



enforcement experiences of both the FTC and the FCC indicate that the following types of permissible telephone calls are particularly significant to businesses and consumers: debt collection calls; informational calls that are not part of a telemarketing campaign; political and survey calls; solicitations for charitable donations; calls from nonprofit organizations; calls based on prior authorization from the recipient of the call; and calls to consumers with whom the seller has an “established business relationship.” The FTC has brought several enforcement actions against marketers that sought to circumvent the Registry by improperly claiming that they had established business relationships with, or authorization from, consumers who had placed their telephone numbers on the Registry.

Finally, both the FTC and the FCC have adopted regulations that generally prohibit “abandoning” telephone calls. A telephone call is “abandoned” when a telemarketer delivers recorded messages instead of connecting recipients of a call to a live sales representative when a person answers, and when a telemarketer makes calls so quickly that there are not enough sales representatives to answer them. The automated dialers associated with abandoned calls have a significant impact on do-not-call enforcement because they allow telemarketers who disregard the Registry to make millions of calls quickly and cheaply. Since December 2003, the FTC has initiated 18 actions against entities using prerecorded telemarketing messages, also known as robocalls, for mass telemarketing, and the FCC has issued three Notices of Apparent Liability for Forfeiture and three forfeiture orders addressing prerecorded message violations. Furthermore, the FTC recently amended the TSR to further restrict robocall campaigns. Effective September 1, 2009, the regulations generally prohibit making telephone calls to consumers to deliver a prerecorded telemarketing solicitation unless the recipient of the call has given his or her express consent, in writing, in advance.

Background: The National Do Not Call Registry

On January 29, 2003, the FTC issued amendments to the Telemarketing Sales Rule (“TSR”) that authorized the creation of the Registry.² On June 26, 2003, the FCC adopted rules under the Telephone Consumer Protection Act (“TCPA”) to require entities under its jurisdiction to comply with do-not-call requests made via the Registry.³ The Registry permits consumers to express their preference not to receive certain telemarketing calls by placing their phone number(s) on a national registry. Consumers may register their telephone numbers by calling a toll-free number from the telephone number(s) they wish to register, or by using the do-not-call website (<http://www.ftc.gov/donotcall>).

Since October 2003, the TSR and complementary regulations adopted by the FCC have required most telemarketers and sellers to honor do-not-call requests made by persons who have

submitted their telephone numbers to the Registry.⁴ Telemarketers and sellers may obtain a current list of telephone numbers on the Registry through an Internet website dedicated to that purpose (<https://telemarketing.donotcall.gov>). Sellers and telemarketers who make telemarketing calls that are subject to the TSR, the FCC rules, or another federal law that requires them to honor do-not-call requests made through the Registry must pay for access to the Registry and must obtain updated lists of numbers on the Registry at least every 31 days.⁵ Persons who are not required by federal law to honor do-not-call requests recorded in the Registry are permitted to access the Registry without charge to allow them to honor such requests voluntarily.⁶

Consumers who receive unwanted telemarketing calls 31 or more days after they have placed their telephone numbers on the Registry can register complaints with the FTC or the FCC. The FTC allows consumers to submit complaints by calling a toll-free telephone number to access an interactive voice response system, or by submitting complaint information over the Internet.⁷ The FCC allows consumers to register complaints about unwanted telemarketing calls by telephone or by submitting complaint forms via either the Internet or mail.

Law enforcement officials can review the FTC's complaints, as well as other data in the Registry, such as consumer registration information and telemarketer access information. Access to Registry data is provided to the law enforcement community through the Consumer Sentinel Network ("CSN"), a secure Internet website maintained by the FTC.⁸ Between July 1, 2003 and September 30, 2009, the CSN collected 7.3 million do-not-call complaints from consumers.⁹ The FCC received over 100,000 do-not-call complaint from consumers during this same period.

The FTC enforces the TSR through two types of civil proceedings. First, the FTC brings actions seeking preliminary relief to immediately halt deceptive telemarketing, violations of do-not-call requirements, and other illegal conduct. Such actions generally result in a final judgment that includes a permanent injunction against misconduct by the defendants, and an award of equitable monetary relief, including consumer redress. Second, the FTC also initiates actions seeking civil penalties from violators. Businesses that violate the do-not-call regulations are subject to civil penalties of up to \$16,000 per violation.¹⁰ Civil penalty actions are ordinarily filed by the Department of Justice ("DOJ") following the FTC's referral of a complaint.¹¹ By statute, in determining the amount of a civil penalty, the courts must take into account the "degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require."¹²

The FCC enforces its do-not-call rules by imposing civil forfeiture penalties, payable to the U.S. Treasury.¹³ Unlike the FTC, the FCC is authorized to impose such penalties on its own, and need not initiate judicial proceedings. Telemarketers are generally subject to forfeitures of up to \$16,000 per violation,¹⁴ and much like the FTC, the FCC considers the nature, circumstances, extent and gravity of the violations; the violator's degree of culpability and history of prior offenses; the violator's ability to pay; and any other factors that justice may require, in setting the amount of the forfeiture.¹⁵ If the subject of a forfeiture order fails to pay, the FCC may ask the DOJ to seek to collect the forfeiture through a trial *de novo* in federal district court. Moreover, the FCC can issue cease and desist orders, and has additional leverage over its licensees – if an egregious violator holds FCC licenses or other authorizations, the FCC can convene a hearing to consider revoking them.¹⁶

I. Do-Not-Call Outreach and Enforcement Efforts with Regard to Senior Citizens and Immigrant Communities.

A. Outreach.

Since the FTC and the FCC regulations establishing the Registry were adopted in 2003, the agencies have continually publicized the Registry as a means for consumers to stop unwanted telemarketing calls.¹⁷ By the time that the regulations prohibiting telemarketing calls to numbers on the Registry went into effect in late 2003, consumers had registered over 50 million telephone numbers in the Registry.¹⁸ Since 2003, the number of registrations has increased nearly four-fold, and there are now more than 191 million telephone numbers on the Registry.¹⁹ Surveys have demonstrated widespread awareness of the Registry. For example, in October 2007 a Harris Poll[®] reported that 86% percent of survey participants were familiar with the Registry, and 72% reported that they had registered their telephone numbers.²⁰

The FTC and the FCC have not collected data on the effectiveness of their do-not-call outreach to specific groups, such as senior citizens or immigrant communities. However, the FTC provides information to these groups concerning the do-not-call program as part of its general efforts to educate the public about fraud and other abusive marketing practices.²¹ In addition, the FTC targets certain consumer education campaigns to specific groups, such as senior citizens.

For example, in May 2008, the FTC conducted a major outreach campaign about telemarketing fraud, *Who's Calling? Recognize and Report Phone Fraud*, which targeted senior citizens and African-American consumers. This campaign was launched in conjunction with Operation Tele-PHONEY, a law enforcement initiative by the FTC and 30 international, federal,

state, and local law enforcement agencies. To promote the outreach campaign, the FTC partnered with a number of state Attorneys General, as well as the United States Postal Inspection Service, and the Canadian Business Practices and Consumer Protection Authority.

To promote outreach to Hispanic consumers, the FTC has an active Hispanic initiative aimed at educating Spanish-speaking consumers about consumer protection issues. The activities of this initiative, which was launched in April 2004, include making consumer information publications available in Spanish, distributing radio public service announcements in Spanish, providing consumer news to the Spanish-language media, and building partnerships with organizations, businesses, and leaders in the Hispanic community. Since April 2004, the FTC has hosted nine regional workshops to develop partnerships with Hispanic organizations. The FTC has strengthened its effectiveness in reaching Spanish-language speakers through Spanish-language educational campaigns, a Spanish-language web portal, and staff appearances on Spanish language television programs. The FTC's National Do Not Call Registry website (<https://www.donotcall.gov>) provides instructions in both English and Spanish for registering numbers on the Registry. In addition, the FTC publishes a Spanish language guide explaining how the Registry allows consumers to register their preferences.²⁴

The FCC also routinely provides information about the Registry to senior citizens and immigrant communities through its general outreach program. For example, the FCC included do-not-call information with its exhibits at the July 2009 American Library Association and La Raza Conventions, and the October 2009 AARP Annual Convention. All of the FCC's do-not-call materials are available in both English and Spanish and are posted on the FCC's website, including on its Spanish-language webpage.

B. Enforcement.

To ensure the Registry's ongoing effectiveness, the both the FTC and the FCC have robust enforcement programs. Since early 2004, the FTC has brought 61 telemarketing cases alleging do-not-call violations. 48 of these cases have been resolved with final court orders that cumulatively require payment of nearly \$21 million in civil penalties and \$12 million in redress or disgorgement.²⁵ Since 2003, the FCC has issued five Notices of Apparent Liability and two forfeiture orders addressing do-not-call violations, with forfeiture amounts totaling \$838,000. In addition, the FCC has settled four do-not-call investigations with consent decrees providing for payments totaling \$1,490,000. The FCC's Enforcement Bureau has also issued over 1,000 warning citations to do-not-call violators since 2003.

The FTC has not found any evidence that businesses have targeted senior citizens or immigrant communities in violating the do-not-call provisions of the TSR. Accordingly, the FTC believes that enforcement actions aimed at deterring violations of the Registry provisions generally are effective in deterring calls to these groups, and has not targeted enforcement to address do-not-call violations reported by seniors or immigrant communities.

However, some of the FTC's enforcement actions have involved telemarketing operations that were particularly likely to solicit seniors. For example, the FTC stopped a group of Canadian telemarketers that targeted elderly and infirm consumers, often claiming to represent banks or the U.S. government. The telemarketers claimed that, for a fee of \$399, they could register the consumer with the Registry, send consumers a call-blocking device to attach to their telephone, and shield consumers' bank accounts from fraudulent withdrawals.²⁶ Another successful FTC action resulted in the liquidation of an Arizona telemarketing operation that targeted the elderly with solicitations offering to sell household goods such as light bulbs and trash bags for exorbitantly high prices, often making multiple repeated calls and billing consumers for goods that they never ordered.²⁷ In a separate action seeking civil penalties, the FTC obtained an injunction that halted illegal telemarketing by a seller of prescription drug discount cards, dental discount cards, health-related discount cards, an online medical referral service, and its telemarketer.²⁸ The FTC alleged that the seller had authorized the telemarketer to make tens of thousands of telephone calls to individuals who had placed their numbers on the Registry, and ignored consumers' requests to put them on the seller's entity-specific do-not-call list. The defendants also agreed to pay \$350,000 in civil penalties and to an injunction prohibiting future violations of the TSR.

The effectiveness of these and other enforcement actions is reflected in consumer surveys that report that the Registry has been overwhelmingly effective in reducing unwanted telemarketing calls. According to an October 2007 Harris Poll[®], more than 90 percent of those who registered their numbers reported fewer unwanted telemarketing calls, and 18% reported that they received no telemarketing calls after registering. While such surveys have not reported on the experience of particular demographic groups, we have no reason to believe that the Registry has been any less successful in reducing unwanted telemarketing calls to senior citizens or members of immigrant communities.²⁹

II. The Impact of the Exceptions to the Do-Not-Call Registry on Businesses and Consumers.

The enforcement experiences of both the FTC and the FCC indicate that the following exemptions and limitations are particularly significant to entities engaged in making outbound telephone calls, and have substantial impact on consumers' perceptions of the Registry:

A. Debt Collection and Informational Calls That Are Not Part of a Telemarketing Campaign.

The TSR prohibits telephone calls to numbers on the Registry only when the calls constitute “telemarketing,” which is defined in the enabling statute for the Rule as “a plan, program, or campaign which is conducted to induce the purchase of goods or services or a

specifically exempt from the FTC's jurisdiction.³⁶ Some entities that are outside the FTC's jurisdiction are subject to the FCC's jurisdiction, but the FCC has exempted from its regulations telephone solicitations by or on behalf of tax-exempt nonprofit organizations. *Id.* § 64.1200(f)(9); 47 U.S.C. § 227(a)(4). Consequently, telephone solicitations by a tax-exempt nonprofit entity fall outside both the FTC and the FCC regulations prohibiting calls to numbers on the Registry.

Telephone calls made by a for-profit entity *on behalf of* a nonprofit, however, are not exempt from the TSR. Thus, an individual or for-profit business subject to the FTC's jurisdiction must comply with the Registry requirements when it makes outbound telephone calls to solicit goods or services on behalf of a nonprofit.³⁷ In addition, an entity that has a nonprofit charter but operates, in fact, as a for-profit, may be held liable for violations of the do-not-call regulations because sham nonprofit organizations are not exempt from the FTC's enforcement authority.³⁸

Consumers whose numbers are on the Registry are unlikely to understand that the underlying laws make these distinctions and, moreover, may not know whether a call is from a tax-exempt organization or a for-profit business calling on its behalf. Consumers who are aware that the law contains exemptions for charities may, therefore, erroneously conclude that a telephone call in the name of a charity is exempt when, in fact, the law prohibits the caller from initiating calls to numbers on the Registry because the caller is a for-profit telemarketer soliciting for the sale of goods or services, not donations. Similarly, a consumer whose number is listed on the Registry may perceive a telephone call from a tax-exempt charity seeking donations to be inconsistent with the Registry, even though federal law permits such calls.

Finally, consumers who receive telephone calls from entities that claim to be nonprofit, and may even have a nonprofit charter, have no way of knowing if the entity is a bona fide nonprofit. The FTC's and FCC's investigations and enforcement actions involving purported nonprofits that claim that their telemarketing activities are not required to comply with the do-not-call regulations tend to be unusually complicated and difficult because, to determine whether an entity is a bona fide nonprofit, the agencies must secure detailed evidence about the purported nonprofit's operations and its relationship to its business partners.³⁹

D. Calls Based on Permission and "Established Business Relationships."

The TSR and the FCC rules contain exemptions that permit a seller or telemarketer to call a person who has listed his or her telephone numbers on the Registry if the person has

expressly authorized such calls, or if the call is to a person with whom the seller has an “established business relationship.”⁴⁰

Both exemptions require a relationship with the seller on whose behalf the call is made. The exemption for express authorization permits a call if the seller has obtained the express agreement, in writing, of the recipient to place outbound telephone calls to the recipient. 16 C.F.R. § 310.4(b)(1)(iii)(B)(i).⁴¹ The written agreement must clearly evidence such person’s authorization that calls made by or on behalf of a specific party may be placed to the recipient of the call, and must include the telephone number to which the calls may be placed and the signature of that person. *Id.* The signature may be a valid electronic signature, such as an agreement that the recipient of the call approves online. Sellers and telemarketers that rely upon this exemption are required to keep records of any express agreements to permit telemarketing calls.

In addition, businesses seeking to circumvent the Registry have sought to exploit these exemptions by making calls to persons who have not clearly authorized such calls, or have not had the requisite contact with the seller. Some marketers have claimed that consumers on the Registry authorized their telemarketing calls in writing, but the documents that the consumers signed do not contain such authorization or hide the language that purports to authorize telemarketing calls. For example, some businesses have telephoned consumers whose numbers are listed on the Registry after the consumers entered a sweepstakes, and have claimed that the act of entering a sweepstakes or language buried in the sweepstakes entry form authorizes the seller to make telemarketing calls to the sweepstakes entrants. The exemptions in the TSR and the FCC rules, however, only apply where a consumer has given express authorization, and do not permit authorization to be obtained through subterfuge. Consequently, the FTC has

The established business relationship exception can present difficulties for enforcement and consumer perception when the relationship arises from a brief, one time transaction, or when the seller identified in the telemarketing call and the seller with whom the consumer has a relationship are part of the same legal entity, but are perceived by consumers to be different because they use different names or are marketing different products. Both the FTC and the FCC have stated that the issue of whether calls by or on behalf of sellers who are affiliates and subsidiaries of an entity with which a consumer has an established business relationship fall within the exception depends on consumer expectations. The FTC has characterized the issue as: “would customers likely be surprised by that call and find it inconsistent with having placed their telephone number on the national ‘do-not-call’ registry?” 68 Fed. Reg. at 4594. The factors to be considered in this analysis include whether the subsidiary or affiliate’s goods or services are similar to the seller’s, and whether the subsidiary or affiliate’s name is identical or similar to the seller’s name.⁴⁵ The greater the similarity between the nature and type of goods sold by the seller and any subsidiary or affiliate, and the greater the similarity in identity between the seller and any subsidiary and affiliate, the more likely it is that the call would fall within the established business relationship exemption. *Id.* When the FTC or the FCC conduct investigations or enforcement actions to address consumer complaints about telemarketing campaigns in which a seller is relying on a consumer’s relationship with a related entity, these factors introduce additional and sometimes complex issues that are not present in telemarketing campaigns that do not rely on such relationships.

III. The Impact of Abandoned Calls Made by Predictive Dialing Devices on Do-Not-Call Enforcement

A call is “abandoned” under the TSR and the FCC rules if a person answers it and the

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representative will be available. Inevitably, a predictive dialer will sometimes reach more consumers than can be connected with available sales representatives. When this occurs, the dialer may “abandon” the call by disconnecting the call immediately, or by playing a recording and then disconnecting the call.⁴⁶

Because prohibiting abandoned calls altogether would preclude the use of predictive dialers, the TSR and the FCC rules include a safe harbor provision that permits the use of dialer technology that ensures that a sales representative is connected to the call within two seconds of the person’s completed greeting for at least 97% of the calls answered by a person during a telemarketing campaign.⁴⁷ In addition, although the safe harbor permits up to 3% of the calls to be “abandoned” because a sales representative is not available to take the call, when these calls are answered by a person the telemarketer’s dialers must promptly play a recorded message that states the name and telephone number of the seller on whose behalf the call was placed. Such recorded messages ensure that the recipient of the abandoned call is not simply connected to “dead air” or to a click signaling that the call has been disconnected.⁴⁸

Abandoned calls by themselves do not have a substantial impact on do-not-call enforcement. Telemarketing practices that generate abandoned calls do not necessarily make it more likely that a telemarketer will also fail to honor do-not-call requests, and a telemarketer’s failure to employ technology that controls abandoned calls does not make it more likely that calls will be made to telephone numbers on the Registry. Nonetheless, violations of consumer privacy through abandoned calls and telemarketing calls to telephone numbers on the Registry sometimes occur in the same telemarketing campaign. In several of the do-not-call enforcement actions that the FTC has brought, the FTC’s investigation found that the telemarketer’s or seller’s practices violated both the provisions of the TSR prohibiting calls to telephone numbers on the Registry, and the regulations restricting abandoned calls.⁴⁹ In other cases, the FTC has charged telemarketers with violating the abandoned call provisions but has not alleged that the telemarketer engaged in a pattern of abusive calls to telephone numbers on the Registry.⁵⁰

The automated dialers associated with prerecorded calls and predictive dialers do have a significant impact on do-not-call enforcement because they allow telemarketers and sellers who disregard the FTC’s and the FCC’s privacy protections to make millions of calls that injure consumers quickly and cheaply. Telemarketers that conduct “voice broadcasting” or “robocall” campaigns combine the efficiency of automated dialers with recorded solicitations. The technology used by some of these telemarketers can initiate 1,200 telephone calls a minute. Moreover, because robocall campaigns do not need to hire operators, a seller can deliver messages through voice broadcasting for a few cents per call. If sellers and telemarketers using

these services fail to screen their calls to prevent calling consumers whose telephone numbers are on the Registry, their telemarketing activities can result in millions of illegal calls to telephone numbers on the Registry in just a few days.

For example, businesses marketing interest rate reduction services and auto warranty offers have used robocalls extensively. These campaigns sometimes place massive numbers of calls indiscriminately, delivering prerecorded messages to individuals who should not receive telemarketing calls of any type because their numbers are listed on the Registry. The FTC began

her express consent, in writing, in advance.⁵⁴ Some calls that deliver prerecorded messages still are permitted under the amendment that went into effect on September 1. For example, prerecorded messages that do not constitute telemarketing are allowed because they are purely informational. Thus, a business may deliver prerecorded messages to alert travelers that a flight has been cancelled or send a reminders about an appointment if the message is not used to promote the sale of any goods or services.⁵⁵

The FTC hopes that this additional restriction on robocalls will reduce the volume of such calls and the violations of do-not-call requirements that have accompanied many robocall campaigns. However, some sellers and businesses have disregarded restrictions on delivery of prerecorded messages, and businesses that flagrantly violate the prohibition on robocall campaigns are also likely to disregard the prohibitions on calling consumers who have placed their numbers on the Registry. Consequently, the FTC anticipates filing additional enforcement actions against telemarketers and sellers who have engaged in multiple abusive telemarketing practices by initiating calls to telephone numbers on the Registry, and using such calls to deliver unlawful prerecorded messages.

Endnotes:

1. Pub. L. No. 110-188, 122 Stat. 635 (2008).
2. Telemarketing Sales Rule, 68 Fed. Reg. 4669 (2003) (codified at 16 C.F.R. Part 310).
3. Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44,144 (2003) (codified at 47 C.F.R. § 64.1200).
4. See 16 C.F.R. § 310.4(b)(1)(iii)(B) (2009); 47 C.F.R. § 64.1200(c)(2) (2009). Differences between the FTC and the FCC regulations concerning the Registry are discussed in Federal Trade Commission, *Report to Congress Pursuant to the Do Not Call Implementation Act on Regulatory Coordination in Federal Telemarketing Laws* (Sept. 9, 2003), <http://www.ftc.gov/os/2003/09/dnciareport.pdf>.
5. 16 C.F.R. §§ 310.4(b)(1), 310.4(b)(3), 310.8; 47 C.F.R. § 64.1200(c)(2)(i)(D). Fees are assessed based on the number of area codes that an entity accesses from the Registry, up to a maximum fee for all area codes. The maximum fee for all area codes is currently \$15,058. Telemarketing Sales Rule Fees, 74 Fed. Reg. 42,771 (2009) (amending 16 C.F.R. § 310.8(c)). Sellers and telemarketers may access five area codes without charge. Pub. L. No. 110-188, § 2(b)(2)(A); 16 C.F.R. 310.8(c).
6. Pub. L. No. 110-188, § 2(b)(2)(B), 122 Stat. 635; Telemarketing Sales Rule Fees, 68 Fed. Reg. 45,134, 45,135 (2003). Each entity that accesses the Registry is required to certify that it is

accessing the Registry solely to comply with laws concerning compliance with the Registry or to otherwise prevent calls to telephone numbers on the Registry.

7. On September 1, 2009, an amendment to the Telemarketing Sales Rule that generally prohibits initiating telephone calls to deliver prerecorded telemarketing messages went into effect. *See* 73 Fed. Reg. at 51,164, 51,204 (2008) (codified at 16 C.F.R. § 310.4(b)(1)(v) (2009)), <http://www.ftc.gov/os/fedreg/2008/august/080829tsr.pdf>. This prohibition applies even if a telephone number is not on the Registry and, since September 1, the FTC's system for recording complaints has, in addition to accepting complaints from consumers whose numbers are on the Registry, accepted complaints from consumers who are not on the Registry but report receiving telephone calls that deliver prerecorded telemarketing messages.

8. In addition to storing Registry information and complaints from consumers who have reported calls to telephone numbers listed on the Registry, the CSN contains millions of consumer complaints, including fraud and identity theft complaints. *See Consumer Sentinel Network Complaint Data, January – December 2008*, <http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2008.pdf>.

9. *National Do Not Call Registry Data Book for Fiscal Year 2009* (Nov. 2009).

10. *See* Federal Civil Penalties Inflation Adjustment Act, 74 Fed. Reg. 857 (Jan. 9, 2009) (to be codified at 16 C.F.R. § 1.98(d)) (increasing the maximum civil penalty from \$11,000 to \$16,000 per violation effective February 9, 2009).

11. In general, under the FTC Act, the FTC must notify the Attorney General of its intention to commence, defend, or intervene in any civil penalty action under the Act. 15 U.S.C. § 56(a)(1). DOJ then has 45 days, from the date of the receipt of notification by the Attorney General, in which to commence, defend or intervene in the suit. *Id.* If DOJ does not act within the 45-day period, the FTC may file the case in its own name, using its own attorneys. *Id.* The FTC supports legislation that would expand the agency's independent litigating authority to allow the FTC to bring actions for civil penalties in federal court in its own name without requiring that DOJ have the option to litigate on the FTC's behalf.

12. 15 U.S.C. § 45(m)(1)(C).

13. 47 U.S.C. § 503(b)(1)(B). If the violator does not, or should not, hold an FCC license or other authorization, the FCC must first issue a warning citation before it can seek to impose a forfeiture penalty. If the entity or individual that has been cited by the FCC does not commit any violation after the issuance of the citation, the FCC may not assess a forfeiture penalty. If, however, the violator continues the unlawful conduct after a citation is issued, the FCC may then issue a Notice of Apparent Liability for Forfeiture to propose a forfeiture penalty for violations that have occurred after the citation.

14. Section 503(b)(2)(C) of the Communications Act provides for forfeitures of up to \$10,000 for each violation in cases not covered by subparagraph (A) or (B), which address forfeitures for violations by licensees and common carriers, among others. *See* 47 U.S.C. §

503(b). In accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, Pub. L. 104-134, Sec. 31001, 110 Stat. 1321, the FCC implemented an increase of the maximum statutory forfeiture under section 503(b)(2)(C) first to \$11,000 and more recently to \$16,000. *See* 47 C.F.R. § 1.80(b)(3); Inflation Adjustment of Maximum Forfeiture Penalties, 65 Fed. Reg. 60,868 (2000)(forfeiture maximum for this type of violator increased to \$11,000); Inflation Adjustment of Maximum Forfeiture Penalties, 73 Fed. Reg. 44,664 (2008) (amendment of section 1.80 to reflect inflation increased the forfeiture maximum for this type of violator to \$16,000).

15. 47 C.F.R. § 1.80(b)(4) (2009).

16. *See* 47 U.S.C. § 312.

17. *See, e.g.*, FTC Consumer Alert: Are You Getting Telemarketing Calls You Don't Want? Here's How to Stop Them, <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt136.shtm>. *See also* FCC Consumer Fact Sheet, "Unwanted Telephone Marketing Calls," <http://www.fcc.gov/cgb/consumerfacts/tpa.html>.

18. National Do Not Call Registry – Total Registrations as of September 16, 2003, <http://www.ftc.gov/opa/2003/09/030917dncstates.pdf>.

19. *National Do Not Call Registry Data Book for Fiscal Year 2009*, at 3 (Nov. 2009).

20. Harris Interactive, National Do Not Call Registry: Seven In Ten Are Registered and All of Them Will Renew Their Registration (October 31, 2007), http://www.harrisinteractive.com/harris_poll/index.asp?PID=824.

21. *See, e.g.*, *Consumer Information, Do Not Call Registry*, <http://www.ftc.gov/bcp/edu/microsites/donotcall/coninfo.html>; *Facts for Consumers: Straight Talk About Telemarketing*, <http://www.ftc.gov/bcp/edu/pubs/consumer/telemarketing/tel15.shtm>.

22. *Who's Calling? Recognize and Report Phone Fraud*, <http://ftc.gov/bcp/edu/pubs/consumer/telemarketing/tel19.pdf>.

23. *See, e.g.*, AARP Fraud Fighters, <http://www.aarpfraudfighters.org/page.asp?o=aarp&s=moneygram&p=389503#a273245>.

24. <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/salt107.shtm> and <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt107.shtm>.

25. The cases described alleged violations of the TSR's requirements that sellers and telemarketers honor do-not-call requests made by persons who submitted their telephone numbers to the Registry, 16 C.F.R. § 310.4(b)(2)(B), or entity-specific do-not-call requests in which a person states that he or she does not wish to receive calls from a particular seller or charitable organization. *Id.* § 310.4(b)(2)(A).

26. *FTC v. International Protection Center*, Civ. No. 04cv1351 (N.D. Ohio filed July 19, 2004).
27. *FTC v. Handicapped & Disabled Workshops*, Civ. No. 2:08-cv-00908-DGC (D. Ariz. filed May 13, 2008).
28. *United States v. Malvern Marketing, LLC*, Civ. No. 06-cv-4612 (S.D.N.Y. filed June 13, 2006).
29. A survey conducted by the Consumer Care Alliance also found that consumers overwhelmingly reported receiving fewer telemarketing calls after the Registry went into effect. Consumer Care Alliance, National Do Not Call Study, Preliminary Findings, at 23, http://www.ccareall.org/downloads/donotcall_report.pdf. Significantly, the Harris Poll[®] asked consumers who had registered their numbers whether they had or planned to renew their registration which, at the time that the survey was conducted, were scheduled to expire after five years. Almost all the respondents (96%) said that they already had or would renew their registrations — strong evidence that consumers who registered believed that the Registry was working. *See Harris Interactive, supra* note 20.
30. Telemarketing Sales Rule, 68 Fed. Reg. at 4655-56; *see also* Rules and Regulations Implementing the TCPA, 68 Fed. Reg. at 44147 n.1 (FCC noting that calls such as surveys, market research, political or religious speech calls may be prohibited telephone solicitations if they serve as a pretext to an otherwise prohibited advertisement).
31. *See* FTC, *Collecting Consumer Debts: The Challenges of Change: A Federal Trade Commission Workshop Report* at iv, 16, 36-37 (February 2009) (“Collectors also now use sophisticated automated dialing and interactive voice recording technologies to efficiently place telephone calls to consumers.”), <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>; GAO, *Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology*, GAO-09-748, at 49 (2009) (noting that predictive dialers are used heavily in the debt collection industry to manage high call volumes); *Berg v. Merchants Ass’n Collection Div., Inc.*, 586 F. Supp. 2d 1336, 1344 (S.D. Fla. 2008) (addressing whether telemarketer use of recorded message delivered to telephone answering machine violates the Fair Debt Collection Practices Act).
32. Telephone calls from debt collectors who are within the scope of the Fair Debt Collections Practices Act are subject to the restrictions in that act concerning communications in connection with debt collection. *See* 15 U.S.C. § 1692a(6) (defining “debt collector”); *id.* § 1692c (restricting communications in connection with debt collection). That Act, however, does not establish a repository of telephone numbers that is analogous to the Registry, and it does not give the FTC authority to issue regulations against abusive debt collection practices.

The FCC has stated that debt collection calls do not qualify as either “telephone solicitations” or “unsolicited advertisements” under the rules implementing the TCPA. *See* Rules and Regulations Implementing the TCPA, 68 Fed. Reg. at 44158. In a declaratory ruling,

the FCC has also stated that when a cell phone subscriber provides his or her cell phone number to a creditor (e.g., as part of a credit application), the subscriber has given prior express consent to be contacted at that number regarding the debt. *See* 73 Fed. Reg. 6041 (2008) (FCC ruling on petition for clarification and declaratory ruling).

33. Telemarketing Sales Rule, 71 Fed. Reg. 58716, 58719, 58725 (2006). Similarly, the FCC has stated that non-solicitation calls, such as “surveys, market research, political or religious speech calls,” are not subject to FCC rules implementing the Registry. Rules and Regulations Implementing the TCPA, 68 Fed. Reg. at 44,147 para. 15.

34. Telemarketing Sales Rule, 73 Fed. Reg. 51,163, 51,173 & n.113 (2008);

38. See *FTC v. Gill*, 183 F. Supp. 2d 1171 (C.D. Cal. 2001) (“[W]hile certain nonprofit corporations are exempt from liability for violations of section 5(a)(1) of the FTC Act, the exemption does not apply to sham corporations.”) (citing *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1022 (8th Cir. 1969)); *FTC v. Ameridebt, Inc.*, 343 F.Supp. 2d 451, 460-62 (D. Md. 2004) (denying motion to dismiss where FTC complaint alleged that purported credit counseling organization incorporated as a nonprofit entity was a “de facto for-profit organization”).

39. The FTC has brought several enforcement actions in which it has alleged that the defendants used purportedly nonprofit entities to promote their for-profit ventures, and failed to comply with the Registry regulations. See, e.g., *FTC v. National Credit Council*, No. SACV04-0474 CJC(JWJx) (C.D. Cal. filed April 23, 2004); *FTC v. Debt Management Foundation Services, Inc.*, C.A. No. 8:04-cv-01674 (M.D. Fla. filed July 20, 2004); *FTC v. Randall L. Leshin*, C.A. No. 0:06-cv-61851 (S.D. Fla. filed Dec. 12, 2006).

40. 16 C.F.R. § 310.4(b)(1)(iii)(B) and § 310.2(n); 47 C.F.R. § 64.1200(c), (f)(4), (f)(12). These exemptions do not apply if the person asked to be on the seller’s “entity-specific” do-not-call list by telling the seller or its representatives that he or she does not wish to receive telemarketing calls from the seller.

41. See also 47 C.F.R. § 64.1200(c)(2)(ii) (corresponding FCC rule).

42. The FCC’s regulations concerning the Registry also contain an exception for calls that are made within eighteen months of a transaction or three months of an inquiry or application, 47 C.F.R. § 64.1200(f), but the terms used to define an “established business relationship” in the See

para. 85.

46. See Telemarketing Sales Rule, 68 Fed. Reg. at 4641-42; 67 Fed. Reg. 4492, 4522-23 (2002) (notice of proposed rulemaking).

47. Under the TSR, the abandonment rate is measured as a percentage of the total number of calls answered by a person over the duration of a single calling campaign if the campaign is less than thirty days, or separately over each successive 30-day period or portion thereof that the campaign continues. 16 C.F.R. § 310.4(b)(4)(i) (2009). A “campaign” refers to telemarketing calls that offer the same good or service for the same seller. See Telemarketing Sales Rule, 73 Fed. Reg. 51,164, 51,200 (2008). The standard for calculating abandonment in the TSR is different from the standard adopted in FCC regulations, which averages abandonment rates over a 30-day period, but contains no “per campaign” limitation. 47 C.F.R. § 64.1200(a)(6).

48. To qualify for the safe harbor, the telemarketer must also allow the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call, and must retain records establishing compliance with the abandoned call safe harbor requirements. 16 C.F.R. 310.4(b)(2)(vi).

49. See, e.g., *FTC v. Paul Navestad d/b/a the Cash Grant Institute*, Civ. No. 09-CV-6329 (W.D.N.Y. filed June 25, 2009); *United States v. DirecTV, Inc. and Voicecast Systems, Inc.*, Civ. No. 2:09-cv-02605-PA-FMO (C.D. Ca. filed April 15, 2009); *United States, California, Illinois, North Carolina, and Ohio v. Dish Network, L.L.C.*, Civ. No. 3:09-cv-03073-JES-CHE (C.D. Ill. filed Mar. 25, 2009); *United States v. Global Mortgage Funding*, Civ. No. 8:07-cv-1275 (C.D. Cal. filed Oct. 30, 2007); *United States v. The Broadcast Team*, Civ. No. 6:05-cv-01920 (M.D. Fla. filed Dec. 29, 2005); *United States v. DirecTV*, Civ. No. 8:05-cv-01211 (C.D. Cal. filed Dec. 12, 2005).

50. See *United States v. Guardian Communications*, Civ. No. 4:07-cv-04070-MMM-JAG (C.D. Ill. filed Nov. 6, 2007); *United States v. Voice Mail Broadcast Corp.*, Civ. No. 2:08-cv-00521 (C.D. Cal. filed Jan. 21, 2008); *United States v. Star Satellite*, Civ. No. 2:08-cv-00797-RLH-LRL (D. Nev. filed June 19, 2008).

51. *FTC v. Debt Management Foundation Services, Inc.*, C.A. No. 8:04-cv-01674 (M.D. Fla. filed July 20, 2004); *FTC v. National Credit Council*, No. SACV04-0474 CJC(JWJx) (C.D. Cal. filed April 23, 2004).

52. *FTC v. Economic Relief Technologies, LLC*, No. 09C 7423 (N.D. Ga. filed Nov. 30, 2009); *FTC v. 2145183 Ontario, Inc.*, No. 1 09-CV-3307(N.D. Ill. filed Nov. 30, 2009); *FTC v. JPM Accelerated Services, Inc.*, No. 6:09-CV-2021-ORL-28-KRS (M.D. Fla. filed Nov. 30, 2009).

53. See, e.g., *Cellco Partnership v. Explicit Media, Inc.*, Civ. No. 3:08-cv-03581-AET-TJB (D.N.J. filed: July 14, 2008); *Texas v. SCM Media, Inc.*, Civ. No. 1:09-cv-00387-LY (W.D. Texas May 14, 2009); *Arkansas v. Dealer Warranty Services, LLC*, Civ. No. 4:09-cv-00357 -GTE (E.D. Ark. filed May 12, 2009); *Arkansas v. Automotive Warranty Solutions, LLC*, Civ.

No. 4:09-cv-00355-JLH (E.D. Ark. filed May 12, 2009); *Indiana v. SVM, Inc.*, Cause No. 49D14-09-05-MI-021108 (Marion Co. Ct., Ind. filed May 5, 2009).

54. *See supra* note 7.

55. *See* FTC Business Alert, Reining in Robocalls (Sept. 2009), <http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt161.shtm>; FTC Consumer Alert, New Rules for Robocalls (Sept. 2009), <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt162.shtm>.

