



UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

Monica E. Vaca  
Acting Associate Director  
Division of Marketing Practices

November 5, 2014

Ms. Karen J. Meyers, Assistant Attorney General  
Director, Consumer Protection Division  
Office of New Mexico Attorney General  
111 Lomas Boulevard – Suite 300  
Albuquerque, NM 87102

Dear Ms. Meyers:

You have requested our opinion on whether the Telemarketing Sales Rule (“TSR”) applies to a business model in which a seller mails promotional materials that it labels “catalogs” to solicit inbound calls from consumers to purchase the seller’s debt relief services. The seller’s materials, such as the example enclosed with your request, offer several debt relief plans, each of which asks consumers to “Call for Custom Price.”

Your request describes a scenario in which a consumer who calls the number listed in the catalog (and also in some cases in a cover letter or additional promotional materials<sup>1</sup>) cannot purchase a debt relief plan during that call, even if the consumer agrees to do so. This is because the seller provides the consumer with an enrollment packet after the call by postal mail, email, fax or website. The packet includes a welcome kit and enrollment agreement that the consumer must sign and return to complete a purchase. The packet also provides the first disclosures to the consumer of all the terms and conditions for using the seller’s debt relief services.

As you know, the definition of “telemarketing” in the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 (“Telemarketing Act” or “Act”),<sup>2</sup> which directed the Commission to issue the TSR,<sup>3</sup> expressly excludes catalog sales.<sup>4</sup> The Act defines telemarketing as “a plan, program, or campaign which is conducted to induce purchases of goods or services, or a charitable contribution, donation, or gift of money or any other thing of value, by use of one

---

<sup>1</sup> You note that a recent court decision, *New Mexico ex rel. King v. Credit Arbitrators, LLC*, Civ. No. 12-16 (D. N.M. Mar. 26, 2014), held that the TSR’s debt relief requirements apply to a seller that mails a debt relief catalog together with a cover letter or other promotional materials that solicit inbound calls to a specified number. The same reasoning and holding apply with equal force, in staff’s view, to any mailing of promotional materials apart from a catalog that solicit inbound calls from consumers to the seller’s telephone number.

<sup>2</sup> 15 U.S.C. §§ 6101-1606.

<sup>3</sup> 15 U.S.C. § 6102(a)(1).

<sup>4</sup> 15 U.S.C. § 6106(4).

or more telephones and which involves more than one interstate telephone call.”<sup>5</sup> The next sentence of the definition then limits the Commission’s authority to apply the TSR to catalog sales as follows:

The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written materials or illustrations; and has been issued not less frequently than once a year, where the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog *and during those calls takes orders only without further solicitation.*<sup>6</sup>

The question you pose is whether this statutory exclusion prevents application of the TSR’s debt relief requirements to the business model described above.<sup>7</sup> In staff’s opinion, it does not and the TSR would apply.

The statutory language unquestionably excludes legitimate mail order catalog sellers from the requirements of the TSR when a consumer can complete his or her order during the initial call. For instance, this would occur when the seller takes the order, verifies payment, and completes the sale before the consumer hangs up.<sup>8</sup> In contrast, consumers cannot complete an order for debt relief services during a call responding to a catalog offer under the business model you describe. The text of the exclusion specifies that it is available to a catalog seller when it “takes orders only without further solicitation” during a consumer’s call. By contrast, if the sales transaction cannot be completed during the call, the catalog sales exclusion would be unavailable.

---

<sup>5</sup> 15 U.S.C. 6106(4).

<sup>6</sup> *Id.* (emphasis added). The definition of telemarketing in the TSR tracks the statutory exclusion. 16 C.F.R. §310.2(dd).

<sup>7</sup> Although the TSR generally exempts inbound calls initiated by a consumer in response to a direct mail solicitation, this exemption does not extend to calls in response to offers of “debt relief services.” 16 C.F.R. § 310.6(b)(6). The exemption also requires that a qualifying direct mail solicitation disclose “all material information listed in § 310.3(a)(1),” rather than deferring those disclosures to an enrollment packet sent to a consumer only after the call.

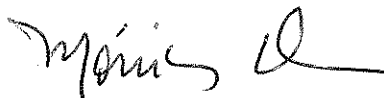
<sup>8</sup> While we have been unable to find any discussion of the exclusion in the legislative history of the Act, there are multiple statements that Congress intended the Act to protect not only consumers but also legitimate businesses engaged in telemarketing. *E.g.*, S. REP. NO. 103-80, at 2 (1993) (“The effects of telemarketing fraud are felt throughout the Nation, and both consumers and legitimate telemarketers are impacted.”); H.R. REP. NO. 103-20, at 2 (1993) (“The legislation strikes an equitable balance between the interest of stopping deceptive (including fraudulent) and abusive telemarketing activities and not unduly burdening legitimate businesses.”); 140 CONG. REC. H6158-06 (1994) (statement of Rep. Swift) (“The telemarketing bill does not impose further regulations on the legitimate telemarketing industry.”).

Furthermore, because the communications between the consumer and seller go beyond mere order taking, and must continue after the initial call to complete an order, the business model you describe involves “further solicitation” and is therefore outside the scope of the exemption. Indeed, the fact that the catalog you describe provides no prices for its debt relief offerings makes it clear that the seller must engage in “further solicitation” during a consumer’s initial call. Without being able to determine the price of the seller’s debt relief plans from its catalog, consumers cannot be prepared to make a purchase when they call, much less decide which of the seller’s plans to buy, in the absence of “further solicitation.”

For the foregoing reasons, it is staff’s opinion that neither the statutory exclusion in the Telemarketing Act, nor the parallel definition of “telemarketing” in the TSR, shield a seller using the debt relief business model you describe from the requirement to comply with the debt relief provisions of the TSR. Any failure to comply with those provisions, including the prohibition in section 310.4(a)(5) against collecting any fees for debt relief services until the promised debt relief services have been provided,<sup>9</sup> may subject the seller to an enforcement action seeking civil penalties of up to \$16,000 for each violation.<sup>10</sup>

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 are not binding on the Commission. However, they reflect the opinion of the staff charged with enforcement of the TSR.

Respectfully yours,



Monica E. Vaca  
Acting Associate Director for Marketing Practices

---

<sup>9</sup> 16 C.F.R. § 310.4(a)(5).

<sup>10</sup> Civil penalties for trade regulation rule enforcement actions are authorized by 15 U.S.C. § 5(m)(1)(A). As required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (FCPIAA), 28 U.S.C. 2461 note, as amended by the Debt Collection Improvement Act of 1996, Public Law 104–134, § 31001(s)(1), 110 Stat. 1321–373, the penalty for violations of 15 U.S.C. § 5(m)(1)(A) was most recently adjusted for inflation in 2009. 74 Fed. Reg. 857 (Jan. 9, 2009).