telemarketer from calling customers to renew subscriptions, warranties, service contracts, and a host of other ongoing services prior to their expiration. Commenters also noted that this prohibition would be particularly burdensome for large, diversified companies with multiple divisions, sales offices and product lines. 104

Given the fact there is nothing about this practice, in and of itself, that is inherently injurious to consumers, and given the widespread use of this practice by legitimate telemarketers, the Commission has dropped from the revised proposed Rule any attempt to restrict this practice. Reloading is a problem when there is deception in the sales offer. Because such deception is prohibited by the revised proposed Rule under Section 310.3(a), a separate prohibition of "reloading" is unnecessary. Accordingly, it has been deleted from the revised proposed Rule.

(h) *The Use of Shills.* Section 310.4(a)(8) of the initially proposed Rule prohibited identifying a person as a reference for a business venture unless: (1) Such person actually purchased the business venture; (2) such person operated that business venture for at least six months, or the seller or telemarketer disclosed the length of time the person operated such business venture; and (3) such person did not receive consideration for any statements made to prospective business venture purchasers. As stated in the discussion of Section 310.2 of the definition of "business venture," the Commission believes that consideration of such a prohibition is more appropriately included as part of its regulatory review of the Franchise Rule.

2. Pattern of Calls. Section 310.4(b)(1)(i) of the proposed Rule prohibited a seller or telemarketer from making a sales call to a person's residence more than once within any three month period. Many commenters stated that this was an unreasonable and arbitrary prohibition that was difficult to comply with, and that should be eliminated. ¹⁰⁵ In addition, commenters noted that consumers already have the protections of the Telephone Consumer

Protection Act ["TCPA"] rules, which require telemarketers to establish and maintain a "do not call" list of consumers who do not wish to be contacted by that seller. 106 Given the fact that calls more frequent than once per month are not, in and of themselves, injurious to consumers, and given the consumer protections afforded by the "do not call" requirements of the TCPA 107 and this Rule, the Commission agrees that this provision is unnecessary and has therefore deleted it.

In its place, the Commission proposes in revised Rule Section 310.4(b)(i) to prohibit any seller or telemarketer to cause any telephone to ring, or engage any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. Such a prohibition is included in the FDCPA, ¹⁰⁸and the legislative history of the Telemarketing Act states that the Commission should consider the FDCPA in establishing prohibited abusive acts or practices. ¹⁰⁹

Section 310.4(b)(1)(ii) of the initially proposed Rule set forth the prohibition on calling a person's residence when that person previously has stated that he or she does not wish to receive such a call made by or on behalf of the seller whose goods or services are being offered. The Commission continues to believe that such a limitation, which is fully consistent with and complementary to similar provisions under the TCPA, 110 will effectively implement the Telemarketing Act's directive to include in this Rule "a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." 111 This Section did not elicit many comments; the only change made to this Section responds to the comments suggesting that the prohibition should apply to a particular person or telephone number, not to a residence (as the initially proposed version of this provision stated), because a residence may have more than one person who is a customer of a particular seller.¹¹² The revised proposed Rule states that the prohibition applies to calls made to a person, rather than a person's residence.

Section 310.4(b)(2) of the initially proposed Rule provided a limited safe harbor against liability for violating the 'do not call" prohibitions included in Section 310.4(b)(1)(ii). This Section stated that a seller or telemarketer will not be liable for such violations once in any calendar year per person called if: (1) It has established and implemented written procedures to comply with the "do not call provisions"; (2) it has trained its personnel in those procedures; (3) the seller, or the telemarketer acting on behalf of the seller, has maintained and recorded lists of persons who may not be contacted; and (4) any subsequent call is the result of administrative error.

Two changes have been made to this Section. First, some commenters suggested that the safe harbor should not be limited to a certain number of violations per consumer or per year.113 These commenters maintained that if the other enumerated steps are taken by a telemarketer in a reasonable manner, and a call is made erroneously, a Rule violation should not be found. The Commission agrees, and has deleted this limitation to the safe harbor. Second, the safe harbor will apply if the subsequent call is the result of any error, not just an administrative error. This responds to concerns raised that unintentional or accidental calls should also be covered by the safe harbor.114

3. Calling Time Restrictions. The initially proposed Rule prohibited any telemarketer from calling a person's residence, without the prior consent of the person, at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location. The Commission included this provision in the initially proposed Rule in response to the Telemarketing Act's directive that the Rule should include "restrictions on the hours of the day and night when unsolicited telephone calls can be made to consumers." ¹¹⁵ While some commenters suggested different time

¹⁰³ ATA at 7–8; ANA at 14; DMA at 27–28; MPA at 14–15; Cox at 9–10; DMSI at 6; Hearst at 2; MSSC at 20; NAA at 13–14; AMCI at 2 (motor club memberships); CUCI at 8; ASAE at 15–16 (association memberships); GE at 4–6; IBM at 19–22 (computer leases); NCTA at 11–12 (cable services); Viacom at 10–11.

 $^{^{104}}$ ANA at 15; DMA at 27; NRF at 31; AmEx at 1–2.

¹⁰⁵ ATA at 8; APAC at 6; DMA at 28; DSA at 15; MPA at 16–18; NRF at 33; PMAA at 75–77; CUCI at 8; Fingerhut at 25; ADS at 1; AmEx at 1–2; AT&T at 20; NCL at 45–46; APAC at 6; AMCI at 1; IBM at 23; ANA at 17.

¹⁰⁶ See, e.g., ANA at 17; Franklin at 1; Olan at 13. The FCC's rules, established pursuant to the TCPA, 47 U.S.C. 227, are codified at 47 CFR 64.1200. The revised proposed Rule includes similar "do not call" protections at Section 310.4(b)(1)(ii), discussed *infra*.

^{107 47} U.S.C. 227.

^{108 15} U.S.C. 1692d(5).

¹⁰⁹ See, e.g., House Report at 8. Moreover, commenters suggested that such a provision would be approprate. See, e.g., NAA at 20; Cox at 10 (abusive conduct involves multiple calls over a short period of time, such as five calls in a day, or ten calls in a week).

¹¹⁰ See 47 U.S.C. 227; 47 CFR 64.1200(e).

^{111 15} U.S.C. 6102(a)(3)(A).

¹¹² See, e.g., NRF at 33; Pacesetter at 4.

¹¹³ See, e.g., IBM at 24; SBTC at 10-11.

¹¹⁴NRF at 35; PMAA at 83; MSSC at 21. Other commenters suggested that the term "administrative error" was too broad, and that a clear definition should be provided. NACAA at 5; NAAG at 27; USD at 5. The Commission believes that any error should be excused here, as long as the seller or telemarketer is complying in good faith with the other requirements of the safe harbor.

^{115 15} U.S.C. 6102(a)(3)(B).