

The Commission shares this viewpoint. As discussed above, the record in this matter, as well as 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. For that reason, the Commission believes that affiliates should be treated as separate sellers for purposes of upsell transactions.

C. Section 310.3 — Deceptive Telemarketing Acts or Practices.

Section 310.3 of the original Rule sets forth required disclosures that must be made in every telemarketing call; prohibits misrepresentations of material information; requires that a telemarketer obtain a customer's express verifiable authorization before obtaining or submitting for payment a demand draft; prohibits false and misleading statements to induce the purchase of goods or services; holds liable anyone who provides substantial assistance to another in violating the Rule; and prohibits credit card laundering in telemarketing transactions.

In the NPRM, the Commission proposed amendments to require that disclosures made pursuant to this section be made "truthfully;" require additional disclosures regarding prize promotions and in the sale of credit card loss protection plans; prohibit misrepresentations in the sale of credit card loss protection plans; expand the reach of the express verifiable authorization provision to include all methods of payment lacking certain key consumer protections; and make certain changes pursuant to the USA PATRIOT Act, which extends the coverage of the Rule to include the inducement of a charitable solicitation.

Based on the record in this proceeding, the Commission has determined to make additional modifications in the amended Rule. These changes, and the reasoning supporting the Commission's decisions, are set forth below.

§ 310.3(a)(1) — Required disclosures

Section 310.3(a)(1) of the original Rule requires the seller or telemarketer to disclose, in a clear and conspicuous manner, certain material information before a customer pays for goods or services offered.²¹⁰ The NPRM proposed to make a minor modification to the

wording, by adding the word "truthfully" to clarify that it is not enough that the disclosures be made; the disclosures must also be true. The Commission received no comment on this proposed change, and therefore has determined to retain this additional wording in amended § 310.3(a)(1).

The few comments that the Commission received on § 310.3(a)(1) in response to the NPRM focused primarily on the timing of the required disclosures. AARP argued that, to be meaningful, the disclosures required by this section must be given before payment is requested, not merely before it is "collected."²¹¹ According to AARP, "[s]uch information is key to making truly informed buying decisions," and so all the necessary disclosures should be given before a consumer is requested to pay for goods and services.²¹² DOJ commented that the use of money-transmission services, rather than couriers, is increasingly popular in fraudulent telemarketing schemes, and recommended that the Commission amend the current footnote addressing the meaning of "before the customer pays" to state: "Similarly, when a seller or telemarketer directs a customer to use a money-transmission service to wire payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before directing the customer to take money to an office or agent of a money-transmission service to wire payment."²¹³

In the SBP for the original Rule, the Commission noted that for a telemarketer to make the required disclosures "before a customer pays," the disclosures must be made "before the consumer sends funds to a seller or telemarketer or divulges to a telemarketer or seller credit card or bank account information."²¹⁴ In the original Rule's TSR Compliance Guide, the Commission further clarified that the disclosures required by § 310.3(a)(1) must be made "[b]efore a seller or telemarketer obtains a consumer's consent to purchase, or persuades a consumer to send any full or partial payment. . . ."²¹⁵ The Guide goes on to say that "[a] seller or telemarketer also must provide the required information before requesting any credit card, bank account, or other information that a seller or telemarketer will or could use to obtain payment."²¹⁶ The Commission believes that its statements to date on

the meaning of the term "before the customer pays" are sufficiently clear and declines to modify this provision.

§ 310.3(a)(1)(i) — Disclosure of total costs

Section 310.3(a)(1)(i) of the original Rule requires a seller or telemarketer to disclose the total costs to purchase, receive, or use the goods or services. As noted in the TSR Compliance Guide, "[i]t is sufficient to disclose the total number of installment payments, and the amount of each payment, to satisfy this requirement."²¹⁷ Some commenters in the Rule Review urged the Commission to require, in sales involving monthly installment payments, the disclosure of the total cost of the entire contract, not just the amount of the periodic installment.²¹⁸ In the NPRM, the Commission declined to modify the provision, but clarified that "the disclosure of the number of installment payments and the amount of each must correlate to the billing schedule that will actually be implemented. Therefore, to comply with the Rule's total cost disclosure provision, it would be inadequate to state the cost per week if the installments are to be paid monthly or quarterly."²¹⁹ The NPRM further noted that the best practice to ensure compliance with the clear and conspicuous standard governing all the § 310.3(a)(1) disclosures is to "do the math" for the consumer, stating the total cost of the contract whenever possible.²²⁰ The Commission acknowledged that such a statement might not be possible in an open-ended installment contract, and stated that in such contracts, "particular care must be taken to ensure that the cost disclosure is easy for the consumer to understand."²²¹

In response to the NPRM, the Commission again received some comments urging that the Commission affirmatively mandate that, in installment sales contracts, the total cost of the contract be disclosed, rather than the number and amount of payments.²²² For example, LSAP opined that "it is illogical to maintain a provision that demands a subjective determination of whether or not a disclosure meets a 'clear and conspicuous' standard when an objective and unambiguous standard

²¹⁷ *Id.* at 12.

²¹⁸ *See* 67 FR at 4502.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at n.92.

²²² *See, e.g.,* LSAP-NPRM at 6-8; NACAA-NPRM at 7-8; NCL-NPRM at 3-4; NCLC-NPRM at 13.

²¹⁰ *See* ARDA-NPRM at 5 (noting that ARDA members support the current disclosures required by this section).

²¹¹ AARP-NPRM at 8.

²¹² *Id.*

²¹³ DOJ-NPRM at 2.

²¹⁴ 60 FR at 4384.

²¹⁵ TSR Compliance Guide at 11.

²¹⁶ *Id.*