

truthfully. The amended Rule adopts both modifications, but also provides additional guidance on when the oral disclosures should be made in upsell transactions and what information should be disclosed in those situations.

The Commission received very few comments on these proposed changes. NAAG expressed its support for inclusion of the word "truthfully" in this section, noting that however obvious it might seem that mandatory disclosures be made truthfully, abuses have occurred when, for example, a telemarketer misstates the purpose of the call, claiming it is a "courtesy" call rather than a sales call.⁸⁰⁹ The Commission agrees that the express requirement that the required disclosures be "truthful" will benefit consumers, and should impose no additional burden on telemarketers. Thus, this requirement is adopted in the amended Rule.

A few commenters recommended limiting or expanding the provision. ASTA urged the Commission to limit the applicability of parts of the oral disclosure provision so that sellers with whom a customer had a prior business or personal relationship would be exempt from making two particular disclosures: 1) that the purpose of the call is to sell goods and services (§ 310.4(d)(2)); and 2) the nature of the goods and services (§ 310.4(d)(3)).⁸¹⁰ ASTA argued that it does not believe "situations in which there is a prior business or personal relationship between the parties, are, in practice, subject to the same sort of abuses that the Rule seeks to address by way of [the § 310.4(d)(2) and (3) disclosures]."⁸¹¹ Tribune made a similar argument, requesting an exemption from compliance with the § 310.4(d) disclosures for newspapers with whom a customer has a prior business relationship. According to Tribune, in many instances, newspapers call current subscribers to ascertain whether the customer is satisfied, and then to offer additional services, such as the weekday paper in addition to an existing Sunday-only subscription; Tribune also believes the required oral disclosures may be off-putting to customers.⁸¹² The Commission does not believe that the existence of a prior or even an ongoing business or personal relationship obviates the need for the required prompt oral disclosures in calls that are, in whole or in part, designed to induce the purchase of goods or services.

Therefore, the Commission declines to create exemptions to § 310.4(d).

DOJ recommended that an additional disclosure—the "seller's title or position in the company"—be added to this section, arguing that such a disclosure would directly address the fraudulent practice wherein a telemarketing sales agent misrepresents that he or she holds a position of great authority within the company on behalf of whom the call is made, such as a claim that he or she is the president of the company.⁸¹³ Although the Commission agrees that such misrepresentations could be injurious to consumers, the Commission does not believe that in non-fraudulent solicitations a prompt, truthful disclosure of the telemarketing sales representative's position within the company would be so beneficial to consumers as to outweigh the costs to business of making such an additional disclosure. Further, the Commission believes that it is highly likely that fraudulent telemarketers who resort to such prevarication to induce sales will be in violation of other provisions of the Rule as well.⁸¹⁴ Therefore, the Commission declines to add a disclosure regarding the telemarketing sales agent's position within the company.

A few commenters requested further clarification regarding the meaning of the term "promptly," suggesting that it is too vague to be a useful guideline in the Rule.⁸¹⁵ One of these commenters also sought to clarify the timing of the prompt oral disclosures required by this section in a multiple purpose call.⁸¹⁶ These two issues were discussed at length in the NPRM, and the Commission reiterates here what it has previously stated: 1) the term "promptly," as used in the Rule, means "at once or without delay, and before any substantive information about a prize, product or service is conveyed to the customer," a standard which allows for some flexibility without sacrificing the consumer's need to know certain material information prior to the beginning of any sales pitch; and 2) in

"any multiple purpose call where the seller or telemarketer plans, in at least some of those calls, to sell goods or services, the [§ 310.4(d) disclosures] must be made 'promptly,' during the first part of the call, before the non-sales portion of the call takes place."⁸¹⁷ The Commission does not believe that any change in the text of the Rule is necessary to achieve clarity regarding these two issues, nor does it believe the suggested modifications would provide greater clarity; thus, the Commission declines to modify this section.

A few commenters suggested that an additional disclosure—of the seller's telephone number—should be added.⁸¹⁸ NASUCA suggested that this number be one useful to consumers who wish to be placed on a seller's "do-not-call" list, while Patrick suggested that the number be one consumers could use to report violations of the Rule. Patrick suggested, in the alternative, that the Rule prohibit the failure to provide name, address, and telephone number information for the seller or telemarketer, if such information is requested by the consumer. The Commission previously has expressed its concern that if too many disclosures are required, particularly in the beginning of the call, their effectiveness is diluted. Further, the Commission believes that amended § 310.4(a)(7), regarding transmission of Caller ID, and § 310.4(b)(1)(iii)(B), creating a national "do-not-call" registry, will help to mitigate the problem these commenters have proposed to cure. Therefore, the Commission declines to require a disclosure of the seller's telephone number in this section.

As explained in the discussion of § 310.2(dd) above, regarding the definition of "upselling," the Commission believes that upsell transactions are analogous to outbound telephone calls. Therefore, the amended Rule requires that the oral disclosures mandated by § 310.4(d) must be promptly disclosed at the initiation of the upsell if any of the information in these disclosures differs from the disclosures made in the initial transaction. For example, in an external upsell (where there is a second seller), the consumer must be told the identity of the second seller—the one on whose behalf the upsell offer is being made. In an internal upsell, however, the identity of the seller remains the same in both transactions and need not be repeated in the second transaction. Thus, the Commission has inserted the phrase "or internal or external upsell" after the

⁸⁰⁹ See NAAG-NPRM at 47.

⁸¹⁰ See ASTA-NPRM at 2.

⁸¹¹ ASTA-NPRM at 2.

⁸¹² See Tribune—NPRM at 9–10.

⁸¹³ DOJ-NPRM at 5 (also noting that some fraudulent telemarketers claim to be with government agencies. The Commission notes that such a misrepresentation would violate amended Rule § 310.3(a)(2)(vii)).

⁸¹⁴ For example, such a "false and misleading" statement, if made to "induce any person to pay for goods or services or to induce a charitable contribution," would violate amended Rule § 310.3(a)(4).

⁸¹⁵ LSAP-NPRM at 17 (urging that the term "promptly" be defined as "at the outset of the call"); NASUCA-NPRM at 16; Patrick-NPRM at 3 (suggesting that at least the identity of the seller be disclosed "first, before any other information is disclosed").

⁸¹⁶ See NASUCA-NPRM at 16.

⁸¹⁷ 67 FR at 4526 (citing the original SBP).

⁸¹⁸ NASUCA-NPRM at 15; Patrick-NPRM at 4.