



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

Division of Marketing Practices

February 4, 2010

Joan Mullen
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**Request for Advisory Opinion:
Transfer of Consumer-Initiated Call to Prerecorded Message**

Dear Ms. Mullen:

You have requested an informal staff opinion on the applicability of the recent amendments to the Telemarketing Sales Rule (“TSR”) to calls that are transferred to a prerecorded solicitation. The amendments at issue impose new restrictions on the use of prerecorded messages in telemarketing. Specifically, these amendments, as of September 1, 2009, generally prohibit initiating an outbound telephone call that delivers a prerecorded message to induce the purchase of any good or service unless the seller has obtained from the recipient of the call an express agreement, in writing, that evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of that seller and includes such person’s telephone number and signature. 16 C.F.R. § 310.4(b)(1)(v) (2009); 73 Fed. Reg. 15204 (Aug. 29, 2008). Your letter asks whether this amendment prohibits use of a prerecorded message in the follow scenario:

A consumer calls in to [sic] a call center with a customer service need or to purchase something. At the conclusion of the primary purpose of the call the consumer is advised by a live agent to “hold the line[”] while the call is transferred to a rewards center. The call is then transferred to an automated sales line and one or more [prerecorded] “pitches” are made. The consumer has no opportunity to give permission for the prerecorded pitches.

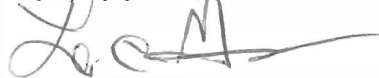
The staff of the Federal Trade Commission has concluded that 16 C.F.R. § 310.4(b)(1)(v)(A) does not apply to the delivery of prerecorded messages in the manner described in your letter. The provisions on prerecorded messages in 16 C.F.R. § 310.4(b)(1)(v) restrict initiating an “outbound telephone call” and such a call is defined as “a telephone call *initiated by* a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.” *Id.* § 310.2(u) (italics added). In the circumstances described in your letter, the customer initiates the telephone call and the transfer of the call that is initiated by the call center is a continuation of the same telephone call. Because call was initiated by the consumer, and not by a seller or telemarketer, 16 C.F.R. § 310.4(b)(1)(v)(A) does not apply to the call.

We note that in 2002, the Commission proposed modifying the definition of “outbound telephone call” in the Telemarketing Sales Rule so that the definition would include situations in which a telephone call is “transferred to a telemarketer other than the original telemarketer.” 67 Fed. Reg. 4491, 4500, 4541 (2002). The Commission decided not to expand the Rule’s definition of “outbound telephone call” by adding this language. 68 Fed. Reg. 4579, 4594-95 (2003). After considering public comments on the proposal, the Commission observed that expanding the definition in this manner would have unintended and undesirable consequences because it would make upselling transactions subject to all the provisions of the Telemarketing Sales Rule relating to outbound calls, including the calling time restrictions and national “do-not-call” provisions. *Id.* In the same document, the Commission explained that the definition of “outbound telephone call” includes situations in which the telemarketer disconnects or “abandons” a call answered by a person without delivering a sales pitch. “A telemarketer initiates a telephone call,” the Commission observed, “by causing the called consumer’s telephone to ring.” 68 Fed. Reg. at 4643. These statements in the Statement of Basis and Purpose accompanying the Commission’s adoption of the current definition of “outbound telephone call” reinforce our conclusion that the situation described in your letter — in which the telemarketer does not cause the consumer’s telephone to ring but transfers a call initiated by the consumer after the primary purpose of the call has been completed — is not an “outbound telephone call” and, therefore, is not subject to 16 C.F.R. § 310.4(b)(1)(v).

Please be advised that this opinion is based exclusively on the information furnished in your letter and applies only to the practice described in your letter. Moreover, this opinion only addresses the issue that you presented, namely the applicability of 16 C.F.R. § 310.4(b)(1)(v). Other provisions of the Telemarketing Sales Rule that are not limited to outbound telephone calls may apply to the situation that you describe. In particular, provisions of the TSR concerning “upselling” would apply to the telephone call that you describe, even though the call is not an outbound telephone call. 16 C.F.R. § 310.3(d).

In addition, please be advised that the views expressed in this letter are those of the FTC staff. They have not been reviewed, approved, or adopted by the Commission, and they are not binding upon the Commission. However, they do reflect the opinions of the staff members charged with enforcement of the TSR. Staff opinions concerning the TSR are routinely posted on the FTC website at <http://www.ftc.gov/bcp/telemarketing/staffopinions.shtm>.

Very truly yours,



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