

maintain certain records.<sup>899</sup> As noted above in the discussion of the express verifiable authorization provision, § 310.3(a)(3)(ii), the Commission believes that sellers, when they accept payment via methods that are novel or lack certain fundamental consumer protections, must obtain express verifiable authorization by any of the three means allowed by the amended Rule. The maintenance of such records is also necessary to ensure the law enforcement goals of the recordkeeping provision.

Finally, ERA noted in its supplemental comment that it believed that it would be expensive for telemarketers conducting upsells to comply with the Rule's recordkeeping requirements.<sup>900</sup> As addressed above in the discussion of § 310.4(a)(6), the Commission believes that both because the cost of digital audio recording and storage is decreasing, and because of the limited circumstances in which such recording is required under the Rule, the burden on sellers who choose to market goods and services using a combination of a "free-to-pay conversion" coupled with preacquired account information is offset by the consumer protection benefits that will accrue from recording and maintaining consumers' express informed consent in these circumstances.

Thus, the only modification to the language of § 310.5(a)(5) in the amended Rule is to require that in addition to retaining all verifiable authorizations, a seller or telemarketer must keep all "records of express informed consent or express agreement" for 24 months. This modification is necessitated by the introduction of these two terms in § 310.4(a)(6), dealing with unauthorized billing, and § 310.4(b)(1)(iii)(B)(i), addressing permission to a seller to call despite a consumer's inclusion on the national "do-not-call" registry. The Commission believes it is necessary for a seller or telemarketer to retain such records of express informed consent and express agreement to enable the Commission and the states to determine compliance with these provisions of the Rule.

#### F. Section 310.6 — Exemptions

Section 310.6 exempts certain telemarketing activities from the Rule's coverage.<sup>901</sup> The exemptions to the Rule

were designed to ensure that legitimate businesses are not unduly burdened by the Rule.<sup>902</sup> Based on the record in this proceeding, and on its law enforcement experience, the Commission has determined to add an exemption, § 310.6(a), to specifically exempt outbound calls to solicit charitable contributions from the national "do-not-call" registry provisions of the amended Rule. In addition, the Commission has determined to modify each of the subsections of the original Rule that are now found in renumbered § 310.6(b).

The Commission amends newly renumbered §§ 310.6(b)(1), (2), and (3)<sup>903</sup> to require telemarketers and sellers of pay-per-call services, franchises, and those whose sales involve a face-to-face meeting before consummation of the transaction, to comply with the "do-not-call" and certain other provisions of § 310.4.

The Commission amends renumbered § 310.6(b)(4),<sup>904</sup> which exempts inbound calls that are not a result of a solicitation, to make this exemption unavailable to upsell transactions and to calls in response to a message left pursuant to the abandoned call safe harbor provision in § 310.4(b)(4)(iii).

The Commission amends the general media exemption, now renumbered § 310.6(b)(5),<sup>905</sup> and the direct mail exemption, now renumbered § 310.6(b)(6),<sup>906</sup> to make these exemptions unavailable to upsells, and to telemarketers of credit card loss protection plans and business opportunities other than business arrangements covered by the Franchise Rule. In addition, the amended Rule makes clear that email and facsimile messages are direct mail for purposes of the Rule. Finally, the amended Rule modifies the proposed business-to-business exemption, now at § 310.6(b)(7)<sup>907</sup> to clarify that sellers and telemarketers of nondurable office or

telephone calls in response to a general media advertisement (except those related to investment opportunities, credit repair, "recovery," or advance fee loan services); (5) inbound telephone calls in response to direct mail solicitations that truthfully disclose all material information (except solicitations relating to prize promotions, investment opportunities, credit repair, "recovery," or advance fee loan services); and (6) business-to-business telemarketing (except calls involving the retail sale of nondurable office or cleaning supplies).

<sup>902</sup> 60 FR at 43859.

<sup>903</sup> These exemptions were found at § 310.6(a), (b), and (c) of the original Rule.

<sup>904</sup> This provision was § 310.6(d) in the original Rule.

<sup>905</sup> The general media exemption was at § 310.6(e) in the original Rule.

<sup>906</sup> The direct mail exemption was at § 310.6(f) in the original Rule.

<sup>907</sup> The business-to-business exemption was at § 310.6(g) in the original Rule.

cleaning supplies need not comply with the amended Rule's "do-not-call" provisions.

In addition, the amended Rule removes the proposal that would have made the business-to-business exemption unavailable to the telemarketing of Web services, Internet services, and charitable solicitations to businesses. Pursuant to the USA PATRIOT Act amendments to the Telemarketing Act, the Commission amends the Rule to expand several of the exemptions to encompass calls to induce charitable solicitations. Thus, the amended Rule exempts: charitable solicitation calls that are followed by face-to-face payment, § 310.6(b)(3); prospective donors' inbound calls not prompted by a solicitation, § 310.6(b)(4); charitable solicitation calls placed in response to general media advertising, § 310.6(b)(5); and donors' inbound calls placed in response to direct mail solicitations that comply with § 310.4(e). In the NPRM, the Commission proposed to make the business-to-business exemption unavailable for charitable solicitation calls. Based upon the record in this proceeding, the Commission has determined that it should not proceed with this proposal.

#### *§§ 310.6(b)(1), (2), and (3) — Exemptions for pay-per-call services, franchising, and face-to-face transactions*

Section 310.6(a) of the original Rule exempts all transactions subject to the Commission's Pay-Per-Call Rule.<sup>908</sup> Similarly, § 310.6(b) exempts transactions subject to the Commission's Franchise Rule.<sup>909</sup> Section 310.6(c) exempts transactions in which the sale of goods or services is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation by the seller.<sup>910</sup> In the NPRM, the Commission proposed to retain the exemptions for pay-per-call services, franchising, and face-to-face transactions,<sup>911</sup> and require

<sup>908</sup> The renumbered exemption in the amended Rule is found at § 310.6(b)(1).

<sup>909</sup> The renumbered exemption in the amended Rule is found at § 310.6(b)(2).

<sup>910</sup> Face-to-face transactions are also covered by the Commission's Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR 429. This exemption has been renumbered in the amended Rule and is now found at § 310.6(b)(3).

<sup>911</sup> No modifications to §§ 310.6(b)(1) and (2) are necessary to implement the USA PATRIOT Act amendments because charitable solicitations are not likely to be combined with pay-per-call or franchise sales. Therefore, there is no need to expressly exempt such an unlikely scenario from TSR coverage. However, it is necessary to amend

<sup>899</sup> NEMA-NPRM at 8-10.

<sup>900</sup> ERA-Supp. at 7.

<sup>901</sup> Specifically, the original Rule exempts: (1) goods and services subject to the Commission's Pay-Per-Call Rule and Franchise Rule; (2) telemarketing sales consummated after face-to-face transactions; (3) inbound telephone calls that are not the result of any solicitation by the seller or telemarketer; (4)