

telemarketers often tout their "moneyback guarantees" and refund policies as part of the sales solicitation. Unfortunately, such companies rarely honor those moneyback guarantees. Therefore, the Commission has decided not to include a broad "safe harbor" or "established business" exemption in the revised proposed Rule. The Commission believes that changes made elsewhere in the revised proposed Rule, including exemptions set forth in Section 310.6, obviate the need for such an exemption or safe harbor.

Section 310.7 Actions by States and Private Persons

The Telemarketing Act permits certain State officials and private persons to bring civil actions in an appropriate Federal district court for violations of this Rule.¹⁹⁸ Section 310.7 of the initially proposed Rule set forth the notice such parties must provide to the Commission concerning those actions. The language regarding the notice has not changed in the revised proposed Rule. However, the revised proposed Rule has added Section 310.7(b), which clarifies that the Rule does not vest State officials or private persons with jurisdiction over any person or activity outside the jurisdiction of the FTC Act.

The Commission added this language in response to questions from a number of commenters regarding the scope of the Rule and the authority to bring actions for violations of the Rule.¹⁹⁹ When coupled with the new language in section 310.1 on the scope of the Rule, the language in Section 310.7(b) clarifies that the Rule does *not* apply to any person outside the jurisdiction of the FTC Act, and that neither the Commission nor any other party authorized to bring suit for violations of the Rule may bring an action against such persons.

This restriction on the scope of the Rule and authority to bring actions under the Rule tracks Section 6(b) of the Telemarketing Act: "[N]o activity which is outside the jurisdiction of [the FTC] Act shall be affected by this Act."²⁰⁰ The language also is consistent with the legislative history of the Telemarketing Act and reflects the intent of Congress:

[T]he legislation * * * does not vest the FTC, the State attorneys general, or private parties with jurisdiction over any person over whom the FTC does not otherwise have authority.²⁰¹

¹⁹⁸ See 15 U.S.C. 6103 and 6104.

¹⁹⁹ See, e.g., AARP at 3; ABA at 1; BOB at 2.

²⁰⁰ 15 U.S.C. 6105(b).

²⁰¹ Senate Report at 14.

Section 310.8 Federal Preemption

Section 310.8 of the initially proposed Rule stated that nothing in the Rule shall be construed to preempt any State law that is not in direct conflict with any provision of the Rule. Several commenters asked that this Section clarify that the Rule establishes a threshold requirement that State laws can exceed as long as they do not conflict with the Rule's requirements.²⁰² At least one commenter expressed concern that they would be subject to making State-required disclosures that are similar to the Rule's requirements but not directly in conflict.²⁰³

The Commission does not believe any changes are necessary to this Section. The language in this Section is clear and provides sufficient guidance that additional State requirements and prohibitions would be permitted as long as they do not conflict directly with the Rule. Thus, State registration, certification, or licensing requirements for telemarketing most likely would not be preempted because they would not be in direct conflict with any provisions of this Rule.

Effective Date

The NPR asked for comments on whether 30 days would provide sufficient time to come into compliance with the initially proposed Rule provisions.²⁰⁴ Most of the parties who commented on the effective date indicated that 30 days would be insufficient given the need "to make system changes, establish training programs [for] employees involved in telephone sales * * *, develop new recordkeeping procedures, prepare written disclosure and acknowledgement forms, draft and negotiate new contracts with service bureaus, [and] develop internal monitoring programs."²⁰⁵ Most of the commenters who believed 30 days was insufficient suggested a 6-month time frame in order to achieve compliance.²⁰⁶ NCL noted that some of the prohibited deceptive and fraudulent practices could be instituted immediately (for example, the prohibitions against misrepresentations), but that industry might need additional time to comply

²⁰² See, e.g., AARP at 25; NYSCPB at 13-14; NAAG at 41-42; NACAA at 6.

²⁰³ See Prudential at 4.

²⁰⁴ 60 FR at 8328.

²⁰⁵ NRF at 41. See also APAC at 9; NCL at 55; Olan at 29; NAA at 24; DMA at 40; SCIC at 71; ARDA at 41; Time Warner at 41. But see USPS at 26.

²⁰⁶ See, e.g., DMA at 40; Olan at 29; NRF at 41; SCIC at 7; Time Warner at 41.

with certain other requirements of the initially proposed Rule.²⁰⁷

Because the revised proposed Rule eliminates many of the disclosure requirements that generated the foregoing compliance time predictions, the Commission proposes to set the effective date at 30 days from the date the final Rule is published. Thirty days should not unduly burden legitimate industry because, based on information provided by industry, legitimate sellers and telemarketers already comply with the revised proposed Rule. For example, legitimate industry represented that it already makes the affirmative disclosures required under Section 310.3(a)(1); it does not misrepresent material information pertaining to the sale of goods or services prohibited under Section 310.3(a)(2); it does not knowingly provide substantial assistance or support to deceptive sellers or telemarketers prohibited under Section 310.3(b); and it does not engage in credit card laundering prohibited under Section 310.3(c). Further, telemarketers have been required to comply with the TCPA since 1992 and should already have in place and be implementing the "do not call" procedures required under that Act. Such procedures therefore would comply with Section 310.4(b)(2) of this Rule, as well. Finally, the Commission understands from the workshop that participants already maintain the records required under Section 310.5. Because the Commission does not require that records be kept in any special form, legitimate industry is most likely already in compliance with Section 310.5 of the Rule. Based on the foregoing, the Commission does not believe that a further delayed effective date for the Rule is reasonable.

Section C. Invitation To Comment

Before adopting this revised proposed Rule as final, consideration will be given to any written comments submitted to the Secretary of the Commission on or before June 30, 1995. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act, 5 U.S.C. 552, and Commission regulations, on normal business days between the hours of 8:30 a.m. and 5 p.m. at the Public Reference Section, Room 130, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW., Washington, DC 20580.

²⁰⁷ NCL at 55.