

AFSA expressed concern over the “specter of vicarious liability” for telemarketers who receive inbound calls in response to direct mail solicitations sent by another party in which the required disclosures are not made “truthfully.” The Commission believes that under § 310.3(b), the assisting and facilitating provision, liability would only attach if a telemarketer knew or consciously avoided knowing that there was a disparity between the material representations in a direct mail piece and the telemarketing script being used in inbound calls in response to that solicitation.

EFSC requested, in connection with the proposal to broaden the direct mail provision to include solicitations by email and fax, that the Commission explicitly state that “a telemarketer’s electronic disclosure of the material information satisfies” the telemarketer’s obligation under the Rule.⁹⁹⁶ EFSC argued that the E-SIGN Act makes such electronic disclosures permissible, and that the Commission should explicitly state that such is the case.⁹⁹⁷ As noted above, in the response to DMA’s suggestion that it should be permissible to make the required disclosures in the email or fax or in the subsequent telemarketing call, the Commission believes that to avail itself of the direct mail exemption, the seller must include the required disclosures in the direct mail piece itself, for to make these disclosures outside that context would defeat the consumer protection purpose of that requirement.⁹⁹⁸ Thus, for the same reason, the Commission believes that in the case of any direct mail solicitation conveyed by email or fax, the required disclosures would have to be included in the email or fax itself in order for any subsequent telemarketing

disclosure to that effect in the direct mail solicitation should provide the consumer with sufficient notice that the price may fluctuate or may not be available after a particular date.

⁹⁹⁶ EFSC-NPRM at 12.

⁹⁹⁷ *Id.*

⁹⁹⁸ The Commission believes that for purposes of § 310.6(b)(6), it is critical that telemarketing calls in response to direct mail solicitations be exempt only on the condition that the direct mail piece contains the requisite disclosures. The requirement that these disclosures be displayed in the direct mail piece itself ensures that these disclosures are proximate in time and location to the direct mail solicitation, which makes it more likely that consumers will be made aware of certain material information that is useful or necessary to evaluate the sales transaction proposed in the solicitation before responding to it. The Commission notes that this outcome is consistent with § 101(f) of the E-SIGN Act, which states that, “Nothing in this title affects the proximity required by any statute, regulation, or other rule of law with respect to any warning, notice, disclosure, or other record required to be posted, displayed, or publicly affixed.” (emphasis added).

call to benefit from the § 310.6(b)(6) exemption.

Finally, NFC requested that the Commission clarify whether the direct mail exemption applies to franchisors.⁹⁹⁹ The Commission believes that § 310.6(b)(2) makes clear that sales of franchises subject to the Commission’s Franchise Rule are exempt from the TSR. The sale of business opportunities not covered by the Franchise Rule, however, is subject to regulation by the Rule. Section 310.6(b)(6) of the amended Rule expressly states that a seller of “business opportunities other than business arrangements covered by the Franchise Rule” would not be able to avail itself of the direct mail exemption, and thus would be required to comply with the Rule’s provisions. Therefore a business opportunity seller, if not eligible for exemption pursuant to § 310.6(b)(2), would be ineligible for the direct mail exemption because of the specific exception for the sale of such services under § 310.6(b)(6).

§ 310.6(b)(7) — Business-to-business telemarketing

Section 310.6(g) of the original Rule exempts from the Rule’s requirements telemarketing calls to businesses, except calls to induce the sale of nondurable office or cleaning supplies. Based on the Commission’s law enforcement experience, the Commission proposed in the NPRM to add two more categories to the list of exceptions to the exemption for calls to businesses: the sale of Internet or Web services, and charitable solicitations.¹⁰⁰⁰ The Commission has determined, however, based upon comments received in response to the NPRM, not to include in the amended Rule the exception of the sale of Internet or Web services and charitable solicitations from the business-to-business exemption. The amended Rule retains unchanged the wording in the original Rule, except to add language clarifying that the Commission’s national “do-not-call” registry provisions do not apply to the telemarketing of nondurable office or cleaning supplies to businesses. The provision is also renumbered, and can be found at § 310.6(b)(7) of the amended Rule.

Consumer groups and state law enforcement officials argued that the Rule should not contain any exemption for business-to-business telemarketing, but if the Commission were to retain the exemption, they supported narrowing

⁹⁹⁹ NFC-NPRM at 4-5.

¹⁰⁰⁰ See NPRM discussion regarding proposed § 310.6(g), 67 FR at 4531-32.

the exemption as much as possible so that sellers and telemarketers of those products or services that have particularly been subject to abuse would not benefit from the exemption.¹⁰⁰¹ Thus, these commenters generally supported the Commission’s proposal to “carve out” the telemarketing of Internet and Web services from the business exemption, citing extensive law enforcement efforts to combat the proliferation of fraudulent telemarketing of website design, hosting, and maintenance services to small businesses.¹⁰⁰²

On the other hand, industry commenters uniformly opposed the “carve out” of Internet and Web services from the business-to-business exemption.¹⁰⁰³ These commenters argued that the proposed definitions of these services were overly broad and that there was insufficient record evidence to support regulation of all Internet and Web services.¹⁰⁰⁴ They noted that federal and state law enforcement efforts had focused on website design, development, hosting, and maintenance services, but that the record does not reveal a pattern of fraud in the sale of Internet access services, including wireless Internet access services.¹⁰⁰⁵ Industry commenters argued that if the Commission persisted in requiring that the telemarketing of Internet and Web services comply with the TSR, the effect would be to chill innovation and development in a nascent industry that is rapidly changing.¹⁰⁰⁶ They also argued that such an action would be anticompetitive because it would subject those sellers and telemarketers who are within the FTC’s jurisdiction to the TSR’s requirements, while exempting competitors who happen to be common carriers.¹⁰⁰⁷ Furthermore, these commenters stated that although the Commission’s goal is to protect small business from fraud in the sale of Internet and Web services, the Commission’s proposal would actually

¹⁰⁰¹ See, e.g., NAAG-NPRM at 60; NCL-NPRM at 11.

¹⁰⁰² NAAG-NPRM at 60; NCL-NPRM at 11.

¹⁰⁰³ See, e.g., Comcast-NPRM at 5; Cox-NPRM at 30-32; ICC-NPRM at 1-2; Nextel-NPRM at 23, 24; Reed-Elsevier-NPRM at 5; SBC-NPRM at 2, 13; SIIA-NPRM at 1-2; YPIMA-NPRM at 5. See also June 2002 Tr. III at 210-20, 222-23, 226.

¹⁰⁰⁴ See, e.g., Nextel-NPRM at 23; SBC-NPRM at 3; SIIA-NPRM at 1-2. June 2002 Tr. III at 210-20, 222-23, 226.

¹⁰⁰⁵ See, e.g., Nextel-NPRM at 23; SIIA-NPRM at 1-2. See also June 2002 Tr. III at 213-14, 217-18, 224.

¹⁰⁰⁶ Nextel-NPRM at 24; Reed-Elsevier-NPRM at 7; SBC-NPRM at 14; SIIA-NPRM at 1-2. See also June 2002 Tr. III at 210-24.

¹⁰⁰⁷ See, e.g., DMA-NPRM at 9. See also June 2002 Tr. III at 213-14, 217-18, 224.