

G. Proposed Rule Adopted with Some Modifications.

Based on the entire record in this proceeding, the amended Rule adopted by the Commission is substantially similar to the proposed Rule. However, the amended Rule contains some important differences from the proposed Rule. These further modifications to the original Rule were based on the recommendations of commenters and on the Commission's more comprehensive law enforcement experience in certain areas over the months since publishing the NPRM.

The major differences between the proposed Rule and the amended Rule adopted here are as follows:

- The definition of "charitable contribution" no longer contains exceptions for religious and political groups;
- Sellers who have an "established business relationship" with the consumer are exempted from the national "do-not-call" registry;
- For-profit telemarketers who solicit charitable contributions are exempted from the national "do-not-call" registry, but remain subject to the entity-specific "do-not-call" provision;
- The original Rule's definition of "outbound call" has been reinstated, and the proposed Rule modified to require specific disclosures in an upsell transaction;
- Disclosures regarding negative option features are required;
- Express verifiable authorization is required for all payments, except those made by a credit or debit card subject to certain statutorily-mandated consumer protections;
- For express oral authorization to be deemed verifiable, a seller must ensure the customer's or donor's receipt of the date the charge will be submitted for payment (rather than the date of the payment) and identify the account to be charged with sufficient specificity such that the customer or donor understands what account is being used to collect payment (rather than provide the account name and number);
- The use of written post-sale confirmations is permitted, subject to the requirement that such confirmations be clearly and conspicuously labeled as such; however, this method is not permitted in transactions involving a "free-to-pay conversion" feature and preacquired account information;
- In charitable solicitations, the prohibited misrepresentation regarding the percentage or amount of any charitable contribution that will go to a charitable organization or program is no longer delimited by the phrase "after

any administrative or fundraising expenses are deducted;"

- The Rule now specifies that billing charges to a consumer's account without the consumer's authorization is an abusive practice and a Rule violation; and the Rule now requires that a customer's express informed consent be provided in every transaction;
- The ban on the transfer of consumers' billing information has been replaced with a ban on transferring unencrypted consumer account numbers;
- The failure to transmit caller identification information is prohibited, rather than the affirmative blocking of such information;
- Abandoned calls are prohibited, subject to a "safe harbor" that requires a telemarketer to: abandon no more than three percent of all calls answered by a person; allow the telephone to ring for fifteen seconds or four rings; whenever a sales representative is unavailable within two seconds of a person's answering the call, play a recorded message stating the name and telephone number of the seller on whose behalf the call was placed; and maintain records documenting compliance;
- Records of express informed consent or express agreement must be maintained;
- The exemptions for certain kinds of calls are explicitly unavailable to upselling transactions;
- The exemption for business-to-business telemarketing is once again available to telemarketing of Web services and Internet services, as well as the solicitation of charitable contributions.

II. Discussion of the Amended Rule

The amendments to the Rule do not alter § 310.7 (Actions by States and Private Persons), or § 310.8 (Severability), although § 310.8 (Severability) has been renumbered as § 310.9 in the amended Rule. Section 310.8 of the amended Rule is now reserved.

A. Section 310.1 — Scope of Regulations.

Section 310.1 of the amended Rule states that "this part [of the CFR] implements the [Telemarketing Act], *as amended*," reflecting the amendment of the Telemarketing Act by § 1011 of the USA PATRIOT Act.⁴⁰ This section discusses comments received regarding the implementation of the USA PATRIOT Act amendments as well as

other issues relating to the scope of coverage of the TSR.

Effect of the USA PATRIOT Act.

As noted in the NPRM, § 1011(b)(3) of the USA PATRIOT Act amends the definition of "telemarketing" that appears in the Telemarketing Act, 15 U.S.C. § 6306(4), by inserting the underscored language:

The term 'telemarketing' means a plan, program, or campaign which is conducted to induce purchases of goods or services or a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones and which involves more than one interstate telephone call. . . .

In addition, § 1011(b)(2) adds a new section to the Telemarketing Act requiring the Commission to include in the "abusive telemarketing acts or practices" provisions of the TSR:

a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.

Finally, § 1011(b)(1) amends the "deceptive telemarketing acts or practices" provision of the Telemarketing Act, 15 U.S.C. § 6102(a)(2), by inserting the underscored language:

The Commission shall include in such rules respecting deceptive telemarketing acts or practices a definition of deceptive telemarketing acts or practices *which shall include fraudulent charitable solicitations* and which may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering.

Notwithstanding the amendment of these provisions of the Telemarketing Act, neither the text of § 1011 nor its legislative history suggests that it amends § 6105(a) of the Telemarketing Act—the provision which incorporates the jurisdictional limitations of the FTC Act into the Telemarketing Act and, accordingly, the TSR. Section 6105(a) of the Act states:

Except as otherwise provided in sections 6102(d) [with respect to the Securities and Exchange Commission], 6102(e) [Commodity Futures Trading Commission], 6103 [state Attorney General actions], and 6104 [private consumer actions] of this title, this chapter shall be enforced by the Commission under the Federal Trade Commission Act (15 U.S.C. § 41 *et seq.*). *Consequently, no activity which is outside of the jurisdiction of that Act shall*

⁴⁰ 15 U.S.C. 6101-6108. The Telemarketing Act was amended by the USA PATRIOT Act on October 25, 2001. Pub. L. 107-56 (Oct. 26, 2001).