

solicitation contain the required disclosures in order to afford the consumer an opportunity to know certain material information before determining whether to call the telemarketer. Apart from DMA's comment, the Commission finds no record evidence to support alteration of this requirement simply because the direct mail solicitations are sent by email rather than the U.S. Postal Service. It is not the intent of the Commission to use this provision to require new disclosures surreptitiously; indeed, the disclosures required (and misrepresentations prohibited, in the case of a charitable solicitation) are merely those that a telemarketer must make in the course of any non-exempt telemarketing transaction. Sellers remain free to choose the most advantageous method by which to contact consumers, and those opting for direct mail solicitations sent by email must determine whether the costs of making the relevant disclosures⁹⁸² are offset by the savings attained by being exempt from the rest of the Rule.

Exceptions to the direct mail exemption: Commenters were generally supportive of the Commission's proposal to narrow the direct mail exemption to make it unavailable to sellers of credit card loss protection and business opportunities other than business arrangements covered by the Franchise Rule or any subsequent rule covering business opportunities the Commission may adopt. In expressing its support, NCL noted that, although most solicitations for credit card loss protection plans were made via outbound telephone calls, it endorsed excepting such plans from the exemption to ensure that they will be covered by the Rule regardless of how they are promoted.⁹⁸³ Similarly, NCL supported the exclusion from the direct mail exemption of work-at-home solicitations, noting that in 2001, 42 percent of the victims of work-at-home scams said that the initial method of contact was direct mail.⁹⁸⁴ Because work-at-home solicitations are not "business arrangements covered by the Franchise Rule," the exception from the direct mail exemption will now ensure that inbound calls in response to direct mail advertising work-at-home opportunities will be subject to the Rule.

Some consumer advocates and law enforcement officials argued, however,

that by simply narrowing the categories of offers eligible for the exemption, the proposed Rule did not go far enough to protect consumers.⁹⁸⁵ Instead of narrowing the exemption, NCL recommended that the Commission eliminate the direct mail exemption altogether,⁹⁸⁶ a position with which NAAG and AARP concurred at the June 2002 Forum.⁹⁸⁷ NCL argued that telemarketing fraud and abuse could be prevented if those currently exempt from the Rule's coverage were required to adhere to its provisions, particularly those Rule provisions mandating material disclosures and express verifiable authorization.⁹⁸⁸ As an alternative to eliminating the direct mail exemption, NCL suggested that all telemarketers should be required to obtain customers' express verifiable authorization in every call, even those that would otherwise be exempt, such as inbound calls in response to a direct mail solicitation.⁹⁸⁹ NAAG suggested that the Rule should also except from the direct mail exemption transactions that involve a high risk of abuse, such as the sale of memberships for discount buyers clubs and for transactions involving negative option features.⁹⁹⁰

Based on a review of the record, the Commission declines to adopt these suggestions. In the SBP of the original Rule, the Commission noted that the direct mail exemption was included in the Rule because, in its experience, direct mail solicitations were not "uniformly related to the forms of deception and abuse the Act seeks to stem."⁹⁹¹ Based on this understanding, and in an effort to strike the appropriate balance between reining in fraudulent telemarketers and not unduly burdening legitimate industry, the Commission included the direct mail exemption in the original Rule. While it may be true that fraudulent telemarketing scams might be reduced if the direct mail exemption were excised from the Rule, the Commission believes that to do so would tip the balance and unnecessarily burden legitimate telemarketers without bringing commensurate benefits to consumers. Therefore, the Commission declines to eliminate the exemption entirely.

The Commission also declines to require express verifiable authorization in all calls. 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). Finally, the Commission declines to add the sale of discount buyers club memberships and solicitations in which there is a negative option feature to the exceptions to the direct mail exemption. The record does not demonstrate that the sale of membership clubs or solicitations in which there is a negative option feature are particularly subject to abuse in conjunction with direct mail solicitations, and thus does not support including such exceptions.⁹⁹²

Other suggested changes

Some commenters raised concerns about the situation where there is a disparity between the disclosures made in a direct mail solicitation and those made in the subsequent telephone call. NAAG urged the Commission to clarify that a pre-call mailing is not truthful if it is inconsistent in some material way with what is stated during the call.⁹⁹³

In order to avail itself of the exemption, a direct mail solicitation must provide the material disclosures required by § 310.3(a)(1) to ensure that the material information about the offer is in the hands of the consumer when the consumer elects whether to place a call to a telemarketer, including information about the total cost and quantity of the goods or services, all material restrictions, limitations or conditions to the offer, and certain information regarding refund policies and prize promotions. By its very definition, this material information is presumed "likely to affect a person's choice of goods or services, or their conduct regarding them."⁹⁹⁴ Thus, in order to meet the Rule's requirement that the information in the direct mail solicitation be "truthful," the information provided to the consumer in the telemarketing call should not vary in any material respect from the disclosures provided in the direct mail solicitation.⁹⁹⁵

⁹⁹² The record does show that buyers club memberships have frequently been associated with complaints regarding preacquired account telemarketing, a practice that is addressed by amended Rule § 310.4(a)(5) and (6). Similarly, goods or services offered in conjunction with a "free-to-pay conversion" negative option feature have been shown to result in complaints of unauthorized charges, and are addressed by amended Rule § 310.4(a)(6) and § 310.3(a)(1)(vii) and 310.3(a)(2)(ix).

⁹⁹³ NAAG-NPRM at 59-60.

⁹⁹⁴ *Cliffdale*, 103 F.T.C. at 165.

⁹⁹⁵ The Commission recognizes that, in some instances, prices may be subject to change, or may only be in effect for a specified period of time. A

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⁹⁸² Presumably in the solicitation of a charitable contribution, there is no cost associated with refraining from making misrepresentations.

⁹⁸³ NCL-NPRM at 12.

⁹⁸⁴ *Id.*

⁹⁸⁵ See NCL-NPRM at 12 (expressing concern that increasing the number of exceptions to exemptions is confusing to businesses and consumers).

⁹⁸⁶ NCL-NPRM at 12.

⁹⁸⁷ June 2002 Tr. III at 177, 182-83.

⁹⁸⁸ NCL-NPRM at 12.

⁹⁸⁹ *Id.*

⁹⁹⁰ See NAAG-NPRM at 59.

⁹⁹¹ 60 FR at 43860.