H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the Clean Air Act.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this proposed action. In reviewing SIP submissions, EPA's role is to approve or disapprove State choices, based on the criteria of the Clean Air Act. Accordingly, this action merely proposes to disapprove certain State requirements for inclusion into the SIP under section 110 and subchapter I, part D of the Clean Air Act and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: February 23, 2010.

Jared Blumenfeld,

Regional Administrator, Region IX.

[FR Doc. 2010–6103 Filed 3–19–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 64 and 68

[CG Docket No. 02–278; FCC 10–18]

Telephone Consumer Protection

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission invites comment on proposed revisions to its rules under the Telephone Consumer Protection Act (TCPA) that would harmonize those rules with the Federal Trade Commission's (FTC's) recently amended Telemarketing Sales Rule. The Commission seeks comment on whether these proposed revisions would benefit consumers and industry by creating greater symmetry between the two agencies' regulations, and by extending the FTC's standards to regulated entities that are not currently subject to the FTC's rules.

DATES: Comments are due on or before May 21, 2010. Reply comments are due on or before June 21, 2010. Written comments on the Paperwork Reduction Act (PRA) proposed information collection requirements must be submitted by the general public, Office of Management and Budget (OMB), and other interested parties to Cathy Williams, Federal Communications Commission, via e-mail to *Cathy Williams@fcc.gov* and to Nicholas A. Fraser, Office of Management and Budget, via e-mail to *Nicholas_A._Fraser@omb.eop.gov* or via fax at 202–395–5167 on or before May 21, 2010.

ADDRESSES: You may submit comments identified by CG Docket No. 02–278 and/or FCC Number 10–18, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://fjallfoss.fcc.gov/ecfs2/*. Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, *etc.*) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, *see* the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Lisa Boehley, Consumer and Governmental Affairs Bureau, Policy Division, at (202) 418–7395 (voice), or e-mail *Lisa.Boehley@fcc.gov*.

For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Cathy Williams, Federal Communications Commission, at (202) 418–2918, or e-mail *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: On July 3, 2003, the Commission released the *Rules and Regulations Implementing the TCPA of 1991,* Report and Order (*2003 TCPA Order*), CG Docket No. 02–278, FCC 03–153, published at 68 FR 44144, July 25, 2003, revising the TCPA rules, and adopted new rules to provide consumers with several options for avoiding unwanted telephone solicitations, including the establishment of a national do-not-call registry. This is a summary of the Commission's document *Rules and Regulations Implementing the TCPA of 1991, Notice of Proposed Rulemaking,* CG Docket No. 02–278, FCC 10–18, adopted January 20, 2010, and released January 22, 2010, seeking comment on proposed revisions to the Commission's rules under the Telephone Consumer Protection Act (TCPA) that would harmonize those rules with the Federal Trade Commission's (FTC's) recently amended Telemarketing Sales Rule.

Document FCC 10–18 contains proposed information collection requirements subject to the PRA of 1995, Public Law 104–13. In addition, it contains a new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002,

Public Law 107–198, *see* 44 U.S.C. 3506 (c)(4).

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/or* the Federal eRulemaking Portal: *http://www.regulations.gov*.
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW–A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Pursuant to § 1.1200 of the Commission's rules, 47 CFR 1.1200, this matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substances of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. *See* 47 CFR 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in § 1.1206(b) of the Commission's rules, 47 CFR 1.1206(b).

A copy of document FCC 10–18 and any subsequently filed documents in this matter will be available during regular business hours at the FCC Reference Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554, (202) 418–0270. Document FCC 10–18 and any subsequently filed documents in this matter may also be purchased from the Commission's duplicating contractor at their Web site, *http://www.bcpiweb.com,* or call (800) 378–3160. A copy of document FCC 10–18 and any subsequently filed documents in this matter may also be found by searching the Commission's Electronic Comment Filing System (ECFS) at *http://www.fcc.gov.cgb/ecfs* (insert CG Docket No. 02–278 into the Proceeding block).

To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). Document FCC 10–18 can also be downloaded in Word or Portable Document Format (PDF) at: *http://www.fcc.gov/cgb/policy*.

Initial Paperwork Reduction Act of 1995 Analysis

Document FCC 10–18 contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burden, invites the general public, OMB and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. Public and agency comments are due May 21, 2010. An agency may not conduct or sponsor a collection of information unless it displays a current valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid control number. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

OMB Control Number: 3060–0519.

Title: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02–278.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions; and Individuals or households.

Number of Respondents and Responses: 49,397 respondents, 135,632,883 responses.

Estimated Time per Response: .004 hours (15 seconds) to 1 hour.

Frequency of Responses: Recordkeeping requirement; Monthly, annual, and on occasion reporting requirements; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The authorizing statute for this information collection is found in the Telephone Consumer Protection Act of 1991 (TCPA), Public Law 102–243, 105 Statute 2394 (1991), which added Section 227 of the Communications Act of 1934, [47 U.S.C. 227] Restrictions on the Use of Telephone Equipment.

Total Annual Burden: 650,906 hours.

Total Annual Cost: $4,590,000.

Privacy Impact Assessment: Yes. The Privacy Impact Assessment was completed on June 28, 2007. It may be reviewed at *http://www.fcc.gov/omd/privacyact/privacy_impact_assessment.html*. The Commission is in the process of updating the PIA to incorporate various revisions to it as a result of revisions to the system of records notice (SORN).

Nature and Extent of Confidentiality: Confidentiality is an issue to the extent

that individuals and households provide personally identifiable information, which is covered by the FCC's SORN, FCC/CGB–1, "Informal Complaints and Inquiries." As required by the Privacy Act, 5 U.S.C. 552a, the Commission also published SORN, FCC/CGB1, "Informal Complaints and Inquiries," in the **Federal Register** on December 15, 2009 (74 FR 66356), which became effective on January 25, 2010. A system of records for the do-not-call registry was created by the Federal Trade Commission (FTC) under the Privacy Act. The FTC published a notice in the **Federal Register** describing the system. *See* 68 FR 37494, June 24, 2003.

Needs and Uses: On July 3, 2003, the Commission released the *Rules and Regulations Implementing the TCPA of 1991, Report and Order (2003 TCPA Order),* CG Docket No. 02–278, FCC 03–153, published at 68 FR 44144, July 25, 2003, revising the TCPA rules, and adopted new rules to provide consumers with several options for avoiding unwanted telephone solicitations. These new rules established a national do-not-call registry, set a maximum rate on the number of abandoned calls, required telemarketers to transmit caller ID information, and modified the Commission's unsolicited facsimile advertising requirements. On January 22, 2010, the Commission released the *Rules and Regulations Implementing the TCPA of 1991, Notice of Proposed Rulemaking (NPRM), CG Docket No. 02–278, FCC 10–18* seeking comment on proposed revisions to its rules under the Telephone Consumer Protection Act (TCPA) that would harmonize those rules with the Federal Trade Commission's (FTC's) recently amended Telemarketing Sales Rule. The Commission anticipates that proposed revisions to §§ 64.1200(a)(1) and 64.1200(a)(2) of the Commission's TCPA rules would contain new information collection requirements under the Paperwork Reduction Act of 1995. The proposed revisions would require sellers and telemarketers, when obtaining telephone subscribers' prior express consent to receive prerecorded telemarketing calls, to obtain such prior express consent *in writing* (including electronic methods of consent).

To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called "Currently Under Review," (3) click on the downward-pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB control number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR."

Synopsis

Discussion

A. Prerecorded Message Calls

Written Consent Requirement

1. *The FCC's TCPA Rules.* The TCPA prohibits the delivery of artificial or prerecorded voice messages to residential telephone lines, absent an emergency, without the "prior express consent" of the called party. Under the Commission's TCPA rules and orders, prior express consent of a residential telephone subscriber to receive a prerecorded telemarketing call (or live telephone solicitation) must be *in writing* if the subscriber's number is listed on the national do-not-call registry, but may be obtained *orally or in writing* if the subscriber's number is not listed on the registry. In explaining the basis for this distinction, the Commission has noted that a residential subscriber who places his or her number on the registry has indicated a desire, through the act of registering, not to receive unsolicited telemarketing calls and, as such, written consent evidences the subscriber's wish to be contacted by only particular sellers at a particular number. When written consent is required under the Commission's rules and orders (because the subscriber is listed on the national do-not-call registry), the seller or telemarketer must obtain a signed, written agreement between the subscriber and seller stating that the subscriber agrees to be contacted by that seller and including the telephone number to which the calls may be placed. The Commission has indicated that the term "signed" may include an electronic or digital form of signature, to the extent such form of signature is recognized as a valid signature under applicable Federal or State contract law.

2. With respect to a residential subscriber who has *not listed* his number on the national do-not-call registry, the Commission has declined to require written consent to deliver prerecorded messages to such a subscriber and noted that allowing oral consent in that context is consistent with statements in the legislative history suggesting that Congress did not believe written consent was needed with respect to calls placed to unregistered subscribers. Whether consent has been obtained orally or in writing, a seller or telemarketer placing a prerecorded telemarketing call must be prepared to provide "clear and convincing evidence" that it received prior express consent from the called party.

3. *The FTC's Telemarketing Sales Rule.* Under the Telemarketing Sales Rule, as amended, prior express consent to receive prerecorded telemarketing calls must be in writing. The written agreement must be signed by the consumer and must be sufficient to show that he or she: (1) Received "clear and conspicuous disclosure" of the consequences of providing the requested consent—*i.e.,* that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller—and (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates. In addition, the written agreement must be obtained "without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service." The FTC has determined that written agreements obtained in compliance with the E-SIGN Act will satisfy the requirements of its rule, such as, for example, agreements obtained via an e-mail or Web site form, telephone keypress, or voice recording. Finally, under the Telemarketing Sales Rule, the seller bears the burden of proving that a clear and conspicuous disclosure was provided, and that an unambiguous consent was obtained.

4. Consistent with Congress's directive in the Do Not Call Improvement Act of 2007 (DNCIA) to "maximize consistency" of the Commission's TCPA rules with the FTC's Telemarketing Sales Rule, the Commission seeks comment on whether it should revise §§ 64.1200(a)(1) and 64.1200(a)(2) of its rules to provide that, for all calls, prior express consent to receive prerecorded telemarketing messages must be obtained in writing. The Commission seeks comment on these proposed revisions and specific related issues in the discussion that follows.

5. As an initial matter, the Commission seeks comment on its authority to adopt a prior written consent requirement similar to the FTC's. Specifically, while the term "prior express consent" appears in both subsections 227(b)(1)(A) and (b)(1)(B) of the Communications Act, the statute is silent regarding the precise form of such

consent (*i.e.,* oral or written). Certain statements in the legislative history, however, suggest that Congress may have contemplated that consent may be obtained orally *or* in writing.

6. Given that such a rule change would permit a telemarketer wishing to deliver prerecorded telemarketing messages to residential subscribers to obtain agreements from the subscribers by any electronic means authorized by the E-SIGN Act (including, for example, e-mail, Web form, telephone key press, or voice recording), the Commission seeks comment on whether Congressional concerns expressed nearly two decades ago regarding the potential burdens of a written consent requirement remain relevant today in light of the multitude of quick and cost effective options now available for obtaining written consent, other than via traditional pen and paper. The Commission also notes that section 227(b)(2)(B) of the Communications Act, in authorizing the Commission to adopt exemptions from the prerecorded message prohibition, states that it may do so "subject to such conditions as the Commission may prescribe." This statement suggests that Congress intended the Commission to exercise discretion in establishing the parameters of any exemption from the prohibition on prerecorded messages. The Commission seeks comment on whether the discretion afforded it in this subsection extends to establishing a written consent requirement. The Commission also seeks comment on how best to reconcile the congressional objective to maximize consistency between the FTC's rule and the Commission's rule with the statements referenced above in the TCPA's legislative history reflecting the concern that written consent may prove unduly burdensome to telemarketers and to subscribers who wish to receive telephone solicitations. The Commission seeks comment on whether the convenience afforded by the E-SIGN Act addresses these concerns.

7. As noted above, when written consent is required under the Commission's current rules (because the called party's number is listed on the national do-not-call registry), the seller or telemarketer must obtain a signed, written agreement between the subscriber and seller stating that the subscriber agrees to be contacted by that seller and including the telephone number to which the calls may be placed. If the Commission were to adopt a written consent requirement for placing prerecorded telemarketing calls to unregistered subscribers, it seeks comment on whether it also should adapt existing § 64.1200(c)(2)(ii) of its rules (governing the content of written consent agreements) to apply specifically to prerecorded telemarketing calls, as the FTC has done in its Telemarketing Sales Rule. The Commission tentatively concludes that requiring a written agreement evidencing consent to receive prerecorded messages in particular, such as that required by the FTC, may help to ensure that consumers are adequately apprised of the specific nature of the consent that is being requested and, in particular, of the fact that they will receive prerecorded message calls as a consequence of their agreement.

8. Assuming the Commission has legal authority to adopt a written consent requirement, it seeks comment on whether it should adopt the same requirement both for calls governed by section 227(b)(1)(A) of the Communications Act (generally prohibiting automated or artificial or prerecorded message calls without prior express consent to emergency lines, health care facilities, and cellular services), and for calls governed by section 227(b)(1)(B) of the Communications Act (generally prohibiting prerecorded message calls without prior express consent to residential telephone lines). Because the two provisions include an identically worded exception for calls made with the "prior express consent of the called party," the Commission tentatively concludes that any written consent requirement adopted should apply to both provisions. The Commission seeks comment on this tentative conclusion.

9. The Commission also seeks information concerning the extent to which, in the absence of written consent, residential subscribers have been targeted by unscrupulous senders of prerecorded messages who erroneously claim to have obtained the subscriber's oral consent. If, after reviewing the record, the Commission determines that it does not have legal authority to adopt a written consent requirement, it seeks comment on what, if any, additional steps should be required by senders who choose to obtain consent orally in order to verify that consent was, in fact, given.

10. As a policy matter, the Commission tentatively concludes that harmonizing its prior consent requirement with the FTC's may reduce the potential for industry and consumer confusion surrounding a telemarketer's obligations to the extent that similarly situated entities would no longer be subject to different requirements depending upon whether an entity is subject to the FTC's rule or to the Commission's rule. It tentatively concludes that written consent also may enhance the Commission's enforcement efforts and serve to protect both consumers and industry from erroneous claims that consent was or was not given, to the extent that, unlike oral consent, the existence of a paper or electronic record may provide unambiguous proof of consent. The Commission seeks comment on these tentative conclusions.

11. The Commission notes that in light of the numerous options available today under the E-SIGN Act to obtain a written agreement, a telemarketer may be afforded flexibility to determine the form of "written" consent that is most appropriate, least burdensome, and most cost effective for that particular business (*e.g.,* e-mail, Web site form, telephone keypress, or voice recording). It seeks information and data on the specific compliance costs and burdens associated with various written consent options under the E-SIGN Act and on the extent to which sellers and telemarketers are already utilizing these methods for obtaining consumer consent, either pursuant to the FTC's amended Telemarketing Sales Rule or pursuant to Commission rules when a called party's number is listed on the national do-not-call registry. Finally, to the extent that the Commission currently requires sellers and telemarketers placing prerecorded telemarketing calls to be prepared to provide "clear and convincing evidence" of the receipt of prior express consent from the called party, even when consent has been obtained orally, it seeks comment on the extent to which Commission adoption of a written consent requirement would add to the compliance burden associated with this existing requirement.

Exemption for Prerecorded Telemarketing Calls to Established Business Relationship Customers

12. *The FCC's TCPA Rules.* The TCPA prohibits the use of artificial or prerecorded messages in telephone calls to residential (wireline) numbers without the prior express consent of the called party, but permits the Commission to exempt from this provision calls that are non-commercial and commercial calls that "do not adversely affect the privacy rights of the called party" and that do not transmit an "unsolicited advertisement." The TCPA does not explicitly exempt from the prohibition on artificial and prerecorded message calls those from a party with whom the subscriber has an established business relationship. Nevertheless, in

1992, the Commission determined to create such an exemption, based on its authority under the TCPA to exempt commercial calls that "do not adversely affect residential subscriber privacy interests." The Commission concluded, based upon "the comments received and the legislative history," that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. It further concluded that such a solicitation can be "deemed to be invited or permitted" by a subscriber in light of the business relationship. Finally, noting that the legislative history indicates that the TCPA "does not intend to unduly interfere with ongoing business relationships," the Commission stated that "requiring actual consent to prerecorded message calls where [established business] relationships exist could significantly impede communications between businesses and their customers."

13. *The FTC's Telemarketing Sales Rule.* In 2004, the FTC published a notice of proposed rulemaking in which it proposed, at the request of a telemarketer, the creation of a safe harbor under the Telemarketing Sales Rule for prerecorded telemarketing calls to established business customers. Under the proposed safe harbor, prerecorded messages to consumers with whom a seller has an "established business relationship" (as defined by the FTC's rules) would not violate the FTC's Telemarketing Sales Rule if, among other things, a keypress opt-out mechanism or other means were provided at the outset of the call for consumers to add their telephone number to the seller's company-specific do-not-call list.

14. In 2006, the FTC denied the proposed safe harbor request that would have permitted prerecorded telemarketing calls to established business customers based, in large measure, on the more than 13,000 consumer comments it had received opposing the proposal. According to the FTC, many consumers expressed the view that, in light of the "intrusive and impersonal nature" of prerecorded messages, neither a prior inquiry nor a purchase should be deemed to imply consumer consent to receive future prerecorded solicitations from a seller. The FTC noted that this reaction was contrary to prior consumer support among commenters for an exemption to allow *live* telemarketing calls to established business customers. In addition, the FTC denied the proposed safe harbor based on record evidence indicating, among other things, that: (1) the self interest of sellers in retaining established customers could not be relied on to prevent abuse through excessive prerecorded message telemarketing, especially as new digital technologies, including Voice over Internet Protocol (VoIP), reduce the cost of transmitting prerecorded telemarketing messages by telephone; (2) prerecorded telemarketing messages impose potential costs, including risks to health and safety when an extended message ties up a line and prevents consumers from placing emergency calls, as well as burdens on consumers, including costs to store and retrieve prerecorded messages on home answering machines or voicemail services; and (3) various methods by which consumers may elect to opt out of future prerecorded message calls are often cumbersome to use or simply do not work. Based on this record, the FTC changed course and published a new proposed amendment to the Telemarketing Sales Rule to expressly prohibit all unsolicited prerecorded telemarketing calls without the consumer's prior written agreement, even with respect to prerecorded calls to established business relationship customers.

15. In 2008, the FTC amended the Telemarketing Sales Rule to make explicit that the existence of an established business relationship will *not* serve as authorization for placing *prerecorded* telemarketing calls. Thus, although an established business relationship will continue to serve as authorization for placing *live* telemarketing calls to consumers under the FTC's Telemarketing Sales Rule, it no longer serves as authorization for placing prerecorded telemarketing calls. As amended, the FTC's Telemarketing Sales Rule prohibits prerecorded message calls *unless* the called party has given prior express written consent and the call complies with certain additional requirements in 16 CFR 310.4(b)(1)(v).

In light of the substantial record of public comments developed over the course of the FTC's four-year rulemaking opposing the creation of a safe harbor for prerecorded telemarketing calls to established business customers, and in view of Congress's mandate to maximize consistency between the Commission's rules and the FTC's Telemarketing Sales Rule, the Commission seeks comment on whether it should reconsider its 1992 determination that an established business relationship may be deemed to constitute express invitation or permission to receive unsolicited prerecorded telemarketing calls. The FTC's 2008 rule amendments make explicit that, absent a consumer's express prior written agreement, sellers and telemarketers are prohibited from delivering a prerecorded telemarketing message, regardless of whether the call is made to a consumer who has an established business relationship with the seller. As a result, an "established business relationship" currently provides the necessary permission to deliver prerecorded telemarketing messages only for entities subject to the Commission's, but not the FTC's, jurisdiction (*e.g.,* banks, airlines, common carriers). Based on the foregoing, the Commission seeks comment on whether it should conform its rule to the FTC's Telemarketing Sales Rule by eliminating the established business relationship exemption from the general prohibition on prerecorded telemarketing calls to residential telephone lines.

16. As noted above, the Commission created the "established business relationship" exemption from the TCPA's ban on artificial or prerecorded messages based on its authority under the TCPA to exempt calls that "do not adversely affect residential subscriber privacy interests." It reasoned that a subscriber's privacy interests are not adversely affected by the receipt of such prerecorded message calls because, in that instance, the solicitation can be "*deemed to be invited or permitted*" by the subscriber in light of the business relationship. In light of the strenuous opposition expressed by the thousands of consumers who filed comments in the FTC's rulemaking, the Commission seeks comment on the continued validity of this determination and whether prerecorded telemarketing calls (*i.e.,* sales calls) may reasonably be "deemed invited or permitted" by established business customers. In particular, the Commission seeks comment on whether its established business relationship exception remains supportable on the basis that artificial or prerecorded message calls to established customers do not adversely affect residential subscriber privacy interests and do not transmit an unsolicited advertisement.

17. In the 1992 rulemaking, the Commission also expressed the concern that "requiring actual consent to prerecorded message calls where [established business] relationships exist *could significantly impede communications between businesses and their customers*" and, as such, might be at odds with statements in the legislative history indicating Congress's desire not to "unduly interfere with ongoing business relationships." The Commission seeks comment on the extent to which authorization to receive

prerecorded message calls based on prior written or oral consent (rather than on the basis of an established business relationship) would in fact "unduly interfere with ongoing business relationships" or "impede communications" between businesses and their customers. In particular, the Commission seeks comment on whether technological advances, such as the use of one or more methods available under the E–SIGN Act for establishing a consumer's prior express written consent to receive prerecorded telemarketing calls, have minimized the burden associated with obtaining the express consent of established business customers (*e.g.,* instructing an established customer during a live telephone solicitation to use a keypress feature to request future prerecorded message calls).

18. The Commission also seeks specific comment on the experiences of telemarketers that have conducted marketing campaigns on behalf of sellers that are subject to the FTC's recently amended Telemarketing Sales Rule in obtaining the requisite prior written consent from those businesses' established customers. Has the FTC's revised rule had the effect of impeding communications between businesses and their customers and, if so, in what ways? If the Commission were to retain the current exemption for established business customers, it seeks comment, particularly from individual consumers and consumer groups, regarding whether consumers would support the use of prerecorded telemarketing messages by sellers and telemarketers with established business customers if such messages provided an interactive opt-out mechanism that would provide a means to avoid future prerecorded messages from that seller.

19. Finally, the Commission tentatively concludes that conforming its rule governing prerecorded message calls to established business customers to the FTC's may reduce the potential for industry and consumer confusion surrounding a telemarketer's authority to place unsolicited prerecorded message calls to established customers to the extent that similarly situated entities would no longer be subject to different requirements depending upon whether an entity is subject to the FTC's rule or to the Commission's. The Commission seeks comment on this tentative conclusion.

Exemption for Health Care Related Calls Subject to HIPAA

20. *The FCC's TCPA Rules.* As previously noted, section 227 of the Communications Act allows the Commission to create exemptions from the TCPA's ban on artificial or prerecorded messages to residential lines for calls that are non-commercial and for commercial calls that do not adversely affect the privacy rights of the called party and that do not transmit an unsolicited advertisement. The Commission's prerecorded message rules currently contain no specific exemption for healthcare-related prerecorded message calls that are subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

21. *The FTC's Telemarketing Sales Rule.* In its 2008 amendments to the Telemarketing Sales Rule, the FTC exempted from its prior written consent requirement healthcare-related prerecorded message calls that are subject to HIPAA. These prerecorded calls include, among others, flu shot and other immunization reminders, prescription refill reminders, health screening reminders; calls to obtain permission to contact doctors for renewal of medication or medical supply orders; calls to obtain documentation needed for billing health plans; calls by home health agencies to follow-up on patients for six months after discharge; calls monitoring patient compliance with prescribed medical therapies; and calls encouraging enrollment in disease management or treatment programs, and in migration from branded to generic drugs, and from retail to mail order pharmacies. The FTC noted commenters' fear that such calls may be subject to the Telemarketing Sales Rule to the extent that they can result in a payment or co-pay for medication, durable medical equipment, or medical services. An exemption is necessary, the FTC determined, because (among other things) the individuals most in need of these healthcare-related prerecorded messages (elderly or ill patients) might be unable or simply unlikely to take the steps necessary to provide their express written consent to receive them. To the extent that the communications between healthcare-related entities subject to HIPAA regulations and their customers already are subject to extensive Federal regulations, some of which directly address the making of telephone solicitations to patients, the FTC was persuaded that there would be little risk that the creation of an exemption for these calls would lead to abusive practices by these entities. Finally, citing evidence that prerecorded healthcare messages of the type described above are generally deemed more welcome and less intrusive by consumers, the FTC determined that the creation of an exemption for this category of calls would not adversely affect consumer privacy rights.

22. On the basis of information presented in the record of the FTC's rulemaking proceeding on healthcare-related prerecorded message calls made by, or on behalf of, a covered entity or its business associate, as those terms are defined in the HIPAA Privacy Rule, the Commission seeks comment on whether it likewise should exempt such calls from the general prohibition on prerecorded message calls to residential lines under the TCPA. If so, it seeks comment on the Commission's authority to exempt these calls either under section 227(b)(2)(B)(i) of the Communications Act (calls that are not made for a commercial purpose), or under section 227(b)(2)(B)(ii) of the Communications Act (commercial calls that do not adversely affect the privacy rights of the called party and that do not transmit an unsolicited advertisement). In addition, it notes that, with limited exception, HIPAA requires that a "covered entity" obtain an individual's written authorization before using protected health information (including the individual's name and telephone number) for marketing purposes. As a practical matter, this HIPAA restriction (in conjunction with other HIPAA provisions) would appear to preclude or limit the delivery of prerecorded telemarketing calls placed by a "covered entity" or its "business associate" to individuals with whom the covered entity or business associate has no pre-existing relationship (*i.e.,* "cold calling" of consumers). The Commission seeks comment on this aspect of the HIPAA requirements, on the relative frequency and volume of healthcare-related prerecorded telemarketing calls placed to individuals by entities that do not have a pre-existing relationship with the consumer, and on the extent to which consumers consider such calls intrusive or an invasion of privacy.

23. The Commission notes that when one of its TCPA rules differs substantively from the FTC's Telemarketing Sales Rule, it has been generally understood that the more restrictive requirement prevails and sets the standard applicable to all entities that are subject to the jurisdiction of both agencies. In this instance, although the FTC has adopted a more specific provision, the Commission's rule, by providing no exemption for healthcare-related prerecorded message calls subject to HIPAA, is arguably more restrictive. Accordingly, the Commission seeks comment on the practical impact of this disparity on

regulated entities currently and if the Commission does not adopt a similar exemption in the future.

Opt-Out Mechanism

24. *The FCC's TCPA Rules.* The TCPA directs the Commission to prescribe technical and procedural standards for systems that are used to transmit "any" artificial or prerecorded voice message via telephone. Under any Commission-adopted standards, the entity initiating a call must be identified at "the beginning" of a prerecorded message, and, "during or after the message," the telephone number or address of such entity must be provided. Such Commission-adopted standards also must require that a prerecorded message call "automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls." Consistent with the TCPA's technical and procedural standards provision, the Commission's rules require that, *at the beginning* of all artificial or prerecorded message calls, the message identify the entity responsible for initiating the call (including the legal name under which the entity is registered to operate), and *during or after the prerecorded message,* provide *a telephone number* that consumers can call during regular business hours to make a company-specific do-not-call request.

25. *The FTC's Telemarketing Sales Rule.* The FTC's Telemarketing Sales Rule, as amended in 2008, requires, with limited exception, that any prerecorded message call that could be answered by the consumer in person provide an automated interactive opt-out mechanism *that is announced* at the outset of the message and is available *throughout the duration of the call.* The opt-out mechanism, when invoked, must automatically add the consumer's number to the seller's do-not-call list and immediately disconnect the call. Where a call could be answered by an answering machine or voicemail service, the message must also include a toll-free number that enables the consumer to call back and connect directly to an automated opt-out mechanism.

26. There are several key differences between the Commission's and the FTC's rules with respect to their respective "opt-out" and related disclosure requirements. First, the FTC opt-out requirement specifies that, if there is any possibility that a call could be answered in person by a consumer, an automated interactive opt-out mechanism must be available throughout the call. The provision permits either a voice or keypress-activated opt-out mechanism to be used, or both in combination. If there is any possibility that a prerecorded call could be answered by an answering machine or voicemail service, a toll-free number must be provided and disclosed promptly at the outset of the call. The toll-free number must connect directly to an automated interactive opt-out mechanism that is accessible at any time throughout the duration of the telemarketing campaign. The provision further requires that, once invoked, the interactive mechanism must automatically add the number called to the seller's entity-specific do-not-call list. In contrast, the Commission's analogous provision does not require an automated opt-out mechanism and, instead, simply requires a telephone number that consumers can call "during regular business hours" to make an entity-specific do-not-call request. Inasmuch as automated, interactive opt-out mechanisms are now widely available and, as discussed above, are now required of most sellers and telemarketers by virtue of the FTC's rule, the Commission seeks comment on whether it should conform its rule to the FTC's rule by requiring their use. Comments supporting this revision should address the Commission's authority to adopt this change, consistent with the "technical and procedural standards" provision of the TCPA, as codified in section 227(d)(3) of the Communications Act. In addition, given that section 227(d)(3) of the Communications Act prescribes technical standards for "any" artificial or prerecorded voice message via telephone, the Commission seeks comment on whether it may adopt additional disclosure and opt-out requirements mirroring the FTC's solely for artificial or prerecorded voice message calls that are for telemarketing purposes.

27. Second, whereas the FTC's Telemarketing Sales Rule requires that prerecorded message calls provide a disclosure at the outset of the message explaining how to opt out of future calls, the TCPA itself provides that, for opt-out purposes, the telephone number of the entity initiating a call can be disclosed "during or after the message." Therefore, commenters supporting a requirement that the telephone number of the entity initiating the prerecorded message be disclosed at the outset of the message should address the Commission's legal authority to do so.

28. Third, although each agency's rule provides for prompt termination of the call after a consumer hangs up, the Commission's standard is more specific (call must be released within 5 seconds of time notification is transmitted to system) than the FTC's (call must be released immediately). Again, in light of the specific statutory language pertaining to call termination, commenters supporting a change to the Commission's existing rules to require immediate release of a call once the consumer has hung up are asked to address the Commission's authority to adopt such a requirement.

29. Finally, the Commission notes that, in addition to exempting certain healthcare-related prerecorded message calls from its express written consent requirement, the FTC likewise exempted such calls from its automated opt-out requirement. Inasmuch as the TCPA technical standards codified in section 227(d)(3) of the Communications Act apply to "any" artificial or prerecorded messages, the Commission seeks comment on its authority to exempt any category of prerecorded message calls from the specific requirements of that section. If it adopts separate disclosure and opt-out requirements (mirroring the FTC's) specifically for prerecorded *telemarketing* calls, the Commission seeks comment on whether it may exempt the category of healthcare-related prerecorded message calls identified in the FTC's rule from those separate requirements and, if so, whether it should provide such an exemption.

30. As a policy matter, the FTC's automated opt-out requirement appears to be more consumer friendly than the Commission's to the extent that it allows consumers to easily and immediately assert their opt-out rights, regardless of the time of day, and without having to wait to opt out until the next business day during regular business hours when an operator is available to record the opt-out request. The Commission therefore seeks comment on whether it should revise its opt-out requirements to make them more consistent with the FTC's, and, if so, how to do so in a manner that is consistent with the "technical and procedural standards" provision of the TCPA.

B. Abandoned Calls/Predictive Dialers

31. *The FCC's TCPA Rules.* Under the Commission's rules, an outbound telephone call is deemed "abandoned" if a person answers the telephone and the caller does not connect the call to a sales representative within two seconds of the person's completed greeting. The Commission imposes restrictions on the percentage of live telemarketing calls

that a telemarketer may drop or "abandon" as a result of the use of predictive dialers. Under the Commission's rules, a seller or telemarketer would not be liable for violating the restrictions on call abandonment if, among other things, it employs technology that ensures abandonment of no more than three percent of all calls answered by a person (rather than by an answering machine). The Commission's call abandonment rule measures the abandonment rate over a 30-day period, but contains no "per campaign" limitation.

32. *The FTC's Telemarketing Sales Rule.* Like the Commission's rule, an outbound telephone call is deemed "abandoned" under the FTC's Telemarketing Sales Rule if a person answers the telephone and the caller does not connect the call to a sales representative within two seconds of the person's completed greeting. A seller or telemarketer similarly is not liable for violating the prohibition on call abandonment if, among other things, the seller or telemarketer employs technology that ensures abandonment of no more than three percent of all calls answered by a person (rather than by an answering machine).

In its 2008 final rule amendments, the FTC revised the standard it uses for measuring the three percent (permissible) call abandonment rate. Whereas the FTC previously required that a telemarketer employ technology that ensures abandonment of no more than three percent of all calls answered by a person, *measured per day per calling campaign,* it revised the standard in 2008 to permit telemarketers to measure the abandonment rate over a *30-day period* for the duration of a *single calling campaign,* if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues. According to the FTC, the effect of this change, which had been requested by the telemarketers, was to allow telemarketers to conduct smaller telemarketing campaigns, such as in test markets, in a more cost effective manner. At the same time, the FTC considered, but rejected, a separate request to eliminate the "per campaign" limitation contained in its rule, which would have allowed call abandonment rates to be averaged across multiple telemarketing campaigns. The FTC reasoned that the absence of a "per campaign" limitation in its rule might encourage telemarketers "to target less-valued customers with a disproportionate share of abandoned calls."

33. The Commission's current rule measures the three percent (permissible) call abandonment rate over a 30-day period but, because it imposes no "per campaign" limitation, it effectively allows the averaging of call abandonment rates across multiple telemarketing campaigns during any single 30-day period. As noted above, the FTC's rulemaking proceeding highlighted concerns that this approach might allow a telemarketer to compute a single call abandonment rate for all campaigns that it conducts during a 30-day period and, in so doing, to allocate a greater percentage of abandoned calls to a less desirable marketing campaign (*e.g.,* a campaign directed at lower income individuals) while allocating a smaller percentage to a more desirable campaign (*e.g.,* a campaign directed at upper income individuals). The Commission seeks comment on the prevalence of such practices among those sellers or telemarketers that are subject to its (but not the FTC's) telemarketing rules and on the practical impact of the two agencies' currently differing standards. In addition, the Commission seeks comment on whether it should revise the standard by which it measures the three percent call abandonment rate to include a "per campaign limitation" in order to eliminate any potential incentive for telemarketers to engage in such practices and to make the Commission's standard more consistent with the FTC's. Finally, it notes that the FTC has clarified that the term "campaign" refers to "the offer of the same good or service for the same seller." If the Commission adopts a "per campaign limitation," as proposed, it seeks comment on whether it also should adopt the FTC's definition of the term "campaign."

C. Implementation Issues

34. In order to reduce initial compliance costs and burdens, the FTC deferred the effective date of the requirement that prerecorded message calls provide an automated interactive opt-out mechanism for three months, and the express written agreement requirement for twelve months. If the Commission adopts an express written consent requirement and/or an automated interactive opt-out mechanism such as those adopted by the FTC, it seeks comment on whether it also should adopt similar implementation periods to ensure that companies have adequate time to prepare to comply. If the Commission adopts these or similar requirements, it seeks comment on whether to allow sellers and telemarketers, as did the FTC, to continue placing prerecorded telemarketing calls to consumers with whom the seller has an established business relationship for the duration of the implementation period for the express written consent requirement. Finally, it seeks comment on an appropriate implementation period for the proposed change to the Commission's call abandonment rules.

Initial Regulatory Flexibility Analysis

35. As required by the Regulatory Flexibility Act of 1980, as amended, (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in document FCC 10–18. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on document FCC 10–18 provided on the first page of this document. The Commission will send a copy of document FCC 10–18, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

Need for, and Objectives of, the Proposed Rules

36. In document FCC 10–18, the Commission seeks comment on proposed revisions to its rules under the TCPA pertaining to prerecorded telemarketing calls and certain other telemarketing practices. Document FCC 10–18 proposes to amend the Commission's TCPA rules in four areas. The first proposed amendment would conform the Commission's rules to the FTC's Telemarketing Sales Rule by prohibiting the use of prerecorded messages in telemarketing sales calls unless the seller or telemarketer has obtained the consumer's prior express consent, in writing, to receive such messages and irrespective of any established business relationship between the caller and the called party. The Commission also proposes to allow sellers or telemarketers to obtain such consent using any medium or format permitted by the E–SIGN Act. The Commission's objective in proposing to harmonize its prior consent requirement with the FTC's by adopting a written consent requirement is to reduce the potential for industry and consumer confusion surrounding telemarketers' obligations to the extent that similarly situated entities would no longer be subject to different requirements depending upon whether an entity is subject to the FTC's rule or to the Commission's rule. The Commission also believes that written consent may

enhance its enforcement efforts and serve to protect both consumers and industry from erroneous claims that consent was or was not given, to the extent that, unlike oral consent, the existence of a paper or electronic record may provide unambiguous proof of consent.

37. The second proposed amendment would conform the Commission's rules to the FTC's Telemarketing Sales Rule by exempting certain healthcare-related calls from the general prohibition on prerecorded telemarketing calls to residential telephone lines. The Commission proposes to exempt such calls based on the FTC's findings that: (1) The individuals most in need of these healthcare-related prerecorded messages (elderly or ill patients) might be unable or unlikely to take the steps necessary to provide their express written consent to receive them; (2) communications between healthcare-related entities subject to HIPAA regulations and their customers already are subject to extensive regulations at the Federal level, including regulations directly addressing the making of telephone solicitations to patients, such that it would be unlikely that the creation of an exemption for these calls would lead to abusive practices; and (3) prerecorded healthcare messages of the type described in document FCC 10–18 are generally deemed more welcome and less intrusive by consumers and, as such, the creation of an exemption for this category of calls would not adversely affect consumer privacy rights. Thus, the Commission's objective in proposing the creation of this exemption is to avoid imposing duplicative regulations in an area that is already extensively regulated at the Federal level and that, as a result, does not appear to give rise to the same privacy and other concerns as other types of calls.

38. The third proposed amendment would conform the Commission's rules to the FTC's Telemarketing Sales Rule by requiring that prerecorded telemarketing calls delivered to residential subscribers include an automated, interactive mechanism by which a consumer may "opt out" of receiving future prerecorded messages from the seller or telemarketer. The Commission's objective in proposing this requirement is to make the opt-out process more consumer friendly by allowing consumers to easily and immediately assert their opt-out rights, regardless of the time of day, and without having to wait to opt out until the next business day during regular business hours when an operator is available to record the opt-out request.

39. The Commission also believes that the use of an automated mechanism, as described above, may enhance the efficiency of companies' outbound telemarketing campaigns. To the extent that the FTC's Telemarketing Sales Rule, as recently amended, imposes different requirements on sellers and telemarketers in these three areas than analogous rules adopted by the Commission, the Commission seeks comment on whether it should attempt to harmonize its TCPA requirements with those of the FTC. In proposing to conform its prerecorded message rules to the Telemarketing Sales Rule in the identified areas, the Commission also identified two overarching objectives: (1) To further empower residential telephone subscribers to avoid unwanted telemarketing messages; and (2) to advance Congress's directive to maximize consistency between the Commission's TCPA rules and the FTC's Telemarketing Sales Rule. The Commission therefore seeks comment on whether these proposed revisions would benefit consumers and industry by creating greater symmetry between the two agencies' regulations and on the extent to which they would enhance the ability of residential telephone subscribers to avoid unwanted telemarketing messages.

40. The final proposed amendment would conform the Commission's rules to the FTC's Telemarketing Sales Rule by adopting a "per campaign" standard for measuring the "call abandonment rate." As noted above, the "call abandonment rate" refers to the percentage of live telemarketing calls that a telemarketer drops or "abandons" as a result of the use of predictive dialers. The Commission proposes to adopt a "per campaign" limitation based on the concern raised in the FTC's rulemaking proceeding that telemarketers would be more likely to target less-valued customers with a disproportionate share of abandoned calls in the absence of such a limitation. Because the absence of a "per campaign" limitation may leave consumers to rely on the industry's good faith that it will not engage in such practices, despite obvious economic incentives to do otherwise, the Commission seeks comment on whether it should revise its current standard for measuring the three percent call abandonment rate by adopting this proposed limitation.

Legal Basis

41. The legal basis for any action that may be taken pursuant to document FCC 10–18 is contained in sections 1–4, 227, and 303(r) of the Communications Act of 1934, as amended; the Telephone Consumer Protection Act of 1991, Public Law 102–243, 105 Statute 2394; and the Do-Not-Call Implementation Act, Public Law 108–10, 117 Statute 557.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

42. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. Under the Small Business Act, a "small business concern" is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).

43. In general, the Commission's rules on telephone solicitation and on the use of autodialers, or artificial or prerecorded messages apply to a wide range of entities. The proposed rules, in particular, would apply (with certain exceptions) to all persons using prerecorded or artificial voice messages for telemarketing purposes. Therefore, the Commission expects that the proposals in this proceeding potentially could have a significant economic impact on a substantial number of small entities. Determining the precise number of small entities that would be subject to the requirements proposed in document FCC 10–18, however, is not readily feasible. Therefore, the Commission invites comment on such number and, after evaluating the comments, will examine further the effect of any rule changes on small entities in the Final Regulatory Flexibility Analysis. Below, the Commission has described some current data that are helpful in describing the number of small entities that might be affected by the proposed action, if adopted.

Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA. A "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Nationwide, as of 2002, there were approximately 1.6 million small organizations.

44. *Telemarketing Bureaus and Other Contact Centers.* According to the

Census Bureau, this economic census category "comprises establishments primarily engaged in operating call centers that initiate or receive communications for others—via telephone, facsimile, e-mail, or other communication modes—for purposes such as (1) promoting clients' products or services, (2) taking orders for clients, (3) soliciting contributions for a client; and (4) providing information or assistance regarding a client's products or services." The SBA has developed a small business size standard for this category, which is: all such entities having $7 million or less in annual receipts. According to Census Bureau data for 2002, there were 1,876 firms in this category that operated for the entire year. Of this total, 1,610 firms had annual sales of under $5 million, and an additional 129 had sales of $5 million to $9,999,999. Thus, the majority of firms in this category can be considered small.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

45. The express written consent requirement proposed in document FCC 10–18 may entail additional recordkeeping requirements for covered entities to the extent that they would be required to obtain and keep records of consumers' written consent to receive prerecorded message calls. As a practical matter, however, it appears that there would not be a significant change in this recordkeeping burden for at least two reasons.

46. First, because a seller or telemarketer placing a prerecorded telemarketing call must be prepared to provide, under the Commission's current requirements, "clear and convincing evidence" that it received prior express consent from the called party, whether consent has been obtained orally or in writing, covered entities already are required to maintain records to demonstrate compliance with the existing express consent requirement. In addition, covered entities already maintain electronic or other records of the existence of an established business relationship in order to demonstrate compliance with current Commission requirements governing prerecorded message calls to established business relationship customers. In place of keeping records of "oral consent" or of "established business relationships" as a precondition for placing prerecorded telemarketing calls, the proposed rule change would require covered entities to maintain records of consumers' express written agreement to receive such calls. And because the Commission has proposed that these agreements may be obtained pursuant to the E–SIGN Act, minimal additional recordkeeping should be necessary. For these reasons, the proposed written consent requirement, as a practical matter, is unlikely to result in significant new reporting, recordkeeping or other compliance requirements for sellers and telemarketers, including small entities.

Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

47. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

By proposing to conform the Commission's TCPA rules to those of the FTC in the areas described in paragraphs two through six above, the actions proposed are consistent with the mandate of the DNCIA to "maximize consistency" of the Commission's TCPA rules with the FTC's Telemarketing Sales Rule.

48. One alternative to the proposed amendments would be to adopt no changes to the Commission's rules on prerecorded messages and call abandonment. Although the Commission considered the option of doing nothing for each of the proposed rules, this option was outweighed by the anticipated benefits of the proposed changes, including: (1) Reducing the potential for industry and consumer confusion surrounding a telemarketer's obligations to the extent that similarly situated entities would no longer be subject to different Federal requirements; (2) enhancing the Commission's enforcement efforts and protecting both consumers and industry from erroneous claims that consent was or was not given, to the extent that the written consent requirement may provide more verifiable proof of consent; (3) empowering consumers to determine which prerecorded commercial solicitations they will receive via their telephones and providing a convenient and consumer-friendly method to "opt-out" of receiving those to which they object; and (4) ensuring that telemarketers do not calculate the three percent (permissible) call abandonment rate in a way that certain communities or populations are subject to a disproportionately greater number of dropped or abandoned calls.

49. In order to reduce initial compliance costs and burdens, the Commission proposes to defer the effective date of the proposed requirement that prerecorded calls provide an automated interactive opt-out mechanism for three months, and the proposed written agreement requirement for twelve months, to ensure that the industry will have adequate time to prepare to comply. Document FCC 10–18 proposes to allow sellers and telemarketers to continue placing prerecorded calls to consumers with whom the seller has an established business relationship during the pendency of the implementation period for the written agreement requirement. In addition, by proposing that written consent agreements be obtained pursuant to any method allowed under the E–SIGN Act, the Commission's proposed written consent requirement would afford small entities flexibility in determining the method of "written" consent that is best suited to those entities' marketing plans and business operations. Although the Commission has determined that there may be an economic impact on small entities as a result of the proposed rules, such impact, which has been minimized to the extent possible, would appear to be minor and not unjustifiably adverse or burdensome.

50. The Commission has determined that, on balance, any such burden is outweighed by the potentially significant benefits of the proposed rules to industry and consumers, as identified in the preceding paragraph. Because these anticipated significant benefits outweigh, based on the Commission's analysis, any minor burden the proposed rules may impose on small entities, the Commission has determined that no further discussion of alternatives to the proposed rules is warranted beyond what it has set forth.

Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

51. As discussed above, the Telemarketing Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. 6101–6108, and the Telemarketing Sales Rule (TSR) adopted by the FTC also address certain telemarketing acts or practices.

Document FCC 10–18 identifies several aspects of the FTC's Telemarketing Sales Rule, as recently amended, that differ from the Commission's TCPA rules. Therefore, the Commission seeks comment in document FCC 10–18 on whether it should revise its rules to harmonize them with the FTC's rule. Amending the Commission's rules, as proposed above, would reduce the inconsistencies that currently exist between the two sets of rules.

Ordering Clause

Pursuant to the authority contained in sections 1–2, 4, 201, 227, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151–152, 154, 201, 227, and 403, document FCC 10–18 *is adopted.*

List of Subjects

47 CFR Part 64

Telecommunications, Telephone.

47 CFR Part 68

Communications equipment, Telecommunications, Telephone.

Marlene H. Dortch,

Secretary, Federal Communications Commission.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 64 and 68 as follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 is revised to read as follows:

Authority: 47 U.S.C. 154, 227, and 254(k); secs. 403(b)(2)(B), (c), Pub. L. 104–104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 227, 228, and 254 (k) unless otherwise noted.

Subpart L—Restrictions on Telemarketing, Telephone Solicitation, and Facsimile Advertising

2. Section 64.1200 is amended by revising paragraph (a)(1) introductory text and (a)(2) introductory text and adding new paragraph (a)(1)(v), removing paragraph (a)(2)(iv), redesignating and revising paragraph (a)(2)(v) as newly designated paragraph (a)(2)(iv), and adding new paragraphs (a)(2)(v) and (a)(2)(vi), revising paragraphs (a)(6) introductory text, (a)(6)(i), and (b) to read as follows:

§ 64.1200 Delivery restrictions. (a) No person or entity may: (1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express written consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

* * * * *

(v) For purposes of paragraph (a)(1) of this section, a person or entity shall be deemed to have obtained prior express written consent upon obtaining from the recipient of the call an express agreement, in writing, that:

(A) The person or entity obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the delivery of calls to the recipient using an automatic telephone dialing system or an artificial or prerecorded voice;

(B) The person or entity obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service;

(C) Evidences the willingness of the recipient of the call to receive calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

(D) Includes the telephone number to which such calls may be placed in addition to the recipient's signature. For purposes of this provision, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable Federal law or State contract law; and

(2) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call;

* * * * *

(iv) Is made by or on behalf of a tax-exempt nonprofit organization; or

(v) Delivers a prerecorded healthcare message made by, or on behalf of, a covered entity or its business associate, as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103;

(vi) For purposes of paragraph (a)(2) of this section, a person or entity shall be deemed to have obtained prior express written consent upon obtaining from the recipient of the call an express agreement, in writing, that:

(A) The person or entity obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the delivery of calls to the recipient using an artificial or prerecorded voice;

(B) The person or entity obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service;

(C) Evidences the willingness of the recipient of the call to receive calls using an artificial or prerecorded voice; and

(D) Includes the telephone number to which such calls may be placed in addition to the recipient's signature, For purposes of this provision, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable Federal law or State contract law; and

* * * * *

(6) Abandon more than three percent of all telemarketing calls that are answered live by a person, or measured over a 30-day period, per marketing campaign. A call is "abandoned" if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting. Whenever a sales representative is not available to speak with the person answering the call, that person must receive, within two (2) seconds after the called person's completed greeting, a prerecorded identification message that states only the name and telephone number of the business, entity, or individual on whose behalf the call was placed, and that the call was for "telemarketing purposes." The telephone number so provided must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign. The telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. The seller or telemarketer must maintain records establishing compliance with paragraph (a)(6) of this section.

(i) A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line that is assigned to a person who has granted prior express written consent for the call to be made shall not be considered an abandoned call if the message begins within two (2) seconds of the called person's completed greeting.

* * * * *

(b) All artificial or prerecorded telephone messages shall conform to the requirements of paragraph (b)(1) or (b)(2) of this section.

(1) All artificial or prerecorded telephone messages, other than those delivered to residential telephone subscribers for telemarketing purposes, shall

(i) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the

call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated, and

(ii) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(2) All artificial or prerecorded telephone messages delivered to residential telephone subscribers for telemarketing purposes shall

(i) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call; that the purpose of the call is to sell goods or services; and the nature of the goods or services, and

(ii) Followed immediately by a disclosure of one or both of the following:

(A) In the case of a call that could be answered in person by a consumer, that the person called can use an automated interactive voice and/or keypress-activated opt-out mechanism to assert a do-not-call request at any time during the message. The mechanism must automatically add the number called to the caller's company-specific do-not-call list; once invoked, immediately disconnect the call; and be available for use at any time during the message; and

(B) In the case of a call that could be answered in person by an answering machine or voicemail service, that the person called can use a toll-free telephone number to assert a do-not-call request. The number provided must connect directly to an automated interactive voice or keypress-activated opt-out mechanism that automatically adds the number called to the caller's company-specific do-not-call list; immediately thereafter disconnects the call; and is accessible at any time throughout the duration of the telemarketing campaign.

(3) Paragraph (b)(2) of this section shall not apply to a prerecorded healthcare message made by, or on behalf of, a covered entity or its business associate, as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

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PART 68—CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK

3. The authority citation for subpart D of part 68 is revised to read as follows:

Authority: Secs. 4, 5, 227, 303, 48 Stat., as amended, 1066, 1068, 1082 (47 U.S.C. 154, 155, 227, 303).

Subpart D—Conditions for Terminal Equipment Approval

4. Section 68.318 is amended by revising paragraph (c) to read as follows:

68.318 Additional limitations.

* * * * *

(c) *Line seizure by automatic telephone dialing systems.* Automatic telephone dialing systems which deliver a recorded message to the called party must release the called party's telephone line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls. When a residential telephone subscriber asserts a do-not-call request pursuant to § 64.1200(b)(2) of this chapter, an automatic dialing system that delivers an artificial or prerecorded message to such subscriber for telemarketing purposes must release the called party's telephone line in the manner prescribed in § 64.1200(b)(2) of this chapter.

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