

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
DYNASTY MORTGAGE, L.L.C.)	File No. EB-03-TC-100
)	
Apparent Liability for Forfeiture)	NAL/Acct. No. 200432170005
)	FRN: 0012612156
)	
)	
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 28, 2005

Released: March 1, 2005

By the Commission:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (“NAL”), we find that Dynasty Mortgage, L.L.C.¹ (“Dynasty”) apparently willfully or repeatedly violated section 64.1200(c)(2) of the Commission’s rules² by making telephone calls for the purpose of delivering telephone solicitations to residential telephone consumers who had registered their telephone numbers on the National Do-Not-Call Registry. This NAL addresses 70 such calls made to 50 residential telephone consumers in Arizona and California between March 2, 2004 and January 20, 2005. Based on our review of the facts and circumstances surrounding these apparent violations, we find that Dynasty is apparently liable for a forfeiture in the amount of \$11,000 for each of the 70 violations for a total of \$770,000.³

¹Dynasty Mortgage, L.L.C is owned by Curtis L. White, who serves as President and Chief Executive Officer. Dynasty has two offices in Arizona and one in California: (1) 2633 E. Indian School Rd., Suite 370, Phoenix, Arizona 85016; (2) 5701 W. Talavi Blvd., Suite 110, Glendale, Arizona 85306; and (3) 4660 E. LaJolla Village Dr., Suite 400, San Diego, California 92122. During the relevant time period, Dynasty had two affiliated companies: Dynasty Lending and Dynasty Title Agency.

²47 C.F.R. § 64.1200(c)(2).

³See 47 U.S.C. § 503(b)(1). The Commission has the authority under this section of the Act to assess a forfeiture against any person who has “willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act” 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.* § 503(b)(3), (4).

II. BACKGROUND

A. Rules Implementing the Telephone Consumer Protection Act

2. The Telephone Consumer Protection Act (“TCPA”) was enacted in 1991 as section 227 of the Communications Act of 1934, as amended (“the Act”), to restrict certain telemarketing practices. The TCPA required the Commission to adopt rules governing such practices, including the delivery of telephone solicitations to residential telephone lines.⁴ Consistent with this statutory mandate, the Commission first adopted rules to implement the TCPA in 1992, establishing a company-specific do-not-call regime whereby residential telephone consumers may make do-not-call requests to companies whose telephone solicitations they seek to end.⁵ Following considerable changes in the telemarketing industry,⁶ new telemarketing rules adopted by the Federal Trade Commission (“FTC”),⁷ and further statutory requirements,⁸ we amended our TCPA rules in 2003.⁹ While retaining a company-specific do-not-call option to prevent telemarketing calls from particular entities, the amended rules, *inter alia*, expand this system to include a National Do-Not-Call Registry that provides residential consumers with a one-step option to prohibit unwanted telephone solicitations.

3. Section 64.1200(c)(2) of the Commission’s rules requires that “no person or entity shall initiate any telephone solicitation . . . to . . . a residential telephone subscriber who has registered his or her telephone number on the National Do-Not-Call Registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government.”¹⁰ Not every promotional call,

⁴Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227. The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.* Section 227(c)(1) required the Commission to conduct a rulemaking proceeding “concerning the need to protect residential telephone subscribers’ privacy rights to avoid receiving telephone solicitations to which they object.”

⁵*See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992) (*1992 TCPA Order*); *see also* 47 C.F.R. § 64.1200. Pursuant to petitions for reconsideration, the Commission adopted amendments to the TCPA rules in 1995 and 1997. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391 (1995) (*1995 TCPA Reconsideration Order*); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Order on Further Reconsideration, 12 FCC Rcd 4609 (1997) (*1997 TCPA Reconsideration Order*).

⁶*See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14021-22 (2003) (*2003 TCPA Order*) (describing expansion of telemarketing industry since 1992).

⁷In 2003, the FTC amended its Telemarketing Sales Rule, 16 C.F.R. Part 310, to include a National Do-Not-Call Registry.

⁸Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003), *codified at* 15 U.S.C. § 6101 (*Do-Not-Call Act*). The Do-Not-Call Act authorizes the establishment of a national do-not-call registry and directs the FCC to adopt rules that maximize consistency with those of the FTC.

⁹*2003 TCPA Order*, 18 FCC Rcd 14014.

¹⁰47 C.F.R. § 64.1200(c)(2).

however, constitutes a prohibited telephone solicitation under this rule. As established by the TCPA, the term “telephone solicitation” means:

the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

- (i) To any person with that person’s prior express invitation or permission.¹¹
- (ii) To any person with whom the caller has an established business relationship¹²; or
- (iii) By or on behalf of a tax-exempt nonprofit organization.¹³

Accordingly, an advertising call that falls within one of these exclusions does not violate section 64.1200(c)(2). In addition to these 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.¹⁴ 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.¹⁵

4. To protect against prohibited telemarketing calls, entities that advertise through telephone solicitations are required to pay fees to access the do-not-call database and must “scrub” their calling lists of non-exempt residential telephone numbers contained in the Registry.¹⁶ Recognizing that parties who have made good faith efforts to comply with the national do-not-call rules may, nonetheless,

¹¹Section 64.1200(c)(2)(ii) of our rules requires that prior express invitation or permission “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. § 64.1200(c)(2)(ii).

¹²For 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. § 64.1200(f)(3).

¹³47 U.S.C § 227(a)(3); *see also* 47 C.F.R. § 64.1200(f)(9).

¹⁴The term “personal relationship” means “any family member, friend, or acquaintance of the telemarketer making the call.” 47 C.F.R. § 64.1200(f)(11).

¹⁵2003 *TCPA Order*, 18 FCC Rcd at 14040. Such speech, however, may not be exempt if it merely “serve[s] as a pretext to an otherwise prohibited advertisement.” *Id.* at n. 141.

¹⁶“Scrubbing” refers to comparing a company’s call list to the National Do-Not-Call Registry and eliminating from the call list all numbers contained in the National Registry that are not covered by an exemption.

occasionally make some calls in error to registered telephone lines, the Commission established standards for a safe harbor exemption from liability.¹⁷

5. In order 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,¹⁸ 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 violative calls made in spite of adherence to the enumerated do-not-call procedures were the result of error.

6. The Commission's do-not-call rules closely correspond to those of the FTC, which maintains the National Registry and shares federal enforcement responsibilities with this Commission. As provided in the *2003 TCPA Order*, we have focused our enforcement efforts 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. Enforcement of the National Do-Not-Call Registry has been the top consumer protection enforcement priority for this Commission since the Registry took effect in October 2003.

B. Investigation of Complaints against Dynasty

7. The Telecommunications Consumers Division ("Division") of our Enforcement Bureau initiated this investigation based upon its review of consumer complaint data involving calls made to telephone lines contained in the National Do-Not-Call Registry.¹⁹ The Division found a significant volume of complaints involving Dynasty, a mortgage services provider that apparently uses telephone solicitations to market its services to consumers in Arizona and southern California. In October and November 2003, the Division 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.²⁰ The November 18 letter to

¹⁷*2003 TCPA Order*, 18 FCC Rcd 14014, 14040; 47 C.F.R. § 64.1200(c)(2).

¹⁸We recently amended our rules to require telemarketers to use a version of the Registry that is no more 31 days old. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, FCC 04-204 (Sept. 21, 2004). 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.

¹⁹Enforcement Bureau staff reviewed do-not-call complaints received by both this Commission and the FTC.

²⁰Letters from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, to Dynasty Mortgage, dated Oct. 6, 2003 and Nov. 18, 2003.

Dynasty forwarded complaints from 114 consumers who are registered on the National Do-Not-Call List and claim to have received telephone solicitations from Dynasty between October and early November 2003. The letter asked Dynasty to provide information demonstrating that the reported calls did not violate the Commission's do-not-call rules, and warned that the Division would issue a citation²¹ against Dynasty if it failed to provide such exculpatory evidence within 20 days.

8. On December 22, 2003, following Dynasty's failure to respond to the November letter, the Division issued a citation against Dynasty.²² 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.

9. Dynasty's contacts with our staff following issuance of the citation provided a series of shifting positions on the company's response to the citation and compliance with our rules. During the week of January 4, 2004, an individual who identified himself as Randy Sage called the Division, on behalf of Dynasty, to discuss the citation. On January 8, 2004, a Division staff member returned Mr. Sage's call. Mr. Sage claimed that "as a government-regulated business," Dynasty is exempt from federal do-not-call rules. The staff person informed Mr. Sage that neither the TCPA nor the Commission's rules contain such an exemption, and repeated the citation's warning that Dynasty's continuing telephone solicitations to consumers who had placed their residential telephone numbers on the National Do-Not-Call Registry could result in substantial monetary penalties. Nonetheless, the staff person encouraged Dynasty to explain in a formal response to the citation the circumstances surrounding its calls, including any reliance on the so-called regulated entity exemption. Mr. Sage stated that Dynasty would provide such a response sometime during the week of January 11, 2004. After the Commission did not receive any such response from Dynasty and the 30-day date for its citation response passed, the staff person called Dynasty's Phoenix office on January 30, 2004. At this time, the staff person was informed that Mr. Sage no longer worked at Dynasty. She was connected to Dynasty employee Butch Hughes. Mr. Hughes informed her that Dynasty had recently terminated Mr. Sage's employment when it discovered that Mr. Sage had provided Dynasty with incorrect information regarding its obligation to comply with the Commission's do-not-call rules. Mr. Hughes indicated that Dynasty had taken steps to subscribe to the National Do-Not-Call Registry and to ensure compliance. Finally, Mr. Hughes stated that he believed Dynasty had already responded to the staff's November 18 letter. The staff person informed Mr. Hughes that the Commission had not received any written response from Dynasty, either to the October or November letters or to the citation, and encouraged Dynasty to respond in writing to the citation as soon as possible.

10. On February 19, 2004, Dynasty's president Curtis L. White called a manager in the Telecommunications Consumers Division. Mr. White repeated the information that Mr. Hughes had provided to the staff person and reiterated Dynasty's determination to comply with the Commission's do-

²¹If, 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. § 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.

²²Letter from Kurt A. Schroeder to Dynasty Mortgage, dated Dec. 22, 2003.

not-call rules. Mr. White also claimed that Dynasty had receipts showing delivery to the Commission of Dynasty's written responses to the citation and the November letter. The Division manager informed Mr. White that the Division had not received any written response from Dynasty and suggested that Dynasty outline in writing its claims and defenses and also forward copies of any prior responses along with documentation of delivery.

11. By letter dated February 20, 2004, Dynasty responded in writing to the citation by reiterating the information provided orally to the Division staff person and manager.²³ Dynasty did not provide copies of any previous responses or proof of delivery. In short, Dynasty claimed that "prior to December 21, 2003 [Dynasty] outsourced its [sic] compliance department" to Mr. Sage's company, Mortgage Marketing Consultants, and relied upon Mr. Sage's advice that Dynasty was exempt from federal do-not-call requirements by virtue of its status as "an approved lending institution" with a license from the Department of Housing and Urban Development. Dynasty stated, that "[o]bviously we now know that this information was incorrect and have fired Mr. Randall Sage and have taken the appropriate actions to comply with the National Do Not Call List." Outlining those actions, Dynasty emphasized that it had recently subscribed to the National Do-Not-Call Registry²⁴ and had put into effect a company-specific do-not-call list "for the people that are not on the National list but still do not want a courtesy call from our company." Dynasty claimed that it scrubs its lead lists using both its company-specific do-not-call list and the National Registry. Dynasty also mentioned its plan to enhance its compliance efforts with the acquisition of a dialing system that will "suppress all the [prohibited] leads automatically."

12. Despite Dynasty's assurances, consumers whose residential telephone numbers are registered on the National Do-Not-Call Registry have continued to complain about telephone solicitations made by Dynasty, even after its February 20 citation response. 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 list. The LOI directed Dynasty to support its response with an affidavit or declaration from a company officer attesting, under penalty of perjury, to the accuracy of the information provided in any response.

13. 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 providing 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 consistent with the safe harbor standards set forth in section 64.1200(c)(2)(i).²⁵

14. All of the consumers whose complaints form the basis of this NAL filed a complaint with either this Commission or the FTC alleging that Dynasty failed to honor their registration on the National

²³Letter from Curtis L. White, President, Dynasty, to Kurt A. Schroeder, FCC, dated Feb. 20, 2004.

²⁴Dynasty provided its subscription account number ("SAN") and expiration date as evidence of its subscription.

²⁵See para. 18, *infra*.

Do-Not-Call Registry by making a phone call or calls to the registered telephone lines.²⁶ The FTC's database shows that each telephone number was, in fact, properly and timely registered on the National Do-Not-Call Registry²⁷ at the time each complainant alleges receipt of a call from Dynasty.²⁸ Further, each complainant has signed a declaration, under penalty of perjury, asserting (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;²⁹ (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).³⁰ 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, 30 complainants attest to receipt of caller ID information, which either explicitly identified Dynasty or displayed a telephone number traceable to Dynasty. These violations are listed in Appendix A.

III. DISCUSSION

A. Apparent Violations Evidenced in the Record

15. The evidence developed in this investigation warrants a finding of apparent liability for Dynasty's failure to comply with the requirement that it refrain from initiating telephone solicitations to consumers registered on the National Do-Not-Call Registry. As indicated above, declarations from 50 residential telephone consumers registered on the National Do-Not-Call Registry detail 70 calls made by Dynasty. The declarations, and information from Dynasty itself, provide convincing evidence that Dynasty apparently made the telemarketing calls without any mitigating circumstances necessary to establish an exemption or support a safe harbor defense.

²⁶These apparently violative calls are listed in Appendix A.

²⁷During the time relevant to most of the calls at issue here, our rules required telephone solicitors to use a version of the National Do-Not-Call Registry that was no more than three months old. In other words, telephone solicitors were, in effect, required to have scrubbed their calling lists against the National Do-Not-Call Registry no more than three months before making any call. Consequently, a consumer's registration was not enforceable until three months passed. As indicated above, effective January 1, 2005, the Commission has amended the rules to reduce the three-month time frame to 31 days. The 31-day time frame applies to three calls at issue here. *See* Appendix A (Scotti, Diane); *see also* n. 18, *supra*.

²⁸The 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. Our staff has independently confirmed that each complainant's telephone number was registered on the National Do-Not-Call Registry for at least three months before the alleged call was made.

²⁹Thirty-six declarants describe Dynasty's telephone solicitations that promoted its mortgage financing services. Fourteen declarants report receiving a total of 26 telephone calls from Dynasty but apparently terminated those calls before delivery of any advertisement. *See* n. 33, *infra*.

³⁰A transaction or inquiry within the respective time frames constitutes an established business relationship. *See* 47 U.S.C. § 64.1200(f)(3).

1. Dynasty's Calls Are Non-Exempt Telephone Solicitations

16. By its own admission, Dynasty places telephone calls for the purpose of promoting its mortgage services. Although Dynasty has failed to provide information regarding the particular circumstances associated with any of the specific calls at issue here, Dynasty appears to concede in its LOI response that it (1) made the calls for which the staff sought explanation and (2) that those calls were made to promote its mortgage services.³¹ Dynasty states:

Reasons for the calls made by Dynasty Mortgage from complaints listed . . .

As a Mortgage Broker we save homeowners an average of \$300 to \$500 each month by lowering payments through interest rates, debt consolidation, etc. We solicit homeowners for the opportunity to show how we can place them in a better financial position. Our telemarketing team schedules appointments for these homeowners to attend a free consultation with a Loan Officer.³²

17. The consumer declarations indicate that the 70 calls at issue here are non-exempt telephone solicitations. Most consumers provide specific information regarding the advertisement delivered by Dynasty.³³ Each consumer describes a Dynasty call or calls apparently made without benefit of prior express consent or the contacts necessary to establish a business relationship. Further, the consumers who noted the name of the Dynasty representative who called them declare that they do not have personal relationships with the callers, *i.e.*, the caller is not a friend, acquaintance, or family member. Given the specific, detailed information provided by the consumer declarations, and the fact that Dynasty has made no claim or provided no evidence to demonstrate that its advertising calls were justified by prior express consent, an established business relationship, or a personal relationship, we conclude that Dynasty's calls are apparently prohibited telephone solicitations.

³¹Dynasty offers no reason other than telephone solicitation to explain these calls. For example, Dynasty does not suggest that any of the calls at issue were made for non-solicitation purposes, such as to collect monies owed or to complete pending transactions.

³²*LOI Response*. We note here that we have previously found that offers for free goods or services and so-called "information-only" messages may be prohibited unsolicited advertisements when they are "part of an overall marketing campaign to sell property, goods, or services." *2003 TCPA Order*, 18 FCC Rcd at 14097. We have stressed that "[t]he TCPA's definition [of unsolicited advertisement] does not require a sale to be made during the call in order for the message to be considered an advertisement." *Id.*

³³As indicated above, 36 consumers affirmatively indicate that Dynasty promoted its mortgage financing services in the calls that they received while 14 other consumers apparently terminated Dynasty's calls before the Dynasty representative could convey an advertisement. *See* n. 29, *supra*. Given Dynasty's admission that it makes calls to promote its mortgage services, and its failure to provide any other rationale for any of its calls, we believe that it is reasonable to conclude that each call was initiated for the purpose of delivering an advertisement.

2. Dynasty's Calls Do Not Fall within the Safe Harbor

18. Dynasty briefly asserts in its LOI response that it complies with the do-not-call standards that underlie a safe harbor defense pursuant to section 64.1200(c)(2)(i).³⁴ Specifically, Dynasty states that it has, among other things, (1) established and implemented written procedures to comply with national do-not-call rules, (2) trained personnel in these procedures, (3) implemented procedures to scrub its telemarketing leads against the National Do-Not-Call Registry and its own company-specific list, and (4) purchased access to the National Registry. Dynasty includes a document that purportedly outlines its do-not-call procedures as well as scripts for its telemarketing calls. Dynasty's blanket assertions, however, are not supported by the meager documentation that it provides; indeed, some of the materials provided by Dynasty are, in fact, inconsistent with the safe harbor requirements. As an initial matter, however, Dynasty provides no information to satisfy a crucial element of the safe harbor: that the calls were made in error. For this reason alone, Dynasty's safe harbor defense fails. Nevertheless, we address other obvious deficiencies in Dynasty's safe harbor defense as well to further demonstrate Dynasty's noncompliance.

a. Error

19. The error aspect of the safe harbor defense exempts telephone solicitations made despite a seller's efforts to prevent unlawful telemarketing as evidenced by compliance with the do-not-call standards outlined above and discussed in more detail below.³⁵ Error, however, does not apply simply because an entity meets all other safe harbor criteria or incorrectly believes that it need not comply with national do-not-call requirements.³⁶ 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.

20. In its LOI Response, Dynasty neither explicitly states that any of the telemarketing calls at issue here were made in error nor provides any information that would support such a determination. On this basis alone, Dynasty's safe harbor defense fails. Moreover, information provided by complainants belies any assumption or claim that Dynasty's calls were made in error. Several consumers who received Dynasty's telemarketing calls outline conversations with Dynasty representatives that clearly demonstrate that Dynasty deliberately made the calls at issue here and, in fact, was aware of the unlawful nature of such calls and the potential penalties. First, a Dynasty supervisor told a consumer that

³⁴As set forth above and discussed in more detail below, the safe harbor insulates sellers and their telemarketers from liability for delivering telephone solicitations to residential telephone consumers who are registered on the National Do-Not-Call Registry when such a solicitation is the result of error and the seller or telemarketer adheres to specified policies and procedures designed to prevent prohibited calls to registered telephone numbers. *See* paras. 4-5, *supra*; paras. 19-28, *infra*.

³⁵*See* paras. 21-28, *infra*.

³⁶Ignorance of the law is not a defense or mitigating circumstance. *Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4388 (1991) citing *Vernon Broadcasting, Inc.*, 60 RR 2d 1275, 1277 (1986) and *Fay Neel Eggleston*, 19 FCC 2d 829 (1969).

Dynasty does not use the National Do-Not-Call Registry.³⁷ Further, despite the fact that Dynasty's LOI response explicitly concedes that the company is subject to the Commission's do-not-call rules and pledges to abandon the erroneous exemption claim that the company previously relied upon, three consumers report that during calls from Dynasty at least three months *after* the LOI response, Dynasty asserted that it is exempt from the National Do-Not-Call Registry.³⁸ Finally, one consumer reports that when he warned a Dynasty telemarketer that the company could be subject to a \$10,000 forfeiture for the call, the telemarketer responded that the potential forfeiture was actually \$11,000.³⁹ The facts of this case clearly preclude an error claim, and, accordingly, Dynasty's safe harbor defense fails.

b. Written Procedures

21. 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."⁴⁰ With regard to this requirement, we find that the record does not support a finding of compliance. In its LOI Response, Dynasty asserts that its written procedures to comply with the national do-not-call rules are reflected in three documents attached to the LOI Response. None of the three brief internal documents, however, constitutes or could be considered a plan for compliance with the national do-not-call rules. One document simply presents promotional scripts, which do not mention either the National Do-Not-Call Registry or Dynasty's company-specific do-not-call list. Another document, entitled "Process for DNC Documentation," contains two very brief scenarios for recording company-specific do-not-call requests. The final document contains two scripts for Dynasty representatives to follow when called parties seek to make or enforce do-not-call requests. With respect to the National Do-Not-Call Registry, the script reads:

Going forward,⁴¹ the following responses will be used for homeowners who identify themselves as being on the National Dot [sic] Not Call List. . . .

"I'm on the National DNC List!"

"In that case, I do apologize for the call and any inconvenience, and I want to assure you that we make every effort to comply with the national do-not-call rules and regulations. I'll add you to our company DNC list to insure that we never call your home again, okay?"

³⁷Declaration of Nigel Atkinson (attesting that Dynasty supervisor stated that it does not check its calling lists against the National Do-Not-Call Registry); Declaration of William P. Chute (attesting that Dynasty caller stated that Dynasty "did not have the list; they had their own database").

³⁸Declaration 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"); declaration of Edwin Langevin (during September 27, 2004 call, Dynasty claimed that "certain financial institutions are exempt").

³⁹Declaration of Thomas McKenzie.

⁴⁰47 C.F.R. § 64.1200(c)(2)(i)(A).

⁴¹Dynasty's document is undated.

This material does not address or describe the steps Dynasty and its representatives should take to comply with the National Do-Not-Call Registry and to prevent calls to numbers listed on the Registry. In fact, rather than presenting a plan that seeks to avoid making calls to telephone numbers contained on the National Registry, the script instead addresses a scenario in which Dynasty calls such a number.

22. In short, Dynasty fails to provide a document explaining, for example, any of the following things that reasonably could be expected to be included in a company's written compliance procedure: a statement explaining what the do-not-call rules are and how they operate; the legal requirements for do-not-call compliance; the company's policies regarding compliance; the consequences for non-compliance; the company's policies regarding compliance by outside lead generators and its means of communicating those policies with the outside parties; or any type of ongoing compliance monitoring.

23. Notwithstanding the absence of written procedures for compliance with the national do-not-call rules, Dynasty asserts that it does, in fact, have a process for compliance:

When we purchase any new leads we suppress the list against our own DNC list as well as against the national DNC list before we load the leads into our dialer. Before purchasing leads to call, our lead broker uses or [sic] S.A.N. number on the National DNC Registry to insure that we are not receiving any phone numbers that are currently registered on the national list.

This assertion, however, does not satisfy the requirement in the rules that Dynasty have written compliance procedures that set the parameters of Dynasty's telemarketing activities.

24. Finally, even assuming that Dynasty has established written do-not-call procedures, evidence suggests that it has failed to implement any such procedures as the rule requires. Several complainants provide information indicating that Dynasty made telemarketing calls without regard to the National Do-Not-Call list.⁴² Most notably, one complainant reports that during an August 2004 telemarketing call from Dynasty, a supervisor stated that the company "doesn't check its numbers against the National Do-Not-Call Registry."⁴³

c. Training of Personnel

25. The safe harbor defense also requires a seller to demonstrate that as part of its routine business practice, "it has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules."⁴⁴ Dynasty points again to the written materials described above to support its claim that it meets this prong of the safe harbor defense. Based on the paucity of evidence in the record, we cannot so conclude. Dynasty does not discuss in any way the manner in which it undertakes to train its telemarketers. Even more significantly, Dynasty's documents in no way reflect that Dynasty telemarketers are provided the most basic information: that they must avoid calling non-exempt telephone numbers contained on the National Do-Not-Call Registry. Instead, as

⁴²See para. 20, *infra*.

⁴³Declaration of Nigel Atkinson.

⁴⁴47 C.F.R. § 64.1200(c)(2)(i)(B).

noted above, the materials deal with recording company specific do-not-call requests and handling calls that it has already made to consumers registered on the National Do-Not-Call Registry.⁴⁵

d. Accessing the National Do-Not-Call Registry

26. The safe harbor defense applies only to an entity that can demonstrate that as part of routine business practices, it “use[d] 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.”⁴⁶ For most of the calls at issue here, Dynasty was required to use a version of the Do-Not-Call Registry that it 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.⁴⁷

27. Dynasty itself provided no records to demonstrate that the company or any authorized telemarketers ever accessed the National Do-Not-Call Registry or that it maintains records documenting its use of the Registry. Our staff has obtained FTC do-not-call records that show that Dynasty’s do-not-call Subscription Account Number has been used to access portions of the National Registry twice in the past year: first, over the course of one week in March 2004, and second, on January 6, 2005.⁴⁸ Dynasty’s lapse of nearly ten months in accessing the Registry automatically removes the safe harbor defense for all telemarketing calls made by Dynasty between June 15, 2004 and January 5, 2005.⁴⁹

28. Apart from Dynasty’s failure to timely access the National Registry, Dynasty fails to demonstrate that it correctly performed *any* scrub of its calling list against the National Registry. Dynasty’s summary statement that its lead broker scrubs potential leads against the National Do-Not-Call Registry before Dynasty purchases them does not evince a process that complies with the safe harbor requirement. Dynasty does not discuss how it ensures that the broker performs the scrub properly. Moreover, Dynasty does not state that such leads are the sole source of its database of telephone numbers used for telemarketing purposes.

e. Purchasing the National Do-Not-Call Registry

29. The safe harbor requires a telephone solicitor to demonstrate that it “uses a process to ensure that it does not sell, rent, lease, purchase, or use the national do-not-call database, or any part thereof, for any purpose except compliance with [the do-not-call rules] and any such state or federal law

⁴⁵See para. 21, *supra*.

⁴⁶47 C.F.R. § 64.1200(c)(2)(i)(D).

⁴⁷See n. 18, 27, *supra*.

⁴⁸Between 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.

⁴⁹As shown in Appendix A, Dynasty made 46 of the calls at issue here between June 15, 2004 and January 5, 2005.

to prevent telephone solicitations to telephone number registered on the national database.”⁵⁰ It must demonstrate that it “purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the cost to access the national database among various client sellers.”⁵¹ Dynasty provides no information or statement regarding this aspect of the safe harbor.

B. Forfeiture Amount

30. Based upon our review of the record in this case, we conclude that Dynasty apparently willfully or repeatedly violated section 64.1200(c)(2) of the Commission's rules by making 70 telephone solicitations to 50 consumers who had registered on the National Do-Not-Call Registry. Accordingly, a proposed forfeiture is warranted against Dynasty for its apparent willful or repeated violations of the Commission's national do-not-call rules.

31. Section 503(b) of the Act authorizes the Commission to assess a forfeiture of up to \$11,000 for each violation of the Act or of any rule, regulation, or order issued by the Commission under the Act, by a non-common carrier or other entity not specifically designated in section 503 of the Act.⁵² In exercising such authority, we are to take into account “the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”⁵³

32. The Commission's *Forfeiture Policy Statement* does not establish a base forfeiture amount for violating the prohibition on making telephone solicitations to customers who have registered on the National Do-Not-Call Registry.⁵⁴ We have, however, previously proposed a \$10,000 forfeiture for each violation of our company-specific do-not-call rules.⁵⁵ We believe that a violation of National Do-Not-Call Registry rules implicates the same concern: that telemarketing was initiated to a consumer who took specific steps to prevent such contact by lodging a do-not-call request, in this case, by signing onto

⁵⁰47 C.F.R. § 64.1200(c)(2)(i)(E).

⁵¹*Id.*

⁵²Section 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).

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

⁵⁴*The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, Report and Order*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

⁵⁵*AT&T Corporation*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 23398 (2003).

the National Do-Not-Call Registry. Accordingly, we believe that \$10,000 is an appropriate base amount for a violation of section 64.1200(c)(2). The *Forfeiture Policy Statement* does, however, contemplate upward or downward adjustments based on the severity of the violation and nature of the violator.⁵⁶

33. In this case, we believe that the record supports imposition of the maximum forfeiture of \$11,000 per violation against Dynasty. As we have described above, both Dynasty's own responses and information provided by consumers who have received Dynasty's calls reveal Dynasty as an apparent chronic and persistent violator of our do-not-call rules.⁵⁷ Dynasty's do-not-call procedures and training efforts appear to be wholly inadequate to promote compliance with our rules governing the National Do-Not-Call Registry. Dynasty's violations have continued despite being informed by the Commission's staff that it was relying upon a non-existent exemption to justify its calls. Most notably, Dynasty has continued to misinform consumers that it is exempt from national do-not-call rules even after admitting, in correspondence to this Commission, that it is, in fact, subject to these rules.

34. Our enforcement goal is compliance, not imposition of forfeiture penalties and collection of monies for the U. S. Treasury. We did not, therefore, commence this forfeiture proceeding immediately after discovering Dynasty's first post-citation violations. Instead, in light of Dynasty's claims that its violations were the result of erroneous advice from a contractor, that it no longer employed the contractor, and that it had instituted procedures to ensure compliance, the staff began to monitor Dynasty's complaint levels to determine whether Dynasty's new compliance procedures were effective. Although the complaint levels have dropped somewhat after January 2004, significant numbers consumers have continued to report receiving Dynasty's telephone solicitations despite registration on the National Do-Not-Call Registry, many of which occurred after Dynasty's February 20, 2004 correspondence that acknowledged the company's previous violations and promised a rigorous compliance plan. Our NAL includes only violations after Dynasty's February 20, 2004 letter.

35. Dynasty has persisted in making prohibited telephone solicitations and attempting to deceive consumers regarding the unlawful nature of such calls despite admitting its violations to this Commission. Accordingly, based on the nature and gravity of Dynasty's conduct and the continued need to ensure compliance with section 64.1200(c)(2), we find Dynasty apparently liable in the amount of \$11,000 for each of 70 violations. This results in a proposed total forfeiture of \$770,000. As set forth below, Dynasty may pay the proposed forfeiture in full or submit evidence and arguments in response to this NAL to show that no forfeiture should be imposed or that some lesser amount should be assessed.⁵⁸

⁵⁶*Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01.

⁵⁷We remind Dynasty that it may be subject to additional enforcement actions if it continues to call residential telephone consumers in violation of section 64.1200(c)(2) or if it engages in other violations of our telemarketing rules. We instruct the staff to continue monitoring complaints against Dynasty to determine whether Dynasty should be subject to additional enforcement action.

⁵⁸*See* 47 U.S.C. § 503(b)(4)(C); 47 C.F.R. § 1.80(f)(3). The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

IV. CONCLUSION AND ORDERING CLAUSES

36. We have determined that Dynasty apparently committed 70 separate violations of section 64.1200(c)(2) of the Commission's rules by failing to abide by our national do-not-call requirements, as described above. We have further determined that Dynasty is apparently liable in the amount of \$11,000 for each of 70 violations of section 64.1200(c)(2) of the Commission's rules, for a total of \$770,000.

37. Accordingly, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that Dynasty Mortgage, L.L.C. IS HEREBY NOTIFIED of its Apparent Liability for Forfeiture in the amount of \$770,000 for willful or repeated violations of sections 64.1200(c)(2) as described in the paragraphs above and detailed in Appendix A.

38. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that within thirty (30) days of the release of this Notice of Apparent Liability, Dynasty SHALL PAY the full amount of the proposed forfeiture OR SHALL FILE a response showing why the proposed forfeiture should not be imposed or should be reduced.⁵⁹

39. IT IS FURTHER ORDERED, pursuant to sections 4(i) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 403, that within forty-five (45) days of the release of this Notice of Apparent Liability, Dynasty SHALL FILE a report, supported by affidavit or statement under penalty of perjury, detailing the steps that Dynasty has taken to ensure compliance with section 64.1200(c)(2) of the Commission's rules, 47 C.F.R. § 64.1200(c)(2).

40. IT IS FURTHER ORDERED that copies of this Notice of Apparent Liability for Forfeiture SHALL BE SENT by certified mail to Dynasty Mortgage, L.L.C. at: (1) 2633 E. Indian School Rd., Suite 370, Phoenix, Arizona 85016; (2) 5701 W. Talavi Blvd., Suite 110, Glendale, Arizona 85306; and (3) 4660 E. LaJolla Village Dr., Suite 400, San Diego, California 92122.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵⁹The forfeiture amount should be paid by check or money order drawn to the order of the Federal Communications Commission. Reference should be made on Dynasty's check or money order to "NAL/Acct. No. 200432170005. Such remittances must be mailed to Forfeiture Collection section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C., 20554. See 47 C.F.R. § 1.1914.

Appendix A

**DYNASTY MORTGAGE, L.L.C.
NATIONAL DO-NOT-CALL VIOLATIONS SUBJECT TO FORFEITURE**

	Telephone Solicitation Recipient	Telephone Solicitation Date	Caller ID Displayed
1	Adams, Robert	8/3/04	
2	Atkinson, Nigel	8/31/04	
3	Berens, Barbara	12/27/04	602-218-9221
4	Bonomo, Robert	8/3/04	
5	Carlson, Jay E.	3/9/04	602-445-9276
6	Chute, William P.	8/14/04	Dynasty Mortgage 602-218-9221
7	Demchak, Barry	3/26/04	858/362-8695
8	Denisac, Frank	3/2/04	858-362-8695
9	Epps, John	7/13/04	602-218-9221
10		8/2/04	602-218-9221
11		8/11/04	602-218-9221
12	Ferguson, Bruce	8/14/04	602-218-9221
13	Fernando, E. Joe A. IV	4/13/04	858-362-8585
14	Finnegan, Philip (Jay)	4/12/04	
15	Frank, Kevin	11/30/04	888-508-5592
16	Gittus, Michael	6/7/04	602-445-9277
17	Grimes, Larry A.	5/10/04	858-362-8468
18		5/11/04	858-362-8598
19	Hansen, Patricia	8/7/04	602-218-9221
20	Holland, Christopher J.	3/5/04	
21	Holmes, Mark	11/22/04	888-508-5592
22	Jaycox, Antoinette	8/2/04	
23	Johnson, Todd	10/26/04	
24	Kertesz, Joe	8/16/04	602-218-9221
25	Koepke, Kevin	1/6/05	602-218-9221
26		1/19/05	602-218-9221
27		1/20/05	602-218-9221
28	Langevin, Edwin	9/27/04	Dynasty Mortgage 888-508-5592
29	Lauterbach, Lynette	12/13/04	602-218-9221
30		12/13/04	602-218-9221
31	Lewis, Jeffrey	7/10/04	
32	Logan, Michelle	11/30/04	602-218-9221
33		12/1/04	602-218-9221
34		12/6/04	602-218-9221
35		12/18/04	602-218-9221
36		12/19/04	602-218-9221
37	Madden, William	7/8/04	602-218-9221
38		7/19/04	602-218-9221

39		8/11/04	602-218-9221
40		8/18/04	602-218-9221
41	Marler, James	7/19/04	
42	McKenzie, James	12/7/04	
43	McKenzie, Thomas	7/8/04	
44	Mitchell, Kelly	4/6/04	
45	Neuberg, Karen	12/20/04	602-445-0070
46	Novitz, Stuart	7/20/04	Dynasty Mortgage 602-218-9221
47	Oleska, Myron	8/18/04	
48	Pickwell, Sheila	3/2/04	
49	Ramsey, Marian	5/8/04	Dynasty Mortgage 602-445-9256
50	Recker, Irene	7/12/04	
51	Rice, Marilyn	Sometime between 10/27/04 and 11/8/04	
52		11/8/04	602-218-9221
53	Rippetoe, Patrick	8/9/04	
54	Rumsey, Eric	4/10/04	
55	Scotti, Diane	12/30/04	602-218-9221
56		1/4/05	602-218-9221
57		1/6/05	602-218-9221
58		1/13/05	
59	Stewart, Hal	12/22/04	602-445-0070
60		12/22/04	602-445-0070
61		12/29/04	602-445-0070
62	Taub, Charles	3/9/04	
63	Torkington, Adrian	5/13/04	858-362-8585
64	Van Hoven, Lynn	3/8/04	602-445-9276
65		3/8/04	602-445-9276
66	Vizcarra, Victor	7/13/04	602-218-9221
67	Walker, Claire	9/23/04	888-508-5592
68	Wassel, Theodore A.	6/1/04	Dynasty Mortgage 858-362-8585
69	Worthington, Mary	8/25/04	
70	Zanelli, Elizabeth	8/6/04	