

that recorded messages containing these disclosures could violate the TCPA.<sup>775</sup> Time similarly opposed it based on concern for requiring the recorded message to include the prompt disclosures and, in addition, posited that consumers would not support receiving recorded-message disclosures on their answering machines.<sup>776</sup> The Commission's approach to the recorded message component of this safe harbor should allay these concerns.<sup>777</sup> The recorded message need not include all required prompt disclosures; rather, the message need contain no more than the seller's name and telephone number.<sup>778</sup> Of course, it must comply with applicable state and federal laws governing the use of recorded messages, such as the FCC's TCPA regulations. Moreover, telemarketers are not required to leave a recorded message on the answering machines of consumers who are not home to answer the telemarketer's call. In light of the limited nature of the elements of the recorded message component of the safe harbor, the Commission's approach also resolves Sytel's caution against allowing the use of recorded messages without regulation.<sup>779</sup>

The fourth component of the abandoned call safe harbor is a recordkeeping requirement. Specifically, telemarketers using predictive dialers under this safe harbor must keep records documenting compliance with the first three components of this safe harbor in a manner that is in accordance with the recordkeeping requirements of the Rule set out in § 310.5(b)-(d). The record clearly establishes the need for this requirement. According to statements at the June 2002 Forum, some telemarketers routinely exceed DMA's recommended maximum abandonment rate of five percent.<sup>780</sup> At the June 2002 Forum, DMA explained that enforcement of its guideline was difficult despite receiving complaints.<sup>781</sup> The Commission foresees that, absent recordkeeping

requirements, the Commission would encounter similar difficulty in enforcing this aspect of the amended Rule. Furthermore, the record does not contain opposition to a recordkeeping requirement associated with the use of predictive dialers, and the records required by the Commission in this provision of the Rule are similar to those supported by industry representatives in the CPUC's predictive dialer rulemaking proceeding.<sup>782</sup> The Commission believes that predictive dialer technology can capture and preserve abandonment rate records as a matter of routine;<sup>783</sup> records showing compliance with the ring time and recorded message requirements will not impose a significant burden on telemarketers who wish to take advantage of this safe harbor.

*§ 310.4(b)(2) — Restrictions on use of list*

Section 310.4(b)(1)(iv) of the proposed Rule prohibited any seller or telemarketer from selling, purchasing, or using a seller's "do-not-call" list for any purpose other than complying with the Rule's "do-not-call" provision. The amended Rule retains the provision but modifies the language to also prohibit the sale, purchase, rental, lease, or use of the national registry maintained by the Commission for any purpose other than compliance with the Rule's "do-not-call" provision or otherwise to prevent telephone calls to telephone numbers on either the sellers' lists or the national registry.

Those commenters who addressed this provision supported such a prohibition.<sup>784</sup> NCL stated that, since consumers who sign up for a "do-not-call" list are seeking to preserve their privacy, it would be an invasion of their privacy to use any information that would identify those consumers (e.g., names or telephone numbers) for any purpose other than to ensure that those individuals do not receive unsolicited telemarketing calls.<sup>785</sup>

In addition to expanding the provision to cover the sale, purchase, rental, lease, or other use of the registry, the amended Rule has made this prohibition a separate and distinct abusive practice. In the proposed Rule, this provision was part of § 310.4(b)(1), which sets out prohibited practices by telemarketers, including adherence to the "do-not-call" provision. Section

310.4(b)(1) also prohibited sellers from causing telemarketers to engage in the prohibited practices. However, the Commission believes that it is important for *all* persons, not just sellers and telemarketers, to use the "do-not-call" lists properly. Therefore, the amended Rule retains this provision, renumbered as § 310.4(b)(2), but extends the prohibition to "*any person*," in order to prohibit all entities, not just sellers and telemarketers, from misusing "do-not-call" lists. By extending the prohibition to "any person," the Commission intends that the provision apply to such parties as list brokers and other entities that do not fall within the definitions of "seller" or "telemarketer." In addition, the amended Rule adds a provision that permits a person to use either seller-specific lists, or the national registry, not only to comply with the "do-not-call" provisions of the Rule, but also "to prevent telephone calls to telephone numbers on such lists." This provision will permit an entity not subject to the amended Rule for whatever reason (e.g., because it is outside of the Commission's jurisdiction) to access the national registry in order to scrub its calling lists, if it wants to avoid calling consumers who have expressed a preference not to receive telemarketing calls.

*§ 310.4(b)(3) — Safe harbor for "do-not-call"*

Section 310.4(b)(3) provides sellers and telemarketers with a limited safe harbor from liability for violating the "do-not-call" provision found in § 310.4(b)(1)(iii).<sup>786</sup> During the original rulemaking, the Commission determined that sellers and telemarketers should not be held liable for calling a person who previously asked not to be called if they had made a good faith effort to comply with the Rule's "do-not-call" provision and the call was the result of error. The Rule established four requirements that a seller or telemarketer must meet in order to avail itself of the safe harbor: (1) it must establish and implement written procedures to comply with the "do-not-call" provision; (2) it must train its personnel in those procedures; (3) it must maintain and record lists of persons who may not be contacted; and (4) any subsequent call must be the result of error.

These criteria tracked the FCC's regulations, which set forth the minimum standards that companies must follow to comply with the TCPA's

<sup>775</sup> DMA-NPRM at 44. See also Sytel-NPRM at 6; Worsham-NPRM at 5.

<sup>776</sup> Time-NPRM at 11. See also ANA-NPRM at 6; Associations-NPRM at 3.

<sup>777</sup> Capital One-NPRM at 6-7.

<sup>778</sup> When consumers receive this information, they will not have to wonder whether the call has been placed by someone with sinister motives, as described by AARP. See AARP-NPRM at 9; ATA-Supp. at 11.

<sup>779</sup> Sytel-NPRM at 6.

<sup>780</sup> June 2002 Tr. II at 29 (ATA); June 2002 Tr. II at 45 (DialAmerica); June 2002 Tr. II at 52 (Syte). See also Capital One-NPRM at 6; DialAmerica-NPRM at 23; NASUCA-NPRM at 14; Sytel-NPRM at 7.

<sup>781</sup> June 2002 Tr. II at 51 (DMA).

<sup>782</sup> CPUC Interim Opinion at 20-22.

<sup>783</sup> TeleDirect-NPRM at 2.

<sup>784</sup> See, e.g., AARP-NPRM at 3; EPIC-NPRM at 16; NCL-NPRM at 8-9; NYSCPB-NPRM at 6-7; Texas PUC-NPRM at 1-2; Verizon-NPRM at 5. See also June 2002 Tr. I at 215-25.

<sup>785</sup> NCL-NPRM at 8-9.

<sup>786</sup> This provision has been renumbered in the amended Rule. In the original Rule and in the NPRM, the "safe harbor" provision is § 310.4(b)(2).