

term “outbound telephone call” in § 310.4(d) of the amended Rule; and has inserted the requirement that “in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.” The goal in this provision is to ensure that consumers receive all of the information they need in order to make an informed decision whether to make a purchase,⁸¹⁹ without requiring duplicative or irrelevant disclosures.

§ 310.4(d)(4) — Sweepstakes disclosure

Section 310.4(d)(4) of the original Rule required that a telemarketer promptly disclose that no purchase or payment is necessary to be eligible to win a prize or participate in a prize promotion if a prize promotion is offered. In the NPRM, the Commission proposed to modify § 310.4(d)(4) to require that the telemarketer disclose that a purchase will not enhance a customer's chances of winning a prize or sweepstakes, which would make the amended Rule's disclosure requirement consistent with the requirements for direct mail solicitations under the Deceptive Mail Prevention and Enforcement Act (“DMPEA”).⁸²⁰ As discussed above with regard to the same disclosure in § 310.3(a)(1)(iv), commenters generally supported this proposal.⁸²¹

PMA maintained that the disclosure was unnecessary and that there was no

evidence in the record to support adding the disclosure.⁸²² Nonetheless, PMA stated that, as a gesture of good faith, they would not oppose the change.⁸²³ They asked, however, that the Commission allow them flexibility on when to make the disclosure, rather than mandating that it be made “promptly,” as required by § 310.4(d), because the disclosure would be more meaningful if it were delivered in conjunction with the sales solicitation rather than the discussion about the sweepstakes.⁸²⁴

The Commission believes that it is important that consumers promptly be put on notice when a call promoting a sweepstakes also includes a sales solicitation. The Commission does not believe it necessary to script the telemarketing call or to define with finite specificity within how many seconds particular disclosures must be made. As with the Rule's requirement that the telemarketer promptly disclose that no purchase or payment is necessary to win a prize,⁸²⁵ the Commission believes that the disclosure that a purchase will not enhance the consumer's chances of winning may occur “before or in immediate conjunction with the description of the prize.”⁸²⁶ As the Commission stated in the original Rule's SBP, this language was included in § 310.4(d)(4) “to prohibit deceptive telemarketers from separating the disclosure (in that instance, of the fact that no purchase or payment is necessary to win a prize) from the description of the prize, thereby negating or diluting its salutary effect.”⁸²⁷ Although this guidance does not alter the imperative that the disclosures be made “promptly”—i.e., “at once or without delay,” but “[a]t a minimum. . . before any sales pitch is given”⁸²⁸—it should provide telemarketers of prize promotions the necessary flexibility in making the requisite disclosures.

Therefore, the Commission has determined that it is an abusive telemarketing act or practice to fail to disclose truthfully, promptly, and in a clear and conspicuous manner, in any prize promotion, that no purchase or payment is required to win a prize or

participate in a prize promotion, that any purchase or payment will not increase the customer's chances of winning, and, upon request, the no-purchase/no-payment method of participating in the prize promotion.

§ 310.4(e) — Required oral disclosures in charitable solicitations

As noted in the NPRM, § 1011(b)(2)(D) of the USA PATRIOT Act mandates that the TSR include a requirement to address abusive practices in the solicitation of charitable contributions.⁸²⁹ Specifically, the USA PATRIOT Act directs the Commission to include in the Rule:

a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and to make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.⁸³⁰

In response to this mandate, the Commission included in the proposed Rule new § 310.4(e), which requires in calls to solicit charitable contributions the truthful, prompt, clear and conspicuous disclosure of two pieces of information: 1) the identity of the charitable organization on behalf of which the request is being made; and 2) that the purpose of the call is to solicit a charitable contribution.⁸³¹ The Commission declined to require the oral disclosure of a charitable organization's mailing address because it was dubious that requiring disclosure of this information in every instance would prove sufficiently beneficial to consumers to justify the costs incurred by telemarketers, and the charities for whom they solicit, of making this disclosure.⁸³² However, the Commission did pose specific questions on this issue, including whether the disclosure requirement should be triggered only when a donor asks for such information.⁸³³

Few comments addressed the proposed requirements for disclosures in the solicitation of charitable

⁸¹⁹ As the Commission noted in the NPRM:

“[I]n external up-selling, when calls are transferred from one seller or telemarketer to another, or when a single telemarketer solicits on behalf of two distinct sellers, it is crucial that consumers . . . clearly understand that they are dealing with separate entities. In the original Rule, the Commission determined that a disclosure of the seller's identity was necessary in every outbound call to enable the customer to make a fully-informed purchasing decision. In the case of a call transferred by one telemarketer to another to induce the purchase of goods or services, or one in which a single telemarketer offers the goods or services of two separate sellers, it is equally important that the consumer know the identity of the second seller, and that the purpose of the second call is to sell goods or services.”

67 FR at 4500. The proposed Rule also required telemarketers on behalf of charitable organizations to adhere to the requirements for upsell transactions. However, the record in this proceeding does not show any evidence that upselling is prevalent in the solicitation of charitable contributions. Therefore, the Commission has deleted any reference to charitable solicitations from the upselling provisions. The Commission will continue to monitor this issue, and, if necessary, may address it in future rule reviews.

⁸²⁰ *Id.* 39 U.S.C. 3001(k)(3)(A)(II).

⁸²¹ NAAG-NPRM at 54-55; NACAA-NPRM at 6-7; NCL-NPRM at 4. See also June 2002 Tr. II at 105-15.

⁸²² PMA-NPRM at 4-8.

⁸²³ PMA-NPRM at 5, 7; ARDA-NPRM at 14-15. See also June 2002 Tr. II at 106, 108 (PMA and ARDA state that they do not oppose the disclosure).

⁸²⁴ June 2002 Tr. II at 106-07. ARDA also requested flexibility in the timing of the disclosure. ARDA-NPRM at 14-15 and June 2002 Tr. II at 108.

⁸²⁵ This provision is found at § 310.4(d)(4) of the original and amended Rules.

⁸²⁶ 16 CFR 310.4(d)(4); 60 FR at 43856.

⁸²⁷ 60 FR at 43856-57.

⁸²⁸ TSR Compliance Guide at 15. See also 60 FR at 43856.

⁸²⁹ See 67 FR at 4522 (discussing the USA PATRIOT Act's mandate to include in the TSR certain prompt disclosures in the solicitations of charitable contributions).

⁸³⁰ Section 1011(b)(2)(D), Pub. L. 107-56 (Oct. 26, 2001).

⁸³¹ Proposed Rule § 310.4(e); see also 67 FR at 4522 (including the discussion of the rationale for including these specific disclosures).

⁸³² 67 FR at 4522.

⁸³³ 67 FR at 4522, 4539.