



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

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May 31, 2006

Mr. Jerry Cerasale  
Senior Vice President  
Government Affairs  
Direct Marketing Association  
1111 19th Street, N.W., Suite 1100  
Washington, D.C. 20036-3603

Re: Request for Advisory Opinion Concerning Upselling and Certain Exemptions to the  
Telemarketing Sales Rule

Dear Mr. Cerasale:

This staff advisory opinion responds to your letter of April 3, 2006, seeking informal clarification of whether the telemarketing program it describes (“marketing program” or “program”) constitutes “upselling” under the Telemarketing Sales Rule (“TSR” or “the Rule”), 16 C.F.R. Part 310. As you noted in your letter, if the program does not constitute upselling, calls made as part of the program may be exempt from the Rule under Sections 310.6(b)(4) and (5), 16 C.F.R. §§ 310.6(b)(4) and (5).

Based on your description, our conclusion is that the program does constitute upselling and is not exempt from the Rule. The opinions expressed in the following discussion of the basis for this conclusion are those of Commission staff only and are not attributable to, nor binding on, the Commission itself or any individual Commissioner.

### **Rule Provisions**

The TSR defines “upselling” to mean:

soliciting the purchase of goods or services following an initial transaction during a single phone call. The upsell is a separate telemarketing transaction, not a continuation of the initial transaction. An “external upsell” is a solicitation made by or on behalf of a seller different from the seller in the initial transaction. An “internal upsell” is a solicitation made by or on behalf of the same seller as in the initial transaction, regardless of whether the

initial transaction and subsequent solicitation are made by the same telemarketer.

16 C.F.R. § 310.2(dd). Upselling is the “direct solicitation for a product or service other than that for which the consumer initiated the call.” Statement of Basis and Purpose (“SBP”) accompanying the amended Rule, 68 Fed. Reg. 4656, Jan. 29, 2003. Upselling is subject to each of the Rule’s requirements except the Do Not Call provisions, 16 C.F.R. § 310.4(b)(1)(iii), and calling time restrictions, 16 C.F.R. § 310.4(c). SBP, 68 Fed. Reg. 4596.

Certain types of calls are exempt from the Rule. *See* 16 C.F.R. 310.6. These include: telephone calls initiated by a customer or donor “that are not the result of any solicitation by a seller, charitable organization, or telemarketer . . .” or that are “in response to an advertisement through any medium other than direct mail solicitation . . .” 16 C.F.R. §§ 310.6(b)(4) and (5). These exemptions do not apply “to any instances of upselling included in such telephone calls.” *Id.*

## Discussion

The program you describe in your letter is one whereby DMA members market products through relationships with financial institutions, such as banks and mortgage companies. Specifically, you state:

The marketing program involves an inbound call from a customer of the . . . [financial institution] to the . . . [financial institution] where the customer requests account, transaction, balance and/or payment information. After responding to the customer’s request, the . . . [financial institution] highlights a service offering and asks the customer if he/she would like to hear more about it. If the customer says yes, the call is transferred to the Member. The customer’s call initially might be answered and transferred to the Member *via* an individual or a voice response unit.

FTC staff’s opinion is that the member in this scenario is engaged in upselling. The member is soliciting the purchase of goods or services following an initial transaction during a single phone call. *See* 16 C.F.R. § 310.2(dd). The initial transaction involves an inbound call to a financial institution by a customer seeking account or other similar information. The Commission contemplated such a transaction as a precursor to an upsell. The Commission stated in the SBP: “The term ‘initial transaction’ is intended to describe any sort of exchange between a consumer and a seller or telemarketer, including but not limited to . . . customer service calls initiated by . . . the consumer . . .” SBP, 68 Fed. Reg. 4596.<sup>1</sup>

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<sup>1</sup> *See* SBP, 68 Fed. Reg. 4597 n.180 (“The upsell can follow either a sales call or a call related to customer service, such as a call about an account payment or product repair

DMA argues that the member is not engaged in upselling because the initial transaction does not involve a “seller” as that term is defined in the Rule. We disagree with this assertion. While the upselling definition includes language describing two types of upsells in which the initial transaction involves a seller, the first sentence of the definition – “[u]pselling means soliciting the purchase of goods or services following an initial transaction during a single telephone call” – is sufficiently broad to include other scenarios. *See* 16 C.F.R. § 310.2(dd). In our view, the meaning of the term “initial transaction” is not narrowly restricted to sales or the consummation of other types of contracts, but instead, as indicated by the SBP, broadly reaches to include such exchanges as completed customer service calls. Therefore, we believe that the scenario described in the DMA letter constitutes “upselling” under Section 310.2(dd).

In addition, we believe that DMA’s interpretation of the TSR’s upselling provisions is inconsistent with the provisions’ underlying purpose: “to ensure that consumers in upselling transactions receive the same information and protections as consumers in other telemarketing transactions subject to the Rule.” *See* SBP, 68 Fed. Reg. 4596. From the consumer’s standpoint, there is little or no material difference between an upsell and an outbound telemarketing call:

[T]he consumer is hearing the terms of the upsell offer for the first time on the telephone. The consumer has not had an opportunity to review and consider the terms of the offer in a direct mail piece, or to view an advertisement and gather information on pricing or quality of the particular good or service before determining to make the purchase.

*Id* at 4597.

The consumer encountering the marketing program described in your letter is in this position. The consumer receives the offer by phone and has not had the opportunity to review the terms of the offer in writing or to gather information on the pricing or quality of the good or service. In addition, because the member may have access to the consumer’s financial information through its relationship with the financial institution, the consumer is particularly vulnerable to financial injury. As the Commission noted in the SBP: “[I]aw enforcement experience indicates that the fact that the consumer has already provided or authorized use of his or her billing information in an initial transaction may actually result in greater risk or abuse during the second transaction.” *Id.* at 4597-98 n.192.

The TSR provides important protections for the consumer presented with the described marketing program. Among other things, the Rule requires disclosure of all information material to the consumer’s decision to accept the offer before the consumer authorizes payment for the purchase. *See* 16 C.F.R. §§ 310.3(a)(1) and 310.4(d). It also requires the member to obtain

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. . . .”)(quoting the National Association of Attorneys General Comment on the January 30, 2002 Notice of Proposed Rulemaking accompanying the proposed amended TSR).

express, informed consent before submitting the consumer's billing information for payment. *See* 16 C.F.R. § 310.4(a)(6). In our view, the Rule cannot be interpreted in a manner that would result in the removal of these protections for consumers confronted by marketing scenarios like the one described in your letter. Moreover, TSR coverage of upsells in the scenario you describe requires no more than basic fair dealing with consumers, and imposes no undue burden on the upseller.

### **Conclusion**

FTC staff's opinion is that the described marketing program constitutes upselling and is not exempt from the TSR. The member is soliciting the purchase of goods or services following an initial transaction during a single phone call. The term "initial transaction" includes completed customer service calls. Moreover, the purpose of the upselling provisions is to cover the type of marketing program described in your letter. The TSR makes clear that, absent any other safeguards, the Rule's most basic protections apply to consumers who are initially solicited to purchase goods and services over the telephone. As the consumers in the marketing program you describe fall into this category, they should receive the Rule's protections.

I hope this discussion is helpful to you and to DMA's members. If you have any further questions, please do not hesitate to contact me.

Sincerely,

Thomas P. Rowan  
Staff Attorney