are made aware of the fact that their complaint information may be released to law enforcement officials and other parties as mandated by law (*i.e.* court-ordered subpoenas). The PII covered by this system of records notice is used by Commission personnel to handle and to process informal complaints from individuals and groups. The Commission does not share this information with other federal agencies except under the routine uses listed in the SORN.

The PIA²⁰ that the Commission completed on June 28, 2007 gives a full and complete explanation of how the Commission collects, stores, maintains, safeguards, and destroys the PII, as required by OMB regulations and the Privacy Act, 5 U.S.C. § 552a. The PIA may be viewed at: http://www.fcc.gov/omd/privacyact/Privacy_Impact_Assessment.html.

Furthermore, as required by the Privacy Act, 5 U.S.C. § 552a, the FCC also published a system of records notice (SORN), FCC/CGB-1, "Informal Complaints and Inquiries", in the *Federal Register* on December 15, 2009 (74 FR 66356), which became effective on January 25, 2010.

A system of records for the do-not-call registry was created by the Federal Trade Commission under the Privacy Act. The FTC originally published a notice in the *Federal Register* describing the system (68 FR 37494, June 24, 2003). The FTC updated its system of records for the do-not-call registry in 2009. (74 FR 17863, April 17, 2009).

The FCC, FTC, and other state regulatory agencies are permitted access to the National Do-Not-Call database for enforcement purposes. Sellers, telemarketers, and other third parties are

²⁰ As stated in fn. 19, the Commission is in the process of updating the PIA to incorporate various revisions to it as a result of revisions to the SORN.

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permitted access to the information maintained in the Do-Not-Call database for purposes of complying with the rules. When there is an indication of a violation or potential violation of the Commission's rules, records (telephone numbers) from the do-not-call database may be obtained for purposes of investigating a violation or for enforcing the rules and may be provided to the respondent/defendant for that same purpose.

The information collections pursuant to this *Report and Order* would not impact or modify any of the confidentiality procedures detailed above.

11. The information collection requirements do not raise any questions or issues of a sensitive nature.

- (a) Additionally, consumers are cautioned not to provide personal information such as social security numbers, credit card numbers, *etc.*
- (b) As noted earlier, the Commission does require consumers (respondents) to provide their names, addresses, and telephone numbers so that Commission staff may process their complaints more expeditiously and if the Commission needs to contact the complainant for any additional information to resolve the complaint.
- (c) In instances where consumers provide PII, the FCC has a SORN, FCC/CGB-1, "Informal Complaints and Inquiries," to cover the collection, use, storage, and destruction of the PII. A full explanation of the privacy safeguards may be found in the Privacy Impact Assessment that the FCC completed on June 28, 2007 and that may be viewed at:
http://www.fcc.gov/omd/privacyact/Privacy_Impact_Assessment.html.

12. Estimates of the burden hours for the collection of information are as follows:

Existing Information Collection Requirements:**Total Number of Respondents: 50,151 respondents²¹**

1. 47 C.F.R. § 64.1200(d) Hour burden for company-specific do-not-call requirements.

The Commission estimates that approximately 44,330 telemarketers (respondents) will maintain company-specific lists of consumers who do not wish to be contacted. The Commission assumes that respondents will receive approximately 133,000 requests per day requiring 15 seconds (.004 hours) per request to process. This process will be done "on-occasion"; thus, the Commission assumes that most recordkeeping will be kept in computer form.

Annual Number of Responses: 133,000 do-not-call request/day x 260²² recordkeeping days/year = **34,580,000 responses/year**

Annual Burden Hours: 133,000 do-not-call requests (responses)/day x .004 hours (15 seconds) per x 260 recordkeeping days/year = **138,320 hours**

²¹ The total number of respondents is as follows: 5,821 common carriers and 44,330 telemarketers.

²² 260 recordkeeping days per year is in terms of "business days" not "calendar days".

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Annual “In-House” Cost: The Commission assumes that respondents use “in-house” personnel to record do-not-call requests, whose pay is comparable to a federal employee GS-4/5, plus 30% overhead. Thus, the Commission estimates respondents cost to be about \$21.50 per hour to comply with the requirement:

133,000 responses x \$.004 per hour/request x 260 recordkeeping days/year x \$21.50 per hour = **\$2,973,880.00**

2. 47 C.F.R. § 64.1200(g)(1) Requirement that 5,821 common carriers (respondents) inform 112,700,000 subscribers of the option to register with a National Do-Not-Call Registry and to inform any telemarketers to which they provide services of the do-not-call requirements. This requirement will be done annually and will require approximately 15 seconds (.004) per request to process.

Annual Number of Responses: 5,821 respondents x 19,361 notifications to subscriber/common carrier provider = **112,700,381 responses**

Annual Burden Hours: 5,821 respondents x 19,361 notifications to subscribers/common carrier provider x .004 per hour/notification = **450,802 hours**

Annual “In-House” Cost: The Commission assumes that respondents use “in-house” personnel to develop and send the notifications, whose pay is comparable to a federal employee GS-4/5, plus 30% overhead. Thus, the Commission estimates respondents’ cost to be about \$21.50 per hour to comply with the requirement:

5,821 respondents x 19,361 notifications to subscribers/common carrier provider x .004 hours/notification/provider x \$21.50 per hour = **\$9,692,232.77**

3. 47 C.F.R. § 64.1200(g)(2) Requirement that common carriers that provide service to any person or entity for the purpose of making telephone solicitations make a one-time notification to such person or entity of the national do-not-call requirements.

The Commission assumes that 39,897 telemarketers (90 percent of 44,330) have been informed of the do-not-call requirements by common carriers since adoption of this rule. In addition, the Commission assumes that 291 common carriers (5% of 5,821 common carriers) will provide a one-time notification to 291 telemarketers.²³ This requirement will be done on occasion and will require approximately 15 seconds (.004) to comply.

Annual Number of Responses: 291 respondents (common carriers) will send x 1 notification (to 291 telemarketers) = **291 responses/year**

Annual Burden Hours: 291 responses x .004 per hour/response = **1 hour/year**

Annual “In-House” Cost:

²³ There is an estimated 4,433 telemarketers that have not been informed of the do-not-call requirements by common carriers. The Commission estimates that they will be informed over an extended period of time. Therefore, the Commission estimates that 291 telemarketers will be notified per year of the do-not-call requirements by common carriers.

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The Commission assumes that respondents use “in-house” personnel to develop and send the notifications, whose pay is comparable to a federal employee GS-4/5, plus 30% overhead. Thus, the Commission estimates respondents’ cost to be about \$21.50 per hour to comply with the requirement:

291 responses x .004 per hour/response x \$21.50 per hour = **\$25.00**

4. 47 C.F.R. § 64.1200(f)(5) Rule that the “established business relationship” (EBR) is limited in duration to 18 months from any purchase or transaction and 3 months from any inquiry or application.

The Commission estimates that a telemarketer must demonstrate its compliance with this requirement “on occasion” and will account for 15 minutes (.25 hour) of recordkeeping burden per telemarketer.

Annual Number of Responses: 44,330 telemarketers (respondents) x 1/monitor EBR purchases or transactions = **44,330 responses**

Annual Hour Burdens: 44,330 responses x .25 hour/monitor EBR purchases or transactions= **11,083 hours**

Annual “In-House” Cost: The Commission assumes that respondents use “in-house” personnel to monitor the existence of their established business relationships, whose pay is comparable to a federal employee GS-4/5, plus 30% overhead. Thus, the Commission estimates respondents’ cost to be about \$21.50 per hour to comply with the requirement:

44,330 responses x .25 per hour/monitor EBR purchases or transactions x \$21.50 per hour = **\$238,273.75**

5. 47 C.F.R. § 64.1200(c)(2)(i), and (ii) Recordkeeping requirements in connection with the National Do-Not-Call Registry. Telemarketers must download the numbers in the registry and “scrub”²⁴ such numbers from their call lists once every 31 days. Once a telemarketer downloads the complete list, it need only obtain “updates” or newly added numbers each month. The Commission estimates that there are approximately 44,330 telemarketers (respondents) in the United States. The Commission believes that 90 percent will access the National Do-Not-Call Registry and scrub their call lists. The Commission estimates that the requirements will account for 1 hour of recordkeeping burden on average per telemarketer.

Annual Number of Respondents: 44,330 respondents x 0.90 (90%) = **39,897 respondents**

Annual Number of Responses: 39,897 x 1/list to scrub = **39,897 responses**

Annual Burden Hours: 39,897 respondents x 1/list to scrub x = 1 hour/maintain record = **39,897 hours**

²⁴ “Scrubbing” refers to comparing a do-not-call list to a company’s call list and eliminating from the call list the telephone numbers of consumers who have registered a desire not to be called.

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Annual “In-House” Cost: The Commission assumes that respondents use “in-house” personnel to access the National Do-Not-Call Registry and scrub their call lists, whose pay is comparable to a federal employee GS-4/5, plus 30% overhead. Thus, the Commission estimates respondents’ cost to be about \$21.50 per hour to comply with the requirement:

$$39,897 \text{ responses} \times 1 \text{ hour/scrub list} \times \$21.50 \text{ per hour} = \$857,785.50$$

New Information Collection Requirements:

6. 47 C.F.R. § 64.1200(a)(2) and (a)(3) Requirement that prior express consent to receive autodialed or prerecorded telemarketing messages to wireless numbers be obtained in writing. Requirement that prior express consent to receive prerecorded telemarketing messages to residential lines.

Under current Commission rules, a seller or telemarketer placing a prerecorded telemarketing call to a residential line or placing an autodialed or prerecorded telemarketing call to a wireless number must be prepared to provide “clear and convincing evidence” that it received prior express consent from the called party, whether consent has been obtained orally or in writing. In addition, sellers and telemarketers already maintain electronic or other records of the existence of an established business relationship in order to demonstrate compliance with current Commission requirements governing prerecorded message calls to established business relationship customers.

Therefore, under the new written consent requirements, covered entities that have not already done so, would be expected to make a one-time modification of their existing customer databases to include an additional field in which they would record consumers’ written consent and to eliminate fields regarding established business relationships. Once this modification has been made, any ongoing incremental burden associated with obtaining and keeping records of consumers’ written consent to receive prerecorded message calls should be minimal, especially due to the fact that the Commission has proposed that written consent may be obtained in any manner allowed by the E-SIGN Act (e.g., an email, website form, text message, telephone keypress, or voice recording). Finally, we note that many entities covered by this new requirement will already have been required to comply with virtually identical FTC requirement that is already effective, thereby limiting any additional costs of compliance with new FCC rule. For these reasons, the Commission estimates that the proposed requirement would account for 1 hour of recordkeeping burden per year per respondent to obtain and keep the records required by the revised rule (including the one-time modifications of existing databases). The Commission estimates that no more than half (50%) of the 44,330 telemarketers, or approximately 22,165 respondents, would be subject to the revised rules.

Annual Number of Responses: 22,165 x 1 record/respondent = **22,165 responses**

Annual Burden Hours: 22,165 respondents x 1 hour/maintain record = **22,165 hours**

Annual “In-House” Cost: The Commission assumes that respondents would use “in-house” personnel to ensure that consumers’ written consent is obtained and recorded. The pay of such personnel is comparable to a federal employee GS-4/5, plus 30% overhead. Thus, the Commission estimates respondents’ cost to be about \$21.50 per hour to comply with the requirement:

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22,165 responses x 1 hour/maintain record x \$21.50 = **\$476,547.50**

7. 4. 47 C.F.R. § 64.1200(a)(7) Requirement that telemarketers (respondents) maintain records demonstrating their compliance with the call abandonment rules.

The Commission estimates that 44,330 telemarketers will maintain compliance records and that this requirement will account for 1 hour of recordkeeping burden per telemarketer. This process will be done “on occasion.”

Annual Number of Responses: 44,330 respondents x 1 record/respondent = **44,330 responses**

Annual Burden Hours: 44,330 responses x 1 hour/maintain record = **44,330 hours**

Annual “In-House” Cost: The Commission assumes that respondents use “in-house” personnel to ensure that the rate of abandoned calls is recorded, whose pay is comparable to a federal employee GS-4/5, plus 30% overhead. Thus, the Commission estimates respondents’ cost to be about \$21.50 per hour to comply with the requirement:

44,330 responses x 1 hour/maintain record x \$21.50 = **\$953,095**

8. Section 64.1200(b)(3) Requirement that all artificial or prerecorded voice telephone telemarketing messages shall include an automated, interactive opt-out mechanism, such as a keypress or voice-activated system, for consumers to employ in order to stop receiving telemarketing messages.

The Commission revises its rules to require that telemarketers offer an automated, interactive opt-out mechanism. While this is a modification of the Commission’s current rules, many of the covered entities already provide an automated, interactive opt out mechanism as required by the Federal Trade Commission’s Telemarketing Sales Rules. As a result, we estimate that not more than one half of telemarketers, 22,165, will face initial implementation of this requirement. In this proceeding, none of the commenters presented any cost estimates or argued that the cost to provide an automated, interactive opt out mechanism imposed significant costs. Based on this information, we estimate that the cost for implementing an automated, interactive opt-out mechanism is *de minimis*.

Additionally, we estimate that telemarketers must demonstrate their compliance with this requirement “on occasion” and will account for 15 minutes of recordkeeping burden per telemarketer.

Annual Number of Responses: 22,165 x 1 record/respondent = **22,165 responses**

Annual Burden Hours: 22,165 respondents x .25 hour/maintain record = **5,542 hours**

Annual “In-House” Cost: The Commission assumes that respondents would use “in-house” personnel to ensure that consumers’ written consent is obtained and recorded. The pay of such personnel is comparable to a federal employee GS-4/5, plus 30% overhead. Thus, the Commission estimates respondents’ cost to be about \$21.50 per hour to comply with the requirement:

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22,165 responses x .25 hour/maintain record x \$21.50 = **\$119,137**

Cumulative Totals for Existing and New Information Collection Requirements:

Total Number of Respondents: 50,151

Total Number of Responses:

34,580,000 + 112,700,381 + 291 + 44,330 + 39,897 + 22,165 + 44,330 + 22,165 = **147,453,559**
responses

Total Annual Burden Hours:

138,320 + 450,802 + 1 + 11,083 + 39,897 + 22,165 + 44,330 + 5,542 = **712,140 hours**

Total Annual “In-House” Costs:

\$2,973,880 + \$9,692,232.77 + \$25.00 + \$238,273.75 + \$857,785.50 + 476,547.50 + \$953,095 +
119,137 = **\$15,310,976.52**

13. The Commission has estimated that there are approximately 44,330 telemarketers that may be affected by these rules. The potential cost to telemarketers of complying with the national do-not-call registry may depend on whether they hire a third party to “scrub” their call lists against the telephone numbers in the national do-not-call database. The Commission anticipates that large telemarketers continue to have longer lists to scrub against the national registry, but that they may be more inclined to hire in-house staff to perform this function. Smaller telemarketing businesses may be able to “scrub” their lists themselves if they have sufficient staff to dedicate to this task. It is unclear how many telemarketers may hire third parties to “scrub” their call lists; however, the Commission estimates that approximately 10 percent of telemarketers may hire a third party to perform this function. The Commission also believes that such telemarketers vary in size and in the number of calls they make. The Commission estimates that the requirement that telemarketers access the national registry every 31 days results in costs on average of \$900 to hire third parties to “scrub” from their call lists 250,000 telephone numbers on the national registry.

(a) Total annualized capital/start-up costs: \$0

(b) Total annual costs (maintenance and operation), calculated as follows:

4,433 telemarketers (10% of 44,330) x \$900/year = **\$3,989,700.**

(c) Total annualized cost requested: \$3,989,700

14. The national do-not-call list is administered by the FTC, which selected Lockheed Martin as the vendor for the database. The Do-Not-Call Implementation Act authorized the FTC to collect fees from telemarketers sufficient to implement and enforce the provisions of the national do-not-call registry. In 2003, Congress initially appropriated \$18 million to operate the do-not-call

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registry. Currently, fees paid by telemarketers to the FTC are used to cover the costs of the registry. Therefore, the Federal Government does not incur any cost for the registry.

15. Due to the adoption of the Commission's Report and Order, FCC 12-21, the Commission has reevaluated its previous burdens associated with this information collection and makes the following assessments (program changes) described herein:

50,151 annual number of respondents; annual number of responses increased by **+44,330**, from 147,409,229 to 147,453,559 responses; annual burden hours increased by **+27,707**, from 684,433 to 712,140 annual hours; and \$3,989,700 annual cost.

With this submission, the Commission used data from FCC Form 499-A filings and the FTC's Biennial Report to Congress to reexamined and reevaluated the data in this supporting statement.

16. There are no plans to publish the result of the collection of information.²⁵ Publishing of recordkeeping data maintained by telemarketers is not mandated by the TCPA or required by Commission's rules.

17. The Commission does not intend to seek approval not to display the expiration date for OMB approval of this information.

18. There are no other exceptions to the Certification Statement.

B. Collections of Information Employing Statistical Methods.

The Commission does not anticipate that the collection of information will employ statistical methods.

²⁵ The national do-not-call registry contains telephone numbers of those individuals who have voluntarily placed their numbers on the registry to avoid receiving telemarketing calls. Telemarketers are required to access the numbers in the registry and scrub their call lists of such numbers in order to comply with the Commission's rules. The collection of information relates only to the requirement on telemarketers to download the telephone numbers in the database. While the Commission may access the registry directly, or request that a telemarketer produce the numbers it obtains from the registry for enforcement purposes, this collection of information will not be made available to the public.