

constitutes a prohibited telephone solicitation under this rule. As established by the Telephone Consumer Protection Act, the term "telephone solicitation" does not include calls (1) to any person with that person's prior express invitation or permission; (2) to any person with whom the caller has an established business relationship; or (3) by or on behalf of a tax-exempt nonprofit organization. Accordingly, an advertising call that falls within one of these statutory exclusions does not violate section 64.1200(c)(2). In addition to the statutory exemptions, section 64.1200(c)(2)(iii) also permits delivery of telephone solicitations to National Do-Not-Call registrants in the limited situation in which the caller has a personal relationship with the called party. Moreover, religious and political messages are not considered to be "telephone solicitations" and are, therefore, exempt from the Commission's National Do-Not-Call rules.

4. To protect against prohibited telemarketing calls, entities that advertise through telephone solicitations are required to pay fees to access the National Do-Not-Call Registry and must "scrub" their call lists of non-exempt residential telephone numbers contained in the Registry. Recognizing that parties who have made good faith efforts to comply with the national do-not-call rules may, nonetheless, occasionally make some calls in error to registered telephone lines, the Commission established standards for a safe harbor exemption from liability.
5. To qualify for safe harbor protection, a seller must first demonstrate that, as part of its routine business practice, it has: (1) established and implemented written procedures to comply with the do-not-call rules; (2) trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to the do-not-call rules; (3) maintained and recorded a list of telephone numbers the seller may not contact; (4) used a process to prevent telemarketing to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the National Do-Not-Call Registry obtained from the administrator of the Registry within a designated time frame, and has maintained records documenting this process; and (5) used a process to ensure that it does not sell, rent, lease, purchase, or use the Registry for any purpose except national do-not-call compliance, and that it has purchased access to the Registry from the Registry administrator without participating in any cost sharing arrangement with any other entity. Finally, the safe harbor only applies if the seller is able to show that the unlawful calls were the result of identifiable error and made in spite of adherence to the enumerated do-not-call procedures.
6. The Telecommunications Consumers Division ("Division") of the Commission's Enforcement Bureau began investigating Dynasty in October 2003 in conjunction with its review of consumer complaint data involving calls made to telephone numbers contained in the then-new National Do-Not-Call Registry. The Division found a significant volume of complaints involving Dynasty, and in October and November 2003, sent letters to Dynasty seeking information both about its telemarketing practices generally and about specific complaints from consumers who allegedly received calls from Dynasty despite their registration on the National Do-Not-Call Registry. After Dynasty failed to respond, the Division issued a citation against Dynasty on December 22, 2003. The citation warned Dynasty that future delivery of telephone solicitations to residential consumers registered on the National Do-Not-Call Registry could subject it to monetary forfeitures of up to \$11,000 per call. In addition, the citation informed Dynasty that it could, within 30 days of the citation, either have a personal interview at a Commission field office or submit a written response to the citation.
7. Dynasty representatives contacted the Division by telephone in early January 2004. Initially, a Dynasty representative claimed that Dynasty was exempt from federal do-not-call regulations. Later, after Dynasty apparently terminated that representative's employment, Dynasty acknowledged its obligation to comply with the Commission's do-not-call rules during telephone conversations with the Division. Finally, by letter dated February 20, 2004, Dynasty responded in writing to the citation, reiterating the information provided orally: that Dynasty's failure to honor its do-not-call obligations and to respond timely to the Division's citation was attributable to incorrect advice from its terminated contract-employee, and that do-not-call compliance was now a priority for Dynasty.
8. Despite Dynasty's assurances, consumers whose residential telephone numbers are registered on the National Do-Not-Call Registry continued to complain about telephone solicitations made by Dynasty. Accordingly, on July 6, 2004, the Division sent to Dynasty a Letter of Inquiry ("LOI") seeking information about consumer complaints received after issuance of the citation, 45 of which were filed after Dynasty's February 20 letter. The LOI directed Dynasty to provide information regarding each complaint including, inter alia, whether and why it called the complainants. In addition, the LOI sought information regarding Dynasty's internal procedures to ensure compliance with the National Do-Not-Call Registry and its own company-specific do-not-call list.
4. Dynasty responded to the LOI on July 28, 2004. Dynasty provided some information regarding its do-not-call efforts but did not fully answer the LOI. In particular, Dynasty did not address the complaints individually; instead it provided a broad general response regarding the purpose of its telephone solicitations. Dynasty did not deny making the calls in question but appeared to invoke the safe harbor defense, claiming to have routine business practices largely

Electronically Filed
Mar 29 2021 12:03 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

consistent with the safe harbor standards set forth in section 64.1200(c)(2)(i). As consumers continued to complain about Dynasty's telemarketing calls, the Division pursued its investigation, reviewing Dynasty's submission and contacting complaining consumers to obtain more information about the calls they had received.

5. On March 1, 2005, the Commission issued the Dynasty NAL to propose a forfeiture penalty against Dynasty for 70 telephone solicitations allegedly made to residential telephone subscribers who had placed their numbers on the National Do-Not-Call Registry. On the basis of information provided by call recipients and Dynasty itself, along with review of FTC National Registry documentation, the NAL concludes that (1) Dynasty's calls were telephone solicitations made in violation of the Commission's national do-not-call requirements; (2) Dynasty had failed to demonstrate that it qualified for the safe harbor from liability; and (3) the maximum forfeiture should be applied given Dynasty's failure to implement effective national do-not-call procedures and its handling of the calls. Supporting these findings are sworn declarations from each consumer that outline the receipt of Dynasty's call(s) and attest to the lack of any mitigating factors that might justify a telephone solicitation, such as a transaction with or inquiry to Dynasty or explicit permission for Dynasty to solicit.
6. Responding to the NAL, Dynasty initially submitted a brief letter challenging the proposed forfeiture. Subsequently, it filed a voluminous submission to explain and document its assertion that it should not be held liable for the calls at issue. In short, Dynasty contends that it has implemented comprehensive procedures to prevent telephone solicitations to consumers on the National Do-Not-Call Registry, and that any calls reaching registered consumers were made unintentionally and constitute a minuscule percentage of its total telemarketing calls. Further, although Dynasty concedes that it placed 21 of the calls subject to forfeiture herein, it disputes the remaining 47 calls for various reasons including that some calls could not or may not have been made and that some consumers actually were not on the Do-Not-Call Registry. Finally, Dynasty also argues that "imposing any forfeiture would ultimately bankrupt this company."
7. With respect to Dynasty's claim of financial hardship, the Division urged Dynasty to provide a more thorough explanation of its financial status and to fully document and authenticate its financial claims. To date, Dynasty has not provided this information or responded to the Division's request.

III. Discussion

13. At the outset, we have carefully reviewed records pertaining to each of the 70 telephone solicitations addressed in the Dynasty NAL. We have considered Dynasty's NAL Response and conclude that with respect to 68 of the calls, Dynasty has failed to present evidence to warrant rescinding or reducing the proposed forfeiture for these violations. Dynasty's arguments against forfeiture are rooted in three assertions: (1) that some of the calls subject to forfeiture either were not made or cannot be proven to have been made; (2) that Dynasty has comprehensive procedures to prevent telemarketing to consumers on the National Do-Not-Call Registry and that any calls made in spite of these procedures are excusable error, falling within the safe harbor from liability; and (3) that any forfeiture threatens Dynasty's financial solvency. We address these contentions below. Finally, we are rescinding the proposed forfeiture with respect to two calls because they were made one day before the recipient's Do-Not-Call registration became effective and, thus, do not constitute violations.

A. Dynasty Has Not Rebutted Evidence of Unlawful Telemarketing Calls

14. Based upon review of its telemarketing records, Dynasty claims that 45 of the 68 calls subject to forfeiture here either were not made or cannot conclusively be confirmed to have been made. Specifically, Dynasty denies making nine calls and notes that it either does not have records, or its records are inconclusive with respect to 36 of the disputed calls. In summary, Dynasty (1) admits making 21 unlawful calls, (2) is unable to confirm or deny making 36 calls, (3) denies making nine calls, and (4) alleges that two calls went to telephone numbers that were not on the National Do-Not-Call Registry.
15. We find Dynasty's claims unpersuasive. With respect to the 45 calls that Dynasty either denies or is unable to confirm, we note again that each of the 50 consumers who filed a complaint about receiving calls from Dynasty has signed, under penalty of perjury, a declaration that details the circumstances surrounding the call or calls that each claims to have received. The fact that Dynasty cannot independently confirm each of the 45 disputed calls at issue does not establish that the calls were not made. First, as Dynasty admits, 21 of these calls were made prior to full implantation of its automated calling system, and it retained no records that would indicate whether or not it placed the calls. Second, given that the record indicates that Dynasty's attention to its telemarketing obligations during the time period at issue was incomplete at best, we believe that the sworn statements provided by consumers are more reliable than Dynasty's records, even over those generated by Dynasty's automated telemarketing operations. In this regard, we also note that Dynasty's automated telemarketing system is not the only means by which Dynasty's telemarketing calls could be made. In fact, Dynasty itself raises questions about the reliability of its telemarketing workforce, specifically suggesting that personnel eager to meet or exceed sales goals may have made unauthorized calls not permitted under Dynasty's own national do-not-call policies.

16. We also reject Dynasty's more specific claims regarding particular calls. Dynasty is incorrect in claiming that two consumers who reported receiving a total of six calls were not on the National Do-Not-Call Registry at the time they were called. The telephone numbers that Dynasty associates with the consumers at issue, however, are not the telephone numbers reported by the complainants. The residential numbers provided by the two consumers were indeed registered on the National Do-Not-Call Registry for the required time as of the date of the calls.
17. We are also unpersuaded by Dynasty's assertion that three calls cannot have occurred because the originating telephone number obtained by the complainants through caller ID cannot be used to make outgoing telephone calls. It is unclear whether Dynasty is asserting that it is actually physically impossible to make outgoing telephone calls from the number in question, which is the main telephone number for Dynasty's San Diego office, or that placing such calls violates company policy because it could tie up the office telephone system. We also note that telemarketers may lawfully transmit through caller ID any telephone number associated with the telemarketer or party on whose behalf a call is made, as long as the transmitted number allows the consumer to identify the caller. A telemarketer or seller such as Dynasty could, therefore, transmit the main office or customer service telephone number in lieu of the actual telephone numbers from which calls were placed. Again, given Dynasty's uncertain support for its assertion, we believe that the complainants' sworn declarations are the more reliable source.
18. In short, Dynasty has failed to demonstrate that it did not make any of the 68 calls subject to forfeiture and detailed in complainants' sworn declarations. We turn next to whether these calls fall within the safe harbor from liability.
 - A. Dynasty's Practices during the Period March 2004 - January 2005 Do Not Satisfy All Safe Harbor Criteria
19. The safe harbor from liability for unlawful telemarketing calls applies only when a seller meets each of five separate operational criteria and also demonstrates that any unlawful calls were made as a result of identifiable error. The Dynasty NAL discusses in detail various aspects of Dynasty's operations that preclude application of the safe harbor defense to the 68 calls at issue. In determining whether those calls fall within the safe harbor from liability, the NAL examined information supplied by Dynasty in response to the LOI; the complainants' declarations; and data maintained by the FTC in connection with the National Registry. We need not repeat the NAL's detailed analysis of how that information, available to the Commission as of March 2005, was inconsistent with safe harbor standards. Instead, we focus our discussion now on the new information provided by Dynasty in its NAL Response to determine whether that information alters our previous conclusions regarding Dynasty's failure to demonstrate applicability of the safe harbor defense.
20. As set forth below, and reflected in Appendix A, we find that 51 of Dynasty's calls do not fall within the safe harbor because they were made during a period that Dynasty either had not accessed relevant portions of the National Do-Not-Call Registry at all or had not obtained updated versions of the Registry. The remaining 17 calls were made at times when Dynasty had obtained relevant portions of the Registry within required time frames. We find, nonetheless, that Dynasty has failed to demonstrate that the safe harbor applies to those 17 calls. The evidence before us does not show that Dynasty conducted the required scrubs of its call lists or fully implemented an accurate and effective written national do-not-call policy during any part of the forfeiture period. Because Dynasty failed to meet these safe harbor criteria, it is liable for the calls at issue.
 1. Accessing the National Do-Not-Call Database - Section 64.1200(c)(2)(i)(D)
21. Under section 64.1200(c)(2)(i)(D), the safe harbor defense reflects the linchpin of sellers' national do-not-call obligations: the requirement to refrain from calling residential telephone consumers who have placed their numbers on the National Do-Not-Call Registry. Accordingly, section 64.1200(c)(2)(i)(D) limits the safe harbor defense to an entity that can demonstrate, inter alia, that as part of its routine business practices, it "use[s] a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry . . . [within a specified timeframe], and maintains records documenting this process."
22. This safe harbor provision thus contains three distinct elements: (1) the requirement to access the National Do-Not-Call Registry at appointed times to obtain numbers that may not be called; (2) the requirement to have a routine process for using that information to prevent delivery of unlawful telephone solicitations, i.e., scrubbing telemarketing lists; and (3) the requirement to maintain records that document such access to and use of the Registry.
23. To facilitate access to the Registry, the FTC assigns a unique subscription account number ("SAN") to each entity that purchases the right to access the Registry. The FTC maintains a database, which is available to law enforcement entities such as this Commission, that records each time that a particular SAN is used to obtain the Registry and what portion (i.e., area codes) of the Registry is accessed. The

FTC thus maintains records that document whether a seller has complied with requirements governing the means and timing of accessing the Registry. For 62 of the calls at issue here, Dynasty was required to use a version of the Do-Not-Call Registry obtained no more than three months prior to the date it made any telemarketing call. Six calls made by Dynasty after January 1, 2005 are subject to a rule amendment that requires use of a version of the Registry obtained no more than 31 days before any telemarketing call.

- a. Dynasty Has Failed to Access the National Do-Not-Call Registry at Appointed Times to Obtain Numbers That May Not Be Called
24. As emphasized in the Dynasty NAL, Dynasty did not access the Registry at all between March 15, 2004 and January 6, 2005. During this almost ten month period, Dynasty missed three deadlines - June 8-15, 2004; September 8-15, 2004; and December 8-15, 2004 - to obtain relevant portions of the Registry in order to scrub its telemarketing lists within the three-month period then in effect. Dynasty made 45 calls that are subject to forfeiture herein during the lapsed period from June 8-15, 2004 until January 5, 2005. In addition, six of the calls at issue herein were made between March 2 and March 9, 2004 before Dynasty even accessed appropriate portions of the Registry for the first time. Dynasty made 51 calls, therefore, either using outdated Registry information or no information at all.
25. Dynasty's 2004 telemarketing plan appears to have called for Dynasty to access the National Do-Not-Call Registry through third party lead generators that it hired to obtain relevant portions of the Registry on its behalf, using its SAN, and then providing scrubbed call lists. Dynasty does not allege that any of its lead generators either failed to obtain the Registry as ordered by Dynasty or to properly scrub call lists; instead Dynasty briefly addresses the lapse in accessing the Registry by referring to "stretching call lists usage." It appears, therefore, that Dynasty consciously used outdated call lists for over five months. Moreover, in March 2004 - more than a month after a Dynasty representative orally admitted to Division staff the company's obligation to comply with the Commission's national do-not-call requirements and more than two weeks after Dynasty's president committed, in writing, to prompt and rigorous compliance - Dynasty made calls without ever having accessed relevant portions of the Registry. For the 51 calls made using either outdated National Registry data or no data at all, Dynasty's safe harbor defense fails on these facts alone. While acceptable written do-not-call policies, training techniques, manner of recording company-specific do-not-call requests, and actual scrubbing of call lists may differ from seller to seller, the safe harbor affords no discretion or variation as to a seller's obligation to access the National Do-Not-Call Registry at the required time.
 - a. Dynasty Has Failed to Demonstrate That It Implemented a Routine Process to Use Information from the National Do-Not-Call Registry to Prevent Delivery of Unlawful Telephone Solicitations
26. It is clear that Dynasty could not have properly scrubbed any call list during the period June 8-15, 2004 through January 5, 2005; its failure to access the National Do-Not-Call Registry during this period precludes any acceptable scrub. Further, even apart from this period, evidence suggests that Dynasty never completely scrubbed all its call lists.
27. Either Dynasty or its third party lead generators accessed the National Do-Not-Call Registry on March 8-15, 2004 and January 6, 2005. Evidence does not establish, however, that Dynasty actually used the Registry data accessed at these times to implement "a process to prevent telephone solicitations to any telephone number" on the Registry as required by section 64.1200(c)(2)(1)(D). Despite its obligation to maintain records documenting its actions, Dynasty does not present evidence that either the company itself or its third party lead generators successfully scrubbed all of Dynasty's call lists. Dynasty provides invoices from five lead generators relating to its purchase of lead lists intermittently over the period December 2003 through February 2005. These records do not demonstrate that Dynasty consistently purchased scrubbed call lists, much less that it took steps to ensure that it actually used only scrubbed call lists. Of the 16 invoices provided by Dynasty, only one lists Dynasty's SAN that must be used to access the National Do-Not-Call Registry on Dynasty's behalf; 12 invoices, on the other hand, contain no entry in the space on the form marked "SAN." One invoice contains the entry "Scrubbed Against the National Do Not Call List." Some invoices specify area codes for which Dynasty purchased leads while others contain generic descriptions such as "homeowners." These scattered and vague records do not establish that Dynasty consistently purchased scrubbed call lists or that it took steps to ensure that every call list it used was properly scrubbed. The mere fact that on occasion Dynasty accessed the Registry itself or obtained scrubbed call lists does not mean that it actually used such lists properly.
28. The lack of documentation in the record to prove that Dynasty actually purchased scrubbed call lists or produced them on its own is not the only factor that raises questions as to whether Dynasty properly used information from the National Do-Not-Call Registry after its March 2004 and January 2005 access. Dynasty suggests that its failure to obtain updated versions of the National Do-Not-Call Registry may have resulted in calls to newly-registered consumers. The record, however, indicates that 23 of the 32 complainants that Dynasty called between June 8, 2004 and January 5, 2005 - the period during which it failed to obtain updated versions of the Registry - had, in fact, been registered on the version of the Registry obtained by Dynasty or by

its lead generators in March 2004. In short, even though Dynasty failed to obtain updated Registry information, it could have prevented 29 of the 45 unlawful telemarketing calls made during the lapsed period simply by using the March 2004 versions of the Registry, which it possessed at the time it made the calls.

29. Finally, although Dynasty accessed the Registry for a second time on January 6, 2005, it did not access the Registry again until March 2, 2005, one day after the Dynasty NAL was released and served upon Dynasty via fax. Dynasty thus failed to access the Registry in February 2005 as required. Although, the NAL does not include any calls made in February or March 2005 after Dynasty's January 6 access expired, Dynasty's continued failure to timely access the National Do-Not-Call Registry is yet further support for our finding that it failed to fully implement a process whereby it used the National Do-Not-Call Registry to prevent delivery of telephone solicitations to registered numbers.
 - a. Dynasty Has Failed to Demonstrate That It Has Maintained Records Documenting Access to and Use of the National Do-Not-Call Registry
30. Section 64.1200(c)(2)(i)(D) conditions a safe harbor defense upon a seller's maintenance of records documenting access to and use of the National Do-Not-Call Registry. As provided in Dynasty's April 12 NAL Response, documentation for the period March 2, 2004 through January 20, 2005 is incomplete and inconclusive. The only documentation submitted by Dynasty related to its access to the Registry or scrubs of its call lists are the 16 invoices described above, which fail to demonstrate that Dynasty properly or completely scrubbed its call lists during the forfeiture period. In fact, Dynasty does not provide any records that document its March 2004 and January 2005 access to the National Do-Not-Call Registry; were it not for the FTC records regarding these access dates, which Commission staff acquired, there would be no clear and conclusive documentation that Dynasty's SAN was ever used to obtain the Registry.
2. Written Procedures - Section 64.1200(c)(2)(i)(A)
31. To qualify for the safe harbor exemption, a seller must demonstrate that as part of its routine business practice, "it has established and implemented written procedures to comply with the national do-not-call rules." In its NAL Response, Dynasty describes at length the procedures that it has adopted to prevent telemarketing calls to consumers on the National Do-Not-Call Registry and to others who have told Dynasty that they do not wish to receive its telephone solicitations. We emphasize, however, that Dynasty's current compliance plan and telemarketing operations are not at issue here.
32. According to Dynasty, it immediately took steps to implement effective national do-not-call procedures when it realized in late January 2004 that it must honor the National Do-Not-Call Registry, contrary to its contractor's advice. Dynasty states that it made significant and immediate changes to its telemarketing operations while it worked to develop an automated calling system, which it introduced on June 1, 2004 to replace its paper-based system for maintaining both telemarketing "leads" and the company-specific do-not-call list. In its NAL Response, Dynasty provides detailed descriptions of both its automated and paper-based systems for complying with both national and company-specific do-not-call requirements along with its training materials and its formal do-not-call policy. These materials stand in stark contrast to the summary responses and scant documentation that Dynasty provided in July 2004 in response to the Division's LOI, and it is difficult to understand why Dynasty would not have provided the Division with complete descriptions and internal company records in response to the LOI, which explicitly directed their submission. Even assuming, however, that the detailed telemarketing handbook, training materials, and other written procedures set forth in Dynasty's April 12 NAL Response existed during the forfeiture period, Dynasty does not meet the criteria established by section 64.1200(c)(2)(i)(A).
33. A compliance plan, however well-conceived and expressed, is meaningless if it is not fully implemented. Dynasty clearly failed multiple times to implement a critical element. Dynasty's Telephone Solicitation Policy calls for the company to access the National Do-Not-Call Registry every eight to ten weeks until January 1, 2005 when access was required every month. As detailed above and in the NAL, Dynasty missed three deadlines for accessing the Registry during the period June 15, 2004 to January 5, 2005. In addition, when Dynasty actually did access the National Do-Not-Call Registry (March 8-15, 2004 and January 6, 2005), evidence does not establish that Dynasty effectively used the Registry in the manner described in its April 12 NAL Response narrative and accompanying internal documents. These failures to follow its own procedures to both access the National Do-Not-Call Registry at required intervals and use such information to prevent unlawful telephone solicitations not only fall short of the safe harbor standard to properly access and use the National Do-Not-Call Registry but also separately indicate that Dynasty did not effectively or fully implement its written procedures. On this basis, Dynasty does not meet the safe harbor standard contained in section 64.1200(c)(2)(i)(A).
34. The evidence in the record makes it difficult to avoid the conclusion that careful implementation of a national do-not-call compliance plan did not become a priority for Dynasty until after issuance of the Dynasty NAL. Dynasty provided detailed written materials concerning such a plan to the Commission only in response to the NAL, despite the fact that the staff specifically requested such records in the July 2004 LOI. This conclusion is further supported by evidence