

# DNC Safe Harbor Proves Elusive

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The national do-not-call registry places burdens and responsibilities on companies that telemarket their goods or services. Compliance can cost in the millions of dollars if you factor in expenses such as software upgrades, training, scrubbing and record retention, not to mention the government's ever-increasing subscription fees.

Moreover, the stakes are high if a person whose telephone number appears on the registry receives a call. Unless the company has some permissible basis for calling this person, penalties can be up to \$11,000 per call.

Many companies have accepted these expenses under the belief that if their telemarketing employs high standards of compliance, significant penalties will not be assessed when inadvertent errors arise. This belief is premised on the Telemarketing Sales Rule's inclusion of a "safe harbor" for best practices relating to DNC compliance.

Two years into the registry, however, companies are learning that the Federal Trade Commission has a very different view on the applicability of the safe harbor provision.

In the simplest terms, the Telemarketing Sales Rule's DNC requirements prohibit calls to any number that appears on the national registry unless an exemption applies.

The most important exemptions are if the company has an existing business relationship (one active in the past 18 months) with the person being called or if the person inquired about the company's services in the past three months. Otherwise, if a telemarketer calls a number on the registry, the telemarketer may have violated the rule.

But the rule includes an important exemption — a safe harbor provision — for what otherwise might be considered improper calls. The safe harbor was

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developed after commenters to the TSR persuaded the FTC that telemarketers who made a good-faith effort to comply should not be liable for violations that result from an inadvertent error.

Specifically, one commenter noted that it was good public policy to reward firms proactive in trying to comply with the rule, and that such a safe harbor provides guidelines for industry best practices. First and foremost, the DNC safe harbor requires that the calling of consumers on the registry be in error. In addition, the seller needs to have written do-not-call procedures, training for its personnel on compliance, and monitoring and enforcement of compliance. If all these elements are present, a company will escape punishment for calling someone on the DNC list, in theory.

At least, that is how the safe harbor provision is supposed to work. To date, while the FTC has announced several settlements for DNC violations, it has never given credit to the safe harbor provision. Moreover, as investigations are percolating nationwide, businesses are reporting that the FTC is giving short shrift to the safe harbor provision.

It appears the FTC has taken the position that if a telemarketer has more than one DNC violation, then the safe harbor will not apply even if the call was made because of an unintentional error. Of course, many telemarketing errors can be the product of simply a computer glitch or human error, resulting in hundreds or thousands of improper calls. Given the FTC's recalcitrance in applying the safe harbor, whether and how the safe harbor is applied may be determined by the courts.

Companies must be aware that devoting a lot of resources (both time and money) to compliance does not mean the company will escape liability for making calls to numbers on the registry. In all of the enforcement actions that the FTC has brought to date involving the DNC, it has refused to give any company credit under the safe harbor.

So how does a company comply? It must monitor its telemarketing system to ensure it works properly. Multiple corporate divisions must work in unison to ensure the system functions as it should. The marketing department decides what groups of people are called based on specified criteria. The IT department houses or is in charge of aggregating the data. An outsourced company conducts the telemarketing campaign. And the legal department needs to have a handle on the entire process to ensure the company remains compliant.

Ensuring compliance for even the smartest telemarketing guru or company can be a complicated — indeed, an impossible — task. Realize the practical effect of the FTC's decision not to recognize safe harbor: A company that makes hundreds of thousands or even millions of calls a year cannot make a single mistake without risking a penalty.

If a company does not constantly monitor and test its telemarketing program, it probably will be unable to take advantage of safe harbor no matter how unintentional the violations were.

It is critical for companies to take an objective look at their telemarketing system, be critical of any deficiencies and not be afraid to ask the difficult questions. Only then can a company know whether it has a telemarketing program that can withstand regulatory scrutiny.