

exempted these direct mail solicitations because such solicitations

are not uniformly related to the forms of deception and abuse the Act seeks to stem, nor are they uniformly related to such misconduct. Rather, in certain discrete areas of telemarketing, such solicitations often provide the opening for subsequent deception and abuse. The Commission has drawn upon its enforcement experience, identified those problem areas, and excluded them from this exemption.⁹⁶⁶

Upselling transactions are one of the problem areas where direct mail solicitations have provided the opening for subsequent deception and abuse.⁹⁶⁷ Upon receiving a direct mail solicitation in which all of the material terms of the offer may be available to evaluate in the direct mail piece, the consumer has the time and the information necessary to make an informed decision whether to call and inquire further or make a purchase. By contrast, an upsell presentation provides the consumer no opportunity to review the material disclosures pertinent to the offer. Once again, the upsell is more akin to an unsolicited outbound call to the consumer, who does not necessarily expect to be solicited for a purchase, and who has none of the material information he or she needs to evaluate the offer and make a purchasing decision. Accordingly, the amended Rule excepts upselling transactions from the direct mail exemption in § 310.6(b)(6).

Finally, 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.

Facsimile and electronic mail solicitations as “direct mail”: NCL and ARDA supported the Commission’s view that facsimile and electronic mail solicitations are analogous to direct mail sent via the U.S. Postal Service, and should be considered direct mail for purposes of the exemption.⁹⁶⁸ NCL noted that facsimile (“fax”) or electronic mail (“email”) solicitations are often sent to promote fraudulent goods or services.⁹⁶⁹ For example, in “Nigerian money offer” schemes, the fastest growing category of telemarketing fraud

reported to NCL, faxes and emails are the primary methods of solicitation.⁹⁷⁰ NCL noted that faxes and email are also used to solicit businesses for a variety of telemarketing scams.⁹⁷¹ DMA also supported the interpretation that advertisements sent via fax or email should be considered as “direct mail” pieces for purposes of the Rule.⁹⁷²

Some commenters opposed the inclusion of fax and email advertisements in the exemption,⁹⁷³ and some expressed concern that the Commission’s interpretation could actually increase the number of unwanted solicitations sent to consumers by fax and email.⁹⁷⁴ NCL stated that unsolicited fax advertisements were prohibited under the TCPA because of their intrusive impact on recipients’ privacy, and expressed concern that exempting calls in response to unsolicited faxes from the Rule, even if the information in them is accurate and complete, “would ignore this important public policy determination.”⁹⁷⁵ NCL recommended that the Commission ban the sending of unsolicited fax advertisements as an abusive practice under the Rule.⁹⁷⁶

The record in this matter provides no support for the assertion that the number of unwanted, but truthful, fax and email solicitations may increase as a result of being exempted from the TSR. The Commission notes that the TCPA, enforced by the FCC, already bans unsolicited fax messages.⁹⁷⁷ The FCC has promulgated rules effectuating the Congressional ban and has enforced those regulations.⁹⁷⁸ Thus, the Commission’s determination that, for the purposes of the TSR, faxes and email are forms of “direct mail” should have no impact on the number of unsolicited faxes that are sent. To presume such would be to anticipate that sellers would blatantly ignore the

FCC’s regulations. To be entirely clear, however, the Commission wishes to state that its interpretation of the term “direct mail” in no way alters the legality of the underlying direct mail contact. Rather, the new TSR provision will require that, to the extent that a fax or email solicitation is allowed by law, these direct mail solicitations must include the required disclosures, or else resulting inbound calls from consumers will be subject to the entire TSR.⁹⁷⁹

Although it favored the Commission’s proposed interpretation which viewed faxes and email as “direct mail” for purposes of the Rule, DMA argued that the Rule should allow the disclosures of material information to be made in the telephone call, rather than in the fax or email advertisement.⁹⁸⁰ As support for its position, DMA stated that to do otherwise could result in increased expense to sellers who use email to reach their target audience, due to the increased length of the message. DMA further argued that the Commission lacks authority to dictate the content of either email or fax advertisements. Finally, DMA posited that, if the intent of the provision is to mandate disclosures, the NPRM failed to evaluate the costs of requiring such disclosures, particularly in email solicitations.⁹⁸¹

The Commission believes that, to warrant exemption of the inbound call in response to a direct mail solicitation from the Rule, it is critical that a consumer receive the required disclosures (or, in the case of a charitable solicitation, that the solicitation not contain misrepresentations) at the time the consumer contemplates contacting the seller or charitable organization by telephone. The amended Rule follows the reasoning of the original Rule, which requires that any direct mail

⁹⁷⁹ If the fax or email advertisement is sent in violation of state or other federal law, the sender would be liable under those federal or state laws, but not under the TSR, unless the fax or email also failed to include the requisite disclosures and the seller or telemarketer, in any subsequent telemarketing effort, failed to abide by the Rule.

⁹⁸⁰ DMA-NPRM at 58 (“The types of disclosures proposed by the Commission are worthwhile, so long as they can be provided over the phone by the telemarketer.”). See also Associations-NPRM at 4; Associations-Supp. at 8.

⁹⁸¹ In their supplemental comment, Associations, of which DMA is a member, noted only that inclusion of the required disclosures in an email or fax “imposes significant costs on businesses. Particularly on email communications, ‘real estate’ and location have significant financial value.” Associations-Supp. at 8. This mere assertion remains all that exists on the record regarding the cost of requiring the § 310.3(a)(1) disclosures in an email or fax, and the Commission finds this insufficient to cause it to reconsider its position based on the financial harm argument asserted by Associations.

⁹⁶⁶ 60 FR at 43860.

⁹⁶⁷ See, e.g., *United States v. Prochnow*, No. 1 02-cv-917 (N.D. Ga. 2002).

⁹⁶⁸ See ARDA-NPRM at 17; NCL-NPRM at 12.

⁹⁶⁹ See NCL-NPRM at 12.

⁹⁷⁰ *Id.*

⁹⁷¹ *Id.*

⁹⁷² See DMA-NPRM at 56.

⁹⁷³ See, e.g., EPIC-NPRM at 26.

⁹⁷⁴ See, e.g., CNO-NPRM at 6; NCL-NPRM at 12.

⁹⁷⁵ See NCL-NPRM at 12-13.

⁹⁷⁶ NCL-NPRM at 13.

⁹⁷⁷ 47 U.S.C. 227(b). In its recent Notice of Proposed Rulemaking, the FCC noted that complaints about unsolicited faxes have been steadily increasing, from 519 in 1996 to over 2100 in 2000. FCC TCPA 2002 (see note 633 above), at para. 8. There is no suggestion in the FCC’s NPRM that a spike in the actual number of unsolicited faxes has occurred or that any increase is attributable to the FTC’s determination that faxes and email are forms of direct mail for purposes of the TSR.

⁹⁷⁸ 47 CFR 64.1200(a)(3). See also FCC Press Release: “FCC Cracks Down on ‘Junk Fax’ Violations,” <http://www.fcc.gov/cgb/news/080802.junkfax.html>; FCC’s 2002 NPRM at para. 7, n.40.