

RCL's COMMENTS ON TRAI's CONSULTATION PAPER ON UNSOLICITED COMMERCIAL CALLS

Globally Unsolicited Commercial Calls have become bane for the society. The problem has compounded with the advent of cellular telephony. The nature of telephone calls is inherently more disruptive to individual's privacy. In response to such concerns, many countries including the United States, the United Kingdom, Australia etc have introduced mandatory legislation for all businesses engaged in telemarketing. In the larger interest of consumers we support regulatory intervention on this issue and would support the cause through all possible means. However a long term solution is possible only via legislation. We at the same time are strongly of the view that this is not a telecom industry issue since we are only conduit for communication. Hence any regulatory remedy on the telecom industry should be a practical.

We are pleased to submit following comments on issues raised in the consultation paper.

Q1: Do you agree with the definition of UCC as mentioned in ¶1.19? If not, please give your definition and explain it.

Ans: As rightly indicated by the Authority, we believe that an "opt in" approach would be excessively restrictive and against the principles enunciated in ¶ 3.3 of the Consultation paper. Few customers would be motivated to register to receive commercial calls. As such, the market for telemarketing may shrink dramatically. It is also likely that few customers who do register to receive telemarketing calls, would receive an unreasonably large number of calls, as these calls would be concentrated on a small group of customers. Moreover, there is no international precedent for the adoption of the "opt in" regime for telemarketing calls. Therefore, the definition needs to reflect the "opt out" approach, which at present is reflecting an "opt in" approach.

2. Further we believe that UCC definition is very broad and covers even those organizations which have an existing business relationship with customers. It is crucial to conduct business to be able to contact existing and prospective customers. Customers can benefit from calls/SMSs as they receive information about current services or services that better suit their needs. Various content and other premium services over telephone networks are hugely popular because customers are able to receive information on launch of new services. Reminder from an insurance agent for payment of premium, call from service centre to remind that car is due for service, call for payment of bill when bill payment date is nearing or is overdue, are not only common but most of the time welcomed by customers. Such calls make it easy for customers to receive important communication without requiring much effort on their part in gathering/remembering information. Even with regard to prospective customers, if a person has made inquiries about a company's products, it is reasonable to expect that follow-up calls will be made so as to convert those enquiries into firm orders. It may be noted that in the USA, if an organization has an existing business relationship with a customer for a period of 18 months preceding the date of a telemarketing call, such a call is treated as an exception and hence and not covered under UCC. In case a customer has made an enquiry or application for a product or service, then a telemarketing call in such a circumstance is not covered under UCC if it is made within 3 months of an enquiry/application. In Australia, this limit is 3 months in the case of an existing business relationship with a customer or made an inquiries regarding a company's goods or services. Copies of Telemarketing Sales Rules of USA (*Annexure I*) and Do Not Call Register Act, 2006 of Australia (*Annexure II*) are attached with these comments.

3. **The UCC scheme should also provide for certain categories of telemarketing calls to subscribers for which they have not chosen to opt out specifically. The remaining business/telemarketing categories will still continue to be on DNC listing.**

4. Further we have not yet found SMS to be a problem to the extent of telemarketing calls. Subscribers have an option to check SMSs at any convenient time and also ignore

telemarketing SMSs as one can identify from the number since mostly short digit numbers are assigned to senders of those SMSs from service providers.

5. Also, the calls made for conducting any surveys such as customer satisfaction surveys (which fall under QoS regulations) to help improve the offerings/service of the telecom service provider, should not be considered under UCC. Any sincere attempts made by the telecom service provider in order to improve and provide innovative, customized, and better services/solutions to subscribers should not fall in the purview of the definition of UCC.

6. Lastly, the service provider may also communicate with the subscriber for the purpose of informing the subscriber of tariff plan details or any billing related information such as credit limits, QoS surveys, pending dues etc. and any such calls should be kept outside the purview of UCC. It is pertinent to note that for providing such communication, subscribers' explicit consent is not sought due to such communication being a part of regulatory/service improvement requirements.

7. In view of the foregoing discussions, the following definition is suggested:

*Any message through a telecommunications service except through an SMS or MMS that is transmitted for the purpose of informing about, or conducting a commercial transaction related to, goods, investments, services, or ideas where the receiving party has explicitly indicated that it **does not** want to receive such a message;*

Provided that any commercial telecommunication message received by a person who has registered in the DNC register shall not be called UCC if he has an existing business relationship with that organization in 18 months prior to the receiving of such a call or has made inquires regarding a company's goods or services or participated in a company's promotional campaign in a period of three months prior to a telemarketing approach, or the call is from the person's telecom service provider, pertinent to the

service and/or being subscribed to by the receiving party and the service status thereof in a period of three months prior to a telemarketing approach ;

Provided further that any commercial telecom message received by a person who has registered in DNC register and had no business relation for past 18 months in case he has given an explicit consent to receive business information from that organization.

Q.2. How have the measures thus far (by the RBI or other agencies, banks, and service providers) been effective in reducing the number of unsolicited messages and calls?

Ans: We cannot comment on the impact of RBI's regulation on UCC. However, we feel that measures initiated by the RBI and the other agencies have given some respite to customers by which they can make a choice to receive or not to receive such unsolicited communication. The initiatives by telecom service providers to make available DNC registration have made customers more aware and they can exercise to opt out of receiving unsolicited calls to a limited extent.

Q.3. Which of the suggested proposals will be appropriate for India? Please suggest alternate proposals, if any.

Ans: The problem of Unsolicited Commercial Communication is arising out of action of telemarketers and any regulatory action/response must be aimed at that. The problem does not arise from telecom service providers carrying those calls. The regulatory response to the direct marketing issue should not interfere with the operations of telecom companies. Regulating the telecom industry to find a solution to a problem created by telemarketers would impose an undue financial burden on them. Internationally too,

regulators regulate concerned telemarketing companies and not the telecom companies. **The issue primarily concerns telemarketing and therefore an appropriate solution would be the telemarketer-oriented approach.**

2. Moreover it is not possible to create an exhaustive list of companies making UCC as its definition is very broad and covers not only big telemarketing companies but also small businesses run from homes. Any attempt to impose a service provider based solution would not be in the interest of telecom growth in the country.

3. We feel that the best possible solution would be to establish a centralized DNC register that is spearheaded by a Government body.

Q.4. Should TRAI consider a centralized DNC register or go for a distributed approach in which each service provider has their own DNC register where subscribers can list? Should the development of a centralized DNC register be left to market forces?

Ans; A service provider can create DNC only for those subscribers not intending to receive messages from concerned service provider. This DNC can be made available on service provider's website which can be accessed by telemarketers.

4. However, internationally DNC register is centrally created and maintained by an Authority which is funded through procurement of data by telemarketing companies. We believe that a long-term solution would be to have a centralized DNC register, which could be funded by the telemarketing industry, as practiced in the UK.

Q.5. In case the telemarketer-oriented approach is followed, what action should be taken against a telemarketer either by service provider or the Government that makes an unsolicited commercial communication to subscriber listed on any DNC register?

Ans: Proper legislation may be needed for the Government to take action against any telemarketer making UCC. International examples indicate that telemarketers are held liable and subjected to fines. We agree with this approach. However, penalties may be levied in case of recurrent violation of legislation.

Q.6. If any of the service-provider oriented approaches are followed, what should be the action taken against service providers (originator/terminator) that allow unsolicited commercial communications to reach subscribers on any DNC register?

Ans: Service provider based solution cannot be a solution to this problem as it is creation of telemarketing companies. It has already been explained in answer to the Q 3 that it is not possible for service providers to create an exhaustive list of companies making UCC as its definition is very broad and covers not only big telemarketing companies but also small businesses run from homes. Any solution based on blockages of calls may also have legal ramifications, which also need to be examined.

2. Also, the service providers should not be subjected to any actions for violation of DNC as they are not responsible for calls made by telemarketers or other agencies. Service providers have implemented their DNC registers to ensure that subscribers who do not wish to be contacted, are not disturbed. However, in case a subscriber receives a telemarketing call from other agency and not from the service provider itself, then such a call cannot be curbed by the service provider. To this extent, ensuring compliance to the undertaking signed with subscribers to prevent UCC, will not be possible for the service provider.

Q.7. With reference to the problem posed in ¶3.12, what additional measures are needed to be implemented?

Ans: In addition to what has been stated in replies to other questions, we feel enactment of a proper legislation that mandates registration of all telemarketing agencies with a central authority is the only effective solution to the problem.

Q.8. Should a subscriber who receives UCC calls in spite of being listed on a DNC register be compensated? If yes, how should this be done for the solution you recommend? What should be the level of compensation?

Ans: Proper legislation may be needed for taking action against telemarketer as well as compensating the subscriber. Initially, limited warnings can be issued, followed by penalties and compensation in case of severe/recurrent violations. However, these should be such, that they act as a deterrent but not to incite legal action on every violation for which easy settlements are otherwise possible.

proposition that local retail shopping has, to date, been reduced as a result of inbound or outbound telemarketing. And, the fact remains that, other than DeHart, none of the commenters, including major sellers, telemarketers, and industry groups, provides any evidence relating to the potential for a national "do-not-call" registry to result in a reduction in service or an increase in cost for inbound telemarketing, nor in a concomitant increase in retail shopping done in local malls.

Moreover, the Commission believes there can be no hard evidence on which to base a prediction of consumers' actions following the implementation of the "do-not-call" registry provision. It seems likely, based on the experience of states that have implemented statewide "do-not-call" lists, and the overwhelmingly high response of consumers to the Commission's proposal, that many consumers will avail themselves of the opportunity to place their telephone numbers on the national "do-not-call" registry. However, as noted above, this may or may not have any impact on consumers' decision to shop at local malls, or on their choice of transportation. Thus, while consumer behavior may change as a result of the promulgation of amendments to the Rule, such changes cannot be quantified or even reasonably estimated because consumer decisions are influenced by many variables other than existence of the "do-not-call" registry. Any indirect impact of the amended Rule on the environment would therefore be highly speculative and impossible to accurately predict or measure.

The Commission does not believe that any alternative to creating a national "do-not-call" registry would both provide the benefits of the registry and ameliorate all potential concerns regarding environmental impact. For example, the Commission does not believe that given its justification for the necessity of the registry, eliminating the provision from the amended Rule would be appropriate based solely on the unsupported allegations of indirect environmental effect raised in the DeHart comment. Furthermore, the Commission can think of no alternative other than eliminating the national "do-not-call" registry that would address DeHart's unsupported and highly speculative concern.

In sum, although any evaluation of the environmental impact of the amendments to the TSR is uncertain and highly speculative, the Commission finds no evidence of avoidable adverse impacts stemming from the amended Rule. Therefore, the Commission has

determined, in accordance with § 1.83 of the FTC's Rules of Practice, that no environmental assessment or EIS is required.¹⁰⁷⁵

List of Subjects in 16 CFR Part 310.

Telemarketing, Trade practices.

Accordingly, title 16, part 310 of the Code of Federal Regulations, is revised to read as follows:

PART 310—TELEMARKETING SALES RULE

Sec.

- 310.1 Scope of regulations in this part.
- 310.2 Definitions.
- 310.3 Deceptive telemarketing acts or practices.
- 310.4 Abusive telemarketing acts or practices.
- 310.5 Recordkeeping requirements.
- 310.6 Exemptions.
- 310.7 Actions by states and private persons.
- 310.8 Reserved: Fee for access to "do-not-call" registry.
- 310.9 Severability.

Authority: 15 U.S.C. 6101–6108.

§ 310.1 Scope of regulations in this part.

This part implements the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101–6108, as amended.

§ 310.2 Definitions.

(a) *Acquirer* means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.

(b) *Attorney General* means the chief legal officer of a state.

(c) *Billing information* means any data that enables any person to access a customer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

(d) *Caller identification service* means a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone.

(e) *Cardholder* means a person to whom a credit card is issued or who is authorized to use a credit card on behalf

of or in addition to the person to whom the credit card is issued.

(f) *Charitable contribution* means any donation or gift of money or any other thing of value.

(g) *Commission* means the Federal Trade Commission.

(h) *Credit* means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(i) *Credit card* means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(j) *Credit card sales draft* means any record or evidence of a credit card transaction.

(k) *Credit card system* means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.

(l) *Customer* means any person who is or may be required to pay for goods or services offered through telemarketing.

(m) *Donor* means any person solicited to make a charitable contribution.

(n) *Established business relationship* means a relationship between a seller and a consumer based on:

(1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or

(2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

(o) *Free-to-pay conversion* means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.

(p) *Investment opportunity* means anything, tangible or intangible, that is offered, offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation.

(q) *Material* means likely to affect a person's choice of, or conduct regarding, goods or services or a charitable contribution.

(r) *Merchant* means a person who is authorized under a written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the

¹⁰⁷⁵ 16 CFR 1.83. See also *National Citizens Comm. for Broad. v. FCC*, 567 F.2d 1095, 1098 n.3 (D.C. Cir. 1977).

purchase of goods or services or a charitable contribution.

(s) *Merchant agreement* means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(t) *Negative option feature* means, in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.

(u) *Outbound telephone call* means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.

(v) *Person* means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(w) *Preacquired account information* means any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged.

(x) *Prize* means anything offered, or purportedly offered, and given, or purportedly given, to a person by chance. For purposes of this definition, chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.

(y) *Prize promotion* means:

(1) A sweepstakes or other game of chance; or

(2) An oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.

(z) *Seller* means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.

(aa) *State* means any state of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(bb) *Telemarketer* means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

(cc) *Telemarketing* means a plan, program, or campaign which is

conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

(dd) *Upselling* means soliciting the purchase of goods or services following an initial transaction during a single telephone call. The upsell is a separate telemarketing transaction, not a continuation of the initial transaction. An "external upsell" is a solicitation made by or on behalf of a seller different from the seller in the initial transaction, regardless of whether the initial transaction and the subsequent solicitation are made by the same telemarketer. An "internal upsell" is a solicitation made by or on behalf of the same seller as in the initial transaction, regardless of whether the initial transaction and subsequent solicitation are made by the same telemarketer.

§ 310.3 Deceptive telemarketing acts or practices.

(a) *Prohibited deceptive telemarketing acts or practices.* It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Before a customer pays¹ for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods

or services that are the subject of the sales offer;²

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

(iii) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the customer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and, if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning; and the no-purchase/no-payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate;

(v) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(vi) In the sale of any goods or services represented to protect, insure, or otherwise limit a customer's liability in the event of unauthorized use of the customer's credit card, the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. 1643; and

(vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

¹ When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment.

² For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226, compliance with the disclosure requirements under the Truth in Lending Act and Regulation Z shall constitute compliance with § 310.3(a)(1)(i) of this Rule.

(ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;

(iii) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;

(iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

(v) Any material aspect of a prize promotion including, but not limited to, the odds of being able to receive a prize, the nature or value of a prize, or that a purchase or payment is required to win a prize or to participate in a prize promotion;

(vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability;

(vii) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity;

(viii) That any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. 1643; or

(ix) Any material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(3) Causing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z,³ or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E.⁴ Such authorization shall be deemed verifiable if any of the following means is employed:

(i) Express written authorization by the customer or donor, which includes the customer's or donor's signature;⁵

(ii) Express oral authorization which is audio-recorded and made available

upon request to the customer or donor, and the customer's or donor's bank or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer's or donor's receipt of all of the following information:

(A) The number of debits, charges, or payments (if more than one);

(B) The date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;

(C) The amount(s) of the debit(s), charge(s), or payment(s);

(D) The customer's or donor's name;

(E) The customer's or donor's billing information, identified with sufficient specificity such that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction;

(F) A telephone number for customer or donor inquiry that is answered during normal business hours; and

(G) The date of the customer's or donor's oral authorization; or

(iii) Written confirmation of the transaction, identified in a clear and conspicuous manner as such on the outside of the envelope, sent to the customer or donor via first class mail prior to the submission for payment of the customer's or donor's billing information, and that includes all of the information contained in

§§ 310.3(a)(3)(ii)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate; *provided*, however, that this means of authorization shall not be deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and preacquired account information.

(4) Making a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution.

(b) *Assisting and facilitating*. It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c) or (d), or § 310.4 of this Rule.

(c) *Credit card laundering*. Except as expressly permitted by the applicable

credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for:

(1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;

(2) Any person to employ, solicit, or otherwise cause a merchant, or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

(3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.

(d) *Prohibited deceptive acts or practices in the solicitation of charitable contributions*. It is a fraudulent charitable solicitation, a deceptive telemarketing act or practice, and a violation of this Rule for any telemarketer soliciting charitable contributions to misrepresent, directly or by implication, any of the following material information:

(1) The nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested;

(2) That any charitable contribution is tax deductible in whole or in part;

(3) The purpose for which any charitable contribution will be used;

(4) The percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program;

(5) Any material aspect of a prize promotion including, but not limited to: the odds of being able to receive a prize; the nature or value of a prize; or that a charitable contribution is required to win a prize or to participate in a prize promotion; or

(6) A charitable organization's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.

§ 310.4 Abusive telemarketing acts or practices.

(a) *Abusive conduct generally*. It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

³ Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR part 226.

⁴ Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.*, and Regulation E, 12 CFR part 205.

⁵ For purposes of this Rule, 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.

(1) Threats, intimidation, or the use of profane or obscene language;

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:

(i) The time frame in which the seller has represented all of the goods or services will be provided to that person has expired; and

(ii) The seller has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Nothing in this Rule should be construed to affect the requirement in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose;

(3) Requesting or receiving payment of any fee or consideration from a person for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney;

(4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person;

(5) Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; *provided*, however, that this paragraph shall not apply to the disclosure or receipt of a customer's or donor's billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction;

(6) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements

in paragraphs (a)(6)(i) through (ii) of this section must be met to evidence express informed consent.

(i) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the seller or telemarketer must:

(A) obtain from the customer, at a minimum, the last four (4) digits of the account number to be charged;

(B) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account number pursuant to paragraph (a)(6)(i)(A) of this section; and,

(C) make and maintain an audio recording of the entire telemarketing transaction.

(ii) In any other telemarketing transaction involving preacquired account information not described in paragraph (a)(6)(i) of this section, the seller or telemarketer must:

(A) at a minimum, identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged; and

(B) obtain from the customer or donor his or her express agreement to be charged for the goods or services and to be charged using the account number identified pursuant to paragraph (a)(6)(ii)(A) of this section; or

(7) Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call; *provided* that it shall not be a violation to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours.

(b) *Pattern of calls.*

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

(i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive

outbound telephone calls established to comply with § 310.4(b)(1)(iii);

(iii) Initiating any outbound telephone call to a person when:

(A) that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited; or

(B) that person's telephone number is on the "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller

(i) has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature⁶ of that person; or

(ii) has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

(iv) Abandoning any outbound telephone call. An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

(2) It is an abusive telemarketing act or practice and a violation of this Rule for any person to sell, rent, lease, purchase, or use any list established to comply with § 310.4(b)(1)(iii)(A), or maintained by the Commission pursuant to § 310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists.

(3) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(ii) and (iii) if it can demonstrate that, as part of the seller's or telemarketer's routine business practice:

(i) It has established and implemented written procedures to comply with § 310.4(b)(1)(ii) and (iii);

(ii) It has trained its personnel, and any entity assisting in its compliance, in

⁶For purposes of this Rule, 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.

the procedures established pursuant to § 310.4(b)(3)(i);

(iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact, in compliance with § 310.4(b)(1)(iii)(A);

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to §§ 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained from the Commission no more than three (3) months prior to the date any call is made, and maintains records documenting this process;

(v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to § 310.4(b)(3)(i); and

(vi) Any subsequent call otherwise violating § 310.4(b)(1)(ii) or (iii) is the result of error.

(4) A seller or telemarketer will not be liable for violating 310.4(b)(1)(iv) if:

(i) the seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign;

(ii) the seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed⁷; and

(iv) the seller or telemarketer, in accordance with § 310.5(b)-(d), retains records establishing compliance with § 310.4(b)(4)(i)-(iii).

(c) *Calling time restrictions.* Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location.

(d) *Required oral disclosures in the sale of goods or services.* It is an abusive

telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion; *provided*, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

(e) *Required oral disclosures in charitable solicitations.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution, to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the charitable organization on behalf of which the request is being made; and

(2) That the purpose of the call is to solicit a charitable contribution.

§ 310.5 Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

(1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of \$25.00 or more;

(3) The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and

the amount paid by the customer for the goods or services;⁸

(4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales or solicitations; *provided*, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

(5) All verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.

(b) A seller or telemarketer may keep the records required by § 310.5(a) in any form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by § 310.5(a) shall be a violation of this Rule.

(c) The seller and the telemarketer calling on behalf of the seller may, by written agreement, allocate responsibility between themselves for the recordkeeping required by this Section. When a seller and telemarketer have entered into such an agreement, the terms of that agreement shall govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, the seller shall be responsible for complying with §§ 310.5(a)(1)-(3) and (5); the telemarketer shall be responsible for complying with § 310.5(a)(4).

(d) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer shall maintain all records as required under this Section. In the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business shall maintain all records required under this Section.

§ 310.6 Exemptions.

(a) Solicitations to induce charitable contributions via outbound telephone calls are not covered by § 310.4(b)(1)(iii)(B) of this Rule.

(b) The following acts or practices are exempt from this Rule:

(1) The sale of pay-per-call services subject to the Commission's Rule

⁷ This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.

⁸ For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with § 310.5(a)(3) of this Rule.

entitled "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992," 16 CFR Part 308, *provided*, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(2) The sale of franchises subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," ("Franchise Rule") 16 CFR Part 436, *provided*, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(3) Telephone calls in which the sale of goods or services or charitable solicitation is not completed, and payment or authorization of payment is not required, until after a face-to-face sales or donation presentation by the seller or charitable organization, *provided*, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(4) Telephone calls initiated by a customer or donor that are not the result of any solicitation by a seller, charitable organization, or telemarketer, *provided*, however, that this exemption does not apply to any instances of upselling included in such telephone calls;

(5) Telephone calls initiated by a customer or donor in response to an advertisement through any medium, other than direct mail solicitation, *provided*, however, that this exemption does not apply to calls initiated by a

customer or donor in response to an advertisement relating to investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or advertisements involving goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls;

(6) Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this Rule, for any goods or services offered in the direct mail solicitation, and that contains no material misrepresentation regarding any item contained in § 310.3(d) of this Rule for any requested charitable contribution; *provided*, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls; and

(7) Telephone calls between a telemarketer and any business, except calls to induce the retail sale of nondurable office or cleaning supplies; *provided*, however, that § 310.4(b)(1)(iii)(B) and § 310.5 of this Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

§ 310.7 Actions by states and private persons.

(a) Any attorney general or other officer of a state authorized by the state to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, shall serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this Rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, and shall include a copy of the state's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the state or private person shall serve the Commission with the required notice immediately upon instituting its action.

(b) Nothing contained in this Section shall prohibit any attorney general or other authorized state official from proceeding in state court on the basis of an alleged violation of any civil or criminal statute of such state.

§ 310.8 [Reserved: Fee for access to “do-not-call” registry.]**§ 310.9 Severability.**

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission’s intention that the remaining provisions shall continue in effect.

By direction of the Commission.

Donald S. Clark,
Secretary.

Note: Appendices A and B are published for informational purposes only and will not be codified in Title 16 of the Code of Federal Regulations.

Appendix A*List of Acronyms for Rule Review Commenters*

February 28, 2000 Request for Comment

Acronym — Commenter

AARP—AARP
 Alan—Alan, Alicia
 ARDA—American Resort Development Association
 ATA—American Teleservices Association
 Anderson—Anderson, Wayne
 Baressi—Baressi, Sandy
 Bell Atlantic—Bell Atlantic
 Bennett—Bennett, Douglas H.
 Biagiotti—Biagiotti, Mary
 Bishop—Bishop, Lew & Lois
 Blake—Blake, Ted
 Bowman-Kruhm—Bowman-Kruhm, Mary
 Braddick—Braddick, Jane Ann
 Brass—Brass, Eric
 Brosnahan—Brosnahan, Kevin
 Budro—Budro, Edgar
 Card—Card, Giles S.
 Collison—Collison, Doug
 Conn—Conn, David
 Conway—Conway, Candace
 Croushore—Croushore, Amanda
 Curtis—Curtis, Joel
 Dawson—Dawson, Darcy
 DMA—Direct Marketing Association
 DSA—Direct Selling Association
 Doe—Doe, Jane
 ERA—Electronic Retailing Association
 FAMSA—FAMSA-Funeral Consumers Alliance, Inc.
 Gannett—Gannett Co., Inc.
 Garbin—Garbin, David and Linda
 A. Gardner—Gardner, Anne
 S. Gardner—Gardner, Stephen
 Gibb—Gibb, Ronald E.
 Gilchrist—Gilchrist, Dr. K. James
 Gindin—Gindin, Jim
 Haines—Haines, Charlotte
 Harper—Harper, Greg
 Heagy—Heagy, Annette M.
 Hecht—Hecht, Jeff
 Hickman—Bill and Donna
 Hollingsworth—Hollingsworth, Bob and Pat
 Holloway—Holloway, Lynn S.
 Holmay—Holmay, Kathleen
 ICFA—International Cemetery and Funeral Association

Johnson—Johnson, Sharon Coleman
 Jordan—Jordan, April
 Kelly—Kelly, Lawrence M.
 KTW—KTW Consulting Techniques, Inc.
 Lamet—Lamet, Jerome S.
 Lee—Lee, Rockie
 LSAP—Legal Services Advocacy Project
 LeQuang—LeQuang, Albert
 Leshner—Leshner, David
 Mack—Mack, Mr. and Mrs. Alfred
 MPA—Magazine Publishers of America, Inc.
 Manz—Manz, Matthias
 McCurdy—McCurdy, Bridget E.
 Menefee—Menefee, Marcie
 Merritt—Merritt, Everett W.
 Mey—Mey, Diana
 Mitchelp—Mitchelp
 TeleSource—Morgan-Francis/Tele-Source Industries
 NACHA—NACHA-The Electronic Payments Association
 NAAG—National Association of Attorneys General
 NACAA—National Association of Consumer Agency Administrators
 NCL—National Consumers League
 NFN—National Federation of Nonprofits
 NAA—Newspaper Association of America
 NASAA—North American Securities Administrators Association
 Nova53—Nova53
 Nurik—Nurik, Margy and Irv
 PLP—Personal Legal Plans, Inc.
 Peters—Peters, John and Frederickson, Constance
 Reese—Reese Brothers, Inc.
 Reynolds—Reynolds, Charles
 Rothman—Rothman, Iris
 Runnels—Runnels, Mike
 Sanford—Sanford, Kanija
 Schiber—Schiber, Bill
 Schmied—Schmied, R. L.
 Strang—Strang, Wayne G.
 TeleSource—Morgan-Francis/Tele-Source Industries
 Texas—Texas Attorney General
 Thai—Thai, Linh Vien
 Vanderburg—Vanderburg, Mary Lou
 Ver Steegt—Ver Steegt, Karen
 Verizon—Verizon Wireless
 Warren—Warren, Joshua
 Weltha—Weltha, Nick
 Worsham—Worsham, Michael C., Esq.

Appendix B*List of Acronyms for NPRM Commenters**Acronym — Commenter*

1-800-DoNotCall—1-800-DoNotCall, Inc.
 AARP—AARP
 ACA—ACA International
 ACUTA—ACUTA
 Advanta—Advanta Corp.
 Aegis—Aegis Communications Group
 Alabama Police—Alabama State Police Association, Inc.
 AAST—American Association of State Troopers
 ABA—American Bankers Association
 ABIA—American Bankers Insurance Association
 American Blind—American Blind Products, Inc.
 ACE—American Council on Education
 ADA—American Diabetes Association
 AmEx—American Express

AFSA—American Financial Services Association
 Red Cross—American Red Cross
 ARDA—American Resort Development Association
 ARDA-2—American Resort Development Association-Do Not Call Registry
 American Rivers—American Rivers
 ASTA—American Society of Travel Agents
 ATA—American Teleservices Association
 Blood Centers—America’s Blood Centers
 Community Bankers—America’s Community Bankers
 Ameriquest—Ameriquest Mortgage Company
 Arme y—Arme y, The Honorable Dick (U.S. House of Representatives)
 AFP—Association of Fundraising Professionals
 APTS—Association of Public Television Stations
 ANA—Association of National Advertisers Associations—joint comment of: American Teleservices Association, Direct Marketing Association, Electronic Retailing Association, Magazine Publishers Association, and Promotion Marketing Association
 Assurant—Assurant Group
 Avinta—Avinta Communications, Inc.
 Ayres—Ayres, Ian
 Baldacci—Baldacci, The Honorable John Elias (U.S. House of Representatives)
 BofA—Bank of America
 Bank One—Bank One Corporation
 Beautyrock—Beautyrock, Inc.
 BellSouth—BellSouth Corporation
 Best Buy—Best Buy Company, Inc.
 BRI—Business Response Inc.
 CCAA—California Consumer Affairs Association
 CATS—Californians Against Telephone Solicitation
 Capital One—Capital One Financial Corporation
 Car Wash Guys—WashGuy Systems
 Carper—Carper, The Honorable Thomas R. (U.S. Senate)
 Celebrity Prime Foods—Celebrity Prime Foods
 Cendant—Cendant Corporation
 Chamber of Commerce—Chamber of Commerce of the United States of America
 CRF—Charitable Resource Foundation, Inc.
 Chicago ADM—Chicago Association of Direct Marketing
 Childhood Leukemia—Childhood Leukemia Foundation
 CDI—Circulation Development, Inc.
 CURE—Citizens United for Rehabilitation of Errants
 Citigroup—Citigroup Inc.
 Civil Service Leader—Civil Service Leader
 Collier Shannon—Collier Shannon Scott
 Comcast—Comcast
 CNHI—Community Newspaper Holdings, Inc.
 Community Safety—Community Safety, LLC
 Connecticut—Connecticut Commissioner of Consumer Protection
 CBA—Consumer Bankers Association
 CCC—joint comment of: Consumer Choice Coalition, ACI Telecentrics, Coverdell & Company, Discount Development Services, HSN LP d/b/a HSN and Home Shopping Network, Household Credit Services, MBNA America Bank, MemberWorks

- Incorporated, Mortgage Investors Corporation, Optima Direct, TCIM Inc., Trilegiant Corporation and West Corporation
- CMC—Consumer Mortgage Coalition
- Consumer Privacy—Consumer Privacy Guide
- Convergys—Convergys Corporation
- CCA—Corrections Corporation of America
- CASE—Council for Advancement and Support of Education
- Cox—Cox Enterprises
- Craftmatic—Craftmatic Organization, Inc.
- Davis—Davis, The Honorable Tom (U.S. House of Representatives)
- DBA—Debt Buyers Association
- DeHart—DeHart & Darr Associates
- Deutsch—Deutsch, The Honorable Peter (U.S. House of Representatives)
- DialAmerica—DialAmerica Marketing, Inc.
- DMA—Direct Marketing Association/U.S. Chamber of Commerce
- DMA-NonProfit—Direct Marketing Association NonProfit Federation
- DSA—Direct Selling Association
- Discover—Discover Bank
- DC—District of Columbia, Office of the People's Counsel
- Eagle—Eagle Bank
- EFSC—Electronic Financial Services Council
- EPIC—Joint comment: Electronic Privacy Information Center, Center for Digital Democracy, Junkbusters Corp., International Union UAW, Privacy Rights Clearinghouse, Consumers Union, Evan Hendricks of Privacy Times, Privacyactivism, Consumer Action, Consumer Project on Technology, Robert Ellis Smith of Privacy Journal, Consumer Federation of America, Computer Scientists for Social Responsibility, and Private Citizen, Inc.
- ERA—Electronic Retailing Association
- EPI—Enterprise Prison Institute
- Experian—Experian Marketing Information Solutions, Inc.
- Fiber Clean—Fiber Clean
- Roundtable—Financial Services Roundtable
- Fire Fighters Associations:
- Asheville FFA—Asheville (NC) Fire Fighters Association
- Bethlehem FFA—Bethlehem (PA), IAFF Local 735
- Boone FFA—Boone (IA)
- California FFA—California Professional Firefighters
- Cedar Rapids FFA—Cedar Rapids (IA), IAFF Local 11
- Cedar Rapids Airport FFA—Cedar Rapids Airport (IA)
- Chattanooga FFA—Chattanooga (TN) Fire Fighters Association, Local 820
- Edwardsville FFA—Edwardsville (IL) Fire Fighters Local 1700
- Greensboro FFA—Greensboro (NC)
- Hickory FFA—Hickory (NC) Firefighters Association, IAFF Local 2653
- Indiana FFA—Indiana, Professional Fire Fighters Union of
- Iowa FFA—Iowa Professional Firefighters
- Missouri FFA—Missouri State Council of Fire Fighters
- North Carolina FFA—North Carolina, Professional Fire Fighters & Paramedics of
- North Maine FFA—North Maine (Des Plaines, IL) Firefighters, IAFF Local 224
- Ottumwa FFA—Ottumwa (IA)
- Roanoke FFA—Roanoke (VA) Fire Fighters Association
- Springfield FFA—Springfield (MO) Firefighters Association, Local 52
- Sycamore FFA—Sycamore, IAFF Local 3046
- Utah FFA—Utah, Professional Firefighters of
- Vermont FFA—Vermont, Professional Firefighters of
- Wisconsin FFA—Wisconsin, Professional Fire Fighters of
- FireCo—FireCo, L.L.C.
- Fleet—FleetBoston Financial Corporation
- FOP—Fraternal Order of Police, Grand Lodge
- FPIR—Fund for Public Interest Research, Inc.
- FCA—Funeral Consumers Alliance, Inc.
- Gannett—Gannett Co., Inc.
- Gottschalks—Gottschalks, Inc.
- Greater Niagara—Greater Niagara Newspapers
- Green Mountain—Green Mountain Energy Company
- Gryphon—Gryphon Networks
- Hagel, Johnson & Carper—Joint letter from: The Honorable Chuck Hagel, Tim Johnson, and Thomas R. Carper (U.S. Senate)
- Hastings—Hastings, The Honorable Doc (U.S. House of Representatives)
- Herald Bulletin—Herald Bulletin
- Horick—Horick, Bob
- Household International:
- Household Auto—Joint comment: Household Finance Corp., OFL-A Receivables Corp., and Household Automotive
- Household Credit—Household Bank, Credit Card Services
- Household Finance—Household Finance Corporation
- Household-Montalvo—Montalvo, David
- HSBC—HSBC Bank USA
- Hudson Bay-Anderson—Hudson Bay Company of Illinois-owner
- Hudson Bay-Goodman—Hudson Bay Company-Goodman
- HRC—Human Rights Campaign
- IBM—IBM
- ICT—ICT Group, Inc.
- Illinois Police—Illinois Council of Police & Sheriffs
- Infocision—Infocision Management Corporation
- Inhofe—Inhofe, The Honorable James (U.S. Senate)
- Insight—Insight Realty, Inc.
- ITC—Interactive Teleservices Corp.
- ICFA—International Cemetery & Funeral Association
- IFA—International Franchise Association
- IUPA—International Union of Police Associations
- ICC—Internet Commerce Coalition
- Intuit—Intuit Inc.
- Italian American Police—Italian American Police Society of New Jersey
- Johnson—Johnson, The Honorable Tim (U.S. Senate)
- Kansas—Kansas, House of Representatives
- KeyCorp—KeyCorp.
- Lautman—Lautman & Associates
- LSAP—Legal Services Advocacy Project
- Leggett & Platt—Leggett & Platt
- Lenox—Lenox Inc.
- Leukemia Society—Leukemia & Lymphoma Society
- Life Share—Life Share
- Lucas—Lucas, The Honorable Ken (U.S. House of Representatives)
- MPA—Magazine Publishers Association
- Make-A-Wish—Make-A-Wish Foundation of America
- Manzullo—Manzullo, The Honorable Donald A. (U.S. House of Representatives)
- March of Dimes—March of Dimes Birth Defects Foundation
- Marketlink—Marketlink, Inc.
- MBA—Massachusetts Bankers Association
- MasterCard—MasterCard International
- MBNA—MBNA America Bank, N.A.
- McClure—McClure, Scott
- McConnell—McConnell, The Honorable Mitch (U.S. Senate)
- Metris—Metris Companies, Inc.
- Michigan Nonprofit—Michigan Nonprofit Association
- MidFirst—MidFirst Bank
- MBAA—Mortgage Bankers Association of America
- Myrick—Myrick, The Honorable Sue (U.S. House of Representatives)
- NACHA—NACHA-The Electronic Payments Association
- Nadel—Nadel, Mark S. (law review article: "Rings of Privacy: Unsolicited Telephone Calls and the Right to Privacy," 4 *Yale Journal on Regulation* 99 (Fall 1986))
- NAAG—National Association of Attorneys General
- NACAA—National Association of Consumer Agency Administrators
- NAIFA—National Association of Insurance & Financial Advisors
- NAR—National Association of Realtors
- NARUC—National Association of Regulatory Utility Commissioners
- ARVC—National Association of RV Parks & Campgrounds
- NASCO—National Association of State Charity Officials
- NASUCA—National Association of State Utility Consumer Advocates
- E-Commerce Coalition—National Business Coalition on E-Commerce & Privacy
- NCTA—National Cable & Telecommunications Association
- National Children's Cancer—National Children's Cancer Society, Inc.
- NCLC—Joint comment: National Consumer Law Center, National Association of Consumer Advocates, Consumer Federation of America, Consumers Union, and US Public Interest Research Group
- NCLF—National Children's Leukemia Foundation
- NCL—National Consumers League
- NEMA—National Energy Marketers Association
- NFPPA—National Family Privacy Protection Association
- NFIB—National Federation of Independent Business
- NFC—National Franchise Council
- NFDA—National Funeral Directors Association
- NNA—National Newspaper Association of America
- NPMA—National Pest Management Association
- NPR—National Public Radio
- NRF—National Retail Federation
- NTC—National Troopers Coalition
- Nelson—Nelson, The Honorable E. Benjamin (U.S. Senate)
- NetCoalition—NetCoalition

- Nethercutt—Nethercutt, The Honorable George R., Jr. (U.S. House of Representatives)
- NeuStar—NeuStar, Inc.
- New Orleans—New Orleans, City Council of (CNO)—Utility, Cable & Telecommunications Committee
- NJ Police—New Jersey Police Officers Foundation, Inc.
- NYSCPB—New York State Consumer Protection Board
- NAA—Newspaper Association of America
- Nextel—Nextel Communications, Inc.
- Ney, Sandlin, Jones, Shows and Cantor—Joint letter from: The Honorable Bob Ney, Max Sandlin, Walter Jones, Ronnie Shows, and Eric Cantor (U.S. House of Representatives)
- Noble—Noble Systems
- NATN—North American Telephone Network LLC
- NC Zoo—North Carolina Zoological Society
- Not-For-Profit Coalition—Not-For-Profit and Charitable Coalition
- NSDI—NSDI Teleperformance
- OSU—Ohio State University
- OTC—Ohio Troopers Coalition
- Pacesetter—Pacesetter Corporation
- PVA—Paralyzed Veterans of America
- Paramount—Paramount Lists, Inc.
- Pascrell—Pascrell, The Honorable Bill, Jr. (U.S. House of Representatives)
- Patrick—Patrick, George W.
- Paul—Paul, The Honorable Ron (U.S. House of Representatives)
- Pelland—Pelland, Paul
- PLP—Personal Legal Plans, Inc.
- Michigan Police—Police Officers Association of Michigan
- possibleNOW—possibleNOW.com, Inc.
- PRC—Privacy Rights Clearinghouse
- Private Citizen—Private Citizen, Inc.
- Proctor—Proctor, Alan
- PBP—Progressive Business Publications
- PCIC—Progressive Casualty Insurance Company
- Angel Food—Project Angel Food
- PMA—Promotion Marketing Association
- Purple Heart—Purple Heart Service Foundation, Military Order of
- Ramstad—Ramstad, The Honorable Jim (U.S. House of Representatives)
- Redish—Redish, Martin H., Esq.
- Reed Elsevier—Reed Elsevier Inc.
- Reese—Reese Brothers, Inc.
- SBC—SBC Communications Inc.
- Schrock—Schrock, The Honorable Edward L. (U.S. House of Representatives)
- Sensenbrenner—Sensenbrenner, The Honorable F. James, Jr. (U.S. House of Representatives)
- SHARE—SHARE
- SIIA—Software & Information Industry Association
- Southerland—Southerland, Inc.
- Southern Poverty—Southern Poverty Law Center
- Special Olympics—Special Olympics, Inc.
- SO-AZ—Special Olympics Arizona
- SO-CA—Special Olympics Southern California
- SO-CO—Special Olympics Colorado
- SO-CN—Special Olympics Connecticut
- SO-IA—Special Olympics Iowa
- SO-KY—Special Olympics Kentucky
- SO-MD—Special Olympics Maryland
- SO-MO—Special Olympics Missouri
- SO-MT—Special Olympics Montana
- SO-NH—Special Olympics New Hampshire
- SO-NJ—Special Olympics New Jersey
- SO-NM—Special Olympics New Mexico
- SO-NY—Special Olympics New York
- SO-VT—Special Olympics Vermont
- SO-VA—Special Olympics Virginia
- SO-WA—Special Olympics Washington
- SO-WI—Special Olympics Wisconsin
- SO-WY—Special Olympics Wyoming
- Spiegel—Spiegel, Marilyn
- Stage Door—Stage Door Music Productions, Inc.
- Statewide Appeal—Statewide Appeal Inc.
- Success Marketing—Success Marketing, Inc.
- Synergy Global—Synergy Global Networks, The
- Synergy Solutions—Synergy Solutions, Inc.
- Sytel—Sytel Limited
- Tate—Tate & Associates
- Technion—Technion Communications Corp
- TDI—Telecommunications for the Deaf, Inc.
- TeleDirect—TeleDirect International, Inc.
- Telefund—Telefund, Inc.
- Teleperformance—Teleperformance USA
- TRC—Tele-Response Center
- TeleStar—TeleStar Marketing, L.P.
- TRA—Tennessee Regulatory Authority
- Terry—Terry, The Honorable Lee (U.S. House of Representatives)
- Texas Environment—Texas Campaign for the Environment
- Texas PUC—Texas Office of Public Utility Counsel
- Thayer—Thayer, Richard E., Esq.
- Time—Time, Inc.
- Tribune—Tribune Publishing Company
- UNICOR—UNICOR: (Federal Prison Industries, Inc, DOJ), Federal Bureau of Prisons)
- DOJ—U.S. Department of Justice
- Uniway—Uniway of Coastal Georgia
- Verizon—Verizon Companies
- Virginia—Virginia Attorney General
- VISA—VISA U.S.A., Inc.
- Watts—Watts, The Honorable J.C., Jr. (U.S. House of Representatives)
- Weber—Weber, Ron & Associates, Inc.
- Wells Fargo—Wells Fargo & Company
- White—White, David T.
- WTA—Wisconsin Troopers' Association Inc.
- Worsham—Worsham, Michael C., Esq.
- YPIMA—Yellow Pages Integrated Media Association (YPIMA)
- Supplemental Comments*
- AARP-Supp.—AARP
- AOP-Supp.—Aircraft Owners and Pilots Association (Marsha Mason-Thies)
- Allstate-Supp.—Allstate Life Insurance Company
- Community Bankers-Supp.—America's Community Bankers
- AICR-Supp.—The American Institute for Cancer Research (Kathryn L. Ward)
- Red Cross-Supp.—American Red Cross
- ARDA-Supp.—The American Resort Development Association (Yartin DePoy and Stratis Pridgeon)
- ATA-Supp.—American Teleservices Association
- Associations-Supp.—Associations Letter
- Avinta-Supp.—Avinta (Abe Chen)
- Bond-Supp.—Bond, The Honorable Christopher S. (U.S. Senate)
- Celebrity Prime Foods-Supp.—Celebrity Prime Foods
- Chesapeake-Supp.—The Chesapeake Bay Foundation (Amelia Koch and Melissa Livingston)
- Christian Appalachian-Supp.—The Christian Appalachian Project
- Comic Relief-Supp.—Comic Relief, Inc. (Dennis Albaigh)
- Covington & Burling-Supp.—Covington and Burling
- DialAmerica-Supp.—DialAmerica Marketing, Inc.
- DMA Letter-Supp.—Direct Marketing Association-Transmittal Letter
- DMA Study-Supp.—Direct Marketing Association-Study
- ERA and PMA-Supp.—Electronic Retailing Association and Promotion Marketing Association
- EPI-Supp.—Enterprise Prison Institute
- Domenici-Supp.—Domenici, The Honorable Pete V. (U.S. Senate)
- FDS-Supp.—Federation Department Stores
- Hoar-Supp.—Hoar, Wesley C.
- Illinois-Supp.—Illinois Attorney General's Office
- ICTA-Supp.—Industry Council for Tangible Assets
- Luntz-Supp.—Luntz Research Companies (Chrys Lemon)
- MPA-Supp.—Magazine Publishers of America
- Maryland-Supp.—Maryland Attorney General's Office (Carol Beyers)
- McIntyre-Supp.—McIntyre Law Firm, PLLC (Chrys Lemon)
- McKenna-Supp.—McKenna, Douglas M.
- Memberworks-Supp.—Memberworks National Survey Topline (Chrys Lemon)
- Minnesota-Supp.—Minnesota Attorney General's Office
- Missouri-Supp.—Missouri Attorney General's Office
- NACDS-Supp.—National Association of Chain Drug Stores
- Ney, Sandlin, Jones, Shows and Cantor-Supp.—Joint letter from: The Honorable Bob Ney, Max Sandlin, Walter Jones, Ronnie Shows, and Eric Cantor (U.S. House of Representatives)
- NAR-Supp.—National Association of Realtors
- NWF-Supp.—National Wildlife Federation
- NAA June 28-Supp.—Newspaper Association of America (John F. Sturm)
- NAA July 31-Supp.—Newspaper Association of America
- Not-For-Profit Coalition-Supp.—Not-For-Profit and Charitable Coalition
- PMA-Supp.—Promotion Marketing Association
- Putnam-Supp.—Putnam, The Honorable Adam H. (U.S. House of Representatives)
- Riley-Supp.—Riley, The Honorable Bob (U.S. House of Representatives)
- SBC-Supp.—SBC Communications Inc.
- Time-Supp.—Time, Inc.
- Vermont-Supp.—Vermont Attorney General's Office
- WWF-Supp.—World Wildlife Fund (Deborah Hechinger)
- Worsham-Supp.—Worsham, Michael C.
- User Fee Comments*
- AARP-User Fee—AARP

ABA-User Fee—American Bankers Association
 Red Cross-User Fee—American Red Cross
 ARDA-User Fee—American Resort Development Association
 ATA-User Fee—American Teleservices Association
 Community Bankers-User Fee—America's Community Bankers
 Ameriquest-User Fee—Ameriquest Mortgage Company
 Celebrity Prime Foods-User Fee—Celebrity Prime Foods
 CBA-User Fee—Consumer Bankers Association
 DialAmerica-User Fee—DialAmerica Marketing, Inc.
 DMA Letter-User Fee—Direct Marketing Association
 DMA Comments-User Fee—Direct Marketing Association
 Discover-User Fee—Discover Bank
 ERA/PMA-User Fee—Electronic Retailing Association and Promotion Marketing Association (joint comment)
 Household-User Fee—Household Bank (SB), N.A. and Household Bank (Nevada), N.A. (joint comment)
 Hudson Bay-User Fee—Hudson Bay Company of Illinois, Inc.
 ICTA-User Fee—Industry Council for Tangible Assets
 InfoCision-User Fee—InfoCision Management Corporation
 ITC-User Fee—Interactive Teleservices Corporation
 MPA-User Fee—Magazine Publishers of America
 MasterCard-User Fee—MasterCard International, Inc.
 NACDS-User Fee—National Association of Chain Drug Stores
 NAR-User Fee—National Association of Realtors
 NASUCA-User Fee—National Association of State Utility Consumer Advocates
 NEMA-User Fee—National Energy Marketers Association
 Not-For-Profit Coalition-User Fee—Not-For-Profit and Charitable Coalition
 SBC-User Fee—SBC Communications, Inc.
 Tennessee-User Fee—Tennessee Regulatory Authority
 SBA-User Fee—United States Small Business Administration, Office of Advocacy
 Visa-User Fee—Visa U.S.A., Inc.
 Wells Fargo-User Fee—Wells Fargo & Company

Concurring Statement of Commissioner Orson Swindle in *Telemarketing Sales Rule*, File No. R411001

I wholeheartedly support the amendments to the Telemarketing Sales Rule ("TSR"), because I believe that they will help protect consumers from deceptive and abusive telemarketing practices. In particular, these amendments will give consumers the ability to avoid the sheer volume of unwanted telemarketing calls that many consider to be a nuisance. I write separately to explain my views on two issues — how the Commission determines whether an act or practice is

"abusive" for purposes of the TSR, and the national do-not-call registry.

Abusive Telemarketing Acts or Practices

The Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act") directs the Commission to promulgate rules that prohibit "deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." 15 U.S.C. 6102 (a)(1). To determine what constitutes an abusive telemarketing practice, the Commission for the most part has used the examples of abusive practices that Congress provided in the Telemarketing Act and principles drawn from these examples. I agree that this is an appropriate analysis, and in light of the rulemaking record as a whole, I fully support the TSR amendments that fall within these parameters. These amendments include, among other things, the provisions involving the national do-not-call registry, transmission of caller identification information, and abandoned calls and predictive dialers.

When the Commission seeks to identify practices as abusive that are less distinctly within the parameters of the Act's examples and their emphasis on privacy protection, the Commission employs its traditional unfairness analysis.¹ I understand the Commission's intention to narrow the potentially expansive scope of the term "abusive" by using its unfairness analysis. However, given the broad ordinary meaning of the term "abusive," I believe that the standard for determining what constitutes an abusive telemarketing practice likely is broader than the stringent definition of the term "unfair." Therefore, I would have preferred it had the Commission looked to the plain meaning of the term "abusive" and then formulated a separate standard to identify abusive

¹ Given that nothing in the language of the Telemarketing Act or its legislative history indicates that Congress intended the Commission to use its unfairness standard to determine which practices are abusive, I previously raised concerns about this analysis and requested comment on this issue. *Concurring Statement of Commissioner Orson Swindle in Telemarketing Sales Rule Review*, File No. R411001, available at (www.ftc.gov/os/2002/01/swindletsrstatement.htm). Although some comments agreed with this concern, they did not offer an alternative analysis of abusive practices beyond suggesting that the Commission's authority is limited to the examples of abusive practices included in the Telemarketing Act and its legislative history. See *Statement of Basis and Purpose* at 100, n. 428. However, because the Act does not limit the Commission's authority to identify abusive practices to the examples in the Act, the Commission may prohibit other practices that it identifies as abusive.

telemarketing practices for purposes of the Telemarketing Act and the TSR.

Nevertheless, I agree with the Commission's conclusion that a telemarketing practice that meets the strict unfairness standard will constitute an abusive practice for purposes of the Act and the TSR. In light of the rulemaking record, I therefore support the TSR amendments that are analyzed under this standard. This includes the requirement that telemarketers obtain consumers' or donors' express informed consent before causing their information to be submitted for payment. The rulemaking record evidences the harm that results from unauthorized billing, the need for the consent requirement, and the need to mandate specific steps that telemarketers must take to obtain consumers' consent in transactions involving preacquired account information.

In addition, the record supports the prohibition on the disclosure or receipt, for consideration, of unencrypted account numbers for use in telemarketing (except to process a payment for goods or services or a charitable contribution pursuant to a transaction). I do not believe that the mere disclosure of personal financial information, without more, causes or is likely to cause substantial consumer injury. In this situation, however, the rulemaking record provides a basis for concluding that trafficking in unencrypted account numbers is likely to cause substantial consumer injury in the form of unauthorized billing. Industry comments state that there is no legitimate reason to purchase unencrypted lists of credit card numbers. Therefore, there is a strong likelihood that telemarketers who do engage in this practice will misuse the information in a manner that results in unauthorized charges to consumers' accounts. The Commission's law enforcement experience corroborates this conclusion.² As a result, I conclude that this practice is abusive for purposes of the Telemarketing Act.

The National Do-Not-Call Registry

The Telemarketing Act and the TSR recognize consumers' "right to be let alone." See, e.g., *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (stating that the "right to be let alone" is the "most comprehensive of rights and the right most valued by

² See *Statement of Basis and Purpose* at 97-98. In addition, given the evidence that the use of encrypted account information in telemarketing can result in unauthorized charges, there is an even greater likelihood that injury will occur when a telemarketer has obtained, for consideration, consumers' actual credit card numbers.

civilized men”). In the context of telemarketing, there is an inherent tension between this right and the First Amendment’s right to free speech. With this in mind, and in light of the rulemaking record as a whole, the Commission has determined to establish a national do-not-call registry. This will enable consumers to stop certain telemarketing calls — calls to induce the purchase of goods and services from companies within the FTC’s jurisdiction (except where the consumer has an “established business relationship” with the seller).

Although the USA PATRIOT Act of 2001 gave the Commission authority to regulate for-profit companies that make telephone calls seeking charitable donations on behalf of charities, the Commission has determined to exempt these entities from the national do-not-call registry requirements. Instead, the Commission requires these telemarketers to comply with the “entity-specific” do-not-call provision, which prohibits them from calling

consumers who have said they do not want to be called by or on behalf of a particular entity. This more narrowly tailored approach seeks to protect consumers from unwanted telemarketing calls seeking charitable donations, while minimizing the impact of the TSR on charities’ First Amendment rights. I do not object to taking this approach at the outset; but if there is evidence that suggests that this approach is not effective in protecting consumers from unsolicited telemarketing calls, the Commission should revisit this decision and require for-profit telemarketers seeking charitable donations to comply with the national do-not-call registry.

While I believe that the amended TSR and the national do-not-call registry will go a long way to help consumers prevent unwanted intrusions into their homes, a number of entities are not subject to the TSR’s requirements. Under the Telemarketing Act and the TSR, the Commission does not have jurisdiction in whole or in part over the

calls of entities such as banks, telephone companies, airlines, insurance companies, credit unions, charities, political campaigns, and political fund-raisers. From the perspective of consumers, the right to be let alone is invaded just as much by unwanted calls from exempt entities (e.g., banks, telephone companies, or political fund-raisers) as it is by such calls from covered entities.³ Therefore, I believe that the entire spectrum of entities that make telemarketing calls to consumers should be subject to do-not-call requirements.

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³ The Federal Communications Commission, however, has requested comment on whether to establish a national do-not-call registry that would address telemarketing calls by at least some of the entities that are exempt from the FTC’s jurisdiction. *Notice of Proposed Rulemaking*, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 67 FR 62667 (Oct. 8, 2002).



Do Not Call Register Act 2006

No. 88, 2006

**An Act to establish a Do Not Call Register, and for
other purposes**

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Do Not Call Register Act 2006

No. 88, 2006

An Act to establish a Do Not Call Register, and for other purposes

[Assented to 30 June 2006]

The Parliament of Australia enacts:

Part 1—Introduction

1 Short title

This Act may be cited as the *Do Not Call Register Act 2006*.

Section 2

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 and 2 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	30 June 2006
2. Sections 3 to 9	The day on which this Act receives the Royal Assent.	30 June 2006
3. Part 2	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 12 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	
4. Part 3	The day on which this Act receives the Royal Assent.	30 June 2006
5. Parts 4 and 5	At the same time as the provision(s) covered by table item 3.	
6. Sections 39 and 40	At the same time as the provision(s) covered by table item 3.	
7. Section 41	The day on which this Act receives the Royal Assent.	30 June 2006
8. Sections 42 to 45	At the same time as the provision(s) covered by table item 3.	
9. Section 46	The day on which this Act receives the Royal Assent.	30 June 2006
10. Schedules 1, 2 and 3	At the same time as the provision(s) covered by table item 3.	

Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Simplified outline

The following is a simplified outline of this Act:

- Unsolicited telemarketing calls must not be made to a number registered on the Do Not Call Register.
- The main remedies for breaches of this Act are civil penalties and injunctions.

Note: The *Telecommunications Act 1997* contains additional provisions about telemarketing calls. Those provisions include Part 6 (industry codes and standards), Part 26 (investigations), Part 27 (information-gathering powers) and Part 31A (enforceable undertakings).

4 Definitions

In this Act:

account includes:

- (a) a free account; and
- (b) a pre-paid account; and
- (c) anything that may reasonably be regarded as the equivalent of an account.

ACMA means the Australian Communications and Media Authority.

acquire, when used in relation to goods or services, has the same meaning as in the *Trade Practices Act 1974*.

agency includes:

- (a) an armed force; and
- (b) a police force.

Section 4

Australia, when used in a geographical sense, includes the eligible Territories.

Australian number means a number that is:

- (a) specified in the numbering plan referred to in section 455 of the *Telecommunications Act 1997*; and
- (b) for use in connection with the supply of carriage services to the public in Australia (within the meaning of that section).

authorise, when used in relation to the making of a telemarketing call, has a meaning affected by clause 6 of Schedule 1.

authorised officer means:

- (a) the Chair of the ACMA; or
- (b) a member of the staff of the ACMA appointed under clause 8 of Schedule 3.

business includes a venture or concern in trade or commerce, whether or not conducted on a regular, repetitive or continuous basis.

candidate means a person who has been nominated as a candidate under:

- (a) the *Commonwealth Electoral Act 1918*; or
- (b) a law of a State or Territory that deals with electoral matters.

carriage service has the same meaning as in the *Telecommunications Act 1997*.

cause has a meaning affected by subsection 11(9).

civil contravention means a contravention of a civil penalty provision.

civil penalty order means an order under subsection 24(1).

civil penalty provision means any of the following provisions:

- (a) subsection 11(1);
- (b) subsection 11(7);
- (c) subsection 12(1);
- (d) subsection 12(2);

(e) a provision of the regulations that is declared to be a civil penalty provision in accordance with paragraph 44(2)(c).

consent, when used in relation to the making of a telemarketing call, has the meaning given by Schedule 2.

contracted service provider means the person (if any) who keeps the Do Not Call Register as mentioned in paragraph 13(1)(b).

data processing device has the same meaning as in the *Telecommunications Act 1997*.

dealing with, in relation to a telemarketing call, includes retrieving the call from a voicemail system or similar system.

designated telemarketing call has the meaning given by Schedule 1.

director includes a member of the governing body of an organisation.

Do Not Call Register means the register kept under section 13.

educational institution includes:

- (a) a pre-school; and
- (b) a school; and
- (c) a college; and
- (d) a university.

eligible Territory means:

- (a) the Territory of Christmas Island; or
- (b) the Territory of Cocos (Keeling) Islands; or
- (c) an external Territory prescribed for the purposes of section 8.

employee has a meaning affected by clause 7 of Schedule 1.

employer has a meaning affected by clause 7 of Schedule 1.

evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Federal Court means the Federal Court of Australia.

Section 4

goods has the same meaning as in the *Trade Practices Act 1974*.

government body means:

- (a) a department of the Commonwealth, a State or a Territory; or
- (b) an agency, authority or instrumentality of the Commonwealth, a State or a Territory; or
- (c) a department of the government of a foreign country; or
- (d) an agency, authority or instrumentality of the government of a foreign country; or
- (e) a department of the government of a part of a foreign country; or
- (f) an agency, authority or instrumentality of the government of a part of a foreign country.

infringement notice means an infringement notice under clause 2 of Schedule 3.

international convention means:

- (a) a convention to which Australia is a party; or
- (b) an agreement between Australia and a foreign country.

investment means any mode of application of money or other property for the purpose of gaining a return (whether by way of income, capital gain or any other form of return).

make includes attempt to make.

mistake means reasonable mistake of fact.

nominee has the meaning given by section 39.

organisation includes:

- (a) a body corporate; and
- (b) a partnership; and
- (c) a government body; and
- (d) a court or tribunal; and
- (e) an unincorporated body or association.

Express references in this Act to organisations do not imply that references in this Act to persons do not include bodies politic or corporate.

Note: Paragraph 22(1)(a) of the *Acts Interpretation Act 1901* provides that **person** includes a body politic or corporate as well as an individual.

penalty unit has the meaning given by section 4AA of the *Crimes Act 1914*.

person includes a partnership.

Note: For treatment of partnerships, see section 585 of the *Telecommunications Act 1997*.

publish includes:

- (a) publish on the Internet; and
- (b) publish to the public or a section of the public.

registered political party means a political party, or a branch or division of a political party, that is registered under:

- (a) the *Commonwealth Electoral Act 1918*; or
- (b) a law of a State or Territory that deals with electoral matters.

relevant telephone account-holder, in relation to a telephone number, means:

- (a) if an individual or organisation is solely responsible for the relevant telephone account—the individual or organisation; or
- (b) if 2 or more individuals and/or organisations are jointly responsible for the relevant telephone account—any of those individuals or organisations.

services has the same meaning as in the *Trade Practices Act 1974*.

supply:

- (a) when used in relation to goods or services—has the same meaning as in the *Trade Practices Act 1974*; or
- (b) when used in relation to land—includes transfer; or
- (c) when used in relation to an interest in land—includes transfer or create.

telemarketing call has the meaning given by section 5.

voice call means:

- (a) a voice call within the ordinary meaning of that expression; or

Section 5

- (b) a call that involves a recorded or synthetic voice; or
- (c) if a call covered by paragraph (a) or (b) is not practical for a particular recipient with a disability (for example, because the recipient has a hearing impairment)—a call that is equivalent to a call covered by either of those paragraphs; whether or not the recipient responds by way of pressing buttons on a telephone handset or similar thing.

5 Telemarketing calls

Basic definition

- (1) For the purposes of this Act, a **telemarketing call** is a voice call to a telephone number, where, having regard to:
- (a) the content of the call; and
 - (b) the presentational aspects of the call; and
 - (c) the content that can be obtained using the telephone numbers, URLs or contact information (if any) mentioned in the call; and
 - (d) if the telephone number from which the call is made is disclosed to the recipient (whether by calling line identification or otherwise)—the content (if any) that can be obtained by calling that telephone number;
- it would be concluded that the purpose, or one of the purposes, of the call is:
- (e) to offer to supply goods or services; or
 - (f) to advertise or promote goods or services; or
 - (g) to advertise or promote a supplier, or prospective supplier, of goods or services; or
 - (h) to offer to supply land or an interest in land; or
 - (i) to advertise or promote land or an interest in land; or
 - (j) to advertise or promote a supplier, or prospective supplier, of land or an interest in land; or
 - (k) to offer to provide a business opportunity or investment opportunity; or
 - (l) to advertise or promote a business opportunity or investment opportunity; or

- (m) to advertise or promote a provider, or prospective provider, of a business opportunity or investment opportunity; or
 - (n) to solicit donations; or
 - (o) a purpose specified in the regulations.
- (2) For the purposes of paragraphs (1)(e) to (m), it is immaterial whether the goods, services, land, interest or opportunity exists.
 - (3) For the purposes of paragraphs (1)(e) to (m), it is immaterial whether it is lawful to acquire the goods, services, land or interest or take up the opportunity.
 - (4) Either of the following:
 - (a) the supplier or prospective supplier mentioned in paragraph (1)(g) or (j);
 - (b) the provider or prospective provider mentioned in paragraph (1)(m);may be the individual or organisation who made the call or authorised the making of the call.
 - (5) Paragraphs (1)(e) to (o) are to be read independently of each other.
 - (6) Subsection (1) has effect subject to subsection (7).

Excluded calls—regulations

- (7) The regulations may provide that a specified kind of voice call is not a *telemarketing call* for the purposes of this Act.

6 Continuity of partnerships

For the purposes of this Act, a change in the composition of a partnership does not affect the continuity of the partnership.

7 Crown to be bound

- (1) This Act binds the Crown in each of its capacities.
- (2) This Act does not make the Crown liable to a pecuniary penalty or to be prosecuted for an offence.

Section 8

- (3) The protection in subsection (2) does not apply to an authority of the Crown.

8 Extension to external Territories

This Act extends to:

- (a) the Territory of Christmas Island; and
- (b) the Territory of Cocos (Keeling) Islands; and
- (c) such other external Territories (if any) as are prescribed.

9 Extra-territorial application

Unless the contrary intention appears, this Act extends to acts, omissions, matters and things outside Australia.

Part 2—Rules about making telemarketing calls

10 Simplified outline

The following is a simplified outline of this Part:

- Unsolicited telemarketing calls must not be made to a number registered on the Do Not Call Register.
- Agreements for the making of telemarketing calls must require compliance with this Act.

11 Unsolicited telemarketing calls must not be made to a number registered on the Do Not Call Register

- (1) A person must not make, or cause to be made, a telemarketing call to an Australian number if:
- (a) the number is registered on the Do Not Call Register; and
 - (b) the call is not a designated telemarketing call.

Note: For *designated telemarketing call*, see Schedule 1.

- (2) Subsection (1) does not apply if:
- (a) the relevant telephone account-holder; or
 - (b) a nominee of the relevant telephone account-holder; consented to the making of the call.

Note 1: For the meaning of *consent*, see Schedule 2.

Note 2: For the meaning of *nominee*, see section 39.

- (3) Subsection (1) does not apply if:
- (a) the number was included on a list that was submitted by the person under subsection 19(1); and
 - (b) during the 30-day period ending at the end of the day on which the call was made:
 - (i) the person received information under subparagraph 19(2)(d)(i) in response to the submission of the list, but

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that information did not state that the number was registered on the Do Not Call Register; or

- (ii) the person was informed under subparagraph 19(2)(d)(ii), in response to the submission of the list, that the number was not registered on the Do Not Call Register; or
- (iii) under subsection 19(3), in response to the submission of the list, the person was given a list that included the number.

For the purposes of this subsection, a list may consist of a single telephone number.

Note: Section 19 deals with access to the Do Not Call Register.

- (4) Subsection (1) does not apply if the person made the call, or caused the call to be made, by mistake.
- (5) Subsection (1) does not apply if the person took reasonable precautions, and exercised due diligence, to avoid the contravention.
- (6) A person who wishes to rely on subsection (2), (3), (4) or (5) bears an evidential burden in relation to that matter.

Ancillary contraventions

- (7) A person must not:
 - (a) aid, abet, counsel or procure a contravention of subsection (1); or
 - (b) induce, whether by threats or promises or otherwise, a contravention of subsection (1); or
 - (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of subsection (1); or
 - (d) conspire with others to effect a contravention of subsection (1).

Civil penalty provisions

- (8) Subsections (1) and (7) are ***civil penalty provisions***.

Note: Part 4 provides for pecuniary penalties for breaches of civil penalty provisions.

Extended meaning of cause

- (9) For the purposes of this section, if:
- (a) a person (the *first person*) enters into a contract or arrangement, or arrives at an understanding, with another person; and
 - (b) under the contract, arrangement or understanding, the other person undertakes to make, or to cause any or all of the employees or agents of the other person to make, telemarketing calls; and
 - (c) the other person, or an employee or agent of the other person, gives effect to the contract, arrangement or understanding by making a telemarketing call;
- the first person is taken to have *caused* the telemarketing call to be made.
- (10) Paragraph (9)(a) applies to contracts or arrangements entered into, or understandings arrived at, before, at or after the commencement of this section.

12 Agreements for the making of telemarketing calls must require compliance with this Act

- (1) A person (the *first person*) must not enter into a contract or arrangement, or arrive at an understanding, with another person, if:
- (a) under the contract, arrangement or understanding, the other person undertakes to:
 - (i) make telemarketing calls; or
 - (ii) cause any or all of the employees or agents of the other person to make telemarketing calls; and
 - (b) there is a reasonable likelihood that some or all of those calls will be made to telephone numbers that, under section 14, are eligible to be entered on the Do Not Call Register; and
 - (c) the contract, arrangement or understanding does not contain an express provision to the effect that the other person will:
 - (i) in any case—comply with this Act; and
 - (ii) if subparagraph (a)(ii) applies—take all reasonable steps to ensure that the employees and agents of the other person comply with this Act;

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in relation to the making of telemarketing calls covered by the contract, arrangement or understanding.

Ancillary contraventions

- (2) A person must not:
- (a) aid, abet, counsel or procure a contravention of subsection (1); or
 - (b) induce, whether by threats or promises or otherwise, a contravention of subsection (1); or
 - (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of subsection (1); or
 - (d) conspire with others to effect a contravention of subsection (1).

Civil penalty provisions

- (3) Subsections (1) and (2) are ***civil penalty provisions***.

Note: Part 4 provides for pecuniary penalties for breaches of civil penalty provisions.

Validity of contracts, arrangements or understandings

- (4) A failure to comply with subsection (1) does not affect the validity of any contract, arrangement or understanding.

Part 3—Do Not Call Register

13 Do Not Call Register

- (1) The ACMA must:
 - (a) keep; or
 - (b) arrange for another person (the *contracted service provider*) to keep, on behalf of the ACMA;
a register of telephone numbers for the purposes of this Act.
- (2) The register is to be known as the Do Not Call Register.
- (3) The register is to be kept in electronic form.
- (4) The register is not a legislative instrument.
- (5) The ACMA must begin to comply with subsection (1) as soon as practicable after the commencement of this section.
- (6) For the purposes of the *Privacy Act 1988*, the primary purpose of the Do Not Call Register is to facilitate the prohibition, under section 11, of unsolicited telemarketing calls (other than designated telemarketing calls).

14 Eligibility for registration

A telephone number is eligible to be entered on the Do Not Call Register if:

- (a) it is an Australian number; and
- (b) it is used or maintained exclusively or primarily for private or domestic purposes; and
- (c) it is not used or maintained exclusively for transmitting and/or receiving faxes.

15 Applications for registration

An application for a telephone number to be entered on the Do Not Call Register:

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- (a) may be made by:
 - (i) the relevant telephone account-holder; or
 - (ii) a nominee of the relevant telephone account-holder; and
- (b) is to be made to:
 - (i) if the Do Not Call Register is kept by the ACMA—the ACMA; or
 - (ii) if the Do Not Call Register is kept by the contracted service provider—the contracted service provider on behalf of the ACMA; and
- (c) is to be in the applicable form (if any) specified in a determination under subsection 18(1); and
- (d) is to be made in the applicable manner (if any) specified in a determination under subsection 18(1).

Note: For the meaning of *nominee*, see section 39.

16 Registration

If:

- (a) an application is made for a telephone number to be entered on the Do Not Call Register; and
- (b) the applicant satisfies:
 - (i) if the Do Not Call Register is kept by the ACMA—the ACMA; or
 - (ii) if the Do Not Call Register is kept by the contracted service provider—the contracted service provider on behalf of the ACMA;

that the number is eligible to be entered on the Do Not Call Register;

then:

- (c) if the Do Not Call Register is kept by the ACMA—the ACMA; or
- (d) if the Do Not Call Register is kept by the contracted service provider—the contracted service provider on behalf of the ACMA;

must enter the number on the Do Not Call Register.

17 Duration of registration

- (1) The registration of a telephone number on the Do Not Call Register:
 - (a) takes effect when it is entered on the Do Not Call Register; and
 - (b) remains in force for 3 years, unless sooner removed from the Do Not Call Register in accordance with a determination under subsection 18(1).
- (2) If the registration of a telephone number on the Do Not Call Register ceases to be in force, this Act does not prevent the number from being re-registered on the Do Not Call Register.
- (3) If a telephone number is removed from the Do Not Call Register, this Act does not prevent the number from being re-registered on the Do Not Call Register.

18 Administration of the Do Not Call Register—determinations

- (1) The ACMA may make a determination that makes provision for and in relation to any or all of the following:
 - (a) the form of applications for telephone numbers to be entered on the Do Not Call Register;
 - (b) the manner in which such applications are to be made;
 - (c) the manner in which entries are to be made on the Do Not Call Register;
 - (d) the correction of entries in the Do Not Call Register;
 - (e) the removal of entries from the Do Not Call Register;
 - (f) any other matter relating to the administration or operation of the Do Not Call Register.
- (2) A determination under subsection (1) is a legislative instrument.
- (3) A determination under subsection (1) is to be an instrument of a legislative character.

19 Access to the Do Not Call Register

- (1) A person (the *access-seeker*) who wishes to access the Do Not Call Register may submit a list of telephone numbers to:
-

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- (a) if the Do Not Call Register is kept by the ACMA—the ACMA; or
- (b) if the Do Not Call Register is kept by the contracted service provider—the contracted service provider on behalf of the ACMA.

For this purpose, a list may consist of a single telephone number.

- (2) If the access-seeker has paid the applicable fee (if any) determined under subsection 21(1), then:

- (a) if the Do Not Call Register is kept by the ACMA—the ACMA; or
- (b) if the Do Not Call Register is kept by the contracted service provider—the contracted service provider on behalf of the ACMA;

must:

- (c) check the telephone numbers on the access-seeker's list against the telephone numbers registered on the Do Not Call Register; and

(d) either:

- (i) inform the access-seeker which numbers (if any) on the access-seeker's list are registered on the Do Not Call Register; or
- (ii) inform the access-seeker which numbers (if any) on the access-seeker's list are not registered on the Do Not Call Register.

- (3) The ACMA, or the contracted service provider, as the case requires, may comply with subparagraph (2)(d)(ii) by returning the access-seeker's list, modified by the deletion of the numbers (if any) registered on the Do Not Call Register.
- (4) A submission under subsection (1) is to be made in the applicable manner (if any) specified in a determination under subsection 20(1).

20 Access—determinations

- (1) The ACMA may make a determination that makes provision for and in relation to any or all of the following:

- (a) the manner in which a submission under subsection 19(1) is to be made;
- (b) the manner in which information under paragraph 19(2)(d) is to be given;
- (c) the manner in which a list is to be returned under subsection 19(3);
- (d) any other matter relating to access to the Do Not Call Register.

Determinations

- (2) A determination under subsection (1) is a legislative instrument.
- (3) A determination under subsection (1) is to be an instrument of a legislative character.

21 Access—fees

- (1) The ACMA may make a determination that makes provision for and in relation to either or both of the following:
 - (a) fees payable for services provided under subsection 19(2) or (3);
 - (b) refunds of fees for those services.

Exemptions

- (2) The ACMA may make a determination that makes provision for and in relation to exemptions from fees for services provided under subsection 19(2) or (3).
- (3) The Minister may make a determination that makes provision for and in relation to exemptions from fees for services provided under subsection 19(2) or (3).
- (4) If one or more determinations are in force under subsection (3), a determination under subsection (2) has no effect except to the extent to which it makes provision for and in relation to exemptions that are in addition to exemptions dealt with by the determinations under subsection (3).

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Other matters

- (5) A fee must not be such as to amount to taxation.
- (6) A fee is payable to the ACMA on behalf of the Commonwealth.
- (7) Section 60 of the *Australian Communications and Media Authority Act 2005* does not apply in relation to services provided under subsection 19(2) or (3).

Note: Section 60 of the *Australian Communications and Media Authority Act 2005* deals with charges relating to the ACMA's expenses.

Determinations

- (8) A determination under subsection (1), (2) or (3) is a legislative instrument.
- (9) A determination under subsection (1), (2), or (3) is to be an instrument of a legislative character.

22 Application of the *Privacy Act 1988* to the contracted service provider

- (1) For the purposes of the *Privacy Act 1988*, if the Do Not Call Register is kept by the contracted service provider under a contract:
 - (a) the keeping of the Do Not Call Register by the contracted service provider; and
 - (b) the operation of the Do Not Call Register by the contracted service provider; and
 - (c) the performance of a function, or the exercise of a power, by the contracted service provider under:
 - (i) this Part; or
 - (ii) a determination under this Part;is taken to be the provision of a service to the ACMA under the contract.
- (2) Subsection (1) is enacted for the avoidance of doubt.

Part 4—Civil penalties

23 Simplified outline

The following is a simplified outline of this Part:

- Pecuniary penalties are payable for contraventions of civil penalty provisions.
- Proceedings for the recovery of penalties are to be instituted in the Federal Court or the Federal Magistrates Court.

Note: Schedule 3 sets up a system of infringement notices relating to contraventions of civil penalty provisions.

24 Civil penalty orders

- (1) If the Federal Court or the Federal Magistrates Court is satisfied that a person has contravened a civil penalty provision, the court may, on the application of the ACMA, order the person to pay to the Commonwealth a pecuniary penalty.
- (2) An order under subsection (1) is to be known as a *civil penalty order*.

Determining pecuniary penalty

- (3) In determining the pecuniary penalty, the court must have regard to all relevant matters, including:
 - (a) the nature and extent of the contravention; and
 - (b) the nature and extent of any loss or damage suffered as a result of the contravention; and
 - (c) the circumstances in which the contravention took place; and
 - (d) whether the person has previously been found by a court in proceedings under this Act to have engaged in any similar conduct; and

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- (e) if the court considers that it is appropriate to do so—whether the person has previously been found by a court in a foreign country to have engaged in any similar conduct.

Civil enforcement of penalty

- (4) The pecuniary penalty is a civil debt payable to the Commonwealth. The Commonwealth may enforce the civil penalty order as if it were an order made in civil proceedings against the person to recover a debt due by the person. The debt arising from the order is taken to be a judgment debt.

25 Maximum penalties for contravention of civil penalty provisions

- (1) The maximum penalty payable under subsection 24(1) by a person in respect of a contravention of a civil penalty provision depends on:
 - (a) whether the person has a prior record in relation to the civil penalty provision (see subsection (2)); and
 - (b) whether the person is a body corporate; and
 - (c) whether the civil penalty provision is subsection 11(1) or (7).

Prior record

- (2) If:
 - (a) on a particular day (the ***first day***), the Federal Court or the Federal Magistrates Court makes a civil penalty order against a person in respect of a contravention of a particular civil penalty provision; and
 - (b) that is the first occasion on which a court makes a civil penalty order against the person in respect of a contravention of the civil penalty provision;then, for the purposes of determining the penalty payable under subsection 24(1) by the person in respect of a contravention of the civil penalty provision that occurs after the first day, the person has a ***prior record*** in relation to the civil penalty provision.

Maximum penalty payable by body corporate—no prior record

- (3) If a body corporate does not have a prior record in relation to a particular civil penalty provision:
- (a) the penalty payable under subsection 24(1) by the body corporate in respect of a contravention of the civil penalty provision must not exceed:
 - (i) if the civil penalty provision is subsection 11(1) or (7)—100 penalty units; or
 - (ii) in any other case—50 penalty units; and
 - (b) if the Federal Court or the Federal Magistrates Court finds that the body corporate has, on a particular day, committed 2 or more contraventions of the civil penalty provision—the total of the penalties payable under subsection 24(1) by the body corporate in respect of those contraventions must not exceed:
 - (i) if the civil penalty provision is subsection 11(1) or (7)—2,000 penalty units; or
 - (ii) in any other case—1,000 penalty units.

Maximum penalty payable by a person other than a body corporate—no prior record

- (4) If a person other than a body corporate does not have a prior record in relation to a particular civil penalty provision:
- (a) the penalty payable under subsection 24(1) by the person in respect of a contravention of the civil penalty provision must not exceed:
 - (i) if the civil penalty provision is subsection 11(1) or (7)—20 penalty units; or
 - (ii) in any other case—10 penalty units; and
 - (b) if the Federal Court or the Federal Magistrates Court finds that the person has, on a particular day, committed 2 or more contraventions of the civil penalty provision—the total of the penalties payable under subsection 24(1) by the person in respect of those contraventions must not exceed:
 - (i) if the civil penalty provision is subsection 11(1) or (7)—400 penalty units; or
 - (ii) in any other case—200 penalty units.

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Maximum penalty payable by body corporate—prior record

- (5) If a body corporate has a prior record in relation to a particular civil penalty provision:
- (a) the penalty payable under subsection 24(1) by the body corporate in respect of a contravention of the civil penalty provision must not exceed:
 - (i) if the civil penalty provision is subsection 11(1) or (7)—500 penalty units; or
 - (ii) in any other case—250 penalty units; and
 - (b) if the Federal Court or the Federal Magistrates Court finds that the body corporate has, on a particular day, committed 2 or more contraventions of the civil penalty provision—the total of the penalties payable under subsection 24(1) by the body corporate in respect of those contraventions must not exceed:
 - (i) if the civil penalty provision is subsection 11(1) or (7)—10,000 penalty units; or
 - (ii) in any other case—5,000 penalty units.

Maximum penalty payable by a person other than a body corporate—prior record

- (6) If a person other than a body corporate has a prior record in relation to a particular civil penalty provision:
- (a) the penalty payable under subsection 24(1) by the person in respect of a contravention of the civil penalty provision must not exceed:
 - (i) if the civil penalty provision is subsection 11(1) or (7)—100 penalty units; or
 - (ii) in any other case—50 penalty units; and
 - (b) if the Federal Court or the Federal Magistrates Court finds that the person has, on a particular day, committed 2 or more contraventions of the civil penalty provision—the total of the penalties payable under subsection 24(1) by the person in respect of those contraventions must not exceed:
 - (i) if the civil penalty provision is subsection 11(1) or (7)—2,000 penalty units; or
 - (ii) in any other case—1,000 penalty units.

26 2 or more proceedings may be heard together

The Federal Court or the Federal Magistrates Court may direct that 2 or more proceedings for civil penalty orders are to be heard together.

27 Time limit for application for an order

Proceedings for a civil penalty order may be started no later than 6 years after the contravention.

28 Civil evidence and procedure rules for civil penalty orders

The Federal Court or the Federal Magistrates Court must apply the rules of evidence and procedure for civil matters when hearing proceedings for a civil penalty order.

29 Criminal proceedings not to be brought for contravention of civil penalty provisions

Criminal proceedings do not lie against a person only because the person has contravened a civil penalty provision.

30 Ancillary orders—compensation

(1) If:

- (a) in one or more proceedings under section 24, the Federal Court or the Federal Magistrates Court finds that a person (the *perpetrator*) has contravened one or more civil penalty provisions; and
- (b) the court is satisfied that another person (the *victim*) has suffered loss or damage as a result of any or all of those contraventions;

the court may, on the application of the ACMA or the victim, make an order that the court considers appropriate directing the perpetrator to compensate the victim.

- (2) In determining whether a person (the *victim*) has suffered loss or damage as a result of one or more contraventions by another person of section 11 in relation to the making of one or more

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telemarketing calls, and in assessing the amount of compensation payable, the court may have regard to the following:

- (a) the extent to which any expenses incurred by the victim are attributable to dealing with the calls;
 - (b) the effect of dealing with the calls on the victim's ability to carry on business or other activities;
 - (c) any damage to the reputation of the victim's business that is attributable to dealing with the calls;
 - (d) any loss of business opportunities suffered by the victim as a result of dealing with the calls;
 - (e) any other matters that the court considers relevant.
- (3) The Federal Court or the Federal Magistrates Court may make an order under subsection (1), whether or not it makes a civil penalty order.
 - (4) An application under subsection (1) may be made at any time within 6 years after the contravention concerned.

31 Ancillary orders—recovery of financial benefit

- (1) If:
 - (a) in one or more proceedings under section 24, the Federal Court or the Federal Magistrates Court finds that a person has contravened one or more civil penalty provisions; and
 - (b) the court is satisfied that the person has obtained (whether directly or indirectly) a financial benefit that is reasonably attributable to any or all of those contraventions;the court may, on the application of the ACMA, make an order directing the person to pay to the Commonwealth an amount up to the amount of the financial benefit.
- (2) The Federal Court or the Federal Magistrates Court may make an order under subsection (1), whether or not it makes a civil penalty order.
- (3) An application under subsection (1) may be made at any time within 6 years after the contravention concerned.

32 Schedule 3 (infringement notices)

Schedule 3 has effect.

Part 5—Injunctions

33 Simplified outline

The following is a simplified outline of this Part:

- The Federal Court or the Federal Magistrates Court may grant injunctions in relation to contraventions of civil penalty provisions.

34 Injunctions

Restraining injunctions

- (1) If a person has engaged, is engaging or is proposing to engage, in any conduct in contravention of a civil penalty provision, the Federal Court or the Federal Magistrates Court may, on the application of the ACMA, grant an injunction:
 - (a) restraining the person from engaging in the conduct; and
 - (b) if, in the court's opinion, it is desirable to do so—requiring the person to do something.

Performance injunctions

- (2) If:
 - (a) a person has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do an act or thing; and
 - (b) the refusal or failure was, is or would be a contravention of a civil penalty provision;the Federal Court or the Federal Magistrates Court may, on the application of the ACMA, grant an injunction requiring the person to do that act or thing.

35 Interim injunctions

Grant of interim injunction

- (1) If an application is made to the Federal Court or the Federal Magistrates Court for an injunction under section 34, the court may, before considering the application, grant an interim injunction restraining a person from engaging in conduct of a kind referred to in that section.

No undertakings as to damages

- (2) The Federal Court or the Federal Magistrates Court is not to require an applicant for an injunction under section 34, as a condition of granting an interim injunction, to give any undertakings as to damages.

36 Discharge etc. of injunctions

The Federal Court or the Federal Magistrates Court may discharge or vary an injunction granted by it under this Part.

37 Certain limits on granting injunctions not to apply

Restraining injunctions

- (1) The power of the Federal Court or the Federal Magistrates Court under this Part to grant an injunction restraining a person from engaging in conduct of a particular kind may be exercised:
 - (a) if the court is satisfied that the person has engaged in conduct of that kind—whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind; or
 - (b) if it appears to the court that, if an injunction is not granted, it is likely that the person will engage in conduct of that kind—whether or not the person has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to any person if the person engages in conduct of that kind.

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Performance injunctions

- (2) The power of the Federal Court or the Federal Magistrates Court to grant an injunction requiring a person to do an act or thing may be exercised:
- (a) if the court is satisfied that the person has refused or failed to do that act or thing—whether or not it appears to the court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; or
 - (b) if it appears to the court that, if an injunction is not granted, it is likely that the person will refuse or fail to do that act or thing—whether or not the person has previously refused or failed to do that act or thing and whether or not there is an imminent danger of substantial damage to any person if the person refuses or fails to do that act or thing.

38 Other powers of the Federal Court or the Federal Magistrates Court unaffected

The powers conferred on the Federal Court or the Federal Magistrates Court under this Part are in addition to, and not instead of, any other powers of the court, whether conferred by this Act or otherwise.

Part 6—Miscellaneous

39 Nominees

Nomination by relevant telephone account-holder

- (1) For the purposes of the application of this Act to a telephone number, if:
 - (a) the relevant telephone account-holder has nominated an individual in relation to the number; and
 - (b) the nomination has not been withdrawn;the individual is a **nominee** of the relevant telephone account-holder.
- (2) A nomination, or a withdrawal of a nomination, must be in writing.
- (3) This Act does not prevent 2 or more individuals from being nominated in relation to the same telephone number.

Deemed nominee

- (4) The regulations may provide that, for the purposes of the application of this Act to a telephone number, an individual is taken to be a **nominee** of the relevant telephone account-holder in the circumstances specified in the regulations.

40 Formal warnings—breach of civil penalty provision

The ACMA may issue a formal warning if a person contravenes a civil penalty provision.

41 Additional ACMA functions

The ACMA has the following functions:

- (a) to conduct and/or co-ordinate community education programs about unsolicited telemarketing calls, in consultation with relevant industry and consumer groups and government agencies;

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- (b) to conduct and/or commission research into issues relating to unsolicited telemarketing calls;
- (c) to liaise with regulatory and other relevant bodies overseas about co-operative arrangements for the prohibition or regulation of unsolicited telemarketing calls.

42 Operation of State and Territory laws

This Act is not intended to exclude or limit the operation of a law of a State or Territory to the extent that the law is capable of operating concurrently with this Act.

43 Implied freedom of political communication

This Act does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.

44 Giving effect to international conventions

- (1) The regulations may make provision for and in relation to giving effect to an international convention that deals with telemarketing calls.
- (2) Regulations made for the purposes of subsection (1) may:
 - (a) vest the Federal Court or the Federal Magistrates Court with jurisdiction in a matter or matters arising under the regulations; and
 - (b) prescribe penalties, not exceeding a fine of 50 penalty units, for offences against the regulations; and
 - (c) declare that a specified provision of the regulations is a civil penalty provision for the purposes of this Act.

45 Review of operation of Act

- (1) The Minister must cause to be conducted a review of the operation of:
 - (a) this Act; and
 - (b) the *Telecommunications Act 1997* to the extent to which that Act relates to this Act; and

- (c) Part 6 of the *Telecommunications Act 1997* to the extent to which that Part relates to telemarketing activities (within the meaning of that Part).
- (2) A review under subsection (1) must be conducted:
 - (a) before the end of the period of 3 years after the commencement of this section; or
 - (b) as soon as practicable after the end of that 3-year period.
- (3) The Minister must cause to be prepared a report of a review under subsection (1).
- (4) The Minister must cause copies of a report to be tabled in each House of the Parliament within 15 sittings days of that House after the completion of the preparation of the report.

46 Regulations

The Governor-General may make regulations prescribing matters:

- (a) required or permitted to be prescribed by this Act; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Schedule 1—Designated telemarketing calls

Note: See section 4.

1 Object

The object of this Schedule is to define the expression *designated telemarketing call*.

Note: Designated telemarketing calls are exempt from section 11 (unsolicited telemarketing calls must not be made to a number registered on the Do Not Call Register).

2 Government bodies, religious organisations and charities

For the purposes of this Act, a telemarketing call is a *designated telemarketing call* if:

- (a) the making of the call is authorised by any of the following bodies:
 - (i) a government body;
 - (ii) a religious organisation;
 - (iii) a charity or charitable institution; and
- (b) if the call relates to goods or services—the body is the supplier, or prospective supplier, of the goods or services; and
- (c) the call is not of a kind specified in the regulations.

3 Political parties, independent members of parliament, candidates etc.

Political parties

- (1) For the purposes of this Act, a telemarketing call is a *designated telemarketing call* if:
 - (a) the making of the call is authorised by a registered political party; and
 - (b) having regard to:
 - (i) the content of the call; and

- (ii) the presentational aspects of the call;
it would be concluded that the purpose, or one of the purposes, of the call is:
 - (iii) to conduct fund-raising for electoral purposes; or
 - (iv) to conduct fund-raising for political purposes; and
- (c) if the call relates to goods or services—the registered political party is the supplier, or prospective supplier, of the goods or services; and
- (d) the call is not of a kind specified in the regulations.

Independent members of parliament etc.

- (2) For the purposes of this Act, a telemarketing call is a ***designated telemarketing call*** if:
- (a) the making of the call is authorised by a person who is a member of:
 - (i) the Parliament of the Commonwealth; or
 - (ii) the parliament of a State; or
 - (iii) the Legislative Assembly for the Australian Capital Territory; or
 - (iv) the Legislative Assembly of the Northern Territory; or
 - (v) the Legislative Assembly of Norfolk Island; or
 - (vi) a local governing body established by or under a law of a State or a Territory;
 and who is not affiliated with any registered political party;
and
 - (b) having regard to:
 - (i) the content of the call; and
 - (ii) the presentational aspects of the call;
it would be concluded that the purpose, or one of the purposes, of the call is:
 - (iii) to conduct fund-raising for electoral purposes; or
 - (iv) to conduct fund-raising for political purposes; and
 - (c) if the call relates to goods or services—the person is the supplier, or prospective supplier, of the goods or services; and
 - (d) the call is not of a kind specified in the regulations.

Clause 4

Candidates

- (3) For the purposes of this Act, a telemarketing call is a ***designated telemarketing call*** if:
- (a) the making of the call is authorised by a person who is a candidate in an election for:
 - (i) the House of Representatives; or
 - (ii) the Senate; or
 - (iii) a house of the parliament of a State; or
 - (iv) the Legislative Assembly for the Australian Capital Territory; or
 - (v) the Legislative Assembly of the Northern Territory; or
 - (vi) the Legislative Assembly of Norfolk Island; or
 - (vii) a local governing body established by or under a law of a State or a Territory; and
 - (b) having regard to:
 - (i) the content of the call; and
 - (ii) the presentational aspects of the call;it would be concluded that the purpose, or one of the purposes, of the call is:
 - (iii) to conduct fund-raising for electoral purposes; or
 - (iv) to conduct fund-raising for political purposes; and
 - (c) if the call relates to goods or services—the person is the supplier, or prospective supplier, of the goods or services; and
 - (d) the call is not of a kind specified in the regulations.

4 Educational institutions

Relevant telephone account-holder is a householder

- (1) For the purposes of this Act, a telemarketing call is a ***designated telemarketing call*** if:
- (a) the making of the call is authorised by an educational institution; and
 - (b) the call is made to a number that is used or maintained primarily for the private or domestic purposes of the relevant

telephone account-holder and/or members of the relevant account-holder's household; and

- (c) either or both of the following subparagraphs apply:
 - (i) the relevant telephone account-holder is, or has been, enrolled as a student in that institution;
 - (ii) a member or former member of the relevant account-holder's household is, or has been, enrolled as a student in that institution; and
- (d) if the call relates to goods or services—the institution is the supplier, or prospective supplier, of the goods or services; and
- (e) the call is not of a kind specified in the regulations.

Relevant telephone account-holder is an employer

- (2) For the purposes of this Act, a telemarketing call is a **designated telemarketing call** if:
 - (a) the making of the call is authorised by an educational institution; and
 - (b) the relevant telephone account-holder is the employer of an employee; and
 - (c) the call is made to a number that is used or maintained primarily for the private or domestic purposes of the employee and/or members of the employee's household; and
 - (d) either or both of the following subparagraphs apply:
 - (i) the employee is, or has been, enrolled as a student in that institution;
 - (ii) a member or former member of the employee's household is, or has been, enrolled as a student in that institution; and
 - (e) if the call relates to goods or services—the institution is the supplier, or prospective supplier, of the goods or services; and
 - (f) the call is not of a kind specified in the regulations.

Note: Clause 7 provides for an extended meaning of **employee** and **employer**.

5 Regulations

The regulations may provide that a specified kind of telemarketing call is a *designated telemarketing call* for the purposes of this Act.

6 Authorising the making of telemarketing calls

Attribution of authorisation to organisation

- (1) For the purposes of this Schedule (including subclause (2)), if:
 - (a) an individual authorises the making of a telemarketing call;
and
 - (b) the individual does so on behalf of an organisation;then:
 - (c) the organisation is taken to authorise the making of the call;
and
 - (d) the individual is taken not to authorise the making of the call.

Self-authorisation

- (2) For the purposes of this Schedule, if:
 - (a) a telemarketing call is made by an individual or organisation;
and
 - (b) the making of the call is not authorised by any other individual or organisation;the first-mentioned individual or organisation is taken to authorise the making of the call.

7 Extended meaning of *employee* and *employer*

Member of the executive body of a body corporate

- (1) For the purposes of clause 4, if an individual is a member of the executive body (whether described as the board of directors or otherwise) of a body corporate, the individual is taken to be an employee of the body corporate.

Contractor

- (2) For the purposes of clause 4, if an individual works under a contract that is wholly or principally for the labour of the individual, the individual is taken to be an employee of the other party to the contract.

Member of parliament

- (3) For the purposes of clause 4, if an individual is a member of the Parliament of the Commonwealth, the individual is taken to be an employee of the Commonwealth.
- (4) For the purposes of clause 4, if an individual is a member of the parliament of a State, the individual is taken to be an employee of the State.
- (5) For the purposes of clause 4, if an individual is a member of the Legislative Assembly for the Australian Capital Territory, the individual is taken to be an employee of the Australian Capital Territory.
- (6) For the purposes of clause 4, if an individual is a member of the Legislative Assembly of the Northern Territory, the individual is taken to be an employee of the Northern Territory.
- (7) For the purposes of clause 4, if an individual is a member of the Legislative Assembly of Norfolk Island, the individual is taken to be an employee of Norfolk Island.

Member of local governing body

- (8) For the purposes of clause 4, if an individual is a member of a local governing body established by or under a law of a State or Territory, the individual is taken to be an employee of that body.

Officeholder etc.

- (9) For the purposes of clause 4, if an individual:
- (a) holds, or performs the duties of, an appointment, office or position under the Constitution or under a law of the Commonwealth, of a State or of a Territory; or

Schedule 1 Designated telemarketing calls

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(b) is otherwise in the service of the Commonwealth, of a State or of a Territory (including service as a member of the Defence Force or as a member of a police force);
the individual is taken to be an employee of the Commonwealth, the State or the Territory, as the case requires.

Schedule 2—Consent

Note: See section 4.

1 Object

The object of this Schedule is to define the expression *consent* when used in relation to the making of a telemarketing call.

Note: The concept of consent is relevant to section 11 (unsolicited telemarketing calls must not be made to a number registered on the Do Not Call Register).

2 Basic definition

For the purposes of this Act, *consent* means:

- (a) express consent; or
- (b) consent that can reasonably be inferred from:
 - (i) the conduct; and
 - (ii) the business and other relationships; of the individual or organisation concerned.

3 Duration of express consent

For the purposes of this Act, if:

- (a) express consent is given; and
- (b) the consent is not expressed to be for a specified period or for an indefinite period;

the consent is taken to have been withdrawn at the end of the period of 3 months beginning on the day on which the consent was given.

4 Consent may not be inferred from the publication of a telephone number

For the purposes of the application of this Act to a telephone number, consent of:

- (a) the relevant telephone account-holder; or

Clause 5

(b) a nominee of the relevant telephone account-holder; may not be inferred from the mere fact that the telephone number has been published.

5 Regulations about consent

- (1) The regulations may provide that, for the purposes of the application of this Act to a telephone number, the consent of:
 - (a) the relevant telephone account-holder; or
 - (b) a nominee of the relevant telephone account-holder; may not be inferred in the circumstances specified in the regulations.
- (2) The regulations may provide that, for the purposes of the application of this Act to a telephone number, the consent of:
 - (a) the relevant telephone account-holder; or
 - (b) a nominee of the relevant telephone account-holder; may be inferred in the circumstances specified in the regulations.

Schedule 3—Infringement notices

Note: See section 32.

1 Object

The object of this Schedule is to set up a system of infringement notices for contraventions of civil penalty provisions as an alternative to the institution of proceedings in the Federal Court or the Federal Magistrates Court.

2 When an infringement notice can be given

- (1) If an authorised officer has reasonable grounds to believe that a person has, on a particular day, committed one or more contraventions of a particular civil penalty provision, the authorised officer may give to the person an infringement notice relating to those contraventions.
- (2) An infringement notice must be given within 12 months after the day on which the civil contraventions are alleged to have taken place.
- (3) This clause does not authorise the giving of 2 or more infringement notices to a person in relation to contraventions of a particular civil penalty provision that allegedly occurred on the same day.

3 Matters to be included in an infringement notice

- (1) An infringement notice must:
 - (a) set out the name of the person to whom the notice is given; and
 - (b) set out the name of the authorised officer who gave the notice; and
 - (c) either:
 - (i) set out brief details of each of the alleged civil contraventions; or

Clause 4

- (ii) be accompanied by one or more data processing devices that contain, in electronic form, brief details of each of the alleged civil contraventions; and
- (d) contain a statement to the effect that the matter or matters will not be dealt with by the Federal Court or the Federal Magistrates Court if the penalty specified in the notice is paid to the ACMA, on behalf of the Commonwealth, within:
 - (i) 28 days after the notice is given; or
 - (ii) if the ACMA allows a longer period—that longer period; and
- (e) give an explanation of how payment of the penalty is to be made; and
- (f) set out such other matters (if any) as are specified by the regulations.

Note: For the amount of penalty, see clause 4.

- (2) For the purposes of paragraph (1)(c), the brief details must include the following information in relation to each alleged civil contravention:
 - (a) the date of the alleged contravention;
 - (b) the civil penalty provision that was allegedly contravened.
- (3) Subparagraph (1)(c)(ii) does not authorise the inclusion of information in a data processing device unless, at the time the infringement notice was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference.
- (4) This clause does not limit the operation of the *Electronic Transactions Act 1999*.

4 Amount of penalty

Infringement notice given to a body corporate

- (1) The penalty to be specified in an infringement notice given to a body corporate must be a pecuniary penalty equal to the number of penalty units worked out using the table:

Number of penalty units		
Item	In this case ...	the number of penalty units is ...
1	the notice relates to a single alleged contravention of subsection 11(1) or (7)	20
2	the notice relates to more than 1, but fewer than 50, alleged contraventions of subsection 11(1) or (7)	the number obtained by multiplying 20 by the number of alleged contraventions
3	the notice relates to 50 or more alleged contraventions of subsection 11(1) or (7)	1,000
4	the notice relates to a single alleged contravention of a civil penalty provision other than subsection 11(1) or (7)	10
5	the notice relates to more than 1, but fewer than 50, alleged contraventions of a civil penalty provision other than subsection 11(1) or (7)	the number obtained by multiplying 10 by the number of alleged contraventions
6	the notice relates to 50 or more alleged contraventions of a civil penalty provision other than subsection 11(1) or (7)	500

Infringement notice given to a person other than a body corporate

- (2) The penalty to be specified in an infringement notice given to a person other than a body corporate must be a pecuniary penalty equal to the number of penalty units worked out using the table:

Number of penalty units		
Item	In this case ...	the number of penalty units is ...
1	the notice relates to a single alleged contravention of subsection 11(1) or (7)	4

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Number of penalty units		
Item	In this case ...	the number of penalty units is ...
2	the notice relates to more than 1, but fewer than 50, alleged contraventions of subsection 11(1) or (7)	the number obtained by multiplying 4 by the number of alleged contraventions
3	the notice relates to 50 or more alleged contraventions of subsection 11(1) or (7)	200
4	the notice relates to a single alleged contravention of a civil penalty provision other than subsection 11(1) or (7)	2
5	the notice relates to more than 1, but fewer than 50, alleged contraventions of a civil penalty provision other than subsection 11(1) or (7)	the number obtained by multiplying 2 by the number of alleged contraventions
6	the notice relates to 50 or more alleged contraventions of a civil penalty provision other than subsection 11(1) or (7)	100

5 Withdrawal of an infringement notice

- (1) This clause applies if an infringement notice is given to a person.
- (2) An authorised officer may, by written notice (the *withdrawal notice*) given to the person, withdraw the infringement notice.
- (3) To be effective, the withdrawal notice must be given to the person within 28 days after the infringement notice was given.

Refund of penalty if infringement notice withdrawn

- (4) If:
 - (a) the penalty specified in the infringement notice is paid; and
 - (b) the infringement notice is withdrawn after the penalty is paid;
 the Commonwealth is liable to refund the penalty.

6 What happens if the penalty is paid

- (1) This clause applies if:
 - (a) an infringement notice relating to one or more alleged civil contraventions is given to a person; and
 - (b) the penalty is paid in accordance with the infringement notice; and
 - (c) the infringement notice is not withdrawn.
- (2) Any liability of the person for the alleged civil contraventions is discharged.
- (3) Proceedings under Part 4 may not be brought against the person for the alleged civil contraventions.

7 Effect of this Schedule on civil proceedings

This Schedule does not:

- (a) require an infringement notice to be given in relation to an alleged civil contravention; or
- (b) affect the liability of a person to have proceedings under Part 4 brought against the person for an alleged civil contravention if:
 - (i) the person does not comply with an infringement notice relating to the contravention; or
 - (ii) an infringement notice relating to the contravention is not given to the person; or
 - (iii) an infringement notice relating to the contravention is given to the person and subsequently withdrawn; or
- (c) limit the Federal Court's or the Federal Magistrates Court's discretion to determine the amount of a penalty to be imposed on a person who is found in proceedings under Part 4 to have committed a civil contravention.

8 Appointment of authorised officer

The ACMA may, by writing, appoint a member of the staff of the ACMA as an authorised officer for the purposes of this Schedule.

9 Regulations

The regulations may make further provision in relation to infringement notices.

*[Minister's second reading speech made in—
House of Representatives on 25 May 2006
Senate on 19 June 2006]*

(68/06)