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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No Fee

I/S 20

L/N

17 UNITED STATES OF AMERICA,
18 Plaintiff,
19 v.
20 DIRECTV, Inc., a California Corporation;
21 VOICECAST SYSTEMS, INC., also d/b/a
22 INTOUCH SOLUTIONS, an Illinois
23 Corporation;
24 MICHAEL KURTZ, individually and as an
25 officer of Voicecast Systems, Inc.; and
26 KEYVAN SAEDI, individually and as an
27 officer of Voicecast Systems, Inc.,
28 Defendants.

Civ. No. **CV09-2605 MRP**
**COMPLAINT FOR
CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

FMox

1 Plaintiff, the United States of America, acting upon notification and
2 authorization to the Attorney General by the Federal Trade Commission (“FTC” or
3 “Commission”), pursuant to Section 16(a)(1) of the Federal Trade Commission
4 Act (“FTC Act”), 15 U.S.C. § 56(a)(1), for its Complaint alleges:

5 1. Plaintiff brings this action under Sections 5(m)(1)(A), 16(a), and 19 of the
6 FTC Act, 15 U.S.C. §§ 45(m)(1)(A), 56(a) and 57b, and Section 6 of the
7 Telemarketing and Consumer Fraud and Abuse Prevention Act
8 (“Telemarketing Act”), 15 U.S.C. § 6105, to obtain monetary civil penalties
9 for Defendants’ violations of the Commission’s Trade Regulation Rule
10 Concerning Telemarketing Sales (“Telemarketing Sales Rule,” “TSR,” or
11 “Rule”), 16 C.F.R. Part 310. Plaintiff also brings this action under Section
12 13(b) of the FTC Act, 15 U.S.C. § 53(b), to obtain permanent injunctive
13 relief against Defendants for their violations of Section 5(a) of the FTC Act,
14 15 U.S.C. § 45(a), and the Telemarketing Sales Rule, 16 C.F.R. Part 310.

15 **JURISDICTION AND VENUE**

16 2. This Court has subject matter jurisdiction over this action pursuant to 28
17 U.S.C. §§ 1331, 1337(a), 1345, and 1355 and 15 U.S.C. §§ 45(l),
18 45(m)(1)(A), 53(b), and 56(a). This action arises under 15 U.S.C. §§ 53(b)
19 and 45(a)(1).

20 3. Venue in this District is proper under 28 U.S.C. §§ 1391(b) - (c) and
21 1395(a), and 15 U.S.C. § 53(b).

22 **DEFENDANTS**

23 4. DIRECTV, Inc. (“DIRECTV”) is a California corporation with its principal
24 place of business at 2230 East Imperial Highway, El Segundo, California
25 90245. Defendant DIRECTV is a seller of DIRECTV programming.
26 DIRECTV transacts or has transacted business in the Central District of
27 California.

28

1 5. Voice Cast Systems, Inc., doing business as InTouch Solutions (“InTouch”),
2 is an Illinois corporation with its principal place of business at 1717 Park
3 Street, Suite 301, Naperville, Illinois 60563. Defendant InTouch is a
4 telemarketer that initiates or has initiated outbound telephone calls to induce
5 consumers to purchase goods or services from DIRECTV. InTouch
6 transacts or has transacted business in the Central District of California.

7 6. Michael Kurtz (“Kurtz”) is an owner and president of InTouch. At all times
8 material to this Complaint, acting alone or in concert with others, he has
9 formulated, directed, controlled, or participated in the acts and practices of
10 InTouch, including the acts and practices set forth in this Complaint. He
11 transacts or has transacted business in the Central District of California.

12 7. Keyvan Saedi (“Saedi”) is an owner and officer of InTouch. At all times
13 material to this Complaint, acting alone or in concert with others, he has
14 formulated, directed, controlled, or participated in the acts and practices of
15 InTouch, including the acts and practices set forth in this Complaint. He
16 transacts or has transacted business in the Central District of California.

17 **THE TELEMARKETING SALES RULE**

18 8. Congress directed the FTC to prescribe rules prohibiting abusive and
19 deceptive telemarketing acts or practices pursuant to the Telemarketing Act,
20 15 U.S.C. §§ 6101-6108, in 1994. On August 16, 1995, the FTC adopted
21 the TSR, 16 C.F.R. Part 310, and amended it on January 29, 2003.

22 9. As amended, the TSR prohibits telemarketers from initiating, and sellers
23 from causing a telemarketer to initiate, any outbound telephone call to a
24 person when that person previously has stated that he or she does not wish
25 to receive an outbound telephone call made by or on behalf of the seller
26 whose goods or services are being offered. 16 C.F.R. § 310.4(b)(1)(iii)(A).

27 10. The TSR also prohibits telemarketers from “abandoning,” and sellers from
28 causing any telemarketer to abandon, an outbound telephone call. An

1 outbound telephone call is abandoned if a person answers it and the
2 telemarketer does not connect the call to a sales representative within two
3 seconds of the person's completed greeting. 16 C.F.R. § 310.4(b)(1)(iv).
4 The use of prerecorded message telemarketing, where a sales pitch to a live
5 consumer begins with or is made entirely by a prerecorded message, violates
6 the TSR because the telemarketer is not connecting the call to a sales
7 representative within two seconds of the person's completed greeting.

8 11. Under the TSR, a "seller" is any person who, in connection with a
9 telemarketing transaction, provides, offers to provide, or arranges for others
10 to provide goods or services to the customer in exchange for consideration.
11 16 C.F.R. § 310.2(z).

12 12. A "telemarketer" is any person who, in connection with telemarketing,
13 initiates or receives telephone calls to or from a customer or donor.
14 16 C.F.R. § 310.2(bb).

15 13. A "person" includes any individual, group, unincorporated association,
16 limited or general partnership, corporation, or other business entity.
17 16 C.F.R. § 310.2(v).

18 14. "Telemarketing" is a plan, program, or campaign which is conducted to
19 induce the purchase of goods or services or a charitable contribution, by use
20 of one or more telephones and which involves more than one interstate
21 telephone call. 16 C.F.R. § 310.2(cc).

22 15. An "outbound telephone call" is a telephone call initiated by a telemarketer
23 to induce the purchase of goods or services or to solicit a charitable
24 contribution. 16 C.F.R. § 310.2(u).

ORDER AGAINST DIRECTV

- 1
2 16. On December 12, 2005, the United States, on behalf of the Federal Trade
3 Commission, brought suit in this District against DIRECTV and several
4 entities that had made calls on its behalf (United States v. DIRECTV et al.,
5 C.D. Ca., No. SACV05-1211), alleging that they violated the TSR by
6 initiating telephone calls to persons on the National Do-Not-Call Registry
7 and failing to connect calls to sales representatives within two seconds of
8 the consumer's greeting.
- 9 17. On December 14, 2005, Judge David O. Carter of the United States District
10 Court for the Central District of California entered a Stipulated Order,
11 requiring DIRECTV to pay a civil penalty of \$5,335,000, and enjoining it
12 from, *inter alia*, future violations of the TSR. A copy of the Stipulated
13 Order is attached hereto as Exhibit A.

DEFENDANTS' BUSINESS ACTIVITIES

- 14
- 15 18. DIRECTV is a "seller" as defined by the TSR, 16 C.F.R. § 310.2(z).
16 DIRECTV sells satellite television programming subscriptions to consumers
17 throughout the United States who enter into contracts directly with
18 DIRECTV to obtain programming.
- 19 19. DIRECTV markets its programming through a variety of methods, including
20 telemarketing.
- 21 20. On March 16, 2004, DIRECTV entered into a contractual agreement with
22 InTouch under the terms of which InTouch was to provide automated
23 telemarketing services at the direction of and on behalf of DIRECTV.
- 24 21. InTouch is a "telemarketer" engaged in "telemarketing," as defined by the
25 TSR, 16 C.F.R. § 310.2.
- 26 22. Beginning on or about August 15, 2007, InTouch engaged in a
27 telemarketing campaign on behalf of DIRECTV. During the campaign,
28 InTouch contacted persons who had previously stated that they did not wish

1 to receive outbound telephone calls from DIRECTV. The calls consisted
2 entirely of a pre-recorded message.

3 23. The pre-recorded message told persons who received the calls that “from
4 time to time, [DIRECTV] extend[s] exciting offers to our loyal customers,
5 like you, but because you are on the DIRECTV Do Not Call List, we are not
6 able to contact you for these exciting offers.” The pre-recorded message
7 then instructed call recipients to press 1 on their phones to remove their
8 number from DIRECTV’s Do Not Call List.

9 24. InTouch placed a total of 1,050,007 calls during the 42-day period from
10 August 15 through September 25, 2007.

11 **VIOLATIONS OF THE TELEMARKETING SALES RULE**

12 **COUNT I**

13 **(Violation of 16 C.F.R. § 310.4(b)(1)(iii)(A))**

14 25. Paragraphs 1-24 are incorporated herein by reference.

15 26. In conducting the telemarketing campaign described in paragraphs 18-24,
16 DIRECTV violated the TSR, 16 C.F.R. § 310.4(b)(1)(iii)(A), and Paragraph
17 I.A.1 of the Stipulated Order, by causing InTouch to place outbound
18 telephone calls to persons who previously had stated that they did not wish
19 to receive outbound telephone calls from DIRECTV.

20 27. In conducting the telemarketing campaign described in paragraphs 18-24,
21 InTouch, Kurtz, and Saedi violated the TSR, 16 C.F.R.
22 § 310.4(b)(1)(iii)(A), by placing outbound telephone calls to persons who
23 previously had stated that they did not wish to receive outbound telephone
24 calls from DIRECTV.

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COUNT II

(Violation of 16 C.F.R. § 310.4(b)(1)(iv))

- 13 28. Paragraphs 1-27 are incorporated herein by reference.
- 14 29. In conducting the telemarketing campaign described in paragraphs 18-24,
15 DIRECTV violated the TSR, 16 C.F.R. § 310.4(b)(1)(iv) and Paragraph 1.B
16 of the Stipulated Order, by causing InTouch to place pre-recorded outbound
17 telephone calls to consumers, and thereby to abandon the calls.
- 18 30. In conducting the telemarketing campaign described in paragraphs 18-24,
19 InTouch, Kurtz, and Saedi violated the TSR, 16 C.F.R. § 310.4(b)(1)(iv), by
20 placing pre-recorded outbound telephone calls to consumers, and thereby
21 abandoning the calls.

CIVIL PENALTIES

- 22 31. Paragraphs 1-30 are incorporated herein by reference.
- 23 32. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), as modified
24 by Section 4 of the Federal Civil Penalties Inflation Adjustment Act of
25 1990, 28 U.S.C. § 2461, as amended, and as implemented by 16 C.F.R.
26 § 1.98(d) (2009) and by 74 Fed. Reg. 857 (Jan. 9, 2009) (to be codified at
27 16 C.F.R. § 1.98(d)), authorizes this Court to award monetary civil penalties
28 of up to \$11,000 for each violation of the TSR on or before February 9,
2009, and up to \$16,000 for each violation of the TSR after February 9,
2009. Defendants' violations of the TSR were committed with the
knowledge required by Section 5(m)(1)(A) of the FTC Act, 15 U.S.C.
§ 45(m)(1)(A).

INJUNCTIVE RELIEF

33. Paragraphs 1-32 are incorporated herein by reference.
34. Section 13(b) of the FTC Act, 5 U.S.C. § 53(b) empowers this Court to
grant injunctive and other ancillary relief to prevent and remedy any
violation of any provision of law enforced by the FTC.

1 35. This Court, in the exercise of its equitable jurisdiction, may award ancillary
2 relief to remedy injury caused by a defendant's violations of the Rule and
3 the FTC Act.

4 36. Defendants' violations of Section 5 of the FTC Act, 15 U.S.C. § 45(a), as
5 set forth above, have caused and are likely to continue to cause substantial
6 injury to consumers. Absent injunctive relief by this Court, Defendants are
7 likely to continue to injure consumers and harm the public interest.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiff, pursuant to Sections 5(a), 5(m)(1)(A), 13(b), and
10 19 of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), and 57b, and the
11 Court's own equitable powers, requests that the Court:

- 12 1. Enter judgment against Defendants and in favor of Plaintiff for each
13 violation alleged in this complaint;
- 14 2. Award Plaintiff monetary civil penalties from Defendants for each violation
15 of the TSR;
- 16 3. Enter permanent injunctions to prevent future violations of the FTC Act and
17 the TSR by Defendants;
- 18 4. Award Plaintiff the costs of bringing this action, as well as such other and
19 additional relief as the Court may determine to be just and proper.

20
21 Respectfully submitted,


22 FOR THE UNITED STATES OF
23 AMERICA

24 MICHAEL F. HERTZ
25 Acting Assistant Attorney General
26 Civil Division
27 United States Department of Justice


28 THOMAS P. O'BRIEN
United States Attorney
Central District of California

23 DATED: April 15, 2009

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16 IN THE UNITED STATES DISTRICT COURT
17 FOR THE CENTRAL DISTRICT OF CALIFORNIA
18 WESTERN DIVISION

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CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES

BY

21 UNITED STATES OF AMERICA,

22 Plaintiff,

23 v.

24 DIRECTV, Inc., et al.

Civ. No.

STIPULATED JUDGMENT
AND ORDER FOR PERMANENT
INJUNCTION AGAINST
DIRECTV, INC.

25
26 Plaintiff, the United States of America, acting upon
27 notification and authorization to the Attorney General by the
28 Federal Trade Commission ("FTC" or the "Commission"), has

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1 commenced this action by filing the complaint herein, and
2 Defendant DIRECTV, Inc., has waived service of the summons and
3 the complaint. The parties, represented by the attorneys whose
4 names appear hereafter, have agreed to settlement of this action
5 without adjudication of any issue of fact or law, and without
6 Defendant admitting liability for any of the violations alleged
7 in the complaint.

8 **THEREFORE**, on the joint motion of the parties, it is hereby
9 **ORDERED, ADJUDGED AND DECREED** as follows:

10 **FINDINGS**

- 11 1. This Court has jurisdiction over the subject matter
12 pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345 and 1355, and 15
13 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a), and 57b.
- 14 2. Plaintiff and Defendant consent to jurisdiction and
15 venue in this District.
- 16 3. The activities of Defendant are in or affecting
17 commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
- 18 4. The complaint states a claim upon which relief may be
19 granted against Defendant, under Sections 5(a), 5(m)(1)(A), 13(b)
20 and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C.
21 §§ 45(a), 45(m)(1)(A), 53(b), and 57b.
- 22 5. Defendant hereby waives all rights to appeal or
23 otherwise challenge or contest the validity of this Order.
- 24 6. Defendant has agreed that this Order does not entitle
25 Defendant to seek or to obtain attorneys' fees as a prevailing
26 party under the Equal Access to Justice Act, 28 U.S.C. § 2412,
27 and Defendant further waives any rights to attorneys' fees that
28 may arise under said provision of law.

1 a catalog which: contains a written description or illustration
2 of the goods or services offered for sale; includes the business
3 address of the seller; includes multiple pages of written
4 material or illustrations; and has been issued not less
5 frequently than once a year, when the person making the
6 solicitation does not solicit customers by telephone but only
7 receives calls initiated by customers in response to the catalog
8 and during those calls takes orders only without further
9 solicitation. For purposes of the previous sentence, the term
10 "further solicitation" does not include providing the customer
11 with information about, or attempting to sell, any other item
12 included in the same catalog which prompted the customer's call
13 or in a substantially similar catalog.

14 7. "Seller" means any person who, in connection with a
15 telemarketing transaction, provides, offers to provide, or
16 arranges for others to provide goods or services to the customer
17 in exchange for consideration, whether or not such person is
18 under the jurisdiction of the Federal Trade Commission.

19 8. "Telemarketer" means any person who, in connection with
20 telemarketing, initiates or receives telephone calls to or from a
21 customer or donor.

22 9. "Authorized Telemarketer" means a person that has
23 received express, written authorization from DIRECTV to use
24 telemarketing to market DIRECTV goods or services.

25 10. "National Do Not Call Registry" means the National Do
26 Not Call Registry maintained by the Federal Trade Commission
27 pursuant to 16 C.F.R. § 310.4(b)(1)(iii)(B).

28

1 11. "Established business relationship" means a
2 relationship between the seller and a person based on: (a) the
3 person's purchase, rental, or lease of the seller's goods or
4 services or a financial transaction between the person and
5 seller, within the eighteen (18) months immediately preceding the
6 date of the telemarketing call; or (b) the person's inquiry or
7 application regarding a product or service offered by the seller,
8 within the three months immediately preceding date of a
9 telemarketing call.

10 12. "DIRECTV goods or services" means satellite programming
11 and all other goods or services.

12 13. "Authorized Marketer" means a business or other entity
13 with whom DIRECTV has entered into an agreement authorizing the
14 solicitation of DIRECTV goods or services.

15 **ORDER**

16 **I. PROHIBITION AGAINST AN ABUSIVE PATTERN OF TELEMARKETING CALLS**

17 **IT IS HEREBY ORDERED** that, in connection with telemarketing
18 DIRECTV goods or services, DIRECTV, whether acting directly or
19 indirectly through Authorized Telemarketers, is hereby
20 permanently restrained and enjoined from engaging in violations
21 of the Telemarketing Sales Rule, including but not limited to:

22 A. Initiating any outbound telephone call to a person
23 when:

24 1. that person previously has stated to DIRECTV or an
25 Authorized Telemarketer that he or she does not
26 wish to receive an outbound telephone call made by
27 or on behalf of DIRECTV, unless the provisions of
28

- 1 16 C.F.R. § 310.4(b)(3) (the Telemarketing Sales
2 Rule Do Not Call safe harbor) are met;
3 2. that person's telephone number is on the National
4 Do Not Call Registry, unless:
5 a. DIRECTV has obtained the express agreement,
6 in writing, of such person to place calls to
7 that person, clearly evidencing such person's
8 authorization that calls made by or on behalf
9 of DIRECTV may be placed to that person, and
10 including the telephone number to which the
11 calls may be placed and the signature of that
12 person; or
13 b. DIRECTV has an established business
14 relationship with such person, and that
15 person has not stated to DIRECTV or an
16 Authorized Telemarketer that he or she does
17 not wish to receive outbound telephone calls
18 pursuant to § 310.4(b)(1)(iii)(A) of the
19 Telemarketing Sales Rule; or
20 c. The provisions of 16 C.F.R. § 310.4(b)(3)
21 (the Telemarketing Sales Rule Do Not Call
22 safe harbor) are met.
- 23 B. Abandoning any outbound telephone call to a person by
24 failing to connect the call to a representative within
25 two (2) seconds of the person's completed greeting,
26 unless the following four (4) conditions are met:
27 1. DIRECTV or an Authorized Telemarketer employ
28 technology that ensures abandonment of no more

- 1 than three (3) percent of all calls answered by a
2 person, measured per day per calling campaign;
- 3 2. Defendant or an Authorized Telemarketer, for each
4 telemarketing call placed, allows the telephone to
5 ring for at least fifteen (15) seconds or four (4)
6 rings before disconnecting;
- 7 3. Whenever a representative is not available to
8 speak with the person answering the call within
9 two (2) seconds after the person's completed
10 greeting, DIRECTV or an Authorized Telemarketer
11 promptly plays a recorded message that states the
12 name and telephone number of the seller on whose
13 behalf the call was placed;
- 14 4. DIRECTV or an Authorized Telemarketer retains
15 records, in accordance with 16 C.F.R. 310.5(b)-
16 (d), establishing compliance with the preceding
17 three conditions.
- 18 C. Pending resolution of the proceeding to amend the TSR,
19 69 Fed. Reg. 67287 (Nov. 17, 2004), DIRECTV or an
20 Authorized Telemarketer will not be deemed to be in
21 violation of the TSR's call abandonment prohibition, 16
22 CFR 310.4(b)(1)(iv), or Paragraph B of this Order,
23 immediately above, for placing a telephone call that
24 delivers a prerecorded telemarketing message to a
25 consumer with whom DIRECTV has an established business
26 relationship, as defined in the TSR, if DIRECTV or an
27 Authorized Telemarketer conducts such call in
28 conformity with the terms of the proposed amended call

1 abandonment safe harbor published in the Nov. 17, 2004
2 Federal Register Notice at 69 Fed. Reg. 67287 (copy
3 appended as Appendix B). Upon resolution of that rule
4 amendment proceeding, subparagraph B of this Paragraph
5 will be deemed to incorporate any amendments to
6 § 310.4(b)(4), and subparagraph C of this Paragraph
7 will have no further effect.

8 D. If the Commission amends the Telemarketing Sales Rule,
9 in whole or part, DIRECTV and its Authorized
10 Telemarketers shall, in connection with telemarketing
11 DIRECTV goods or services, comply fully and completely
12 with all applicable requirements of the amended Rule,
13 on and after the effective date of any such amended
14 Rule.

15 **II. MONITORING OF AUTHORIZED TELEMARKETERS**

16 **IT IS FURTHER ORDERED** that DIRECTV is hereby permanently
17 restrained and enjoined from:

18 A. Failing to conduct a reasonable due diligence
19 investigation of a person before making the person an
20 Authorized Telemarketer, to ensure that the person has
21 established and actively enforces effective policies
22 and procedures for compliance with the Telemarketing
23 Sales Rule, including procedures to prevent the
24 initiation of outbound telemarketing calls to numbers
25 on the National Do Not Call Registry, in violation of
26 16 C.F.R. § 310.4(b)(1)(iii), and to prevent call
27 abandonment, in violation of § 310.4(b)(1)(iv);
28

- 1 B. Failing to have a written contract with each Authorized
2 Telemarketer;
- 3 C. Failing to include in the written contract with each
4 Authorized Telemarketer requirements that the
5 Authorized Telemarketer comply with all provisions of
6 the Telemarketing Sales Rule, including, but not
7 limited to, § 310.4(b)(1)(iii) and (iv);
- 8 D. Failing to monitor outbound telemarketing campaigns
9 conducted by an Authorized Telemarketer to determine
10 whether:
- 11 1. Any telemarketing call is placed only to a
12 telephone number that is -
- 13 a. not on the National Do Not Call Registry
14 and not on an individual do not call
15 list maintained by DIRECTV or any of its
16 Authorized Telemarketers; or
- 17 b. on the National Do Not Call Registry,
18 provided that the customer either has
19 given his or her express agreement in
20 writing to receive telemarketing calls
21 at that number, or has an established
22 business relationship with DIRECTV;
- 23 2. Not more than three percent (3%) of telemarketing
24 calls answered by a person, measured per day per
25 calling campaign, are being connected to a pre-
26 recorded message in lieu of a live sales
27 representative, pursuant to 16 C.F.R.
28 §§ 310.4(b)(1)(iv) and 310.4(b)(4);

1 E. Providing any monetary compensation for any
2 telemarketing related sales or activities, including
3 but not limited to hourly rates of pay or commissions,
4 to any Authorized Telemarketer after DIRECTV knows or
5 reasonably should have known that such Authorized
6 Telemarketer has, in connection with telemarketing
7 DIRECTV goods and services;

8 (i) failed to fulfill contract requirements with
9 respect to compliance with the Telemarketing
10 Sales Rule, or

11 (ii) violated the Telemarketing Sales Rule.

12 F. Continuing to do business with any Authorized
13 Telemarketer that fails to fulfill contract
14 requirements with respect to compliance with the
15 Telemarketing Sales Rule, or violates any provision of
16 the Telemarketing Sales Rule.

17 *Provided, however, that this Paragraph does not prohibit*
18 *DIRECTV from entering into a subscription agreement with a*
19 *consumer who was called by an Authorized Telemarketer that fails*
20 *to fulfill contract requirements with respect to compliance with*
21 *the Telemarketing Sales Rule, violates any provision of the*
22 *Telemarketing Sales Rule, or fails to comply with Paragraph I of*
23 *this Order.*

24 **III. MONITORING OF AUTHORIZED MARKETERS**

25 **IT IS FURTHER ORDERED** that DIRECTV is hereby permanently
26 restrained and enjoined from:

27
28

- 1 A. Failing to monitor Authorized Marketers to determine
2 whether they are initiating contact with consumers
3 through outbound telephone calls to telemarket DIRECTV
4 goods or services; and
- 5 B. Doing business with any Authorized Marketer and shall
6 not provide any monetary compensation, including but
7 not limited to hourly rates of pay or commissions, to
8 any Authorized Marketer who DIRECTV knows or should
9 know engages in the following conduct:
- 10 1. initiating contact with consumers through outbound
11 telephone calls to telemarket DIRECTV goods or
12 services without express, written authorization
13 from DIRECTV; or
- 14 2. entering into any type of agreement with any other
15 person to initiate contact with consumers through
16 outbound telephone calls to telemarket DIRECTV
17 goods or services.

18 *Provided, however, this Paragraph does not prohibit DIRECTV*
19 *from entering into a subscription agreement with a consumer who*
20 *was called in violation of the Telemarketing Sales Rule, or by a*
21 *person who has engaged in any of the conduct described in*
22 *subparagraph B of this Paragraph of this Order.*

23 **IV. ADDITIONAL MONITORING**

24 **IT IS FURTHER ORDERED** that DIRECTV is hereby permanently
25 restrained and enjoined from failing to take the following
26 actions with regard to Authorized Telemarketers and Authorized
27 Marketers:

28

1 A. DIRECTV shall develop, implement, adequately staff, and
2 continuously operate and maintain, a system to receive
3 and retain complaints related to telemarketing DIRECTV
4 goods and services that are received by telephone,
5 mail, and e-mail. DIRECTV shall take all reasonable
6 steps to obtain, record, retain, and make easily
7 accessible to DIRECTV and, upon reasonable request, the
8 FTC, all relevant information regarding all complaints
9 relating to telemarketing of DIRECTV goods or services,
10 including but not limited to: (1) the consumer's name,
11 address, and telephone number; (2) the substance of the
12 complaint, including the name of any person referenced;
13 (3) the nature and result of any investigation
14 conducted concerning the complaint; (4) each response
15 to the complaint and the date of such response to the
16 complaint; (5) any final resolution of the complaint,
17 and the date of such resolution; (6) in the event of a
18 denial of any resolution, the reason for the denial;
19 (7) the name, telephone number, and address of the
20 Authorized Telemarketer or Authorized Marketer which
21 made the call that was the basis for the complaint; (8)
22 the date of the call; and (9) any relevant information
23 for determining whether a violation of the
24 Telemarketing Sales Rule has occurred. The system for
25 complaints related to telemarketing shall be capable of
26 producing and shall produce monthly reports that show
27 (1) the aggregate number of complaints relating to
28 telemarketing, (2) the total number and type of

1 telemarketing complaints for each Authorized
2 Telemarketer, and (3) the total number and type of
3 telemarketing complaints for each Authorized Marketer;
4 B. DIRECTV shall promptly investigate each consumer
5 complaint relating to telemarketing or the
6 Telemarketing Sales Rule and shall take all reasonable
7 steps to identify the person whose activities prompted
8 the complaint; and
9 C. At the time DIRECTV activates a new subscriber, DIRECTV
10 shall ask how the person was solicited and shall note
11 and keep records of any response indicating that the
12 person was initially solicited by an outbound telephone
13 call. For each subscriber who indicates that he or she
14 was contacted initially through an outbound telephone
15 call, DIRECTV shall, as soon as practicable, identify
16 the Authorized Marketer who will receive the payment
17 from DIRECTV in respect to such subscriber activation
18 and use this information to monitor compliance with
19 this Order. DIRECTV shall keep this procedure in place
20 for a period of three (3) years after November 15,
21 2005, or three (3) years after the date of entry of
22 this Order, whichever date is later.
23 **V. PROHIBITION ON ASSISTING AND FACILITATING**
24 **IT IS FURTHER ORDERED** that DIRECTV is hereby permanently
25 restrained and enjoined from providing substantial assistance and
26 support to any telemarketer when DIRECTV knows or consciously
27 avoids knowing that the telemarketer is engaged in one or more
28 violations of the Telemarketing Sales Rule.

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VI. CIVIL PENALTY

IT IS FURTHER ORDERED that judgment in the amount of Five Million Three Hundred Thirty Five Thousand Dollars (\$5,335,000.00) is hereby entered against DIRECTV as a civil penalty pursuant to Section 5(m) (1) (A) of the Federal Trade Commission Act, 15 U.S.C. § 45(m) (1) (A).

- A. Prior to or concurrently with its execution of this Order, DIRECTV shall transfer the civil penalty payment in the form of a wire transfer or certified or cashier's check made payable to the Treasurer of the United States. The check or written confirmation of the wire transfer shall be delivered to: Director, Office of Consumer Litigation, U.S. Department of Justice Civil Division, P.O. Box 386, Washington, DC 20044. The cover letter accompanying the check shall include the title of this litigation and a reference to DJ# 102-3316.
- B. In the event of default on the payment required to be made by this Paragraph, the entire unpaid civil penalty, together with interest computed under 28 U.S.C. § 1961 -- accrued from the date of default until the date of payment -- shall be immediately due and payable.
- C. DIRECTV shall cooperate fully with Plaintiff and the Commission and their agents in all attempts to collect the amount due pursuant to this Paragraph if DIRECTV fails to pay fully the amount due at the time specified herein. In such an event, DIRECTV agrees to provide

1 Plaintiff and the Commission with its federal and state
2 tax returns for the preceding two years, and to
3 complete new standard financial disclosure forms fully
4 and accurately within ten (10) business days of
5 receiving a request from Plaintiff or the Commission to
6 do so. DIRECTV further authorizes Plaintiff and the
7 Commission to verify all information provided on the
8 financial disclosure form from DIRECTV with all
9 appropriate third parties, including but not limited to
10 financial institutions.

11 D. In accordance with 31 U.S.C. § 7701, DIRECTV is hereby
12 required, unless DIRECTV has done so already, to
13 furnish to Plaintiff and the FTC, DIRECTV's taxpayer
14 identifying number(s) (employer identification numbers)
15 which shall be used for purposes of collecting and
16 reporting on any delinquent amount arising out of such
17 Defendant's relationship with the government.

18 E. DIRECTV agrees that the facts as alleged in the
19 complaint filed in this action shall be taken as true
20 for the purpose of a nondischargeability complaint in
21 any bankruptcy proceeding.

22 F. Proceedings instituted under this Paragraph are in
23 addition to, and not in lieu of, any other civil or
24 criminal remedies that may be provided by law,
25 including any other proceedings the Commission may
26 initiate to enforce this Order.

27 G. This Order resolves all allegations in the Complaint
28 against DIRECTV and that nothing in this Paragraph

1 permits the Commission to seek any additional remedies
2 for the conduct alleged in the complaint against
3 DIRECTV.

4 **VII. COMPLIANCE MONITORING**

5 **IT IS FURTHER ORDERED** that, for the purpose of monitoring
6 and investigating compliance with any provision of this Order,

7 A. Within thirty (30) days of receipt of written notice
8 from a representative of the Commission or Plaintiff,
9 DIRECTV shall submit additional written reports, sworn
10 to under penalty of perjury; produce documents for
11 inspection and copying; appear for deposition; and/or
12 provide entry during normal business hours to any
13 business location in DIRECTV's possession, or direct or
14 indirect control, to inspect the business operation;

15 B. In addition, the Commission and Plaintiff are
16 authorized to monitor compliance with this Order by all
17 other lawful means, including but not limited to the
18 following:

19 1. Obtaining discovery from any person, without
20 further leave of court, using the procedures
21 prescribed by Fed. R. Civ. P. 30, 31, 33, 34,
22 36, and 45; and

23 2. Posing as consumers and suppliers to DIRECTV,
24 any of DIRECTV's employees, or any other
25 entity managed or controlled in whole or in
26 part by DIRECTV, without the necessity of
27 identification or prior notice; and

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1 C. DIRECTV shall permit representatives of the Commission
2 or Plaintiff to interview any employer, consultant,
3 independent contractor, representative, agent, or
4 employee who has agreed to such an interview, relating
5 in any way to any conduct subject to this Order. The
6 person interviewed may have counsel present;

7 *Provided, however,* that nothing in this Order shall limit
8 the Commission's lawful use of compulsory process, pursuant to
9 Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to
10 obtain any documentary material, tangible things, testimony, or
11 information relevant to unfair or deceptive acts or practices in
12 or affecting commerce (within the meaning of 15 U.S.C.
13 § 45(a)(1)).

14 **VIII. COMPLIANCE REPORTING**

15 **IT IS FURTHER ORDERED** that, in order that compliance with
16 the provisions of this Order may be monitored:

17 A. For a period of three (3) years from the date of entry
18 of this Order DIRECTV shall notify the Commission of
19 any changes in corporate structure that may affect
20 compliance obligations arising under this Order,
21 including but not limited to a dissolution, assignment,
22 sale, merger, or other action that would result in the
23 emergence of a successor entity; the creation or
24 dissolution of a subsidiary, parent, or affiliate that
25 engages in any acts or practices subject to this Order;
26 the filing of a bankruptcy petition; or a change in the
27 corporate name or address, at least thirty (30) days
28 prior to such change, *provided that,* with respect to

1 any proposed change in the corporation about which
2 DIRECTV learns less than thirty (30) days prior to the
3 date such action is to take place, DIRECTV shall notify
4 the Commission as soon as is practicable after
5 obtaining such knowledge.

6 B. One hundred eighty (180) days after the date of entry
7 of this Order, DIRECTV shall provide a written report
8 to the FTC, sworn to under penalty of perjury, setting
9 forth in detail the manner and form in which it has
10 complied and is complying with this Order. This report
11 shall include:

- 12 1. A copy of each acknowledgment of receipt of this
13 Order, obtained pursuant to Paragraph X of this
14 Order;
- 15 2. Any changes required to be reported pursuant to
16 subparagraph (A) of this Paragraph;
- 17 3. A list of the telephone numbers that DIRECTV or
18 any Authorized Telemarketers used or uses in
19 telemarketing since entry of this Order; and the
20 name and address of the phone company providing
21 service, including any telephone number programmed
22 to be transmitted for caller identification
23 purposes.
- 24 4. A list of all subscription account numbers DIRECTV
25 or any Authorized Telemarketers have used, uses,
26 or have obtained in connection with the National
27 Do Not Call Registry since entry of this Order;
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5. A list of all Authorized Telemarketers and Authorized Marketers, including the trade names and any other names under which, to DIRECTV's knowledge, these entities do business.

C. Once every twelve months, starting after the 180-day report required in Paragraph VIII.B above is provided, for a period of three years, DIRECTV shall provide a written report to the FTC that includes a reasonably detailed description of all monitoring activity taken by DIRECTV pursuant to Paragraphs II, III, and IV of this Order. The report shall also be served upon the Board of Directors of DIRECTV. The report shall include as applicable, but is not be limited to, the following:

1. A reasonably detailed description of the due diligence review DIRECTV performed on prospective Authorized Telemarketers and the results of the due diligence review;
2. The names, addresses and telephone numbers of all Authorized Telemarketers and the dates they became Authorized Telemarketers;
3. The names, addresses, and telephone numbers of all Authorized Marketers;
4. The names, addresses, and telephone numbers of all Authorized Telemarketers and all Authorized Marketers who have been terminated by DIRECTV for reasons related to telemarketing, the dates of the

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terminations, and the specific reasons for termination;

5. At the end of each quarter, starting after the 180-day report required in Paragraph VIII.B above is provided, for a period of three years, DIRECTV will provide a description of all outbound telemarketing campaigns conducted by DIRECTV or its Authorized Telemarketers during the previous quarter, including, for each campaign, the dates during which each campaign was in place and the average number of calls made each day. At the Commission's discretion, in each quarter, it may request detailed data for up to three days for one telemarketing campaign or one day each for each campaign. For each selected day, DIRECTV will supply the names of the entities making the calls, the telephone numbers each entity called, the basis for any established business relationship between DIRECTV and a person at the number called, or if such person does not have an established business relationship with DIRECTV, the reason why that person was called;
6. A detailed description of the methodology and results of DIRECTV's investigation of any call by an Authorized Telemarketer to a telephone number on the National Do Not Call Registry which shall include, but not be limited to, (a) the date of the call, (b) whether there is an existing

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business relationship with the consumer, and (c) if there is an existing business relationship, the date it began;

7. Evidence showing that DIRECTV developed, implemented, staffed, and operated a system for complaints related to telemarketing pursuant to Paragraph IV of this Order;
8. Evidence showing that DIRECTV took all reasonable steps to capture, record and retain every complaint relating to telemarketing that it received;
9. Evidence showing that DIRECTV took all reasonable steps to obtain, record, and retain all relevant information regarding all complaints relating to telemarketing DIRECTV goods or services, including, to the extent provided by the complainant or discovered through investigation:
 - (1) the consumer's name, address, and telephone number;
 - (2) the substance of the complaint, including the name of any person referenced;
 - (3) the nature and result of any investigation conducted concerning the complaint;
 - (4) each response to the complaint, and the date of such response to the complaint;
 - (5) any final resolution of the complaint, and the date of such resolution;
 - (6) in the event of a denial of any resolution, the reason for the denial;
 - (7) the name, telephone number, and address of the

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- Authorized Telemarketer or Authorized Marketer;
(8) the date of the call; and (9) any relevant information for determining whether a violation of the Telemarketing Sales Rule has occurred;
10. Evidence showing that DIRECTV's system for complaints related to telemarketing produced monthly reports pursuant to Paragraph IV of this Order;
 11. Copies of all monthly reports showing the aggregate number of complaints relating to telemarketing, the total number and type of telemarketing complaints for each Authorized Telemarketer, and the total number and type of telemarketing complaints for each Authorized Marketer;
 12. Evidence showing that DIRECTV promptly investigated each consumer complaint relating to telemarketing and took all reasonable steps to identify the person whose activities prompted the consumer complaint; and
 13. Evidence showing that DIRECTV has complied with Paragraph IV.C.
- D. For the purposes of this Order, DIRECTV shall, unless otherwise directed by the Commission's authorized representatives, mail all written notifications to the Commission to:

1 Associate Director for Enforcement
2 Federal Trade Commission
3 601 New Jersey Ave., NW
4 Washington, DC 20580
5 Re: United States v. DIRECTV, Civ. No. ____.

6 The Commission shall, unless otherwise directed by
7 DIRECTV's officers or attorneys, mail all written
8 notifications to DIRECTV to:

9 Executive Vice President, General Counsel
10 DIRECTV, Inc.
11 2230 East Imperial Hwy., 11th Floor
12 El Segundo, CA 90245

- 13 E. For the purposes of this Order, DIRECTV shall, unless
14 otherwise directed by a representative of Plaintiff,
15 identify all written notifications to Plaintiff as
16 provided in reference to DJ# 102-3316, and mail them
17 to:

18 Director, Office of Consumer Litigation
19 U.S. Department of Justice - Civil Division
20 P.O. Box 386
21 Washington, DC 20044.

- 22 F. For purposes of the compliance reporting and monitoring
23 required by this Order, representatives of Plaintiff
24 and the Commission are authorized to communicate
25 directly with officers of DIRECTV.

26 **IX. RECORD KEEPING PROVISIONS**

27 **IT IS FURTHER ORDERED** that, for a period of six (6) years
28 from the date of entry of this Order, DIRECTV and its successors
and assigns, shall maintain and make available to the Plaintiff
or Commission, within thirty (30) days of the receipt of a
written request, business records demonstrating compliance with
the terms and provisions of this Order.

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X. DISTRIBUTION OF ORDER BY DEFENDANT

IT IS FURTHER ORDERED that, for a period of three (3) years from the date of entry of this Order, DIRECTV shall deliver copies of this Order as directed below:

- A. DIRECTV must deliver a copy of this Order to all officers and directors. DIRECTV shall also deliver a copy of this Order to all of its employees who are responsible for telemarketing DIRECTV goods or services, handling telemarketing complaints, or maintaining records relating to telemarketing complaints or other telemarketing activities. For the current officers, directors and employees described above, delivery of this Order shall be within five (5) days of service of this Order on DIRECTV. For new personnel, delivery shall occur prior to them assuming their responsibilities with DIRECTV.
- B. DIRECTV must secure a signed and dated statement acknowledging receipt of this Order, within thirty (30) days of delivery, from all persons receiving a copy of this Order pursuant to this Paragraph.

XI. ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANT

IT IS FURTHER ORDERED that DIRECTV, within five (5) business days of receipt of this Order as entered by the Court, must submit to the Plaintiff and the Commission a truthful sworn statement acknowledging receipt of this Order.

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XII. FEES AND COSTS

IT IS FURTHER ORDERED that each party to this Order hereby agrees to bear its own costs and attorneys' fees incurred in connection with this action.

XIII. SEVERABILITY

IT IS FURTHER ORDERED that the provisions of this Order are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall remain in full force and effect.

XIV. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification and enforcement of this Order.

XV. COMPLETE SETTLEMENT

The parties, by their respective counsel, hereby consent to entry of the foregoing Order which shall constitute a final judgment and order in this matter. The parties further stipulate

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and agree that the entry of the foregoing Order shall constitute a full, complete and final settlement of this action.

FOR THE DEFENDANTS:

FOR THE PLAINTIFF:




PETER D. KEISLER, JR.
Assistant Attorney General
Civil Division
U.S. DEPARTMENT OF JUSTICE

By: Larry D. Hunter
Executive Vice President and
General Counsel of DIRECTV

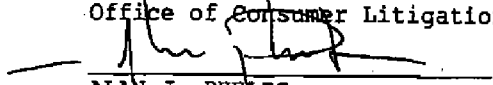
DEBRA W. YANG
United States Attorney
Central District of California



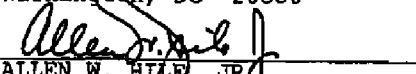

LINDA KONTOS
Assistant U.S. Attorney


LARRY D. HUNTER
Counsel for DIRECTV

EUGENE M. THIROLF
Director
Office of Consumer Litigation



ALAN J. PHELPS
Trial Attorney
Office of Consumer Litigation
Civil Division
U.S. Department of Justice
Washington, DC 20530


ALLEN W. HILE, JR.
Acting Associate Director for
Marketing Practices


RUSSELL DEITCH
GARY IVENS
Attorneys, Federal Trade
Commission
600 Pennsylvania Ave, N.W.,
Washington, DC 20580

IT IS SO ORDERED.

DATED: December 14, 2005


UNITED STATES DISTRICT JUDGE

Appendix A



Code of Federal Regulations

16

Parts 0 to 999

Revised as of January 1, 2004

Commercial Practices

Containing a codification of documents
of general applicability and future effect

As of January 1, 2004

With Ancillaries

Published by
Office of the Federal Register
National Archives and Records
Administration

A Special Edition of the Federal Register

Exhibit A, p.37

Part 310

16 CFR Ch. I (1-1-04 Edition)

**PART 310—TELEMARKETING SALES
RULE**

- Sec.
- 310.1 Scope of regulations in this part.
- 310.2 Definitions.
- 310.3 Deceptive telemarketing acts or practices.
- 310.4 Abusive telemarketing acts or practices.
- 310.5 Recordkeeping requirements.
- 310.6 Exemptions.
- 310.7 Actions by states and private persons.
- 310.8 Fee for access to "do-not-call" registry.
- 310.9 Severability.

AUTHORITY: 15 U.S.C. 6101-6109.

SOURCE: 68 FR 4689, Jan. 29, 2003, unless otherwise noted.

§ 310.1 Scope of regulations in this part.

This part implements the Telemarketing and Consumer Fraud and

Abuse Prevention Act, 15 U.S.C. 6101-6109, as amended.

§ 310.2 Definitions.

(a) *Acquirer* means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.

(b) *Attorney General* means the chief legal officer of a state.

(c) *Billing information* means any data that enables any person to access a customer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

Federal Trade Commission

§ 310.2

(k) *Caller identification service* means a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone.

(l) *Cardholder* means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.

(m) *Charitable contribution* means any donation or gift of money or any other thing of value.

(n) *Commission* means the Federal Trade Commission.

(o) *Credit* means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(p) *Credit card* means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(q) *Credit card sales draft* means any record or evidence of a credit card transaction.

(r) *Credit card system* means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.

(s) *Customer* means any person who is or may be required to pay for goods or services offered through telemarketing.

(t) *Donor* means any person solicited to make a charitable contribution.

(u) *Established business relationship* means a relationship between a seller and a consumer based on:

- (1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or
- (2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

(v) *Free-to-pay conversion* means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a

product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.

(w) *Investment opportunity* means anything, tangible or intangible, that is offered, offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation.

(x) *Material* means likely to affect a person's choice of, or conduct regarding, goods or services or a charitable contribution.

(y) *Merchant* means a person who is authorized under a written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(z) *Merchant agreement* means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(aa) *Negative option feature* means, in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.

(ab) *Outbound telephone call* means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.

(ac) *Person* means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(ad) *Preacquired account information* means any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged.

(ae) *Prize* means anything offered, or purportedly offered, and given, or purportedly given, to a person by chance.

§ 310.3

16 CFR Ch. I (7-1-04 Edition)

For purposes of this definition, chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.

(y) *Prize promotion* means:

(1) A sweepstakes or other game of chance; or

(2) An oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.

(z) *Seller* means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.

(aa) *State* means any state of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(bb) *Telemarketer* means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

(cc) *Telemarketing* means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

(dd) *Upselling* means soliciting the purchase of goods or services following an initial transaction during a single telephonic call. The upsell is a separate telemarketing transaction, not a continuation of the initial transaction. An "external upsell" is a solicitation 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. An "internal upsell" is a solicitation 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.

§ 310.3 Deceptive telemarketing acts or practices.

(a) *Prohibited deceptive telemarketing acts or practices.* It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(i) Before a customer pays for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:

(I) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer;¹

(II) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

(III) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the customer that this is the

¹When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment.

²For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 16 CFR 226, compliance with the disclosure requirements under the Truth in Lending Act and Regulation Z shall constitute compliance with § 310.3(a)(1)(I) of this Rule.

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seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and, if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chance of winning; and the no-purchase/no-payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate;

(v) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(vi) In the sale of any goods or services represented to protect, insure, or otherwise limit a customer's liability in the event of unauthorized use of the customer's credit card, the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 16 U.S.C. 1643; and

(vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

(ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;

(iii) Any material aspect of the performance, efficacy, nature, or general

characteristics of goods or services that are the subject of a sales offer;

(iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

(v) Any material aspect of a prize promotion including, but not limited to, the odds of being able to receive a prize, the nature or value of a prize, or that a purchase or payment is required to win a prize or to participate in a prize promotion;

(vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability;

(vii) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity;

(viii) That any customer needs offered goods or services to provide protections a customer already has pursuant to 16 U.S.C. 1643; or

(ix) Any material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(3) Causing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z,³ or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E.⁴ Such authorization shall be deemed verifiable if any of the following means is employed:

³Truth in Lending Act, 16 U.S.C. 1601 et seq., and Regulation Z, 12 CFR part 226.

⁴Electronic Fund Transfer Act, 16 U.S.C. 1601 et seq., and Regulation E, 12 CFR part 205.

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(3) Express written authorization by the customer or donor, which includes the customer's or donor's signature;⁵

(11) Express oral authorization which is audio-recorded and made available upon request to the customer or donor, and the customer's or donor's bank or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer's or donor's receipt of all of the following information:

(A) The number of debits, charges, or payments (if more than one);

(B) The date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;

(C) The amount(s) of the debit(s), charge(s), or payment(s);

(D) The customer's or donor's name;

(E) The customer's or donor's billing information, identified with sufficient specificity such that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction;

(F) A telephone number for customer or donor inquiry that is answered during normal business hours; and

(G) The date of the customer's or donor's oral authorization; or

(12) Written confirmation of the transaction, identified in a clear and conspicuous manner as such on the outside of the envelope, sent to the customer or donor via first class mail prior to the submission for payment of the customer's or donor's billing information, and that includes all of the information contained in §§ 310.3(a)(3)(1)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate; provided, however, that this means of authorization shall not be

⁵For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and preacquired account information.

(4) Making a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution.

(b) *Assisting and facilitating.* It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c) or (d), or § 310.4 of this Rule.

(c) *Credit card laundering.* Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for:

(1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;

(2) Any person to employ, solicit, or otherwise cause a merchant, or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

(3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.

(d) *Prohibited deceptive acts or practices in the solicitation of charitable contributions.* It is a fraudulent charitable solicitation, a deceptive telemarketing act or practice, and a violation of this Rule for any telemarketer soliciting charitable contributions to misrepresent, directly or by implication, any of the following material information:

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- (1) The nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested;
- (2) That any charitable contribution is tax deductible in whole or in part;
- (3) The purpose for which any charitable contribution will be used;
- (4) The percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program;
- (5) Any material aspect of a prize promotion including, but not limited to: the odds of being able to receive a prize; the nature or value of a prize; or that a charitable contribution is required to win a prize or to participate in a prize promotion; or
- (6) A charitable organization's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.

turn of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney.

(4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person;

(5) Disclosing, or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; provided, however, that this paragraph shall not apply to the disclosure or receipt of a customer's or donor's billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction;

(6) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements in paragraphs (a)(5)(i) through (10) of this section must be met to evidence express informed consent.

(i) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the seller or telemarketer must:

(A) obtain from the customer, at a minimum, the last four (4) digits of the account number to be charged;

(B) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account number pursuant to paragraph (a)(5)(i)(A) of this section; and,

(C) make and maintain an audio recording of the entire telemarketing transaction.

§310.4 Abusive telemarketing acts or practices.

(a) *Abusive conduct generally.* It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Threats, intimidation, or the use of profane or obscene language;

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:

(i) The time frame in which the seller has represented all of the goods or services will be provided to that person has expired; and

(ii) The seller has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Nothing in this Rule should be construed to affect the requirement in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose;

(3) Requesting or receiving payment of any fee or consideration from a person for goods or services represented to recover or otherwise assist in the re-

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(C) In any other telemarketing transaction involving preacquired account information not described in paragraph (a)(6)(i) of this section, the seller or telemarketer must:

(A) at a minimum, identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged; and

(B) obtain from the customer or donor his or her express agreement to be charged for the goods or services and to be charged using the account number identified pursuant to paragraph (a)(6)(iv)(A) of this section; or

(7) Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call; provided that it shall not be a violation to substitute (i) the name and phone number used in, or billed for, making the call; the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours.

(b) *Pattern of calls.* (1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

(i) Causing any telephone to ring, or engaging any person in telephone conversation; repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls established to comply with § 310.4(b)(1)(iii);

(iii) Initiating any outbound telephone call to a person when:

(A) that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization

for which a charitable contribution is being solicited; or

(B) that person's telephone number is on the "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller

(i) has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature* of that person; or

(ii) has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

(iv) Abandoning any outbound telephone call. An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

(2) It is an abusive telemarketing act or practice and a violation of this Rule for any person to sell, rent, lease, purchase, or use any list established to comply with § 310.4(b)(1)(iii)(A), or maintained by the Commission pursuant to § 310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists.

(3) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(ii) and (iii) if it can demonstrate that, as part of the seller's or telemarketer's routine business practices:

(i) It has established and implemented written procedures to comply with § 310.4(b)(1)(ii) and (iii);

(ii) It has trained its personnel, and any entity assisting in its compliance,

*For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

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in the procedures established pursuant to §310.4(b)(3)(1);

(iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of telephone numbers; the seller or charitable organization may not contact, in compliance with §310.4(b)(3)(ii)(A);

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to §310.4(b)(3)(ii) or §310.4(b)(3)(ii)(B), employing a version of this "do-not-call" registry obtained from the Commission no more than three (3) months prior to the date any call is made, and maintains records documenting this process;

(v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to §310.4(b)(3)(C); and

(vi) Any subsequent call otherwise violating §310.4(b)(3)(ii) or (iii) is the result of error.

(8) A seller or telemarketer will not be liable for violating §310.4(b)(3)(iv) if:

(i) the seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign;

(ii) the seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed; and

(iv) the seller or telemarketer, in accordance with §310.4(b)-(3), retains records establishing compliance with §310.4(b)(3)(C)-(iii).

(o) *Calling time restrictions.* Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location.

(d) *Required oral disclosures in the sale of goods or services.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

- (1) The identity of the seller;
- (2) That the purpose of the call is to sell goods or services;
- (3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion, if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion; provided, however, that in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

(e) *Required oral disclosures in charitable solicitations.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution, to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

- (1) The identity of the charitable organization, on behalf of which the request is being made; and

*This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1201.

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(2) That the purpose of the call is to solicit a charitable contribution.

§310.5 Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

(1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of \$25.00 or more;

(3) The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;

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

(5) All verifiable, authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.

(b) A seller or telemarketer may keep the records required by §310.5(a) in any form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by §310.5(a) shall be a violation of this Rule.

(c) The seller and the telemarketer calling on behalf of the seller may, by written agreement, allocate responsibility between themselves for the recordkeeping required by this Section. When a seller and telemarketer have entered into such an agreement, the

terms of that agreement shall govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, the seller shall be responsible for complying with §§310.5(a)(1)-(3) and (5); the telemarketer shall be responsible for complying with §310.5(a)(4).

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

§310.5 Exemptions.

(a) Solicitations to induce charitable contributions via outbound telephone calls are not covered by §310.4(b)(1)(ii)(B) of this Rule.

(b) The following acts or practices are exempt from this Rule:

(1) The sale of pay-per-call services subject to the Commission's Rule entitled "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992" 16 CFR Part 308, provided, however, that this exemption does not apply to the requirements of §§310.4(a)(1), (a)(7), (b), and (c);

(2) The sale of franchises subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," ("Franchise Rule") 16 CFR Part 436, provided, however, that this exemption does not apply to the requirements of §§310.4(a)(1), (a)(7), (b), and (c);

(3) Telephone calls in which the sale of goods or services or charitable solicitation is not completed, and payment or authorization of payment is not required, until after a face-to-face sales or donation presentation by the seller or charitable organization, provided, however, that this exemption does not apply to the requirements of §§310.4(a)(1), (a)(7), (b), and (c);

*For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 et seq. and Regulation Z, 12 CFR Part 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with §310.5(a)(2) of this Rule.

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(4) Telephone calls initiated by a customer or donor that are not the result of any solicitation by a seller, charitable organization, or telemarketer, provided, however, that this exemption does not apply to any instances of upselling included in such telephone calls;

(5) Telephone calls initiated by a customer or donor in response to an advertisement through any medium, other than direct mail solicitation, provided, however, that this exemption does not apply to calls initiated by a customer or donor in response to an advertisement relating to investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or advertisements involving goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls;

(6) Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this Rule, for any goods or services offered in the direct mail solicitation, and that contains no material misrepresentation regarding any item contained in § 310.3(d) of this Rule for any requested charitable contribution; provided, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls; and

(7) Telephone calls between a telemarketer and any business, except calls to induce the retail sale of non-durable office or cleaning supplies; provided, however, that § 310.4(b)(1)(iii)(B) and § 310.5 of this Rule shall not apply to sellers or telemarketers of non-durable office or cleaning supplies.

§ 310.7 Actions by states and private persons.

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

(b) Nothing contained in this Section shall prohibit any attorney general or other authorized state official from proceeding in state court on the basis of an alleged violation of any civil or criminal statute of such state.

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

(a) It is a violation of this Rule for any seller to initiate, or cause, any telemarketer to initiate, an outbound telephone call to any person whose telephone number is within a given area code unless such seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to telephone numbers within that area code that are included in the National Do Not Call Registry maintained by the Commission under § 310.4(b)(1)(iii)(B); provided, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(ii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

(b) It is a violation of this Rule for any telemarketer, on behalf of any seller, to initiate an outbound telephone call to any person whose telephone number is within a given area code unless that seller, either directly or

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through another person, first has paid the annual fee, required by § 310.8(c), for access to the telephone numbers within that area code that are included in the National Do Not Call Registry; provided, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(H)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

(c) The annual fee, which must be paid by any person prior to obtaining access to the National Do Not Call Registry, is \$25 per area code of data accessed, up to a maximum of \$7,375; provided, however, that there shall be no charge for the first five area codes of data accessed by any person, and provided further, that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the National Do Not Call Registry without being required under this Rule, 47 CFR § 1.1200, or any other federal law. Any person accessing the National Do Not Call Registry may not participate in any arrangement to share the cost of accessing the registry, including any arrangement with any telemarketer or service provider to divide the costs to access the registry among various clients of that telemarketer or service provider.

(d) After a person, either directly or through another person, pays the fees set forth in § 310.8(c), the person will be provided a unique account number which will allow that person to access the registry data for the selected area codes at any time for twelve months following the first day of the month in which the person paid the fee ("the annual period"). To obtain access to additional area codes of data during the first six months of the annual period, the person must first pay \$25 for each additional area code of data not initially selected. To obtain access to additional area codes of data during the second six months of the annual period, the person must first pay \$15 for each additional area code of data not initially selected. The payment of the additional fee will permit the person to

access the additional area codes of data for the remainder of the annual period.

(e) Access to the National Do Not Call Registry is limited to telemarketers, sellers, others engaged in or causing others to engage in telephone calls to consumers, service providers acting on behalf of such persons, and any government agency that has law enforcement authority. Prior to accessing the National Do Not Call Registry, a person must provide the identifying information required by the operator of the registry to collect the fee, and must certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent telephone calls to telephone numbers on the registry. If the person is accessing the registry on behalf of sellers, that person also must identify each of the sellers on whose behalf it is accessing the registry, must provide each seller's unique account number for access to the national registry, and must certify, under penalty of law, that the sellers will be using the information gathered from the registry solely to comply with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on the registry.

[28 FR 45144, July 31, 2003]

§ 310.9 Severability.

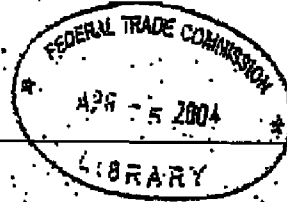
The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.



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Nevertheless, the Commission believes that, to the extent that this amendment has an economic effect on small business, the Commission has adopted an approach that minimizes the impact to ensure that it is not burdensome, while fulfilling the mandate of the Appropriations Act that all businesses obtain data from the National Do Not Call Registry on a monthly basis.

As discussed above in detail, based on the record, the Commission has extended the interval at which businesses must access Registry data and purge their calling lists of numbers contained on the Registry to thirty-one (31) days, the maximum allowable pursuant to the Appropriations Act. In recognition of the need for businesses, particularly small businesses, to modify their procedures and systems to accommodate this amendment, the Commission has set the effective date for this amended Rule provision as January 1, 2005, allowing more than nine months time for necessary preparations.

4. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement of Obtaining Data From the National Do Not Call Registry Every Thirty (30) Days and the Type of Professional Skills That Will Be Necessary To Comply.

As discussed in the NPRM, this amendment does not impose any new, or affect any existing, reporting, disclosure, or specific recordkeeping requirements within the meaning of the Paperwork Reduction Act. The Commission further pointed in the NPRM that it did not "believe that the modification regarding sellers and telemarketers to obtain data from the National Registry at a more frequent interval will create a significant burden on sellers or telemarketers that have already established systems to comply with the requirement in the existing TSR that requires accessing the Registry database on a quarterly basis." But, the Commission recognized that "there will likely be additional costs" incurred to access the Registry every thirty days (effectively twelve (12) times per year) versus the current requirement

telemarketing does not distinguish between those entities that conduct exempt calling, such as survey calling, those that make cold calls, and those that conduct outbound calling campaigns. Moreover, sellers who act as their own telemarketers are not covered by the Consent Rule.

of every three months (effectively four (4) times per year).²²

Many commenters argued that the amended Rule provision will be burdensome to businesses, particularly small businesses. NADA noted that "dealers and other small businesses can expect a corresponding increase in the personnel costs necessary to download the data and perform the scrub. Because small businesses may lack available personnel to perform this additional function, they may find it necessary to outsource the function to a vendor, which would further increase costs associated with the more frequent scrub requirement." However, as described below, in response to Question 5, the Commission has taken steps to minimize the impact of the amended Rule provision on small businesses, to the extent possible while still effectuating the mandate of the Appropriations Act.

5. Steps the Agency Has Taken To Minimize Any Significant Economic Impact on Small Entities, Consistent With the Stated Objectives of the Appropriations Act, Including the Federal Policy, and Legal Reasons For Selecting the Alternative Finally Adopted, and Why Each of the Significant Alternatives Was Rejected.

As noted in the NPRM, the Appropriations Act of 2004 provides the Commission no discretion in the matter of whether to amend the TSR. The Commission, however, included in the NPRM a request for factual information about the amount of time it will take for "sellers and telemarketers, including small businesses, to modify their business procedures and systems to be able to comply with the amended provision." Based on the record, the Commission has determined to set the effective date for this amendment as January 1, 2005. This time frame will, as noted above, provide businesses,

²² Based on data obtained during the TSR comment period finalized in 2003, the Commission estimated that "the cost of accessing the National Do Not Call Registry to purge the numbers it contains from a company's calling list (expressed here as the fee paid to obtain the list) is around \$700. Given this estimate, sellers and telemarketers wishing to comply with the proposed rule modification would pay \$1,400 per year (\$700 per scrub x 21 scrubs per year) rather than \$420 per year (\$210 per scrub x 2 scrubs per year)."

²³ NADA also commented on January 1, 2005 effective date. See also Section 4.3 noting that the more frequent scrub interval will "add an additional burden to SELLERS, and cost 'next to nothing' to NRP at 2.3. The smaller businesses, in particular, the ones least likely to be forced to spend each month in order to prepare to conduct their businesses in relation to the time they would spend scrubbing their customer's

especially small businesses," adequate time to modify their systems and procedures to comply with the amended provision. In addition, the Commission has extended the interval at which businesses must access Registry data and purge their calling lists of numbers contained on the Registry to thirty-one (31) days, the maximum allowable pursuant to the Appropriations Act mandate.

Thus, while the Commission considered more burdensome alternatives (i.e., choosing an interval of thirty (30), rather than thirty-one (31) days, the Commission rejected those alternatives, as discussed above, in favor of a regulatory approach that was the least burdensome to all regulated entities, including small entities, if any.

IX. Amended Rule
Accordingly, the Commission amends title 16, Code of Federal Regulations, as follows:

PART 310--TELEMARKETING SALES RULE

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

Authority: 16 U.S.C. 5511-5512.

2. Amend § 310.4 by revising paragraph (b)(3)(iv) to read as follows:

§ 310.4 Abusive telemarketing acts or practices.

(b) * * *

(iv) The seller or a telemarketer uses a pretext to prevent telemarketing to any telephone number on any list established pursuant to § 310.4(b)(3)(iii) or 310.4(b)(3)(iv), employing a version of the "do-not-call" registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process;

By direction of the Commission,
Donald S. Clark,
Secretary.

Note: This appendix will not appear in the Code of Federal Regulations.

²⁴ The Commission notes that the TSR applies only to interstate telemarketing campaigns, and thus, is likely to exempt numerous small business entities that only conduct their telemarketing within a single state. The FCC, which regulates intrastate calling, while not mandated by the Appropriations Act to modify its telemarketing rules, is considering a change to bring them in line with the TSR. See FCC Staff Comment on Rules to Eliminate Spam From Mobile Phone Commission Also Acts for Comments on Prohibiting "Robo-Caller" for Telemarketing Calls to Mobile Phones, Mar. 23, 2004 (containing references to the FCC's pending NPRM on a thirty (30) day scrub interval).



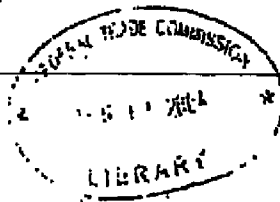
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expired, it will be presumed to renew its subscription at that time.

I. Paperwork Reduction Act

The proposed revised fee provision does not create any new recordkeeping, reporting, or third-party disclosure requirements. However, the Commission now has data based on the operation of the National Do Not Call Registry indicating that an estimated 8,000 entities will access the registry each year. The Commission's staff has increased its estimate of the total paperwork burden accordingly, and has notified the Office of Management and Budget ("OMB") of the resulting minor change in burden hours to the existing clearance, OMB Control No. 3084-0097.

II. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 et seq., requires an agency to provide an initial regulatory flexibility analysis ("IRFA") with its proposed rule, and a final Regulatory Flexibility Analysis ("FRFA") with its final rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. As explained in the Revised Fee NPRM and this Statement, the Commission has not expected that its Final Amended Fee Rule will have the threshold impact on small entities. As discussed above, the Amended Rule specifically charges no fee for access to data included in the registry from one to five area codes. As a result, the Commission anticipates that many small businesses will be able to access the national registry without having to pay any annual fee. Thus, it is unlikely that there will be a significant burden on small businesses resulting from the adoption of the proposed revised fees. Nonetheless, the Commission published an IRFA with the Revised Fee NPRM, and is also publishing a FRFA with its Final Amended Fee Rule below, in the event of further explaining its determination, even though the Commission continues to believe that it is not required to publish such analyses.

I. Reasons for Consideration of Agency Action

The Amended Final Fee Rule has been considered and adopted pursuant to the requirements of the Implementation Act and the 2004 Appropriations Act, which authorizes the Commission to collect fees sufficient to implement and enforce the "do-not-call" provisions of the Amended TSR.

B. Statement of Objectives and Legal Basis

As explained above, the objective of the Amended Final Fee Rule is to collect sufficient fees from entities that must access the National Do Not Call Registry. The legal authority for this Rule is the 2004 Appropriations Act, the Implementation Act, and the Telemarketing Act.

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

The Small Business Administration has determined that "telemarketing business" with 56 million or less in annual receipts qualify as small businesses.⁴³ Similar standards, i.e., \$1 million or less in annual receipts, apply for many retail businesses that may be "seller" and subject to the revised fee provisions set forth in this Amended Final Rule. In addition, there may be other types of businesses, other than retail establishments, that would be "seller" subject to this rule.

As described in Section IV, above, 6 data more than 87,000 entities have accessed five or fewer area codes of data from the national registry at no charge. While not all of these entities may qualify as small businesses, and some small businesses may be required to purchase access to more than five area codes of data, the Commission believes that this is the best estimate of the number of small entities that will be subject to this Amended Final Rule. In any event, as explained elsewhere in this Statement, the Commission believes that, to the extent the Amended Final Fee Rule has an economic impact on small business, the Commission has adopted an approach that minimizes that impact to ensure that it is not substantial, while fulfilling the legal mandate of the Implementation Act and 2004 Appropriations Act to ensure that the telemarketing industry supports the cost of the National Do Not Call Registry.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The information collection activities at issue in this Amended Final Rule consist principally of the requirement that firms, regardless of size, that access the national registry submit minimal identifying and payment information, which is necessary for the agency to collect the required fees. The cost impact of that requirement and the labor or professional expertise required for compliance with that requirement were

discussed in Section V of the Revised Fee NPRM.⁴⁴

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

X. Duplication With Other Federal Rules

F. Discussion of Significant Alternatives

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

List of Subjects in 18 CFR Part 310

Telemarketing, Trade practices.

VII. Final Rule

Accordingly, for the reasons set forth above, the Commission hereby amends part 310 of title 18 of the Code of Federal Regulations as follows:

PART 310—TELEMARKETING SALES RULE

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

Authority: 18 U.S.C. 6101-6106.

§ 310.2. Revise § 310.2(a) and (d) to read as follows:

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

(a) The annual fee, which must be paid by any person prior to obtaining access to the National Do Not Call Registry, is \$40 per area code of data accessed, up to a maximum of \$21,000; provided, however, that there shall be no charge for the first five area codes of data accessed by any person, and provided further, that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the National Do Not Call Registry without being required under this Rule, 47 CFR 64.1200, or any other Federal law. Any person accessing the National Do Not Call Registry may not participate in any arrangement to share the cost of accessing the registry.

⁴³ See 13 CFR 121.201.

⁴⁴ See 29 FR at 12704.

Appendix B

Proposed Rules

67287

Federal Register
Vol. 69, No. 221
Wednesday, November 17, 2004

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rule.

DATE: Written comments must be received by January 10, 2005.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to "Pre-recorded Messages EBR Telemarketing, Project No. R411001" to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H-159 (Annex K), 800 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form, as explained in the SUPPLEMENTARY INFORMATION section. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments filed in electronic form should be submitted by clicking on the following Weblink: <https://secure.commissioner.gov/ftc/> and following the instructions on the Web-based form.

privacy policy, at <http://www.ftc.gov/ftc/Privacy.htm>.

FOR FURTHER INFORMATION CONTACT: Michael Goodman, (202) 325-3071, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.
SUPPLEMENTARY INFORMATION:

I. Background

Section 310.4(b)(1)(iv) of the amended Telemarketing Sales Rule ("TSR" or "Rule") prohibits telemarketers from abandoning calls. An on-hold telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two seconds of the person's completed greeting.²

Call abandonment is an unavoidable consequence of using "predictive dialer"—telemarketing equipment that increases telemarketers' productivity by calling multiple consumers for every available sales representative. Doing so maximizes the amount of time representatives spend speaking with consumers and minimizes the time representatives spend waiting to reach a prospective customer. An inevitable side effect of predictive dialer's functionality, however, is that the dialer will reach more consumers than can be connected to available sales representatives. In those situations, the dialer will either disconnect the call (resulting in a "hang-up" call) or keep the consumer connected with no one on the other end of the line in case a sales representative becomes available (resulting in a "dead air"). The call abandonment provision is designed to remedy these abusive practices.

Notwithstanding the prohibition on call abandonment, the TSR contains a safe harbor designed to preserve telemarketers' ability to use predictive dialers. The safe harbor is available if the telemarketer or seller abandons no more than three percent of all calls answered by a person; allows the telephone to ring for fifteen seconds or four rings; whenever a sales representative is unavailable within two seconds of a person's answering the call, plays a pre-recorded message stating the name and telephone number of the seller on whose behalf the call was

FEDERAL TRADE COMMISSION

RIN 3084-0088

16 CFR Part 310

Telemarketing Sales Rule

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this document, the Federal Trade Commission ("FTC" or "Commission") addresses three issues. First, the Commission speaks comment on a proposed amendment of the Telemarketing Sales Rule ("TSR") to create an additional call abandonment safe harbor to allow telemarketing calls that deliver a pre-recorded message to consumers with whom the caller or whose behalf the calls are made has an established business relationship. Second, the Commission announces that, pending completion of this proceeding, the Commission will forbear from bringing any enforcement action for violation of the TSR's call abandonment prohibition, 16 CFR 310.4(b)(1)(iv), against a seller or telemarketer that places telephone calls to deliver pre-recorded telephone messages to consumers with whom the seller on whose behalf the telemarketing calls are made has an established business relationship, as defined in the TSR, provided the seller or telemarketer conducts this activity in conformity with the terms of the proposed amended call abandonment safe harbor. Third and finally, the Commission seeks comment on a petition submitted by the Direct Marketing Association ("DMA") to amend the TSR's call abandonment safe harbor provision that currently requires use of "technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign" substituting instead the phrase "measured over a 30-day period."

¹ 16 CFR 310.4(b)(1)(iv) (emphasis supplied).

To ensure that the Commission considers an electronic comment, you must file it on the Web-based form at the <https://secure.commissioner.gov/ftc/> Weblink. You may also visit <http://www.regulations.gov> to read this proposed Rule, and may file an electronic comment through that Web site. The Commission will consider all comments that [regulations.gov](http://www.regulations.gov) forwards to it.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Web site, to the extent practicable, at <http://www.ftc.gov>. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from public comments it receives before placing these comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's

² 16 CFR 310.4(b)(1)(iv).

placed; and maintains records documenting compliance.³ Thus, to comply with this provision of the TSR, at least ninety-seven percent of a telemarketer's calls that are answered by a person (rather than an answering machine) must be connected to a live sales representative. A telemarketing campaign that consists solely of prerecorded messages, therefore, would violate § 310.4(b)(1)(iv) and would not satisfy the safe harbor.

II. Voice Mail Broadcasting Corporation's Submission Regarding the TSR's Treatment of Telemarketing Calls To Deliver a Prerecorded Message to Consumers With Whom the Seller Has an Established Business Relationship

Voice Mail Broadcasting Corporation ("VMBC") submitted a request for an advisory opinion on the permissibility of prerecorded message telemarketing to consumers with whom the seller has an established business relationship.⁴ The Commission has decided to treat VMBC's request as a petition to amend the TSR under § 1.25 of the FTC's Rules of Practice.⁵

VMBC's submission pertains to the impact of § 310.4(b)(1)(iv) on a telemarketer using a particular business model. As indicated above, that business model involves delivery of prerecorded telephone messages solely to consumers with whom the seller on whose behalf the telemarketing calls are performed has an "established business relationship."⁶ Additionally, under the business model in question, the prerecorded messages would give the called party an opportunity to assert an entity-specific Do Not Call request by speaking to a sales representative. The messages would either allow the called party to speak to a sales representative by pressing a button on the telephone keypad during the message, or, in the alternative, they would provide a toll-

free number that the called party may call to speak to a sales representative.

VMBC asserts that the harms that prompted inclusion of the call abandonment provisions in the TSR would not be present in campaigns conducted according to the business model described above. Those harms were (1) "dead air" calls, in which there is a prolonged period of silence between a consumer answering a call and the connection of that call to a sales representative; and (2) "hang-up" calls, in which telemarketers hang up on consumers whom they have called without speaking to them.⁷ Nothing inherent in telemarketing calls that deliver prerecorded messages to consumers with whom the seller has an established business relationship would cause "dead air" nor would such calls necessarily result in any "hang-ups" on consumers. In fact, it appears that using prerecorded messages to consumers with whom the seller has an established business relationship would enable a telemarketer to preclude completely some of the odious side effects of predictive dialers. For instance, using a prerecorded message would make it unnecessary to subject a consumer who has answered a call to a "dead air" time while waiting for a live sales representative to become available, or to a hang-up because no sales representative becomes available.

Moreover, the prerecorded messages in the business model VMBC describes would disclose the seller's identity in every call, so the seller would not be engaging in recorded message telemarketing under the cloak of anonymity. In fact, according to VMBC, because the messages in question would be delivered only to existing customers, the "strong incentive to protect the goodwill of customers" would serve as a check on the potential for abuse.⁸

VMBC points out that the Federal Communications Commission ("FCC") telemarketing rules under the Telephone Consumer Protection Act ("TCPA")—which largely parallel the Do Not Call and certain other of the TSR's provisions—have since the early 1990s permitted prerecorded message telemarketing to consumers with whom a seller has an established business relationship.⁹ In virtually all other

circumstances, the TCPA rules broadly prohibit prerecorded message telemarketing.¹⁰

VMBC points out that the FTC, in its Report to Congress Pursuant to the Do Not Call Implementation Act¹¹ ("DNCA Report"), discussed the difference between the TSR and the TCPA regulations with respect to the treatment of prerecorded message telemarketing in instances where the seller has an established business relationship with the called consumer. In its DNCA Report, the Commission suggested that "the incentive to nurture established business relationships may provide an adequate restraint on the growth of recorded message telemarketing."¹²

A. The Importance of Preserving the Consumer's Ability To Assert a Do Not Call Request When Receiving a Prerecorded Message Telemarketing Call

It appears that "dead air" and "hang-up" calls are unlikely to result from the business model VMBC describes. At the same time, the Commission recognizes that it may be more economical for companies to contact consumers via prerecorded messages rather than using live telemarketers, so the volume of commercial calls that consumers receive may increase. Accordingly, the Commission believes that, if allowed, telemarketing calls that deliver prerecorded messages to consumers with whom a seller has an established business relationship must preserve the ability of those consumers to assert their Do Not Call rights quickly, effectively,

relationship exception when it revised its TCPA regulations last year, pursuant to the Do Not Call Implementation Act: "We believe that while consumers may find prerecorded voice messages intrusive, such messages do not necessarily impose the same costs on the recipients as, for example, unsolicited telemarketing messages. Therefore, we retain the exemption for established business relationship calls from the ban on prerecorded messages." 47 FR 44188 (1990) (July 25, 2003).

¹⁰ The only other circumstance in which the TCPA permits prerecorded message telemarketing is in instances where the consumer has given prior consent. 47 CFR 64.1200(a)(6)(i).

¹¹ Public Law No. 108-10, 117 Stat. 537. Section 4 of the DNCA required, *inter alia*, that within 45 days after the promulgation of final revised TCPA regulations by the FCC, the FTC and the PCC each transmit to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science, and Transportation a report to include: an analysis of the telemarketing rules promulgated by the FTC; an analysis of the telemarketing rules promulgated by the PCC; a discussion of inconsistencies between the rules promulgated by the FTC and the PCC; a discussion of the effect of any inconsistencies on consumers; and persons paying for access to the registry; and proposals to remedy any such inconsistencies. The FTC's Report is accessible online at <http://www.ftc.gov/ce/2003/09/dnciareport.pdf>.

¹² DNCA Report, p. 35.

³ The safe harbor provision is 16 CFR 310.4(b)(6).
⁴ Stars Encore Group, The Spoken Hub, Copflewitz & Carter, and SoundRite Communications also have written to the Commission seeking compliance advice about this issue.

⁵ 16 CFR 1.25.
⁶ 16 CFR 310.2(m). Under this definition, "[established business relationship] means a relationship between a seller and a consumer based on: (1) The consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or (2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call."

⁷ Statement of Basis and Purpose for the Amended TSR, 48 FR 4590, 4641 (Jan. 29, 2003).
⁸ To support its assertion that consumers do not object to prerecorded message telemarketing when they have an established business relationship with the seller, VMBC states that in one typical campaign conducted for a major retailer, only .62 of 1% of the nearly 3.8 million calls resulted in the consumer asserting an entity-specific Do Not Call request.
⁹ See 47 CFR 64.1200(a)(2)(iv). The FCC stated its rationale for retaining the established business

and efficiently, so that consumers retain an effective right to decide whether to receive commercial calls, including prerecorded messages. Asserting an entity-specific Do Not Call request should be no more difficult in the case of prerecorded message telemarketing than it is in the case of telemarketing that uses live sales representatives. Although consumers who have placed their telephone numbers on the National Do Not Call Registry may receive telemarketing calls from sellers with whom they have an established business relationship, consumers may immediately request that their number be placed on the seller's entity-specific do not call list. This request prevents future calls from that seller. Consumers should have the same ability to immediately assert a Do Not Call request when they receive a prerecorded telemarketing call pursuant to the established business relationship exemption.

When a consumer is contacted by a live sales representative, the consumer may interrupt the sales pitch immediately to make a Do Not Call request, and the sales representative must take that request without delay. The Commission believes that, similarly, prerecorded messages must present an entity-specific Do Not Call option immediately after the prompt disclosures required by § 310.4(d) and (e) are delivered at the outset of the call.¹³ Nevertheless, the Commission seeks information and data about the costs and benefits of requiring that the disclosure of how to make a Do Not Call request be made at the outset of the call. The Commission also seeks information about alternative approaches that the Commission might use in this area and the costs and benefits of these alternatives.

Moreover, the Commission believes that the Do Not Call option should allow consumers to assert their Do Not Call rights during the message. Although FCC rules allow prerecorded messages to provide a toll-free number that consumers may call to make a Do Not Call request,¹⁴ this requires consumers

¹³ Section 310.4(d) requires the following prompt oral disclosure in outbound commercial telemarketing calls: (1) The identity of the seller; (2) that the purpose of the call is to sell goods or services; (3) the nature of the goods or services; and (4) that no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. Section 310.4(e) requires the following oral disclosures in outbound charitable solicitation calls: (1) The identity of the charitable organization on behalf of which the request is being made; and (2) that the purpose of the call is to solicit a charitable contribution.

¹⁴ See 47 CFR 64.1200(b)(2).

to be prepared with pen and paper at the ready when they answer the phone, to take down the number, and to place a separate call in order to assert a Do Not Call request. This approach encumbers consumers' assertions of company-specific Do Not Call rights.

The business model described in VMBC's letter contemplates some prerecorded messages that would enable consumers to speak with a sales representative during the call by pressing a button on their telephone keypads. The Commission believes this type of interactive feature (pressing a button during the message to connect to a sales representative or an automated system to make a Do Not Call request) would be ideal in the established business relationship prerecorded message context as it means to protect consumers' Do Not Call rights under the TSR.

The Commission has, therefore, incorporated this feature into the proposed amendment to the call abandonment safe harbor provision that would permit telemarketing calls to consumers with whom a seller has an established business relationship to deliver a prerecorded message. Nevertheless, the Commission seeks information and data about the technical feasibility and costs of implementing such a feature in outbound telemarketing calls that deliver prerecorded messages to established customers. The Commission also seeks comment on alternative methods of preserving the consumer's ability to assert a Do Not Call request when receiving a prerecorded message telemarketing call.

B. The Commission's Proposal To Amend the TSR's Call Abandonment Safe Harbor Provision To Permit Prerecorded Message Telemarketing to Consumers With Whom a Seller Has an Established Business Relationship

Because the harms that the call abandonment provisions were intended to remedy seem unlikely to arise from calls made pursuant to the business model at issue in VMBC's petition, the Commission proposes to amend the TSR to add a new call abandonment safe harbor, as indicated below:

(5) A seller or telemarketer initiating an outbound telephone call that delivers a prerecorded message to a person with whom the seller has an established business relationship will not be liable for violating 310.4(b)(1)(iv) if:

(i) The seller or telemarketer, for such such telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(ii) Within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a prerecorded message that:

(a) Presents an opportunity to assert an entity-specific Do Not Call request pursuant to § 310.4(b)(1)(iii)(A) at the outset of the message, with only the prompt disclosures required by §§ 310.4(d) or (e) preceding such opportunity; and

(b) Complies with all other requirements of this Rule and other applicable federal and state laws. Proposed § 310.4(b)(5) would create a new safe harbor for sellers and telemarketers calling consumers with whom the seller has an established business relationship for the purpose of delivering a prerecorded message. There are four criteria that a seller or telemarketer placing such calls would be required to meet to take advantage of the safe harbor and avoid liability for violating the TSR's prohibition against call abandonment in § 310.4(b)(1)(iv). The first criterion is that the seller or telemarketer (1) must allow the telephone to ring for at least fifteen seconds or four rings before disconnecting an unanswered call. This "ring time" element is identical to the analogous element of the existing safe harbor in § 310.4(b)(4)(ii). The ring time standard is intended to give consumers, including the elderly or infirm who may struggle to get to the telephone, a reasonable opportunity to answer telemarketing calls while preventing the undesirable result of consumers' privacy being disrupted by ringing phones with no caller present on the other end of the line. The ring time standard is modeled on DMA's ethical guidelines for its members.¹⁵

The second criterion of the proposed safe harbor is that the seller or telemarketer must play the prerecorded message within two seconds after the person's completed greeting. The purpose of this element of the safe harbor is to minimize "dead air." This element follows the analogous element in § 310.4(b)(4)(iii), allowing no more than two seconds of dead air. As noted, where there is no wait for a live sales representative because a prerecorded message is being delivered by a

The second criterion of the proposed safe harbor is that the seller or telemarketer must play the prerecorded message within two seconds after the person's completed greeting. The purpose of this element of the safe harbor is to minimize "dead air." This element follows the analogous element in § 310.4(b)(4)(iii), allowing no more than two seconds of dead air. As noted, where there is no wait for a live sales representative because a prerecorded message is being delivered by a

¹⁵ Prior to adoption of the amended TSR, Article #34 of DMA's ethical guidelines recommended allowing the phone to ring at least four times or for twelve seconds before disconnecting a call. 65 FR 4360, 4644 (Jan. 29, 2003). Since adoption of the amended TSR, DMA has issued revised guidelines. Article #45 of these revised ethical guidelines now tracks the TSR in urging that "[m]arketers using automated dialing equipment should allow 15 seconds or 4 rings before disconnecting an unanswered call." <http://www.the-dma.org/guidelines/ethicalguidelines.shtml#tele>.

machine, telemarketers should have no problem meeting this standard. The Commission, however, specifically seeks information on whether the maximum amount of dead air should be less than two seconds in the new safe harbor, since the rationale for allowing two seconds may be inapposite to telemarketing that uses prerecorded messages rather than live sales representatives. The Commission also seeks information on the relative costs and benefits of a standard that would set the maximum amount of dead air at a level lower than two seconds.

The third criterion of the proposed new safe harbor is self-explanatory. Its purpose is to ensure the same Do Not Call rights for consumers receiving telemarketing calls that deliver a

prerecorded message that are enjoyed by consumers receiving telemarketing calls from live sales representatives. It requires that the prerecorded message present, "at the outset," preceded only by the prompt oral disclosures required by the TSR, an opportunity for the called party to assert an entity-specific Do Not Call request pursuant to § 310.4(b)(1)(iii)(A).

Under the business model VMBC describes, some telemarketing campaigns would employ messages with an entity-specific Do Not Call mechanism, providing the called party with an opportunity to speak to a sales representative during the message by pressing a button on the telephone keypad. This approach allows consumers to exercise their Do Not Call rights in a manner that closely tracks consumers' experience when called by a live sales representative, and would therefore satisfy the proposed safe harbor. The Commission seeks information about the costs to industry of requiring this mechanism in each message, and whether the costs are outweighed by the benefits to consumers who want to assert an entity-specific Do Not Call request immediately, without having to write down a toll-free number and call back.

The fourth and final element of the proposed new safe harbor provision makes it explicit that it does not obviate or negate any other provision of the TSR or other federal or state laws. This proposed safe harbor provision would preserve consistency with the existing TSR safe harbor governing predictive dialers¹⁸ and put sellers and

¹⁸ Footnote 7 of the amended TSR states: "This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1700." The final element of the proposed new safe harbor

telemarketers on notice that other applicable regulations may be stricter than what the Commission's proposal provides.

C. FTC Enforcement Policy Pending Completion of This Proceeding

In consideration of VMBC's petition and similar requests from other parties, the Commission now believes that, under certain limited circumstances, enforcement of the call abandonment provision would serve only to deter conduct that does not cause the harms to consumers that prompted adoption of that provision. Therefore, the Commission has determined that, pending completion of this proceeding, the Commission will forbear from bringing any enforcement action for violation of the TSR's call abandonment prohibition, 16 CFR 310.4(b)(1)(iv), against a seller or telemarketer that places telephone calls to deliver prerecorded telemarketing messages to consumers with whom the seller or whose behalf the telemarketing calls are placed has an established business relationship, as defined in the TSR, provided the seller or telemarketer conducts this activity in conformity with the terms of the proposed amended call abandonment safe harbor. In the event the record that develops in this proceeding tends to disprove the Commission's tentative conclusions regarding prerecorded message telemarketing to consumers with whom the seller has an established business relationship, the Commission will announce a revised enforcement policy that will apply to subsequent enforcement actions.

III. DMA's Petition

On May 18, 2004, DMA submitted a petition asking that the Commission "revise its current method for calculating abandoned calls from a per day, per calling campaign measurement * * * to the per 30 day measurement adopted by the Federal Communications Commission (FCC) in its revisions to its telemarketing rules * * *." DMA states that "meeting the 3% benchmark under the FTC's per day, per calling campaign standard presents a much greater compliance obstacle than meeting the FCC's abandoned call standard. Marketers who use predictive dialing technology are having difficulty configuring their software to comply with the FTC's per day, per calling campaign 3% standard." DMA's letter

incorporates the same concept without duplicating this footnote.

¹⁷ DMA petition at 1 (available at <http://www.ftc.gov/os/2004/10/041018dnacpetition.pdf>).

does not explain why this would be so. The letter, however, does quote a DMA member as follows:

The FTC requires the 3% abandon average per campaign per day, which is virtually impossible for vendors who run multiple campaigns each day. On a typical day, we may run more than 100 individual client campaigns. The system manages the efficiency as an average of all campaigns per day, so it is inevitable that certain logins would end the day at say, 3.1% and others at 2.9%, yet the overall average would still be 3% or less.

Nevertheless, DMA's letter does not explain why a telemarketer's system cannot dynamically maintain a steady level of no more than three percent call abandonment for all calls being placed. In fact, the paragraph quoted above suggests that telemarketers engage in precisely the practice the Commission was concerned about when it adopted the "per day, per campaign" method of calculating the maximum level of abandoned calls. The Commission stated:

The "per day per campaign" unit of measurement is consistent with DMA's guidelines addressing its members' use of predictive dialer equipment. Under this standard, a telemarketer running two or more calling campaigns simultaneously cannot offset a six percent abandonment rate on behalf of one seller with a zero percent abandonment rate for another seller in order to satisfy the Rule's safe harbor provision. Each calling campaign must record a maximum abandonment rate of three percent per day to satisfy the safe harbor.¹⁹

DMA's petition concedes that "the former DMA Guidelines for Ethical Business Practices (The DMA Guidelines) used the per day standard for the maximum number of abandoned calls per campaign that companies who use predictive dialing equipment must satisfy as a condition of membership in the DMA." DMA points to the fact that the permissible abandonment rate in the DMA Guidelines was five percent, instead of the three percent level incorporated in the TSR's call abandonment safe harbor. Nevertheless, DMA provides no facts to support the proposition that the per day per campaign method was feasible at a five percent level, but not at the three percent level.

DMA mentions two other factors in support of its petition. The first factor is that the California Public Utilities Commission—whose three percent call abandonment rate the Commission cited in adopting the TSR's call abandonment safe harbor—measures abandoned calls on a per 30-day basis, according to DMA. Second, DMA argues the FTC

¹⁹ 68 FR 4643 (Jan. 29, 2003) (footnotes omitted).

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should defer to the FCC's determination on how the permissible call abandonment rate should be calculated, because the issue "lies closer to the core expertise of the FCC than of the FTC." The Commission does not believe these factors are sufficient to require the requested change in the TSR. It is not impossible for entities subject to both the TSR and either the FCC's TCPA rules or the California Public Utilities Commission's rules to comply with both; compliance with the FTC's more precise standard would constitute acceptable compliance with either or both of those other sets of regulations. Moreover, recent court decisions controvert DMA's argument that the FTC's expertise or legal authority regarding the acceptable level of call abandonment is inferior to that of the FCC.¹⁹

DMA provides no information that would tend to counter the concern about the shortcomings of a "per 30-day" standard that the Commission set forth at length in its DNCLIA Report.²⁰ The concern is that the FCC's approach to measuring the three percent call abandonment rate over a 30-day period could enable telemarketers to target call abandonments at certain less valued groups of consumers, resulting in their receipt of more than their share of abandoned calls. Under such a scenario, predictive dialers could be set to abandon calls at a higher rate to one subset of the population and a lower rate to another subset of the population. For example, a telemarketer could offset a high abandonment rate in a multi-day cold-call campaign to persons who never previously purchased from the seller, and make up the difference by abandoning no calls in a subsequent campaign targeting its most valued existing customers. Telemarketers could also offset a high abandonment rate in low income zip codes and make up the difference by abandoning no calls in affluent ones. The FTC's per day per campaign measure reduces the potential for concentrating abuse by ensuring an even distribution of abandoned calls to all segments of the public, regardless of

their purchasing history or demographic characteristics. Given the detrimental impact of call abandonment on consumers, the FTC does not believe that variations in telemarketing campaigns (such as calling times, number of operators available, and the number of telephone lines used by the call centers) justify allowing call abandonment to fall disproportionately on particular groups of consumers.

Therefore, the Commission believes that DMA has not provided an adequate factual basis that would compel modification of the TSR's method for measuring the maximum allowable abandonment rate. Nonetheless, the Commission is receptive to any factual information that would establish that such a change is warranted, and encourages commenters to include such information in their submissions. In particular, the Commission is interested in any elaboration on the problems telemarketers who are running multiple campaigns at the same time face in attempting to comply with the current requirement. The Commission is also interested in any information demonstrating that callers who make a relatively small number of calls per day may be differentially disadvantaged by the current requirements. Finally, the Commission seeks information and data demonstrating that it need not be concerned that, if additional flexibility were provided, telemarketers would intentionally set the abandonment rates above 3 percent on some campaigns or on calls directed to certain consumers and use lower rates of abandonment on other campaigns or calls to satisfy the overall 3 percent requirement.

IV. Invitation To Comment

All persons are hereby given notice of the opportunity to submit written data, views, facts, and arguments addressing the issues raised by this Notice. Written comments must be received on or before January 10, 2005. Comments should refer to: "Pre-recorded Message EBR Telemarketing, Project No. R411001" to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H-159 (Annex K), 800 Pennsylvania Avenue, NW., Washington, DC 20580. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be

clearly labeled "Confidential."²¹ The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

To ensure that the Commission considers an electronic comment, you must file it on the Web-based form at the <https://secure.comenentworks.com/fic-tr> Weblink. You may also visit <http://www.regulations.gov> to read this proposed Rule, and may file an electronic comment through that Web site. The Commission will consider all comments that [regulations.gov](http://www.regulations.gov) forwards to it.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Web site, to the extent practicable, at <http://www.ftc.gov>. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at <http://www.ftc.gov/fic/privacy.htm>.

V. Communications by Outside Parties to Commissioners or Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record. See 16 CFR 1.26(b)(5).

VI. Paperwork Reduction Act

The information collection requirements contained in the TSR were reviewed by OMB under the Paperwork Reduction Act and cleared on July 24, 2003, under OMB Control Number 3094-0097. The proposed rule amendment, as discussed above, provides a safe harbor from the TSR's prohibition on call abandonment for sellers and telemarketers that call only

²¹ Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record.

¹⁹ *Mahabunan Mktg. Serv., Inc. v. FTC*, 263 F. Supp. 2d 1251, 1170 (D. Colo. 2003) ("The court finds no basis to conclude that the FCC has exclusive jurisdiction to regulate the practice of abandoning calls"; *U.S. Security v. FTC*, 282 F. Supp. 2d 1248, 1282 (W.D. Okla. 2003) ("The [TSR's] restriction on abandoned calls is a permissible regulation of this most (and undeniably) invasive and abusive practice, and the prohibition, which is in no way hindered or inhibited by the FCC's grant of authority, has carried into effect congressional intent as expressed by the [Telemarketing Act]"; *Neri, Fed'n. of the Blind v. FTC*, 308 F. Supp. 2d 707 at 719 (D. Md. 2004).
²⁰ DNCLIA Report, p. 31.

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consumers with whom the seller has an established business relationship, as defined in the Rule. Thus, the proposed rule amendment does not impose any new, or affect any existing, record submission, recordkeeping, or public disclosure requirement that would be subject to review and approval by OMB pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501-3520.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601-612, requires an agency to provide an Initial Regulatory Flexibility Analysis ("IRFA") with a proposed rule and a Final Regulatory Flexibility Analysis ("FRFA") with the final rule, if any, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 603-605.

The Commission has determined that it is appropriate to publish an IRFA in order to inquire into the impact of the proposed rule on small entities. Therefore, the Commission has prepared the following analysis.

A. Reasons for the Proposed Rule

The proposed modification of the TSR, discussed above, responds to requests from the telemarketing industry to provide a safe harbor to allow sellers and telemarketers calling persons with whom the seller has an established business relationship to deliver a prerecorded message.

B. Statement of Objectives and Legal Basis

The objectives of the proposed rule are discussed above. The legal basis for the proposed rule is the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 8102.

C. Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

This proposed rule will impact sellers that make interstate telephone calls to consumers (outbound calls) with whom the seller has an established business relationship for the purpose of delivering a prerecorded message in an attempt to sell their products or services. Also affected may be firms that provide prerecorded message telemarketing services to others on a contract basis. For the majority of entities subject to the proposed rule, a small business is defined by the Small Business Administration as one whose average annual receipts do not exceed

58 million or that has fewer than 500 employees.²²

In the proceedings to amend the TSR in 2002, the Commission sought public comment and information on the number of small business sellers and telemarketers that would be impacted by those amendments, which were broader in scope than those at issue in the instant proceeding. In its requests, the Commission noted the lack of publicly available data regarding the number of small entities that might be impacted by the proposed Rule.²³ The Commission received no information in response to its requests.²⁴

The requests for clarification regarding the operation of the abandoned call provision of the TSR that have led to this rulemaking proceeding provide no data regarding the number of small entities that may be affected by the outcome of the proceeding. Based on the absence of available data in this and related proceedings, the Commission believes that a precise estimate of the number of small entities that fall under the proposed rule is not currently feasible, and specifically requests information or comment on this issue.

D. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule

The proposed rule does not impose any new, or affect any existing, reporting, disclosure, or specific recordkeeping requirements within the meaning of the Paperwork Reduction Act. The Commission does not believe that modifying the Rule to create a safe harbor that would allow sellers and telemarketers calling to deliver a prerecorded message to persons with whom they have an established business relationship will create a significant burden on sellers or telemarketers that have already established systems to comply with the existing TSR. The

Commission also does not believe that this modification of the Rule will increase or otherwise modify any existing compliance costs, and may in fact reduce them for small entities that are able to take advantage of the safe harbor.

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

The FTC has not identified any other federal statutes, rules, or policies that would conflict with the proposed safe harbor that would allow telemarketing calls that deliver a prerecorded message to persons with whom the seller has an established business relationship. The FCC rules pursuant to the TCPA contain a safe harbor that allows telemarketing calls that deliver a prerecorded message to persons with whom the seller has an established business relationship. The FTC's proposed modification would harmonize the TSR to the FCC's TCPA rules on this issue. With respect to the issue of calculating callers' abandonment rate on a "per day" or "per 30-day" basis, the FTC does not propose to modify its Rule to make it consistent with the relevant FCC TCPA rule. As explained in Section III above, compliance with the FTC's more precise standard would constitute acceptable compliance with the FCC rule, so there is no conflict between these rules.

F. Discussion of Significant Alternatives to the Proposed Rule That Would Accomplish the Stated Objectives and Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

The proposed safe harbor would allow telemarketing calls that deliver a prerecorded message to persons with whom the seller has an established business relationship, but require that the prerecorded message include an opportunity during the call for the recipient of the call to assert an entity-specific Do Not Call request. Other regulatory options under consideration include requiring instead that the prerecorded message include a toll-free number that call recipients could contact to assert an entity-specific Do Not Call request. Also, the proposed safe harbor requires that the prerecorded message begin within two seconds after the recipient of the call completes his or her greeting. Other regulatory options under consideration include requiring that the prerecorded message begin sooner than two seconds after the recipient of the call completes his or her greeting. The proposed safe harbor is intended to be available to all entities subject to the Rule, and it does not

²² These numbers represent the size standards for most retail and service industries (\$8 million total receipts) and manufacturing industries (500 employees). A list of the SBA's size standards for all industries can be found at <http://www.sba.gov/size/summary-whatls.html>.

²³ See 68 FR 4590, 4597 (Jan. 28, 2003) (noting that Census data on small entities conducting telemarketing does not distinguish between those entities that conduct exempt calling, such as survey calling, those that receive inbound calls, and those that conduct outbound calling campaigns. Moreover, sellers who act as their own telemarketers are not accounted for in the Census data).

²⁴ See 68 FR 4590, 4597 (Jan. 29, 2003); 68 FR 45194, 45143 (July 31, 2003) (noting, in the final amended rule, that comment was requested, but not received, regarding the number of small entities subject to the National Do Not Call Registry provisions of the amended TSR).

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appear that a delayed effective date for small entities or other alternatives to the current proposal would either be appropriate or necessarily result in any further reduction in the compliance burdens of the Rule for small entities. The Commission nonetheless seeks comments and information on what other alternative formulations, if any, of the proposed safe harbor might further minimize compliance burdens for small entities, without compromising the intent and purpose of the Rule to prevent abusive telemarketing practices.

VIII. Specific Issues for Comment

The Commission seeks comment on various aspects of the proposed amendment to the call abandonment safe harbor provision of the TSR.

Without limiting the scope of issues on which it seeks comment, the Commission is particularly interested in receiving comments on the questions that follow. In responding to these questions, include detailed, factual supporting information whenever possible.

A. General Questions for Comment

Please provide comment, including relevant data, statistics, consumer complaint information, or any other evidence, on (a) the proposed safe harbor to allow telemarketing calls that deliver a prerecorded message to persons with whom the seller has an established business relationship, and (b) DMA's request to substitute a "per 30-day period" for the current "per day per campaign" method of measuring the maximum allowable rate of call abandonment under the existing safe harbor in 16 CFR 310.4(b)(4)(i). Please include answers to the following questions:

1. What is the effect (including any benefits and costs), if any, on consumers?
2. What is the impact (including any benefits and costs), if any, on individual firms that must comply with the Rule?
3. What is the impact (including any benefits and costs), if any, on industry, including those who may be affected by these proposals but not obligated to comply with the Rule?
4. What changes, if any, should be made to the proposed Rule to minimize any cost to industry, individual firms that must comply with the Rule, or consumers?
5. How would each suggested change affect the benefits that might be provided by the proposed Rule to industry, individual firms that must comply with the Rule, or consumers?
6. How would the proposed Rule affect small business entities with

respect to costs, profitability, competitiveness, and employment?

B. Questions on Proposed Specific Provisions

In response to each of the following questions, please provide: (1) Detailed comment, including data, statistics, consumer complaint information, and other evidence, regarding the issue referred to in the question; (2) comment as to whether the proposed changes do or do not provide an adequate solution to the problems they were intended to address, and why; and (3) suggestions for additional changes that might better maximize consumer protections or minimize the burden on industry.

1. Are "hang-up" calls and "dead air"—the two harms that prompted adoption of the current call abandonment provisions—likely to arise from telemarketing calls that deliver a prerecorded message to consumers with whom the seller has an established business relationship? Are there other consumer harms that may result from such calls, and if so, what are they? Could the proposed safe harbor be crafted to eliminate such harms, and if so, how? If not, why not?

2. What are the costs and benefits to consumers of receiving telemarketing calls from companies with whom they have an established business relationship via prerecorded messages as opposed to live sales representatives? Is there any data as to how many consumers choose to act on the telemarketing calls that they receive via prerecorded messages? Is it likely that consumers will receive more telemarketing calls under this proposed new safe harbor in § 310.4(b)(5)? Is it likely that consumers will receive more unwanted telemarketing calls under this proposed new safe harbor?

3. What are the costs and benefits of obtaining consumers' prior consent before contacting them with prerecorded telemarketing messages?

4. Is there any data as to how many consumers choose to opt out of prerecorded telemarketing calls currently? What mechanisms are used to allow consumers to opt out of prerecorded telemarketing messages? At what point in the course of the message are consumers given the opportunity to opt out? Does the industry follow a standard practice as to when in the call a consumer must be given the opportunity to opt out?

5. How much, if any, "dead air" should be permitted between the completion of the answering consumer's greeting and the beginning of the prerecorded message in the proposed new call abandonment safe harbor for

telemarketing calls delivering a prerecorded message to consumers with whom the seller has an established business relationship? Because using prerecorded messages obviates the need to wait for an available live sales representative, is there any reason that the prerecorded message could not start less than two seconds after completion of the answering consumer's greeting? What would be the costs and benefits of starting the prerecorded message less than two seconds after completion of the answering consumer's greeting?

6. What would be the costs to industry of requiring that each prerecorded message include a mechanism that would enable the consumer receiving the call to assert a Do Not Call request during the call, for example, by pressing a number on the keypad, or by stating aloud the wish not to receive future calls? Specifically, what would be the incremental expense of such a requirement? What would be the overall costs and benefits to consumers of such a requirement? What would be the comparative costs and benefits to industry and consumers of providing a toll-free number in a prerecorded message that call recipients could call to assert a Do Not Call request? Are there other alternative means of preserving the consumer's ability to assert a Do Not Call request that would strike a better balance of costs and benefits than requiring an opportunity during the prerecorded message to assert a Do Not Call request?

7. Is it appropriate that the proposed new safe harbor in § 310.4(b)(5) specifies that the seller or telemarketer must use a prerecorded message that presents an opportunity to assert an entity-specific Do Not Call request at the outset of the message, with only the prompt disclosures required by § 310.4(d) or (e) preceding it? Why or why not? What are the costs and benefits of this approach? In the alternative, would it be better to specify that the information about how to assert an entity-specific Do Not Call request be given within a certain length of time after the beginning of the pre-recorded message? If so, how much time should be allowed before the information must be given? What are the costs and benefits of this approach?

8. Does the proposed new safe harbor in § 310.4(b)(5) provide industry with sufficient guidance as to the circumstances under which prerecorded message telemarketing calls would be permissible? If not, how could the provision be crafted to accomplish that purpose more effectively?

9. Would the proposed new safe harbor in § 310.4(b)(5) complicate

enforcement efforts against a seller or telemarketer who violates the TSR and claims falsely that it has an established business relationship with called consumers?

10. Is it appropriate that the proposed new safe harbor in § 310.4(b)(5) specifies that the seller or telemarketer must allow the telephone to ring for at least fifteen seconds or four rings before disconnecting an unanswered call? If not, is there some other more appropriate element that should be included in the safe harbor to preclude the problem of premature "hang-ups" before consumers can reach the telephone?

11. Is it appropriate that the proposed new safe harbor in § 310.4(b)(5) specifies that the seller or telemarketer must comply with all other requirements of the TSR and other applicable federal and state laws? If not, why not?

12. Is the burden on telemarketers in meeting the three percent maximum abandoned call level per day per telemarketing campaign outweighed by benefits to consumers in having call abandonment distributed evenly at a uniformly low level to all called consumers? What, if any, characteristics of the telemarketing equipment currently in use might make compliance with the "per day per campaign" standard problematic? What, if any, costs would result from having the equipment adjusted or replaced to eliminate problems?

13. According to DMA, "marketers who use predictive dialing technology are having difficulty configuring their software to comply with the FTC's per day, per calling campaign 3% (maximum abandoned call) standard." Is this statement accurate? If so, why? And if so, how widespread is this difficulty? If this statement is not accurate, why not? Were similar problems encountered in meeting the DMA's former guideline of no more than five percent of calls abandoned per day per telemarketing campaign? Why or why not?

14. If the three percent maximum call abandonment rate were measured over a 30-day period, instead of per day per telemarketing campaign, what effect, if any, would this change have on actual call abandonment rates? What would prevent a telemarketer from targeting call abandonments at certain less valued groups of consumers, resulting in their receipt of more than their share of abandoned calls? What would prevent setting predictive dialers to abandon calls at a higher rate to one subset of the population and a lower rate to another subset of the population? Is it

appropriate that some segments of the population should be subjected to a higher rate of call abandonment than other segments of the population? If so, why?

15. Can telemarketing equipment be programmed to dynamically maintain a steady level of no more than three percent call abandonment for all calls being placed? What, specifically, is the equipment that has that capacity to be programmed in such a manner, if any? What are the costs associated with this equipment?

IX. Proposed Rule

List of Subjects in 18 CFR Part 310

Telemarketing, Trade practices. Accordingly, the Commission proposes to amend title 18, Code of Federal Regulations, as follows:

PART 310—TELEMARKETING SALES RULE

1. The authority citation for part 310 continues to read as follows: Authority: 15 U.S.C. 8101-8102.
2. Amend § 310.4 by adding a new paragraph (b)(5).

§ 310.4 Abusive telemarketing acts or practices.

- (b) * * *
- (5) A seller or telemarketer initiating an outbound telephone call that delivers a prerecorded message to a person with whom the seller has an established business relationship will not be liable for violating § 310.4(b)(3)(v) if:
 - (i) The seller or telemarketer, for each such telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;
 - (ii) Within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a prerecorded message that:
 - (A) Presents an opportunity to assert an entity-specific Do Not Call request pursuant to § 310.4(b)(1)(iii)(A) at the outset of the message, with only the prompt disclosure required by § 310.4(d) or (e) preceding such opportunity; and
 - (B) Complies with all other requirements of this part and other applicable federal and state laws.* * *

By direction of the Commission.
Donald S. Clark,
Secretary.
[FR Doc. 04-25470 Filed 11-16-04; 8:45 am]
ST.LNS CC06 074-01-P

* This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and Federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD08-04-042]

RIN 1825-AA08

Drawbridge Operation Regulation; Gulf Intracoastal Waterway, Cypremort, LA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to change the regulation governing the operation of the State Route 918 (Louisiana) bridge across the Gulf Intracoastal Waterway, mile 134.0 west of Harvey Lock, near Cypremort, Louisiana. A new high-level, double-leaf bascule bridge that will require limited openings is replacing the low-level swing bridge across the waterway. This proposed regulation change would remove the regulation governing the to-be-removed bridge and replace it with a regulation for the operation of the new bascule bridge.

DATES: Comments and related material must reach the Coast Guard on or before January 18, 2005.

ADDRESSES: You may mail comments and related material to Commander (cgc), Eighth Coast Guard District, 500 Poydras Street, New Orleans, Louisiana 70130-3310. The Commander, Eighth Coast Guard District, Bridge Administration Branch maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the Bridge Administration office between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: David Frank, Bridge Administration Branch, telephone 504-589-2965.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking [CGD08-04-042].

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I (a) PLAINTIFFS (Check box if you are representing yourself)
UNITED STATES OF AMERICA

DEFENDANTS
DIRECTV, Inc., a California Corporation; VOICECAST SYSTEMS, INC., also
d/b/a INTOUCH SOLUTIONS, an Illinois Corporation; MICHAEL KURTZ,
individually and as an officer of Voicecast Systems, Inc.; and KEYVAN SAEDI,
individually and as an officer of Voicecast Systems, Inc.
County of Residence of First Defendant (in US Plaintiff Case Only) Los Angeles

(b) Attorneys (Firm Name, Address and Telephone Number. If you are representing
yourself, provide same.)

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MO; Phn.: 816-472-9000 (INTOUCH)

II. BASIS OF JURISDICTION (Place an X in one box only.)

- 1 U.S. Government Plaintiff 3 Federal Question (U.S.
Government Not a Party)
- 2 U.S. Government Defendant 4 Diversity (Indicate Citizenship
of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES - For Diversity Cases Only
(Place an X in one box for plaintiff and one for defendant.)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business in this State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. ORIGIN (Place an X in one box only.)

- 1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from another district (specify): 6 Multi-District Litigation 7 Appeal to District Judge from Magistrate Judge

V. REQUESTED IN COMPLAINT: JURY DEMAND: Yes No (Check 'Yes' only if demanded in complaint.)

CLASS ACTION under F.R.C.P. 23: Yes No MONEY DEMANDED IN COMPLAINT: \$ Yes, tied to violations of TSR

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)
Action for injunctive relief and civil penalties (\$2,310,000 - DIRECTV and \$115,000 for INTOUCH, et al) for violations of FTC's Telemarketing Sales Rule (16 CFR 310)

VII. NATURE OF SUIT (Place an X in one box only.)

OTHER STATUTES	CONTRACT	TORTS PERSONAL INJURY	TORTS PERSONAL PROPERTY	PRISONER PETITIONS	LABOR
<input type="checkbox"/> 400 State Reapportionment	<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 710 Fair Labor Standards Act
<input type="checkbox"/> 410 Antitrust	<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 530 General Habeas Corpus	<input type="checkbox"/> 720 Labor/Mgmt. Relations
<input type="checkbox"/> 430 Banks and Banking	<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act
<input type="checkbox"/> 450 Commerce/ICC Rates/etc.	<input type="checkbox"/> 140 Negotiable Instrument Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Fed. Employers' Liability	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 540 Mandamus/Other	<input type="checkbox"/> 740 Railway Labor Act
<input type="checkbox"/> 460 Deportation	<input type="checkbox"/> 150 Medicare Act	<input type="checkbox"/> 340 Marine	BANKRUPTCY	<input type="checkbox"/> 550 Civil Rights	<input type="checkbox"/> 790 Other Labor Litigation
<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations	<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act
<input type="checkbox"/> 480 Consumer Credit	<input type="checkbox"/> 152 Recovery of Defaulted Student Loan (Excl. Veterans)	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 423 Withdrawal 28 USC 157	FORFEITURE / PENALTY	PROPERTY RIGHTS
<input type="checkbox"/> 490 Cable/Sat TV	<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	CIVIL RIGHTS	<input type="checkbox"/> 610 Agriculture	<input type="checkbox"/> 820 Copyrights
<input type="checkbox"/> 810 Selective Service	<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 620 Other Food & Drug	<input type="checkbox"/> 830 Patent
<input type="checkbox"/> 850 Securities/Commodities/Exchange	<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 362 Personal Injury-Med Malpractice	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 840 Trademark
<input type="checkbox"/> 875 Customer Challenge 12 USC 3410	<input type="checkbox"/> 195 Contract Product Liability	<input type="checkbox"/> 365 Personal Injury-Product Liability	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> 630 Liquor Laws	SOCIAL SECURITY
<input checked="" type="checkbox"/> 890 Other Statutory Actions	<input type="checkbox"/> 196 Franchise	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 640 R.R. & Truck	<input type="checkbox"/> 861 HIA (1395ff)
<input type="checkbox"/> 891 Agricultural Act	REAL PROPERTY	IMMIGRATION	<input type="checkbox"/> 445 American with Disabilities - Employment	<input type="checkbox"/> 650 Airline Regs	<input type="checkbox"/> 862 Black Lung (923)
<input type="checkbox"/> 892 Economic Stabilization Act	<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 462 Naturalization Application	<input type="checkbox"/> 446 American with Disabilities - Other	<input type="checkbox"/> 660 Occupational Safety /Health	<input type="checkbox"/> 863 DIWC/DIWW (405(g))
<input type="checkbox"/> 893 Environmental Matters	<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 463 Habeas Corpus-Alien Detainee	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 690 Other	<input type="checkbox"/> 864 SSID Title XVI
<input type="checkbox"/> 894 Energy Allocation Act	<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 465 Other Immigration Actions			<input type="checkbox"/> 865 RSI (405(g))
<input type="checkbox"/> 895 Freedom of Info. Act	<input type="checkbox"/> 240 Torts to Land				<input type="checkbox"/> 866 Black Lung (923)
<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice	<input type="checkbox"/> 245 Tort Product Liability				<input type="checkbox"/> 867 DIWC/DIWW (405(g))
<input type="checkbox"/> 950 Constitutionality of State Statutes	<input type="checkbox"/> 290 All Other Real Property				<input type="checkbox"/> 868 SSID Title XVI
					<input type="checkbox"/> 869 RSI (405(g))
					<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)
					<input type="checkbox"/> 871 IRS-Third Party 26 USC 7609

CV09-2605

FOR OFFICE USE ONLY: Case Number: _____

AFTER COMPLETING THE FRONT SIDE OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED BELOW.

**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT CALIFORNIA
CIVIL COVER SHEET**

VIII(a). IDENTICAL CASES: Has this action been previously filed in this court and dismissed, remanded or closed? No Yes

If yes, list case number(s): _____

VIII(b). RELATED CASES: Have any cases been previously filed in this court that are related to the present case? No Yes

If yes, list case number(s): SACV05-1211 DOC (US v. DIRECTV, Inc., et al.) Judge David O. Carter

Civil cases are deemed related if a previously filed case and the present case:

- (Check all boxes that apply) A. Arise from the same or closely related transactions, happenings, or events; or
 B. Call for determination of the same or substantially related or similar questions of law and fact; or
 C. For other reasons would entail substantial duplication of labor if heard by different judges; or
 D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

IX. VENUE: (When completing the following information, use an additional sheet if necessary.)

- (a) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named plaintiff resides.
 Check here if the government, its agencies or employees is a named plaintiff. If this box is checked, go to item (b).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
UNITED STATES OF AMERICA, County N/A	

- (b) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named defendant resides.
 Check here if the government, its agencies or employees is a named defendant. If this box is checked, go to item (c).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
DIRECTV Corp., Los Angeles County	Voice Cast Systems, Inc., dba InTouch Solutions and Michael Kurtz and Keyvan Saedi, Dupage County, IL (but did business in CD CA)

- (c) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** claim arose.
Note: In land condemnation cases, use the location of the tract of land involved.

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Los Angeles County	

* Los Angeles, Orange, San Bernardino, Riverside, Ventura, Santa Barbara, or San Luis Obispo Counties
Note: In land condemnation cases, use the location of the tract of land involved

X. SIGNATURE OF ATTORNEY (OR PRO PER): *David O. Carter* Date 4/15/09

Notice to Counsel/Parties: The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3-1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))