

requirements in order to reduce the burden on business. For example, several parties read the recordkeeping requirements to require them to maintain records of *all* customer contacts, regardless of whether the customer actually made a purchase.¹⁶¹ They recommended that businesses only be required to maintain records relating to customers who actually made a purchase of goods or services. The Commission did not add clarifying language addressing this concern because it believes that the plain language in Section 310.5(a)(3) of the revised proposed Rule is sufficiently clear that only records relating to *actual sales* need be maintained. That Section specifically requires information to be maintained regarding the sales transaction: the identity of the goods or services purchased, the fulfillment, and the amount paid by the customer.

Other commenters asked that, in connection with the requirement to maintain employee records, the revised proposed Rule more clearly define who is "directly involved in telephone sales" in order to minimize the burden of maintaining records on employees who might be only tangentially involved in telemarketing activities.¹⁶² In addition, some commenters asked that the Commission clarify that records on former employees be kept only on those persons who are employees on or after the effective date of the final Rule.¹⁶³

The revised proposed Rule does not add clarifying language addressing these concerns. The Commission believes that the Rule is sufficiently clear about the types of telemarketing activities that would be subject to the Rule's provisions as to minimize the number and type of employees on whom records must be maintained. In addition, the Commission intends that any Rule requirements, including recordkeeping requirements, will commence with the effective date of the final Rule. Therefore, any records relating to employees and former employees would be required only for those persons who are or become employees or former employees on or after the effective date of the Rule.

The revised proposed Rule incorporates suggestions from some commenters to clarify that the seller and telemarketer need not duplicate those records that are already maintained in the ordinary course of business.¹⁶⁴ Additionally, Section 310.5(c) of the

revised Rule permits a seller and telemarketer to allocate between themselves, by written agreement, responsibility for complying with the recordkeeping requirements. The revised proposed Rule further clarifies a seller's and a telemarketer's recordkeeping responsibilities. Under revised Section 310.5(d), absent a written agreement described in Section 310.5(c), a seller is responsible for complying with Sections 310.5(a) (1)–(3) and a telemarketer is responsible for complying with Section 310.5(a)(4). Revised Section 310.5(d) allows sellers and telemarketers to keep the required records in any manner, format, or place as they keep such records in the ordinary course of business.

Several commenters expressed concern that sellers and telemarketers may not have access to all of the information required to be maintained, and requested that the Rule set out which parties should have responsibility for maintaining certain types of records.¹⁶⁵ After considering these comments, the Commission has determined that the language in Section 310.5(b) is already sufficiently clear to convey that the parties may enter into a written agreement allocating responsibility for maintaining records. Thus, there is nothing in Section 310.5(b) that would prohibit the parties from maintaining only those records to which they would normally have access, as long as each of the required types of information is maintained by at least one of the parties. Indeed, several commenters supported this Section, noting that it strikes a reasonable balance between maintaining necessary documentation and avoiding overly burdensome requirements, as well as noting that it is consistent with the contractual nature of the relationship between sellers and telemarketers.¹⁶⁶

Finally, the Commission has deleted former Section 310.5(a)(5) that required that "any written notices, disclosures, and acknowledgements required to be provided or received under this Rule" be kept. The Commission deleted this Section because the revised proposed Rule no longer requires specific written disclosures and acknowledgements.

Section 310.6 Exemptions

Section 310.6 of the initially proposed Rule exempts certain acts or practices from the Rule's provisions. This Section prompted considerable comment.

Law enforcement and consumer groups cautioned against any exemptions because of the additional

burden of proof exemptions place on law enforcement and because of the potential danger that deceptive telemarketers will seize upon any perceived loophole to avoid coverage under the Rule.¹⁶⁷ At the workshop conference, DSA-Nev. explained Nevada's negative experience with legislative exemptions. DSA-Nev. stated that Nevada's telemarketing legislation exempted charitable solicitations. Shortly after its enactment, Nevada saw fraudulent telemarketers rushing to switch their operations to fraudulent "telefunding" in order to take advantage of that exemption.¹⁶⁸

The business community, however, suggested that the Commission formulate exemptions that specifically differentiate between deceptive and legitimate telemarketing because of the broad coverage of the initially proposed Rule.¹⁶⁹ Industry suggested that the Commission take one or both of the following courses: (1) narrow the definition of "telemarketing" to include only outbound telephone calls;¹⁷⁰ or (2) if the Commission decides to continue including inbound telephone calls, set forth additional exemptions that would allow the legitimate telemarketing industry to operate without the restraints of additional regulation.¹⁷¹

After careful consideration, the Commission has decided that narrowly-tailored exemptions are necessary to avoid unduly burdening legitimate businesses and sales transactions that Congress specifically intended not to cover under the Rule. Section 310.6 enumerates these exemptions. The Commission determined the advisability of each exemption after considering the following factors: (1) Whether the conduct or business in question already is regulated extensively by Federal or State law; (2) whether Congress intended that a certain type of telemarketing activity be exempt under the Rule; (3) whether, based on the Commission's enforcement experience, the conduct or business lends itself easily to deception or abuse; and (4) whether requiring businesses to comply with the Rule would be unduly burdensome when weighed against the likelihood that deceptive sellers or telemarketers would use an exemption to circumvent the Rule's coverage.

¹⁶⁷ See, e.g., NCL at 54–55; NAAG at 37. See also Tr. at 254–256, 704, and 725.

¹⁶⁸ Tr. at 82–84.

¹⁶⁹ See, e.g., NRF at 9; Time Warner at 4–7; DMA at 10–12. See also Tr. at 79–81, 702–703, and 710–711.

¹⁷⁰ See, e.g., MPA at 8–10; MSSC at 9–10; Olan at 19–20; ANA at 10; ACRA at 6–7.

¹⁷¹ See, e.g., NRF at 20–21; ICTA at 31–35; Time Warner at 28.

¹⁶¹ See, e.g., Wachovia at 3; ARDA at 37; IBM at 27.

¹⁶² See, e.g., DMA at 35–36; ARDA at 37.

¹⁶³ See, e.g., NB at 5; Citicorp at 9; ARDA at 37.

¹⁶⁴ See, e.g., Comcast at 6.

¹⁶⁵ See, e.g., MPA at 25; DSA at 21; OPC at 4.

¹⁶⁶ See, e.g., NRF at 41; ARDA at 37–38.