

communication of information about services that are not offered or made available for purchase in a phone conversation.⁹²² However, the definition of “telemarketing” does not require that the purchase be made during the telephone conversation. The definition simply states that the call be “conducted to induce the purchase of goods or services.” The inducement could be made during the telephone call, or it could be in the form of setting up a subsequent face-to-face meeting at which an additional sales presentation could take place.

In summary, the Telemarketing Act mandates that the Commission’s Rule address abusive telemarketing practices and specifically mandates that the Commission’s Rule include a prohibition on calls that a reasonable consumer would consider coercive or abusive of the consumer’s right to privacy, as well as restrictions on calling times.⁹²³ The rulemaking record shows that face-to-face transactions are *not* less susceptible to certain abusive practices prohibited in § 310.4.⁹²⁴ For this reason, the Commission has determined that telemarketing calls to solicit a face-to-face presentation or the purchase of pay-per-call services should be subject to certain Rule provisions designed to limit abusive practices. Because franchise sales generally involve a face-to-face meeting at some point, these transactions are simply another type of face-to-face transaction and thus the telemarketing of franchises should be held to the same standard.

Therefore, the Commission retains the exemptions for pay-per-call services, franchising, and face-to-face transactions set out in §§ 310.6(b)(1)-(3), but amends the TSR to require that telemarketers making these types of calls comply with §§ 310.4(a)(1) and (7), and §§ 310.4(b) and (c). The amended Rule continues to exempt such calls from the requirements of § 310.3 relating to deceptive practices and from the recordkeeping requirements set out in § 310.5.⁹²⁵ These calls would also continue to be exempt from providing the oral disclosures required by § 310.4(d). Similarly, telemarketers soliciting charitable donations would be exempt from § 310.4(e) when the

payment or donation is made subsequently in a face-to-face setting. However, the amended Rule requires that, even when a call falls within these exemptions, a telemarketer may not engage in the following practices:

- threatening or intimidating a customer, or using obscene language;
- failing to transmit Caller ID information;
- causing any telephone to ring or engaging a person in conversation with intent to annoy, abuse, or harass the person called;
- denying or interfering with a person’s right to be placed on a “do-not-call” registry;
- calling persons whose telephone numbers have been placed on the national “do-not-call” registry maintained by the Commission, unless an established business relationship exists between the seller and the person (telemarketers seeking charitable solicitations are exempted from this requirement);
- calling persons who have placed their names on that seller’s or charitable organization’s “do-not-call” list; and
- calling outside the time periods allowed by the Rule.

§ 310.6(b)(4) — Inbound calls not in response to a solicitation

The amended Rule revises § 310.6(b)(4) to expressly except from the exemption any upsell following an exempt transaction initiated by the consumer. When the Commission issued the original Rule in 1995, this exemption was intended to apply to a single telemarketing transaction initiated by the consumer without any solicitation by the seller or telemarketer. Since then, the practice of upselling has emerged, and has grown dramatically, particularly in the inbound telemarketing context. The reasons for exempting a telemarketing transaction pursuant to § 310.6(b)(4) do not apply to an upsell linked to that initial transaction.

Section 310.6(b)(4) of the amended Rule exempts calls initiated by consumers without solicitation by the seller or telemarketer because such calls are not part of a “plan, program, or campaign to induce the purchase of goods or services.”⁹²⁶ Thus, these calls do not fall within the definition of “telemarketing.” The exemption was intended to cover

incidental uses of the telephone that are not in response to a direct solicitation, *e.g.*, calls from a customer to make hotel, airline, car rental, or similar reservations, to place carry-out or restaurant delivery orders, or to obtain

information or customer technical support.⁹²⁷

Furthermore, in these calls, the consumer presumably is in control of the transaction that the consumer initiated, absent any outbound call or direct mail piece.

In contrast, the upsell is a direct solicitation for a product or service other than that for which the consumer initiated the call. As such, upsells *are* part of a telemarketing “plan, program, or campaign to induce the purchase of goods or services” and thus *do* fall within the definition of “telemarketing.” Furthermore, in upsells, the consumer does not initiate the sales transaction; the sales solicitation is initiated by the seller. When the consumer initiates an unsolicited inbound call, the consumer does not necessarily expect to be offered a good or service during the course of that call (such as in the case of a technical support call), or to be offered additional goods or services (in the case where the consumer was calling to make a purchase). Some commenters suggested that upsells appended to inbound calls should be exempted.⁹²⁸ However, the Commission’s experience indicates that upsells appended to unsolicited inbound calls open the door to potential deception and abuse in the subsequent upsell transaction.⁹²⁹ Accordingly, the amended Rule excepts upsell transactions from the exemption provided for unsolicited inbound calls by consumers in § 310.6(b)(4).

There was substantial comment on the potential cost of subjecting upsells associated with inbound calls to any provisions beyond the Rule’s disclosure requirements.⁹³⁰ The original Rule exempted most inbound calls entirely, since most would fall within either this exemption for calls initiated by the consumer, or into renumbered §§ 310.4(b)(5) or (6) for general media advertisements or certain direct mail solicitations—each of which is discussed below. As a result, sellers and telemarketers were not required to

⁹²² 60 FR at 43860.

⁹²⁸ See, *e.g.*, AFSA-NPRM at 15.

⁹²⁹ Indeed, NAAG noted that the states’ law enforcement experience revealed that upsells often proved problematic when appended to inbound calls initiated by the consumer, or by general media advertisements. NAAG-NPRM at 33 (“[Upsells] are usually inbound calls during which the company receiving the call completes the purpose for which the consumer initiated the call and then entices the consumer to consider another seller’s products. The upsell can follow either a sales call or a call related to customer service such as a call about an account payment or product repair.”) See, *e.g.*, *New York v. Ticketmaster and Time, Inc.*, (Assurance of Discontinuance).

⁹³⁰ See, *e.g.*, DMA-NPRM at 38; ERA-NPRM at 11; PMA-NPRM at 9-13.

⁹²² NAR-NPRM at 3-4. See also ICFA-NPRM at 1-2 (regarding funeral goods and services).

⁹²³ 15 U.S.C. 6102(a)(1) and (3)(A)-(B).

⁹²⁴ See Gindin-RR at 1; Mey-RR generally; DNC Tr. at 241-46; RR Tr. at 291-95.

⁹²⁵ Of course, a seller or telemarketer would have to keep documentation in order to successfully raise the “safe harbor” defense in § 310.4(b)(3) regarding compliance with the amended Rule’s “do-not-call” requirements. The safe harbor relating to abandoned calls, discussed in § 310.4(b)(4), also includes a requirement to maintain certain records.

⁹²⁶ See S. REP. NO. 103-80, at 8 (1993).