

supported the proposition that upsells should be expressly included in the Rule.<sup>166</sup> Most of these commenters, however, suggested that the Commission's proposal to address the problem by expanding the definition of "outbound telephone call" to include upselling was not the most effective way to achieve this goal.<sup>167</sup> Instead, many commenters recommended treating upsells as a distinct type of transaction by adding a definition of "upselling" to the Rule and specifying a unique set of disclosures required in upsell transactions.<sup>168</sup> Others suggested retaining the expanded definition of "outbound telephone call" but amending it to avoid application of certain provisions unnecessary or inappropriate to the upselling context,<sup>169</sup> such as application of the "do-not-call" and calling time provisions of the Rule, to upsells.<sup>170</sup> The Commission does not intend for upselling to be subject to the "do-not-call" requirements or the calling time restrictions in the Rule.<sup>171</sup> The goal of

the initial proposal,<sup>172</sup> and the focus of the current amendments, is to ensure that consumers in upselling transactions receive the same information and protections as consumers in other telemarketing transactions subject to the Rule.

Based upon the comments received during the rulemaking period and the Commission's law enforcement experience, the Commission has taken a two-fold approach to upselling in the amended Rule. The Commission has added a definition of "upselling," which, in combination with certain amendments to §§ 310.4(d) and 310.6 of the Rule,<sup>173</sup> provides important protections to consumers who, after completing one transaction, are offered goods or services in an additional telemarketing transaction during the same telephone call.<sup>174</sup> By including the definition, the Commission intends to clarify that upsells are subject to all of the Rule's requirements except the "do-not-call" and calling time restrictions in §§ 310.4(b)(1)(iii) and 310.4(c).<sup>175</sup> With this definitional shift, the "do-not-call" regime no longer applies to upsells, since the "do-not-call" provisions specifically prohibit "initiating outbound telephone calls" to anyone

who has placed their telephone numbers on a company-specific "do-not-call" list or on the FTC's "do-not-call" registry.<sup>176</sup> Second, the amended Rule expressly excludes upsell transactions from the exemptions in §§ 310.6(b)(4), (5) and (6)—*i.e.*, where the initial transaction is exempted from the Rule because the call was initiated by the consumer unilaterally or because it was initiated in response to a direct mail solicitation or general media advertisement.<sup>177</sup>

The definition of "upselling" encompasses any solicitation for goods or services that follows an initial transaction of any sort in a single telephone call. Thus, both solicitations made by or on behalf of the same seller involved in the initial transaction, and those made by or on behalf of a different seller are considered upsells, and both types of transactions are covered by the Rule.<sup>178</sup> The term "initial transaction" is intended to describe any sort of exchange between a consumer and a seller or telemarketer, including but not limited to sales offers, customer service calls initiated by either the seller or telemarketer or the consumer, consumer inquiries, or responses to general media advertisements or direct mail solicitations. The upsell is defined as a "separate telemarketing transaction, not a continuation of the initial transaction" to emphasize that an upsell is to be treated as a new telemarketing call, independently requiring adherence to all relevant provisions of the Rule.<sup>179</sup>

Upselling occurs in a wide variety of circumstances—as an addendum to a customer service call, or after an initial

<sup>166</sup> See, e.g., AmEx-NPRM at 6 ("We agree with the Commission that the disclosure requirements of the TSR should apply whenever a new offer is made to the consumer, whether by the original telemarketer or a telemarketer to whom a call is transferred. Consumers should always be informed of material terms and conditions before they purchase a product."); ERA-NPRM at 8, 11 ("The ERA is cognizant of the fact that the practice of upselling has increased dramatically since the Rule was originally promulgated in 1995. . . . The ERA acknowledges the Commission's desire to include upsells within the ambit of the Rule and supports the position that, in instances where solicitations are made during a single telephone call on behalf of multiple unaffiliated entities, there should be a clear disclosure. . . ."); ERA-Supp. at 6; LSAP-NPRM at 6; NAAAG-NPRM at 36; NCL-NPRM at 3; PMA-NPRM at 4, 8 ("PMA acknowledges that the practice of marketing products and services via upsell offers has increased in recent years and that the existing TSR does not provide express guidance regarding responsible marketing practices via the upsell channel."); June 2002 Tr. II at 213-15, 249-50. But see CCC-NPRM at 15-16; CMC-NPRM at 7; Household Auto-NPRM at 3; Keycorp-NPRM at 5-6; Noble-NPRM at 3; NATN-NPRM at 3-4; NSDI-NPRM at 4; PCIC-NPRM at 1-2; Technion-NPRM at 5.

<sup>167</sup> AmEx-NPRM at 6; ARDA-NPRM at 4; DMA-NPRM at 38; ERA-NPRM at 8, 12; Household Auto-NPRM at 3; ICT-NPRM at 2; E-Commerce Coalition-NPRM at 2; NCTA-NPRM at 14; PMA-NPRM at 8-10; SIIA-NPRM at 3; Time-NPRM at 9; June 2002 Tr. II at 213-14.

<sup>168</sup> See, e.g., ERA-NPRM at 14-15; ERA-Supp. at 6; PMA-NPRM at 8-10.

<sup>169</sup> ARDA-NPRM at 4; Cox-NPRM at 36; Discover-NPRM at 5; Eagle Bank-NPRM AT 4; NCL-NPRM at 3.

<sup>170</sup> ABA-NPRM at 4-5; AFSA-NPRM at 15; ARDA-NPRM at 4; CCC-NPRM at 13; DMA-NPRM at 38; Eagle Bank-NPRM at 4; NCTA-NPRM at 14; PMA-NPRM at 10; SIIA-NPRM at 3; Time-NPRM at 10. The "do-not-call" provision is found at proposed and amended Rules § 310.4(b)(1)(iii), while the calling time restrictions are at proposed and amended Rules § 310.4(c).

<sup>171</sup> June 2002 Tr. II at 213-15.

<sup>172</sup> See 67 FR at 4500.

<sup>173</sup> Section 310.4(d) now includes the phrase "or internal or external upsell" after "outbound telephone call" to clearly state that the basic disclosure requirements of that provision—the identity of the seller, that the purpose of the call is to sell goods or services, the nature of the goods or services, and disclosures related to prize promotions—must be made in any upsell associated with an initial telephone transaction. Sections 310.6(b)(4), (5) and (6) have been amended to expressly exclude upsells from these exemptions.

<sup>174</sup> The provisions relating to "upselling" address the practices which the Commission had proposed to address in the NPRM through modification of the definition of "outbound telephone call." Because the amended Rule addresses the practice of "upselling" in a different manner, the amended Rule retains unchanged the wording in the original Rule for the definition of "outbound telephone call" (now expanded to cover calls to induce charitable contributions, pursuant to the USA PATRIOT Act). See § 310.2(u) of the amended Rule.

<sup>175</sup> In the NPRM, the Commission noted that in addition to the disclosure requirements of § 310.4(d) (and the proposed disclosures of § 310.4(e)), the disclosures in § 310.3(a)(1):

"would, of course, also have to be made by each telemarketer. In fact . . . the Commission believes that [in any upsell] it is necessary for this transaction to be treated as separate for the purposes of complying with the TSR. Therefore, in such an instance, the telemarketer should take care to ensure that the customer/donor is provided with the necessary disclosures for the primary solicitation, as well as any further solicitation. Similarly, express verifiable authorization for each solicitation, when required, would be necessary. Of course, even absent the Rule's requirement to obtain express verifiable authorization, telemarketers must always take care to ensure that the consumer's or donor's explicit consent to the purchase or contribution is obtained."

67 FR at 4500, n.71.

<sup>176</sup> See § 310.4(b)(1)(iii).

<sup>177</sup> Treating upsells as "outbound telephone calls" meant that they were implicitly not covered by any of these exemptions (which all involve inbound telephone calls of one sort or another). Creating a separate definition for "upselling" requires that the Commission explicitly address which of the exemptions in § 310.6 of the Rule do not apply to upselling.

<sup>178</sup> In the NPRM, the Commission focused its analysis of upselling on whether there were one or two telemarketers or sellers involved in the upsell transaction. After reviewing the record in this matter, the Commission believes that the salient distinction is whether a separate offer is made in the course of a single telephone call.

<sup>179</sup> This definition also addresses the concerns of some telemarketers that simply transferring a consumer-initiated call to the individual most qualified to address the consumer's inquiry would trigger the application of the Rule to that otherwise exempt transaction. See, e.g., CMC-NPRM at 7-8; Cox-NPRM at 35; Eagle Bank-NPRM at 4; HSBC-NPRM at 2. Instead of focusing on the transfer of a call, the definition of "upselling" centers on the instigation of an offer for sale of goods or services subsequent to an initial transaction. Thus, where a consumer calls a company, makes an inquiry, and is immediately transferred in direct response to that inquiry, that transfer would not fall within the definition of "upselling" and would not be subject to the Rule.