

sellers and telemarketers the right to block transmission of that information.

§ 310.4(b) — Pattern of calls

Section 310.4(b)(1) of the original Rule specifies that “[i]t 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,” several practices deemed to be abusive of consumers. The proposed Rule contained some modifications to various subsections of this provision. The responses received in response to the NPRM, and the discussion at the June 2002 Forum, are set forth below.

§ 310.4(b)(1)(i) — Calling repeatedly or continuously

Section 310.4(b)(1)(i) specifies that it is an abusive telemarketing act or practice to cause any telephone to ring, or to engage any person in telephone conversation, repeatedly or continuously, with intent to annoy, abuse, or harass any person at the called number. None of the comments recommended that changes be made to the current wording of § 310.4(b)(1)(i).⁵⁶¹ Therefore, the language in that provision remains unchanged in the amended Rule.⁵⁶² However, the expansion in the scope of the Rule effectuated by the USA PATRIOT Act brings within the ambit of this provision telemarketers soliciting charitable contributions.

§ 310.4(b)(1)(ii) — Denying or interfering with “do-not-call” rights

In the NPRM, the Commission proposed to prohibit a telemarketer from denying or interfering in any way with a person’s right to be placed on a “do-not-call” list, including hanging up the telephone when a consumer initiates a request that he or she be placed on the seller’s list of consumers who do not wish to receive calls made by or on behalf of that seller.⁵⁶³ In setting out the proposed prohibition, the Commission noted that during the Rule Review, numerous individual consumers had complained about being hung up on when they asked to be placed on a “do-

not-call” list. In other instances, consumers complained that the telemarketer had used other means to hamper or impede these consumers’ attempts to be placed on a “do-not-call” list. Participants in both the “Do-Not-Call” Forum and the Rule Review Forum echoed these complaints.⁵⁶⁴

A seller or telemarketer has an affirmative duty under the Rule to accept a “do-not-call” request, and to process that request. Failure to do so by impeding, denying, or otherwise interfering with an attempt to make such a request clearly would defeat the purpose of the “do-not-call” provision, and would frustrate the intent of the Telemarketing Act to curtail telemarketers from undertaking unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of the consumer’s right to privacy.⁵⁶⁵

Those commenters who addressed this provision strongly supported the prohibition.⁵⁶⁶ For example, NAAG stated that an express prohibition against denying or interfering with a consumer’s right to be added to a company-specific “do-not-call” list clarifies the seriousness of the telemarketer’s obligation to process the consumer’s request and will raise confidence in the system.⁵⁶⁷

NAAG noted that the consumer who receives the telemarketing call generally must rely exclusively on the telemarketer’s truthful disclosure of his or her identity and the nature of the call, and that consumers are often confused because many company names are very similar.⁵⁶⁸ In this respect, the Commission’s determination to require telemarketers to transmit Caller ID information, discussed above, will provide a valuable tool to both consumers and law enforcement agencies in identifying those telemarketers who fail to comply with their obligation to process the consumer’s request.

Therefore, the Commission has determined that it is an abusive telemarketing act or practice to deny or interfere in any way with a person’s right to be placed on a “do-not-call” list, including hanging up on the individual when he or she initiates such a request. Section 310.4(b)(1)(ii) of the amended Rule prohibits this practice, and encompasses both telemarketers soliciting the purchase of goods or

services and those soliciting charitable contributions in accordance with the USA PATRIOT Act amendments.⁵⁶⁹ In addition, § 310.4(b)(1)(ii) prohibits anyone from directing another person to deny or interfere with a person’s right to be placed on a “do-not-call” list. This aspect of the provision is intended to ensure that sellers who use third-party telemarketers cannot shield themselves from liability under this provision by suggesting that the violation was a single act by a “rogue” telemarketer where there is evidence that the seller caused the telemarketer to deny or defeat “do-not-call” requests.⁵⁷⁰

§ 310.4(b)(1)(iii) — “Do-not-call”

The original Rule prohibited a seller or telemarketer from calling a person who had previously asked not to be called by or on behalf of the seller whose goods or services were offered.⁵⁷¹ The proposed Rule added a second “do-not-call” provision that would prohibit a seller or telemarketer from calling a consumer who had placed his or her name and/or telephone number on a centralized registry maintained by the Commission, unless the consumer had provided express authorization for the seller to call him or her.⁵⁷² To effectuate the USA PATRIOT Act amendments, the Commission also proposed that for-profit telemarketers who solicit charitable donations be subject to the proposed national registry.⁵⁷³

The national “do-not-call” registry proposal generated extensive comment.⁵⁷⁴ Consumer and privacy advocates, as well as individual consumers, overwhelmingly supported the creation of such a registry.⁵⁷⁵

⁵⁶⁹ Moreover, the Rule Review yielded evidence that, in some instances, telemarketers soliciting charitable contributions are unwilling to honor donors’ “do-not-call” requests, even when threatened with withdrawal of future support. See Peters-RR at 1.

⁵⁷⁰ Because the USA PATRIOT Act amendments do not give the Commission jurisdiction over non-profit organizations, the prohibition against causing a telemarketer to deny or defeat “do-not-call” requests applies only to sellers of goods or services, not to non-profit organizations.

⁵⁷¹ 16 CFR 310.4(b)(1)(ii). This is termed a “company-specific” approach to eliminating unwanted telephone solicitations.

⁵⁷² Proposed Rule §§ 310.4(b)(1)(iii)(B) and 310.4(b)(1)(iii)(B)(1) and (2).

⁵⁷³ 67 FR at 4516, 4519.

⁵⁷⁴ As discussed above, the Commission received about 64,000 written and electronic comments in response to the NPRM, including over 45 supplemental comments from organizations and individuals and almost 15,000 comments from Gottschalks’ customers that were submitted by Gottschalks as its supplemental comment. The vast majority of comments touched, at least in part, on the proposed national “do-not-call” registry.

⁵⁷⁵ See, e.g., DOJ-NPRM at 4-5; EPIC-NPRM at 2-3; LSAP-NPRM at 12; NAAG-NPRM at 4, 6, 12, 29; NACAA-NPRM at 2; NCLC-NPRM at 13; NCL-

⁵⁶¹ In its comments in the Rule Review, NASAA stated that this provision strikes directly at one of the manipulative techniques used in high-pressure sales to coerce consumers to purchase a product, and noted that the organization advises consumers that one of the “warning signs of trouble” is the “three-call” technique used by fraudulent sellers of securities. NASAA-RR at 2.

⁵⁶² Section 310.4(b)(1)(i) of the amended Rule prohibits as an abusive practice “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.”

⁵⁶³ 67 FR at 4516.

⁵⁶⁴ *Id.*

⁵⁶⁵ 15 U.S.C. 6102(a)(3)(A).

⁵⁶⁶ See, e.g., ARDA-NPRM at 6; Assurant-NPRM at 7; NAAG-NPRM at 44; NCL-NPRM at 8; NYSCPB-NPRM at 5-6; Proctor-NPRM at 4.

⁵⁶⁷ NAAG-NPRM at 44. See also NCL-NPRM at 8.

⁵⁶⁸ NAAG-NPRM at 44.