

The Commission is persuaded that the costs of requiring monthly updating outweigh any additional benefits that might accrue to consumers from such a provision. Based on the record in this matter, the amended Rule modifies the "safe harbor" requirement that lists be reconciled every 30 days. Instead, re-numbered § 310.4(b)(3)(iv) of the amended Rule requires that the seller or telemarketer employ a version of the registry obtained not more than three months before any call is made, and maintain records documenting the process it uses to prevent telemarketing to any number on the list. Thus, telemarketers will be required to update their lists at least every three months, a time period that is consistent with most state requirements. Instead of making the list available on specific dates, the registry will be available for downloading on a constant basis, 24 hours a day, seven days a week, so telemarketers can access the registry at any time. As a result, each telemarketer's three-month period may begin on a different date. The Commission intends that the records documenting the process to prevent telemarketing calls to telephone numbers on the "do-not-call" registry will include copies of any express agreements the seller has obtained from consumers giving their permission for the seller to call, as well as documentation showing when and how often the seller has reconciled its list of names and/or telephone numbers against the national "do-not-call" registry.

The Commission is confident that the additional criteria in the amended Rule do not conflict with FCC regulations. FCC regulations are silent as to the process to be used, or the specific time frame within which the company must reconcile the names on its "do-not-call" list with its list of prospective customers to be called in a telemarketing campaign.⁸⁰⁰ Therefore, any FTC requirement that there be a process in place to prevent calls to telephone numbers on a "do-not-call" list would not conflict with the FCC's regulations. Similarly, FCC regulations are silent as to the requirement to monitor compliance and take action to correct any non-compliance, or to maintain

⁸⁰⁰ FCC regulations require companies to reconcile "do-not-call" requests for company-specific lists on a continuing or ongoing basis. Specifically, 47 CFR § 64.1200(e)(2)(iii) requires the seller or telemarketer to record the consumer's "do-not-call" request and place the consumer's name and telephone number on the company's "do-not-call" list at the time the request is made. The TSR is silent as to how frequently a company must reconcile "do-not-call" requests for company-specific lists.

evidence of express verifiable written authorization to accept telemarketing calls. Thus, the proposed Rule would not conflict with the FCC's regulations. Furthermore, as discussed more fully above, the Commission believes that it is necessary for the amended Rule to diverge from FCC regulations by imposing a monitoring requirement in the "safe harbor" provision in order to clarify the applicability of the safe harbor.

§ 310.4(c) — Calling time restrictions

Section 310.4(c) of the original Rule proscribes the making of outbound telemarketing calls before 8:00 a.m. and after 9:00 p.m. local time at the called person's location.⁸⁰¹ In response to comments received during the Rule Review suggesting further limitations on calling times, the Commission noted in the NPRM that it declined to adopt further restrictions because the original Rule's calling times strike the appropriate balance between protecting consumer privacy and not unduly burdening industry.

In response to the NPRM, the Commission received more than 100 comments from consumers on this issue, the vast majority of which recommended that the calling times be limited in some fashion. Many consumers urged that the calling times provision further restrict calls during the "dinner hour,"⁸⁰² or at either end of the day, arguing that calls that come at 8:00 a.m. or 9:00 p.m. are inconvenient, particularly for families with small children.⁸⁰³ Some commenters urged the Commission to prohibit telemarketing on Saturdays, Sundays, or the entire weekend.⁸⁰⁴ Still others urged the Commission to consider the plight of those shift workers for whom the current calling hours provide little or no protection from calls during "sleep time."⁸⁰⁵

The few industry comments regarding calling times were supportive of the

⁸⁰¹ See 16 CFR 310.4(c).

⁸⁰² See, e.g., Harvey Butler (Msg. 197); Roy Broman (Msg. 452); Robert Clifton (Msg. 3762); Ernie and Helen Darrow (Msg. 9941); SSMBOYLE (Msg. 14401); Worsham-NPRM at 4.

⁸⁰³ See, e.g., John Hallberg Jones (Msg. 1644); Jim Coupal (Msg. 3504); Adam Block Willow (Msg. 3513); Donald Nelson (Msg. 4225); Lolita469 (Msg. 5115); Anonymous (Msg. 27184).

⁸⁰⁴ See, e.g., Sjkble (Msg. 12060) (no Saturday calls); OMEGA217 (no Sunday calls); David Meads (Msg. 13726) (no Sunday calls); Lisa Hallman (Msg. 20291) (no Sunday calls); H00Kie (Msg. 1040) (no weekend calls); Lee C. Clayton (Msg. 1950) (no weekend calls); Sherrell Goggin (Msg. 2247) (no weekend calls); Henry Miller (Msg. 10173) (no weekend calls); Nanagus (Msg. 12471) (no weekend calls).

⁸⁰⁵ See, e.g., Paul Merchant, Jr. (Msg. 387); Bobby Morris (Msg. 639); Gayle Tanner (Msg. 4505); Anonymous (Msg. 27196).

current hours, but critical of the notion that allowing consumers to customize their preferred calling times via the national "do-not-call" registry would be workable.⁸⁰⁶ EPIC noted that it favored retaining the current calling times provision, but found it desirable to allow consumers who wish to do so to set other preferred times via the national "do-not-call" registry.⁸⁰⁷

As noted in the NPRM, the Commission believes the current calling hours provide a reasonable window for telemarketers to reach their existing and potential customers. The Commission recognizes that while some consumers may find it objectionable to receive telemarketing calls between 8:00 a.m. and 9:00 p.m., the majority of consumers would not find calls within these hours to be particularly abusive of their privacy. Furthermore, consumers who wish to avoid telemarketing calls will, under the amended Rule, have the option of placing their telephone numbers on the national "do-not-call" registry, thus blocking most unwanted calls at all times.⁸⁰⁸ Therefore, the Commission declines to modify the calling hours prescribed by § 310.4(c), and retains this provision without amendment.

§ 310.4(d) — Required oral disclosures

Section 310.4(d) of the original Rule requires that a telemarketer in an outbound call make certain oral disclosures promptly, and in a clear and conspicuous manner. The NPRM proposed to make two minor modifications to the wording of this section. First, the Commission proposed inserting, after the phrase "in an outbound telephone call," the phrase "to induce the purchase of goods or services." This would clarify that § 310.4(d) applies only to telemarketing calls made to induce sales of goods or services (in contrast to proposed new § 310.4(e), which contains an analogous phrase clarifying that § 310.4(e) will apply to calls made "to induce a charitable contribution"). Second, the Commission proposed to add the word "truthful" to clarify that it is not enough that the disclosures be made; the disclosures must also be made

⁸⁰⁶ See ARDA-NPRM at 13 (noting it felt no need to comment on this provision because the Commission had proposed no modification, and urging that no customizable calling preferences be allowed); NAA-NPRM at 17.

⁸⁰⁷ See EPIC-NPRM at 18, 22 (noting that while generally acceptable, the current calling times "represent only the Commission's judgment on what time of day people most value their privacy," and urging the Commission to allow for customizable calling time preferences).

⁸⁰⁸ See amended Rule § 310.4(b)(1)(iii)(B), discussed above.