

Other recommendations

Limitations to the definition of "upselling." Some commenters suggested that the definition of "upselling" be limited to "external upselling" transactions (*i.e.*, where there are two different sellers in the two transactions).¹⁹³ They argued that any requirements that the Commission might apply to "upselling" should not include upsells made by or on behalf of the same seller.¹⁹⁴ However, the Commission believes that law enforcement experience indicates that "internal upsells" (where both transactions are by or on behalf of the same seller) have as much potential for deception and abuse as other types of telemarketing transactions that are subject to the Rule's requirements.¹⁹⁵ Therefore, the Commission has not adopted this suggestion.

Other commenters argued that the definition of "upselling" should not include upsells by "affiliates."¹⁹⁶ Still others made more specific requests to exempt banks, their affiliates and non-affiliated third parties who provide services on the banks' behalf or with whom the banks have joint marketing relationships;¹⁹⁷ to exempt agents or affiliates of common carriers;¹⁹⁸ and to exempt affiliates of insurance companies.¹⁹⁹ However, once again, there is scant support justifying such an approach. On the contrary, the record as

in an initial transaction may actually result in greater risk of abuse during the second transaction. For example, in actions by the FTC and several states against Triad Discount Buying Service, Inc., and related entities, the Commission and the states alleged that the defendants crafted a marketing campaign designed to lure consumers to call solely for the purpose of upselling them. *See FTC v. Smolev*, No. 01-8922-CIV ZLOCH (S.D. Fla. 2001). Specifically, the Commission and states alleged that the defendants ran an advertising campaign for a free product, inviting consumers to call a toll-free number. When they called, consumers were asked to provide account information to pay for shipping and handling for the free product, and then were upsold a "free trial" in a membership club or buyers club, that was then charged, without the consumer's knowledge or consent, to the account provided by the consumer to pay for the shipping of the first product. *See also* NAAG-NPRM at 30, n.73 (*citing*, among others such cases, *Illinois v. Blitz Media, Inc.* (Sangamon County, No. 2001-CH-592) and *New York v. Ticketmaster and Time, Inc.*, (Assurance of Discontinuance)).

¹⁹³ ERA-NPRM at 9; NCTA-NPRM at 14.

¹⁹⁴ *Id.*

¹⁹⁵ *See* NAAG-NPRM at 30, n.73, *citing* cases involving internal upsells, including but not limited to *Illinois v. Blitz Media, Inc.* (Sangamon County, Case No. 2001-CH-592); *Triad Discount Buying Serv., Inc.* [a/k/a *Smolev*] and related entities; and *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001).

¹⁹⁶ ABIA-NPRM at 5; AFSA-NPRM at 15; NFC-NPRM at 6.

¹⁹⁷ ABIA-NPRM at 5; MBA-NPRM at 3.

¹⁹⁸ SBC-NPRM at 2, 5, 8.

¹⁹⁹ PCIC-NPRM at 1-2.

a whole and law enforcement experience indicate that upsells by affiliates and non-affiliated third parties with whom there is a joint marketing relationship have as much potential for deception and abuse as other types of telemarketing transactions that are subject to the Rule's requirements.²⁰⁰

The Commission has made it very clear that the Rule does not apply to entities or activities that fall outside the Commission's authority under the FTC Act, such as banks, savings associations and federal credit unions; regulated common carriers, and the business of insurance. However, the Commission has also made it very clear that the exemption enjoyed by those entities does not extend to any third-party telemarketers who may make or receive calls on behalf of those exempt entities. As the Commission stated in the SBP for the original Rule:

The Commission is not aware of any reason why the Final Rule should create a special exemption for such companies where the FTC Act does not do so. Accordingly, the 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.²⁰¹

Clarification of "seller" in an upsell transaction. ERA and PMA recommended that the Commission clarify what is meant by "seller" in the context of upselling.²⁰² First, ERA and PMA suggested that "seller" be construed as the marketer who will submit the charge for payment against the consumer's account.²⁰³ As ERA stated:

[A] marketer might offer (and bill) a consumer for a product that it obtains on a wholesale basis from a manufacturer (in many instances, the marketer may not even take possession of the product, but rather have the manufacturer ship directly to the purchaser). Both the marketer and the manufacturer receive consideration in exchange for providing, or arranging for the other to provide, the product to the consumer. Thus, both entities are arguably 'sellers.' However, only the marketer will bill the consumer for the sale. As such, there should be no need to identify both entities

²⁰⁰ *See* NAAG-NPRM at 30, n.73 ("States have taken actions against companies using preacquired information as part of an upsell of membership programs or magazines. *See* note 188. *See also* *New York v. Ticketmaster and Time, Inc.* (Assurance of Discontinuance)").

²⁰¹ 60 FR at 43843.

²⁰² ERA-NPRM at 9-10; PMA-NPRM at 12-13. *See also* VISA-NPRM at 9 (requesting clarification of the term in all transactions, not just those involving upselling).

²⁰³ ERA-NPRM at 10; PMA-NPRM at 13.

to the consumer. In fact it would likely be confusing to the consumer to do so.²⁰⁴

The Commission has retained in the amended Rule the definition of "seller," which states that a "seller" is "any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration."²⁰⁵ The Commission believes that this definition makes clear that, for purposes of the Rule, a "seller" is not necessarily the manufacturer of a product, nor the sole financial beneficiary from its sale. Rather, the definition of "seller" is predicated upon a person's provision of goods or services—whether consummated, merely offered, or even simply "arranged for"—to the customer. Therefore, in the case of an upselling transaction, or, indeed, any telemarketing transaction, the marketer or other entity who provides, offers to provide, or arranges for the provision of the goods or services that are the subject of the offer would be the "seller" for purposes of the Rule.

Second, both ERA and PMA, as well as a number of other commenters, suggested that the Commission "clarify that affiliated entities do not constitute separate sellers."²⁰⁶ To this end, ERA recommended looking to the Commission's Privacy of Consumer Financial Information Rule,²⁰⁷ while PMA and NRF suggested using the standard laid out by the FCC for "do-not-call" purposes.²⁰⁸ NCL and AARP disagreed. NCL stated:

We believe affiliates have to be treated as second sellers. They may be selling totally different products with different terms and conditions. Consumers don't have any way of knowing what is an affiliate of that company and what isn't, and ultimately it doesn't really matter to them because they need the same basic disclosures about who they're dealing with, what they're buying and the terms and conditions, whether it's entirely a different seller or an affiliate of the original one.²⁰⁹

²⁰⁴ ERA-NPRM at 11.

²⁰⁵ Amended Rule § 310.2(z).

²⁰⁶ ERA-NPRM at 10. *See also* June 2002 Tr. II at 222 (ATA); PMA-NPRM at 13; SBC-NPRM at 9.

²⁰⁷ The Privacy of Consumer Financial Information Rule, 16 CFR 313.3(a), defines an affiliate as "any company that controls, is controlled by or is under common control with another company," (quoted in ERA-NPRM at 11).

²⁰⁸ The applicable definition in the FCC's regulations is found at 47 CFR 64.1200(e)(2)(v). PMA-NPRM at 13 ("Thus, we suggest that corporate affiliates be exempt in those situations where the consumer would reasonably expect such affiliates to be related to the original seller."). *See also* June 2002 Tr. II at 217-18; and at 226-28 (NRF).

²⁰⁹ June 2002 Tr. II at 221-22; and at 228 (AARP).