

Dynasty Mortgage, L.L.C., Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 4901 (2005) ("Dynasty NAL" or "NAL"). The Dynasty NAL was issued pursuant to section 503 of the Communications Act of 1934, as amended, which gives the Commission authority to assess a forfeiture against any person who has "willfully or repeatedly failed to comply with any of the provision of this Act or of any rule, regulation, or order issued by the Commission under this Act. . . ." 47 U.S.C. S 503(b)(1). Section 503 provides that the Commission must assess such penalties through the use of a written notice of apparent liability or notice of opportunity for hearing. Id. at S 503(b)(3), (4).

47 C.F.R. S 64.1200(c)(2), (d).

Id. The Commission's do-not-call rules closely correspond to those of the Federal Trade Commission ("FTC"), which shares federal enforcement responsibilities with this Commission and also maintains and manages the National Do-Not-Call Registry. As provided in the Commission's 2003 order that incorporated the Registry in section 64.1200, we have focused our enforcement efforts in this area on entities that fall outside the FTC's jurisdiction: communications common carriers, airlines, insurance companies, banks, credit unions, savings and loans, and intrastate calls by any entity. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd 14014, 14138-39 (2003) ("2003 TCPA Order").

47 C.F.R. S 64.1200(c)(2).

Section 64.1200(c)(2)(ii) of our rules requires that prior express invitation or permission to call a residential telephone consumer who has signed on to the National Do-Not-Call Registry "must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed." 47 C.F.R. S 64.1200(c)(2)(ii).

For do-not-call purposes, the term "established business relationship" means "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party." 47 C.F.R. S 64.1200(f)(3).

47 U.S.C S 227(a)(3); 47 C.F.R. S 64.1200(f)(9).

The term "personal relationship" means "any family member, friend, or acquaintance of the telemarketer making the call." 47 C.F.R. S 64.1200(f)(11).

2003 TCPA Order, 18 FCC Rcd at 14040. A call containing such speech, however, may not be exempt if it merely "serve[s] as a pretext to an otherwise prohibited advertisement." Id. at 14040 n. 141.

"Scrubbing" refers to comparing a company's call list to the National Do-Not-Call Registry and eliminating from the call list all non-exempt numbers contained in the National Registry that are not covered by an exemption. 2003 TCPA Order, 18 FCC Rcd at 14023 n. 37.

47 C.F.R. S 64.1200(c)(2)(i); 2003 TCPA Order, 18 FCC Rcd at 14040.

Since January 1, 2005, telemarketers are required to use a version of the Registry that is no more than 31 days old. In other words, telephone solicitors are, in effect, required to scrub their call lists against the National Do-Not-Call Registry no more than 31 days before making any call. Consequently, unlawful calls may be prosecuted no sooner than 31 days after a consumer has signed on to the National Do-Not-Call Registry. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Order, 19 FCC Rcd 19215 (2004) (amending section 64.1200(c)(2)(i)(D)). Prior to January 1, 2005, and during the time period relevant to most of the calls at issue here, telemarketers were permitted to use a version of the Registry that was no more than three months old. See para. 23, *infra*.

47 C.F.R. S 64.1200(c)(2)(i).

Division staff reviewed do-not-call complaints received by both this Commission and the FTC.

Letters from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, to Dynasty Mortgage, dated Oct. 6, 2003 and Nov. 18, 2003.

If, as here, an alleged violator does not hold a Commission license, permit, certificate, or authorization, the Commission may not initiate a forfeiture proceeding without first issuing a warning citation. 47 U.S.C. S 503(b)(5). If the citation recipient continues the unlawful behavior after receiving the citation, the Commission may propose monetary penalties, but only for those violations that occur after issuance of the citation.

Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, to Dynasty Mortgage, dated Dec. 22, 2003.

Commission staff disputed this claim and urged the Dynasty representative to respond to the citation in writing to fully explain the basis for its

<https://transition.fcc.gov/eb/Orders/2007/FCC-07-67A1.html>

Electronically Filed
Mar 29 2021 12:09 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

position. Dynasty NAL, 20 FCC Rcd at 4905.

See id. (reporting January 30, 2004 and February 19, 2004 telephone conversations).

Letter from Curtis L. White, President, Dynasty Mortgage, to Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, dated Feb. 20, 2004.

As explained below, we are canceling the proposed forfeiture for two calls that were made prior to effectuation of the call recipient's do-not-call registration. See para. 13, *infra*.

Each complainant has signed a declaration, under penalty of perjury, asserting that (1) receipt of a telephone call or calls from Dynasty Mortgage on the complainant's residential telephone line despite registration of that number on the National Do-Not-Call Registry; (2) absence of prior express permission or invitation for the call(s); and (3) absence of a transaction with Dynasty or any of its affiliated companies within the 18 months immediately preceding the call(s), or an inquiry or application to any of these entities within the three months immediately preceding the call(s). In addition, three complainants who recorded the name of the individual calling on behalf of Dynasty attest that they do not, to the best of their knowledge, have a personal relationship with the caller. Finally, 29 complainants also attest to receipt of caller ID information, which either explicitly identified Dynasty or displayed a telephone number traceable to Dynasty in the case of 44 calls.

Letter from Curtis L. White, President, Dynasty Mortgage, to Kurt Schroeder, Deputy Chief, Telecommunications Consumers Division, dated Mar. 31, 2005 ("March 31 NAL Response"); Response to Apparent Liability for Forfeiture, dated Apr. 14, 2005 ("April 14 NAL Response") (collectively "NAL Response").

This figure does not include the two calls for which we are canceling the proposed forfeiture. See n. 22, *supra*, and para. 13, *infra*.

March 31 NAL Response.

Letter from Kurt Schroeder, Deputy Chief, Telecommunications Consumers Division, to Curtis L. White, President, Dynasty Mortgage, dated Dec. 22, 2005.

The two calls at issue were received by Hal Stewart on December 22, 2004. Mr. Stewart's residential telephone number was registered on the National Do-Not-Call Registry on September 23, 2004 and that registration became effective on December 23, 2004. The December 22nd calls, therefore, are not violations. Mr. Stewart received another call from Dynasty on December 29, 2004, which is a violation and subject to forfeiture herein. See Appendix A, *infra*.

Dynasty concedes making 21 calls but claims without elaboration that 10 of those calls were never actually completed ("21 prohibited calls . . . are confirmed to have been dialed of these 10 only were connected"). April 12 NAL Response at 20.

Dynasty notes that its review is complicated by the fact that its original paper-based telemarketing system did not generate records that can be reviewed now to determine whether particular calls were made.

Dynasty makes this claim with respect to 38 of the 70 calls specified in the Dynasty NAL. As indicated above, however, we are rescinding the proposed forfeiture for two of these calls. See para. 13, *supra*. Dynasty's position with respect to these calls is not entirely clear: Dynasty both states that the identified complainants "are assumed to have been called" and that the calls to those individuals "can not be confirmed nor denied." April 12 NAL Response at 18, 20.

See n. 23, *supra*.

Dynasty's position with respect to these calls is not entirely clear: Dynasty both states that the identified complainants "are assumed to have been called" and that the calls to those individuals "can not be confirmed nor denied." April 12 NAL Response at 18, 20.

See paras. 19-34, *infra*.

Dynasty reports that its automated records are "inconclusive" with respect to 17 calls that complainants claim to have received after Dynasty's new automated telemarketing system was introduced in June 2004. April 12 NAL Response at 20.

Id. at 20, 23.

Dynasty admits two of the calls but maintains that its automated records do not show that the remaining four calls were made. April 12 NAL Response at 19.

The residential telephone numbers provided in the consumers' sworn declarations are different from those that Dynasty attributes to its calls. In one case, Dynasty indicates that it called a consumer, Michelle Logan, at a California telephone number that was supposedly not on the National Do-Not-Call Registry at the time of the call. The NAL, however, applies to calls made to an individual named Michelle Logan at an Arizona telephone number. Ms. Logan reports receiving a total of five calls within less than one month. In the other case, involving a call received by Antoinette Jaycox, two online telephone directories confirm that the telephone number provided in Ms. Jaycox's declaration is listed under the

name "Antoinette Jaycox" while the number that Dynasty claims to have used to call Ms. Jaycox is listed under another name. Dynasty's errors in this regard may stem from the fact that it apparently reviewed its telemarketing records by call recipients' name, and did not request from the Division the consumer declarations, each of which lists the telephone number at which the consumer received Dynasty's call(s). For privacy reasons, the declarations are not routinely-available Commission records like the NAL itself. The Division, however, makes such materials available to NAL recipients upon request.

As shown in Appendix A, we have confirmed that each residential telephone number provided by the 50 complainants in this case was timely and properly registered on the National Do-Not-Call Registry at the time the 68 calls subject to forfeiture were made.

Appendix A of the NAL incorrectly noted that one consumer, Joe Fernando, had provided caller ID information. Instead, as indicated in Mr. Fernando's declaration, the listed telephone number was provided orally by Dynasty's telemarketer.

"This phone line is not used for outbound calls; doing so would occupy the main incoming line preventing incoming calls. The phone system at 4660 E. La Jolla Village Dr. Ste. 400 San Diego, CA 92122 does not allow outbound calls using the phone line 858-362-8585." Dynasty April 12 NAL Response at 20.

47 U.S.C. § 64.1601(e); 2003 TCPA Order, 18 FCC Rcd at 14122.

The Dynasty NAL does not address Dynasty's compliance with the safe harbor requirement to record company-specific do-not-call requests, 47 C.F.R. § 64.1200(c)(2)(i)(C). Likewise, we do not address this safe harbor aspect here although we note that we have not received complaints that Dynasty has failed to honor company-specific do-not-call requests within the required 31-day period.

See n. 13, *supra*.

47 C.F.R. § 64.1200(c)(2)(i)(D)

In addition, the FTC's Internet do-not-call complaint system automatically checks the complainant's telephone number to determine whether and when that number was added to the National Do-Not-Call Registry. The system then compares the registration date against the date of the alleged telemarketing call, and only accepts complaints in which the complainant's telephone number was timely registered at the time of the alleged call. In this case, our staff has independently confirmed that each complainant's telephone number was registered on the National Do-Not-Call Registry for the required three months or 31 days before the alleged call was made. As indicated above, we have discovered that two calls for which we proposed a forfeiture penalty were made one day prior to effectuation of the call recipient's do-not-call registration. See para 13, *supra*. This complainant also received a call from Dynasty after effectuation of his do-not-call registration, which was accepted by the FTC's automated complaint system.

See n. 13, *supra*.

Dynasty NAL, 20 FCC Rcd at 4912. As indicated in the NAL, our staff obtained FTC do-not-call records that show that Dynasty's SAN was used to access portions of the National Registry twice during the forfeiture period: first, over the course of one week in March 2004, and second, on January 6, 2005. Between March 8 and March 15, 2004, Dynasty accessed portions of the Do-Not-Call Registry for three Arizona and three California area codes. On January 6, 2005, Dynasty accessed these same portions of the Registry and, in addition, portions for two new Arizona area codes, one new California area code, and one Nevada area code.

April 12 NAL Response at 16-17, Exhibit A (5-16). Dynasty notes that beginning on January 6, 2005, it also "began accessing the National Registry directly and appending the change list to its company specific internal do not call list." April 12 NAL Response at 17.

April 12 NAL Response at 27.

See para. 7, *supra*.

Dynasty states that it began an interim "lead database" system of managing its do-not-call obligations in February 2004. April 12 NAL Response at 3. Yet it did not access the National Do-Not-Call Registry until March 8-15, 2004.

See para. 30, *infra*.

April 12 NAL Response at Exhibit C.

The FTC's National Registry documentation does not indicate that Dynasty's SAN was used to access the Registry around the time specified in the invoice, January 2004.

Again, however, FTC records do not show that Dynasty's SAN was used to access the Registry around the time of this invoice, November 2004.

Dynasty April 12 NAL Response at 22.

A December 2004 amendment to Dynasty's June 2004 Telephone Solicitation Policy explicitly recognizes that, beginning January 1, 2005, Dynasty must access the Registry no less than every 31 days rather than every three months. Dynasty April 12 NAL Response at Exhibit A (Amendment).

See para. 27, *supra*.

47 C.F.R. § 64.1200(c)(2)(i)(A).

April 12 NAL Response at 2-8.

Id.

We note that accessing the Registry every 8-10 weeks goes beyond the requirements in effect for most of the forfeiture period: that call lists had to be scrubbed against a version of the National Do-Not-Call Registry no more than three months old. See n. 13, *supra*.

April 12 NAL Response, Exhibit A.

Between March 2, 2005 and September 27, 2005 Dynasty accessed the Registry on ten different dates. During this time, Dynasty twice briefly exceeded the 31-day maximum; the interval between access was 33 days between April and May and 36 days between August and September.

Although Dynasty's current conduct is not subject to forfeiture herein, FTC records show that Dynasty's last access to the Registry occurred on September 27, 2005.

47 C.F.R. § 64.1200(c)(2)(i)(B).

Despite Dynasty's February 20, 2004 written assurance that it would abandon its previous claim that it was exempt from national do-not-call rules, two complainants report telephone solicitations they received in June and July 2004 during which they were told - once by an individual identified as a Dynasty supervisor - that Dynasty was exempt from national do-not-call requirements. Declaration of Theodore A. Wassel (during June 1, 2004 call, Dynasty manager stated Dynasty is exempt from the National Do-Not-Call Registry); declaration of Stuart Novitz (during July 20, 2004 call, Dynasty claimed to be a "federally exempt company for telemarketing purposes"). We expect that effective training of Dynasty's telemarketers would preclude such claims, especially by supervisory personnel.

47 C.F.R. § 64.1200(c)(2)(i)(E).

Id.

April 12 NAL Response at 16.

20 FCC Rcd at 4909.

See para. 5, *supra*.

April 12 NAL Response at 12-14.

Dynasty briefly acknowledges its lapse in accessing the National Do-Not-Call Registry. See April 12 NAL Response at 21, 27. Dynasty appears to believe that it unlawfully failed to access the Registry in March, August, and December 2004. *Id.* at 21. However, as indicated above, Dynasty's three missed deadlines to access the Registry occurred in June, September, and December 2004. See para. 24, *supra*.

April 12 NAL Response at 21-23 (describing various possible technical and human errors).

April 12 NAL Response at 23 ("A telemarketer will often deviate from established scripts or training in an attempt to entice a sale. . . . Telemarketers have been found to have created and utilized their own call lists not in accordance with Dynasty's established procedures for obtaining current call lists.") *Id.* at 21 ("If data in call lists or do not call lists are not formatted correctly information can pass through. A phone number in a call list formatted as (123) 456-7890 will not be scrubbed if the same number is in the do not call list as 1234567890.")

The NAL notes that "an error claim should be supported by evidence showing that otherwise unlawful telephone solicitations were made unintentionally and detailing any procedural breakdowns that led to such calls, as well as the steps that the seller has taken to minimize future errors." See Dynasty NAL, 20 FCC Rcd at 4909.

Section 503(b)(2)(C) provides for forfeitures up to \$10,000 for each violation in cases not covered by subparagraphs (A) or (B), which address forfeitures for violations by licensees and common carriers, among others. See 47 U.S.C. § 503(b). Pursuant to the Debt Collection Improvement Act of 1996, P.L. 104-134, 110 Stat. 1321-358, the statutory maximum amount for a forfeiture penalty shall be adjusted for inflation at least once every four years. Accordingly, the \$10,000 forfeiture ceiling has been adjusted to \$11,000. 47 C.F.R. § 1.80(b)(5). Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation, 15 FCC Rcd 18221 (2000); Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation, 19 FCC Rcd 10945 (2004).

47 U.S.C. § 503(b)(2)(D); 47 C.F.R. § 1.80(b)(4).

Dynasty NAL, 20 FCC Rcd at 4913 (citing AT&T Corporation, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 23398 (2003)).

Id. at 4914.

As a related matter, Dynasty contends that it did not misinform consumers, arguing that reported conversations between Dynasty telemarketers and complainants are of questionable accuracy or isolated and ambiguous. April

12 NAL Response at 25 We note that each of these complainants signed a sworn declaration attesting to statements made by Dynasty telemarketers, including supervisory personnel. Moreover, our forfeiture, including the upward adjustment, is rooted in the totality of Dynasty's noncompliant conduct, not simply its reported conversations with call recipients. Dynasty NAL, 20 FCC Rcd at 4014.

See paras.

When Dynasty discovered in January 2004 that its telemarketing operations were unlawful, it could have chosen to suspend telemarketing operations briefly until it was able to ensure compliance. As discussed below, we have not imposed a forfeiture penalty for any of Dynasty's unlawful telephone solicitations delivered before March 2, 2004. See Appendix A, para. 47, *infra*.

"Willful" in this context means that the violator knew that he was doing the act in question, in this case, initiating a telephone solicitation. See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California*"). A violator need not know that his action or inaction constitutes a violation; ignorance of the law is not a defense or mitigating circumstance. *Id.* (citing *Vernon Broadcasting, Inc.*, 60 RR 2d 1275, 1277 (1986); *Fay Neel Eggleston*, 19 FCC 2d 829 (1969)). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. See, e.g., *Callais Cablevision, Inc.*, 16 FCC Rcd 1359 (2001) ("*Callais Cablevision*") (issuing a notice of apparent liability for forfeiture for, *inter alia*, a cable television operator's repeated signal leakage). The term "repeated" means that the act was committed or omitted more than once, or lasts more than one day. *Callais Cablevision*, 16 FCC Rcd at 1362; *Southern California*, 6 FCC Rcd at 4388.

See para. 32, *supra*.

As noted above, Dynasty again has neglected to access the National Do-Not-Call Registry within the required time frame. See n. 65, *supra*. Assuming that Dynasty is continuing its telemarketing activities, the most recent lapse - failure to access the Registry since September 27, 2005 - is another indication that Dynasty's do-not-call compliance remains haphazard.

Seawest Yacht Brokers, 9 FCC Rcd 6099 (1994) ("Corrective action taken to come into compliance with Commission rules or policy is expected, and does not nullify or mitigate any prior forfeitures or violations.").

Dynasty NAL, 20 FCC Rcd at 4914.

Dynasty lists various factors that it claims threaten the companies' financial viability ranging from losses from embezzlement and failed business ventures, to expenditures associated with its national do-not-call compliance program, to increased competition and cyclical downswings, to negative publicity associated with our warning citation and NAL. See NAL Response at 27-28. We note here that national do-not-call compliance costs do not appropriately factor into a financial hardship analysis; entities that cannot afford full do-not-call compliance should not be engaged in telemarketing.

20 FCC Rcd at 4914, n. 58.

See para. 12, *supra*.

47 U.S.C § 504(a).

See 47 U.S.C § 1.1914.

Shows Dynasty's most recent access to the National Do-Not-Call Registry prior to the date of its telephone solicitation. When Dynasty failed to access the Registry before making a telephone solicitation, the date provided is the access date closest to the date of the telephone solicitation.

Shows Dynasty's most recent access to the National Do-Not-Call Registry prior to the date of its telephone solicitation. When Dynasty failed to access the Registry before making a telephone solicitation, the date provided is the access date closest to the date of the telephone solicitation.

Shows Dynasty's most recent access to the National Do-Not-Call Registry prior to the date of its telephone solicitation. When Dynasty failed to access the Registry before making a telephone solicitation, the date provided is the access date closest to the date of the telephone solicitation.

Shows Dynasty's most recent access to the National Do-Not-Call Registry prior to the date of its telephone solicitation. When Dynasty failed to access the Registry before making a telephone solicitation, the date provided is the access date closest to the date of the telephone solicitation.

(Continued from previous page)

(continued....)

Federal Communications Commission FCC 07-67

JA002228
001103