

were required. NCL further advanced the proposition that all telemarketers should be subject to the express verifiable authorization requirements when consumers' accounts will be billed, regardless of whether calls are outbound or inbound, and, in the latter instance, even when such calls are in response to an advertisement delivered by general media or direct mail.⁹⁴⁴ EPIC noted its position that "[g]eneral media advertising may be deceptive, abusive or merely lack the information required to be disclosed under the Rule, thus substantially reducing the level of protection otherwise afforded to consumers by the Rule."⁹⁴⁵

The Commission declines to adopt these recommendations to further regulate inbound calls resulting from general media advertisements. In the SBP issued with the original Rule, the Commission explained that in its experience "calls responding to general media advertising do not typically involve the forms of deception and abuse the Act seeks to stem."⁹⁴⁶ The Commission's experience since the promulgation of the Rule continues to support the exemption for general media advertising, with targeted exceptions for certain goods or services that have routinely been touted by fraudulent sellers using general media advertising to generate inbound calls. In response to the suggestion that express verifiable authorization be required in all telemarketing transactions when the consumer's account will be billed, the Commission notes that the parameters of the amended express verifiable authorization provision, and the Commission's rationale in adopting it, are discussed above in the analysis of § 310.3(a)(3).⁹⁴⁷

NAAG expressed concern about the growing number of sellers of membership or buying club opportunities that operate using an "upsell" technique after an initial inbound call is placed by consumers in response to an advertisement for a completely different product.⁹⁴⁸ NAAG suggested that the Commission amend the general media exemption to ensure that the Rule does not inadvertently exempt upselling transactions that occur when a consumer calls a seller or telemarketer in response to a general

media advertisement.⁹⁴⁹ The Commission agrees that this scenario would be an unwelcome consequence of the provision's wording and thus has amended this provision to clarify that the exemption may not be claimed in any instances of upselling that occur in the call.

NAAG also recommended that the list of exceptions to the general media exemption be expanded to include other transactions that involve a high risk of abuse, such as discount buyers clubs and offers involving "opt out free trials."⁹⁵⁰ The Commission agrees that the telemarketing of these products or services frequently involves fraudulent or deceptive practices. However, there is no evidence on the record indicating that these products or services are telemarketed through general media advertisements. Rather, the states and the Commission have brought law enforcement actions challenging the deceptive telemarketing of these products predominantly when they are sold via outbound cold calls or in upselling, after the consumer has called to purchase another product or service in response to a general media advertisement.⁹⁵¹ As discussed above, the amended Rule contains a modified general media exemption, which makes the exemption unavailable to upselling transactions that occur in a call in response to a general media advertisement. In addition, the amended Rule contains specific requirements for negative option, "free-to-pay conversion," and upselling transactions.⁹⁵² Therefore, the Commission finds it unnecessary to except discount buyers clubs and offers involving "opt out free trials" from the general media exemption.

DSA opposed the amendment of the general media exemption provision, expressing the concern that the exception for "business opportunities other than business arrangements covered by the Franchise Rule" will require individual direct sellers to comply with the Rule when they solicit

customers or salespeople through general media advertisements.⁹⁵³ DSA argues that "[t]here is nothing inherently deceptive or abusive about communications over the telephone (particularly those initiated by the consumer) regarding a business opportunity" and that "there should be even fewer concerns about communications related to *prospective* transactions involving activities clearly deemed de minimis by the Franchise Rule."⁹⁵⁴ As the Commission stated in the NPRM, it has determined, based on the record and in particular on its extensive law enforcement experience in this area, that "telemarketing fraud perpetrated by the advertising of work-at-home and other business opportunity schemes in general media sources is a prevalent and growing phenomenon."⁹⁵⁵ Outbound telephone calls to induce the purchase of a business opportunity not regulated by the Franchise Rule have been subject to the Rule's coverage since it was promulgated, and the new exception for general media advertisements merely expands that requirement when an inbound call results from the advertisement of such ventures in the general media.⁹⁵⁶ Moreover, if a direct seller is marketing its underlying product to customers, the exception would not bring such activity under the Rule because it would not implicate the sale of a business opportunity.⁹⁵⁷ Furthermore, as the Commission noted in the SBP for the original Rule, DSA's concern about recruitment of persons to engage in the direct sale of goods or services is likely unfounded because the face-to-face exemption takes such efforts outside the Rule's coverage.⁹⁵⁸

Based on its review of the record in this matter, and its law enforcement experience, the Commission has determined to retain the proposed general media provision in the amended

⁹⁵³ DSA-NPRM at 8-9.

⁹⁵⁴ *Id.*

⁹⁵⁵ 67 FR at 4530-31 (this determination is equally applicable to the advertisement by direct mail of business opportunities other than business arrangements covered by the Franchise Rule).

⁹⁵⁶ The Commission noted in the original SBP that "[w]hen a business venture is not covered by the Franchise Rule, then consumers do not receive the protection afforded by that Rule's pre-sale disclosure requirements. Therefore, it is appropriate that telephone sales of such ventures should be covered by this Rule, so that consumers may receive the benefit of its protections." 60 FR at 4360. The addition of the exception provisions to the direct mail and general media exemptions merely expands upon the initial requirement.

⁹⁵⁷ For example, the exception to the general media exemption would bring under the Rule an effort by a direct seller to recruit others to market its products, but not the sale by the direct seller of cosmetics to its own end-customers.

⁹⁵⁸ 60 FR at 43860, n.185.

⁹⁴⁴ NCL-NPRM at 12.

⁹⁴⁵ EPIC-NPRM at 25-26.

⁹⁴⁶ 60 FR at 43860.

⁹⁴⁷ The Commission also notes that new § 310.4(a)(6) requires that, in every instance, a seller or telemarketer secure the consumer's express informed consent to be charged for the goods or services or charitable contribution, and to be charged using the identified account.

⁹⁴⁸ NAAG-NPRM at 58-59.

⁹⁴⁹ *Id.* See also EPIC-NPRM at 25 (agreeing that upselling calls should be subject to the Rule). Cf. Capital One-NPRM at 5 (requesting clarification that upselling calls are exempt, at least in an internal upsell).

⁹⁵⁰ NAAG-NPRM at 59.

⁹⁵¹ See, e.g., *FTC v. Smolev.*, No. 01-8922 CIV ZLOCH (S.D. Fla. 2001); *New York v. MemberWorks, Inc.*, Assurance of Discontinuance (Aug. 2000); *Minnesota v. MemberWorks, Inc.*, No. MC99-010056 (4th Dist. Minn. June 1999); *Minnesota v. Damark Int'l, Inc.*, No. C8-99-10638, Assurance of Discontinuance (Ramsey County Dist. Ct. Dec. 3, 1999); *FTC v. S.J.A. Soc'y, Inc.*, No. 2:97 CM 472 (E.D. Va. filed May 31, 1997).

⁹⁵² See amended Rule § 310.3(a)(1)(vii), 310.3(a)(2)(ix), 310.3(a)(3)(iii), 310.4(a)(6), 310.4(a)(7), and 310.4(d).