

"do-not-call" provision.⁷⁸⁷ In the NPRM, the Commission proposed three additional requirements which have to be met by sellers or telemarketers or others acting on behalf of a seller or charitable organization before they may avail themselves of the "safe harbor:" (1) they must use a process to prevent telemarketing calls from being placed to any telephone number included on the Commission's national registry using a version of the registry obtained not more than 30 days before the calls are made; (2) they must maintain and record consumers' express verifiable authorizations to call; and (3) they must monitor and enforce compliance with their "do-not-call" procedures.

Based on the record in this matter, and for the reasons set forth below, the amended Rule retains the "safe harbor" requirement to monitor and enforce compliance. However, the amended Rule deletes the "safe harbor" provision expressly requiring maintenance and recording of express verifiable authorizations.⁷⁸⁸ In addition, § 310.4(b)(3)(iv), the "safe harbor" requirement to purchase and reconcile the registry, has been modified to delete the 30-day requirement and, instead, require that telemarketers employ a version of the registry which has been obtained no more than three months before a call is made, and to maintain records documenting that process.⁷⁸⁹

The Commission continues to believe that the Rule should contain a "safe harbor" from liability for violations of its "do-not-call" provision. Commenters generally agreed with this position.⁷⁹⁰ Sellers or telemarketers who have made a good faith effort to provide consumers or donors with an opportunity to exercise their "do-not-call" rights should not be liable for violations that result from error. Further, as discussed in the NPRM, the Commission believes that the same rationale applies to potential violations of § 310.4(b)(1)(ii), and therefore has, in the introductory sentence of § 310.4(b)(5), extended the "safe harbor" to cover violations of *both* amended §§ 310.4(b)(1)(ii) and (iii). Section 310.4(b)(1)(ii) prohibits a seller or telemarketer from denying or interfering with a person's right to be placed on a "do-not-call" list, whereas

§ 310.4(b)(1)(iii) prohibits calling a person who has previously requested to be placed on such a list.

Although the Commission has extended the "safe harbor" provision to cover the additional practice of denying or interfering with a consumer's right to be on a "do-not-call" list, it has also tightened the provision by adding the requirement that sellers and telemarketers monitor compliance and take disciplinary action for non-compliance in order to be eligible for the safe harbor. Section § 310.4(b)(5)(v) of the amended Rule requires the seller or telemarketer to monitor and enforce compliance with the procedures established in § 310.4(b)(5)(i).

During the Rule Review, numerous commenters described the problems they had encountered in attempting to assert their "do-not-call" rights and with companies that continued to call after the consumer asked not to be called.⁷⁹¹ Several commenters echoed these complaints in their responses to the NPRM.⁷⁹² This anecdotal evidence indicates that some entities may not be enforcing employee compliance with their "do-not-call" policies. In fact, one consumer reported that telemarketers for two different companies told her that it was not necessary that a company's "do-not-call" policy be effective, only that such a policy exist.⁷⁹³

To clarify this apparent misconception about the Rule's requirements, the Commission proposed that, in order to avail themselves of the "safe harbor" provision, sellers and telemarketers must be able to demonstrate that, as part of ordinary business practice, they monitor and enforce compliance with the written procedures required by § 310.4(b)(5)(i). The Commission received few comments on this proposal, and those commenters supported the proposal.⁷⁹⁴ Therefore, the Commission retains § 310.4(b)(5)(v) unchanged, except for renumbering. It is not enough that a seller or telemarketer has written procedures in place; the company must be able to show that those procedures

have been and *are implemented* in the regular course of business. Thus, a seller or telemarketer cannot take advantage of the safe harbor exemption in § 310.4(b)(5) unless it can demonstrate that it actually trains employees in implementing its "do-not-call" policy, and enforces that policy.

Finally, in the "safe harbor" provision in the proposed Rule, the Commission required that the seller or telemarketer use a process to prevent calls to telephone numbers on the national "do-not-call" list, employing a version of the "do-not-call" registry obtained from the Commission not more than 30 days before the calls are made, and to maintain records documenting this process.⁷⁹⁵ Virtually all comments on the safe harbor provision were directed at the proposed 30-day requirement for using the registry, which would have required sellers and telemarketers to reconcile or "scrub" the names on the registry with their customer list every 30 days. Industry commenters were unanimous in their view that a 30-day requirement would be extremely burdensome.⁷⁹⁶ They also pointed out that a 30-day requirement would be virtually impossible to meet without shutting down operations for a day to scrub their lists, and would be particularly burdensome for small businesses with few employees or those that do not use sophisticated technology.⁷⁹⁷ Industry commenters urged the Commission to require quarterly updating, which is the standard adopted by the majority of states in implementing their "do-not-call" statutes.⁷⁹⁸ They pointed out that, after an initial period of "volatility" when consumers sign up for the new registry, the number of names on the registry will stabilize and there may not be as great a need for frequent updating.⁷⁹⁹

⁷⁹⁵ This requirement was in § 310.4(b)(2)(iii) of the proposed Rule.

⁷⁹⁶ See, e.g., ABA-NPRM at 12; AFSA-NPRM at 9-10; ARDA-NPRM at 13; Capital One-NPRM at 5-6; Cox-NPRM at 38; Discover-NPRM at 3; Household Auto-NPRM at 8; Household Credit-NPRM at 13; Household Finance-NPRM at 13; HSBC-NPRM at 2; Nextel-NPRM at 26; NFIB-NPRM at 2; NRF-NPRM at 16. See also June 2002 Tr. I at 234-72.

⁷⁹⁷ See, e.g., ABA-NPRM at 12; AFSA-NPRM at 9-10; ARDA-NPRM at 13; Capital One-NPRM at 5-6; Cox-NPRM at 38; Discover-NPRM at 3; HSBC-NPRM at 2; Nextel-NPRM at 26; NFIB-NPRM at 2; NRF-NPRM at 16. See also June 2002 Tr. I at 234-72.

⁷⁹⁸ See, e.g., ABA-NPRM at 12; AFSA-NPRM at 9-10; ARDA-NPRM at 13; Capital One-NPRM at 5-6; Cox-NPRM at 38; Discover-NPRM at 3; Household Auto-NPRM at 8, 10; Household Credit-NPRM at 13, 15; HSBC-NPRM at 2; Nextel-NPRM at 26; NFIB-NPRM at 2; NRF-NPRM at 16. See also June 2002 Tr. I at 234-72.

⁷⁹⁹ See June 2002 Tr. I at 237-39.

⁷⁸⁷ 47 CFR 64.1200(e)(2).

⁷⁸⁸ This requirement was in § 310.4(b)(2)(v) of the proposed Rule.

⁷⁸⁹ This requirement was in § 310.4(b)(2)(iii) of the proposed Rule.

⁷⁹⁰ See, e.g., ARDA-NPRM at 13; BofA-NPRM at 6; NACAA-NPRM at 9; Verizon-NPRM at 4-6. But see CATS-NPRM at 2; Patrick-NPRM at 5-6

(cautioning that the standards set forth in the "safe harbor" should be obligatory for all telemarketers subject to the Rule).

⁷⁹¹ See, e.g., Bennett-RR at 1; A. Gardner-RR at 1; Gilchrist-RR at 1; Gindin-RR at 1; Harper-RR at 1; Heavy-RR at 1; Johnson-RR at 3; McCurdy-RR at 1; Menefee-RR at 1; Mey-RR, *passim*; Nova53-RR at 1; Peters-RR at 1; Runnels-RR at 1.

⁷⁹² See, e.g., Synergy Global-NPRM at 1-2 (ex-telemarketer says firm ignored "do-not-call" lists); Denny (Feb. 21, Msg. 970); Connolly (Mar. 6, Msg. 961); Young (Feb. 27, Msg. 165); Jackson (Feb. 2, Msg. 521); Horowitz (Feb. 27, Msg. 598); Truitt (Feb. 28, Msg. 687); Griffin (Feb. 28, Msg. 708); Loeher (Feb. 28, Msg. 729).

⁷⁹³ Mey-RR at 2. See also DC-NPRM at 6-7.

⁷⁹⁴ See, e.g., DC-NPRM at 6-7; Verizon-NPRM at 5. But see Patrick-NPRM at 5-6 (cautioning that the standards set forth in the "safe harbor" should be obligatory for all telemarketers subject to the Rule).