



Division of Marketing Practices

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

April 15, 2008

Ms. Kristen Marshall
Copilevitz & Canter, LLC
310 W. 20th Street, Ste. 300
Kansas City, Mo. 64108

Dear Ms. Marshall:

This letter responds to your request, dated January 31, 2008, for a staff advisory opinion regarding the interplay between the recordkeeping requirements of § 310.5 of the Telemarketing Sales Rule (“TSR”) and the Do Not Call and Call Abandonment “safe harbor” provisions of §§ 310.4(b)(3) and (4). Specifically, you note that § 310.5(a) requires that a seller or telemarketer retain certain records “for a period of 24 months from the date the record is produced,” while § 310.4(b)(3) provides, in relevant part, that:

A seller or telemarketer will not be liable for violating § 310.4(b)(1)(ii) and (iii) *if it can demonstrate* that, as part of the seller’s or telemarketer’s routine business practice:

- (i) It has established and implemented *written procedures* to comply with § 310.4(b)(1)(ii) and (iii); . . .
- (iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, *has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact*, in compliance with § 310.4(b)(1)(iii)(A);
- (iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to § 310.4(b)(3)(iii) or § 310.4(b)(1)(iii)(B), employing a version of the “do-not-call” registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, and *maintains records documenting this process . . .* [Emphasis added.]

Similarly, § 310.4(b)(4) provides, in relevant part, that:

A seller or telemarketer will not be liable for violating § 310.4(b)(1)(iv) if:

- (i) the seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign;
- (ii) the seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;
- (iii) whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed; and
- (i) the seller or telemarketer, in accordance with §310.5(b)-(d), ***retains records establishing compliance with §310.4(b)(4)(i)-(iii).***

[Emphasis added.]

You ask whether the “duration of time for which the records [mentioned in § 310.4(b)(3) and § 310.4(b)(4), highlighted in boldface italic above] must be maintained . . . [is] the same [24 months] as that found in § 310.5.”

Our conclusion is that the 24-month limitation on the recordkeeping requirements in § 310.5 does not pertain to the safe harbor elements in § 310.4(b)(3) and § 310.4(b)(4). The reasons for this conclusion are set out below. Please be advised that this conclusion and the opinions expressed in the following discussion are those of Commission staff only and are not attributable to, nor binding on, the Commission itself or any individual Commissioner.

Discussion

Section 310.5 sets forth affirmative recordkeeping requirements. If an entity subject to the rule were to fail comply with these requirements for the specified 24 months, that failure could, standing alone, constitute a law violation carrying a maximum civil penalty of \$11,000 for each instance. An entity subject to the TSR must create and maintain the specified records and retain them for 24 months after creation.

By contrast, the elements of the §§ 310.4(b)(3) and (4) safe harbors highlighted above are not recordkeeping requirements, but rather provide an entity subject to the TSR with a means of exculpation in situations where the FTC has reason to believe that the entity is or has been in violation of the Do Not Call provisions of § 310.4(b)(1)(iii) or the Call Abandonment provisions of § 310.4(b)(1)(iv). Put another way, the documentation that comprises the highlighted elements of the two safe harbors is in the nature of evidence necessary to support an affirmative

defense. Such exculpatory evidence would be produced to rebut potential allegations of Do Not Call or Call Abandonment violations. On the other hand, failure of an entity to produce such evidence when faced with allegations of § 310.4(b)(1)(iii) Do Not Call violations or of § 310.4(b)(1)(iii) Call Abandonment violations could result in the entity being held liable to pay a civil penalty for such violations.¹

Entities subject to the TSR may choose to retain the documentation that comprises elements of the two safe harbors for as long as they might be subject to enforcement action for non-compliance with the Do Not Call or Call Abandonment requirements. The statute of limitations for FTC enforcement actions for civil penalties for violation of the TSR and other trade regulation rules is five years. 28 U.S.C. § 2462.

I hope this information is helpful.

Sincerely,

Allen W. Hile, Jr.
Assistant Director

¹Under the FTC Act, the Commission may also seek restitution for consumers injured by violations of the TSR, or disgorgement of ill-gotten gains attributable to violations of the TSR. 15 U.S.C. § 53(b).