

aware of none. SBC claims that the cases cited by the Commission in the NPRM⁶⁸ in support of its authority provide no support for Commission jurisdiction over a common carrier's agent assisting in selling common carrier services.⁶⁹ In fact, in one of those cases, the publisher of what the court described as "the primary market tool of . . . virtually every (air) carrier . . . in the United States" was held not to be exempt under the exemption for air carriers.⁷⁰ Accordingly, the Commission declines to revise its position.

Citigroup requested that the amended Rule clarify that certain financial services providers, such as insurance underwriters and registered broker-dealers, are exempt from the Rule.⁷¹ NAIFA requested similar clarification regarding insurance companies, as well as an explicit statement of exemption in the Rule.⁷² The Commission believes that the explicit statement of the Commission's jurisdictional limitation over broker-dealers is abundantly clear in the Telemarketing Act itself;⁷³ thus, it is unnecessary to exempt them in the Rule. Similarly, the Commission believes its jurisdictional limitations regarding the business of insurance are clear, and thus no express exemption for these entities is necessary.⁷⁴

In contrast to these requests to circumscribe or restate the Commission's jurisdiction under the Rule, a number of commenters urged the expansion of the Rule's scope beyond its current boundaries. As NCL put it, "[b]ecause the Commission's general jurisdiction does not include significant segments of the telemarketing industry, such as common carriers and financial institutions, the Rule does not provide comprehensive protection for consumers or a level playing field for marketers."⁷⁵ Others argued that the Commission should assert jurisdiction over intrastate calls as well as interstate calls.⁷⁶

As the Commission stated in the NPRM, "the jurisdictional reach of the

Rule is set by statute, and the Commission has no authority to expand the Rule beyond those statutory limits."⁷⁷ Thus, absent amendments to the FTC Act or the Telemarketing Act, the Commission is limited with regard to its ability to regulate under the Rule those entities explicitly exempt from the FTC Act. Despite this limitation, the Commission can reach telemarketing activity conducted by non-exempt entities on behalf of exempt entities.⁷⁸ Therefore, when an exempt financial institution, telephone company, or non-profit entity conducts its telemarketing campaign using a third-party telemarketer not exempt from the Rule, then that campaign is subject to the provisions of the TSR.⁷⁹

Regarding the suggestion that the Commission regulate intrastate telemarketing calls, the Commission notes that, pursuant to the definition of "telemarketing" included in the Telemarketing Act, 15 U.S.C. § 6106(4), the Commission only has authority to regulate "a plan, program, or campaign which is conducted . . . by use of one or more telephones and which involves more than one interstate call." (emphasis added).

Finally, one commenter suggested that the Commission expressly state its jurisdiction over prerecorded telephone solicitations and facsimile advertisements.⁸⁰ The Commission believes that sales calls using prerecorded messages may fall within the Rule's definition of "telemarketing," provided the call is not exempt and provided the call meets the other criteria of "telemarketing." Thus, a sales call using a prerecorded message may be "telemarketing" if it is part of a plan, program, or campaign for the purpose of inducing the purchase of goods or services or inducing a donation to a charitable organization, is conducted by use of one or more telephones, and involves more than one interstate call. However, the fact that prerecorded sales

calls may be "telemarketing" does not affect the fact that such calls are already prohibited, except with the consumer's prior express consent, under regulations promulgated by the FCC pursuant to the TCPA.⁸¹ Similarly, FCC regulations already prohibit unsolicited facsimile advertisements,⁸² although facsimiles also are a form of direct mail subject to the TSR. The Commission notes in the discussion of § 310.6(b)(6) below that it considers facsimiles to be a form of direct mail solicitation. Thus, under § 310.6(b)(6), a seller using a facsimile advertisement to induce calls from consumers may not claim the direct mail exemption unless the facsimile truthfully discloses the material information listed in § 310.3(a)(1) (or contains no material misrepresentation regarding any item contained in § 310.3(d) if the solicitation is for a charitable contribution).

B. Section 310.2 — Definitions.

The amended Rule retains the following definitions from the original Rule unchanged, apart from renumbering: "acquirer," "Attorney General," "cardholder," "Commission," "credit," "credit card," "credit card sales draft," "credit card system," "customer,"⁸³ "investment opportunity,"⁸⁴ "merchant," "merchant agreement," "person," "prize," "prize promotion," "seller," and "State."

Based on the record developed in this matter, the Commission has determined to retain the following definitions from

⁸¹ 47 CFR 64.1200(a)(2).

⁸² 47 CFR 64.1200(a)(3).

⁸³ VISA stated that the definition of "customer" is too broad, encompassing not only "the person who is party to the telemarketing call and who would be liable for the amount of a purchase as the contracting party, but also would include any person who is liable under the terms of the payment device." VISA-NPRM at 7. Although the term "customer," defined to mean "any person who is or may be required to pay for goods or services offered through telemarketing," is broad in scope, the Commission believes this breadth is necessary to effect the purposes of the Rule. Further, the Commission believes that the term "customer," taken in context of the various Rule sections in which it is used, is not confusing. Therefore, the Commission makes no change in the amended Rule to the definition of "customer."

⁸⁴ One commenter recommended that the Commission clarify that an investment vehicle whose main attribute is that it provides tax benefits would be considered an "investment opportunity" under the Rule. Thayer-NPRM at 6. The Commission believes that such a tax-advantaged investment would come under the present definition, which is predicated on representations about "past, present, or future income, profit, or appreciation." The Commission believes that any such investment opportunity would only result in a tax advantage because of its ability to produce income or appreciation, regardless of whether that income is positive (and tax-deferred or tax-exempt) or negative (resulting in deductible losses). Thus, the Commission has retained the original definition of "investment opportunity" in the amended Rule.

⁶⁸ 67 FR at 4407 (citing 60 FR at 43843, citing *FTC v. Miller*, 549 F.2d 452 (7th Cir. 1977) and *Official Airline Guides*), see note 62 above.

⁶⁹ SBC-NPRM at 4-5.

⁷⁰ *Official Airline Guides*, see note 62 above. See also cases cited above in note 63, rejecting exemption claims of telemarketers for exempt organizations.

⁷¹ See Citigroup-NPRM at 10.

⁷² See NAIFA-NPRM at 1-2.

⁷³ 15 U.S.C. 6102(d)(2).

⁷⁴ See Section 2 of the McCarran-Ferguson Act, 15 U.S.C. 1012(b) (the business of insurance, to the extent that it is regulated by state law, is exempt from the Commission's jurisdiction pursuant to the FTC Act).

⁷⁵ NCL-NPRM at 2. See also Horick-NPRM at 1; PRC-NPRM at 3-4; Myrick-NPRM at 1.

⁷⁶ FCA-NPRM at 2.

⁷⁷ 67 FR at 4497.

⁷⁸ *Id.*

⁷⁹ As the Commission stated when it promulgated the Rule, "[t]he Final Rule does not include special provisions regarding exemptions of parties acting on behalf of exempt organizations; where such a company would be subject to the FTC Act, it would be subject to the Final Rule as well." 60 FR at 43843. Although some commenters, such as SBC (SBC-NPRM at 5-8) and Wells Fargo (Wells Fargo-NPRM at 2), took issue with this proposition, the fact remains that the Telemarketing Act states merely that "no activity which is outside the jurisdiction of that Act shall be affected by this chapter." 15 U.S.C. 6105(a). Thus, when an entity not exempt from the FTC Act engages in telemarketing, that conduct falls within the Commission's jurisdiction under the TSR. *Id.*; TSR Compliance Guide at 12.

⁸⁰ See Worsham-NPRM at 6.