[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") proposes to amend the Telemarketing Sales Rule ("Rule") to extend its coverage to inbound telemarketing calls by consumers to technical support services – i.e., calls that consumers make in response to an advertisement through any medium or to a direct mail solicitation. The proposed amendment is necessary in light of the widespread deception and consumer injury caused by tech support scams. The amendment would provide the Commission with the ability to obtain stronger relief in cases involving tech support scams, including civil penalties and consumer redress.

DATES: Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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 online at 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 Federal Trade Commission issues this Notice of Proposed Rulemaking ("NPRM") to invite public comment on a proposed amendment to the TSR that would require inbound technical support ("tech support") calls to comply with the Rule.[1] The Rule is currently framed to exempt from its requirements: (1) calls initiated by a customer in response to an advertisement through any medium, and (2) calls initiated by a customer in response to a direct mail solicitation.[2] The proposal would specifically exclude tech support calls from these inbound call exemptions. The NPRM also explains the Commission's decision to refrain from proposing changes to the TSR that would: (1) require a notice and cancellation mechanism with negative option sales or (2) further address business to business ("B2B") calls.[3]

This NPRM invites written comments on all issues raised by the proposed amendment, including answers to the specific questions set forth in Section IV of this Notice. The Commission is also issuing a Final Notice of Proposed Rulemaking ("FNPR") that, among other things, will require telemarketers and sellers to maintain additional records of their telemarketing

[1] *See* 16 CFR pt. 310. References to the TSR will cite the Section number (e.g., § 310.6(b)(5)).

[2] *See* Section 310.6(b)(5) & (b)(6). The exemptions currently exclude certain categories of calls that are likely to be deceptive, such as calls relating to investment opportunities and debt relief services.

[3] The Commission is concurrently issuing a Final Rule that would require B2B calls to comply with the TSR's prohibitions on deception.

transactions and prohibit material misrepresentations and false or misleading statements in B2B telemarketing calls.

II. Overview of the Telemarketing Sales Rule

Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act" or "Act") in 1994 to curb deceptive and abusive telemarketing practices and provide anti-fraud and privacy protections for consumers receiving telephone solicitations to purchase goods or services.[4] The Telemarketing Act directed the Commission to adopt a rule prohibiting deceptive or abusive telemarketing practices, including prohibiting telemarketers from undertaking a pattern of unsolicited calls that reasonable consumers would consider coercive or abusive of their privacy, restricting the time of day telemarketers may make unsolicited calls to consumers, and requiring telemarketers to promptly and clearly disclose that the purpose of the call is to sell goods or services.[5] The Act also directed the Commission to address in its rule other acts or practices that it found to be deceptive or abusive, including acts or practices of entities or individuals that assist and facilitate deceptive telemarketing, and to consider including recordkeeping requirements.[6] Finally, the Act authorized state Attorneys General, or other appropriate state officials, and private litigants to bring civil actions in federal district court to enforce compliance with the FTC's rule.[7]

---

[4] 15 U.S.C. 6101-6108.

[5] 15 U.S.C. 6102(a)(3). The Telemarketing Act was subsequently amended in 2001 to add 15 U.S.C. 6102(a)(3)(D), which requires a telemarketer to promptly and clearly disclose the purpose calls made to solicit charitable contributions. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act"), Pub. L. 107-56, 115 Stat. 272 (Oct. 26, 2001).

[6] 15 U.S.C. 6101(a); *see also* 2002 Notice of Proposed Rulemaking, 67 FR 4492, 4510 (Jan. 30, 2002).

[7] 15 U.S.C. 6103, 6104.

Pursuant to the Act's directive, the FTC promulgated the TSR on August 23, 1995.[8] Since then, the Commission has amended the Rule's substantive provisions on four occasions: (1) in 2003 to, among other things, create the National Do-Not Call Registry and extend the Rule to telemarketing calls soliciting charitable contributions;[9] (2) in 2008 to prohibit calls playing a recorded message ("robocalls") selling a good or service or soliciting charitable contributions;[10] (3) in 2010 to ban the telemarketing of debt relief services requiring an advance fee;[11] and (4) in 2015 to bar the use in telemarketing of certain novel payment mechanisms widely used in fraudulent transactions.[12]

On June 3, 2022, the Commission issued an Advance Notice of Proposed Rulemaking ("ANPRM") and a separate Notice of Proposed Rulemaking ("June NPRM").[13] concerning several potential changes to the TSR. The June NPRM proposed amending the TSR's recordkeeping requirements and requiring B2B calls to comply with the TSR's prohibitions on several types of misrepresentations.[14] The TSR currently excludes most B2B calls from the

[8] *See* Statement of Basis and Purpose and Final Rule ("Original TSR"), 60 FR 43842 (Aug. 23, 1995).

[9] *See* Statement of Basis and Purpose and Final Amended Rule ("2003 TSR Amendments"), 68 FR 4580 (Jan. 29, 2003) (adding Do Not Call Registry, charitable solicitations, and other provisions).

[10] *See* Statement of Basis and Purpose and Final Rule Amendments ("2008 TSR Amendments"), 73 FR 51164 (Aug. 29, 2008) (addressing the use of robocalls).

[11] *See* Statement of Basis and Purpose and Final Rule Amendments ("2010 TSR Amendments"), 75 FR 48458 (Aug. 10, 2010) (adding debt relief provisions). The prohibition on misrepresenting material aspects of debt relief services in § 310.3(a)(2)(x) was added in 2010 along with other debt relief provisions. *See* 2010 TSR Amendments, 75 FR at 48498. The Commission subsequently published correcting amendments to the text of § 310.4 of the TSR. Telemarketing Sales Rule; Correcting Amendments, 76 FR 58716 (Sept. 22, 2011).

[12] *See* Statement of Basis and Purpose and Final Rule Amendments ("2015 TSR Amendments"), 80 FR 77520 (Dec. 14, 2015) (prohibiting the use of remotely created checks and payment orders, cash-to-cash money transfers, and cash reload mechanisms).

[13] 87 FR 3367.

[14] *Id.* at 3367. The June NPRM also proposed adding a new definition of "previous donor."

Rule's coverage.[15] The ANPR sought comment on: (1) whether to further modify the TSR's treatment of B2B calls including removing the exemption entirely; (2) whether the Rule should require sellers of negative option products to provide consumers notice before they are billed and a simple mechanism to cancel the negative option; and (3) whether to extend the Rule to apply to inbound tech support calls.

III. Discussion of Comments

A. Negative Option

The Commission received seven comments that addressed whether the Rule should require a notice and cancellation mechanism with negative option sales.[16] Six of the comments supported creating additional protections for negative option sales, and one opposed any changes.

The Professional Association for Customer Engagement ("PACE") opposed any changes to the Rule to address negative options. PACE claimed that many consumers "embrace negative option offers" and regularly check their bank statements to identify and stop unwanted recurring charges.[17] PACE also argued that requiring sellers or telemarketers to give notice to consumers before they are billed for recurring payments would "amount to yet another nuisance."[18]

The other six commenters supported amending the Rule to create greater protections for negative option sales. Three of those comments expressed general support for the Rule requiring

---

[15] *See* Section 310.6(b)(7). The exemption for B2B calls excludes calls selling nondurable office or cleaning supplies.

[16] Many commenters filed one comment either in response to the ANPR or June NPRM that addressed issues raised by both documents. We address relevant comments that were filed in response to both rulemakings. We cite public comments by name of the commenting organization or individual, the rulemaking (ANPR comments were assigned "33" and the NPRM comments were assigned "34") and the comment number.

[17] PACE 34-21 at 9.

[18] *Id.*

notice and a simple cancellation method for negative options sales.[19] The National Association of Attorneys General ("NAAG"), and the Electronic Privacy Information Center, along with thirteen other consumer organizations ("EPIC"), observed that negative options continue to grow in popularity.[20] NAAG's comment "echoes sentiments expressed by State AGs for more than a decade," though those sentiments were directed to negative options generally as opposed to the specific benefits or risks of negative options sold by telemarketing.[21] NAAG noted that negative option plans have become "increasingly prevalent" over the past decade "especially as home delivery became more popular during the COVID-19 pandemic."[22] EPIC cited a prediction made by UBS that the "subscription economy" will more than double by 2025, and it noted the rise of a "cottage industry" to help consumers manage and cancel their subscriptions.[23]

Commenters also expressed concern for rules that would create inconsistent regulation of negative options. The Third Party Payments Association ("TPPA") urged the FTC to use its rule making authority to "promulgate consistent requirements across its various rules, regardless of sales channel, means of communication and/or method of obtaining payment authorization."[24] EPIC also noted that Visa and Mastercard require sellers to provide advance notice before the

[19] Two of those comments were anonymous, 33-10 and 33-11, and one was made by Kara V, 33-12.

[20] NAAG 33-16; EPIC 33-17. The other individuals and organizations participating in the EPIC comment are: National Consumer Law Center (on behalf of its low-income clients), Center for Digital Democracy, Consumer Action, Consumer Federation of America, FoolProof, Mountain State Justice, National Consumers League, New Jersey Citizen Action, Patient Privacy Rights, Public Good Law Center, Public Justice Center, Public Knowledge, South Carolina Appleseed Legal Justice Center, Cathy Lesser Mansfield (Senior Instructor in Law, Case Western Reserve University School of Law).

[21] NAAG 33-16 at 3-4.

[22] *Id.* at 3.

[23] EPIC 33-17 at 7.

[24] TPPA 34-14 at 2.

end of a trial period, and it cautioned that "leaving these safeguards up to individual companies will create a patchwork of different policies."[25]

At the same time the Commission has been considering amendments to the Rule, it has also been considering a broader rule that would address negative option sales regardless of the method through which the sale is made. On October 2, 2019 the Commission issued an Advance Notice of Proposed Rulemaking regarding the need for a "Rule Concerning the Use of Prenotification Negative Option Plans,"[26] and on April 24, 2023, the Commission issued a Notice of Proposed Rulemaking ("Negative Option NPRM").[27] The Negative Option NPRM would apply to sales calls made by telephone. It proposes a rule that would, among other things: require a clear and conspicuous disclosure of the negative option feature and its conditions; require sellers to obtain consumers' express informed consent to the negative option transaction; and require sellers to provide a simple mechanism to cancel the negative option that is at least as easy as the method used to initiate the transactions. Because the proposed Negative Option Rule addresses the commenters' suggestions including the preference for a rule that would apply to all transactions, instead of potentially creating different regulatory regimes depending on the sales channel, the Commission will not amend the TSR to address negative option transactions at this time.

B. Business to Business

The Commission received fifteen comments addressing the ANPR's question of whether the Commission should modify the TSR's B2B provision beyond the proposal in the June NPRM

[25] EPIC 33-17 at 8. EPIC also proposed that the Rule specify the timing, manner of delivery, and content of the notice and also set standards for cancelation.

[26] *See* Advance Notice of Proposed Rulemaking, 84 FR 52393 (Oct. 2, 2019).

[27] 88 FR 24716 (Apr. 24, 2023).

that would subject B2B calls to the TSR's prohibitions on misrepresentations. Ten comments supported removing the B2B exemption entirely, and five comments opposed making any changes. Eight of the ten comments supporting removing the B2B provision were made by consumers.[28] Two of the consumers referred to the B2B exemption as a "loophole," and one complained about receiving unwanted B2B telemarketing calls.[29]

NAAG and EPIC supported removing the B2B exemption entirely. NAAG called the exemption a "relic of a bygone era."[30] NAAG cited data showing that: in 2020 more than 62% of U.S. households did not have a landline; in 2020 only 26% of employees have employer-provided mobile phones; and in 2018 36% of workers participated in the gig economy in some capacity.[31] EPIC noted that the "operational realities of work have changed" and the TSR should be amended to better reflect those realities.[32]

Several commenters who opposed making any changes to the Rule argued that the Commission lacks the legal authority to remove the B2B exemption because the Telemarketing Act is focused on harms to consumers.[33] Three commenters supported keeping the B2B exemption without modification. The Chamber of Commerce asserted that the B2B exemption "has proven beneficial to the business community."[34] The Revenue Based Finance Coalition ("RBFC") argued that additional regulation of business activities is unwarranted "given the

[28] The comments are 34-9, 34-11, 33-5, 33-9, 33-10, 33-11, 33-12, and 33-13.

[29] *See* 33-5; 33-9.

[30] NAAG 33-16 at 8.

[31] *Id.*

[32] EPIC 33-17 at 11-12.

[33] National Federation of Independent Business 34-1 at 9-11; PACE 33-20 at 7.

[34] Chamber of Commerce 34-24 at 2.

sophistication of the parties to the transaction" and that regulation could "increase the cost of capital available to small businesses."[35] TPPA also noted that its members use telemarketing to engage with and acquire potential customers.[36]

The Commission is persuaded that it is appropriate to modify the B2B exemption to require compliance with the TSR's prohibitions on misrepresentation and false or misleading statements but not to require compliance with all other TSR requirements. The comments do not provide sufficient support to warrant modifying the B2B exemption beyond the proposal in the ANPR that would require all B2B calls to comply with the TSR's prohibitions on misrepresentations. The ANPR sought information about the market for B2B telemarketing generally, including whether businesses appreciate B2B telemarketing as a way to sell or buy products. The ANPR also sought comment on whether businesses believe they are harmed by B2B telemarketing or subject to unwanted B2B calls. The Commission noted that it is "particularly interested in seeking comment on the number of sellers or telemarketers who engage in telemarketing to businesses"[37] and it asked about the kinds of goods or services that are sold through B2B telemarketing, as well as how often businesses receive B2B telemarketing calls.[38] Only three comments addressed these broader questions. TPPA claimed that its members rely on telemarketing to sell their products, and two anonymous commenters claimed that they receive an excessive volume of B2B telemarketing calls.[39] As NAAG and EPIC

[35] RBPFC 34-13 at 3-5.

[36] TPPA 34-14 at 2.

[37] ANPR, 87 FR at 33674.

[38] *Id.* at 33675.

[39] TPPA 34-14 at 2; 33-5; and 33-10.

described, the Commission recognizes the increasing interchangeability of personal and business phones. But, as a whole, these comments do not adequately address the nature or scope of relevant problems, and they do not enable the Commission to assess related harm flowing from B2B telemarketing in order to craft proposed changes that would mitigate or address such harm. The Commission will consider further modifications to the B2B exemption at a later date if the record demonstrates that any modifications may be warranted.

C. Tech Support

The Commission received ten comments addressing whether the TSR should require inbound tech support calls to comply with the TSR. Nine comments supported the proposal: six filed anonymously or by consumers and three filed by organizations.[40] NAAG "wholeheartedly" agreed with the proposal and believed that amending the TSR will have a "substantial effect" on tech support scams.[41] NAAG stated that the scams "have become one of the most prevalent scams in the nation over the past few years."[42] EPIC also supported the proposal and noted that the "serious nature of this fraud is comparable to that in the transactions already singled out for coverage of inbound calls."[43] USTelecom- The Broadband Association ("USTelecom") also supported the proposal, noting that tech support scams are a "significant menace for both consumers and businesses."[44]

[40] The comments are Jennifer Pierce 33-04; Kara V. 33-12; Anonymous 33-02; Anonymous 33-10; and Anonymous 33-11.

[41] NAAG 33-16 at 6.

[42] *Id.* at 7.

[43] EPIC 33-17 at 10.

[44] UST 33-14 at 7.

TPPA opposed "prohibiting inbound telemarketing calls."[45] TPPA acknowledged that these scams disproportionately affect older adults, but it contended that those problems will "diminish over time" as consumers become more familiar with technology.[46] TPPA also cautions that "prohibiting" inbound tech support calls could raise conflicts with the FTC's Policy Statement on Repair Restrictions, create confusion for consumers and businesses, and "unduly burden legitimate business activity by prohibiting Inbound telemarketing of technical support services."[47]

As explained below, the scope and severity of injury from tech support scams, including their impact on older adults, warrants amending the TSR.[48] The Commission is mindful of concerns that the proposed amendment may unduly burden businesses, and the Commission seeks comment on whether the proposed Rule will burden businesses and how any undue burdens can be ameliorated.

IV. Proposed Rule

A. Overview of Tech Support Scams

Tech support scams can begin in a variety of ways. Sometimes the scammer places an outbound call to consumers warning them that their computers have been infected.[49] Other

[45] TPPA 34-14 at 2. The ANPR did not propose prohibiting inbound tech support calls. It proposed requiring inbound tech support calls to comply with the TSR. It is not clear from TPPA's comment whether TPPA's concerns are limited to the effects of prohibiting tech support calls as opposed to merely requiring the calls to comply with the TSR.

[46] *Id.*

[47] *Id.*

[48] *See* FTC Report to Congress, Protecting Older Consumers, 2021-2022 ("2022 Protecting Older Consumers Report") at 31 (Oct. 18, 2022), *available at* https://www.ftc.gov/reports/protecting-older-consumers-2021-2022-report-federal-trade-commission (last visited Apr. 24, 2023).

[49] *See, e.g.,* Prepared Statement of the Federal Trade Commission Before the United States Senate Special Committee on Aging on Combatting Technical Support Scams ("Tech Support Testimony"), at 3-5 (Oct. 21, 2015),

scammers use deceptive computer pop-up messages that claim the consumer's computer has a problem and direct the consumer to call a phone number to fix the errors.[50] Still other scammers place advertisements with search engines that appear when consumers search for their computer company's tech support telephone number.[51] And sometimes, scammers pay computer security software companies so that when consumers call to activate their service, they reach the scammer and are pitched additional and unnecessary products and services.[52] Once consumers connect with the scammer, whether through outbound telemarketing or inbound telemarketing, the scammers deceive consumers about a variety of problems with their computers and dupe consumers into purchasing subscription tech support services or software that they do not need.[53]

Although tech support scams have typically targeted consumers looking for help with computers, tech support scams also target consumers looking for help with other electronic devices, such as cellular phones and smart home devices. News stories report on consumers encountering tech support scams when they search for help with their iPhones[54] or look for support for their Kindle tablets.[55] In August 2022, Amazon filed a lawsuit alleging that a tech

---

available at https://www.ftc.gov/system/files/documents/public_statements/826561/151021techsupporttestimony.pdf (last visited Jan. 31, 2022).

[50] *Id.*

[51] *Id*; *see also FTC v. Click4Support, LLC*, No. 15-cv-05777-SD, at 9-10 (E.D. Pa. Oct. 26, 2015), *available at* https://www.ftc.gov/system/files/documents/cases/151113click4supportcmpt.pdf (last visited Jan. 31, 2022).

[52] *See FTC v. Inbound Call Experts,* No. 9:14-cv-81935 (S.D. Fla. Nov. 19, 2014), *available at* https://www.ftc.gov/system/files/documents/cases/141119icecmpt.pdf (last visited June 23, 2023).

[53] Tech Support Testimony at 3.

[54] "Woman loses $1,500 to fake Apple Customer Service Scam," WCPO ABC 9, Cincinnati, (May 20, 2022), *available at* https://www.wcpo.com/money/consumer/dont-waste-your-money/woman-loses-1-500-to-fake-apple-customer-service-scam (last visited June 23, 2023).

[55] "Don't get Scammed by Fake Amazon Kindle and Fire Tablet Support Sites" (Feb. 22, 2016), *available at* https://blog.the-ebook-reader.com/2016/02/22/dont-get-scammed-by-fake-amazon-kindle-and-fire-tablet-support-

support operation targeted consumers who were seeking help with their smart home doorbells and streaming video services.[56]

Consumer complaints about tech support scams have increased dramatically over the last few years, ranging from approximately 40,000 complaints in 2017 to nearly 115,000 complaints in 2021.[57] In 2018, consumers reported losing more than $55 million to these scams, with an average individual loss of approximately $400, and an average individual loss of approximately $500 for consumers over the age of 60.[58]

Moreover, tech support scams disproportionately harm older consumers, with consumers 60 years of age and older being five times more likely to report a financial loss to tech support scams compared to younger consumers.[59] Data shows that tech support scams have consistently caused such disproportionate harm to older consumers. From 2015 to 2018, older consumers filed more reports on tech support scams than on any other fraud category.[60]

---

sites/ (last visited June 23, 2023).

[56] *Amazon.com, Inc. v. Pionera, Inc.*, 2:22-cv-1491 (E.D. Cal. Aug. 23, 2022).

[57] *See* FTC Consumer Sentinel Network Databook 2022 at 86, *available at* https://www.ftc.gov/reports/consumer-sentinel-network-data-book-2021 (last visited June 23, 2023).

[58] *See,* FTC Data Spotlight ("Tech Support Spotlight"), *available at* https://www.ftc.gov/news-events/blogs/data-spotlight/2019/03/older-adults-hardest-hit-tech-support-scams (last visited Jan. 31, 2022).

[59] *See* 2022 Protecting Oder Consumers Report at 31, *available at* https://www.ftc.gov/reports/protecting-older-consumers-2021-2022-report-federal-trade-commission (last visited June 23, 2023). In 2020, older consumers were six times as likely to report a financial loss to tech support scams as compared to younger consumers. *See* FTC Report to Congress, Protecting Older Consumers, 2019-2020 ("2020 Protecting Older Consumers Report") at 6 (Oct. 18, 2020),, *available at* https://www.ftc.gov/system/files/documents/reports/protecting-older-consumers-2019-2020-report-federal-trade-commission/p144400_protecting_older_adults_report_2020.pdf (last visited April. 24, 2023).

[60] Tech Support Spotlight; *see also* FTC Report to Congress, Protecting Older Consumers, 2018-2019 ("2019 Protecting Older Consumers Report") at 5 (Oct. 18, 2019), *available at* https://www.ftc.gov/reports/protecting-older-consumers-2018-2019-report-federal-trade-commission (last visited Jan. 31, 2022). In 2021, reports of online shopping frauds and business imposter frauds were the top fraud complaint for older consumers, with tech support scams dropping to third. 2022 Protecting Older Consumers Report, at 31. Older consumers, however, are disproportionately more likely to lose money to tech support scams. *Id.*

B. Law Enforcement and Other Responses

The Commission has responded to tech support scams through consumer education and law enforcement actions. For consumer education, the Commission has issued guidance to consumers including "How to Spot, Avoid, and Report Tech Support Scams,"[61] and "Keep tech support strangers out of your computer."[62] The Commission has also responded to particular tech support campaigns with consumer education such as "Fake Calls from Apple and Amazon Support: What you need to know,"[63] "No gift cards for tech support scammers,"[64] and "FTC asking for access to your computer? It's a scam."[65] Other government agencies and consumer organizations have also issued guidance on tech support scams.[66]

In addition to consumer education, the Commission and other state and federal law enforcement partners have brought a multitude of actions against tech support scams. For example, on May 12, 2017, the Commission announced "Operation Tech Trap" which consisted of 29 law enforcement actions brought by the Commission and other law enforcement agencies

---

[61] "How to Spot, Avoid, and Report Tech Support Scams" (Sept. 6, 2022), *available at* https://consumer.ftc.gov/articles/how-spot-avoid-and-report-tech-support-scams (last visited June 23, 2023).

[62] "Keep tech support strangers out of your computer" (Mar. 7, 2019), *available at* https://consumer.ftc.gov/consumer-alerts/2019/03/keep-tech-support-strangers-out-your-computer (last visited June 23, 2023).

[63] "Fake Calls from Apple and Amazon Support: What you need to know" (Dec. 3, 2020), *available at* https://consumer.ftc.gov/consumer-alerts/2020/12/fake-calls-apple-and-amazon-support-what-you-need-know (last visited June 23, 2023).

[64] "No gift cards for tech support scammers" (June 6, 2018), *available at* https://consumer.ftc.gov/consumer-alerts/2018/06/no-gift-cards-tech-support-scammers (last visited June 23, 2023).

[65] "FTC asking for access to your computer? It's a scam" (Apr. 6, 2018), *available at* https://consumer.ftc.gov/consumer-alerts/2018/04/ftc-asking-access-your-computer-its-scam (last visited June 23, 2023).

[66] *See, e.g.,* AARP, "How to Get Good Tech Support" (Jan. 3, 2022), *available at* https://www.aarp.org/home-family/personal-technology/info-2021/tips-for-getting-tech-support.html (last visited June 23, 2023); CFPB, "What you should do about tech support scams" (Jan. 21, 2021), *available at* https://www.consumerfinance.gov/about-us/blog/what-you-should-know-about-tech-support-scams/ (last visited June 23, 2023).

against tech support schemes.[67] On March 7, 2019, the Department of Justice announced the largest-ever elder fraud sweep, which focused on tech-support scams and involved actions against "more than 260 defendants from around the globe who victimized more than two million Americans."[68] The Commission has filed numerous tech support cases outside the scope of the sweeps.[69]

While the Commission has sued tech support scams for engaging in deceptive practices under the TSR where applicable, the Commission has brought cases under the FTC Act alone if the telemarketer's practices could arguably fall within an exception to the TSR. In *FTC v. PCCare247*, for example, the Commission used the FTC Act to seek monetary relief from a tech support operation that placed deceptive online advertisements to induce consumers to place inbound calls.[70] The calls at issue in *PCCare 247* may have fallen outside of the Rule to the

[67] Press Release, FTC and Federal, State and International Partners Announce Major Crackdown on Tech Support Scams (May 12, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/05/ftc-federal-state-international-partners-announce-major-crackdown (last visited June 23, 2023).

[68] Press Release, Justice Department Coordinates Largest-Ever Nationwide Elder Fraud Sweep (Mar. 7, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-coordinates-largest-ever-nationwide-elder-fraud-sweep-0 (last visited June 23, 2023).

[69] *See, e.g., United States v. Nexway SASU,* No. 1:23-cv-900 (D.D.C. Apr. 3, 2023) (complaint alleging that Nexway provided payment processing services for several deceptive tech support operations), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/nexway-complaint.pdf (last visited Apr. 19, 2023); *FTC v. RevenueWire, Inc*., No. 1:20-cv-1032 (D.D.C. April 21, 2020) (complaint alleging that companies to which RevenueWire provided payment processing services used pop-up dialog boxes that claimed to have detected computer infections and directed consumers to call a 1-800 number), *available at* https://www.ftc.gov/system/files/documents/cases/revcomp3.pdf (last visited Jan. 31, 2022); *FTC v. Boost Software, Inc.*, No. 14-cv-81397 (S.D. Fla. Nov. 10, 2014), *available at* https://www.ftc.gov/system/files/documents/cases/141119vastboostcmpt.pdf (last visited Jan. 31, 2022); *FTC v. Click4Support, LLC*, No. 15-cv-05777-SD, at 9-10 (E.D. Pa. Oct. 26, 2015), *available at* https://www.ftc.gov/system/files/documents/cases/151113click4supportcmpt.pdf (last visited Jan. 31, 2022) ("Click4Support"); *FTC v. Inbound Call Experts, LLC*, 9:14-cv-81395 (S.D. Fla. Nov. 2014), *available at h*ttps://www.ftc.gov/system/files/documents/cases/141119icecmpt.pdf (last visited June 23, 2023) ("Inbound Call Experts").

[70] *FTC v. PCCare247, Inc*., 12-cv-7189 (S.D.N.Y. Oct. 3, 2012) ("PCCare247"), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2012/10/121003pccarecmpt.pdf (last visited Jan. 31, 2022) ("PCCare247").

extent they were telephone calls initiated by a consumer in response to an advertisement.[71] Similarly in *FTC v. Vylah Tec LLC*, the Commission used the FTC Act to seek monetary relief from a tech support operation that lured consumers by placing deceptive pop up messages warning consumers that their computers had been infected with viruses.[72] The calls at issue in *Vylah Tec* may have fallen outside the Rule if a court were to determine that pop-up messages are a form of advertisement or a direct mail solicitation under the Rule.[73]

In April 2021, the Supreme Court's decision in *AMG Capital Management, LLC v. FTC* overturned forty years of precedent from the U.S. Circuit Courts of Appeal that held the Commission could take action under the FTC Act to return money unlawfully taken from consumers through deceptive practices.[74] As a result, the Commission is now limited in its ability to obtain monetary relief from tech support scams whose business practices, in some cases, arguably place the scams beyond the reach of the Rule. Amending the Rule will clarify that all tech support scams are potentially subject to the Rule.

---

[71] *See* Section 310.6(b)(5). Even if the consumer's call was in response to an advertisement, the Rule would still apply to instances of upselling included in the call. Section 310.6(b)(5)(iii). If, for example, the consumer initiated a call for technical support with their computer and the consumer was pitched additional software products or computer services, that transaction would likely be an upsell under the Rule.

[72] *See, e.g., FTC v. Vylah Tec LLC*, No. 17-cv-228-FtM-99MRM (M.D. Fla. May 17, 2017) ("Vylah Tec"), *available at* https://www.ftc.gov/system/files/documents/cases/162_3253_vylah_tec_llc_complant.pdf (last visited Jan. 31, 2022).

[73] In an abundance of caution, the Commission pursued its claim regarding the pop-ups under Section 5. The Commission, however, does not believe such pop-up messages are exempt under the Rule. The exemption in § 310.6(b)(5) "applies to calls in response to television commercials, infomercials, home shopping programs, magazine and newspaper advertisements, and other forms of mass media advertising solicitation.… In the Commission's experience, calls responding to general media advertising do not typically involve the forms of deception and abuse the Act seeks to stem." 60 FR at 43860. The Commission also generally has not observed pop-up messages that contained the disclosures necessary to fall within the exemption for direct mail solicitations.

[74] *See AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1352 (2021).

C. Discussion of the Proposed Rule

The proposed rule would define "technical support service" and amend the exemptions for calls in response to advertisements and calls in response to direct mail solicitations, to add technical support services to the categories of calls excluded from the exemptions.

1. Definition of Technical Support Service.

The proposed rule defines technical support services as "any plan, program, software or service that is marketed to repair, maintain, or improve the performance or security of any device on which code can be downloaded, installed, run, or otherwise used, such as a computer, smartphone, tablet, or smart home product." This definition is broad enough to encompass a wide range of electronic devices.

A broad definition is necessary because, in the Commission's experience, tech support scams have shown an ability to evolve with changes in consumer behavior and technology. The Commission's first actions against tech support scams involved telemarketers making outbound calls to consumers in which the telemarketer claimed to be a Microsoft technician who had identified a virus on the consumer's computer.[75] As consumers learned that Microsoft does not call consumers to warn them about viruses on their computers, tech support scams began relying on intrusive popup messages that claimed the computers had been infected with viruses.[76] As web browsers began blocking popup messages, tech support scammers have taken other means to reach consumers, including placing advertisements that solicit inbound calls from consumers

[75] Press Release, "FTC Halts Massive Tech Support Scams"(Oct. 3, 2012), *available at* https://www.ftc.gov/news-events/news/press-releases/2012/10/ftc-halts-massive-tech-support-scams (last visited June 23, 2023).

[76] *See* Vylah Tec. Microsoft has also advised consumers to keep in mind that Microsoft does not make unsolicited phone calls "to request personal or financial information, or to fix your computer." "Tech Support scams." *available at* https://learn.microsoft.com/en-us/microsoft-365/security/intelligence/support-scams?view=o365-worldwide (last visited Apr. 19, 2023).

looking for tech support.[77] The techniques that scammers use to alarm consumers have also evolved. Early tech support scams relied on "red x's" in a computer's event viewer while later scams have instructed consumers to download software programs that run diagnostics of computers and exaggerated the risks the diagnostics reveal.[78] Scammers have also evolved from targeting computers to also targeting a variety of electronic devices.[79]

The unifying characteristic of tech support scams is that scammers attempt to profit from consumers' problems with technology and potential lack of familiarity with complicated electronic devices. As technology changes, tech support scams are likely to change as well, and the definition of tech support in the proposed rule is intended to be broad enough to encompass these changes.

The definition of tech support also excludes "any plan, program, software, or services in which the person providing the repair obtains physical possession of the device being repaired." In the Commission's experience, tech support scams have not involved situations where the repair includes physical interaction with the device, such as replacing a computer hard drive or repairing a broken phone screen.[80] Whether this interaction involves face-to-face contact between the consumer and the person providing the repair or the consumer shipping the device to the repair person and waiting for a return shipment, the Commission believes that tech support

[77] *See* Click4Support; Inbound Call Experts.

[78] *See* PCCare247; Elite IT.

[79] Supra notes 54-56.

[80] Tech support scammers sometimes obtain remote access to a computer or electronic device to perform diagnosis or service. The "physical possession" is not intended to apply when the tech support involves remote access to a device.

scams rarely involve physical repair of electronic devices.[81] The Rule currently exempts calls in which payment is not required until "after a face-to-face sales or donation presentation by the seller."[82] In creating that exemption, the Commission explained that the "occurrence of a face-to-face meeting limits the incidence of telemarketing deception and abuse" because the "paradigm of telemarking fraud involves an interstate telephone call in which the customer has no other direct contact with the caller."[83] Here too, the "paradigm" of tech support scams are consumers speaking with third parties with whom they have limited contact and often at a time when they have been misled to believe that they have a problem with their electronic device. Physical in-person repair does not involve the same pressures as remote tech support, and it is less conducive to scams. The Commission seeks comment on the proposed definition of tech support.

2. Requirements.

The proposed rule would add "tech support services" to the categories of calls excluded from the TSR's exemptions for inbound calls "in response to an advertisement through any medium" and inbound calls in response to "a direct mail solicitation," including email.[84] The Commission created these exemptions in the original Rule based on its consideration of four factors: whether Congress intended certain types of sales activity to be exempt under the Rule;

[81] The Commission's lawsuit against Office Depot is an exception to this pattern. *See FTC v. Office Depot Inc.*, 9:19-cv-80431 (S.D. Fla. Mar. 29, 2019) (alleging that Office Depot and Support.com deceived consumers who brought their computers into Office Depot stores for support services).

[82] Section 310.6(b)(3).

[83] Original TSR, 60 FR at 43860.

[84] Sections 310.6(b)(5) and 310.6(b)(6). For "direct mail solicitations" to qualify for the exemption, the solicitations must "clearly, conspicuously, and truthfully disclose[] all material information listed in § 310.3(a)(1)" and contain "no material misrepresentation regarding any item contained in § 310.3(d)."

whether the conduct or business in question "already is regulated extensively by Federal or State law"; whether the conduct "lends itself easily to the forms of deception or abuse that the Act is intended to address"; and whether requiring business to comply the Rule would be "unduly burdensome weighed against the likelihood that sellers or telemarketers engaged in fraud would use an exemption to circumvent Rule coverage."[85]

The Commission decided to create exemptions from the rule for calls in response to advertisements and direct mail solicitation because, in the Commission's experience, calls in response to these solicitations "do not typically involve the forms of deception and abuse the Act seeks to stem."[86] At the same time, the Commission recognized that "some deceptive sellers or telemarketers use mass media or general advertising to entice their victims to call, particularly in relation to the sale of investment opportunities, specific credit-related programs" and other areas.[87] The Commission decided to exclude certain categories of calls from the exemptions given its "experience with the marketing of these deceptive telemarketing schemes."[88] The Commission's experience with tech support schemes also supports excluding tech support calls from the exemptions for inbound calls in response to advertisements and direct mail solicitations.

The Commission is mindful of the potential burden that the proposed amendment may have on tech support businesses that do not engage in deceptive practices. The proposed amendment has been drafted in an attempt to minimize the burden on these businesses, and the Commission seeks comment on whether the burden would be undue or can be further reduced.

---

[85] Original TSR, 60 FR at 43859.

[86] *Id.* at 43860.

[87] *Id*.

[88] *Id.*

Two features of the proposed amendment would minimize the burden on legitimate tech support businesses. First, tech support calls "that are not the result of any solicitation by a seller, charitable organization, or telemarketer" would still be exempt under § 310.6(b)(5). As the Commission recognized when it created this exemption, these type of calls are not "part of a telemarketing 'plan, program, or campaign * * * to induce the purchase of goods or services' under the Act."[89] The Commission further explained: "This exemption covers incidental uses of the telephone that are not in response to a direction solicitation, e.g., calls from a customer… to obtain information or customer technical support."[90] Under this exemption, as long as the call is not solicited, a consumer calling their computer manufacturer for technical support or a home security company about a disruption to their service would not be subject to the Rule unless, as part of that transaction, the company also engaged in an upsell.[91]

Second, excluding tech support where the person providing the service takes physical possession of the device will also limit the breadth of the rule. Consumer calls to a local repair shop or to the manufacturer of their device seeking physical repairs will not be subject to the Rule. The Commission seeks comment on whether it should consider other approaches to reduce any burden imposed by the Rule.

V. Request for Comment

[89] *Id*.

[90] *Id.*

[91] Section 310.6(b)(4).

The Commission seeks comments on all aspects of the proposed regulation. The Commission also seeks comments on the estimated burden that compliance with the proposed regulations will 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 costs of complying with the proposed amendment.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Write "Telemarketing Sales Rule (16 CFR Section 310 - NPRM) (Project No. 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 https://www.regulations.gov website.

Because of 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 https://www.regulations.gov 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 (16 CFR Section 310 - NPRM) (Project No. 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. If possible, please submit your paper comment to the Commission by overnight service.

Because your comment will be placed on the publicly accessible website, https://www.regulations.gov, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not

include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any 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." 15 U.S.C. 46(f); *see* FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, your comment should not include 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, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 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), 16 CFR 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 www.regulations.gov, as legally required by FTC Rule 4.9(b), 16 CFR 4.9(b), we cannot redact or remove your comment from the FTC Website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), 16 CFR 4.9(c), and the General Counsel grants that request.

Visit the FTC Website to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to

consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. 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.

In addition to the issues raised above, the Commission solicits public comment on the list of questions below regarding the costs and benefits of the proposed amendment. The Commission requests that comments provide the factual data upon which they are based. These questions are designed to assist the public and should not be construed as a limitation on the issues on which a public comment may be submitted.

A. Questions for Comments

1. Should the Commission finalize the proposed rule as a final rule? Why or why not? How, if at all, should the Commission change the proposed rule in promulgating a final rule?
2. Is the definition of "technical support service" clear and understandable? It is ambiguous in any way? How, if at all, should it be improved?
3. Is the definition of "technical support service" appropriately tailored? Is it overinclusive or underinclusive in any way? How, if at all, should it be improved?
4. Do you support excluding from the definition of technical support instances in which the person providing the repair obtains physical possession of the device being repaired? Why or why not?
5. Do you support the proposal to add technical support services to the list of calls that do not qualify for the exemptions for calls in response to advertisements and direct mail

solicitations in § 310.6(b)(5) and § 310.6(b)(6)? Should the Commission consider other modifications to the Rule to address tech support scams?

6. Would the proposed rule place an undue burden on technical support operations that do not engage in deceptive acts or practices? If so, what burden would it impose and how can the burden be reduced?

7. Do you agree with the estimates in the Paperwork Reduction Analysis? Why or why not?

8. How many new calls would be subject to the TSR if the proposed rule is adopted?

9. Would the proposed rule disproportionately benefit or burden original equipment manufacturers? If so, how should the proposed rule be changed?

VI. Paperwork Reduction Act

The current Rule contains various provisions that constitute information collection requirements as defined by 5 CFR 1320.3(c), the definitional provision within the Office of Management and Budget ("OMB") regulations implementing the Paperwork Reduction Act (PRA). 44 U.S.C. chapter 35. OMB has approved the Rule's existing information collection requirements through October 31, 2025 (OMB Control No. 3084-0097). The proposed amendment will newly require certain inbound tech support calls to comply with the Rule's recordkeeping and disclosure requirements. This will increase the PRA burden for sellers or telemarketers as detailed below. Accordingly, FTC staff is simultaneously submitting this notice of proposed rulemaking and the associated Supporting Statement to OMB for review under the PRA.[92]

A. Estimated Annual Hours Burden

The Commission estimates the PRA burden of the proposed amendment based on its

[92] This PRA analysis focuses specifically on the information collection requirements created by or otherwise

knowledge of the telemarketing industry and data compiled from the Do Not Call Registry. The annual hours of burden for sellers or telemarketers will consist of two components: the time required to make disclosures and the costs of complying with the Rule's recordkeeping requirements.

First the Commission estimates that the disclosure burden will take 19,566 hours. Calculating the disclosure burden requires estimating the number of inbound tech support calls that will now be subject to the TSR if the proposed amendment goes into effect. The Commission uses the same methodology it has used in the past to calculate the disclosure burden for categories of calls that are excluded from the TSR's exemptions for inbound calls.[93]

As it has in the past, the Commission estimates that there are 1.8 billion inbound telemarketing calls that result in sales, that consumer injury from telemarketing fraud is $40 billion a year, and that it takes seven seconds to make the disclosures required by the Rule in inbound calls.[94] The Commission estimates the disclosure burden for particular categories of calls that are excluded from the TSR's exemptions by extrapolating a percentage of those calls based on their complaint rates in the FTC's Consumer Sentinel system.[95] The resulting percentage of total fraud complaints must be adjusted to reflect the fact that only a relatively small percentage of telemarketing calls are fraudulent. To extrapolate the percentage of fraudulent telemarketing calls, staff divides a Congressional estimate of annual consumer injury

affected by the proposed amendment.

[93] *See, e.g.,* Agency Information Collection Activities; Proposed Collection; Comment Request; Extension. 87 FR 23179 (April 19, 2022).

[94] *Id.*

[95] *Id.*

from telemarketing fraud ($40 billion)[96] by available data on total consumer and business-to-business telemarketing sales ($310.0 billion projected for 2016),[97] or 13%. The two percentages are then multiplied together to determine the percentage of the 1.8 billion annual inbound telemarketing calls represented by each type of fraud complaint. That number is then rounded to the nearest ten. In 2022, there were 2,369,527 fraud complaints and 89,158 complaints about tech support.[98] Thus, the general sales disclosure burden is 19,566 hours (1.8 billion inbound calls x the percentage of fraud complaints for tech support (89,158/2,369,527) x the percentage of telemarketing calls that are estimated to be fraudulent (.13) x the length of the disclosures (8 seconds per disclosure, ÷ 3,600 to convert to hours).

Second, the estimated recordkeeping burden is 104,250 hours. Estimating this burden requires estimating how many new telemarketing entities will be subject to the TSR if the proposed amendment goes into effect. To create this estimate, staff first estimates the number of existing telemarketing entities that engage in tech support sales. In calendar year 2022, 10,804 telemarketing entities accessed the Do Not Call Registry; however, 549 were "exempt" entities obtaining access to data.[99] Of the non-exempt entities, 6,562 obtained data for a single

---

[96] *House Committee on Government Operations, The Scourge of Telemarketing Fraud: What Can Be Done Against It*, H.R. Rep. 421, 102nd Cong., 1st Sess. at 7 (Dec. 18, 1991). The FBI believes that this estimate overstates telemarketing fraud losses as a result of its investigations and closings of once massive telemarketing boiler room operations. *See* FBI, *A Byte Out of History: Turning the Tables on Telemarketing Fraud* (Dec. 8, 2010), *available at* https://www.fbi.gov/news/stories/2010/december/telemarketing_120810/telemarketing_120810. *See also* Internet Crime Complaint Center, 2020 Annual Report on Internet Crime (citing $4.1 billion of losses claimed in consumer complaints for 2020), available at https://www.ic3.gov/Media/PDF/AnnualReport/2020_IC3Report.pdf.

[97] DMA 2013 Statistical Fact Book (January 2013) projection up through 2016, p. 5 (no associated DMA updates made or otherwise found thereafter).

[98] *See* FTC, Consumer Sentinel Network Data Book 2022 (February 2023) ("Sentinel Data") at 9, 87, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/CSN-Data-Book-2022.pdf (last visited June 12, 2023).

[99] *See* National Do not Call Registry Data Book for Fiscal Year 2022 ("Data Book"), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/DNC-Data-Book-2022.pdf (last visited April 13, 2023). An exempt entity is one that, although not subject to the TSR, voluntarily chooses to scrub its calling lists against the data in the

state. Staff assumes that these 6,562 entities are operating solely intrastate, and thus would not be subject to the TSR. Therefore, staff estimates that approximately 3,693 telemarketing entities (10,804 – 549 exempt – 6,562 intrastate) are currently subject to the TSR. To estimate the percentage of those entities that sell tech support products and services, staff again relies on the percentage of fraud complaints for tech support out of the total fraud complaints. (89,158/2,369,527) which is multiplied by the number of telemarketing entities, (3,693) to produce the estimate that 139 telemarketing entities receive tech support calls.

If the proposed amendment goes into effect, additional businesses will likely be covered by the TSR. For example, tech support companies that advertise their products through general advertisements and do not engage in upselling may be subject to the Rule for the first time.[100] On the other hand, companies that market through a combination of advertisements and outbound telemarketing are already subject to the Rule. Companies that receive inbound calls from consumers with questions about their products who then engage in upsells of technical support services are also already subject to the Rule. The Commission estimates that the Proposed amendment will increase the number of telemarketing entities that receive inbound tech support calls by a factor of 5, which would mean that an additional 695 entities will be covered by the Rule.

The Commission estimates that after implementation of the separate Final Rule proceeding which, among other things, requires telemarketers and sellers to maintain additional records of their telemarketing transactions, complying with the TSR's current recordkeeping requirements requires 150 hours for new entrants to develop recordkeeping systems that comply

Registry.

[100] *See* Section 310.6(b)(5).

with the TSR, for a total annual recordkeeping burden of 104,250 hours.[101]

B. Estimated Annual Labor Costs

The Commission estimates annual labor costs by applying appropriate hourly wage rates to the burden hours described above. The Commission estimates that the annual labor cost for disclosures will be $315,991. This total is the product of applying an assumed hourly wage of $16.15 for 19,566 hours of disclosures.[102] The Commission estimates that the annual labor cost for recordkeeping will be $3,228,623. This is calculated by applying a skilled labor rate of $30.97/hour[103] to the estimated 150 burden hours for the estimated 695 entities that will now be covered by the Rule ($30.97 x 150 x 695).

C. Estimated Annual Non-Labor Costs

The FNPR estimates that the annual non-labor costs are $55 a year, derived from $5 for electronically storing audio files, and $50 for storing the required records. The Commission thus estimates that the annual non-labor costs will be $38,255 (695 entries x $55).

The Commission invites comments on the accuracy of the FTC's burden estimates, including whether the methodology and assumptions used are valid. Specifically, the Commission invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the FTC, including whether the information will have practical utility; (2) the accuracy of the FTC's estimate of the burden of

---

[101] The Commission is using a Final Rule simultaneously with this NPRM.

[102] This figure is derived from the mean hourly wage shown for Telemarketers. *See* "Occupational Employment and Wages–May 2022," U.S. Department of Labor, released April 25, 2023 Table 1 ("National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2022"), *available at* https://www.bls.gov/news.release/ocwage.t01.htm (last visited July 19, 2023).

[103] This figure is derived from the mean hourly wage shown for Computer Support Specialists from the U.S. Department of Labor source set out in the prior footnote.

the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of collecting information on those who respond.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under Review - Open for Public Comments" or by using the search function. The reginfo.gov web link is a United States Government website produced by OMB and the General Services Administration (GSA). Under PRA requirements, OMB's Office of Information and Regulatory Affairs (OIRA) reviews Federal information collections.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires that the Commission conduct an analysis of the anticipated economic impact of the proposed amendment on small entities.[104] The RFA requires that the Commission provide an Initial Regulatory Flexibility Analysis ("IRFA") with a proposed rule unless the Commission certifies that the rule will not have a significant economic impact on a substantial number of small entities.[105]

The Commission believes that the proposed amendment would not have a significant economic impact upon small entities, nor will it affect a substantial number of small businesses. In the Commission's view, the proposed amendment should not significantly increase the costs of small entities that are sellers or telemarketers. Therefore, based on

[104] 5 U.S.C. 601-612.

[105] 5 U.S.C. 605.

available information, the Commission certifies that amending the Rules as proposed will not have a significant economic impact on a substantial number of small entities, and hereby provides notice of that certification to the Small Business Administration ("SBA"). Nonetheless, the Commission has determined that it is appropriate to publish an IRFA in order to inquire into the impact of the proposed amendment on small entities. The Commission invites comment on the burden on any small entities that would be covered and has prepared the following analysis.

A. Description of the Reasons the Agency Is Taking Action

The Commission proposes amending the TSR to explicitly exclude tech support calls from the exemptions for inbound calls by consumers in response to advertisements and direct mail solicitations from tech support services. As described in Section IV, the proposed amendment is intended to address the widespread harm caused by deceptive tech support services, which disproportionately impact older consumers compared to younger ones.

B. Statement of Objectives of, and Legal Basis for, the Proposed Amendment

The objective of the proposed amendment is to lessen the harm caused by deceptive tech support scams. The legal basis for the proposed amendment is the Telemarketing Act, which authorizes the Commission to issue rules to prohibit deceptive or abusive telemarketing practices.

C. Description and Estimated Number of Small Entities to Which the Rule Will Apply

The proposed amendment to the Rule affects sellers and telemarketers that sell technical support services through inbound telemarketing calls that are made in response to advertisements and direct mail solicitations. As noted above, staff estimates that there are 695 such entities that

would be covered by the Rule. For telemarketers, a small business is defined by the SBA as one whose average annual receipts do not exceed $25.5 million.[106] It is not possible to identify how many of these entities would be a small business as defined by the SBA. Commission staff are unable to determine a precise estimate of how many sellers or telemarketers constitute small entities as defined by SBA. The Commission invites comment and information on this issue.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements, Including Classes of Small Entities and Professional Skills Needed to Comply

The proposed amendment would require sellers and telemarketers that sell technical support services through inbound telemarketing calls that are made in response to advertisements and direct mail solicitations to comply with the TSR's disclosure and recordkeeping requirements. The small entities potentially covered by the proposed amendment will include all such entities subject to the Rule. The Commission has described the skills necessary to comply with these recordkeeping requirements in Section VI above on the Paperwork Reduction Act.

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

The Commission has not identified any other federal statutes, rules, or policies currently in effect that may duplicate, overlap or conflict with the proposed amendment. The Commission invites comment and information regarding any potentially duplicative, overlapping, or conflicting federal statutes, rules, or policies.

F. Significant Alternatives to the Proposed Amendment

The Commission believes that there are no significant alternatives to the proposed

[106] Telemarketers are typically classified as "Telemarketing Bureaus and Other contact Centers," (NAICS Code 561422). *See* Table of Small Business Size Standards Matched to North American Industry Classification System Codes, *available at* https://www.sba.gov/sites/sbagov/files/2023-06/Table%20of%20Size%20Standards_Effective%20March%2017%2C%202023%20%282%29.pdf.

amendment but is seeking comment on whether the proposed rule places an undue burden on technical support operations that do not engage in deceptive acts or practices and, if so, how can the burden be reduced. The Commission has over many years pursued alternatives to the proposed amendment in the form of law enforcement and consumer outreach. The continued injury caused by these scams shows that the proposed amendment to the Rule is necessary.

VIII. Communications by Outside Parties to the Commissioners or Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding, from any outside party to any Commissioner or Commissioner's advisor, will be placed on the public record.[107]

IX. Proposed Rule Language

List of Subjects in 16 CFR Part 310

Advertising; Consumer protection; Telephone; Trade practices.

For the reasons stated above, the Federal Trade Commission proposes to amend part 310 of title 16 of the Code of Federal Regulations as follows:

PART 310--TELEMARKETING SALES RULE

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

Authority: 15 U.S.C. 6101-6108.

PART 310 – [AMENDED]

2. In § 310.2,

a. Redesignate paragraphs (ff) through (hh) as follows:

Old section	New section
(ff)	(gg)

[107] *See* 16 CFR 1.26(b)(5).

(gg) (hh)

(hh) (ii)

b. Revise paragraph (ff) to read as follows:

§ 310.2 Definitions

* * * * *

(ff) Technical Support Service means any plan, program, software, or service that is marketed to repair, maintain, or improve the performance or security of any device on which code can be downloaded, installed, run, or otherwise used, such as a computer, smartphone, tablet, or smart home product. Technical support service does not include any plan, program, software, or services in which the person providing the repair, maintenance, or improvement obtains physical possession of the device being repaired.

3. Amend § 310.6 by revising paragraphs (b)(5)(i) and (b)(6)(ii) to read as follows:

§ 310.6 Exemptions

* * * * *

(b) * * *

(5) * * *

(i) Calls initiated by a customer or donor in response to an advertisement relating to investment opportunities, debt relief services, technical support services, business opportunities other than business arrangements covered by the Franchise Rule or Business Opportunity Rule, or advertisements involving offers for goods or services described in § 310.3(a)(1)(vi) or § 310.4(a)(2) through (4);

* * * * *

(6) * * *

(ii) Calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, debt relief services, technical support services, business opportunities other than business arrangements covered by the Franchise Rule or Business Opportunity Rule, or goods or services described in § 310.3(a)(1)(vi) or § 310.4(a)(2) through (4);

* * * * *

By direction of the Commission.

April J. Tabor,

Secretary