

The record does not contain any new evidence regarding the potential harm that accrues from the use of couriers, or any new evidence regarding the benefits to legitimate companies of being able to use couriers to collect payment. Although the Commission recognizes that fraudulent telemarketers often use couriers to collect payment, it continues to believe that "[t]here is nothing inherently deceptive or abusive about the use of couriers by legitimate business."⁸⁸³ Moreover, the Commission reiterates its view that telemarketers who seek to use courier services to defraud consumers are likely to "engage in other acts or practices that clearly are deceptive or abusive, and that are prohibited by this Rule."⁸⁸⁴ Therefore, the Commission declines to adopt the recommendation to ban the use of couriers to collect payment for goods or services sold through telemarketing.

Targeting vulnerable groups and the sale of victim lists: DOJ proposed that the Commission include in the amended Rule a provision that "would prohibit a seller or telemarketer who is engaged in any act or practice that violates §§ 310.3(a), (c), or (d) or 310.4(a)-(e) from purchasing lists of prospective contacts from any source."⁸⁸⁵ This suggested change responds to the problems of the sale of victim lists and the targeting of vulnerable groups. As DOJ explains, such a provision would "ensure that any injunctive relief it sought in enforcement proceedings would include a prohibition on any further purchases of 'mooch lists' by any individual or corporate defendants in the action," and lay the foundation for criminal contempt proceedings if such an injunction were violated.⁸⁸⁶ DOJ also argued that such an injunction, served on "any list provider known to have done business with the fraudulent telemarketer," would limit such telemarketer's ability to resume fraudulent solicitations.⁸⁸⁷ Finally, DOJ noted that such a provision "would enable the Commission to address, at least in part, the targeting of vulnerable victims by fraudulent telemarketers, without having to grapple with the difficulties of defining what constitutes 'vulnerability' or 'targeting.'"⁸⁸⁸

After careful consideration, the Commission has determined not to adopt the provision proposed by DOJ. The Commission believes that it is

unnecessary to include an explicit prohibition against Rule violators purchasing lists of prospective contacts to provide the benefits detailed by DOJ in its comment. In numerous cases, the Commission has already included a similar prohibition in final orders that achieves the goals articulated by DOJ.⁸⁸⁹ Thus, the Commission declines to include a provision to this effect in the amended Rule.

E. Section 310.5 — Recordkeeping

Section 310.5 of the original Rule identifies the kinds of records that must be kept by sellers and telemarketers, and the time period for retention of these records.⁸⁹⁰ In the NPRM, the Commission noted that it had declined to adopt any of the suggested modifications to this section submitted pursuant to the Rule Review. Specifically, the Commission declined to: (1) reduce the record retention period to less than 24 months; or (2) tie the duration of record retention either to the value of the goods or services sold or the refund policy of the seller, believing that such modifications would minimize the effectiveness of this provision in law enforcement.⁸⁹¹ The Commission did note that the effect of the USA PATRIOT Act amendments was to extend the recordkeeping requirement to include not only calls to induce the purchase of goods or services, but also calls to induce charitable contributions.⁸⁹² The only explicit change to the language of the section to implement the USA PATRIOT Act amendments was to add the phrase "or solicitations of charitable contributions" to § 310.5(a)(4) following the phrase "employees directly involved in telephone sales."⁸⁹³

Very few comments addressed the recordkeeping requirements set forth in § 310.5. ARDA noted that it "agrees with the Commission and feels that the

current provisions are adequate."⁸⁹⁴ DMA-NonProfit stated that "imposing burdensome and lengthy (two-year) recordkeeping responsibilities" on charities would hurt the ability of charities, especially small ones, because it would divert funds away from fulfillment of charities' missions.⁸⁹⁵ The Commission believes that the recordkeeping burden on telemarketers who solicit on behalf of charities will be minimal. As noted in the SBP for the original Rule, the recordkeeping provision was already tailored to "strike a balance between minimizing the recordkeeping burden on industry and retaining the records necessary to pursue law enforcement actions. . . ."⁸⁹⁶ In addition, the Commission believes that the records required to be maintained are those commonly maintained by businesses in the ordinary course of business.⁸⁹⁷ The Commission believes that, as applied to telemarketers who solicit on behalf of charities, the burden of compliance with the recordkeeping provision will be further lessened because many of the recordkeeping provisions will be inapplicable in the charitable solicitation context, or are burdens typically borne by the telemarketer, not the organization on whose behalf the calls are made.⁸⁹⁸

NEMA requested that the Commission consider the recordkeeping burden on energy marketers who must, pursuant to their self-regulatory guidelines, already

⁸⁹⁴ ARDA-NPRM at 17. ARDA did reiterate, however, its concern that "overlapping, inconsistent, and conflicting state laws create a substantial burden."

⁸⁹⁵ DMA-NonProfit-NPRM at 16.

⁸⁹⁶ 60 FR at 43857.

⁸⁹⁷ *Id.*

⁸⁹⁸ For example, § 310.5(a)(2) only applies when the offer includes a prize promotion, a circumstance unlikely to be implicated in most charitable solicitations. Section 310.5(a)(3) only applies in the commercial solicitation context, as it requires maintenance of records showing information about "customers." Section 310.5(a)(4) is a requirement typically borne by telemarketers, and the Commission believes that charitable organizations are unlikely to incur additional costs of compliance with this provision as a result of the Rule's inclusion of charitable solicitations. The Commission does not believe that compliance with amended § 310.5(a)(5), which requires that all verifiable authorizations or records of express informed consent or express agreement required to be provided under the Rule be maintained will be unduly burdensome to charities who are less likely to avail themselves of the marketing methods that implicate these Rule requirements. Therefore, the only provision of the recordkeeping section that is likely to affect charities is § 310.5(a)(1), the requirement that "[a]ll substantially different advertising, brochures, telemarketing scripts, and promotional materials" be maintained. To the extent that retention of such materials is not already customary in the non-profit sector, the Commission believes that the burden of compliance is offset by the corresponding law enforcement benefits that accrue from this provision.

⁸⁸³ 60 FR at 30415.

⁸⁸⁴ *Id.*

⁸⁸⁵ DOJ-NPRM at 7.

⁸⁸⁶ *Id.*

⁸⁸⁷ *Id.*

⁸⁸⁸ *Id.*

⁸⁸⁹ See, e.g., *FTC v. Fed. Data Servs.*, No. 00-6462-CV-Ferguson (S.D. Fla. filed Apr. 3, 2000) (Stipulated final judgment entered Jan. 9, 2001); *FTC v. Data Med. Capital, Inc.*, No. SA-CV-99-1266AHS (EHC) (S.D. Cal. filed Oct. 14, 1999) (Stipulated final order for permanent injunction and other settlement of claims entered July 13, 2001); *FTC v. RJB Telecom, Inc.*, No. CIV002017PHXEHC (D. Ariz. filed Oct. 25, 2000) (Stipulated final judgment and order for permanent injunction filed Aug. 27, 2001); *FTC v. Story d/b/a Network Publ'ns.*, No. 3-99CV0968-L (N.D. Tex. filed Apr. 25, 1999) (Stipulated order for permanent injunction and civil penalty filed June 6, 2000).

⁸⁹⁰ 16 CFR 310.5.

⁸⁹¹ 67 FR at 4527-28.

⁸⁹² 67 FR at 4528.

⁸⁹³ Due to an oversight, the text of the NPRM noted the correct language of the provision ("or solicitations of charitable contributions"), while the text of the proposed Rule included an abbreviated version ("or solicitations").