

Rule with two changes. First, the phrase "or any subsequent rule covering business opportunities the Commission may promulgate" has been deleted in the amended Rule. Should the Commission promulgate a rule covering business opportunities, the nexus between the TSR and any such rule will be considered, and any necessary conforming amendments made to the TSR at that time. Second, § 310.6(b)(5) has also been amended to expressly except from the general media exemption any upsell following the exempt transaction associated with the general media solicitation. As with telephone calls initiated by the consumer without any solicitation by the seller or telemarketer, the reasons for exempting a telemarketing transaction following certain general media solicitations do not apply to an upsell linked to that initial transaction.⁹⁵⁹ The original Rule exempts calls in response to a general media advertisement because "calls responding to general media advertising do not typically involve the forms of deception and abuse the Act seeks to stem."⁹⁶⁰ However, the Commission recognized that some fraudulent telemarketers and sellers have used general media advertisements to entice victims to call, and thus has excepted those problem areas from the exemption. Upselling is one of the problem areas where general media advertisements have provided the opening for subsequent deception and abuse.⁹⁶¹ In addition, an upsell transaction is not similar to a general media advertisement. It is a wholly new sales offer targeted at the consumer a seller or telemarketer has on the line for some other purpose, whether it be in response to a general media advertisement about a different product or service, or a customer service call initiated by the consumer. Accordingly, the amended Rule excepts upsell transactions from the general media exemption in § 310.6(b)(5).

§ 310.6(b)(6) — Exemption for direct mail solicitations

Section 310.6(b)(6) of the original Rule exempts from the Rule's requirements inbound telephone calls resulting from a direct mail solicitation

that clearly, conspicuously, and truthfully disclosed all material information required by § 310.3(a)(1). Certain categories of transactions, specifically those in which the solicitation was for a prize promotion, investment opportunity, credit repair service, "recovery" service, or advance fee loan, were excepted from this exemption because the record and the Commission's law enforcement experience made clear that these particular products and services were so often subject to abuse by fraudulent telemarketers that regulation under the TSR was appropriate.

The proposed Rule retained the direct mail exemption provision, but clarified that advertisements sent via facsimile or electronic mail were considered direct mail for purposes of this exemption.⁹⁶² The proposed Rule also added two new categories of transactions to be excepted from the direct mail exemption: 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. Finally, pursuant to the USA PATRIOT Act, the proposed Rule expanded the exemption to exclude from the Rule's coverage inbound calls to solicit a charitable contribution made in response to a direct mail solicitation that complies with § 310.3(a)(1).

The Commission has determined, based on a review of the record and its own law enforcement experience, to adopt the proposed amendments to the direct mail exemption, renumbered in the amended Rule as § 310.6(b)(6). The amended Rule, however, differentiates between the requirements for direct mail solicitations for goods or services and direct mail solicitations for charitable contributions. The amended Rule retains unchanged the requirements of the original Rule—*i.e.*, the direct mail solicitation must clearly, conspicuously, and truthfully disclose all material information required by § 310.3(a)(1). However, because § 310.3(a)(1) applies only to goods and services and not to charitable solicitations, the amended Rule modifies the direct mail exemption language to ensure that prospective donors who receive direct mail solicitations for charitable contributions have protections similar to those enjoyed by consumers who purchase goods or services. Thus, the amended Rule adds language to the direct mail exemption provision prohibiting material misrepresentations regarding

any item contained in § 310.3(d) in charitable solicitations sent by direct mail to donors.

In the proposed Rule, the Commission stated that the direct mail exemption would be applicable to inbound calls made in response to a direct mail charitable solicitation that complies with § 310.3(a)(1). NAAG suggested that inbound calls resulting from a direct mail charitable solicitation be exempt instead if the direct mail piece clearly, conspicuously, and truthfully sets forth the disclosure in § 310.4(e)(1) (the identity of the charitable organization) and the fact that the organization is soliciting a charitable contribution.⁹⁶³ NAAG further recommended that, at a minimum, several categories of information (including the nature of the goods or services and the facts relating to a charitable contribution) deemed important to consumers and donors be expressly referenced in § 310.6(f).⁹⁶⁴ The Commission agrees that the specific disclosures required by § 310.3(a)(1)—targeted at the sale of goods or services—are an imperfect fit with the type of information a potential donor would need to determine if he or she wished to contact a charitable organization in response to a solicitation received via direct mail. Therefore, the amended Rule requires that, in order for the telemarketer to take advantage of the direct mail exemption for inbound calls in response to any direct mail charitable solicitation, such solicitation contain no material misrepresentation regarding any item contained in § 310.3(d) of the Rule.

Section 310.6(b)(6) has also been amended to expressly except from the direct mail exemption any upsell following the exempt transaction associated with the direct mail advertisement. As with telephone calls initiated by the consumer without any solicitation by the seller or telemarketer, or in response to general media solicitations, the reasons for exempting a telemarketing transaction triggered by a direct mail advertisement do not apply to an upsell linked to that initial transaction.⁹⁶⁵ Section 310.6(b)(6) of the amended Rule exempts direct mail solicitations only if the disclosures required by § 310.3(a)(1) are truthfully, clearly, and conspicuously provided in the direct mail piece. The Commission

⁹⁵⁹ The reasons for this exception are explained in greater detail in the discussion of amended Rule § 310.6(b)(4) above.

⁹⁶⁰ 60 FR at 43860.

⁹⁶¹ *FTC v. Smolev* (a/k/a Triad Discount Buying Service) is one example of an internal upsell triggered by consumer response to a general media advertisement. *Smolev*, No. 01-8922-CIV ZLOCH (S.D. Fla. 2001). *New York v. Ticketmaster* (Settlement announced on Jan. 7, 2002).

⁹⁶² The direct mail exemption provision is found in the proposed Rule at § 310.6(f).

⁹⁶³ NAAG-NPRM at 59-60.

⁹⁶⁴ *Id.*

⁹⁶⁵ The reasons for this exception are discussed in greater detail in the explanation of §§ 310.6(b)(4) and (5) above. Capital One requested clarification of the applicability of this exemption to upselling transactions. Capital One-NPRM at 5-6. EPIC requested that upselling be subject to the Rule. EPIC-NPRM at 25.