

representatives.⁷²² In those situations, the dialer will either disconnect the call or keep the consumer connected in case a sales representative becomes available.⁷²³

According to one consumer organization, the Rule's prohibition on abandoned calls as set forth in the NPRM addresses "one of the most invasive practices of the telemarketing industry."⁷²⁴ "Hang up" calls and "dead air" frighten consumers,⁷²⁵ invade their privacy,⁷²⁶ cause some of them to struggle to answer the phone only to be hung up on,⁷²⁷ and waste the time and resources of consumers working from home.⁷²⁸

The amended Rule prohibits abandoning outbound telephone calls, but constructs a safe harbor allowing telemarketers to continue using predictive dialers in a regulated manner. Under § 310.4(b)(1)(iv), an outbound telephone call is abandoned if, once the call has been answered by a consumer, the telemarketer fails to connect the call to a sales representative within two seconds of the consumer's completed greeting. (As explained herein, "hang up" calls and delays of more than two seconds before connecting the call to a sales representative are prohibited by this section of the Rule.) The Commission's prohibition of abandoned calls is authorized by § 6102(a)(3)(A) of the Telemarketing Act, which directs the Commission to prohibit telemarketers from undertaking a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy, and by § 6102(a)(3)(C), which directs the Commission to require telemarketers to promptly and clearly disclose certain material information. Section 6102(a)(3), which directs the Commission to consider recordkeeping requirements in prescribing rules regarding deceptive and abusive telemarketing acts or practices, is the authority for the required recordkeeping related to predictive dialers.

Section 310.4(b)(4), the amended Rule's safe harbor provision, provides that the Commission will refrain from bringing a Rule enforcement action against a seller or telemarketer based on violations of § 310.4(b)(1)(iv) if the seller

or telemarketer's conduct meets certain specified standards designed to minimize call abandonment. These standards are: (1) the seller or telemarketer must employ technology that ensures abandonment of no more than three percent of all calls answered by a consumer, measured per day per calling campaign; (2) the seller or telemarketer must allow each telemarketing call placed to ring for at least fifteen seconds or four complete rings before disconnecting an unanswered call; (3) whenever a sales representative is not available to speak with the person answering the call within two seconds of that person's completed greeting, the seller or telemarketer must promptly play a recorded message; and (4) the seller or telemarketer must retain records, in accordance with § 310.5(b)-(d), establishing compliance with § 310.4(b)(4)(i)-(iii).

Telemarketers voiced strong objection to the NPRM discussion of abandoned calls as violative of § 310.4(d),⁷²⁹ and argued that this interpretation would in effect ban the use of predictive dialers,⁷³⁰ causing the loss of efficiency benefits that arise from the use of predictive dialers.⁷³¹ The Commission is mindful of the benefits of increased efficiency, but believes that the increased efficiency of predictive dialers must be balanced against the abusive nature of abandoned calls. The abuses of abandoned calls were delineated in the NPRM and elsewhere in the record.⁷³² As NAAG asserted at the June 2002 Forum, an abandoned call is basically a

"prank call."⁷³³ However, the Commission is persuaded that a total ban on abandoned calls, which would amount to a ban on predictive dialers, would not strike the proper balance between addressing an abusive practice and allowing for the use of a technology that provides substantially reduced costs for telemarketers. At the June 2002 Forum, one telemarketing group posited that consumers who make purchases via the telephone ultimately benefit from these reduced costs in the form of lower prices.⁷³⁴ Therefore, taking into account the record as a whole, and arguments raised by both sides of this issue, the Commission has determined to prohibit abandoned calls from continuing without regulation, and has created requirements that, in effect, closely govern the use of predictive dialers. Under this approach, consumers will benefit from a substantial reduction in the number of abandoned calls they receive,⁷³⁵ but telemarketers will not be deprived of a large part of the efficiency benefits that accrue from the use of predictive dialers.⁷³⁶ The Commission also notes that the amended Rule's establishment of a national "do-not-call" registry should significantly reduce the number of calls received by consumers who place their numbers on the registry, thereby reducing the number of abandoned calls these consumers must contend with as well.

"Abandoned call": Section 310.4(b)(1)(iv) of the amended Rule defines a prohibited abandoned outbound call as one in which the recipient of the call answers the call, and the telemarketer does not connect the call to a sales representative within two seconds of the person's completed greeting. This definition of abandoned call covers "dead air" and "hang up" calls, in which the telemarketer hangs up on a called consumer without connecting that consumer to a sales representative. This approach to abandoned calls clarifies several issues raised by telemarketers in the record.

The amended Rule removes any possibility of doubt that a call placed by a telemarketer is an outbound telephone call within the meaning of the Rule, even if the telemarketer hangs up on the called consumer without speaking to him or her, or subjects the called consumer to dead air. The Rule's disclosure requirement is triggered once a recipient of a telemarketing call

⁷²² June 2002 Tr. I at 211 (CCC); Time-NPRM at 11; ATA-Supp. at 11; Miller Study at 13-14.

⁷²³ NASUCA-NPRM at 12-13; Sytel-NPRM at 4-7; ATA-Supp. at 11; Miller Study at 13-14.

⁷²⁴ PRC-NPRM at 3.

⁷²⁵ 67 FR at 4523.

⁷²⁶ AARP-NPRM at 9.

⁷²⁷ 67 FR at 4523; Texas PUC-NPRM at 5; Worsham-NPRM at 5.

⁷²⁸ PRC at 3.

⁷²⁹ ABA-NPRM at 12; ACA-NPRM at 9; ATA-NPRM at 30; Associations-NPRM at 3; Capital One-NPRM at 6; DialAmerica-NPRM at 24-25; DMA-NPRM at 44; ERA-NPRM at 40-41; Gannett-NPRM at 4; Infocision-NPRM at 6-7; Metris-NPRM at 10; MPA-NPRM at 29-30; NAA-NPRM at 13, 15; Time-NPRM at 11; Tribune-NPRM at 9.

⁷³⁰ June 2002 Tr. I at 211 (CCC); ABA-NPRM at 12; Advanta-NPRM at 4; Aegis-NPRM at 5; AFSA-NPRM at 16; Capital One-NPRM at 6; Gannett-NPRM at 4; Household Auto-NPRM at 12; ICT-NPRM at 2; PMA-NPRM at 30; PCIC-NPRM at 2; VISA-NPRM at 12; Miller Study at 14. *But see* EPIC-NPRM at 23.

⁷³¹ ACA-NPRM at 8-9; ARDA-NPRM at 15; ANA-NPRM at 6; ATA-NPRM at 31; BofA-NPRM at 9; BRI-NPRM at 3; Discover-NPRM at 6; Fleet-NPRM at 6; FPIR-NPRM at 2; Household Auto-NPRM at 11-12; ICT-NPRM at 2; ITC-NPRM at 2-3; KeyCorp-NPRM at 6; Marketlink-NPRM at 3; MPA-NPRM at 8; NAA-NPRM at 14; Noble-NPRM at 4; NATN-NPRM at 4; NSDI-NPRM at 4; SHARE-NPRM at 4; Synergy Solutions-NPRM at 4; Technion-NPRM at 5; TeleDirect-NPRM at 2; Teleperformance-NPRM at 3; TRC-NPRM at 4; TeleStar-NPRM at 2; Time-NPRM at 10; Allstate-Supp. at 2; Miller Study at 15. *See also* Citigroup-NPRM at 10; IMC-NPRM at 7 (Predictive dialers enhance dialing accuracy); NAA-NPRM at 7 (Predictive dialers help with "do not call" compliance).

⁷³² 67 FR at 4522-24; AARP-NPRM at 9; NAAG-NPRM at 47; NACAA-NPRM at 10; PRC-NPRM at 3.

⁷³³ June 2002 Tr. II at 27 (NAAG). *See also* NAAG-NPRM at 47; McKenna-Supp. at 2.

⁷³⁴ June 2002 Tr. I at 212-13 (CCC). *But see* June 2002 Tr. I at 222-23 (EPIC).

⁷³⁵ AFSA-NPRM at 16; Sytel-NPRM at 7-8.

⁷³⁶ *See* KeyCorp-NPRM at 6; PCIC-NPRM at 2.