radius of Columbia Regional Airport; and within 2.4 miles each side of the Columbia VOR/DME 019° radial extending from the 6.8-mile radius of the Columbia Regional Airport to 7 miles north of the Columbia VOR/DME; and within 2 miles each side of the 315° bearing from the Columbia Regional Airport extending from the 6.8-mile radius of the airport to 10.7 miles northwest of the airport; and within 2 miles each side of the Columbia VOR/DME 333° radial extending from the 6.8-mile radius of the Columbia Regional Airport to 11.1 miles northwest of the airport.

Issued in Fort Worth, Texas, on May 31, 2022.

Martin A. Skinner,
Acting Manager, Operations Support Group,
ATO Central Service Center.

[FR Doc. 2022–11964 Filed 6–2–22; 8:45 am]
BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 310
RIN 3084–AB19
Telemarketing Sales Rule

AGENCY: Federal Trade Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: As part of the Federal Trade Commission’s (“FTC” or “Commission”) regulatory review of the Telemarketing Sales Rule (“TSR” or “Rule”), the Commission issues this advance notice of proposed rulemaking (an “ANPR”) to seek public comment on whether the Rule should continue to exempt telemarketing calls to businesses, whether the Rule should require a notice and cancellation mechanism with negative option sales, and whether to extend the Rule to apply to telemarketing calls that consumers initiate to a telemarketer (i.e., “inbound telemarketing calls”) regarding computer technical support services.

DATES: Comments must be received on or before August 2, 2022.

ADDRESSES: Interested parties may file a comment online or on paper by following the instructions in the Request for Comment part of the SUPPLEMENTARY INFORMATION section below. Write “Telemarketing Sales Rule ANPR, R411001” on your comment, and file your comment through https://www.regulations.gov. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex B), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Benjamin R. Davidson, (202) 326–3055, bdavidson@ftc.gov, or Patricia Hsue, (202) 326–3132, phsue@ftc.gov, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Mail Stop CC–8528, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Commission reviews its rules and guides periodically to seek information about their costs and benefits and their regulatory and economic impact. The information obtained assists the Commission in identifying rules and guides it should modify or rescind. Where appropriate, the Commission combines such periodic general reviews with reviews seeking information on specific questions about an industry.

On August 11, 2014, the Commission initiated a regulatory review by publishing a notice in the Federal Register requesting public comment on the TSR ("Regulatory Review"). It sought comment on questions including whether the Rule continues to be necessary and serve a useful purpose, whether and how the Rule’s compliance burdens and costs can be decreased and its benefits increased, and the impact of changes in the marketplace and new technologies on the Rule. It also requested comment on three specific issues; namely, whether the Rule should: (1) Prohibit the sharing of preacquired account information for any purpose; (2) enhance protections for negative option and free offers, and apply them to inbound calls induced by general media advertising; and (3) require sellers and telemarketers to maintain records of the numbers they dial in their telemarketing campaigns.

Having reviewed the record, the Commission is issuing a Notice of Proposed Rulemaking (“NPRM”) seeking comments on the Commission’s proposal to amend the TSR’s recordkeeping provisions and to prohibit deception in business-to-business telemarketing calls. The Commission is also issuing this ANPR seeking comment on whether to repeal all exemptions regarding telemarketing calls to businesses and inbound telemarketing of computer technical support services, and whether the TSR should provide consumers additional protections for negative option products or services.

II. Background

A. Statutory Basis for the TSR

Enacted in 1994, the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act" or "Act") targeted deceptive and abusive practices in telemarketing. It directed the Commission to adopt a rule with anti-fraud and privacy protections for consumers receiving telephone solicitations to purchase goods or services, and authorized the Commission and state attorneys general or other appropriate state officials, as well as private persons who meet certain jurisdictional requirements, to bring civil actions against violators in Federal district court.

In determining whether certain practices that do not fall distinctly within the parameters of the Telemarketing Act’s emphasis on protecting consumer privacy are “abusive,” the Commission has applied the unfairness analysis set forth in Section 5(n) of the FTC Act. An act or practice is unfair under Section 5 of the Federal Trade Commission Act (“FTC Act”) if it causes or is likely to cause substantial injury to consumers, if any countervailing benefits to consumers or competition do not outweigh the consumer harm, and if that harm is not reasonably avoidable by consumers.

B. TSR History and Key Provisions

Pursuant to the Telemarketing Act’s directive, the FTC promulgated the TSR on August 23, 1995. The Commission subsequently amended the Rule on four occasions: (1) In 2003 to add the National Do-Not Call Registry and other requirements; (2) in 2008 to prohibit...
unwanted sales robocalls;\(^8\) (3) in 2010 to ban the telemarketing of debt relief services requiring an advance fee; \(^9\) and (4) in 2015 to ban the use in telemarketing of certain payment mechanisms widely used in fraudulent transactions.\(^10\)

The TSR applies to virtually all “telemarketing,” defined in accordance with the Telemarketing Act to mean “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.”\(^11\)

The Rule wholly or partially exempts several types of calls from its coverage. For example, it generally exempts telemarketing calls to businesses.\(^12\) It also generally exempts inbound calls placed by consumers in response to direct mail or general media advertising.\(^13\) However, there are certain “carve-outs” from some of the TSR’s exemptions that bring certain conduct back within the ambit of the rule, such as the carve-out for calls initiated by a consumer in response to a general media advertisement relating to investment opportunities.\(^14\)

The TSR is designed to protect consumers in a number of different ways. First, the TSR includes provisions governing communications between telemarketers and consumers, requiring certain disclosures and prohibiting material misrepresentations.\(^15\) Second, the TSR requires telemarketers to obtain consumers’ “express informed consent” to be charged on a particular account before billing or collecting payment and, through a specified process, to obtain consumers’ “express verifiable authorization” to be billed through any payment system other than a credit or debit card.\(^16\) Third, the TSR prohibits as an abusive practice requesting or receiving any fee or consideration in advance of obtaining any credit repair services;\(^17\) recovery services;\(^18\) offers of a loan or other extension of credit, the granting of which is represented as “guaranteed” or having a high likelihood of success;\(^19\) and debt relief services.\(^20\) Fourth, the TSR prohibits credit card laundering\(^21\) and assisting and facilitating sellers or telemarketers engaged in violations of the TSR.\(^22\) Fifth, the TSR, with narrow exceptions, prohibits telemarketers from calling consumers whose numbers are on the National Do Not Call Registry or who have specifically requested not to receive calls from a particular entity.\(^23\)

Finally, the TSR requires that telemarketers transmit to consumers’ telephones accurate Caller ID information\(^24\) and places restrictions on calls made by predictive dialers\(^25\) and those delivering prerecorded messages.\(^26\)

C. Legal Standard for Retaining, Amending, or Repealing the TSR

There is a presumption that an existing rule should be retained.\(^27\) A decision to retain any portion of a current rule may be based upon evidence gathered during the original rulemaking and the Commission’s subsequent enforcement experience, as well as evidence adduced during a new rulemaking.\(^28\) Moreover, the Telemarketing Act’s rulemaking authorization applies not only to an initial rulemaking, but also to the amendment or repeal of a telemarketing rule.\(^29\)

Because of the “potentially pervasive and deep effect” of FTC rules,\(^30\) the Commission carefully scrutinizes the regulatory review record to determine whether the record is reliable and provides sufficient support for undertaking an industry-wide rulemaking or amendment proceeding. In particular, the Commission routinely evaluates a number of factors, including the relative costs and benefits of the Rule, industry compliance, the effect on competition and consumer choice, its enforcement experience, and the adequacy of case-by-case law enforcement under the FTC Act to address existing problems that fall outside the Rule’s scope.\(^31\) In addition, as a responsible steward of the public funds allocated to it by Congress, the Commission considers whether a rulemaking or amendment proceeding would serve the public interest, recognizing the rulemaking process requires a substantial, long-term investment of the Commission’s finite resources that could otherwise be

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\(^9\) See 2010 TSR Amendments (adding debt relief provisions). The Commission subsequently published correcting amendments to the text of provisions). The Commission subsequently corrected the amendments in its subsequent publication of the TSR’s other requirements. 16 CFR 310.6(a).


\(^11\) 16 CFR 310.2(gg) (using the same definition as the Telemarketing Act, 15 U.S.C. 6106(4)). The TSR, like the Telemarketing Act, also excludes catalog sales solicitations. \(^12\) The Act also explicitly states that the jurisdiction of the Commission in enforcing the Rule is coextensive with its jurisdiction under Section 5 of the FTC Act. 15 U.S.C. 6105(b).

\(^13\) 16 CFR 310.6(b)(7). See also 2015 TSR Amendments, 80 FR at 77555 [clarifying that the “business-to-business” exemption under 310.6(b)(7) applies only to telemarketing calls that are “soliciting the purchase of goods or services or a charitable contribution [from] a business itself, rather than personal purchases or contributions by employees of the business”).

\(^14\) 16 CFR 310.6(b)(5). Moreover, the Rule exempts from the National Do Not Call Registry provisions calls placed by for-profit telemarketers to solicit charitable contributions; such calls are not exempt, however, from the “entity-specific” do not call provisions or the TSR’s other requirements. 16 CFR 310.6(a).

\(^15\) See, e.g., 16 CFR 310.6(b)(5)–(6) [provisions related to general advertisements and direct mail solicitations]; 16 CFR 310.2(e) (definition of “investment opportunity”). The TSR’s definition of “investment opportunity” includes anything sold in part based on a representation of future income. In addition to traditional passive investments, the

\(^16\) 16 CFR 310.4(a)(4).

\(^17\) 16 CFR 310.4(a)(2).

\(^18\) 16 CFR 310.4(a)(3).

\(^19\) 16 CFR 310.4(a)(4). As the Commission has previously explained, “[i]n recovery room scams, a deceptive telemarketer calls consumers who have lost money, or who has failed to win a promised prize, in a previous fraud. The recovery room telemarketer falsely promises to recover the lost money, or obtain the promised prize, in exchange for a fee paid in advance. After the fee is paid, the promised services are never provided. In fact, the consumer may never hear from the telemarketer again.”

\(^20\) 16 CFR 310.4(b)(4); see also 2008 TSR Amendments, 68 FR at 4614 (finding that three of these services were “fundamentally bogus”).

\(^21\) 16 CFR 310.4(a)(5).

\(^22\) 16 CFR 310.3(c).

\(^23\) 16 CFR 310.3(d).

\(^24\) 16 CFR 310.4(b)(1)(iii).

\(^25\) 16 CFR 310.4(b)(1)(iv).

\(^26\) 16 CFR 310.4(b)(1)(v).


\(^28\) Amended Federal Rule of Procedure, 16 CFR 1.25. See also 2003 TSR Amendments, 68 FR at 4583.

\(^29\) See Oksi v. FTC, 626 F.2d 896, 905 (D.C. Cir. 1980).

\(^30\) American Optometric Ass’n v. FTC, 626 F.2d 896, 905 (D.C. Cir. 1980).

\(^31\) See, e.g., 2003 TSR Amendments and 2008 TSR Amendments.
devoted to enforcement actions against rule violators.

D. Summary of the Regulatory Review Record

The regulatory review record contains 114 unique responsive comments. They include: two comments from other law enforcement agencies; one comment from a telemarketer; one from an industry services provider; one from a credit card association; and ten comments from industry trade associations representing companies that promote and sell services, employ telemarketers, or make their own telemarketing calls to consumers. There are three comments on behalf of 13 consumer advocacy groups, one from an academic, two submissions attaching essentially identical comments from 2,064 Illinois residents, and 92 unique comments from individual consumers.

III. Regulatory Review: Continuing Need for the TSR

All commenters generally agree on the continuing need for the TSR but differ in their opinions as to whether amendments are necessary. Consumers and their advocates largely argue for amendments they believe will enhance consumer protection including by closing “loopholes” in the TSR, and for more enforcement. Industry representatives, on the other hand, largely advocate against any amendments, arguing the current regulatory requirements, coupled with the existence of self-policing industry organizations, provide consumers sufficient protections.

A. Consumer Perspective

Consumers and their advocates all support the continuing need for the TSR. The 2,064 largely identical comments from Illinois consumers ask the Commission to “keep and strengthen” the TSR’s consumer protections that have “battled telemarketing fraud and deception for nearly two decades,” and four other individual consumers expressly agree the TSR is still needed and should be retained. AARP asserts it “strongly agrees that there is a continuing need for the [TSR],” and the National Consumer Law Center (“NCLC”) and other consumer groups state the TSR “provides important protections for consumers and clear rules of the road for the telemarketing industry.”

Comments from two other consumer advocates, an academic engaged in relevant behavioral research, and two state and Federal law enforcement agencies state while the TSR is still needed, it is also in need of improvements. In particular, consumers and their advocates argue for additional protections. These include heightened restrictions on the “data pass” of preacquired account information from an initial seller to a third party seller comparable to those of the Restore Online Shoppers’ Confidence Act (“ROSCA”) for online transactions, extending the TSR’s requirements to inbound calls, and requiring sellers and telemarketers to create and maintain their own records of the numbers dialed in telemarketing campaigns to facilitate enforcement by Federal and state agencies and private lawsuits by injured consumers.

More than half of the unique individual consumer comments make a case that more is needed. They include requests for enforcement against particular violators, reports about specific violations of the TSR, complaints about continuing unwanted calls, demands for more general enforcement of the TSR’s Do Not Call provisions, appeals for more severe penalties to deter violations or a ban on all telemarketing, and concern that violations are calling with impunity due to inadequate enforcement. The 2,064 Illinois consumer comments request amendments that: (1) Require telemarketers to provide recordings of their calls, (2) ban third-party use of preacquired account information, and (3) request stronger consumer protection against inbound telemarketing calls placed in response to advertisements. AARP also notes the number of telemarketing complaints filed with the FTC and Federal Communications Commission (“FCC”) has risen.

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32 We cite public comments here by the name of the commenting organization or individual and the comment number. Although the comment record contains 118 submissions, one is a duplicate, American Resort Development Association, Nos. 00100, 00101; one twice, Abrams, No. 00038; one contains a final attachment to a prior submission, Citizens Utility Board, No. 00037 (supplementing No. 00036); and one is simply a comment period extension request, PACE, No. 00039, that was granted by the Commission. 79 FR 61267 (Oct. 10, 2014).

33 There are three comments on behalf of 13 consumer advocacy groups, one from an academic, two submissions attaching essentially identical comments from 2,064 Illinois residents, and 92 unique comments from individual consumers.

34 American Bankers Association (“ABFA”), No. 00106; American Resort Development Association (“ARDIA”), No. 00100; Brand Activation Association (“BAA”), No. 00115; Consumer Industry Association (“CIA”), No. 00098; Direct Marketing Association (“DMA”), No. 00103; Electronic Retailing Association (“ERA”), No. 00083; MPA-The Association of Magazine Media (“MPA”), No. 00116; National Automobile Dealers Association (“NADA”), No. 00112; Newspaper Association of America (“NAA”), No. 00099; and Professional Association for Customer Engagement (“PACE”), No. 00107.


36 Boeing, No. 00056; Citizens Utility Board, Nos. 00035 and 00037; see Brouer, No. 00046.

37 Ashley L., No. 00052 (“TSR is ‘still greatly needed, in its entirety’”); Leaf, No. 00085 (“Please improve—or at least maintain the status quo”); Wright, No. 00002 (“The Do Not Call registry is a valuable resource for consumers and should be continued”); West Italian, No. 00013 at 1 (“We need the TSR, and its enforcement, more than ever”).

38 AARP, No. 00097, at 1.

39 NCLC, No. 00110, at 1.

40 CRL, No. 00093, at 1; American Association for Justice, No. 00102, at 1.

41 Grossklags, No. 00114.

42 NAAG, No. 00117, at 1–2; DOJ, No. 00111, at 1.
significantly, and “a rise in complaints means more need for enforcement.”

B. Industry Perspective

Industry comments support the continuing need for the TSR and generally oppose any amendments. As one trade organization observes, “the FTC’s enforcement actions under the Rule have provided industry with adequate and predictable notice as to what practices the agency views as acceptable and unacceptable.”

Another notes “[i]n its current form, the TSR has functioned well and continues to serve its purpose of protecting the customers we serve as well as the operations of legitimate businesses.”

The Professional Association for Customer Engagement (“PACE”) states “[t]he Rule has had an overall positive impact on consumers . . . and there is a continuing need for the majority of its protections.”

PACE, however, also asserts that while it “supports strong enforcement against companies that intentionally violate the Rule’s DNC provisions,” “no additional substantive changes are necessary at this time.”

The Electronic Retailing Association (“ERA”) agrees. “No revisions to the TSR are warranted.”

Most of the industry comments maintain “the current framework of laws, regulations, and industry self-regulation adequately covers telemarketing.” The Direct Marketing Association (“DMA”) stresses “[a]ny changes to the Rule would have adverse impacts on the industry and consumers alike.” and the Consumer Credit Industry Association (“CCIA”) states “[d]ue to the multiple layers of [Federal and state] regulation and legislation, the industry is in a precarious position in attempting to comply.” PACE similarly asks that the Commission consider the impact other laws and regulations have had on businesses before adopting any additional regulations of its own or expanding the reach of current regulations.

Several industry trade associations emphasize the voluntary compliance steps they have taken by establishing Self-Regulatory Organizations (“SROs”) to enhance consumer protection. DMA’s Guidelines for Ethical Business Practice (“DMA Guidelines”) and the PACE SRO 71 were created to ensure compliance not only with the TSR, but also all state telemarketing laws and regulations. DMA asserts its Guidelines include a “robust accountability program” that is “enforced by DMA’s Ethics Committee that ‘processes tens of thousands of complaints annually, and takes action against members and non-members alike,’” including disclosure of “cases where companies failed to conform their practices to industry requirements.” The PACE–SRO accredits contact centers that “undergo an initial and recurring onsite compliance assessment, and are subject to quarterly data audits of their outbound calling records, and those that do not comply fail to obtain accreditation or have their accreditation revoked.”

Both DMA and PACE emphasize that their SRO programs require compliance not only with telemarketing regulations, but also with industry “best practices,” and that they can amend SRO requirements to address new technology and other issues more quickly than government can amend regulations.

The associations ask the FTC to encourage and support their SRO efforts as a “strong tool that can assist in preventing the need for increased regulations.”

The public comments on the record from industry and consumer stakeholders, as well as the Commission’s own law enforcement experience, persuade the Commission that the TSR continues to serve an important and useful public purpose.

The Commission invites comment on the specific issues discussed below.

IV. Regulatory Review: Comments on Specific Issues

Commenters also provided responses to the specific issues identified in the Regulatory Review. The majority of the comments focused on whether the Rule should: (1) Prohibit or regulate the use or retention of preacquired account information; (2) enhance protections for negative option and free offers, and apply them to inbound calls induced by general media advertising; and (3) require sellers and telemarketers to maintain records of the numbers they dial in their telemarketing campaigns.

A. Should the TSR Ban the Data Pass of Preacquired Account Information?

The TSR prohibits the disclosure or receipt, for consideration, of unencrypted consumer account numbers for use in telemarketing, except to process a payment. It also prohibits telemarketers and sellers from causing a consumer to be charged, directly or indirectly, without the consumer’s express informed consent (i.e. “unauthorized billing”) for all transactions, including those using preacquired account information.

It does not, however, generally bar the transfer or “data pass” of preacquired consumer account information from one seller to telemarketer to a third party seller or telemarketer, unless doing so results in unauthorized billing.

In 2010, Congress enacted ROSCA, requiring a post-transaction third-party seller to obtain a consumer’s “express informed consent” to be charged, and prohibiting an “initial merchant” from disclosing the billing information of a consumer for use in an internet sale.

The operating rules of three of the major credit card associations are consistent with ROSCA in prohibiting any “disclosure, exchange, or use” by and among their merchants of...
preacquired account information for their branded credit, debit and prepaid cards, except to process payments.82 Thus, the card association rules now require each merchant to obtain a consumer's full account number directly from the consumer at the time of her first purchase from the merchant. In light of ROSCA's passage and the subsequent operating rule changes of the credit card industry, the Regulatory Review sought comment on whether the TSR should be amended to generally ban the data pass of preacquired account information.

AARP's comment expresses the view “allowing telemarketers to share information with third parties without consent creates a large loophole that will allow data collectors and lead generators to . . . harm consumers by signing them up for products and services they never intended to purchase or hassling them with unwanted telephone calls.”83 The National Association of Attorneys General (“NAAAG”) concurs, arguing that the “very nature of telemarketing makes the use of preacquired account information difficult to identify” and consumers should have the same protection against unauthorized charges arising from the exchange of preacquired account information in telemarketing sales as ROSCA provides in internet sales, because the same consumer confusion that spurred ROSCA's passage exists in the telemarketing context.84 NCLC also supports a ban, and asserts data pass is not necessary to conduct legitimate business, arguing that such transfers meet the unfairness test the Commission employs to ban abusive telemarketing practices.85 VISA likewise urges the Commission to consider “[h]armonizing the TSR with ROSCA” to ensure data pass in telemarketing is not just prevented by the credit card associations and cannot “migrate to other forms of payment to the detriment of consumers.”86

Industry advocates do not recommend adding a data pass ban to the TSR. The Association of Magazine Media (“MPA”) asserts that in the wake of ROSCA and the credit card rules, “usage of the data pass process has declined steadily,” and suggests that “concerns regarding deceptive or unfair transfers of preacquired account information are no longer necessary.”87 DMA notes its Guidelines “instruct DMA members not to transfer or exchange credit card numbers when a consumer has a reasonable expectation that the information will be kept confidential.”88 Another possible explanation is that Federal laws bar financial institutions from disclosing account numbers to non-affiliates for marketing purposes, including telemarketing.89

DMA and PACE argue against the need for a data pass prohibition for a different reason: namely, the TSR already requires a business to obtain a consumer’s “express informed consent” before it can charge her account for a purchase, even if it already has her billing information.90 Moreover, for payments not made by a debit or credit card, the TSR requires “express verifiable authorization” of the charge by a written authorization signed by the consumer, an audio recording of an oral authorization, or written confirmation of the transaction by mail.91 DMA and MPA also assert the evidence underpinning enactment of ROSCA cannot support a TSR data pass ban, because online sales are fundamentally different from telemarketing sales.92

At this time, it is unclear a TSR amendment restricting the data pass of preacquired account information is necessary to prevent unauthorized billing. The TSR currently prohibits data pass that causes unauthorized billing.93 It also requires sellers and telemarketers to obtain a consumer’s “express informed consent” to be charged for a good, service, or charitable contribution for any form of payment94 and “express verifiable authorization” for payments other than credit or debit cards.95 Further, card association rules and other Federal laws, including the 2015 TSR payment method pro

prohibitions,96 provide additional protections against unauthorized billing.

The Commission, however, does recognize it may be difficult to identify when preacquired account information has resulted in unauthorized billing in the context of telemarketing, in part because it is not always clear whether consumers have provided “express informed consent” or “express verifiable authorization” (collectively, “consent”) for a particular transaction.97

To address this challenge, among others, the Commission is issuing an NPRM that would require telemarketers and sellers to retain complete records of consumer consent, including documentation on the purpose for which consent is sought, in the same manner and format that the request for consent is presented to consumers.98

The Commission believes the proposed recordkeeping requirements will help clarify the extent to which the use of preacquired account information may result in unauthorized billing, and whether additional protections against a data pass of preacquired account information are necessary. Thus, the Commission is seeking comment on these issues in the NPRM.

B. Should the TSR Require Consumer Consent for the Retention of Account Information?

When a consumer gives a seller or telemarketer her account information to pay for a purchase, that information will be covered by the TSR’s definition of

86 On December 14, 2015, one year after the regulatory review comment period closed, the Commission issued antifraud amendments to the TSR. 2015 TSR Amendments, 80 FR at 77520. The amendments prohibited the use of remotely created checks, remotely created payment orders, cash-to-cash money transfers and cash reload mechanisms in telemarketing. 16 CFR 310.4(a)(9). Each of the prohibited payment mechanisms had been widely used by fraudulent sellers and telemarketers and three commenters urged the Commission to adopt these amendments during the regulatory review comment period. AARP, No. 00097, at 3; NCLC, No. 00110, at 15; NAAG, No. 00117, at 12–13. During its rulemaking, the Commission concluded that the TSR’s “express verifiable authorization” requirement for payments other than credit or debit cards was not sufficient to prevent consumer harm because unscrupulous telemarketers that use these payment methods typically ignore the TSR’s restrictions. 2015 TSR Amendments, 80 FR at 77543. Given the pervasiveness of fraud resulting from these payment mechanisms and the minimal legitimate uses for them, the Commission decided to ban these payment mechanisms as a bright line rule that benefits competition and consumers. I comport. 77537.

87 MPA, No. 00116, at 2.
88 DMA, No. 00103, at 6.
89 ABIA, No. 00106, at 2; see also 15 U.S.C. 6802(d); 12 CFR 1016; 15 CFR 313.12.
90 DMA, No. 00103, at 6; PACE, No. 00107, at 4; see 16 CFR 310.4(a)(7). PACE also expresses concern that a data pass ban would prevent sellers from using third-party telemarketers, who must be able to transmit billing information back to the seller.
91 16 CFR 310.3(a)(3).
92 DMA, No. 00103, at 5; MPA, No. 00118, at 2; but see NAAG, No. 00117, at 5 (“the same consumer confusion which spurred ROSCA’s passage also exists in the telemarketing arena”).
93 16 CFR 310.4(a)(7).
94 Id.
95 16 CFR 310.3(a)(3).
96 On December 14, 2015, one year after the regulatory review comment period closed, the Commission issued antifraud amendments to the TSR. 2015 TSR Amendments, 80 FR at 77520. The amendments prohibited the use of remotely created checks, remotely created payment orders, cash-to-cash money transfers and cash reload mechanisms in telemarketing. 16 CFR 310.4(a)(9). Each of the prohibited payment mechanisms had been widely used by fraudulent sellers and telemarketers and three commenters urged the Commission to adopt these amendments during the regulatory review comment period. AARP, No. 00097, at 3; NCLC, No. 00110, at 15; NAAG, No. 00117, at 12–13. During its rulemaking, the Commission concluded that the TSR’s “express verifiable authorization” requirement for payments other than credit or debit cards was not sufficient to prevent consumer harm because unscrupulous telemarketers that use these payment methods typically ignore the TSR’s restrictions. 2015 TSR Amendments, 80 FR at 77543. Given the pervasiveness of fraud resulting from these payment mechanisms and the minimal legitimate uses for them, the Commission decided to ban these payment mechanisms as a bright line rule that benefits competition and consumers. I comport. 77537.
98 See NPRM Section III.B.4.
“preacquired account information” if the seller retains and uses the information for subsequent purchases in the same or a subsequent telemarketing call.100 The Regulatory Review asked whether sellers and telemarketers should be required to obtain consumer consent to retain preacquired account information to prevent unauthorized billing.

Consumer advocates acknowledge consumers would not be surprised that a seller to whom they have given their account information has retained it, since sellers may need it for purposes such as canceling the transaction and crediting the consumer’s account.101 PACE and DMA also argue that from an industry perspective, sellers need to keep account information obtained directly from a consumer not only for cancellation purposes, but also to facilitate and expedite returns, exchanges, refunds, and order modifications.102

NCLC urges the Commission to amend the TSR to add four safeguards to protect consumers if sellers retain their billing information.103 Specifically, NCLC requests the following protections in transactions involving preacquired account information: (1) Sellers should obtain a consumers’ “express verifiable consent” to retain their billing information; (2) sellers should confirm the last four digits of the consumers’ account number, and if the account has an expiration date, to confirm the expiration date; (3) sellers should allow consumers the right to revoke their consent to retain their account information at any time; and (4) sellers should allow consumers to use a different account than the one previously provided to complete a transaction.

Industry advocates argue against amending the TSR to add safeguards for transactions involving preacquired account information. They point out that the “retention [of preacquired account information] is different from charging a consumer’s account.”104 and consumers have sufficient protection because the TSR already requires sellers to obtain a consumer’s authorization to charge her account even if they have the information on file.105 DMA also emphasizes that sellers and telemarketers must obtain a consumer’s “express informed consent” before charging an account, and must “identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged.”106

While NCLC’s proposals may have merit, neither the Commission’s law enforcement experience nor the regulatory review provide sufficient evidence to warrant further Commission action at this time.

C. Should the TSR provide additional protections for negative option offers, including Free-to-Pay Conversion transactions?

For telemarketing transactions involving preacquired account information, such as negative option offers, the TSR requires sellers and telemarketers to: (1) Identify the account to be charged with sufficient specificity so that a consumer understands what account will be charged; and (2) ensure the consumer’s “express agreement” to charge that account to complete the transaction.107 For transactions involving both preacquired account information and a “free-to-pay conversion”108 feature, such as free-trial offers, the TSR provides additional protections by requiring sellers and telemarketers to record the entire telemarketing call, obtain the last four digits of the account number to be used, and confirm the consumer’s “express agreement” to charge that account to complete the transaction.109 For payment mechanisms other than credit or debit cards, the telemarketer or seller must also obtain “express verifiable authorization,” which for oral authorizations includes the number of times a consumer will be charged and the dates of those charges.110

The Regulatory Review sought comment on whether changes in the marketplace require additional protections for negative option offers, including “free-to-pay conversion” transactions.111 Consumer advocates argue the existing protections are inadequate and offer a myriad of recommendations for enhanced protections. NAAG argues additional protections are necessary because all negative option offers generate “confusion, misunderstanding, and outright deception” because some consumers do not understand that sellers will interpret their silence and inaction as authorization to charge recurring payments.112 NAAG suggests an amendment to the TSR requiring a statement of the negative option terms in the initial telemarketing transaction that is separate from the other terms of the offer, and a separate audible acceptance of the negative option terms.113 NAAG also suggests the TSR should require telemarketers to send a “confirmation to the consumer, whether by mail or otherwise” whenever a consumer is enrolled in a negative option feature.114 NCLC suggests that for all negative option offers using preacquired account information, the TSR should require sellers and telemarketers to obtain full account numbers directly from the consumer every time they charge the consumer so consumers will understand their account will be charged.115

For “free-to-pay conversion” offers in particular, NCLC urges the Commission to adopt an amendment barring sellers from obtaining account information until the end of the trial period, or at least an amendment requiring sellers to give consumers timely phone or email reminders about how to avoid a charge a few days before they will charge the consumer’s account.116 AARP’s comment concurs and proposes requiring sellers to send a reminder notice and obtain confirmation of a consumer’s continued desire to complete the purchase not only for “free-to-pay conversion” offers, but for all negative option offers.117
NAAG also advocates for stronger protections in the context of free-to-pay conversion offers. Specifically, NAAG suggests that the Commission extend Section 310.4(a)(7) to all such offers, even if no preacquired account information is used, to ensure telemarketers obtain a consumer’s express informed consent before telemarketers are able to bill or send invoices to consumers after the “free trial” is over.\textsuperscript{117}

Industry advocates object to all of these proposed changes. DMA emphasizes both card association rules and SRO Guidelines require a third-party seller with preacquired account information to obtain the full account number directly from the consumer for “free-to-pay conversion” offers.\textsuperscript{118}

Industry also contends the TSR’s current requirements appropriately balance consumer convenience and protection. For example, MPA argues free trials and automatic renewals benefit consumers, particularly in situations where consumers are repeat customers and already have an established business relationship with the seller. MPA and other industry representatives state that requiring consumers to repeat their full 16-digit card number for each additional negative option offer, such as an automatic magazine subscription renewal, would frustrate consumers and would negatively impact legitimate business.\textsuperscript{119}

DMA concurs, emphasizing the TSR and its SRO Guidelines require sellers to disclose all material terms of the offer, “identify the account [to be charged] with specificity,” and “obtain affirmative consent from the consumer to charge that account.”\textsuperscript{120} DMA further argues requiring sellers to obtain full account information from existing customers simply increases the cost and time involved in the transaction, thus frustrating consumers without providing any additional protections.\textsuperscript{121} PACE adds the TSR’s requirement that sellers and telemarketers obtain a consumer’s authorization to charge her account gives the FTC “ample authority to pursue entities charging accounts without proper authorization.”\textsuperscript{122}

As discussed above, the Commission is proposing to amend the TSR’s recordkeeping provisions to explicitly require telemarketers and sellers to retain complete and accurate records of consumers’ “express informed consent” to be charged for a particular transaction.\textsuperscript{123} In the event a transaction includes a negative option, including “free-to-pay” or “fee-to-pay” conversion offers, a complete record of “express informed consent” must include the purpose for which consent is requested, the account that will be charged, the date a consumer provided consent, and the consumer’s consent to be charged using the identified account for the relevant good or service. The proposed recordkeeping requirements also require sellers and telemarketers to retain records that demonstrate they have complied with Section 310.4(a)(7)’s requirements regarding the use of preacquired account information. The Commission believes the new recordkeeping requirements will provide additional protections to consumers by requiring sellers and telemarketers obtain actual “express informed consent” from consumers to be charged for a transaction with a negative option feature.\textsuperscript{124} The Commission also believes these requirements will be more effective than requiring third-party telemarketers to obtain the full account information from consumers as an indication of consent because consumers providing full account information may not understand that they are being sold a transaction with a negative option feature.

The Commission is also interested in exploring the commenters’ suggestions that sellers or telemarketers provide consumers notice and the opportunity to cancel negative option transactions whenever they are billed.\textsuperscript{125} Requiring sellers or telemarketers to provide consumers with reminders of negative

\textsuperscript{117} NAAG\textsuperscript{,} No. 00117, at 11.
\textsuperscript{118} DMA, No. 00103, at 4.6.
\textsuperscript{119} MPA, No. 00116, at 3; \textit{see also} DMA, No. 00103 at 6–7; ARDA, No. 00100, at 7. PACE, No. 00107, at 4.
\textsuperscript{120} DMA, No. 00103, at 6–7.
\textsuperscript{121} \textit{Ibid.} at 3.
\textsuperscript{122} PACE, No. 00107, at 4.
\textsuperscript{123} \textit{See supra VI.A.}
\textsuperscript{124} \textit{See NPRM Section III.B.4.} NAAG also reports that telemarketers are circumventing the heightened “express informed consent” requirements for “free-to-pay” conversion offers by charging a “nominal upfront fee.” No. 00117, at 5. [“By offering their products and services for an initial term at a nominal upfront price . . . telemarketers relying on preacquired account information circumvent the TSR’s requirement of obtaining the last four (4) digits of the consumer’s account number and the equally important requirement of maintaining an audio recording of the entire transaction.”]. The proposed recordkeeping requirements that clarify the records necessary to prove that a consumer has consented to a transaction should eliminate any incentive to circumvent the express informed consent requirement.
\textsuperscript{125} AARP suggests that companies “send a reminder to the consumer and receive confirmation the consumer still wants to purchase the service or product.” AARP, No. 00097, at 4. cf. NAAG, No. 00117, at 11 (arguing that the TSR require a telemarketer to send a confirmation to the consumer at the time of enrollment in a negative option that clearly and conspicuously sets forth the terms of the negative option plan).
Is there a need to apply outbound call protections to inbound calls?

The TSR generally exempts inbound calls responding to media advertising, with some specific exceptions. The Regulatory Review asked if there is a need to amend the exemption in view of the proliferation of infomercials in the marketplace, including for negative option offers.

Consumers and their advocates regard the general media exemption as a “loophole” in the TSR, advocating that the TSR should apply to all telemarketing calls regardless of which party initiated the call. NAAG cites the Commission’s 2013 Consumer Fraud Survey as support because it reports that more than half of frauds are marketed through means other than telemarketing. Consumer advocates specifically suggest the TSR should apply equally to inbound and outbound telemarketing for negative option offers.

NCLC asserts the TSR requirements for the use of preacquired account information in negative option offers should apply to all inbound calls responding to general media and direct mail ads because “the potential risks are the same” as offers in outbound telemarketing. NAAG agrees, and advocates an amendment to extend the TSR’s outbound call material terms disclosure requirements for negative option offers, as well as the ban on misrepresenting any aspect of such offers, to all inbound calls induced by direct mail or general media ads.

Industry advocates uniformly oppose adding any limitations to either the general media or direct mail exemptions. PACE and ERA agree all material terms and conditions of negative option offers should be disclosed prior to any sale, but argue against amending the TSR to require the disclosures be made during an inbound call. DMA explains that required oral disclosures during inbound calls would be duplicative in many cases of disclosures in the marketing materials that induced the call. BAA adds that unlike answering outbound telemarketing calls, consumers placing inbound calls have the “luxury, time and discretion to decide whether to respond” to general media or direct mail ads, and can obtain “the information they need to make an informed purchasing decision” in advance of or during the call.

MPA argues applying the TSR’s disclosure requirements to inbound telemarketing for newspaper subscriptions, particularly for existing customers, would add time and expense for industry to comply without providing additional consumer protections when the general media advertisement includes all material terms of the offer. ERA similarly argues against a disclosure requirement without evidence of widespread abuse. ERA joins PACE in contending the Commission can always rely on its authority under Section 5 of the FTC Act to bring cases against sellers that fail to disclose material terms in their advertising or during an inbound call.

The general media and direct mail exemptions for inbound calls contain additional limitations that narrow the scope of the exemptions. For example, negative option sales in inbound telemarketing that are upsells after an initial purchase are expressly excluded from both the general media and direct mail exemptions. The TSR’s outbound call provisions therefore are equally applicable to inbound call upsells.

Whether and to what extent there may be a problem with inbound telemarketing calls offering a negative option is unclear from the regulatory review record. It therefore is difficult to determine at this time whether there is a need for an amendment that would apply the negative option disclosure requirements and prohibitions or other protections to such calls. The Commission is mindful, however, of the rising trend of certain types of goods or services that are marketed through general media or direct mail and induce inbound telemarketing sales that often include a negative option feature. In particular, the Commission’s law enforcement experience indicates that scams offering computer technical support services (or “tech support”) have been a rising trend that particularly impacts older adults and are marketed through inbound telemarketing. Many of these tech support services also include negative options. As a result, as outlined below in Section V, the Commission is seeking comment on whether the TSR should apply to inbound telemarketing of tech support services.

The Commission also seeks comment in Section V.E on the number of sellers or telemarketers who deceptively sell products or services with negative options, other than tech support services, solely through inbound telemarketing.

Should the rule continue to exempt business-to-business telemarketing?

Currently the TSR exempts telemarketing calls to “any business to induce the purchase of goods or services or a charitable contribution by the business,” (i.e., “business-to-business exemption” or “B2B exemption”). The Commission sought comment on how sales to a “home-based business should be treated” under the Rule. One comment suggests “home businesses should be treated more like [ ] consumer[s] . . . out of deference to the overall home environment. . . . The same phone often handles both personal and business calls in a home business or in a home occupied by an independent consultant or freelancer.”

PACE, however, argues the current exemption “properly strikes a balance between consumer protection and overregulation and should be left intact.” PACE also asserts allowing the exemption to continue “represents sound public policy and equitableness because it is impossible for callers to know whether the phone provider classifies the number as a residential or business number.” Although the Commission did not receive many comments on this...
question, the Commission’s law enforcement experience with deceptive business-to-business telemarketing along with changing market forces influencing where consumers perform their jobs and the nature of those jobs raise the question whether the TSR should continue to exempt such calls. Thus, for the reasons outlined below in Section V, the Commission is seeking additional comment on whether the TSR should continue to exempt business-to-business telemarketing.145

F. Other Commenter Proposals

A number of comments have recommended a variety of other amendments to the TSR. These comments fall into the following categories: (1) Revision of prior determinations or interpretations the Commission is not inclined to reconsider; 146 (2) amendments the Commission does not believe are necessary; 147 (3) amendments outside the agency’s jurisdiction; 148 and (4) amendments that lack data to support the suggested change.149 As such, the Commission is not inclined to further consider or implement these requested amendments.

V. Request for Comments

In determining the advisability of exempting certain calls from complying with the TSR the Commission considers the following factors: (1) Did Congress intend the TSR to cover such calls; (2) is the conduct or business in question regulated extensively by Federal or state law; (3) in the Commission’s law enforcement experience, does the conduct or business lend itself to the type of deceptive acts and practices that the TSR is intended to address; and (4) would it be unduly burdensome to require businesses to comply with the TSR compared to the likelihood that sellers or telemarketers engaged in fraud will use the existing exemption to circumvent the TSR’s coverage.150

To assist the Commission in evaluating these factors, the Commission seeks comments on whether the TSR should: (1) Apply to inbound telemarketing of tech support services; (2) apply to telemarketing to businesses; and (3) require telemarketers to provide consumers with notice that they are about to be billed for a negative option product or service and provide consumers with a simple cancellation mechanism. The Commission also seeks comments on the benefits and estimated burdens these potential rule changes would impose on sellers and telemarketers. In their replies, commenters should provide any available evidence and data that supports their position, such as empirical data on the harm to consumers caused by deceptive inbound telemarketing of tech support services, deceptive telemarketing to businesses, or the failure to provide consumers with notice and simple cancellation mechanism in negative option telemarketing. Commenters should also provide any empirical data on the costs to sellers or telemarketers that would be caused by applying the TSR’s requirements on inbound telemarketing of tech support services, telemarketing to businesses, or requiring notification and a simple cancellation mechanism for negative option products or services.

The questions are designed to assist the Commission in determining the advisability of exempting certain calls from complying with the TSR. The Commission is not inclined to reconsider; (2) amendments the Commission does not believe are necessary; (3) amendments outside the agency’s jurisdiction; and (4) amendments that lack data to support the suggested change. As such, the Commission is not inclined to further consider or implement these requested amendments.

145 See infra Section V.B.

146 Infocision, No. 00108, at 2 (amendment to exempt for-profit telemarketers who offer goods or services on behalf of non-profits (i.e., ticket sales on behalf of a ballet company)); NAA, No. 00099, at 1–6 (amendment of the “established business relationship” exception to allow live calls to introduce digital offerings to former newspaper subscribers with numbers on the Do Not Call Registry); ARDA, No. 00100, at 2–4 (e.g., amendments to the prohibition to send robocalls and relaxing the restrictions on abandoned calls to existing customers); NCLC, No. 00110, at 14 (amendment to change the assisting and facilitating knowledge standard from “knows or consciously avoids knowing” to “knows or has reason to know”); NobelBiz, No. 00104, at 5 (amendment relating to the TSR’s intent to deceive the call recipient).

147 NAA, No. 00099, at 7–8 (amendment to require monthly purging of disconnected and reassigned numbers on the Registry which is unnecessary since the agency already performs such purging—see FTC, Do-Not-Call Improvement Act of 2007, Report To Congress: Regarding the Accuracy of the Do Not Call Registry (Oct. 2008), available at https://www.ftc.gov/sites/default/files/documents/reports/do-not-call-improvement-act-2007-report-congress-regarding-accuracy-do-not-call-registry/p034305dncreport.pdf); Air Rehab. Corp., No. 00047 (amendment to exempt calls to arrange face-to-face sales meetings which are already exempt under Section 310.6(b)(3)); Whi, No. 00017 (amendment to permit private lawsuits, which are already permitted under the Telemarketing Act, 15 U.S.C. 6104, and the Telephone Consumer Protection Act, 47 U.S.C. 227(b)(3)).

148 See, e.g., ARDA, No. 00100, at 2, 4–6 (amendments relating to issues under the FCC’s jurisdiction, including autodials, call phones, and SMS texts).

149 See, e.g., CRL, No. 00093 at 4, 10 (acknowledging lack of data); NCLC, No. 00110, at 18–19.

150 Original TSR, 60 FR at 43859.


that they have detected an issue on their computers. Alternatively, scammers use deceptive computer pop-up messages that tell consumers to run a scan resulting in numerous “error” messages. Or, they place search engine advertisements displayed when a consumer searches online for either the phone number of her computer company or for information about an issue she is having with her computer. The pop-up messages and search engine advertisements typically direct consumers to call a phone number to fix the purported problems. Once consumers connect with telemarketers, whether through outbound telemarketing or inbound, the telemarketers convince consumers there are a variety of problems with their computers and persuade consumers to purchase subscription tech support services or software they do not need.

The Commission has brought a multitude of cases against sellers and telemarketers perpetrating tech support frauds on consumers. In many of those cases, telemarketers have induced inbound telemarketing by placing advertisements via search engine ads, thus falling outside of the TSR’s purview unless the telemarketer also upsets the consumer on a good or service. Given this rising threat and the harm it causes to consumers, particularly those aged 60 and older, the Commission believes the time is ripe to consider repealing the TSR exemption for inbound telemarketing of tech support services.

In considering this proposal, in addition to the questions listed below, the Commission seeks comment on whether: (1) It should add tech support services to the list of goods or services for which the inbound telemarketing exemptions do not apply; (2) it should repeal the exemption only for general media advertisements (e.g., search engine ads) that induce inbound telemarketing of tech support services but retain the exemption for direct mail solicitation under Section 310.6(b)(6); or (3) it should repeal the exemption in its entirety but carve out an exemption for sellers who manufacture the computer at issue, and with whom the consumer has an existing business relationship (i.e., if a consumer purchased a computer from Microsoft, the TSR would not apply to any inbound telemarketing calls induced by or on behalf of Microsoft to that consumer). The Commission also seeks comment on whether tech support service scams impact other devices such as mobile phones or tablets.

B. Questions for Inbound Telemarketing of Tech Support Services

1. Should the TSR apply to inbound telemarketing of tech support services? If not, why not? If yes, why? What harm is caused by such calls? What benefits do such calls confer? What existing Federal or state laws apply to such calls, and are the existing laws sufficient or insufficient to address the identified harm? If no, why? If yes, what harm would it affect consumers? If sellers or telemarketers receive on average per year, per month, or per day? How many of those calls or what percentage of those calls result in a sale? If sellers or telemarketers receive on average per year, per month, or per day? How many of those calls or what percentage of those calls result in a sale?

2. What kind of tech support services do sellers offer to consumers? What kinds of products do the tech support services cover? What is the nature of the services offered? Do the services require consumers to sign up for a subscription plan? How many services require a subscription plan?

3. How many sellers or telemarketers sell tech support services through inbound telemarketing without using unfair or deceptive acts or practices? How many sellers offer those services only through inbound telemarketing and do not employ any outbound telemarketing? How do consumers learn about these sellers? Do they advertise through general media advertisements or direct mail solicitations? What kind of advertisements? How would requiring such sellers to comply with the TSR affect their business? How would it affect consumers?

4. How many inbound telemarketing calls for tech support services do sellers or telemarketers receive on average per year, per month, or per day? How many of those calls or what percentage of those calls result in a sale?

5. Do sellers or telemarketers that sell tech support services through inbound telemarketing sell those services to consumers, businesses, or both? If sellers or telemarketers are engaged in inbound telemarketing of tech support services to consumers, how many such calls do sellers or telemarketers receive on average per year, per month, or per day? How many of those calls or what percentage of those calls result in a sale? If sellers or telemarketers are engaged in inbound telemarketing of tech support services to businesses, how many such calls do sellers or telemarketers receive on average per year, per month, or per day? How many of those calls or what percentage of those calls result in a sale?

6. How many inbound tech support telemarketing calls were induced by general media advertising such as search engine advertisements? How many of those calls or what percentage of calls induced by general media resulted in a sale?

7. How many inbound tech support telemarketing calls were induced by a direct mail solicitation? How many of those calls or what percentage of calls induced by direct mail solicitations resulted in a sale?

8. Do entities that manufacture and sell computers engage in inbound telemarketing of tech support services to businesses or consumers? If so, do such entities use unfair or deceptive acts or practices to sell their tech support services? If such entities engage in inbound telemarketing of tech support services to consumers, how many calls do such entities receive from consumers on average per year, per month, or per day? How many calls result in a sale? If such entities engage in inbound telemarketing of tech support services to businesses, how many calls do such entities receive from businesses on
average per year, per month, or per day? How many calls result in a sale?

9. Should the TSR apply to inbound telemarketing of tech support services induced by advertisements through any medium? If yes, why, and what is the harm caused by such solicitations? If not, why not, and should the TSR apply to inbound telemarketing of tech support services induced by particular types of advertisements?

10. Should the TSR apply to inbound telemarketing of tech support services induced by direct mail solicitation? If yes, why and what harm is caused by such solicitations? If not, why not?

11. Should the TSR continue to exempt inbound telemarketing of tech support services but lessen that burden on industry? If yes, why, and what is the harm caused by such solicitations? If not, why not?

12. If the Commission repeals the exemptions for inbound telemarketing of tech support services, should it create a carve out? What kind of carve out and why? Should the Commission carve out an exemption for entities who manufacture the computer at issue and have an existing business relationship with the consumer? Why or why not?

13. How should the Commission define “tech support services”? Should the definition apply to any type of technology assistance, including for any device (e.g., mobile phones and tablets)? If not, why not? If yes, why and what is the harm caused in connection with those technology assistance services? Have there been instances of fraud occurring in connection with those technology assistance services? How pervasive is this type of fraud?

14. If the Commission considers employing a broad definition of tech support so that it either encompasses multiple types of services, or any form of technology assistance, should the Commission consider carve outs for a particular type of technology assistance? If yes, what carve out should the Commission consider and why?

15. If the Commission repeals the exemptions for inbound telemarketing of tech support services, what burden would be imposed on industry? How do you quantify that burden? How can the Commission repeal the exemption for inbound telemarketing of tech support services but lessen that burden on industry?

B. Business-to-Business Telemarketing Calls

1. Regulatory History of Business-to-Business Telemarketing Exemption

The Commission has considered whether to narrow or clarify the business-to-business (“B2B”) exemption on several occasions since its promulgation in 1995. First, in 2003 the Commission considered whether to include a carve out from the exemption for the sale of internet or web services to prevent small businesses from being defrauded as they navigated the then-new world of internet advertising. The Commission defined internet or web services as services that enable businesses to access the internet or the world wide web. The Commission noted that reports of frauds from small businesses about telemarketers promoting services that could help them increase their internet presence had risen dramatically with the rapid adoption of internet use from 1997 to 2002.

Consumer advocates and law enforcement agencies argued the TSR should not exempt telemarketing of internet or web services to businesses based on extensive law enforcement efforts to combat the proliferation of fraudulent telemarketing of those services. Industry proponents argued the record did not support applying the TSR to those services in such a sweeping fashion and overregulation would result in harming small businesses because “it would increase their costs and hamper their use of Web-based advertising such as online Yellow Pages.” The Commission decided imposing regulations without further evidence that its law enforcement tools were insufficient might negatively impact small businesses by increasing their cost and impeding their use of internet advertising. The Commission stated it needed to “move cautiously so as not to chill innovation in the development of cost-efficient methods for small businesses to join in the internet marketing revolution.”

The Commission revisited the B2B exemption in 2013 when it issued a Notice of Proposed Rulemaking (“2013 NPRM”) seeking comment on whether to amend the exemption to explicitly limit it to telemarketing calls selling a good or service to that business or seeking a charitable contribution from that business, rather than personal purchases or charitable contributions of employees of the business. The Commission noted in its 2013 NPRM that it had allowed business telephone numbers to be listed on the FTC’s Do Not Call (“DNC”) Registry “because, among other reasons, telemarketers who seek to circumvent the Registry have solicited employees at their place of business to buy goods or services such as dietary products, auto warranties, and credit assistance.” In implementing the amendment in 2015, the Commission reiterated the amendment is “simply a clarification of the scope of the existing exemption, not a change in its substance” and the “clarification should further deter telemarketers from attempting to circumvent the Registry.”

2. Law Enforcement Experience in Deceptive Business-to-Business Telemarketing

Since the Commission last considered, and declined, to substantively amend the B2B exemption to exclude services providing access to the internet, the marketplace has substantially evolved. The digital marketing landscape has become increasingly complex and ripe with opportunities for sellers or telemarketers to defraud small businesses by selling them services to help them advertise their businesses online. Indeed, the
expansion of the different ways to advertise online has been accompanied by numerous types of deceptive telemarketing schemes aimed at small businesses, including schemes that have purportedly sold business directory listing services, the very same services industry proponents claimed small businesses would not be able to access if the Commission implemented its proposed amendments.\(^\text{173}\) The Commission has brought many cases against fraudulent telemarketers selling services that purportedly assist small businesses to advertise online, including business directory listings,\(^\text{176}\) web hosting or design scams,\(^\text{177}\) and search engine optimization (“SEO”) services.\(^\text{178}\) The Commission has also seen deceptive telemarketing schemes that target businesses in other areas not related to online advertising services.\(^\text{179}\) In fact, the Commission has filed cases against other telemarketing frauds targeting small businesses such as market-specific advertising opportunities\(^\text{180}\) and government imposition scams.\(^\text{181}\) Given the Commission’s law enforcement experience in this area showing the prevalence of fraud in digital marketing services targeting businesses, and the maturation of this industry, the Commission believes it is time to reconsider whether the TSR should continue to exempt B2B telemarketing at all, or at a minimum, B2B telemarketing of digital marketing services or imposter scams that harm businesses.\(^\text{182}\) The Commission also believes there is evidence to apply the TSR’s prohibitions against making material misrepresentations or false or misleading statements in B2B telemarketing and seeks comment on this proposal in the NPRM.

3. Market Changes in People’s Work Experience

In addition to the Commission’s law enforcement experience, the Commission also notes that since it last considered making substantive changes to the exemption in 2003, technological advancements, along with current events, have drastically affected where people typically perform their jobs as well as the types of jobs they perform. Specifically, technological changes have provided people more workplace

173 See supra note 169.
179 A 2018 survey conducted by the Better Business Bureau revealed that the same scams that harm consumers, such as tech support scams and imposter scams, also harm small businesses, and that 57% of scams that impact small businesses are perpetrated through telemarketing. Better Business Bureau, Scams and Your Small Business Research Report, at 9–10 (June 2018), available at https://www.bbb.org/globalassets/local-bbb/bbboidal-31650353-mktg-b2b11smallbusinessresearch-bbb smallbizscamsreport-final-06-18.pdf (last visited Jan. 31, 2022).
work, it is likely gig workers utilize their personal phones for business purposes rather than relying on separate phone lines dedicated for business purposes. Thus, for gig workers, allowing B2B telemarketing might subject them to an increasing number of unwanted calls they cannot avoid by using call-blocking technology or by placing their numbers on the FTC’s DNC Registry. This is not a new dilemma; one commenter to the Regulatory Review highlighted it as a challenge for home-based businesses several years ago. But it may be on the rise along with the gig economy. This issue likely affects more than just home-based businesses and applies to any person who utilizes one phone for both personal purposes and business purposes. Despite the Commission’s amendments in 2015 to make explicit that the B2B telemarketing exemption only applies to the sale of goods or services to a business, unscrupulous telemarketers could take advantage of this rising trend to assert the B2B exemption should apply if a person does have a dual purpose phone.

In light of these changes in workforce dynamics, the Commission is seeking comment on whether the TSR should continue to exempt B2B telemarketing calls. Specifically, the Commission seeks comments on whether: (1) The exemption should be repealed in its entirety; (2) the exemption should be partially repealed so that only specific provisions of the TSR would apply to B2B telemarketing; or (3) the exemption should be partially repealed so that the TSR applies to a subset of B2B telemarketing based on, for example, the particular goods or services offered for sale. Because, as PACE has noted, telemarketers cannot easily differentiate Uber drivers, Task Rabbit workers, contract nurses, and freeancers.

While call-blocking technology may be effective for a consumer’s personal phone, businesses and individuals using their personal phones for business purposes may not feel able to employ call-blocking technology to the same extent if they anticipate receiving calls from prospective customers. Because the TSR exempts B2B telemarketing calls, a seller or telemarketer engaged in B2B telemarketing may argue that it is not prohibited from calling people on the FTC’s Do Not Call registry if those people are also using their phone numbers for business purposes and the seller or telemarketer is calling to sell a good or service to a business. West Italian, No. 00113, at 3. The Commission is also interested in understanding whether its proposal to apply more completely the TSR to B2B telemarketing will impact underserved communities differently. For example, would applying the TSR to B2B telemarketing impose greater burdens on minority-owned businesses engaged in telemarketing? Would it create barriers to entrepreneurship when entrepreneurs from communities of color are already underrepresented compared to their share of the population? Or would it provide greater protection to minority-owned businesses against fraud and disruptive telemarketing? The Commission has found very few sources of data on these issues and invites comments that can help the Commission understand the full impact of its proposal on underserved communities.

The Commission believes it is possible many telemarketers who engage in telemarketing to businesses may already ensure that they do not make calls to numbers on the FTC’s DNC Registry even though they are not currently required to comply with the DNC provisions of the TSR. As such, the Commission is also particularly interested in seeking comment on the number of sellers or telemarketers who engage in telemarketing to businesses. The Commission is also interested in whether, in the ordinary course of business, such sellers or telemarketers make any attempts to determine whether a phone number is on the FTC’s DNC Registry or to differentiate between phone numbers used for personal purposes and those used for business purposes.

From its law enforcement experience and through its policy work in connection with the Every Community Initiative, the Commission is cognizant that fraud and other consumer and business concerns can have disproportionate negative impacts on underserved communities. Thus, the Commission is also interested in understanding whether its proposal to apply more completely the TSR to B2B telemarketing will impact underserved communities differently. For example, would applying the TSR to B2B telemarketing impose greater burdens on minority-owned businesses engaged in telemarketing? Would it create barriers to entrepreneurship when entrepreneurs from communities of color are already underrepresented compared to their share of the population? Or would it provide greater protection to minority-owned businesses against fraud and disruptive telemarketing? The Commission has found very few sources of data on these issues and invites comments that can help the Commission understand the full impact of its proposal on underserved communities.

The Commission believes it is possible many telemarketers who engage in telemarketing to businesses may already ensure that they do not make calls to numbers on the FTC’s DNC Registry even though they are not currently required to comply with the DNC provisions of the TSR. As such, the Commission is also particularly interested in seeking comment on the number of sellers or telemarketers who engage in telemarketing to businesses. The Commission is also interested in whether, in the ordinary course of business, such sellers or telemarketers make any attempts to determine whether a phone number is on the FTC’s DNC Registry or to differentiate between phone numbers used for personal purposes and those used for business purposes.

From its law enforcement experience and through its policy work in connection with the Every Community Initiative, the Commission is cognizant that fraud and other consumer and business concerns can have disproportionate negative impacts on underserved communities. Thus, the Commission is also interested in understanding whether its proposal to apply more completely the TSR to B2B telemarketing will impact underserved communities differently. For example, would applying the TSR to B2B telemarketing impose greater burdens on minority-owned businesses engaged in telemarketing? Would it create barriers to entrepreneurship when entrepreneurs from communities of color are already underrepresented compared to their share of the population? Or would it provide greater protection to minority-owned businesses against fraud and disruptive telemarketing? The Commission has found very few sources of data on these issues and invites comments that can help the Commission understand the full impact of its proposal on underserved communities.
Questions Regarding Possible Benefits to People and Businesses From Repealing the B2B Exemption

1. How many telemarketing calls do businesses and non-profit charitable organizations receive on average per year, per month, or per day? What kinds of goods or services are the subject of those B2B telemarketing calls? Do businesses and non-profit charitable organizations receive B2B telemarketing calls utilizing prerecorded messages, including soundboard technology? If yes, how many do businesses receive on average per year, per month, or per day? What kinds of goods or services are sold to businesses and non-profit charitable organizations via prerecorded message? How many of these calls involve soundboard technology?

2. Do businesses and non-profit charitable organizations receive telemarketing calls soliciting charitable contributions? If yes, how many such calls do businesses receive on average per year, per month, or per day? On behalf of what kinds of organizations do telemarketers solicit charitable contributions from businesses and non-profit charitable organizations? Do businesses and non-profit charitable organizations receive B2B telemarketing that use prerecorded messages to solicit charitable contributions? How many such calls do businesses and non-profit charitable organizations receive on average per year, per month, or per day? Do those messages utilize soundboard technology?

3. Do people or businesses support repealing the business-to-business exemption from the TSR? If not, why not? If yes, what harm does B2B telemarketing cause to people, small businesses, or to businesses of any size? What is an accurate estimate of annual harm suffered by businesses as a result of B2B telemarketing?

4. Do underserved communities support repealing the business-to-business exemption from the TSR? If not, why not? If yes, what harm does B2B telemarketing cause to underserved communities? What is an accurate estimate of annual harm suffered by underserved communities as a result of B2B telemarketing?


7. Should the TSR apply only to B2B telemarketing calls offering digital marketing goods or services to businesses or non-profit charitable organizations and impostor scams? If not, why not? If yes, why? How would you define digital marketing goods or services? What harm is caused by telemarketing goods or services to businesses or non-profit charitable organizations? If the TSR were applied to B2B telemarketing calls of digital marketing goods or services or impostor scams harming businesses, should the TSR carve out any exceptions? If yes, what exceptions and why?

8. Should the TSR be limited to B2B telemarketing calls of specific goods or services? If yes, what goods or services? What harm is caused by telemarketing those goods or services to businesses or non-profit charitable organizations? What existing laws apply to the telemarketing of those goods or services to businesses or non-profit charitable organizations? Why are the existing laws governing the sale of those goods or services to businesses or non-profit charitable organizations insufficient to prevent the identified harm? Should all provisions of the TSR apply to the telemarketing of those goods or services to businesses? If not, why not and what specific TSR provisions should apply? Should there be any carve outs from applying the TSR or specific call prohibitions in the TSR to the telemarketing of those goods or services to businesses or non-profit charitable organizations?


10. Should all of the provisions of the TSR apply to B2B telemarketing calls? If yes, why? If not, which provision(s) of the TSR should apply to B2B telemarketing calls? What harm would be prevented by applying that provision?

11. Should the TSR’s provisions regarding the use of prerecorded messages apply to B2B telemarketing calls? If not, why not? What harm is caused by B2B telemarketing calls that utilize prerecorded messages?


14. Do businesses or non-profit organizations employ call-blocking technologies? If yes, do they successfully reduce the number of unwanted B2B telemarketing calls? If they don’t use such technologies, why not?

15. Do people who work from home or gig workers use call-blocking technologies? If yes, do they use such technologies on their business phones or personal phones? Do the call-blocking technologies successfully reduce the number of unwanted telemarketing calls, including unwanted B2B calls, if any? If they don’t use such technologies, why not?

16. How many home-based businesses have a dedicated phone number for business purposes? How many B2B telemarketing calls do such businesses receive on their business phone numbers on average per year, per month, or per day? How many home-based businesses utilize one phone number for both personal and business purposes? How many B2B telemarketing calls do such businesses receive on their dual purpose phone number on average per year, per month, or per day? Do home-based businesses use call-blocking technologies? If yes, do such businesses use call-blocking
technologies on their business lines? Do call-blocking technologies successfully reduce the number of unwanted telemarketing calls, including unwanted B2B calls, if any? If not, why don’t home-based businesses use call-blocking technologies? What types of goods or services are offered for sale in the B2B telemarketing calls that home-based businesses receive?

18. How many small businesses have a dedicated phone number for business purposes? How many B2B telemarketing calls do such businesses receive on their business lines on average per year, per month, or per day? How many small businesses have one phone number that they use for personal and business purposes? How many B2B telemarketing calls do such businesses receive on their dual purpose phone number on average per year, per month, or per day? Do small businesses use call-blocking technologies? If yes, do small businesses use call-blocking technologies on their business lines? Do call-blocking technologies successfully reduce the number of telemarketing calls, including unwanted B2B calls, if any? If not, why don’t small businesses use call-blocking technologies? What types of goods or services are offered for sale in the B2B telemarketing calls that small businesses receive?

19. How do sellers or telemarketers determine whether a phone number belongs to a person or a business? Has this determination been made more difficult by people working from home or participating in the gig economy?

Questions Regarding the Potential Burden to Telemarketers and Sellers From Repealing the B2B Exemption

1. How many sellers or telemarketers engage in telemarketing to businesses? How much revenue do sellers or telemarketers make in telemarketing to businesses and how would removing the exemption for B2B sales affect their revenue?

2. How many sellers or telemarketers engage in telemarketing exclusively to businesses and do not engage in telemarketing to people?

3. How many telemarketers solicit charitable contributions from businesses? Do those same telemarketers also solicit charitable contributions from people?

4. What goods or services do sellers offer for sale to businesses through telemarketing? Do sellers utilize other means of marketing those same goods or services to businesses? Do sellers sell those same goods or services to people?

5. How many outbound B2B telemarketing calls do sellers or telemarketers make on average per year, per month, or per day? How many of those calls or what percentage of those outbound B2B telemarketing calls result in a sale? How many inbound B2B telemarketing calls do sellers or telemarketers receive on average per year, per month, or per day? How many of those calls or what percentage of those inbound telemarketing calls result in a sale? Do sellers or telemarketers keep records of the outbound calls or inbound B2B telemarketing calls in the ordinary course of business? What type of records do sellers or telemarketers keep of those telemarketing calls? How long are they kept?

6. Do sellers or telemarketers offer goods or services to businesses by using prerecorded messages, including through soundboard technology? If so, how many B2B telemarketing calls do sellers or telemarketers make using prerecorded messages on average per year, per month, or per day? How many of those calls result in a sale?

7. Do sellers or telemarketers make B2B telemarketing calls involving debt relief services? If so, how many calls involving debt relief services do sellers or telemarketers make on average per year, per month, or per day? How many of those calls or what percentage of those calls result in a sale?

8. What is the estimated burden of complying with the TSR if the B2B exemption is repealed for both outbound and inbound telemarketing? What is the basis for the estimated burden?

9. What is the estimated burden of complying with the TSR if the B2B exemption for outbound telemarketing is repealed? What is the basis for the estimated burden?

10. What is the estimated burden to underserved communities of complying with the TSR if the B2B exemption is repealed for outbound telemarketing? What is the estimated burden to underserved communities of complying with the TSR if the B2B exemption is repealed for inbound telemarketing? What is the basis for the estimated burden?

11. What is the estimated burden of complying with the TSR if the B2B exemption is repealed for the sale of digital marketing goods or services or impostor scams that harm businesses? What is the basis for the estimated burden?

12. What is the estimated burden of complying with the TSR if the B2B telemarketing calls are required to comply with the TSR’s provisions regarding prerecorded messages? What is the basis for the estimated burden?

13. Do sellers or telemarketers who engage in B2B telemarketing take any steps to ensure they are not making calls to phone numbers on the DNC Registry? If so, what steps do sellers or telemarketers take? Do such sellers or telemarketers also engage in telemarketing to people? Do sellers or telemarketers who engage in B2B telemarketing exclusively take steps to ensure that they are not making calls to phone numbers on the FTC’s DNC Registry? If so, what steps do such sellers or telemarketers take? Do they access the DNC Registry?

D. Questions for Negative Option Notice and Cancelation Mechanisms

As discussed in Section IV.C, the Commission seeks comment on the proposal that negative option sellers and telemarketers provide consumers with notice and the opportunity to cancel before they are billed for negative option products. The Commission also seeks comment on the scope of deceptive or abusive inbound telemarketing with a negative option feature.

1. How many telemarketing calls involve a negative option feature on average per year, per month, or per day? How many of those calls or what percentage of those calls result in a sale?

2. Which industries offer negative option goods or services through telemarketing and what products do they sell? How many of the goods or services sold by these industries are sold through telemarketing that includes negative options?

3. When sellers or telemarketers sell goods, or services with negative option features, how often (e.g., weekly, monthly, annually) do the sellers bill consumers and businesses?

4. Do sellers or telemarketers already provide consumers notice when consumers and businesses are billed as part of negative option programs? How is that notice provided? How often is the notice provided before the consumer and business is billed? What is the cost of providing this notice?

5. Do consumers want notification that they are about to be charged for a subscription plan? If so, how would they like to be notified? How often would they like to be notified? When would they like the notification to take place (e.g., once a week before being charged)?

6. What cancelation mechanisms do sellers or telemarketers provide for consumers and businesses to cancel their negative option programs? What is the cost of these mechanisms? Are some mechanisms easier for consumers to use than others? If sellers or telemarketers offer multiple cancelation mechanisms, how often do consumers use each mechanism?
7. Do consumers and businesses who purchase a negative option product or service through telemarketing have a preference for how they communicate with the seller (e.g., email, phone, online chat, or some other method)?

8. Do consumers and businesses who purchase negative option products or services through telemarketing typically have email accounts where they can receive notice of negative option programs? Do they typically provide email addresses to sellers or telemarketers? Do they have a preference for how they cancel the negative option or service? If not, what is the best way for those consumers and businesses to cancel negative-option programs?

9. When sellers or telemarketers sell negative option programs to consumers and businesses, what personal information do they obtain? How often do sellers or telemarketers communicate with consumers by email?

10. How often do sellers or telemarketers use unfair or deceptive acts or practices to sell goods or services with a negative option feature solely through inbound telemarketing that are not part of an upsell? Are goods or services other than tech support sold in this manner? If so, which goods or services and how often are they sold in this manner? Should the TSR be further amended to provide consumers with additional protections against these deceptive acts or practices? How so?

VI. Comment Submissions

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before August 2, 2022. Write “Telemarketing Sales Rule ANPR, R411001” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the FTC website. Because of the public health emergency in response to the COVID–19 outbreak and the agency’s heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comment online through the FTC website. To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write “Telemarketing Sales Rule ANPR, R411001” on your comment and on the envelope and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex B), Washington, DC 20580.

Because your comment will be placed on the publicly accessible website, https://www.regulations.gov, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include any personal sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “trade secret or any commercial or financial information which . . . is privileged or confidential”—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, but must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c).

In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at the FTC website, you will not receive a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this document and the news release describing it. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding. The Commission will consider all timely and responsive public comments it receives on or before August 2, 2022. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see https://www.ftc.gov/site-information/privacy-policy.

By direction of the Commission,

April J. Tabor,
Secretary.

|FR Doc. 2022–10922 Filed 6–2–22; 8:45 am|

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION

16 CFR Part 310

RIN 3084–AB19

Telemarketing Sales Rule

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Trade Commission (“FTC” or “Commission”) seeks public comment on proposed amendments to the Telemarketing Sales Rule (“TSR”). The proposed amendments would require telemarketers and sellers to maintain additional records of their telemarketing transactions, prohibit material misrepresentations and false or misleading statements in business to business (“B2B”) telemarketing transactions, and add a new definition for the term “previous donor.” The modified recordkeeping requirements are necessary to protect consumers from deceptive or abusive telemarketing practices and support the Commission’s law enforcement mandate to enforce the TSR. The prohibition on material misrepresentations and false or misleading statements is necessary to protect businesses from deceptive telemarketing practices. The new definition of “previous donor” will clarify that a telemarketer may not use prerecorded messages to solicit charitable donations on behalf of a charitable organization unless the recipient of the call made a donation to that particular charitable organization within the prior two years.

DATES: Comments must be received by August 2, 2022.

ADDRESSES: Interested parties may file a comment online or on paper by following the instructions in the Request for Comment part of the SUPPLEMENTARY INFORMATION section below. Write “Telemarketing Sales Rule (16 CFR part 310—NPRM) (Project No. R411001)” on your comment and file your comment through https://www.regulations.gov. If you prefer to file your comment on paper, mail your