

be encompassed within an “established business relationship,” the Commission looks to consumer expectations: If consumers received a call from a company that is an affiliate or subsidiary of a company with whom they have a relationship, would consumers likely be surprised by that call and find it inconsistent with having placed their telephone number on the national “do-not-call” registry?

The Commission used similar reasoning in resolving this issue in connection with the definition of “seller” in the original Rule. In the discussion on the definition of “seller,” the Commission stated that there were several factors that it would consider in determining how it would view the Rule’s application to diversified companies or divisions within one parent organization. Among those factors was “whether the nature and type of goods or services offered by the division are substantially different from those offered by other divisions of the corporation or the corporate organization as a whole.”¹⁵¹ This distinction looks to consumer expectations and whether a consumer would perceive the division to be the same as or different from other divisions or from the corporate organization as a whole. For example, a consumer who had purchased aluminum siding from Company A’s aluminum and vinyl siding subsidiary would likely not be surprised to receive a call from kitchen remodeling service also owned by, and operating under the name of, Company A.

Thus, under the amended Rule, some but not all affiliates will be able to take advantage of the “established business relationship” exemption to the national “do-not-call” registry. The Commission intends that the affiliates that fall within the exemption will only be those that the consumer would reasonably expect to be included given the nature and type of goods or services offered and the identity of the affiliate. The consumer’s expectations of receiving the call are the measure against which the breadth of the exemption must be judged.

§ 310.2(o) — Free-to-pay conversion

Section 310.2(o) of the amended Rule sets out a new definition:—“free-to-pay conversion.” In connection with an offer or agreement to sell or provide goods or services, a “free-to-pay conversion” is “a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take

affirmative action to cancel before the end of that period.” The term “free-to-pay conversion” is the terminology commonly used in the telemarketing industry to describe what was referred to throughout the Rule Review proceeding as a “free trial offer.”¹⁵²

A “free-to-pay conversion” is a form of “negative option feature”—a term that is also newly defined in the amended Rule and is discussed below. The term “free-to-pay conversion” comes into play in the amended Rule in three provisions. First, as a form of negative option feature, any “free-to-pay conversion” is subject to the newly-added disclosure requirements in § 310.3(a)(1)(vii). Second, where a telemarketing offer involves a “free-to-pay conversion,” and is accepted by a consumer using a payment method subject to the express verifiable authorization requirements of § 310.3(a)(3), the seller or telemarketer may not use the written confirmation form of authorization generally available under § 310.3(a)(3)(iii). Third, under the new unauthorized billing provision at § 310.4(a)(6), the amended Rule sets forth specific requirements to obtain express informed consent in any transaction involving preacquired account information and a “free-to-pay conversion.” Each of these provisions is discussed in detail below.

§ 310.2(q)—Material

The amended Rule retains unchanged the definition of “material” from the original Rule, except for extending it to charitable contributions pursuant to the mandate of the USA PATRIOT Act. The Commission received no comments on this definition in response to the NPRM. The amended Rule has deleted the designations for subsections (a) and (b) that had been proposed in the NPRM. This is merely a formatting change and does not alter the substantive content of the definition. The amended Rule’s definition of “material,” therefore, reads: “likely to affect a person’s choice of, or conduct regarding, goods or services or a charitable contribution.”

§ 310.2(t)—Negative option feature

The amended Rule includes new requirements in § 310.3(a)(1)(vii) for specific material disclosures necessary to avoid misleading consumers with respect to offers that entail incurring an

obligation to pay a seller due to the consumers’ non-action. To describe the circumstances when these disclosures must be made, the amended Rule employs the term “negative option feature” and, accordingly, provides a definition of that term in § 310.2(t). A “negative option feature” is any provision under which the consumer’s silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer. This provision includes, but is not limited to, “free-to-pay conversions,” (which are discussed above), as well as negative option plans¹⁵³ and continuity plans.¹⁵⁴ Section 310.3(a)(1)(vii) below provides a detailed discussion of the definition of “negative option feature” and the disclosures necessary when such a provision is a part of an offer to sell goods or services.

§ 310.2(u)—Outbound telephone call

Based on a review of the record, the Commission has decided to retain the definition of “outbound telephone call” that was in the original Rule, and not to expand the definition to include “upsell” transactions, as proposed in the NPRM. Many commenters noted that, by including upselling in the proposed Rule’s definition of “outbound telephone call,” the proposal brought upselling transactions within all of the provisions relating to outbound calls,

¹⁵³ Under a “negative option plan,” the customer agrees to purchase a specific number of items in a specified period of time. The customer receives periodic announcements of the selections; each announcement describes the selection, which will be sent automatically and billed to the customer unless the customer tells the company not to send it. See the Commission’s Rule governing “Use of Negative Option Plans by Sellers in Commerce,” 16 CFR 425.

¹⁵⁴ A “continuity plan” consists of a subscription to a collection or series of goods. Customers are offered an introductory selection and agree to receive additional selections on a regular basis until they cancel their subscription. Unlike negative option plans, customers do not agree to buy a specified number of additional items in a specified time period, but may cancel their subscriptions at any time. Continuity plans resemble negative option plans in that customers are sent announcements of selections and those selections are shipped automatically to the customer unless the customer advises the company not to send them. Unlike negative option plans, however, customers are not billed for the selection when it is shipped, but only if they do not return the selection within the time specified for the free examination period. See, e.g., FTC Facts for Consumers, “Continuity Plans: Coming to You Like Clockwork,” (June 2002), <http://www.ftc.gov/bcp/online/pubs/products/continue.htm>. See also FTC, “Pre-Notification Negative Option Plans” (May 2001) (distinguishing these plans from continuity plans), <http://www.ftc.gov/bcp/online/pubs/products/negative.htm>; and FTC, “Facts for Business: Complying with the Telemarketing Sales Rule,” <http://www.ftc.gov/bcp/online/pubs/buspubs/tsr.htm>.

¹⁵² See, e.g., Electronic Retailing Association, GUIDELINES FOR ADVANCE CONSENT MARKETING, http://www.retailing.org/regulatory/publicpolicy_consent.html; Magazine Publishers of America, Resources - Research: “Advance Consent Subscription Plans,” http://www.magazine.org/resources/advance_consent.html.