

**FEDERAL COMMUNICATIONS COMMISSION****47 CFR Part 64**

[CG Docket No. 02–278; FCC 12–21]

**Telephone Consumer Protection Act of 1991****AGENCY:** Federal Communications Commission.**ACTION:** Final rule.

**SUMMARY:** In this document, the Federal Communications Commission (“FCC” or “Commission”) revises its rules to: require prior express written consent for all autodialed or prerecorded telemarketing calls to wireless numbers and for prerecorded calls to residential lines and, accordingly, eliminate the established business relationship exemption for such calls to residential lines while maintaining flexibility in the form of consent needed for purely informational calls; require all prerecorded telemarketing calls to allow consumers to opt out of future prerecorded telemarketing calls using an interactive, automated opt-out mechanism; and limit permissible abandoned calls on a per-calling campaign basis, in order to discourage intrusive calling campaigns. The Commission also exempts from its telemarketing requirements prerecorded calls to residential lines made by health care-related entities governed by the Health Insurance Portability and Accountability Act of 1996. Taken together, today’s actions offer consumers greater protection from intrusive telemarketing calls and protect consumers from unwanted autodialed or prerecorded telemarketing calls to wireless numbers and from unwanted prerecorded telemarketing calls to residential lines, also known as “telemarketing robocalls,” and maximize consistency with the analogous Telemarketing Sales Rule (“TSR”) of the Federal Trade Commission (“FTC”), as contemplated by the Do-Not-Call Implementation Act (“DNCIA”) in a way that reduces industry confusion about telemarketers’ obligations and does not increase compliance burdens for most telemarketers.

**DATES:** Effective July 11, 2012, except revised 47 CFR 64.1200(a)(2), 64.1200(a)(3), and 64.1200(a)(7), and 47 CFR 64.1200(b)(3), which contain modified information collection requirements that have not been approved by the Office of Management and Budget (OMB). The Commission will publish a separate document in the

**Federal Register** announcing the effective dates of those amendments.

**FOR FURTHER INFORMATION CONTACT:**

Karen Johnson Consumer and Governmental Affairs Bureau, at 202–418–7706 or [karen.johnson@fcc.gov](mailto:karen.johnson@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 via email at [Cathy.Williams@fcc.gov](mailto:Cathy.Williams@fcc.gov) and [PRA@fcc.gov](mailto:PRA@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission’s Report and Order, FCC 12–21, adopted on February 15, 2012 and released on February 15, 2012. The full text of document FCC 12–21 is available for inspection and copying during normal business hours in the FCC Reference Information Center, Room CY–A257, 445 12th Street SW., Washington, DC 20554. The complete text may be purchased from the Commission’s duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street SW., Room CY–B402, Washington, DC 20554, (202) 488–5300, facsimile (202) 488–5563, or via email at [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com). The complete text is also available on the Commission’s Web site at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2012/db0215/FCC-12-21A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0215/FCC-12-21A1.pdf). To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer and Governmental Affairs Bureau 202–418–0530 (voice), 202–418–0432 (TTY).

**Congression Review Act**

The Commission will send a copy of document FCC 12–21 to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

**Final Paperwork Reduction of 1995 Analysis**

Document FCC 12–21 contains modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, will invite the general public to comment on the information collection requirements contained in document FCC 12–21 as required by the PRA of 1995, Public Law 104–13 in a separate notice that will be published in the **Federal Register**. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C.

3506(c)(4), the Commission previously sought specific comment on how it might further reduce the information collection burden for small business concerns.

The rules adopted herein establish recordkeeping requirements for a large variety of businesses, including small business entities. First, the seller must secure a written agreement between itself and the consumer showing that the consumer agrees to receive, from the seller, autodialed or prerecorded telemarketing calls to a wireless number and/or prerecorded calls to a residential line. The prior express written consent requirement applies to autodialed or prerecorded telemarketing calls to wireless numbers and prerecorded calls to residential lines only. Limiting the written consent requirement to telemarketing calls significantly reduces the compliance burden for all entities, including small entities. The Commission allows the seller the flexibility to determine the type of written agreement that it will secure from the consumer. The Commission does not require a particular form or format for this written agreement or its retention. In adopting the written consent requirement for autodialed or prerecorded telemarketing calls to wireless numbers and prerecorded telemarketing calls to residential lines, the Commission also concluded that consent obtained pursuant to the E–SIGN Act, Electronic Signatures in Global and National Commerce Act 15 U.S.C. 7001 (2000), will satisfy the requirement of its revised rule, including permission obtained via an email, Web site form, text message, telephone keypress, or voice recording. Accepting consent pursuant to the E–SIGN Act relieves all businesses, including small entities, from the economic impact of generating and retaining a paper document to evidence their compliance. The E–SIGN Act also provides additional flexibility in obtaining electronic consent producing minimal additional recordkeeping efforts. To the extent that the calling parties previously relied on an established business relationship in lieu of express consent, the Commission notes that it stated that such telemarketers had to be prepared to provide clear and convincing evidence of the existence of such a relationship. Hence, a record of written consent will replace the previously required record of an established business relationship. Because of these factors, any additional recording keeping costs should be minimal. Second, telemarketers and sellers, including small business

entities, that initiate telemarketing calls using prerecorded messages, must provide an automated, interactive opt-out feature at the outset of such a call. This rule obligates telemarketers and sellers to retain records of providing this feature and to retain records of consumers opting out of receiving these autodialed or prerecorded telemarketing messages. Such records should demonstrate the telemarketer's and seller's compliance with the provision and utilization of the automated, interactive opt-out feature. The Commission allows the telemarketers and sellers the flexibility to determine how to implement the mechanism. The Commission does not require a particular form or format evidencing this mechanism or its implementation. Third, the FCC revises its abandoned call requirement to require the permissible three percent abandoned call rate to be calculated for every telemarketing calling campaign. There is no additional recordkeeping burden for this revision because the FCC's rule already requires that the seller or telemarketer maintain records establishing compliance with the abandoned call rules. Moreover, all of these revised rules are consistent with analogous requirements under the FTC's TSR, with which many telemarketers must already comply; therefore, the additional burden of complying with the FCC's new requirements is substantially mitigated. The Commission identified alternatives to the rules adopted in document FCC 12-21, but it rejects these alternatives because they are more costly to small businesses. Finally, to the extent that there are compliance costs resulting from the Commission's action, it finds that the implementation periods it adopts here—30 days from publication of OMB approval for the abandoned call rule, 90 days from publication of OMB approval for the automated, interactive opt-out requirement, and one year from publication of OMB approval for the written consent requirement and phase-out of the EBR exemption—should allow covered entities time to find cost-efficient ways to comply with these changes, to the extent they have not already made such changes to comply with the FTC's rules.

### Synopsis

#### Discussion

1. Based on substantial record support and evidence of continued consumer frustration with unwanted telemarketing robocalls, and in furtherance of the statutory goal of maximizing consistency with the FTC's

telemarketing rules, the Commission adopts the consumer protection measures proposed in the *2010 TCPA NPRM*, published at 75 FR 13471, March 22, 2010. First, the Commission requires prior express written consent for autodialed or prerecorded telemarketing calls to wireless numbers and for prerecorded telemarketing calls to residential lines. Second, the Commission eliminates the "established business relationship" exemption as it previously applied to prerecorded telemarketing calls to residential lines. Third, the Commission requires telemarketers to implement an automated, interactive opt-out mechanism for autodialed or prerecorded telemarketing calls to wireless numbers and for prerecorded telemarketing calls to residential lines, which would allow a consumer to opt out of receiving additional calls immediately during a telemarketing robocall. Fourth, the Commission requires that the permissible three percent call abandonment rate be calculated for each calling campaign, so that telemarketers cannot shift more abandoned calls to certain campaigns, as is possible if calculation is made across multiple calling campaigns. Finally, the Commission adopts an exemption to its implementing rules under the Telephone Consumer Protection Act ("TCPA") for prerecorded health care-related calls to residential lines, which are already regulated by the federal Health Insurance Portability and Accountability Act.

2. At the outset, the Commission notes that the benefits to consumers of increased protection from unwanted telemarketing robocalls are significant. By enacting the TCPA and its prohibitions on unwanted calls, Congress has already made an assessment that the benefits of protecting consumer privacy are substantial. Congress, through enactment of a second law—the DNCLIA—has further determined that there are substantial benefits to consistency in telemarketing regulations by the FCC and the FTC. The FCC further finds that the significant ongoing consumer frustration reflected in its complaint data and the positive consumer response to the FTC's proceeding confirm the need to strengthen its current rules in some respects, and narrow them in others where other legal protections are in place. Moreover, with the exception of the limited group of entities that are outside the FTC's jurisdiction, the FCC expects that many telemarketers affected

by the changes in this Report and Order have already incurred the cost of implementing a written consent requirement, have already given up reliance on the EBR as a basis for making prerecorded telemarketing calls to residential lines without prior express consent, have implemented an automated, interactive opt-out mechanism, and are calculating the call abandonment rate on a per-campaign basis. As a result, the Commission finds that increased consumer protection from unwanted telemarketing robocalls will provide substantial benefits to consumers without substantial implementation costs. While these benefits may not be easily quantifiable, nothing in the record persuades the Commission that the costs of complying with its revised rules outweigh the benefits.

#### *A. Autodialed and Prerecorded Message Calls*

##### 1. Prior Express Written Consent Requirement

3. Based on substantial record support, the volume of consumer complaints the Commission continues to receive concerning unwanted, telemarketing robocalls, and the statutory goal of harmonizing the FCC rules with those of the FTC, the FCC requires prior express written consent for all telephone calls using an automatic telephone dialing system or a prerecorded voice to deliver a telemarketing message to wireless numbers and for prerecorded telemarketing calls to residential lines.

4. As an initial matter, the Commission notes that the TCPA is silent on the issue of what form of express consent—oral, written, or some other kind—is required for calls that use an automatic telephone dialing system or prerecorded voice to deliver a telemarketing message. Thus, the Commission has discretion to determine, consistent with Congressional intent, the form of express consent required. The vast majority of commenters support harmonizing the FCC's rules with those of the FTC by adopting a written consent requirement for autodialed or prerecorded telemarketing calls to wireless numbers and prerecorded telemarketing calls to residential lines. For example, Bank of America asserts that the Commission should harmonize its regulations with those of the FTC. Similarly, the National Cable & Telecommunications Association urges that a written consent requirement should apply to telemarketing calls. The National Council of Higher Education

Loan Programs and the Educational Finance Council also supports a written consent requirement for telemarketing calls. While a few commenters argue that the Commission should require written consent for *all* autodialed or prerecorded calls (*i.e.*, not simply those delivering marketing messages), it concludes that requiring prior express written consent for all such calls would unnecessarily restrict consumer access to information communicated through purely informational calls. For instance, bank account balance, credit card fraud alert, package delivery, and school closing information are types of information calls that the Commission do not want to unnecessarily impede. The FCC takes this action to maximize consistency with the FTC's TSR, as contemplated in the DNCIA, and avoid unnecessarily impeding consumer access to desired information.

5. Since the TCPA's enactment and the adoption of implementing rules, the Commission has continued to receive thousands of complaints regarding unwanted telemarketing robocalls. Furthermore, in its TSR proceeding, the FTC noted that it received over 13,000 comments opposing its proposal to, among other things, adopt an established business relationship (EBR) exemption for prerecorded telemarketing calls. In deciding to amend its rules to require prior written consent for prerecorded telemarketing calls, the FTC also considered its enforcement experience that resulted in multi-million dollar settlements where telemarketers, among other things, failed to secure the appropriate consent for telemarketing calls. In light of the FCC's record and the record amassed by the FTC in its TSR proceeding, the Commission finds that, notwithstanding current consent requirements and other TCPA safeguards, consumers continue to experience frustration in receiving unwanted telemarketing robocalls.

6. The Commission also finds that a written consent requirement would advance Congress' objective under the DNCIA to harmonize the Commission's rules with those of the FTC. As stated previously, the DNCIA provides that "the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to *maximize consistency* with the telemarketing rule promulgated by the Federal Trade Commission." Eliminating the differences between the FCC's rules and those of the FTC where warranted will "maximize consistency" with the FTC's consent requirements.

7. Among the findings Congress made when adopting the TCPA were that: (1) The use of the telephone to market

goods and services to the home and to other businesses has become pervasive due to the increased use of cost-effective telemarketing techniques; (2) telephone subscribers considered automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy; and (3) individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals yet permits legitimate telemarketing practices. While current regulations provide a measure of consumer protection from unwanted and unexpected calls, the complaint data, as noted above, show that the proliferation of intrusive, annoying telemarketing calls continues to trouble consumers. The Commission concludes that requiring prior express written consent for telemarketing calls utilizing autodialed or prerecorded technologies will further reduce the opportunities for telemarketers to place unwanted or unexpected calls to consumers. The Commission believes that requiring prior written consent will better protect consumer privacy because such consent requires conspicuous action by the consumer—providing permission in writing—to authorize autodialed or prerecorded telemarketing calls, and will reduce the chance of consumer confusion in responding orally to a telemarketer's consent request.

8. The Commission further finds that the unique protections for wireless consumers contained in the TCPA supports requiring prior written consent for telemarketing robocalls. Because section 227(b)(1)(A) of the Act specifically protects wireless users, among others, from autodialed or prerecorded calls to which they have not consented, the Commission must ensure that its rules address privacy issues for wireless consumers. In addition, the Commission notes that the substantial increase in the number of consumers who use wireless phone service, sometimes as their only phone service, means that autodialed and prerecorded calls are increasingly intrusive in the wireless context, especially where the consumer pays for the incoming call. Further, the costs of receiving autodialed or prerecorded telemarketing calls to wireless numbers often rest with the wireless subscriber, even in cases where the amount of time consumed by the calls is deducted from a bucket of minutes. Given these factors, the Commission believes that it is essential to require prior express written consent for autodialed or prerecorded

telemarketing calls to wireless numbers. One commenter, USAA, appears to suggest that oral consent is sufficient to permit any autodialed or prerecorded calls to wireless numbers.

It argues that its customers may orally provide their wireless phone number as a point of contact and therefore those customers expect *marketing* and service calls. The Commission disagrees. Consumers who provide a wireless phone number for a limited purpose—for service calls only—do not necessarily expect to receive telemarketing calls that go beyond the limited purpose for which oral consent regarding service calls may have been granted. Moreover, as use of wireless numbers continues to increase, the Commission believes that increased protection from unwanted telemarketing robocalls is warranted.

9. The Commission further concludes that harmonizing its prior consent requirement with that of the FTC will reduce the potential for industry and consumer confusion surrounding a telemarketer's obligations because similarly situated entities will no longer be subject to different requirements depending upon whether the entity is subject to the FTC's or the FCC's jurisdiction. The Commission also finds that requiring prior written consent will enhance the FCC's enforcement efforts and better protect both consumers and industry from erroneous claims that consent was or was not provided, given that, unlike oral consent, the existence of a paper or electronic record can be more readily verified and may provide unambiguous proof of consent.

10. *Calls Not Subject to Written Consent Requirement.* While the Commission adopts rules to protect consumers from unwanted telemarketing robocalls, it leaves undisturbed the regulatory framework for certain categories of calls. Specifically, consistent with section 227(b)(2)(C) of the Act and its implementing rules and orders, the Commission does not require prior written consent for calls made to a wireless customer by his or her wireless carrier if the customer is not charged. One commenter requests that the Commission clarify that wireless carriers may send free autodialed or prerecorded calls, including text messages, without prior written consent, if the calls are intended to inform wireless customers about new products that may suit their needs more effectively, so long as the customer has not expressly opted out of receiving such communications. As noted above, the Commission addressed this issue in the *1992 TCPA Order*, published at 57

FR 48333, October 23, 1992, by concluding that Congress did not intend to prohibit autodialed or prerecorded message calls by a wireless carrier to its customer when the customer is not charged. The Commission based its conclusion on the fact that neither the TCPA nor its legislative history indicates that Congress intended to impede communications between common carriers and their customers regarding the delivery of customer services by barring calls to wireless consumers for which the consumer is not charged. Nothing in the record or the Commission's analysis of consumer complaints provides it a reason to alter its finding.

11. Moreover, while the Commission revises its consent rules to require prior written consent for autodialed or prerecorded *telemarketing* calls to wireless numbers and prerecorded *telemarketing* calls to residential lines, it maintains the existing consent rules for *non-telemarketing*, *informational* calls, such as those by or on behalf of tax-exempt non-profit organizations, calls for political purposes, and calls for other noncommercial purposes, including those that deliver purely informational messages such as school closings. The FCC's rules for these calls will continue to permit oral consent if made to wireless consumers and other specified recipients, and will continue to require no prior consent if made to residential wireline consumers. Commenters support distinguishing telemarketing calls from non-telemarketing, informational calls. For instance, the National Cable & Telecommunications Association has urged that a written consent requirement should apply only to telemarketing calls and notes that its members make informational, non-telemarketing calls to wireless phones that should not be subject to a written consent requirement. The National Council of Higher Education Loan Programs and the Educational Finance Council also seek clarification that the written consent requirement will be limited to telemarketing calls. Additionally, the Commission notes that many commenters expressed concern about obtaining written consent for certain types of autodialed or prerecorded calls, including debt collection calls, airline notification calls, bank account fraud alerts, school and university notifications, research or survey calls, and wireless usage notifications. Again, such calls, to the extent that they do not contain telemarketing messages, would not require any consent when made to

residential wireline consumers, but require either written or oral consent if made to wireless consumers and other specified recipients.

12. While the Commission observes the increasing pervasiveness of telemarketing, it also acknowledges that wireless services offer access to information that consumers find highly desirable and thus do not want to discourage purely informational messages. As was roundly noted in the comments, wireless use has expanded tremendously since passage of the TCPA in 1991. The Commission believes that requiring prior express written consent for all robocalls to wireless numbers would serve as a disincentive to the provision of services on which consumers have come to rely. Moreover, in adopting these rules today, the FCC employs the flexibility Congress afforded to address new and existing technologies and thereby limit the prior express written consent requirement to autodialed or prerecorded telemarketing calls to wireless numbers and prerecorded telemarketing calls to residential lines. In addition, the Commission notes that section 227(b)(1)(A) of the Act and its implementing rules continue to require some form of prior express consent for autodialed or prerecorded non-telemarketing calls to wireless numbers. The Commission also maintains the requirement of prior express consent for autodialed or prerecorded non-telemarketing calls to wireless numbers that are not subject to any exemptions under section 227(b)(2) of the Act. The FCC leaves it to the caller to determine, when making an autodialed or prerecorded *non-telemarketing* call to a wireless number, whether to rely on oral or written consent in complying with the statutory consent requirement.

13. Some commenters also express concern that written consent for autodialed or prerecorded calls to wireless numbers and for prerecorded calls to residential lines that offer certain home loan modifications and refinancing would frustrate their compliance with the American Recovery and Reinvestment Act, also known as the Recovery Act, which established certain outreach requirements designed to prevent foreclosure. These commenters assert that the calls may be interpreted as telephone solicitations because certain fees or charges to the consumer may be involved. These commenters note that calls and messages made pursuant to the Recovery Act also include non-telemarketing information regarding the status of the consumer's loan and repayment options, among other things.

In the *2003 TCPA Order*, published at 68 FR 44144, July 25, 2003, the Commission articulated a standard in evaluating "dual-purpose" robocalls. The Commission asserted that in evaluating dual-purpose calls, it would determine whether the call includes an advertisement. The Commission provided that if the call, notwithstanding its free offer or other information, is intended to offer property, goods, or services for sale either during the call, or in the future, that call is an advertisement.

14. The Commission believes that the intent of calls made pursuant to the Recovery Act, when the call is made by the consumer's loan servicer, is to fulfill a statutory requirement rather than offer a service for sale. Similarly, the Commission, in analyzing telephone solicitation, states that the application of the prerecorded message rule should turn, not on the caller's characterization of the call, but on the purpose of the message. Again, the Commission believes that the predominant purpose of a "Recovery Act" call, when it is made by the consumer's loan servicer, is compliance with the Recovery Act. In this instance, the FCC finds that the home loan modification and refinancing calls placed pursuant to the Recovery Act generally are not solicitation calls and do not include or introduce an unsolicited advertisement, when those calls are made by the consumer's loan servicer, because the primary motivation of the calling party is to comply with that statute's outreach requirements. The FCC notes, however, that should such calls be challenged as TCPA violations because the primary motivation appears to be sending a telephone solicitation or unsolicited advertisement rather than complying with the Recovery Act, the Commission will consider the facts on a case-by-case basis. Further, if a "Recovery Act" robocall is made to a wireless number, prior express consent, which may be either oral or written, is specifically required pursuant to the Act.

15. *Content and Form of Consent.* With respect to written consent, 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. Under the FTC's rules, prior express consent to receive prerecorded telemarketing calls must be in writing. The FTC's rules require that the written agreement must be signed by the consumer and 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 email, Web site form, text message, telephone keypress, or voice recording. Finally, under the TSR, the seller bears the burden of proving that a clear and conspicuous disclosure was provided, and that an unambiguous consent was obtained.

16. Consistent with the FTC’s TSR, the Commission concludes that a consumer’s written consent to receive telemarketing robocalls must be signed and be sufficient to show that the consumer: (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.” Finally, should any question about the consent arise, the seller will bear the burden of demonstrating that a clear and conspicuous disclosure was provided and that unambiguous consent was obtained.

17. *Electronic Consent.* In the 2010 TCPA NPRM, the Commission proposed to allow sellers or telemarketers to obtain prior express written consent using any medium or format permitted by the E-SIGN Act, as the FTC permits in the TSR. The FTC specifically found that consent obtained via an email, Web site form, text message, telephone keypress, or voice recording are in compliance with the E-SIGN Act and would satisfy the written consent requirement in the amended TSR. Consistent with the FTC, the Commission now similarly concludes that consent obtained in compliance with the E-SIGN Act will satisfy the requirements of its revised rule,

including permission obtained via an email, Web site form, text message, telephone keypress, or voice recording. Allowing documentation of consent under the E-SIGN Act will minimize the costs and burdens of acquiring prior express written consent for autodialed or prerecorded telemarketing calls while protecting the privacy interests of consumers. Because it greatly minimizes the burdens of acquiring written consent, commenters generally support using electronic signatures consistent with the E-SIGN Act. The Commission concludes that the E-SIGN Act significantly facilitates its written consent requirement, while minimizing any additional costs associated with implementing the requirement.

## 2. Established Business Relationship Exemption

18. The Commission next considers whether to retain the exemption to the prior consent requirement for prerecorded telemarketing calls made to consumers with whom the caller has an established business relationship (EBR). In making the determination here, the Commission is again mindful of the statutory goal of maximizing consistency with the FTC’s regulations in this area. As described below, the Commission eliminates the established business relationship exemption for prerecorded telemarketing calls to residential lines.

19. *The FCC’s Rules.* In the 1992 TCPA Order, the Commission allowed, without the need for additional consent, prerecorded telemarketing calls to residential lines when the caller has an established business relationship with the consumer. The Commission concluded, based on the record and legislative history, that a solicitation to someone with whom a prior business relationship exists does not adversely affect consumer privacy interests because a consumer with an established business relationship implicitly consents to the call. Such a solicitation, the Commission reasoned, can be deemed to be invited or permitted by the consumer. In addition, the Commission relied on the legislative history, which suggests that Congress did not intend that the TCPA unduly interfere with ongoing business relationships. The Commission later codified in its rules the EBR exemption for telemarketing calls to residential lines.

20. *The FTC’s Approach.* The FTC has recently taken a different view of whether an established business relationship alone should allow prerecorded telemarketing calls when there is no prior express consent. In its

2008 amendment to the TSR, the FTC terminated its previously announced policy of forbearing from bringing enforcement actions against sellers and telemarketers who, in accordance with a safe harbor that was proposed in November 2004, made calls that deliver prerecorded messages to consumers with whom the seller has an EBR. In reaching this conclusion, the FTC was persuaded by the number of comments opposing its safe harbor rule, lack of consumer confidence in industry assurances to self-regulate and not abuse consumers, consumer privacy concerns, and the difficulty in stopping unwanted calls.

21. At the outset, the Commission notes that there is no statutory barrier to eliminating the established business relationship exemption for prerecorded telemarketing calls. Section 227 of the Act grants the Commission authority to create exemptions to the restrictions on prerecorded calls to residential lines but does not require that the Commission recognize an EBR exemption in this context. Hence, the statute gives the Commission authority to establish—or not establish—an EBR exemption for prerecorded telemarketing calls. While, as noted above, the Commission previously interpreted the statute to permit an EBR exemption and did adopt one, additional experience, the record before it, and evidence of ongoing consumer frustration lead us to conclude that the exemption has adversely affected consumer privacy rights.

22. Based on the record in this proceeding and the volume of complaints filed by consumers that have an established business relationship with the caller, and consistent with the FTC’s findings, the Commission concludes that the public interest would be served by eliminating the established business relationship exemption for telemarketing calls. As such, telemarketing calls to residential lines will require prior written consent, even where the caller and called party have an EBR.

23. In general, consumer groups and individual commenters in this proceeding support eliminating the established business relationship exemption. For example, some commenters assert that a reasonable consumer would consider prerecorded telemarketing messages even where an EBR exists to be coercive or abusive of the consumer’s right to privacy. Another commenter contends that businesses falsely claim to have an EBR when none exists, or improperly expand the scope of their business relationships with customers to permit calls. One

commenter objects to the notion that consumers welcome or expect prerecorded messages from companies with which they conduct business. Two other commenters argue that telemarketing calls should not be "deemed invited" by virtue of an EBR and assert that prerecorded telemarketing calls are intrusive whether or not the caller has a preexisting relationship with the recipient. Business groups and industries, however, support retention of the exemption because, they assert, communication between businesses and their customers would be significantly impeded without it. Another commenter reiterates the Commission's 1992 determination that the exemption does not adversely affect the consumer's privacy interests. The Commission disagrees with commenters advocating retention of the EBR for the reasons described below.

24. The FCC's complaint data shows that thousands of consumers remain unhappy with prerecorded telemarketing messages even when they have an established business relationship with the caller. The Commission finds these complaints to be a clear indication that many consumers do not consider prerecorded calls made pursuant to an established business relationship either invited or expected. Consistent with its data, the FTC has found "compelling evidence that consumer aversion to artificial or prerecorded message telemarketing—regardless of whether an established business relationship exists—has not diminished since enactment of the TCPA, which, in no small measure, was prompted by consumer outrage about the use of artificial or prerecorded messages." More than 13,000 comments opposing an EBR exemption were received on the issues presented in the FTC's proceeding, and, the FTC concluded, such opposition to artificial or prerecorded telemarketing messages could not be ignored. The FTC subsequently decided to discontinue its recognition of an EBR exemption for prerecorded telemarketing calls.

25. Complaints about EBR-based calls demonstrate that, in many cases, a prior business relationship does not necessarily result in a consumer's willingness to receive prerecorded telemarketing calls and often adversely affects consumer privacy rights. The Commission emphasizes that its decision to eliminate the established business relationship exemption is consistent with the FTC's findings rejecting an EBR exemption and the DNCIA's requirement that the FCC "maximize consistency" with the FTC's

approach in this area. In doing so, the FCC ensures that all telemarketers subject to federal law are given clear and consistent guidance regarding the circumstances under which prior express consent must be obtained from consumers before making prerecorded telemarketing calls. The Commission believes that its decision here strikes an appropriate balance between preserving ongoing business relationships and protecting consumer privacy, as intended by Congress. Since the enactment of the TCPA and the FCC's creation of an established business relationship exemption, methods for efficiently obtaining electronic consent have been developed and have been legally recognized by the E-SIGN Act. These newer consent options have significantly facilitated business relationships while, at the same time, allowing consumers to affirmatively choose whether they wish to receive prerecorded telemarketing calls before such calls invade their privacy.

26. While commenters' assertions that eliminating the EBR exemption will impede business communications suggest that there are compliance costs associated with this new rule, commenters do not, however, quantify any such costs. In light of the fact that the FTC's rules have been in place for more than two years, the Commission believes that compliance costs, if substantial, should be known. Commenters have failed to put forward evidence of such costs, however. Nevertheless, elimination of the EBR will require telemarketers to secure consent from consumers in some cases where they would not have obtained consent under the current rules. As with the other changes the Commission adopts in document FCC 12–21, many telemarketers are already required to market without benefit of the EBR for entities under FTC jurisdiction, and given the absence of record evidence on the incremental cost of complying with these changes, the Commission lacks a basis for finding that the costs outweigh the substantial consumer benefits. For those entities that currently rely on the EBR exemption, the Commission notes that its rules require "clear and convincing evidence" that an EBR exists. Although commenters opposing elimination of the EBR exemption have not provided information on compliance costs, the Commission notes that the incremental cost resulting from its action is offset to some degree by the costs that these entities already incur to retain "clear and convincing evidence." The Commission believes that any additional cost incurred by having to

obtain written consent is further lowered by the option of using electronic measures consistent with E-SIGN.

### 3. Opt-Out Mechanism

27. The FCC next considers whether to require an automated opt-out mechanism that would allow consumers to bar unwanted prerecorded telemarketing calls. The FTC has recently required such an automated opt-out mechanism, and the FCC now considers how it can maximize consistency with the FTC's approach. The FCC adopts an automated, interactive opt-out requirement for autodialed or prerecorded telemarketing calls to wireless numbers and prerecorded telemarketing calls to residential lines.

28. *The FCC's Rules.* Under the FCC's existing rules, a consumer who does not wish to receive further prerecorded telemarketing calls can "opt out" of receiving such calls by dialing a telephone number (required to be provided in the prerecorded message) to register his or her do-not-call request. Specifically, the FCC'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 message, provide a telephone number that consumers can call during regular business hours to make a company-specific do-not-call request.

29. *The FTC's Rule.* The FTC's TSR, as amended in 2008, requires, with limited exception, that any artificial or prerecorded message call that could be answered by the consumer in person provide an 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 the consumer's answering machine or voicemail service, the message must also include a toll-free number that enables the consumer to subsequently call back and connect directly to an automated opt-out mechanism.

30. Based on the record, the FCC revises its rules to require any artificial or prerecorded message call that could be answered by the consumer in person provide an interactive opt-out mechanism that is announced at the outset of the message and is available throughout the duration of the call. In addition, 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 the consumer's answering machine or voicemail service, the message must also include a toll-free number that enables the consumer to subsequently call back and connect directly to an automated opt-out mechanism. The Commission adopts these rules to enable consumers to control their exposure to, and continued participation in, prerecorded telemarketing calls and to harmonize its opt-out rules with the FTC's TSR, consistent with the Congressional intent expressed by the DNCIA. The Commission notes that the TCPA does not require implementation of a particular opt-out mechanism. Rather, the TCPA provides that the Commission shall prescribe technical and procedural standards for systems that are used to transmit any prerecorded voice message via telephone and provides two elements that the Commission must include in its standards.

31. The Commission believes that the automated, interactive opt-out mechanism adopted will empower consumers to revoke consent if they previously agreed to receive autodialed or prerecorded telemarketing calls and stop receipt of unwanted autodialed or prerecorded telemarketing calls to which they never consented. The record developed in the FTC proceeding includes an industry analysis showing, among other things, that consumers are four times more likely to opt out of a prerecorded call that has an automated, interactive opt-out mechanism as opposed to opting out of a prerecorded call that provides a toll-free number for the consumer to call during business hours. This analysis suggests that consumers are reluctant to use toll-free numbers to end unwanted telemarketing calls. The majority of commenters in this proceeding who address this issue support an automated, interactive opt-out mechanism for telemarketing calls. For instance, the National Consumer Law Center states that the Commission's current opt-out mechanism, which requires a separate call to the telemarketer, is far less useful or protective of a consumer's privacy, and thus advocates adopting the more consumer-friendly automated, interactive opt-out mechanism. While a few commenters assert that the Commission should apply the automated, interactive opt-out requirement to non-telemarketing and telemarketing calls alike, the Commission declines to do so at this

time because the record does not reveal a level of consumer frustration with non-telemarketing calls that is equal to that for telemarketing calls. The Commission therefore limits the automated, interactive opt-out requirement that it adopts in this Report and Order to autodialed or prerecorded telemarketing calls.

32. The Commission emphasizes that an entity placing an otherwise unlawful autodialed or prerecorded call cannot shield itself from liability simply by complying with the FCC's opt-out and identification rules. Furthermore, the revised rules the Commission adopts in this Order do not alter the current technical and procedural standards as applied to non-telemarketing, informational calls. The Commission maintains its identification and contact information requirements in § 64.1200(b) of the Commission's rules. The Commission also takes this opportunity to stress that the identification and contact information must be valid, verifiable, and actionable.

#### *B. Abandoned Calls/Predictive Dialers*

33. The Commission next decides whether to adopt rules that are consistent with the FTC's method for determining whether a telemarketer's "abandoned" call rate is within the lawful numerical limits for such calls. Based on the record, the Commission modifies its abandoned call rule to require that the three percent call abandonment rate be calculated for each calling campaign.

34. *The FCC's Rules.* Predictive dialers initiate phone calls while telemarketers are talking to other consumers and frequently disconnect those connected calls when a telemarketer is otherwise occupied and unavailable to take the next call, resulting in a hang-up or dead-air call. 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 called person's completed greeting. The Commission's existing rules restrict the percentage of live telemarketing calls that a telemarketer may drop (or abandon) as a result of predictive dialers. Specifically, a seller or telemarketer would not be liable for violating the two-second restriction if, among other things, it employs technology that ensures abandonment of no more than three percent of all calls answered by the called person (rather than by an answering machine). The Commission's existing call abandonment rule measures the

abandonment rate over a 30-day period, but contains no "per-calling-campaign" limitation.

35. *The FTC's Rule.* As does the FCC's rule, the FTC's TSR deems an outbound telephone call to be "abandoned" if the called person answers the telephone and the caller does not connect the call to a sales representative within two seconds of the called person's completed greeting. Under the TSR, a seller or telemarketer 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) for the duration of a *single calling campaign*, if the campaign is less than 30 days, or separately over each successive 30-day period or portion thereof during which the calling campaign continues.

36. The Commission revises its rules to match the FTC's and require assessment of the call abandonment rate to occur during a single calling campaign over a 30-day period, and if the single calling campaign exceeds a 30-day period, the Commission requires that the abandonment rate be calculated each successive 30-day period or portion thereof during which the calling campaign continues. The revised requirement will deprive telemarketers of the opportunity to average abandoned calls across multiple calling campaigns, which can result in targeting abandoned calls to less desirable consumers, a form of robocall "redlining."

37. Several commenters support the proposed rules, and several oppose them. Michigan PSC, NASUCA, and SmartReply generally support the proposed rule and favor harmonization of the Commission's rule with the FTC's rule. Bank of America (BoFA) opposes the per-calling campaign measurement because, BoFA asserts, it does not engage in the kind of rate manipulation the proposed rule attempts to address. The Newspaper Association of America opposes the per-campaign modification to the Commission's existing rule because it claims that the rule would adversely impact smaller organizations that utilize shorter calling lists. Roylance opposes the proposed rule and instead argues that a per-day measurement should be used to ensure a reduction in the abandoned call rate and that a per-telephone number limitation, without regard to the number of telemarketers or campaigns, should be imposed to ensure that the consumer does not receive more than a certain number of abandoned calls to a certain telephone number. Although BoFA

claims that it has not calculated the abandoned call rate based upon multiple calling campaigns, no commenter in this proceeding provided industry data regarding the occurrence of averaging over multiple calling campaigns. The Commission notes, however, that the Connecticut Attorney General supported the FTC's per-calling campaign limitation, as did several consumer commenters.

38. The Commission declines to adopt a "per-day" assessment of the abandonment rate instead of the 30-day assessment, as urged by some commenters. In changing its per-day, per-calling campaign assessment to a 30-day, per-calling campaign assessment, the FTC noted that the biggest problem with the per-day calculation is adjusting for the unexpected spikes in answered and abandoned calls. As the FCC has previously noted, a rate measured over a longer period of time will allow for reasonable variations in telemarketing calling campaigns such as calling times, number of operators available, number of telephone lines used by the call centers, and similar factors. This allowance alleviates some of the difficulties experienced by small businesses that use a smaller calling list. Thus, the Commission finds it necessary to maintain the 30-day time period for measurement of abandoned calls. The Commission also declines to adopt a "per-telephone number" assessment of the abandoned call rate instead of the 30-day assessment as noted above by one commenter. The cost of implementing a per-telephone number limitation would outweigh the benefit of the extra measure of protection against abandoned calls.

39. In addition, the FCC will apply the term "campaign" as defined by the FTC. In the 2008 TSR, published at 73 FR 51164, August 29, 2008, the FTC defines "campaign" as "the offer of the same good or service for the same seller." So long as a telemarketer is offering the same good or service for the same seller, the FCC will regard the offer as part of a single campaign, irrespective of whether telemarketing scripts used to convey the offer use or contain different wording.

#### *C. Exemption for Health Care-Related Calls Subject to HIPAA*

40. The Commission next considers whether prerecorded calls subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) should be exempt from its TCPA consent, identification, time-of-day, opt-out, and abandoned call rules. Once again, as contemplated by the DNCIA,

the FCC considers the FTC's approach to this issue so that the FCC can "maximize consistency" with the FTC's TSR. The HIPAA statute strives to improve portability and continuity of health insurance coverage in the group and individual markets, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, and to simplify the administration of health insurance, among other purposes. HIPAA also gives individuals important controls over whether and how their protected information is used and disclosed for marketing purposes. With limited exceptions, HIPAA requires an individual's written authorization before his or her protected health information can be used or disclosed for marketing purposes. In view of the privacy protections afforded under HIPAA, the FCC exempts from its consent, identification, time-of-day, opt-out, and abandoned call requirements all prerecorded health care-related calls to residential lines that are subject to HIPAA.

41. *The FCC's Statutory Authority.* The Act provides that the Commission may establish exemptions from the prohibitions on prerecorded voice calls to residential lines. Specifically, section 227(b)(2)(B) of the TCPA provides, in relevant part, that two types of calls may be exempted: "(i) calls that are not made for a commercial purpose, and (ii) such classes or categories of calls made for commercial purposes as the Commission determines (I) will not adversely affect the privacy rights that this section is intended to protect; and (II) do not include the transmission of any unsolicited advertisement."

42. *The FTC's Approach.* In its 2008 amendment to the TSR, the FTC exempted health care-related prerecorded message calls subject to HIPAA from its restrictions on such calls, basing its determination on six primary considerations. First, the FTC found that delivery of health care-related prerecorded calls subject to HIPAA is already regulated extensively at the federal level. Second, it found that coverage of such calls by the TSR could frustrate the Congressional intent embodied in HIPAA, as well as other federal statutes governing health care-related programs. Third, the FTC found that the number of health care providers who might call a patient is inherently quite limited—as is the scope of the resulting potential privacy infringement—in sharp contrast to the virtually limitless number of businesses potentially conducting commercial

telemarketing campaigns. Fourth, the FTC found that there is no incentive, and no likely medical basis, for providers who place health care-related prerecorded calls to attempt to boost sales through an ever-increasing frequency or volume of calls. Fifth, the FTC concluded that the existing record did not show that "the reasonable consumer" would consider prerecorded health care calls coercive or abusive. Finally, FTC enforcement experience did not suggest that health care-related calls have been the focus of the type of privacy abuses the exemption was intended to remedy. For these reasons, the FTC determined, pursuant to both its authority under the Telemarketing Act and its authority under the FTC Act, that health care-related prerecorded message calls subject to HIPAA should be exempt from the TSR because application of the TSR to such calls "is not necessary to prevent the unfair or deceptive act or practice [that harms consumer privacy] to which the [TSR] relates."

43. For the reasons discussed herein and consistent with the FTC's action, the FCC exempts from its consent, identification, time-of-day, opt-out, and abandoned call requirements applicable to prerecorded calls all health care-related calls to residential lines subject to HIPAA. Establishing this exemption advances the statutory goal of maximizing consistency with the FTC's rules, and the FCC's record affirmatively supports adopting the FTC's approach. Therefore, pursuant to section 227(b)(2)(B) of the Act, which allows the Commission to establish an exemption for specified prerecorded calls that are commercial in nature if such calls will not adversely affect consumer privacy rights and do not include an unsolicited advertisement, the Commission finds that prerecorded calls to residential lines that are subject to HIPAA should be exempted from the consent, identification, time-of-day, opt-out, and abandoned call requirements under its TCPA rules. Furthermore, the Commission agrees with commenters that assert these calls serve a public interest purpose: to ensure continued consumer access to health care-related information.

44. As has the FTC, the FCC finds that HIPAA's existing protections, which it describes below, already safeguard consumer privacy, and the FCC therefore does not need to subject these calls to its consent, identification, opt-out, and abandoned call rules. The FCC notes at the outset that HIPAA regulations cover all communications regarding protected health information and all means of communication

regarding such information. The Department of Health and Human Services (HHS) explains that HIPAA protects individually identifiable health information held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral. In addition to limiting the use or disclosure of health information for treatment, payment, or health care operations or otherwise permitted or required disclosures, HIPAA restricts the use of this information for marketing. Unless the covered entity secures the individual's written authorization, HIPAA allows marketing only if the communication imparts information about a product or service that is included in a health care benefits plan offered by the covered entity, gives information concerning treatment, or describes goods or services for case management or care coordination. It is also noteworthy that HIPAA applies its regulations not only to certain uses or disclosures by the covered entity, but also extends HIPAA obligations, without exception, to third parties to which covered entities disclose protected health information. Violations of HIPAA are subject to civil penalties and criminal penalties, including possible imprisonment.

45. All health care industry commenters support a consent exemption for health care-related prerecorded calls subject to HIPAA. Among those opposing the exemption, one commenter states without elaboration that an exemption should not be established for health care-related prerecorded marketing calls. Although it is unclear from the comment, this commenter may not understand that restrictions imposed by HIPAA would restrain any such marketing calls. A second commenter opposes a HIPAA exemption but misjudges the effect of an exemption, not acknowledging that without an exemption, calls permitted by HIPAA would be prohibited by the FCC's existing rules and not acknowledging that HIPAA provides rigorous privacy protections and penalties.

46. In the FTC's TSR proceeding, concern was raised, in relevant part, whether immunization reminders, health screening reminders, medical supply renewal requests, and generic drug migration recommendations would constitute inducements to purchase goods or services. In the FCC's proceeding, one commenter argues that a call "pushing" flu vaccines would be illegal under the TCPA. Without reaching the merits of this argument, the Commission does believe that an exemption for prerecorded health care-

related calls to residential lines is warranted when such calls are subject to HIPAA. With respect to the privacy concerns that the TCPA was intended to protect, the Commission believes that prerecorded health care-related calls to residential lines, when subject to HIPAA, do not tread heavily upon the consumer privacy interests because these calls are placed by the consumer's health care provider to the consumer and concern the consumers' health. Moreover, the exemption the Commission adopts in document FCC 12-21 does not leave the consumer without protection. The protections provided by HIPAA safeguard privacy concerns. Under the second prong of the TCPA exemption provision, which requires that such calls not include an unsolicited advertisement, the Commission finds the calls at issue here are intended to communicate health care-related information rather than to offer property, goods, or services and conclude that such calls are not unsolicited advertisements. Therefore, such calls would satisfy the TCPA standard for an exemption as provided in the Act and the FCC's implementing rules.

47. Third, a commenter anticipates abuse of the HIPAA marketing definition and suggests that robocalling a neighborhood to alert persons that the calling entity will provide immunizations would be allowed under HIPAA. HHS enforcement measures of HIPAA discourage abuse because these measures include civil and criminal penalties. Lastly, one commenter that opposes the HIPAA exemption questions the Commission's authority to adopt such an exemption. Because the Commission concludes that prerecorded, health care-related calls, subject to HIPAA, to residential lines do not constitute an unsolicited advertisement and will not adversely affect the privacy rights that the Act was intended to protect, the Act allows the Commission to establish an exemption for such calls, and it does so in this Report and Order.

48. In sum, based on the record and the HIPAA requirements, the FCC agrees with the FTC approach under the TSR and is persuaded that the HIPAA privacy regulations are rigorous and reflect a statutory mission to protect privacy rights. HHS enforcement measures of HIPAA discourage abuse because these measures include civil and criminal penalties. The FCC therefore adopts an exemption from its TCPA rules for prerecorded health care-related calls to residential lines that are subject to HIPAA. In those instances where the prerecorded health care-

related call is not covered by HIPAA, as determined by HHS, restrictions imposed by the TCPA and the FCC's implementing rules will apply as the facts warrant.

#### *D. Implementation*

49. Finally, the Commission addresses the timing and cost of implementing the rules it adopts in document FCC 12-21. The Commission seeks to ensure that the consumer protection measures it adopts are timely implemented so that consumers can realize the benefits, while allowing a reasonable time for affected parties to implement necessary changes in a way that makes sense for their business models. Each of the FCC's implementation periods is consistent with the implementation periods adopted by the FTC. Specifically, the FCC establishes a twelve-month period for implementation of the requirement that prior express consent be in writing for telemarketers employing autodialed or prerecorded calls or messages to wireless numbers and prerecorded calls or messages to residential lines. This twelve-month period will commence upon publication of OMB approval of the FCC's written consent rules in the **Federal Register**. In connection with the implementation of the written consent requirement for telemarketing robocalls, the FCC will phase out the established business relationship exemption over the same twelve-month period that follows publication of OMB approval of its written consent rule in the **Federal Register**. To reiterate, the FCC allows telemarketers twelve months from publication of OMB approval of its written consent rules to cease utilization of the established business relationship as evidence of consumer consent to receive prerecorded telemarketing calls. Second, the FCC establishes a 90-day implementation period for the automated, interactive opt-out mechanism for telemarketing calls, again commencing upon publication of OMB approval of its opt-out rules in the **Federal Register**. Finally, the FCC establishes a 30-day implementation period for the revised abandoned call rule, also commencing upon publication of OMB approval of its abandoned calls rule in the **Federal Register**.

50. Based on its review of the record and the considerations noted above, the Commission adopts implementation timetable as described herein. Although industry commenters focused their remarks on the time that would be needed for implementing a prior express written consent requirement for non-telemarketing calls, they did not address implementation where the proposed consent requirement was limited to

telemarketing calls. The Commission finds that establishing a twelve-month implementation period for the written consent requirement is appropriate because, as noted in the FTC proceeding, it will take time for businesses to redesign Web sites, revise telemarketing scripts, and prepare and print new credit card and loyalty program applications and response cards to obtain consent from new customers, as well as to use up existing supplies of these materials and create new record-keeping systems and procedures to store and access the new consents they obtain.

51. One commenter in this proceeding supports the use of consent obtained under the Commission's existing rules to authorize continued autodialed or prerecorded calls for a limited period of time. Because allowing telemarketers to rely on such consent pending the effective date of its new written consent requirement would ease the operational and technical transition for autodialed and prerecorded voice telemarketing calls, the Commission finds that it would serve the public interest to permit continued use of existing consents for an interim period. For example, in cases where a telemarketer has not obtained prior written consent under the FCC's existing rules, the Commission will allow such telemarketer to make prerecorded voice telemarketing calls until the effective date of its written consent requirement, so long as the telemarketer has obtained another form of prior express consent. Once the Commission's written consent rules become effective, however, an entity will no longer be able to rely on non-written forms of express consent to make autodialed or prerecorded voice telemarketing calls, and thus could be liable for making such calls absent prior written consent.

52. With respect to the 90-day implementation period for the automated, interactive opt-out mechanism for telemarketing calls, there is no indication in the FCC's record that implementing the proposed opt-out mechanism would be especially burdensome or pose extraordinary technical issues. Moreover, the FTC observed in its proceeding, that industry comments uniformly represent that interactive technology is affordable and widely available. In addition, the FCC believes that the implementation circumstances associated with its revised abandonment rate measurement rules merit a 30-day allotment of time for compliance. None of the commenters on the proposed abandoned call rule requested any delay to give affected entities sufficient time to comply.

Having received no input regarding the implementation period needed to implement the abandoned call rule, the Commission believes the appropriate time for implementation of this revised rule is also 30 days after publication of OMB approval of this rule in the **Federal Register**.

53. In the *2010 TCPA NPRM*, the Commission asked for comment on the incremental costs of implementing its proposals to require written consent. With one exception (elimination of the EBR, which the Commission address above), industry commenters do not substantially oppose the proposals the Commission adopt today. As described above, neither telemarketers nor sellers oppose the written consent requirement for telemarketing robocalls—the Commission would have expected such opposition if compliance costs were material. Many, perhaps the vast majority, of telemarketers already have processes in place to comply with this requirement. Hence, with the exception of the limited group of entities that are outside the FTC's jurisdiction, the FCC expects that many telemarketers affected by the changes in this Report and Order have already incurred the cost of implementing a written consent requirement, have already given up reliance on the EBR as a basis for making robocalls without prior express consent, have implemented an automated opt-out mechanism, and are calculating the call abandonment rate on a per-campaign basis. Because there is little record opposition to these changes, other than elimination of the EBR, and because many affected entities should already have processes in place to comply with the changes and of the availability of electronic means to obtain written consent, the Commission finds no reason to conclude that the consumer benefits that will result from these changes are outweighed by the associated costs.

#### **Final Regulatory Flexibility Analysis**

54. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*2010 TCPA NPRM*) released by the Federal Communications Commission (Commission) on January 22, 2010. The Commission sought written public comments on the proposals contained in the *2010 TCPA NPRM*, including comments on the IRFA. None of the comments filed in this proceeding were specifically identified as comments addressing the IRFA; however, comments that address the impact of the proposed rules and policies on small

entities are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

#### *E. Need for, and Objectives of, the Order*

55. The DNCIA provides that "the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission." The FCC notes that the Federal Trade Commission amended its Telemarketing Sales Rule (TSR) in 2008 to require, among other things, that telemarketers secure the consumer's express written agreement to receive prerecorded telemarketing messages, provide an automated, interactive opt-out mechanism, terminate its safe harbor provision allowing prerecorded telemarketing calls to consumers with whom the telemarketer enjoyed an established business relationship, and limit abandoned calls on a 30-day, per campaign period. This Commission has determined to harmonize its rules with the FTC's TSR to protect consumers from unwanted autodialed or prerecorded telemarketing calls, also known as "robocalls." Despite establishing a National Do-Not-Call Registry and adopting other consumer protection rules, the Commission observes that consumers continue to receive unwanted robocalls. The continued receipt of unwanted robocalls demonstrates a need for the actions taken in this Order. Abuses in telemarketing have motivated the Commission to the objective of bringing an end to consumers receiving unwanted robocalls, encountering difficult or ineffective opt-out procedures, and receiving dead-air calls. In adopting these rules, the Commission fulfills another objective in document FCC 12–21 by acting upon Congress's directive in the DNCIA.

56. In document FCC 12–21, the Commission adopts measures under the Telephone Consumer Protection Act (TCPA) to help consumers protect their privacy from unwanted telemarketing calls. Specifically, to summarize the rules adopted, the Commission revises its rules to require prior express written consent for all autodialed or prerecorded telemarketing calls to wireless numbers and prerecorded telemarketing calls residential lines and to eliminate the established business relationship exemption for prerecorded calls to residential lines while providing more flexibility for purely informational calls. The Commission revises its rules to require an automated, interactive opt-out feature at the outset of any autodialed or prerecorded telemarketing

call that could be answered by the consumer in person and is available throughout the duration of the autodialed or prerecorded telemarketing call. In addition, if the called party elects to opt out, the calling party's mechanism must automatically add the consumer's number to the seller's do-not-call list and immediately disconnect the call. The revised rules will also require provision of a toll-free number that enables the consumer to call back and connect directly to an automated opt-out mechanism if the telemarketing call could be answered by an answering machine or voicemail service. Next, document FCC 12-21 revises the Commission's abandoned call rule whereby measurement of abandoned calls will occur over a 30-day period for the duration of a single calling campaign to discourage certain targeted calling campaigns. A campaign consists of the offer of the same good or service for the same seller.

57. Finally, for health care-related entities governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Commission establishes an exemption from its TCPA rules. The Commission adopts these new rules to further protect consumers from unwanted autodialed or prerecorded telemarketing calls, also known as "robocalls," and establish consistency with the Federal Trade Commission's Telemarketing Sales Rule (TSR), as required by statute.

58. The Commission believes the rules it adopts in document FCC 12-21 strike an appropriate balance between maximizing consumer privacy protections and avoiding imposing undue burdens on telemarketers. Document FCC 12-21 avoids imposing undue burdens of (1) requiring written consent for informational calls, (2) requiring handwritten consent agreements and handwritten signatures to fulfill the written consent requirement for telemarketing calls, and (3) requiring immediate implementation of the rules adopted herein on large and small telemarketers. For example, a community bank will not have to secure prior express written consent to provide a fraud alert notification to its customer's wireless number. In this instance, prior express oral consent to receive notifications satisfies the Commission's rules. Similarly, while the Commission adopts a prior express written consent requirement for prerecorded or autodialed telemarketing calls to wireless numbers and for prerecorded calls to residential lines, it also allows documentation and signature requirements recognized by the Electronic Signatures in Global and

National Commerce Act (E-SIGN Act) satisfies the FCC's rules and avoids the undue burden associated with generating hardcopy documentation to evidence written consent. In 2000, Congress enacted the E-SIGN Act to "facilitate the use of electronic records and signatures in interstate or foreign commerce" by granting legal effect, validity, and enforceability to electronic signatures, contracts, or other records relating to transactions in or affecting interstate or foreign commerce. Finally, the Commission eases the burden on telemarketers by deferring the effective date of the rules adopted. By adopting the rules in document FCC 12-21, the Commission maximizes the consistency between its rules and the FTC's TSR, as contemplated in the DNCA.

#### *F. Summary of Significant Issues Raised by Public Comments in Response to the IRFA*

59. There were no comments filed in direct response to the IRFA. Some commenters, however, raised issues and questions about the impact the proposed rules and policies would have on small entities.

60. *Prior Express Written Consent Requirement.* Commenters expressed a variety of concerns regarding adoption of a prior express written consent requirement for autodialed or prerecorded non-telemarketing calls. American Financial Services Association (AFSA), Bank of American (BoFA) and Cross-Industry Group are concerned that requiring written consent to authorize autodialed or prerecorded calls delivering account or loan application or modification information and other informational calls would be too costly for small financial institutions. AFSA argues that the Commission should limit the prior express written consent requirement to telemarketing calls only, or alternatively that account and loan modification calls be exempt from the prior express written consent requirement. Bank of America appears to object to a prior express written consent requirement for account-servicing and loan application calls made to wireless numbers. It cautions that such a requirement would be disadvantageous to individual and small business customers seeking credit approval if Bank of America is unable to communicate with them on their wireless numbers to secure needed information. Cross-Industry Group opposes written consent for autodialed or prerecorded, non-telemarketing calls to wireless services because requiring written consent unnecessarily impedes efficient communication between businesses and consumers. The

Commission limits its prior express written consent requirement to telemarketing calls; therefore, the actions it takes impose no new burdens on entities placing autodialed or prerecorded non-telemarketing calls, including home loan modification calls placed pursuant to the American Recovery and Reinvestment Act.

61. The Commission reiterates that it requires prior express written consent for autodialed or prerecorded telemarketing calls to wireless numbers and for prerecorded telemarketing calls to residential lines only. Prior express consent is not required for purely informational calls, *i.e.* non-telemarketing. As stated earlier, several commenters expressed concerns about the consent requirement for autodialed or prerecorded non-telemarketing calls. Below you will find a summary of those concerns.

62. Research organizations expressed a concern opposing written consent for autodialed or prerecorded calls that deliver research or survey messages. For instance, Marketing Research Association (MRA) states that small businesses conducting research studies that include cell phone users in their samples would face increased costs if a written consent standard is adopted. The Commission does not require prior express written consent for autodialed or prerecorded informational, non-telemarketing calls to wireless numbers or for informational, non-telemarketing prerecorded calls to residential lines.

63. Similarly, charitable organizations contend that they would be negatively impacted if they had to secure prior express written consent for fundraising calls using autodialed or prerecorded messages. MDS Communications, Inc. asserts that a prior express written consent requirement for calls to cell phones using autodialed or prerecorded messages will have a material, detrimental effect on non-profit organizations that utilize telephone fundraising. Again, the Commission does not require prior express written consent for autodialed or prerecorded informational, non-telemarketing calls to wireless numbers or for prerecorded informational, non-telemarketing calls to residential lines.

64. Likewise, Portfolio Recovery Associates (PRA) predicts that numerous entities, including school boards, non-profit organizations, political candidates, debt collectors, small businesses, and large established companies would be unnecessarily and adversely affected if the written consent requirement is applied to all autodialed and prerecorded calls to mobile telephones, including purely

informational calls. The Commission's actions do not require prior express written consent for informational, non-telemarketing calls to wireless numbers.

65. The last comment to address potential burdens on small businesses arising from the consent rules concerns electronic documentation obtained pursuant to the E-SIGN Act. Mark Schwartz states that it is incorrect for the Commission to reason that the burden of requiring a small business to obtain an existing customer's written or electronic consent to send intrastate prerecorded sales calls to that customer is lessened by the E-SIGN Act. He argues that the E-SIGN Act (1) was written for interstate and foreign commerce only and (2) burdens small businesses with determining which technological methods are compliant with the E-SIGN Act. Congress enacted the E-SIGN Act to "facilitate the use of electronic records and signatures in interstate or foreign commerce" by granting legal effect, validity, and enforceability to electronic signatures, contracts, or other records relating to transactions in or affecting interstate or foreign commerce. The Commission believes that by allowing E-SIGN measures to secure written consent, it relieves all businesses, including small businesses, from the burden of securing paper documents from consumers to evidence prior express written consent. Although the E-SIGN Act may be directed to interstate and foreign commerce, the Commission concludes that the measures to affect an electronic signature described in the E-SIGN Act should be allowed here because these measures would significantly facilitate its written consent requirement. With regard to any uncertainty concerning what satisfies the prior express consent requirement, the Commission concludes that consent obtained in compliance with the E-SIGN Act will satisfy the requirements of its revised rule, including permission obtained via an email, Web site form, text message, telephone keypress, or voice recording.

66. *Abandoned Calls.* Predictive dialers initiate phone calls while telemarketers are talking to other consumers and these dialers frequently disconnect those calls when a telemarketer is unavailable to take the next call. In attempting to "predict" the average time it takes for a consumer to answer the phone and when a telemarketer will be free to take the next call, predictive dialers may either "hang-up" on consumers or keep the consumer on hold until connecting the call to a sales representative, resulting in what has been referred to as "dead air." Dead-air calls are abandoned calls.

The Commission's existing rules limit the percentage of abandoned calls that a telemarketer may incur to three percent (3%) over a thirty day period.

67. Newspaper Association of America (NAA) states that the "per campaign" limitation adopted in this Order has a negative impact on smaller businesses, including newspapers. A campaign consists of the offer of the same good or service for the same seller. NAA believes that small community newspapers would be hampered the most because their telemarketing calling list is less than 5,000. It contends that when calling a small list the algorithm used by predictive dialers is not as precise and results in more abandoned calls. NAA favors the existing abandoned call rule. NAA's concern is not significant because the FTC has already implemented this same abandoned call requirement and the burden, if any, is significantly mitigated by the FTC's action.

#### *G. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply*

68. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein. 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) satisfies any additional criteria established by the Small Business Administration (SBA).

69. The Commission's rules on telephone solicitation and the use of autodialers and artificial or prerecorded messages apply to a wide range of entities, including all entities that call residential telephone lines and/or telephone numbers assigned to wireless numbers to advertise. In the IRFA, the Commission concluded that determining the precise number of small entities that will be subject to the rules is not readily feasible and invited comment on such number. None of the commenting parties provided the requested information. Based on the absence of available data in this proceeding, the Commission, like the FTC, believes that determining the precise number of small entities to

which the rules adopted herein will apply is not currently feasible.

70. Because its action affects the myriad of businesses throughout the nation that use telemarketing to advertise, the Commission offers these following categories of businesses which it believes will be impacted by rules it adopts in document FCC 12-21. For example the types of business impacted by its rules include, but are not limited to, commercial banks, mortgage brokers, pharmacies, freight airlines, and utility companies that elect to use automated or prerecorded telemarketing calls or health care-related calls.

71. *Commercial Banks.* SBA defines a commercial bank as a small business if its total assets do not exceed \$175 million. This industry comprises establishments primarily engaged in accepting demand and other deposits and making commercial, industrial, and consumer loans. Commercial banks and branches of foreign banks are included in this industry. U.S. Census data for 2007 indicate that, in this industry, there were 6,490 commercial banks that operated for the entire year. Of these, 6,490, 6135 operated with annual receipts of \$100,000,000 or less; 189 operated with annual receipts of \$100,000,000 to \$249,999,999; and 166 operated with annual receipts of more than \$250,000,000. Based on this data, it is impossible to state precisely how many commercial banks operated with annual receipts of \$175 million or less, but since the data do specifically indicate that 6,135 of 6,490 banks operated with less than \$100,000,000 in annual receipts, the Commission concludes that a substantial majority of commercial banks are small under the SBA standard.

72. *Mortgage Brokers.* SBA defines a mortgage broker as a small business if its annual receipts do not exceed \$7 million. Census data for 2007 indicate that in 2007, 17,702 mortgage broker firms operated for the entire year. Of these, 17,363 operated with annual receipts of \$5 million or less; 177 operated with annual receipts of between \$5 million and \$9,999,999; and 132 operated with annual receipts of \$10 million or more. While the exact number that operated with annual receipts of \$7 million or less cannot be stated precisely, the available data clearly show that a substantial majority of brokerage firms were small by the SBA standard.

73. *Pharmacies and Drug Stores.* Likewise, pharmacies and drug stores which do not exceed \$25.5 million in annual receipts are considered small businesses. U.S. Census data show that

17,217 firms operated in this category during that entire year. Of these 7,217 firms, 14,136 received annual receipts of \$5 million or less; 2,311 received annual receipts of between \$5 million and \$9,999,999; and 770 received annual receipts of \$10 million or more. Based on this data, the Commission cannot state precisely how many businesses earned \$7.0 million or less in annual receipts. The Commission concludes, however, that a substantial majority of businesses in this category are small under the SBA standard.

74. *Freight Airlines.* This U.S. industry comprises establishments primarily engaged in providing air transportation of cargo without transporting passengers over regular routes and on regular schedules. Establishments in this industry operate flights even if partially loaded. Establishments primarily engaged in providing scheduled air transportation of mail on a contract basis are included in this industry. For freight airlines, the SBA developed a small business size standard for such companies stating that those companies having 1500 or fewer employees are small. U.S. Census data for 2007 indicate that there were 221 businesses in this category that operated for the entire year. Of these 221, 220 operated with 999 employees or less, and one (1) operated with more than 1000 employees. Based on this data, the Commission concludes that a substantial majority of the freight airlines in this category are small under the SBA standard.

75. *Utility Companies.* The SBA also developed a small business size standard for utility companies. For electric utility companies, the small business size standard is any electric utility that it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours. U.S. Census does not provide megawatt hours information and does not provide a specific number of small utility companies.

76. *Telemarketing Bureaus and Other Contact Centers.* This U.S. industry comprises establishments primarily engaged in operating call centers that initiate or receive communications for others—via telephone, facsimile, email, 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. These establishments do not own the product

or provide the services they are representing on behalf of clients. The SBA has determined that “Telemarketing Bureaus and other Contact Centers” with \$7 million or less in annual receipts qualify as small businesses. U.S. Census data for 2007 indicate that 2,100 businesses in this category operated throughout that year. Of those 2,100 businesses, 1,764 operated with annual receipts of less than \$5 million; 145 operated with annual receipts between \$5 million and \$9,999,999; and 191 operated with annual receipts of \$10 million or more. Based on this data, it is not possible to state precisely how many businesses in this category operated with annual receipts of \$7 million or less. The Commission concludes, however, that a substantial majority of businesses in this category are small under the SBA standard.

#### *H. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities*

77. The rules adopted herein establish recordkeeping requirements for a large variety of businesses, including small business entities. First, the seller must secure a written agreement between itself and the consumer showing that the consumer agrees to receive autodialed or prerecorded telemarketing calls from the seller. The Commission allows the seller the flexibility to determine the type of written agreement that it will secure from the consumer. The Commission does not require a particular form or format for this written agreement or its retention. The E-SIGN Act also provides additional flexibility in obtaining electronic consent producing minimal additional recordkeeping efforts. To the extent that the calling parties rely on an established business relationship, the Commission notes that it previously stated that telemarketers that claim their prerecorded messages are delivered pursuant to an established business relationship must be prepared to provide clear and convincing evidence of the existence of such a relationship. Because of these factors, any additional recordkeeping costs should be minimal.

78. Second, telemarketers and sellers, including small business entities, that initiate telemarketing calls using autodialed or prerecorded messages, must provide an automated, interactive opt-out feature at the outset of such a call. This rule obligates telemarketers and sellers to retain records of providing this feature and to retain records of consumers opting out of receiving these autodialed or prerecorded telemarketing messages. Such records should

demonstrate the telemarketer's and seller's compliance with the provision and utilization of the automated, interactive opt-out feature. The Commission allows the telemarketers and sellers the flexibility to determine how to implement the mechanism. The Commission does not require a particular form or format evidencing this mechanism or its implementation.

79. Thirdly, the Commission revises its abandoned call requirement. There is no additional recordkeeping burden for this revision because the Commission's rule already requires that the seller or telemarketer maintain records establishing compliance with the abandoned call rules.

#### *I. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered*

80. The RFA requires an agency to describe any significant alternatives that it has considered in developing its 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 such 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 such small entities.” As indicated above, various groups will be subject to the Commission's new rules, and some of these entities are classified as small entities.

81. *Prior Express Written Consent Requirement.* At the outset, the Commission notes that the adopted rules differ from the proposed rules. In the proposed rules, the Commission considered adopting prior express written consent for all autodialed or prerecorded calls to wireless numbers and for all prerecorded calls to residential lines. Here, the Commission adopts prior express written consent for autodialed or prerecorded telemarketing calls to wireless numbers and for prerecorded telemarketing calls to residential lines only. Limiting the written consent requirement to telemarketing calls significantly reduces the compliance burden for all entities, including small entities. In adopting the written consent requirement for autodialed or prerecorded telemarketing calls to wireless numbers and for prerecorded telemarketing calls to residential lines, the Commission also concluded that consent obtained

pursuant to the E-SIGN Act will satisfy the requirement of its revised rule, including permission obtained via an email, Web site form, text message, telephone keypress, or voice recording. Accepting consent pursuant to the E-SIGN Act relieves all businesses, including small entities, from the economic impact of generating and retaining a paper document to evidence their compliance.

82. *Elimination of Established Business Relationship Exemption.* In document FCC 12–21, the Commission amends its rules to eliminate the established business relationship (EBR) exemption for prerecorded telemarketing calls. Eliminating the established business relationship exemption will be a burden to the calling telemarketer because the calling party will not be able to rely on the EBR as its form of prior express consent. That burden is mitigated because the prior express written consent requirement can be fulfilled using electronic measures including those described in the E-SIGN Act. Securing written consent using electronic measures relieves the calling parties from the task of securing handwritten documentation and handwritten signatures. This reasoning applies equally to small entities. Moreover, with the increasing use of cell phones, the burden of eliminating the established business relationship exemption on telemarketers is further diminished because the EBR never applied to robocalls to cell phones. In addition, because the FTC's TSR already imposes a prior express written consent requirement for telemarketing calls and does not recognize an EBR, many entities have already implemented steps to fulfill this requirement, thereby reducing the burden associated with the rule the Commission adopts in document FCC 12–21.

83. *Opt-Out Mechanism.* The opt-out provisions in document FCC 12–21 do not impose significant economic impact on small businesses. The Commission did not receive any comments stating that this rule would cause a significant economic impact on small businesses.

84. *Abandoned Call.* One business concern, the Newspaper Association of America, suggests that the abandoned call rule adopted will present an adverse economic impact on small businesses. The Commission disagrees. Neither NAA nor its membership will be burdened by the abandoned call rule adopted in document FCC 12–21 because these entities are already subject to the FTC's abandoned call provision in the TSR. The abandoned call provision adopted in this Order is

identical to the FTC's TSR abandoned call provision. Document FCC 12–21 also rejects an alternate proposal to measure the abandoned calls on a per-campaign, per day basis. Measuring the abandoned call rate on a per-campaign, per-day basis, instead of a per-campaign, 30-day basis, would pose a significant economic burden on all businesses, including small businesses.

The Commission identified alternatives to the rules adopted in document FCC 12–21, but it rejects these alternatives because they are more costly to small businesses.

#### Ordering Clauses

Pursuant to the authority contained in sections 1–4, 222, 227, and 303(r) of the Communications Act of 1934, as amended; 47 U.S.C. 151–154, 222, 227, and the Do-Not-Call Implementation Act, Public Law 108–10, 117 Stat. 557, that document FCC 12–21 in CG Docket No. 02–278 IS ADOPTED, and that part 64 of the Commission's rules, 47 CFR 64.1200, is amended. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of document FCC 12–21, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

#### List of Subjects in 47 CFR Part 64

Communications common carriers, Radio, Telephone.

Federal Communications Commission.

**Marlene H. Dortch,**  
*Secretary.*

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 64 as follows:

#### PART 64—[AMENDED]

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

**Authority:** 47 U.S.C. 154, 254(k); 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, 254(k), 616, and 620 unless otherwise noted.

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

- 2. In § 64.1200, revise paragraphs (a), (b), (c), and (f) to read as follows:

##### § 64.1200 Delivery restrictions.

(a) No person or entity may:  
(1) Except as provided in paragraph (a)(2) of this section, initiate any telephone call (other than a call made for emergency purposes or is made with

the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

(iv) A person will not be liable for violating the prohibition in paragraph (a)(1)(iii) of this section when the call is placed to a wireless number that has been ported from wireline service and such call is a voice call; not knowingly made to a wireless number; and made within 15 days of the porting of the number from wireline to wireless service, provided the number is not already on the national do-not-call registry or caller's company-specific do-not-call list.

(2) Initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section, other than a call made with the prior express written consent of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers a "health care" 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.

(3) 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;

(i) Is made for emergency purposes;

(ii) Is not made for a commercial purpose;

(iii) Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing;

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

(v) Delivers a "health care" 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.

(4) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless—

(i) The unsolicited advertisement is from a sender with an established business relationship, as defined in paragraph (f)(6) of this section, with the recipient; and

(ii) The sender obtained the number of the telephone facsimile machine through—

(A) The voluntary communication of such number by the recipient directly to the sender, within the context of such established business relationship; or

(B) A directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution. If a sender obtains the facsimile number from the recipient's own directory, advertisement, or Internet site, it will be presumed that the number was voluntarily made available for public distribution, unless such materials explicitly note that unsolicited advertisements are not accepted at the specified facsimile number. If a sender obtains the facsimile number from other sources, the sender must take reasonable steps to verify that the recipient agreed to make the number available for public distribution.

(C) This clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005 if the sender also possessed the facsimile machine number of the recipient before July 9, 2005. There shall be a rebuttable presumption that if a valid established business relationship was formed prior to July 9, 2005, the sender possessed the facsimile number prior to such date as well; and

(iii) The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements under this paragraph only if—

(A) The notice is clear and conspicuous and on the first page of the advertisement;

(B) The notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under

paragraph (a)(4)(v) of this section is unlawful;

(C) The notice sets forth the requirements for an opt-out request under paragraph (a)(4)(v) of this section;

(D) The notice includes—

(1) A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and

(2) If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or email address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and

(E) The telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.

(iv) A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.

(v) A request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(A) The request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(B) The request is made to the telephone number, facsimile number, Web site address or email address identified in the sender's facsimile advertisement; and

(C) The person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.

(vi) A sender that receives a request not to send future unsolicited advertisements that complies with paragraph (a)(4)(v) of this section must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days, and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender. The recipient's opt-out

request terminates the established business relationship exemption for purposes of sending future unsolicited advertisements. If such requests are recorded or maintained by a party other than the sender on whose behalf the unsolicited advertisement is sent, the sender will be liable for any failures to honor the opt-out request.

(vii) A facsimile broadcaster will be liable for violations of paragraph (a)(4) of this section, including the inclusion of opt-out notices on unsolicited advertisements, if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.

(5) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(6) Disconnect an unanswered telemarketing call prior to at least 15 seconds or four (4) rings.

(7) Abandon more than three percent of all telemarketing calls that are answered live by a person, as measured over a 30-day period for a single calling campaign. If a single calling campaign exceeds a 30-day period, the abandonment rate shall be calculated separately for each successive 30-day period or portion thereof that such calling campaign continues. 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.

(i) Whenever a live sales representative is not available to speak with the person answering the call, within two (2) seconds after the called person's completed greeting, the telemarketer or the seller must provide:

(A) A prerecorded identification and opt-out message that is limited to disclosing that the call was for "telemarketing purposes" and states the name of the business, entity, or individual on whose behalf the call was placed, and a telephone number for such business, entity, or individual that permits the called person to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; provided, that, such telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges, and

(B) An automated, interactive voice-and/or key press-activated opt-out mechanism that enables the called person to make a do-not-call request prior to terminating the call, including brief explanatory instructions on how to use such mechanism. When the called person elects to opt-out using such

mechanism, the mechanism must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call.

(ii) A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line or to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section after the subscriber to such line 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.

(iii) The seller or telemarketer must maintain records establishing compliance with paragraph (a)(7) of this section.

(iv) Calls made by or on behalf of tax-exempt nonprofit organizations are not covered by this paragraph (a)(7).

(8) Use any technology to dial any telephone number for the purpose of determining whether the line is a facsimile or voice line.

(b) All artificial or prerecorded voice telephone messages shall:

(1) 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;

(2) 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. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; and

(3) In every case where the artificial or prerecorded voice telephone message includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line or any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii), provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism, within two (2) seconds of providing the identification

information required in paragraph (b)(1) of this section. When the called person elects to opt out using such mechanism, the mechanism, must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call. When the artificial or prerecorded voice telephone message is left on an answering machine or a voice mail service, such message must also provide a toll free number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person's number to the seller's do-not-call list.

(c) No person or entity shall initiate any telephone solicitation to:

(1) Any residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), or

(2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government. Such do-not-call registrations must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator. Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if:

(i) It can demonstrate that the violation is the result of error and that as part of its routine business practice, it meets the following standards:

(A) Written procedures. It has established and implemented written procedures to comply with the national do-not-call rules;

(B) Training of personnel. It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(C) Recording. It has maintained and recorded a list of telephone numbers that the seller may not contact;

(D) Accessing the national do-not-call database. It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process.

**Note to paragraph (c)(2)(i)(D):** The requirement in paragraph 64.1200(c)(2)(i)(D)

for persons or entities to employ a version of the national do-not-call registry obtained from the administrator no more than 31 days prior to the date any call is made is effective January 1, 2005. Until January 1, 2005, persons or entities must continue to employ a version of the registry obtained from the administrator of the registry no more than three months prior to the date any call is made.

(E) Purchasing the national do-not-call database. It uses a process to ensure that it does not sell, rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose except compliance with this section and any such state or federal law to prevent telephone solicitations to telephone numbers registered on the national database. It purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers; or

(ii) It has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed; or

(iii) The telemarketer making the call has a personal relationship with the recipient of the call.

\* \* \* \* \*

(f) As used in this section:

(1) The term *advertisement* means any material advertising the commercial availability or quality of any property, goods, or services.

(2) The terms *automatic telephone dialing system* and *autodialer* mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(3) The term *clear and conspicuous* means a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures. With respect to facsimiles and for purposes of paragraph (a)(4)(iii)(A) of this section, the notice must be placed at either the top or bottom of the facsimile.

(4) The term *emergency purposes* means calls made necessary in any situation affecting the health and safety of consumers.

(5) The term *established business relationship* for purposes of telephone

solicitations means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

(i) The subscriber's seller-specific do-not-call request, as set forth in paragraph (d)(3) of this section, terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.

(ii) The subscriber's established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

(6) The term *established business relationship* for purposes of paragraph (a)(4) of this section on the sending of facsimile advertisements means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

(7) The term *facsimile broadcaster* means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

(8) The term *prior express written consent* means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous

disclosure informing the person signing that:

(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

(B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

(ii) 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.

(9) The term *seller* means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(10) The term *sender* for purposes of paragraph (a)(4) of this section means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.

(11) The term *telemarketer* means the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(12) The term *telemarketing* means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(13) The term *telephone facsimile machine* means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(14) The term *telephone solicitation* means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

(15) The term *unsolicited advertisement* means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(16) The term *personal relationship* means any family member, friend, or acquaintance of the telemarketer making the call.

\* \* \* \* \*

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

#### 49 CFR Part 386

[Docket No. FMCSA-2003-14794]

#### Notice of Final Revision to Guidance for the Use of Binding Arbitration Under the Administrative Dispute Resolution Act of 1996

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of final revision to guidance.

**SUMMARY:** Under existing guidance, FMCSA must use a form of arbitration known as "Night Baseball" for its civil penalty forfeiture proceedings in which the only issues remaining to be resolved are the amount of the civil penalty owed and/or the length of time in which to pay it. On March 21, 2011, FMCSA proposed to revise the Guidance to eliminate the "Night Baseball" format, and to replace it with a format in which the Arbitrator determines the final civil penalty and the amount of time in which to pay it. The Arbitrator would no longer be bound by the closest suggested penalty submission of the parties. The Notice provided the public with 30 days to comment on the proposal. The Agency received no comments and is therefore revising the Guidance by eliminating the "Night Baseball" format. The Agency is also revising the Guidance to incorporate typographical and other minor changes.

**DATES:** The revised Guidance is effective June 11, 2012. It will apply to all cases in which an order assigning a matter to binding arbitration is issued from June 11, 2012 forward.

**FOR FURTHER INFORMATION CONTACT:** Steven B. Farbman, Adjudications