

comply with the Rule's recordkeeping requirements with respect to these exempt telephone calls. While the amended Rule retains these exemptions (although with some modification), upsell transactions are excluded from those exemptions. Thus, to the extent that the Rule requires that records be maintained, including recordings of express verifiable authorization or express informed consent, such records must be maintained regarding these inbound upsells.

Commenters expressed concern primarily about the potential need for sellers and telemarketers to record certain inbound transactions.<sup>931</sup> These commenters suggested that call centers accustomed to handling only inbound telemarketing calls were not necessarily equipped with recording equipment, and that obtaining and implementing the necessary systems would be prohibitively expensive for many such organizations.<sup>932</sup> However, the Commission notes that taping is required only in one circumstance: under new § 310.4(a)(6)(i)(C), the seller or telemarketer must make and maintain a recording of the entire sales transaction any time a telemarketing transaction involves both preacquired account information and a "free-to-pay conversion" feature.<sup>933</sup> In instances where it is necessary to obtain the consumer's express verifiable authorization pursuant to § 310.3(a)(3), the amended Rule provides alternatives to making a recording of the consumer's oral authorization.<sup>934</sup> Thus, the number of industry members who would be required to obtain recording equipment is relatively limited. Moreover, with the growth of digital recording technology, the capital investment in recording equipment and record storage is rapidly declining.<sup>935</sup>

CCC argued that in inbound calls not currently subject to the Rule, the impact of these amendments would be to "unnecessarily increase inbound call length by 50 percent or more and thereby increase the cost of goods or services to consumers."<sup>936</sup> CCC also suggested that additional recordkeeping, "public disclosure," and taping requirements will be overly

burdensome.<sup>937</sup> While the Commission recognizes that, to the extent telemarketers have not been subject to the Rule, there is potential for additional burdens, the obligations of the Rule are minimal, and generally reflect regular practices already in place for most sellers and telemarketers in the ordinary course of business—such as the basic disclosure requirements, prohibition on misrepresentations, and recordkeeping requirements.<sup>938</sup> Moreover, the taping requirement is limited to those transactions that involve both preacquired account information and a "free-to-pay conversion" offer. Thus, only those sellers and telemarketers that choose to structure their upselling campaigns in this fashion will be subject to this additional requirement. The Commission therefore believes that any additional burden caused by these new requirements will be minimal. Ultimately, the Commission believes that the benefits to consumers of receiving the appropriate disclosures in an upsell transaction outweigh the costs to industry of providing those disclosures and ensuring that any charges are authorized by the consumer.

Additionally, it should be clear that telephone calls initiated by a customer or donor in response to a telemarketer's transmission of Caller ID information or use of a recorded message under the abandoned call safe harbor provision described in § 310.4(b)(4) are excepted from this exemption, as the customer or donor in this context would have had no reason to initiate a telephone call but for the solicitation efforts of the seller, charitable organization, or telemarketer. The transmission of Caller ID information and the use of a recorded message are considered forms of solicitation by a seller, charitable organization, or telemarketer under this exemption because they are part of a telemarketer's efforts to induce the purchase of goods or services or a charitable contribution. Although the information displayed on a consumer's caller identification service or provided via a recorded message will not include a sales pitch, it is a "result of [a] solicitation" and therefore outside the scope of the exemption described in this section.

#### *310.6(b)(5) — Exemption for general media advertisements*

The Commission received few comments addressing its proposal to narrow the general media exemption by adding two additional categories of

goods or services to the list of its exceptions: credit card loss protection plans, and business opportunities other than those covered by the Franchise Rule or any subsequent rule covering business opportunities the Commission may promulgate.<sup>939</sup> The proposed expansion of the exemption to cover charitable solicitations pursuant to the USA PATRIOT Act yielded no comments.

Several of the commenters who addressed the general media exemption opposed having any exemption at all for general media, and therefore supported any effort to narrow it.<sup>940</sup> NCL stated that if the Commission determined to retain the general media exemption, it supported the addition of credit card loss protection plans and business opportunities other than those covered by the Franchise Rule to the list of goods and services excepted from the exemption. In support of its position, NCL noted that in 35 percent of the work-at-home complaints made to the NFIC in the year 2001, consumers reported that they were solicited through print media.<sup>941</sup> Since work-at-home solicitations are not "business arrangements covered by the Franchise Rule," the exception from the general media exemption will now ensure that inbound calls in response to general media advertisements touting work-at-home opportunities will be subject to the Rule. NCL also noted that although most of the solicitations for credit card loss protection plans were made by telephone, these services should be covered by the Rule regardless of how they are promoted "given the egregious nature of these complaints."<sup>942</sup>

While commenters and forum participants generally endorsed the proposed narrowing of the general media exemption, some urged the Commission to reconsider whether a general media exemption is "appropriate and workable," arguing that consumers who call in response to such advertisements are vulnerable to fraud and deception unless certain minimal disclosures are made.<sup>943</sup> NCL acknowledged that the Commission could combat such deception using its authority under Section 5 of the FTC Act, but argued that consumer injury could better be prevented if disclosures

<sup>931</sup> CCC-NPRM at 12-13; June 2002 Tr. II at 224 (CCC); June 2002 Tr. II at 232-33 (MPA).

<sup>932</sup> CCC-NPRM at 12-13; June 2002 Tr. II at 224 (CCC); MPA-NPRM at 28-29; June 2002 Tr. II at 232-33 (MPA).

<sup>933</sup> See discussion of §§ 310.2(o) and (w), and § 310.4(a)(6) above for a detailed explanation of these provisions.

<sup>934</sup> See discussion of § 310.3(a)(3) above.

<sup>935</sup> See note 480 above.

<sup>936</sup> CCC-NPRM at 16.

<sup>937</sup> *Id.*

<sup>938</sup> 60 FR at 32682-83 (June 23, 1995).

<sup>939</sup> This section was found at § 310.6(e) in the proposed Rule.

<sup>940</sup> See, e.g., EPIC-NPRM at 25-26; NCL-NPRM at 12; NAAG-NPRM at 58; June 2002 Tr. III at 177, 182-83 (NAAG has historically opposed the exemption; AARP supports NAAG position).

<sup>941</sup> NCL-NPRM at 12.

<sup>942</sup> *Id.*

<sup>943</sup> *Id.* See also June 2002 Tr. III at 177-83 (NAAG and AARP).