

offer of goods or services via an inbound or outbound telephone call, for example.¹⁸⁰ The upsell can be made by or on behalf of the same seller involved in the initial transaction (“internal upsell”), or a different seller (“external upsell”).¹⁸¹ Commenters argue that upsell transactions provide benefits to both sellers and consumers. According to some industry commenters, sellers can reduce costs associated with telemarketing by linking transactions together in a single call,¹⁸² and are more likely to make successful sales to consumers already predisposed to the transaction.¹⁸³ Consumers can benefit from the convenience of such transactions, and from receiving more targeted marketing offers.¹⁸⁴ Industry commenters also suggested that sellers’ reduced costs in such transactions are passed along as savings to consumers.¹⁸⁵

Despite these benefits, upsells are no less vulnerable to abuse than other telemarketing practices, and provide the potential for harm to consumers. Some industry commenters argued that this is not the case, suggesting that, particularly when the call is initiated by the consumer: “The consumer calling a

business voluntarily puts herself in a business environment and knows that she is doing so. It should come as no surprise to the consumer if, once in that environment, she is solicited for products and services provided by affiliates or partners of the business . . .”¹⁸⁶

According to NCL, however, “[c]omplaints to the NFIC [National Fraud Information Center] indicate that abuses can occur when consumers who respond to an advertisement for one thing are then solicited for something else, especially if the new offer is significantly different than the original one or is from another vendor. In these situations, the only information that consumers have on which to decide whether to make a purchase or donation is that which is provided during the call.”¹⁸⁷ In other words, in any upsell, the seller or telemarketer initiates the offer; it is not the consumer who solicits or requests the transaction. This means that the consumer is hearing the terms of that upsell offer for the first time on the telephone. The consumer has not had an opportunity to review and consider the terms of the offer in a direct mail piece, or to view an advertisement and gather information on pricing or quality of the particular good or service before determining to make the purchase. This makes an upsell very much akin to an outbound telephone call from the consumer’s perspective, even when the seller is someone with whom the consumer is familiar. Thus, as NCL noted, every consumer needs “the same basic disclosures about who they’re dealing with, what they’re buying and the terms and conditions [of the offer]” regardless of the nature of the telephone sale.¹⁸⁸ The disclosure provisions of §§ 310.3(a) and 310.4(d) were designed to ensure that consumers know they are being offered goods or services for sale, and receive all information material to their decision to accept an offer before they pay for the purchase.

Moreover, it should be noted that the introductory paragraphs of §§ 310.3(a), 310.4(a) and 310.5 do not distinguish between types of telemarketing transactions.¹⁸⁹ The Rule is clear that its

requirements and prohibitions apply to *all sellers and telemarketers* that are subject to the Commission’s jurisdiction. Thus, a seller or telemarketer subject to the Rule must abide by the requirements of these sections, regardless of whether they are engaged in an initial telemarketing transaction or in an upsell transaction. Indeed, the Commission assumes that, where the initial transaction is subject to the Rule, most sellers and telemarketers treat the upsell as subject to the Rule as well, and comply with the Rule’s requirements in both segments of the telephone call.¹⁹⁰

The Commission also finds that consumers should have the Rule’s billing protections in each of these transactions. CCC suggested that, at least in inbound calls that include upsells, consumers have “the highest level of consumer protection because the consumer is specifically asked and consents to the additional goods or services being charged to the same billing source the consumer provided and/or accessed just moments before.”¹⁹¹ However, the Commission’s and states’ law enforcement experience does not support CCC’s assertion that, by giving consent to the use of an account number in an initial transaction, the consumer in an upsell is afforded protection from deception or unauthorized billing.¹⁹²

following conduct.” (emphasis added). Similarly, § 310.4(a) states “it is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct.” (emphasis added). Section 310.5(a) states “any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities.”

¹⁹⁰ The record suggests, however, that the opposite is true when upsells are appended to calls that are otherwise exempt from the Rule. In these instances, the upsells have been treated as part of the exempt telemarketing transaction and, thus, consumers are not receiving the protections the Rule requires when a consumer receives an outbound telephone call, despite the fact that upsells are similar to outbound calls from the consumer’s perspective. See, e.g., PCIC-NPRM at 1-2. The Commission believes that the protections provided a consumer in an upsell should be the same as the protections accorded to consumers receiving an outbound telephone call, regardless of whether the upsell is appended to an exempt telemarketing transaction or to a transaction subject to the Rule. As noted above, consumer advocates and the FTC’s law enforcement experience confirm that upselling can be equally or more problematic, and thus sellers and telemarketers engaged in upselling should be required to provide the basic disclosures mandated by the Rule. In addition, there is no evidence to suggest that upsells should not be subject to any other part of the Rule (other than the “do-not-call” and calling time restrictions).

¹⁹¹ CCC-NPRM at 12.

¹⁹² Indeed, law enforcement experience indicates that the fact that the consumer has already provided or authorized use of his or her billing information

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¹⁸⁰ See, e.g., NAAG-NPRM at 33 (“The upsell can follow either a sales call or a call related to customer service, such as a call about an account payment or product repair. . . . Some examples are the upsell of membership programs, magazines and the like or a television solicitation to buy an inexpensive lighting product that includes an upsell of a costly membership program, consumers sold a membership program when attempting to purchase United States flags following the September 11, 2001, tragedy, or tickets to entertainment events.”) (citations omitted). Industry commenters emphasized the prevalence of upselling in the inbound call context generally. See, e.g., CCC-NPRM at 12; ERA-NPRM at 11-12; PMA-NPRM at 9-10.

¹⁸¹ The NPRM described these forms of upselling as “internal” and “external.” 67 FR at 4496. Some commenters, such as ERA, noted that the industry refers to multiple offers by a single seller—what the Commission calls an “internal upsell”—as a “cross sell,” and to multiple offers by separate sellers—what the Commission calls an “external upsell”—as an “upsell.” ERA-NPRM at 9, n.3. The Commission’s approach, however, does not appear to have caused any confusion in the industry, or on the consumer side. So, for the sake of consistency both within the rulemaking process and with existing law enforcement cases, the Commission has decided to retain these terms as originally proposed.

¹⁸² See, e.g., PMA-NPRM at 9.

¹⁸³ CCC determined that 14 billion inbound calls are made per year, of which 40 percent have an upsell associated with them. June 2002 Tr. II at 218. ERA estimated, based on a 12 percent conversion rate, that approximately \$1.5 billion in sales are generated through inbound upsells alone each year. ERA-NPRM at 11. Aegis estimated the conversion rate for consumers accepting upsell offers at between 25 and 30 percent. Aegis-NPRM at 4.

¹⁸⁴ DMA-NPRM at 40; PMA-NPRM at 10; SIA-NPRM at 3.

¹⁸⁵ ERA-NPRM at 12; PMA-NPRM at 10; SIA-NPRM at 3.

¹⁸⁶ CMC-NPRM at 9. See also Citigroup-NPRM at 6-7; Fleet-NPRM at 5; Household Auto-NPRM at 4.

¹⁸⁷ NCL-NPRM at 3. Accord ERA-NPRM at 11 (“The ERA is . . . aware of the fact that there have been some marketers who have engaged in unscrupulous marketing practices in soliciting purchases via upsells, particularly when such upsells involve a free trial offer and/or other advance consent marketing technique.”).

¹⁸⁸ June 2002 Tr. II at 221-22.

¹⁸⁹ Section 310.3(a) states “it is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the