

which led to unintended and undesirable consequences, such as subjecting upsells to the calling time restrictions and national “do-not-call” registry provisions.¹⁵⁵ The amended Rule addresses upselling transactions separately, rather than attempting to sweep them within the definition of “outbound telephone call.”¹⁵⁶ The amended Rule reinstates the original definition of “outbound telephone call,” with only a modification to reflect the expanded reach of the Rule to charitable contributions pursuant to the USA PATRIOT Act. In the amended Rule, then, an “[o]utbound telephone call” means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.”

§ 310.2(w)—Preacquired account information

The amended Rule adds a definition of “preacquired account information” to address the problems that have been associated with telemarketing transactions where the telemarketer already has access to the customer’s billing information at the time the outbound call is placed.¹⁵⁷ The NPRM discussed these problems at length. The Commission used the term “preacquired account telemarketing” in the NPRM during its discussion of the proposed ban on disclosing or receiving billing information for use in telemarketing, but did not use the term itself in the proposed Rule, and so did not define it.¹⁵⁸ In response, several industry commenters asked for more specificity as to what the Commission intends the term to mean.¹⁵⁹ Thus, the definition of “preacquired account information” also serves to address these commenters’ concerns about clarifying the concept of preacquired account telemarketing.

As explained in detail in the discussion of § 310.4(a)(6) below, the amended Rule sets forth specific requirements for obtaining express informed consent in any telemarketing transaction that involves “preacquired account information.” To clarify the

situations where these requirements come into play, the amended Rule defines “preacquired account information” as:

any information that enables a seller or telemarketer to cause a charge to be placed against a customer’s or donor’s account without obtaining the account number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged.

The Commission intends this definition to be construed broadly. The definition includes any type of billing information, encrypted or unencrypted,¹⁶⁰ that enables a seller or telemarketer to cause a charge to be placed on any customer’s or donor’s account without obtaining the account number directly from the customer or donor. It obviously covers instances where the seller or telemarketer is in actual possession of account information, whether by virtue of some prior relationship with the consumer or otherwise. It also is intended specifically to address affinity marketing campaigns where, for example, through a joint marketing arrangement, Seller A provides access to its customer base and those customers’ accounts or account numbers to Seller B in exchange for a percentage of the proceeds from each sale.¹⁶¹

Some industry members expressed their belief that this second class of transactions does not involve preacquired account information at all because, in such affinity marketing campaigns, Seller B may possess only encrypted account numbers, or no account numbers at all prior to initiating the call to the consumer.¹⁶² The Commission intends to clarify that such an arrangement *does* involve

¹⁶⁰ By “unencrypted,” the Commission means both unencrypted readable account information, and encrypted information in combination with a decryption key. See discussion of amended Rule § 310.4(a)(5) below.

¹⁶¹ See 67 FR at 4513.

¹⁶² ERA/PMA-Supp. at 14; June 2002 Tr. II at 134 (ERA). ERA described such a scenario during the June 2002 Forum:

“What typically might occur is L.L. Bean might enter into some type of [affinity] agreement with Timberland to say, We would like you to sell your boots . . . to our customers. . . . So L.L. Bean would provide the name and telephone number . . . and they might provide some unique identifier, it could be a four digit code. It might be an encrypted code that’s used solely for the purpose of matching back, but the account billing number or any information that would provide access to the account is not transmitted to the telemarketer when you make that call. They make the call to the consumer. They ask the consumer if they want to order the boots. If the customer says yes, that information is then transferred to Timberland. Timberland would go back to L.L. Bean and say, This customer has accepted our offer. We would now like to get the account information to bill the consumer for something that they’ve authorized.”

June 2002 Tr. II at 136-37.

“preacquired account information,” since the seller or telemarketer does not have to obtain the account number from the customer or donor in order to cause a charge to be placed on the customer’s or donor’s account.

Finally, this definition would apply to upsell transactions, because the seller or telemarketer in the upsell transaction may either already possess the account information from the initial transaction, or would, by virtue of a joint marketing or other arrangement, have access to that information, so as to be able to charge the customer without getting the account number directly from the customer in the upsell transaction.

§ 310.2(cc) — Telemarketing

The Commission received very few comments on its proposed definition of “telemarketing,”¹⁶³ but those it did receive expressed agreement that the definition should continue to include the phrase “by use of one or more telephones,” to ensure that large and small telemarketing operations are covered by the Rule.¹⁶⁴ Based on the Commission’s review of the record in this proceeding, the amended Rule retains unchanged the definition of “telemarketing” that was proposed in the NPRM. This definition is virtually the same as that in the original Rule, except that it now includes the phrase “or a charitable contribution” following “goods or services,” pursuant to the mandate of the USA PATRIOT Act.

§ 310.2(dd) — Upselling

As described above in § 310.2(u), the Commission proposed in the NPRM to modify the Rule’s definition of “outbound telephone call” to include most upsell transactions.¹⁶⁵ The majority of commenters who addressed this issue, including both industry members and consumer groups,

¹⁶³ Although few commenters directly addressed this definition, many who commented on the USA PATRIOT Act amendments discussed the expansion of the Rule to cover the solicitation of charitable contributions. These comments are addressed above, in the discussion of amended Rule § 310.1 relating to the scope of the Rule.

¹⁶⁴ DOJ-NPRM at 1 (noting its experience with fraudulent telemarketers operating using only one or two telephones); Patrick-NPRM at 2 (urging that the practice of subcontracting telemarketing to individual sales agents who work from their homes using their home phones continue to be captured by the Rule).

¹⁶⁵ Specifically, the Commission proposed amending the definition to mean “any telephone call to induce the purchase of goods or services or to solicit a charitable contribution, when such telephone call: (1) is initiated by a telemarketer; (2) is transferred to a telemarketer other than the original telemarketer; or (3) involves a single telemarketer soliciting on behalf of more than one seller or charitable organization.” Proposed Rule § 310.2(t), 67 FR at 4541.

¹⁵⁵ See, e.g., ABA-NPRM at 4; AmEx-NPRM at 6; AFSA-NPRM at 16; Associations-NPRM at 3; Cendant-NPRM at 2; CCC-NPRM at 13; Cox-NPRM at 6; KeyCorp-NPRM at 6; Metris-NPRM at 9; MBA-NPRM at 4; NBCECP-NPRM at 2; NCTA-NPRM at 13-14; PCIC-NPRM at 1; PMA-NPRM at 10-11; Time-NPRM at 10; VISA-NPRM at 8; Wells Fargo-NPRM at 5-6.

¹⁵⁶ See § 310.2(dd), defining the term “upselling” in the amended Rule.

¹⁵⁷ See discussions of amended Rule § 310.4(a)(5) and (6) below.

¹⁵⁸ See 67 FR at 4512-14.

¹⁵⁹ See, e.g., June 2002 Tr. II at 123-24 (CCC), 133-34 (ERA) and 173 (ATA); PMA-NPRM at 13-14; MPA-Supp. at 5; PRA-NPRM at 13-14.