restrictions,¹¹⁶ the FCC has established these calling time hours in its regulations implementing the TCPA,¹¹⁷ and the Commission has been presented with no compelling reasons to change them. Accordingly, no substantive changes to Section 310.4(c) are proposed.¹¹⁸

4. Required Oral Disclosures.

(a) *All outbound telephone calls.* The Telemarketing Act requires the Commission to include in this Rule the following:

A requirement that any person engaged in telemarketing for the sale of goods or services shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make other such disclosures as the Commission deems appropriate.¹¹⁹

The initially proposed Rule, at Section 310.4(d)(1)(i), implemented this legislative directive by requiring all outbound telephone calls (or telephone solicitations, as they previously were called), to begin with the disclosure of the caller's true first and last name, the seller's name, and a statement that the purpose of the call is to sell goods or services. The divergence between the statutory language and that of the initially proposed Rule elicited significant comment.

Many industry representatives objected to these disclosures being required "at the beginning," rather than "promptly and clearly." ¹²⁰ According to these commenters, requiring disclosures at the beginning disturbs the normal flow of a telephone call,¹²¹ allows no time for a seller to establish, or reestablish, a relationship with the consumer,¹²² infringes on the seller's ability to design and implement effective telemarketing sales presentations,¹²³ and is in effect a "kill message" that will result in most

117 See 47 CFR 64.1200(e)(1).

consumers hanging up when they hear the required disclosures.¹²⁴

After considering these comments, the Commission has determined that requiring these disclosures "at the beginning'' may be too rigid a standard for achieving the statutory purpose of providing important information to consumers while permitting the use of the telephone in making sales.¹²⁵ The revised proposed Rule adheres to the statutory requirement that the disclosures be prompt and clear. By adhering more closely to the statutory language, the Commission intends to permit some flexibility in the seller's telemarketing presentation. For example, a prompt disclosure would not preclude the seller or telemarketer from establishing some initial rapport with the customer before stating the purpose of the call. However, in "multiple purpose calls," where one purpose is to sell goods or services, the sales purpose must be disclosed promptly.

The requirement that all outbound telephone calls include the disclosure of the caller's true first and last name also elicited significant comment. Commenters noted that "desk names" are commonly used in the industry to protect the safety and privacy of employees, and to protect against potential prejudice or harassment.¹²⁶ Upon reconsideration, the Commission has determined that disclosure of the seller's identity is sufficient. Therefore, disclosure of the caller's identity need not be included in this Rule.

In addition to the disclosure of the identity of the seller and the fact that the purpose of the call is to sell goods or services, Section 310.4(d) of the revised proposed Rule now requires the prompt and clear disclosure of the nature of the goods and services that are the subject of the call. The Commission revised the language of Section 310.4(d) to more accurately reflect language from Section 3(a)(3)(C) of the Telemarketing Act setting forth those additional disclosures.

Section 310.4(d)(1)(ii) of the initially proposed Rule required a number of disclosures in any telephone solicitation that included a charitable solicitation.127 Upon careful review of the comments, it is clear that separate treatment of such charitable solicitations is unnecessary. As ATFA suggested at the workshop, the sale of goods or services that includes a representation that a portion of the money paid for such goods or services will go to charity could be treated under the Rule as a sale of goods or services, rather than a charitable solicitation.128 As a result, such a sale would be covered under the Rule without having to expressly cover charitable solicitations or donations. Because the initially proposed Rule attempted to encompass these specific types of sales, and given that such sales will be covered under the Rule's definition of "telemarketing," the Commission has decided to delete Section 310.4(d)(1)(ii) from the revised proposed rule.

Additionally, many comments indicated that former Section 310.4(d)(1)(ii) engendered a great deal of confusion on the part of nonprofit entities as to their coverage under the Rule. In including former Section 310.4(d)(1)(ii), the Commission did not intend to regulate nonprofit entities.129 The Commission is mindful of the limitations on its jurisdiction in this area. Specifically, Section 4 of the FTC Act gives the Commission jurisdiction over corporations that are operated for their own profit or that of their members and over the business aspects of the activities of organizations serving both nonprofit and for-profit purposes.130 Federal courts have construed this to bar the Commission from suing any bona fide nonprofit organization under the FTC Act, thereby removing most charitable organizations from the scope of the FTC's authority.131 Section 6(a) of

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¹¹⁶ DSA-Nev Tab B at 11 (7 a.m. to 10 p.m.); Monex at 15 (no restrictions for the precious metals market); NACAA at 5 and GA OCA at 2 (5:00 p.m. to 9:00 p.m. to protect vulnerable older consumers); NAAG at 27 (no calls before noon on Sunday).

¹¹⁸ Certain commenters suggested that the safe harbor provisions of Section 310.4(b)(2) should apply to the calling time restrictions as well as the "do not call" requirements. *See, e.g.,* NRF at 35; ARDA at 31. The Commission believes that the calling time restrictions do not present the administrative compliance difficulties that the "do not call" restrictions impose, and therefore does not believe a safe harbor is necessary here.

¹¹⁹15 U.S.C. 6102(a)(3)(C).

¹²⁰ ATA at 9; ANA at 21; NRF at 36; DMA at 30; Chemical at 7; CUCI at 9; Gannet at 4; Olan at 16. ¹²¹ See, e.g., NRF at 36.

¹²² See, e.g., ADS at 2.

¹²³ Ann Arbor at 2 (with numerous other newspapers submitting a substantially similar comment).

¹²⁴ See, e.g., Citicorp at 8; Time Warner at 37–38. Not all industry representatives agreed. One telemarketer stated that requiring the disclosures at the beginning is very reasonable. "Rather than impeding business, disclosure of the information proposed by the Commission adds credibility to the legitimacy of the caller and increases consumer confidence [and] responsiveness to its telemarketing calls." TMGI at 2, 4.

¹²⁵ The Senate Report stated that the "prompt" disclosure requirement was added to the Telemarketing Act to address concerns raised by the market research industry (those who conduct surveys and public opinion polls without selling goods or services) that telemarketing calls should not be made under the guise of being calls solely for survey research or similar purposes. *See* Senate Report at 4.

¹²⁶ See, e.g., ANA at 21; Cox at 7–8; APAC at 6; ADS at 2.

¹²⁷ The definition of "goods or services" in Section 310.2(j) of the initially proposed Rule included a statement that the term included "any charitable service promoted in conjunction with an offer of a prize, chance to win a prize, or the opportunity to purchase any other goods or services."

¹²⁸ See Tr. at 188-93 (ATFA).

¹²⁹ See generally ATFA; NFN.

¹³⁰ See American Medical Ass'n v. FTC, 94 F.T.C. 701, 982–93, aff'd, 638 F.2d 443, 448 (2d Cir. 1980), aff'd mem. by equally divided court, 455 U.S. 676 (1982).

¹³¹ This jurisdictional limitation, however, does not prevent the Commission from suing a for-profit company that engages in deceptive practices to solicit charitable contributions from consumers. To this end, the Commission has recently sued several allegedly deceptive "telefunders"—companies that solicit charitable contributions by telephone which allegedly misrepresented the use to which donations would be directed and allegedly misrepresented the value of certain prizes. See FTC