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Part III

Federal Trade Commission

**16 CFR Part 310
Telemarketing Sales Rule; Final Rule**

FEDERAL TRADE COMMISSION

16 CFR Part 310

Telemarketing Sales Rule

AGENCY: Federal Trade Commission.

ACTION: Final Amended Rule.

SUMMARY: In this document, the Federal Trade Commission (“FTC” or “Commission”) issues its Statement of Basis and Purpose (“SBP”) and final amended Telemarketing Sales Rule (“amended Rule”). The amended Rule sets forth the FTC’s amendments to the Telemarketing Sales Rule (“original Rule” or “TSR”). The amended Rule is issued pursuant to the Commission’s Rule Review, the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act” or “Act”) and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (“USA PATRIOT Act”).

EFFECTIVE DATES: The amended Rule will become effective March 31, 2003. Full compliance with § 310.4(a)(7), the caller identification transmission provision, is required by January 29, 2004. The Commission will announce at a future time the date by which full compliance with § 310.4(b)(1)(iii)(B), the “do-not-call” registry provision, will be required. The Commission anticipates that full compliance with the “do-not-call” provision will be required approximately seven months from the date a contract is awarded to create the national registry.

ADDRESSES: Requests for copies of the amended Rule and this SBP should be sent to: Public Reference Branch, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580. The complete record of this proceeding is also available at that address. Relevant portions of the proceeding, including the amended Rule and SBP, are available at <http://www.ftc.gov>.

FOR FURTHER INFORMATION CONTACT: Catherine Harrington-McBride, (202) 326-2452, Karen Leonard, (202) 326-3597, Michael Goodman, (202) 326-3071, or Carole Danielson, (202) 326-3115, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The amended Rule: (1) retains most of the original Rule’s requirements concerning deceptive and abusive telemarketing acts or practices without major substantive changes; (2) establishes a national “do-not-call” registry maintained by the Commission; (3)

defines “upselling” to clarify the amended Rule’s application to these transactions, requires specific disclosures for upsell transactions, and expressly excludes upselling transactions from certain exemptions in the amended Rule; (4) requires that sellers and telemarketers accepting payment by methods other than credit and debit cards subject to certain protections obtain express verifiable authorization from their customers; (5) retains the exemptions for pay-per-call, franchise, and face-to-face transactions, but makes these transactions subject to the national “do-not-call” registry and certain other provisions in the abusive practices section of the Rule; (6) specifies requirements for the use of predictive dialers; (7) requires disclosures and prohibits misrepresentations in connection with the sale of credit card loss protection plans; (8) requires an additional disclosure in connection with prize promotions; (9) requires disclosures and prohibits misrepresentations in connection with offers that include a negative option feature; (10) eliminates the general media and direct mail exemptions for the telemarketing of credit card loss protection plans and business opportunities other than business arrangements covered by the Franchise Rule¹; (11) requires telemarketers to transmit caller identification information; (12) eliminates the use of post-transaction written confirmation as a means of obtaining a customer’s express verifiable authorization when the goods or services are offered on a “free-to-pay conversion” basis; (13) prohibits the disclosure or receipt of the customer’s or donor’s unencrypted billing information for consideration, except in limited circumstances; and (14) requires that the seller or telemarketer obtain the customer’s express informed consent to all transactions, with specific requirements for transactions involving “free-to-pay conversions” and preacquired account information.

Statement of Basis and Purpose

I. Background

A. Telemarketing and Consumer Fraud and Abuse Prevention Act.

The early 1990s saw heightened Congressional attention to burgeoning problems with telemarketing fraud.²

¹ Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures (“Franchise Rule”), 16 CFR Part 436.

² Statutes enacted by Congress to address telemarketing fraud during the early 1990s include the Telephone Consumer Protection Act of 1991

The culmination of Congressional efforts to protect consumers against telemarketing fraud occurred in 1994 with the passage of the Telemarketing Act, which was signed into law on August 16, 1994.³ The purpose of the Act was to combat telemarketing fraud by providing law enforcement agencies with new tools and to give consumers new protections.

The Telemarketing Act directed the Commission to issue a rule prohibiting deceptive and abusive telemarketing acts or practices, and specified, among other things, certain acts or practices the FTC’s rule must address. The Act also required the Commission to include provisions relating to three specific “abusive telemarketing acts or practices:” (1) a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the consumer would consider coercive or abusive of his or her right to privacy; (2) restrictions on the time of day telemarketers may make unsolicited calls to consumers; and (3) a requirement that telemarketers promptly and clearly disclose in all sales calls to consumers that the purpose of the call is to sell goods or services, and make other disclosures deemed appropriate by the Commission, including the nature and price of the goods or services sold.⁴ Section 6102(a) of the Act not only required the Commission to define and prohibit deceptive telemarketing acts or practices, but also authorized the FTC to define and prohibit acts or practices that “assist or facilitate” deceptive telemarketing.⁵ The Act further directed the Commission to consider including recordkeeping requirements in the rule.⁶ Finally, the Act authorized state Attorneys General, other appropriate state officials, and private persons to bring civil actions in federal district court to enforce compliance with the FTC’s rule.⁷

(“TCPA”), 47 U.S.C. 227 *et seq.*, which restricts the use of automatic dialers, bans the sending of unsolicited commercial facsimile transmissions, and directs the Federal Communications Commission (“FCC”) to explore ways to protect residential telephone subscribers’ privacy rights; and the Senior Citizens Against Marketing Scams Act of 1994, 18 U.S.C. 2325 *et seq.*, which provides for enhanced prison sentences for certain telemarketing-related crimes.

³ 15 U.S.C. 6101–6108.

⁴ 15 U.S.C. 6102(a)(3)(A)-(C).

⁵ Examples of practices that would “assist or facilitate” deceptive telemarketing under the Rule include credit card laundering and providing contact lists or promotional materials to fraudulent sellers or telemarketers. See 60 FR 43842, 43853 (Aug. 23, 1995).

⁶ 15 U.S.C. 6102(a)(3).

⁷ 15 U.S.C. 6103, 6104.

B. Original Rule.

The FTC adopted the original Rule on August 16, 1995.⁸ The Rule, which became effective on December 31, 1995, requires that telemarketers promptly tell each consumer they call several key pieces of information: (1) the identity of the seller; (2) the fact that the purpose of the call is to sell goods or services; (3) the nature of the goods or services being offered; and (4) in the case of prize promotions, that no purchase or payment is necessary to win.⁹ Telemarketers must, in any telephone sales call, also disclose cost and other material information before consumers pay.¹⁰ In addition, the original Rule requires that telemarketers have consumers' express verifiable authorization before using a demand draft (or "phone check") to debit consumers' bank accounts.¹¹ The original Rule prohibits telemarketers from calling before 8:00 a.m. or after 9:00 p.m. (in the time zone where the consumer is located), and from calling consumers who have said they do not want to be called by or on behalf of a particular seller.¹² The original Rule also prohibits misrepresentations about the cost, quantity, and other material aspects of the offered goods or services, and the terms and conditions of the offer.¹³ Finally, the original Rule bans telemarketers who offer to arrange loans, provide credit repair services, or recover money lost by a consumer in a prior telemarketing scam from seeking payment before rendering the promised services,¹⁴ and prohibits credit card laundering and other forms of assisting and facilitating fraudulent telemarketers.¹⁵

The Rule expressly exempts from its coverage several types of calls, including calls where the transaction is completed after a face-to-face sales presentation, calls subject to regulation under other FTC rules (e.g., the Pay-Per-Call Rule,¹⁶ or the Franchise Rule),¹⁷ calls initiated by consumers that are not in response to any solicitation, calls initiated by consumers in response to direct mail, provided certain disclosures are made, and calls initiated by consumers in response to advertisements in general media, such

as newspapers or television.¹⁸ Lastly, catalog sales are exempt, as are most business-to-business calls, except those involving the sale of non-durable office or cleaning supplies.¹⁹

C. Rule Review and Request for Comment.

The Telemarketing Act required that the Commission initiate a Rule Review proceeding to evaluate the Rule's operation no later than five years after its effective date of December 31, 1995, and report the results of the review to Congress.²⁰ Accordingly, on November 24, 1999, the Commission commenced the mandatory review with publication of a **Federal Register** notice announcing that Commission staff would conduct a forum on January 11, 2000, limited to examination of issues related to the "do-not-call" provision of the Rule, and soliciting applications to participate in the forum.²¹

On February 28, 2000, the Commission published a second notice in the **Federal Register**, broadening the scope of the inquiry to encompass the effectiveness of all the Rule's provisions. This notice invited comments on the Rule as a whole and announced a second public forum to discuss the provisions of the Rule other than the "do-not-call" provision.²² In response to this notice, the Commission received 92 comments from representatives of industry, law

enforcement, and consumer groups, as well as from individual consumers.²³

The commenters generally praised the effectiveness of the TSR in combating the fraudulent practices that had plagued the telemarketing industry before the Rule was promulgated. They also strongly supported the Rule's continuing role as the centerpiece of federal and state efforts to protect consumers from interstate telemarketing fraud. Commenters consistently stressed that it is important to retain the Rule. However, commenters were less sanguine about the effectiveness of the Rule's provisions dealing with consumers' right to privacy, such as the "do-not-call" provision and the provision restricting calling times. They also identified a number of areas of continuing or developing fraud and abuse, as well as the emergence of new technologies that affect telemarketing for industry members and consumers alike. Commenters identified several changes in the marketplace that had occurred in the five years since the Rule was promulgated and that threatened the Rule's effectiveness. Those changes included increased consumer concern about personal privacy,²⁴ the development of novel payment methods,²⁵ and the increased use of

²³ A list of the commenters and the acronyms used to identify each commenter who submitted a comment in response to the February 28 Notice is attached hereto as Appendix A. Appendix B is a list of the commenters and the acronyms used to identify each commenter who submitted a comment in response to the Notice of Proposed Rulemaking ("NPRM"), discussed below, including supplemental comments and comments submitted on the user fee proposal. References to comments are cited by the commenter's acronym followed by the appropriate page designation. "RR" after the commenter's acronym indicates that the comment was received in response to the Rule Review. "NPRM" after the commenter's acronym indicates that the comment was received in response to the NPRM. "Supp." after the commenter's acronym indicates that the comment was received as a Supplemental Comment. "User Fee" after the commenter's acronym indicates the comment was submitted in response to the request for comments on the Commission's user fee proposal.

²⁴ The past several years have seen a greater public and governmental focus on the "do-not-call" issue. Related to the "do-not-call" issue is the proliferation of technologies, such as caller identification service, that assist consumers in managing incoming calls to their homes. Similarly, privacy advocates have raised concerns about technologies used by telemarketers (such as predictive dialers and deliberate blocking of caller identification information) that hinder consumers' attempts to screen calls or make requests to be placed on a "do-not-call" list.

²⁵ The growth of electronic commerce and payment systems technology has led, and likely will continue to lead, to new forms of payment and further changes in the way consumers pay for goods and services they purchase through telemarketing. In addition, billing and collection systems of telephone companies, utilities, and mortgage lenders are becoming increasingly available to a

Continued

⁸ 60 FR at 43842 (codified at 16 CFR 310 (1995)).

⁹ 16 CFR 310.4(d).

¹⁰ 16 CFR 310.3(a)(1).

¹¹ 16 CFR 310.3(a)(3).

¹² 16 CFR 310.4(c), and 310.4(b)(1)(ii).

¹³ 16 CFR 310.3(a)(2).

¹⁴ 16 CFR 310.4(a)(2)-(4).

¹⁵ 16 CFR 310.3(b) and (c).

¹⁶ Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 ("Pay-Per-Call Rule"), 16 CFR Part 308.

¹⁷ 16 CFR 310.6(a)-(c).

¹⁸ 16 CFR 310.6(d)-(f).

¹⁹ 16 CFR 310.2(u) (pursuant to 15 U.S.C. 6106(4) (catalog sales)); 16 CFR 310.6(g) (business-to-business sales). In addition to these exemptions, certain entities including banks, credit unions, savings and loans, common carriers engaged in common carrier activity, non-profit organizations, and companies engaged in the business of insurance regulated by state law are not covered by the Rule because they are specifically exempt from coverage under the FTC Act. 15 U.S.C. 45(a)(2); *but see* discussion below concerning the USA PATRIOT Act amendments to the Telemarketing Act. Finally, a number of entities, and individuals associated with them, that sell investments and are subject to the jurisdiction of the Securities and Exchange Commission or the Commodity Futures Trading Commission are exempt from the Rule. 15 U.S.C. 6102(d)(2)(A); 6102(e)(1).

²⁰ 15 U.S.C. 6108.

²¹ 64 FR 66124 (Nov. 24, 1999). Comments regarding the Rule's "do-not-call" provision, § 310.4(b)(1)(ii), as well as the other provisions of the Rule, were solicited in a later **Federal Register** notice on February 28, 2000. *See* 65 FR 10428 (Feb. 28, 2000). Seventeen associations, individual businesses, consumer groups, and law enforcement agencies were selected to engage in the forum's roundtable discussion ("Do-Not-Call" Forum), which was held on January 11, 2000, at the FTC offices in Washington, D.C. References to the "Do-Not-Call" Forum transcript are cited as "DNC Tr." followed by the appropriate page designation.

²² 65 FR 10428 (Feb. 28, 2000) (the "February 28 Notice"). The Commission extended the comment period from April 27, 2000, to May 30, 2000. 65 FR 26161 (May 5, 2000).

preacquired account telemarketing²⁶ and upselling.²⁷

Following the receipt of public comments, the Commission held a second forum on July 27 and 28, 2000 ("Rule Review Forum"), to discuss provisions of the Rule other than the "do-not-call" provision and to discuss the Rule's effectiveness.²⁸ Both the "Do-Not-Call" Forum and the Rule Review Forum were open to the public, and time was reserved to receive oral comments from members of the public in attendance. Both proceedings were transcribed and, along with the comments received, placed on the public record.²⁹

Based on the record developed during the Rule Review, as well as the Commission's law enforcement experience, the Commission determined to retain the Rule but proposed to amend it to better address recurring abuses and to reach emerging problem areas.

D. The USA PATRIOT Act of 2001.

On October 25, 2001, the USA PATRIOT Act³⁰ became effective. This legislation contains provisions that have significant impact on the TSR. Specifically, § 1011 of that Act amends the Telemarketing Act to extend the coverage of the TSR to reach not just telemarketing to induce the purchase of goods or services, but also charitable fundraising conducted by for-profit

wide variety of vendors of all types of goods and services. These newly available payment methods in many instances are relatively untested, and may not provide protections for consumers from unauthorized charges.

²⁶The practice of preacquired account telemarketing—where a telemarketer acquires the customer's billing information prior to initiating a telemarketing call or transaction—has increasingly resulted in complaints from consumers about unauthorized charges. Billing information can be preacquired in a variety of ways, including from a consumer's utility company, from the consumer in a previous transaction, or from another source. In many instances, the consumer is not involved in the transfer of the billing information and is unaware that the seller possesses it during the telemarketing call.

²⁷The practice of "upselling" has also become more prevalent in telemarketing. Through this technique, customers are offered additional items for purchase after the completion of an initial sale. In the majority of upselling scenarios, the seller or telemarketer already has received the consumer's billing information, either from the consumer or from another source.

²⁸References to the Rule Review Forum transcript are cited as "RR Tr." followed by the appropriate page designation.

²⁹Relevant portions of the entire record of the Rule Review proceeding, including all transcripts and comments, can be viewed on the FTC's website at <http://www.ftc.gov/bcp/rulemaking/tsr/tsr-review.htm>. In addition, the full paper record is available in Room 130 at the FTC, 600 Pennsylvania Avenue, N.W., Washington, DC 20580, telephone number: 1-202-326-2222.

³⁰Pub. L. 107-56, 115 Stat. 272 (Oct. 26, 2001).

telemarketers on behalf of charitable organizations. Because enactment of the USA PATRIOT Act took place after the comment period for the Rule Review closed, the Commission did not raise issues relating to charitable fundraising by telemarketers in the Rule Review.

Section 1011(b)(3) of the USA PATRIOT Act amends the definition of "telemarketing" that appears in the Telemarketing Act, 15 U.S.C. § 6106(4), expanding it to cover any "plan, program, or campaign which is conducted to induce . . . a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones and which involves more than one interstate telephone call"

In addition, § 1011(b)(2), among other things, adds a new section to the Telemarketing Act directing the Commission to include new requirements in the "abusive telemarketing acts or practices" provisions of the TSR.³¹ Finally, § 1011(b)(1) amends the "deceptive telemarketing acts or practices" provision of the Telemarketing Act, 15 U.S.C. § 6102(a)(2), by specifying that "fraudulent charitable solicitation" is to be included as a deceptive practice under the TSR.

E. Notice of Proposed Rulemaking.

On January 30, 2002, the Commission published its NPRM, proposing revisions to the TSR ("proposed Rule") in order to ensure that consumers receive the protections that the Telemarketing Act mandated, and to effectuate § 1011 of the USA PATRIOT Act.³² The Commission proposed a number of changes, including creating a national "do-not-call" registry maintained by the FTC, a ban on receiving from or disclosing to a third party a consumer's billing information, a prohibition against blocking caller identification information, and a requirement that sellers or telemarketers accepting payment via novel payment methods obtain the customer's express verifiable authorization. During the course of this NPRM proceeding, the Commission received about 64,000

³¹Specifically, § 1011(b)(2)(d) mandates that the TSR include in its regulation of abusive telemarketing acts and practices "a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made." Pub. L. 107-56 (Oct. 26, 2001).

³²67 FR 4492 (Jan. 30, 2002).

electronic and paper comments from representatives of industry, law enforcement, consumer and privacy groups, and from individual consumers.³³ On June 5, 6 and 7, 2002, the Commission held a forum ("June 2002 Forum") to discuss the issues raised by commenters regarding the FTC's proposed revisions.³⁴ The forum was open to the public, and time was reserved to receive oral comments from members of the public in attendance. During the forum, the Commission announced that it would accept supplemental comments until June 28, 2002.³⁵ The forum proceeding was transcribed and placed on the public record. The public record, including many comments and all forum transcripts, has been placed on the Commission's website on the Internet.³⁶

Individual consumers generally favored the Commission's proposals, particularly with regard to a national "do-not-call" registry. Consumer groups and state law enforcement representatives also generally supported the proposed amendments, although they expressed concern about the effect of the proposal on state "do-not-call"

³³Of these, more than forty-five were supplemental comments from organizations and individuals, and about 15,000 supplemental comments were from Gottschalks' customers submitted by Gottschalks. Simultaneous with, but separate from, the NPRM proceeding, the Commission has been exploring possible methods for implementing the proposed national "do-not-call" registry. On February 28, 2002, the Commission published a Request for Information ("RFI") that solicited information from potential contractors on various aspects of implementing the proposed registry. The RFI comment period closed on March 29, 2002. On August 2, 2002, the Commission issued a Request for Quotes to selected vendors. Final proposals were submitted on September 20, 2002, and are being evaluated by Commission staff. On May 29, 2002, the Commission published a Notice of Proposed Rulemaking, soliciting comments on a proposed amendment to the TSR that would establish the methods by which fees for use of the registry would be set. 67 FR 37362 (May 29, 2002). The comment period ended June 28, 2002. The proposed amendment received about forty comments (cited as "[Name of Commenter]-User Fee at [page number]"), virtually all of which argued that the Commission does not have the authority to issue a user fee, or that it was premature to propose a user fee because the Commission did not have sufficient information upon which to base the proposal. The user fee proposal remains under review as the Commission continues to evaluate the issues raised in the comments.

³⁴References to the June 2002 Forum transcript are cited as "June 2002 Tr." followed by the appropriate day (I, II, or III, referring to June 5, 6, or 7, respectively) and page designation.

³⁵June 2002 Tr. II at 254. References to the supplemental comments received are cited as "[Name of Commenter]-Supp. at [page number]."

³⁶Much of the record in this proceeding can be viewed on the FTC's website at <http://www.ftc.gov/bcp/rulemaking/tsr/tsr-review.htm>. In addition, the full paper record is available in Room 130 at the FTC, 600 Pennsylvania Avenue, N.W., Washington, DC 20580, telephone number: 1-202-326-2222.

and other laws. Business and industry commenters generally opposed the proposal, but suggested changes that they believed would make the proposed amendments less burdensome on legitimate business while still achieving the desired consumer protections. Comments from charitable organizations focused primarily on the FTC proposal which would require for-profit telemarketers who solicit on behalf of charitable organizations to comply with the proposed "do-not-call" registry. Charitable organizations consistently opposed such a requirement. The comments and the basis for the Commission's decision on the various recommendations are analyzed in detail in Section II below.

F. The Amended Rule.

The Commission has carefully reviewed the entire record developed in its rulemaking proceeding. The record, as well as the Commission's law enforcement experience, leave little doubt that important changes have occurred in the marketplace, and that modifications to the original Rule are necessary if consumers are to receive the protections that Congress intended to provide when it enacted the Telemarketing Act. Based on that record and on the Commission's law enforcement experience, the Commission has modified the proposed Rule published in the NPRM and now promulgates this amended Rule, as described in this SBP.

The Commission's decision to retain certain provisions of the original Rule while supplementing or amending others is made pursuant to the Rule Review requirements of the Telemarketing Act,³⁷ and pursuant to the rulemaking authority granted to the Commission by that Act to protect consumers from deceptive and abusive practices,³⁸ including practices that may be coercive or abusive of the consumer's interest in protecting his or her privacy.³⁹ The Commission's decision to amend the original Rule also is made pursuant to the authority granted to the Commission by § 1011 of the USA PATRIOT Act.

As discussed in detail herein, the Commission believes that it is necessary to amend the original Rule to ensure that the Telemarketing Act's goals are met—that is, encouraging the growth of the legitimate telemarketing industry, while curtailing those practices that are abusive or deceptive. The record in this rulemaking proceeding demonstrates

that many of the changes in the marketplace that have occurred since the original Rule was promulgated have led to the growth of deceptive and abusive practices in areas not adequately addressed by the original Rule. The amended Rule addresses these practices by responding to the changes in the marketplace in a manner consistent with the intent of Congress in enacting the Telemarketing Act and § 1011 of the USA PATRIOT Act. The Commission believes that the amended Rule strikes a balance, maximizing consumer protections without imposing unnecessary burdens on the telemarketing industry. Each of the amendments is discussed in detail in this SBP. A summary of the major changes from the original Rule is set forth below. The amended Rule:

- Supplements the current company-specific "do-not-call" provision with a provision that will empower a consumer to stop calls from all companies within the FTC's jurisdiction by placing his or her telephone number on a central "do-not-call" registry maintained by the FTC, except when the consumer has an "established business relationship" with the seller on whose behalf the call is made;
 - Permits consumers who have put their numbers on the national "do-not-call" registry to provide permission to call to any specific seller by an express written agreement;
 - Explicitly exempts solicitations to induce charitable contributions via outbound telephone calls from coverage under the national "do-not-call" registry provision;
 - Modifies § 310.3(a)(3) to require express verifiable authorization for all transactions except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z, or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E;
 - Modifies § 310.3(a)(3)(iii), the provision allowing a telemarketer to obtain express verifiable authorization by sending written confirmation of the transaction to the consumer prior to submitting the consumer's billing information for payment;
 - Mandates disclosures in the sale of credit card loss protection, and prohibits misrepresenting that a consumer needs offered goods or services in order to receive protections he or she already has under 15 U.S.C. § 1643 (limiting a cardholder's liability for unauthorized charges on a credit card account);
 - Explicitly mandates that all required disclosures in § 310.3(a)(1) and § 310.4(d) be made truthfully;

- Expands upon the current prize promotion disclosures to include a statement that any purchase or payment will not increase a consumer's chances of winning;

- Prohibits disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing, except when the disclosure or receipt is to process a payment for goods or services or a charitable contribution pursuant to a transaction;

- Prohibits causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor;

- Sets out guidelines for what evidences express informed consent in transactions involving preacquired account information and "free-to-pay conversion" features;

- Requires telemarketers to transmit the telephone number, and name, when available, of the telemarketer to any caller identification service;

- Prohibits telemarketers from abandoning any outbound telephone call, and provides, in a safe harbor provision, that to avoid liability under this provision, a telemarketer must: abandon no more than three percent of all calls answered by a person; allow the telephone to ring for fifteen seconds or four rings; whenever a sales representative is unavailable within two seconds of a person's answering the call, play a recorded message stating the name and telephone number of the seller on whose behalf the call was placed; and maintain records documenting compliance;

- Extends the applicability of most provisions of the Rule to "upselling" transactions;

- Prohibits denying or interfering in any way with a consumer's right to be placed on a "do-not-call" list;

- Requires maintenance of records of express informed consent and express agreement;

- Narrows certain exemptions of the Rule;

- Clarifies that facsimile transmissions, electronic mail, and other similar methods of delivery are direct mail for purposes of the direct mail exemption; and

- Modifies various provisions throughout the Rule to effectuate expansion of the Rule's coverage to include charitable solicitations, pursuant to Section 1011 of the USA PATRIOT Act, and adds new mandatory disclosures and prohibited misrepresentations in charitable solicitations.

³⁷ 15 U.S.C. 6108.

³⁸ 15 U.S.C. 6102(a)(1) and (a)(3).

³⁹ 15 U.S.C. 6102(a)(3)(A).

G. Proposed Rule Adopted with Some Modifications.

Based on the entire record in this proceeding, the amended Rule adopted by the Commission is substantially similar to the proposed Rule. However, the amended Rule contains some important differences from the proposed Rule. These further modifications to the original Rule were based on the recommendations of commenters and on the Commission's more comprehensive law enforcement experience in certain areas over the months since publishing the NPRM.

The major differences between the proposed Rule and the amended Rule adopted here are as follows:

- The definition of "charitable contribution" no longer contains exceptions for religious and political groups;
- Sellers who have an "established business relationship" with the consumer are exempted from the national "do-not-call" registry;
- For-profit telemarketers who solicit charitable contributions are exempted from the national "do-not-call" registry, but remain subject to the entity-specific "do-not-call" provision;
- The original Rule's definition of "outbound call" has been reinstated, and the proposed Rule modified to require specific disclosures in an upsell transaction;
- Disclosures regarding negative option features are required;
- Express verifiable authorization is required for all payments, except those made by a credit or debit card subject to certain statutorily-mandated consumer protections;
- For express oral authorization to be deemed verifiable, a seller must ensure the customer's or donor's receipt of the date the charge will be submitted for payment (rather than the date of the payment) and identify the account to be charged with sufficient specificity such that the customer or donor understands what account is being used to collect payment (rather than provide the account name and number);
- The use of written post-sale confirmations is permitted, subject to the requirement that such confirmations be clearly and conspicuously labeled as such; however, this method is not permitted in transactions involving a "free-to-pay conversion" feature and preacquired account information;
- In charitable solicitations, the prohibited misrepresentation regarding the percentage or amount of any charitable contribution that will go to a charitable organization or program is no longer delimited by the phrase "after

any administrative or fundraising expenses are deducted;"

- The Rule now specifies that billing charges to a consumer's account without the consumer's authorization is an abusive practice and a Rule violation; and the Rule now requires that a customer's express informed consent be provided in every transaction;
- The ban on the transfer of consumers' billing information has been replaced with a ban on transferring unencrypted consumer account numbers;
- The failure to transmit caller identification information is prohibited, rather than the affirmative blocking of such information;
- Abandoned calls are prohibited, subject to a "safe harbor" that requires a telemarketer to: abandon no more than three percent of all calls answered by a person; allow the telephone to ring for fifteen seconds or four rings; whenever a sales representative is unavailable within two seconds of a person's answering the call, play a recorded message stating the name and telephone number of the seller on whose behalf the call was placed; and maintain records documenting compliance;
- Records of express informed consent or express agreement must be maintained;
- The exemptions for certain kinds of calls are explicitly unavailable to upselling transactions;
- The exemption for business-to-business telemarketing is once again available to telemarketing of Web services and Internet services, as well as the solicitation of charitable contributions.

II. Discussion of the Amended Rule

The amendments to the Rule do not alter § 310.7 (Actions by States and Private Persons), or § 310.8 (Severability), although § 310.8 (Severability) has been renumbered as § 310.9 in the amended Rule. Section 310.8 of the amended Rule is now reserved.

A. Section 310.1 — Scope of Regulations.

Section 310.1 of the amended Rule states that "this part [of the CFR] implements the [Telemarketing Act], as amended," reflecting the amendment of the Telemarketing Act by § 1011 of the USA PATRIOT Act.⁴⁰ This section discusses comments received regarding the implementation of the USA PATRIOT Act amendments as well as

other issues relating to the scope of coverage of the TSR.

Effect of the USA PATRIOT Act.

As noted in the NPRM, § 1011(b)(3) of the USA PATRIOT Act amends the definition of "telemarketing" that appears in the Telemarketing Act, 15 U.S.C. § 6306(4), by inserting the underscored language:

The term 'telemarketing' means 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 or more telephones and which involves more than one interstate telephone call. . . .

In addition, § 1011(b)(2) adds a new section to the Telemarketing Act requiring the Commission to include in the "abusive telemarketing acts or practices" provisions of the TSR:

a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.

Finally, § 1011(b)(1) amends the "deceptive telemarketing acts or practices" provision of the Telemarketing Act, 15 U.S.C. § 6102(a)(2), by inserting the underscored language:

The Commission shall include in such rules respecting deceptive telemarketing acts or practices a definition of deceptive telemarketing acts or practices which shall include fraudulent charitable solicitations and which may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering.

Notwithstanding the amendment of these provisions of the Telemarketing Act, neither the text of § 1011 nor its legislative history suggests that it amends § 6105(a) of the Telemarketing Act—the provision which incorporates the jurisdictional limitations of the FTC Act into the Telemarketing Act and, accordingly, the TSR. Section 6105(a) of the Act states:

Except as otherwise provided in sections 6102(d) [with respect to the Securities and Exchange Commission], 6102(e) [Commodity Futures Trading Commission], 6103 [state Attorney General actions], and 6104 [private consumer actions] of this title, this chapter shall be enforced by the Commission under the Federal Trade Commission Act (15 U.S.C. § 41 *et seq.*). Consequently, no activity which is outside of the jurisdiction of that Act shall

⁴⁰ 15 U.S.C. 6101-6108. The Telemarketing Act was amended by the USA PATRIOT Act on October 25, 2001. Pub. L. 107-56 (Oct. 26, 2001).

be affected by this chapter. (emphasis added).⁴¹

One type of "activity which is outside the jurisdiction" of the FTC Act, as interpreted by the Commission and federal court decisions, is that conducted by non-profit entities. Sections 4 and 5 of the FTC Act, by their terms, provide the Commission with jurisdiction only over persons, partnerships, or "corporations organized to carry on business for their own profit or that of their members."⁴²

Reading the amendments to the Telemarketing Act effectuated by § 1011 of the USA PATRIOT Act together with the unchanged sections of the Telemarketing Act compels the conclusion that for-profit entities that solicit charitable donations now must comply with the TSR, although the Rule's applicability to charitable organizations themselves is unaffected.⁴³ The USA PATRIOT Act brings the Telemarketing Act's jurisdiction over charitable solicitations in line with the jurisdiction of the

Commission under the FTC Act by expanding the Rule's coverage to include not only the sale of goods or services, but also charitable solicitations by for-profit entities on behalf of nonprofit organizations.

The Commission received numerous comments regarding the change in scope to the TSR required by the USA PATRIOT Act amendments of the Telemarketing Act. Some comments supported the Commission's interpretation of the USA PATRIOT Act amendments, and the coverage of for-profit telemarketers who solicit on behalf of exempt charitable organizations.⁴⁴ However, the majority of commenters who addressed this issue believed the Commission had misinterpreted the mandate of the USA PATRIOT Act amendments. Law enforcement agencies and consumer groups, including NAAG and NASCO, generally expressed the view that the Commission had underestimated the jurisdictional powers conferred on it by the USA PATRIOT Act amendments, and urged that the Rule apply not only to for-profit solicitors who call on behalf of charities, but also to the charities themselves.⁴⁵ These commenters argued that the language of the USA PATRIOT Act and its legislative history do not support limiting the applicability of the TSR to telemarketers who call on behalf of non-profits, rather than extending it to cover charitable organizations as well.⁴⁶

On the other hand, most non-profit organizations that commented argued that the Commission's interpretation of the USA PATRIOT Act amendments was too expansive. Several of these commenters argued that in adopting § 1011 of the USA PATRIOT Act, "Congress meant only to apply certain disclosure requirements—and not the other aspects of the Rule—to professional fundraisers for charities

and to for-profit entities soliciting charitable contributions for their own philanthropic purposes."⁴⁷ Others suggested that "Congress intended only to address bogus charitable solicitation where the non-profit or charitable cause or organizational scheme itself is of a criminal or fraudulent nature."⁴⁸ These commenters cite statements made by the legislation's chief sponsor to the effect that concerns about fraudulent charities prompted him to introduce the legislation.⁴⁹

The Commission believes that concerns about bogus charitable fundraising in the wake of the events of September 11, 2001, in large measure propelled passage of § 1011 of the USA PATRIOT Act.⁵⁰ But the fact remains that Congress did more than impose upon the solicitation of charitable contributions by for-profit telemarketers prohibitions against misrepresentation and basic disclosure obligations. Indeed, the USA PATRIOT Act amendments alter the scope of the entire TSR by altering the key definition of the statute—"telemarketing"—to encompass charitable solicitation. Moreover, the text of § 1011 expressly directs the Commission to address both deceptive and abusive acts or practices.⁵¹ Thus, there is no textual support for the notion that § 1011 excludes from its grant of authority over charitable solicitations the power to prohibit deceptive or abusive practices.⁵²

⁴¹ Section 6105(b) reinforces the point made in § 6105(a), as follows:

"The Commission shall prevent any person from violating a rule of the Commission under section 6102 of this title in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. § 41 *et seq.*) were incorporated into and made a part of this chapter. Any person who violates such rule shall be subject to the penalties and entitled to the same privileges and immunities provided in the Federal Trade Commission Act in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this chapter." (emphasis added).

⁴² Section 5(a)(2) of the FTC Act states: "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a)(2). Section 4 of the Act defines "corporation" to include: "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members . . ." 15 U.S.C. 44 (emphasis added).

⁴³ A fundamental tenet of statutory construction is that "a statute should be read as a whole, . . . [and that] provisions introduced by the amendatory act should be read together with the provisions of the original section that were . . . left unchanged . . . as if they had been originally enacted as one section." 1A NORMAN J. SINGER, SUTHERLAND STATUTES & STAT. CONSTR. § 22:34 (6th ed. 2002), citing, *inter alia*, *Brothers v. First Leasing*, 724 F.2d 789 (9th Cir. 1984); *Republic Steel Corp. v. Costle*, 581 F.2d 1228 (6th Cir. 1978); *Am. Airlines, Inc. v. Remis Indus., Inc.*, 494 F.2d 196 (2d Cir. 1974); *Kirchner v. Kansas Tpk. Auth.*, 336 F.2d 222 (10th Cir. 1964); *Nat'l Ctr. for Preservation Law v. Landrieu*, 496 F. Supp. 716 (D.S.C. 1980); *Conoco, Inc. v. Hodel*, 626 F. Supp. 287 (D. Del. 1986); *Palardy v. Horner*, 711 F. Supp. 667 (D. Mass. 1989). Thus, in construing a statute and its amendments, "[e]ffect is to be given to each part, and they are to be interpreted so that they do not conflict." *Id.*

⁴⁴ See, e.g., AARP-NPRM at 4; AFP-NPRM at 3 (arguing that the USA PATRIOT Act gives the FTC jurisdiction over for-profit telemarketers soliciting on behalf of non-profits, agreeing that the disclosures required by amended Rule § 310.4(e) are necessary, and noting that the disclosures mirror the disclosures required by AFP's code of ethics); ASTA-NPRM at 1; Make-a-Wish-NPRM, *passim*; MBNA-NPRM at 6 (the Rule amendments to effectuate the USA PATRIOT Act's provisions "reflect Congress' intent and are limited in scope and impact while providing important consumer benefits.").

⁴⁵ See, e.g., NAAG-NPRM at 50-51; NASCO-NPRM at 3-4.

⁴⁶ See NAAG-NPRM at 50-51; NASCO-NPRM at 3-4 (the USA PATRIOT Act refers to "fraudulent charitable solicitations," and requires disclosures by "any person" engaged in telemarketing; also noting that the USA PATRIOT Act was passed in the wake of September 11, 2001, and in response to misrepresentations by non-profits as well as their for-profit telemarketers.).

⁴⁷ DMA-NonProfit-NPRM at 4. See also ACE-NPRM at 1-2; ERA-NPRM at 45; IUPA-NPRM at 21-22.

⁴⁸ Not-For-Profit Coalition-NPRM at 26. See also Community Safety-NPRM at 2.

⁴⁹ See Not-For-Profit Coalition-NPRM at 27-28; DMA-NonProfit-NPRM at 5.

⁵⁰ See letter dated June 14, 2002, from Senator Mitch McConnell to FTC Chairman Timothy Muris, commenting on the NPRM and stating:

"In an effort to protect generous citizens and the charitable institutions they support, I was proud to introduce the Crimes Against Charitable Americans Act and secure its inclusion in the USA PATRIOT Act. This legislation strengthens federal laws regulating charitable phone solicitations. The bill also takes important steps to combat deceptive charitable solicitations by requiring telemarketers to make common sense disclosures such as the charity's identity and address at the beginning of the phone call. . . . When Congress enacted this legislation, it did not envision, nor did it call for, the FTC to propose a federal "do-not-call" list, and certainly not a list that applied to charitable organizations or their authorized agents."

⁵¹ Pub. L. 107-56 (Oct. 26, 2001).

⁵² It is a tenet of statutory construction that "an amendatory act is not to be construed to change the original act . . . further than expressly declared or necessarily implied." SUTHERLAND STAT. CONSTR., note 43 above, at § 22:30 (citations omitted). The Commission believes the necessary implication of modifying the definition of "telemarketing" in the USA PATRIOT Act is to have all provisions of the Rule apply to charitable solicitations.

Some non-profit commenters also argued that the Commission's interpretation of the USA PATRIOT Act produced, in effect, a double standard, regulating charities who outsource their telemarketing, but not those who conduct their own telemarketing campaigns.⁵³ Others opined that this bifurcated regulatory scheme was not intended by Congress when it passed the USA PATRIOT Act amendments to the Telemarketing Act.⁵⁴ These commenters argued that this distinction penalizes charities (by subjecting them to regulation) merely because they choose to outsource an administrative function. Some argued further that the increased costs of regulatory compliance will not be borne by the for-profit telemarketers, but rather by charities themselves, negatively impacting their ability to carry out their primary mission.⁵⁵

Again, the Commission notes that despite its broad mandate to regulate charitable solicitations made via telemarketing, the USA PATRIOT Act amendments did not expand the Commission's jurisdiction under the TSR to make direct regulation of non-profit organizations possible. Nevertheless, reading the amendatory act together with the original language, as it must, the Commission has sought to give full effect to the directive of Congress set forth in the USA PATRIOT Act amendments.

Another argument raised by large numbers of non-profit commenters is that regulating for-profit telemarketers who solicit on behalf of non-profits, and in particular subjecting them to the requirements of the "do-not-call" registry provision, is unfair given the other limitations on the Commission's jurisdiction.⁵⁶ These commenters suggested that the result of this scheme would be to allow commercial calls that consumers find intrusive, while banning calls from charities, even those with whom a donor has a past relationship.⁵⁷ As explained in greater detail in the discussion of the applicability of the "do-not-call" provisions to charitable solicitation telemarketing, careful consideration of this argument has led the Commission to exempt solicitations to induce charitable contributions via

outbound telephone calls from the "do-not-call" registry provision. Only the less restrictive entity-specific "do-not-call" provision included in the original Rule will apply to charitable solicitation telemarketing. However, both the entity-specific "do-not-call" provisions and the "do-not-call" registry provisions apply to commercial telemarketing to induce purchases of goods or services. This approach fulfills the Commission's intention that the TSR be consistent with First Amendment principles, whereby a higher degree of protection is extended to charitable solicitation than to commercial solicitation. Moreover, as a practical matter, the Commission believes that this approach will enable charities to continue soliciting support and pursuing their missions.

Commenters' Proposals.

Noting the Commission's jurisdictional limitations with respect to banks, MBNA requested that the Rule explicitly state that it is "inapplicable to entities exempt from coverage under § 5(a)(2) of the [FTC Act]."⁵⁸ MBNA also recommended that the Rule extend this exemption to "entities acting on behalf of banks . . . because such entities are regulated by the Bank Service Company Act, 15 U.S.C. § 45(a)(2), concerning services they provide for banks."⁵⁹ MasterCard challenged the Commission's statement that it can regulate third-party telemarketers who call on behalf of a bank, and urged that the Commission explicitly exempt "any bank subsidiary or affiliate performing services on behalf of a bank."⁶⁰ ABA recommended that the amended Rule clarify that "non-bank operating subsidiaries of banks as defined by the banking agencies" are exempt.⁶¹

The Commission notes that, from the inception of the Rule, the Commission has asserted that parties acting on behalf of exempt organizations are not thereby exempt from the FTC Act, and thus, for example, "a nonbank company that contracts with a bank to provide telemarketing services on behalf of the bank is covered" by this Rule.⁶² This

reading is consistent with the Commission's long-standing interpretation of the scope of its authority under the FTC Act, as well as with judicial precedent.⁶³ Furthermore, the Commission's authority was clarified in § 133 of the Gramm-Leach-Bliley Act ("GLBA"), which states that "[a]ny person that . . . is controlled directly or indirectly . . . by . . . any bank . . . ([as] defined in section 3 of the Federal Deposit Insurance Act) and is not itself a bank . . . shall not be deemed to be a bank . . . for purposes of any provisions applied by" the FTC under the FTC Act.⁶⁴ Most recently, a federal district court held that, under this language, the Rule applies to telemarketing by a mortgage subsidiary of a national bank. As the court stated, "the definition of 'bank' identified by Congress simply does not include the subsidiaries of banks."⁶⁵

The Commission believes it is unnecessary to state in the Rule what is already plain in the Telemarketing Act, *i.e.*, that its jurisdiction for purposes of the TSR is coterminous with its jurisdiction under the FTC Act, and therefore declines to include an express statement of this fact in the Rule. Further, the Commission declines to adopt the interpretation of some commenters that the FTC Act itself exempts non-bank entities based on their affiliation with or provision of services to exempt banks, and the recommendations of those commenters who sought an exemption from the Rule for bank subsidiaries or agents. To do so would be contrary to the Commission's interpretation of its jurisdictional boundaries, and would unnecessarily limit the reach of the Rule.⁶⁶

In a similar argument, SBC asserted that, contrary to the Commission's stated position, the Commission's lack of jurisdiction over common carriers engaged in common carriage activity extends to their affiliates and their agents engaged in telemarketing on their behalf.⁶⁷ SBC cites no authority for this proposition, and the Commission is

with the *Telemarketing Sales Rule* (Apr. 1996) ("TSR Compliance Guide") at 7.

⁵³ See, e.g., *March of Dimes-NPRM* at 2.

⁵⁴ See *IUPA-NPRM* at 1.

⁵⁵ See *Reese-NPRM* at 2.

⁵⁶ See, e.g., *FOP-NPRM* at 2; *HRC-NPRM* at 1; *Italian American Police-NPRM* at 1; *Lautman-NPRM* at 2; *Leukemia Society-NPRM* at 1-2; *NCLF-NPRM* at 1; *Angel Food-NPRM* at 1; *North Carolina FFA-NPRM* at 1; *SO-CT-NPRM* at 1; *SO-NJ-NPRM* at 1; *SO-WA-NPRM* at 1; *Reese-NPRM* at 2; *SHARE-NPRM* at 3; *Stage Door-NPRM* at 1.

⁵⁷ See, e.g., *PAF-NPRM* at 1; *AOP-Supp.* at 1; *Chesapeake-Supp.* at 1.

⁵⁸ MBNA-NPRM at 2. *Accord* *Fleet-NPRM* at 2 (arguing that the Office of the Comptroller of the Currency already provides significant guidance to banks on managing risks that may arise from their business relationships with third parties); *AFSA-NPRM* at 3.

⁵⁹ MBNA-NPRM at 2. See also *AFSA-NPRM* at 3.

⁶⁰ MasterCard-NPRM at 13-14. *Accord* *Citigroup-NPRM* at 11.

⁶¹ ABA-NPRM at 3.

⁶² 60 FR at 43843, citing, *inter alia*, *Official Airline Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980) (holding that the air carrier exemption from the FTC Act did not apply to a firm publishing schedules and fares for air carriers, which was not itself an air carrier); *FTC/Direct Mktg. Ass'n., Complying*

⁶³ See, e.g., *Official Airline Guides*, note 62 above; *FTC v. Saja*, 1997-2 CCH (Trade Cas.) P 71,952 (D. Ariz. 1997); *FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp. 1080 (1994).

⁶⁴ GLBA, Pub. L. 106-102, 113 Stat. 1383, Title I, § 133(a), 15 U.S.C. 6801-6810 (2001).

⁶⁵ *Minnesota v. Fleet Mortgage Corp.*, 181 F. Supp. 2d 995 (D. Minn. 2001) (noting that the applicable definition under the Federal Deposit Insurance Act ("FDIA") is "any national bank, State bank, District bank, and any Federal branch and insured branch" citing FDIA, 12 U.S.C. 1813(a)(1)(A)).

⁶⁶ This approach is consistent with that laid out in the SBP of the original Rule. See 60 FR at 43483.

⁶⁷ SBC-NPRM at 2, 4-5.

aware of none. SBC claims that the cases cited by the Commission in the NPRM⁶⁸ in support of its authority provide no support for Commission jurisdiction over a common carrier's agent assisting in selling common carrier services.⁶⁹ In fact, in one of those cases, the publisher of what the court described as "the primary market tool of . . . virtually every (air) carrier . . . in the United States" was held not to be exempt under the exemption for air carriers.⁷⁰ Accordingly, the Commission declines to revise its position.

Citigroup requested that the amended Rule clarify that certain financial services providers, such as insurance underwriters and registered broker-dealers, are exempt from the Rule.⁷¹ NAIFA requested similar clarification regarding insurance companies, as well as an explicit statement of exemption in the Rule.⁷² The Commission believes that the explicit statement of the Commission's jurisdictional limitation over broker-dealers is abundantly clear in the Telemarketing Act itself;⁷³ thus, it is unnecessary to exempt them in the Rule. Similarly, the Commission believes its jurisdictional limitations regarding the business of insurance are clear, and thus no express exemption for these entities is necessary.⁷⁴

In contrast to these requests to circumscribe or restate the Commission's jurisdiction under the Rule, a number of commenters urged the expansion of the Rule's scope beyond its current boundaries. As NCL put it, "[b]ecause the Commission's general jurisdiction does not include significant segments of the telemarketing industry, such as common carriers and financial institutions, the Rule does not provide comprehensive protection for consumers or a level playing field for marketers."⁷⁵ Others argued that the Commission should assert jurisdiction over intrastate calls as well as interstate calls.⁷⁶

As the Commission stated in the NPRM, "the jurisdictional reach of the

Rule is set by statute, and the Commission has no authority to expand the Rule beyond those statutory limits."⁷⁷ Thus, absent amendments to the FTC Act or the Telemarketing Act, the Commission is limited with regard to its ability to regulate under the Rule those entities explicitly exempt from the FTC Act. Despite this limitation, the Commission can reach telemarketing activity conducted by non-exempt entities on behalf of exempt entities.⁷⁸ Therefore, when an exempt financial institution, telephone company, or non-profit entity conducts its telemarketing campaign using a third-party telemarketer not exempt from the Rule, then that campaign is subject to the provisions of the TSR.⁷⁹

Regarding the suggestion that the Commission regulate intrastate telemarketing calls, the Commission notes that, pursuant to the definition of "telemarketing" included in the Telemarketing Act, 15 U.S.C. § 6106(4), the Commission only has authority to regulate "a plan, program, or campaign which is conducted . . . by use of one or more telephones and which involves more than one interstate call." (emphasis added).

Finally, one commenter suggested that the Commission expressly state its jurisdiction over prerecorded telephone solicitations and facsimile advertisements.⁸⁰ The Commission believes that sales calls using prerecorded messages may fall within the Rule's definition of "telemarketing," provided the call is not exempt and provided the call meets the other criteria of "telemarketing." Thus, a sales call using a prerecorded message may be "telemarketing" if it is part of a plan, program, or campaign for the purpose of inducing the purchase of goods or services or inducing a donation to a charitable organization, is conducted by use of one or more telephones, and involves more than one interstate call. However, the fact that prerecorded sales

calls may be "telemarketing" does not affect the fact that such calls are already prohibited, except with the consumer's prior express consent, under regulations promulgated by the FCC pursuant to the TCPA.⁸¹ Similarly, FCC regulations already prohibit unsolicited facsimile advertisements,⁸² although facsimiles also are a form of direct mail subject to the TSR. The Commission notes in the discussion of § 310.6(b)(6) below that it considers facsimiles to be a form of direct mail solicitation. Thus, under § 310.6(b)(6), a seller using a facsimile advertisement to induce calls from consumers may not claim the direct mail exemption unless the facsimile truthfully discloses the material information listed in § 310.3(a)(1) (or contains no material misrepresentation regarding any item contained in § 310.3(d) if the solicitation is for a charitable contribution).

B. Section 310.2 — Definitions.

The amended Rule retains the following definitions from the original Rule unchanged, apart from renumbering: "acquirer," "Attorney General," "cardholder," "Commission," "credit," "credit card," "credit card sales draft," "credit card system," "customer,"⁸³ "investment opportunity,"⁸⁴ "merchant," "merchant agreement," "person," "prize," "prize promotion," "seller," and "State."

Based on the record developed in this matter, the Commission has determined to retain the following definitions from

⁶⁸ 67 FR at 4407 (citing 60 FR at 43843, citing *FTC v. Miller*, 549 F.2d 452 (7th Cir. 1977) and *Official Airline Guides*), see note 62 above.

⁶⁹ SBC-NPRM at 4-5.

⁷⁰ *Official Airline Guides*, see note 62 above. See also cases cited above in note 63, rejecting exemption claims of telemarketers for exempt organizations.

⁷¹ See Citigroup-NPRM at 10.

⁷² See NAIFA-NPRM at 1-2.

⁷³ 15 U.S.C. 6102(d)(2).

⁷⁴ See Section 2 of the McCarran-Ferguson Act, 15 U.S.C. 1012(b) (the business of insurance, to the extent that it is regulated by state law, is exempt from the Commission's jurisdiction pursuant to the FTC Act).

⁷⁵ NCL-NPRM at 2. See also Horick-NPRM at 1; PRC-NPRM at 3-4; Myrick-NPRM at 1.

⁷⁶ FCA-NPRM at 2.

⁷⁷ 67 FR at 4497.

⁷⁸ *Id.*

⁷⁹ As the Commission stated when it promulgated the Rule, "[t]he Final Rule does not include special provisions regarding exemptions of parties acting on behalf of exempt organizations; where such a company would be subject to the FTC Act, it would be subject to the Final Rule as well." 60 FR at 43843. Although some commenters, such as SBC (SBC-NPRM at 5-8) and Wells Fargo (Wells Fargo-NPRM at 2), took issue with this proposition, the fact remains that the Telemarketing Act states merely that "no activity which is outside the jurisdiction of that Act shall be affected by this chapter." 15 U.S.C. 6105(a). Thus, when an entity not exempt from the FTC Act engages in telemarketing, that conduct falls within the Commission's jurisdiction under the TSR. *Id.*; TSR Compliance Guide at 12.

⁸⁰ See Worsham-NPRM at 6.

⁸¹ 47 CFR 64.1200(a)(2).

⁸² 47 CFR 64.1200(a)(3).

⁸³ VISA stated that the definition of "customer" is too broad, encompassing not only "the person who is party to the telemarketing call and who would be liable for the amount of a purchase as the contracting party, but also would include any person who is liable under the terms of the payment device." VISA-NPRM at 7. Although the term "customer," defined to mean "any person who is or may be required to pay for goods or services offered through telemarketing," is broad in scope, the Commission believes this breadth is necessary to effect the purposes of the Rule. Further, the Commission believes that the term "customer," taken in context of the various Rule sections in which it is used, is not confusing. Therefore, the Commission makes no change in the amended Rule to the definition of "customer."

⁸⁴ One commenter recommended that the Commission clarify that an investment vehicle whose main attribute is that it provides tax benefits would be considered an "investment opportunity" under the Rule. Thayer-NPRM at 6. The Commission believes that such a tax-advantaged investment would come under the present definition, which is predicated on representations about "past, present, or future income, profit, or appreciation." The Commission believes that any such investment opportunity would only result in a tax advantage because of its ability to produce income or appreciation, regardless of whether that income is positive (and tax-deferred or tax-exempt) or negative (resulting in deductible losses). Thus, the Commission has retained the original definition of "investment opportunity" in the amended Rule.

⁶⁸ 67 FR at 4407 (citing 60 FR at 43843, citing *FTC v. Miller*, 549 F.2d 452 (7th Cir. 1977) and *Official Airline Guides*), see note 62 above.

⁶⁹ SBC-NPRM at 4-5.

⁷⁰ *Official Airline Guides*, see note 62 above. See also cases cited above in note 63, rejecting exemption claims of telemarketers for exempt organizations.

⁷¹ See Citigroup-NPRM at 10.

⁷² See NAIFA-NPRM at 1-2.

⁷³ 15 U.S.C. 6102(d)(2).

⁷⁴ See Section 2 of the McCarran-Ferguson Act, 15 U.S.C. 1012(b) (the business of insurance, to the extent that it is regulated by state law, is exempt from the Commission's jurisdiction pursuant to the FTC Act).

⁷⁵ NCL-NPRM at 2. See also Horick-NPRM at 1; PRC-NPRM at 3-4; Myrick-NPRM at 1.

⁷⁶ FCA-NPRM at 2.

⁷⁷ 67 FR at 4497.

⁷⁸ *Id.*

⁷⁹ As the Commission stated when it promulgated the Rule, "[t]he Final Rule does not include special provisions regarding exemptions of parties acting on behalf of exempt organizations; where such a company would be subject to the FTC Act, it would be subject to the Final Rule as well." 60 FR at 43843. Although some commenters, such as SBC (SBC-NPRM at 5-8) and Wells Fargo (Wells Fargo-NPRM at 2), took issue with this proposition, the fact remains that the Telemarketing Act states merely that "no activity which is outside the jurisdiction of that Act shall be affected by this chapter." 15 U.S.C. 6105(a). Thus, when an entity not exempt from the FTC Act engages in telemarketing, that conduct falls within the Commission's jurisdiction under the TSR. *Id.*; TSR Compliance Guide at 12.

⁸⁰ See Worsham-NPRM at 6.

the proposed Rule unchanged, apart from renumbering: “caller identification service,” “donor,” “telemarketer,”⁸⁵ and “telemarketing.” The amended Rule modifies the definitions put forth in the NPRM for the terms “billing information,” “charitable contribution,” “material,” and “outbound telephone call.” Finally, the amended Rule adds five definitions that were not included in the NPRM proposal. They are: “established business relationship,” “free-to-pay conversion,” “negative option feature,” “preacquired account information,” and “upselling.” The Commission discusses each of these definitions below, along with the comments received regarding them, and the Commission’s reasoning in making a final determination regarding each of these definitions.⁸⁶

§ 310.2(c) — Billing information

The proposed Rule included a definition of the term “billing information,” which was used in proposed § 310.3(a)(3), the express verifiable authorization provision, and proposed § 310.4(a)(5), the section that addressed preacquired account telemarketing. Under the definition proposed in the NPRM, the term “billing information” encompassed “any data that provides access to a consumer’s or donor’s account, such as a credit card, checking, savings, or similar account, utility bill, mortgage loan account, or debit card.”⁸⁷

The Commission received numerous comments regarding this definition as it pertained to the express verifiable authorization and preacquired account provisions of the proposed Rule. The use of the term in the express verifiable authorization provision drew less comment, perhaps because that provision merely required that the customer or donor receive such billing information if express verifiable authorization of payment is to be

deemed verifiable.⁸⁸ Comments from consumer groups generally favored the “billing information” definition, noting that the breadth of the term would prove beneficial to consumers.⁸⁹ AARP, for example, stated that the definition, as employed in the proposed preacquired account telemarketing provision, “is broad enough so as not to leave any doubt in the mind of the telemarketer regarding what can and cannot be shared.”⁹⁰ Law enforcement representatives and some consumer groups expressed their concern that, as broad as the definition might seem, it should be further expanded to encompass encrypted data, and other kinds of information that can allow access to a consumer’s account.⁹¹ Industry commenters, on the other hand, argued precisely the opposite, requesting that the definition be narrowed and that it specifically exclude encrypted data,⁹² or other

specified items unique to that commenter’s business practices.⁹³ Instead, industry commenters recommended, “billing information” should be limited to account information that “in and of itself, is sufficient to effect a transaction” against a consumer’s account.⁹⁴ Virtually all of these comments were made in the context of the proposed Rule provision regarding preacquired account telemarketing, which would have prohibited the disclosure or receipt of “billing information” except when provided by the customer or donor to process payment.

As noted below in the discussions of amended Rule §§ 310.4(a)(5) and (6), the Commission has tailored its approach to preacquired account telemarketing, thereby addressing many of the concerns raised by commenters on both sides regarding the proposed definition of “billing information.” The amended Rule’s approach to preacquired account telemarketing—which no longer focuses on the sharing of “billing information” in anticipation of telemarketing, but instead prohibits “[c]ausing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor”—obviates the concerns about the breadth of the term, and whether it includes or excludes encrypted account numbers.⁹⁵ However,

⁸⁸ As discussed below, in the section explaining the express verifiable authorization provision (*i.e.*, § 310.3(a)(3)), commenters’ concerns regarding billing information in the express verifiable authorization provision focused on the dangers of disclosure of consumers’ account numbers.

⁸⁹ See NCLC-NPRM at 13; LSAP-NPRM at 5 (approved of definition, but also suggested changing “such as” to “including but not limited to”).

⁹⁰ AARP-NPRM at 7.

⁹¹ Specifically, NAAG noted: “[T]he Gramm Leach Bliley Act (“GLBA”) has resulted in the common use of reference numbers and encrypted numbers to identify consumer accounts in preacquired account telemarketing. These types of account access devices definitely should be included in the list of examples. Failure to include encrypted numbers within the scope of the Rule’s definition of ‘billing information’ would render the Rule useless as a device to combat the ills of preacquired account telemarketing.” NAAG-NPRM at 38. See also NACAA-NPRM at 5-6 (“consider providing a non-exclusive list of such information, based upon technologies in place today. Thus, name, account number, telephone number, married and maiden names of parents, social security number, passwords to accounts and PINs, and encrypted versions of this information, with or without the encryption [key], should all be prohibited from use in any transaction but the immediate one in which the consumer is engaged.”); NCLC-NPRM at 13.

⁹² Citigroup-NPRM at 7-8; Household Auto-NPRM at 2 (“Although the specific language of the proposed definition does appear to be consistent with the Commission’s GLBA interpretation, the explanation of the term in the [NPRM] is broader and creates a conflict with the GLBA interpretation To avoid such a conflict, we suggest that the Commission clarify that the term . . . includes only account numbers and specifically excludes encrypted account numbers.”). Accord ABIA-NPRM at 2; Roundtable-NPRM at 8 (“The Roundtable is concerned that this definition is so broad that it could be construed to restrict the sharing of publicly available identifying information, such as a consumer’s name, phone number and address.”). See also AFSA-NPRM at 11-12; Advanta-NPRM at 3; ARDA-NPRM at 3; Assurant-NPRM at 3; Capital One-NPRM at 8-9; Cendant-NPRM at 7; Citigroup-NPRM at 7; E-Commerce Coalition-NPRM at 2; ERA-NPRM at 24; IBM-NPRM at 10; MPA-NPRM at 23, n.23; MasterCard-NPRM at 8; Metris-NPRM at 7; VISA-NPRM at 6.

⁹³ See, *e.g.*, Green Mountain-NPRM at 31 (“If the Commission intends to adopt its proposal to amend the TSR to add a new Section 310.4(a)(5) to ban the use of preacquired billing information obtained from third parties, it should exempt names, addresses, electricity meter identifiers, and electricity usage patterns from its definition of ‘billing information.’”)

⁹⁴ IBM-NPRM at 10. ARDA argued that information that would fall within the definition of “billing information”—such as a customer’s or donor’s date of birth—may be collected during a call for purposes other than to effect a charge. ARDA cited examples including “eligibility to enter a contest or drawing” or “demographic purposes.” ARDA-NPRM at 3. ARDA then asserted that, while this information may not be gathered during a call in which a billing occurs, or used for billing purposes in the first instance, it could be passed along to other parties for marketing or other purposes. *Id.* While the Commission recognizes that information like date of birth has marketing uses beyond access to consumer accounts for billing purposes, the Commission finds it improbable at best that collection or confirmation of date of birth, or similar piece of information, as a proxy for consent to be charged for a purchase or donation would satisfy the “express informed consent” requirements of amended Rule § 310.4(a)(6), discussed below.

⁹⁵ During the Rule Review, industry argued the term was so broad it might mean that sellers and telemarketers could not share customer names and telephone numbers for use in telemarketing. See, *e.g.*, Advanta-NPRM at 3; Roundtable-NPRM at 8. Industry also argued that encrypted data should not be included in the definition of “billing information,” because such data by itself does not allow a charge to be placed on a consumer’s

⁸⁵ One commenter expressed concern that “a company that sells telemarketing services to sellers, but does not maintain any calling facilities itself, instead subcontracting the actual telephoning to individuals” might not fall within the definition of “telemarketer.” Patrick-NPRM at 2. The Commission disagrees, and believes that regardless of whether an entity maintains a physical call center, it would be a “telemarketer” for purposes of the Rule if “in connection with telemarketing, [it] initiates or receives telephone calls to or from a customer or donor.” Amended Rule § 310.2(bb).

⁸⁶ The definitions proposed in the NPRM for “express verifiable authorization,” “Internet services,” and “Web services” have been deleted from the amended Rule because they are no longer necessary in light of certain substantive modifications in the amended Rule.

⁸⁷ See proposed Rule § 310.2(c), and discussion, 67 FR at 4498-99.

the amended Rule includes a definition of “preacquired account information,” which encompasses both encrypted and unencrypted account information, to address specifically the practice of preacquired account telemarketing.⁹⁶

Consequently, after consideration of the record in this proceeding, and in light of the more focused approach to the provisions in which the term is used, the Commission has decided to retain the proposed definition of “billing information,” with a minor modification. The definition now encompasses “any data that enables any person to obtain access to a customer’s or donor’s account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.” (emphasis added). The Commission believes that this syntactical modification, substituting the phrase “that enables any person to obtain access” for the phrase “that provides access,” makes the definition more precise and somewhat easier to understand. The definition retains the broad scope of its predecessor in order to capture the myriad ways a charge may be placed against a consumer’s account,⁹⁷ yet has more limited effect in the context of the approach adopted in the amended Rule to address preacquired account telemarketing and express verifiable authorization.

§ 310.2(d) — Caller identification service

The definition of “caller identification service” comes into play in § 310.4(a)(7) of the amended Rule, discussed below. In the NPRM, the Commission proposed to define “caller identification service” to mean “a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party

account, and because sharing it is permitted by the GLBA. See, e.g., Cendant-NPRM at 7; E-Commerce Coalition-NPRM at 2; MPA at 23, n.23. These arguments have been addressed by the Commission’s revised approach to preacquired account telemarketing, which focuses not on the sharing of account information—except in the very limited area of sale of unencrypted account numbers—but on the harm that results from certain practices in preacquired account telemarketing, i.e., unauthorized charges. Moreover, in those instances where there has been the strongest history of abuse, sellers and telemarketers are required to obtain part or all of the customer’s account number directly from the customer.

⁹⁶ See amended Rule § 310.2(w), and related discussion below.

⁹⁷ The record shows that a telemarketer or seller may provide anything from complete account number to mother’s maiden name to initiate a charge for a telemarketing transaction, depending on its relationship with another seller, financial institution, or billing entity. See, e.g., Assurant-NPRM at 4.

transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber’s telephone.” As the Commission explained in the NPRM, the Commission intends the definition of “caller identification service” to be sufficiently broad to encompass any existing or emerging technology that provides for the transmission of calling party information during the course of a telephone call.⁹⁸ Those few commenters who addressed the definition supported the Commission’s proposal.⁹⁹ Therefore, the amended Rule adopts § 310.2(d), the definition of “caller identification service,” unchanged from the proposal.

§ 310.2(e) — Charitable contribution

The original Rule did not include a definition of “charitable contribution” because originally the term “telemarketing” in the Telemarketing Act, which determined the scope of the TSR, was defined to reach telephone solicitations only for the purpose of inducing sales of goods or services.¹⁰⁰ The proposed Rule added a definition of the term “charitable contribution” because § 1011 of the USA PATRIOT Act amended the Telemarketing Act to specify that “telemarketing” now includes not only calls to induce purchases of goods or services but also calls to induce “a charitable contribution, donation, or gift of money or any other thing of value.”¹⁰¹ The Commission has determined that the term “charitable contribution,” defined for the purposes of the Rule to mean “any donation or gift of money or any other thing of value” succinctly captures the meaning intended by Congress. Therefore, the Commission has retained this definition from the proposed Rule. It has, however, determined to modify the proposed definition to eliminate the exemptions included in the proposed Rule.

The proposed definition in the NPRM expressly excluded donations or gifts of money or any other thing of value solicited by or on behalf of “political clubs, committees, or parties, or

constituted religious organizations or groups affiliated with and forming an integral part of the organization where no part of the net income inures to the direct benefit of any individual, and which has received a declaration of current tax exempt status from the United States government.”¹⁰² This proposed exemption drew strong comment and criticism. NASCO recommended that a definition of “constituted religious organizations” be included in the Rule to set clear boundaries for what kinds of groups were intended to be included.¹⁰³ Hudson Bay stated that “establishing governmentally preferred groups, such as religious organizations or political parties, and providing them with superior access to the public, is in our opinion unquestionably a violation of the Fourteenth Amendment’s guarantee of equal protection and of the First Amendment.”¹⁰⁴ Similarly, DMA-Nonprofit stated “the Commission has no authority to single out agents of religious organizations for exemption . . . [T]here is no language in the [USA PATRIOT Act] that allows the Commission to make this distinction.”¹⁰⁵

Based on careful consideration of the record, the Commission is persuaded that no exemptions based upon the type of organization engaged in telemarketing are warranted, and that all telemarketing (as defined in the Telemarketing Act as amended by the USA PATRIOT Act) conducted by any entity within its jurisdiction should be covered by the TSR. This does *not* mean that the Commission believes political fundraising is within the scope of the Rule.¹⁰⁶ It means only that the TSR applies to all calls that are part of any “plan, program, or campaign” that is conducted by any entity within the FTC’s jurisdiction, involving more than one interstate telephone call for the purpose of inducing a purchase of goods or services or a charitable contribution, donation, or gift of money or any other thing of value. Thus, for example, if a for-profit telemarketer on behalf of a

¹⁰² Proposed Rule § 310.2(f).

¹⁰³ NASCO-NPRM at 6.

¹⁰⁴ Hudson Bay-NPRM at 12.

¹⁰⁵ DMA-NonProfit-NPRM at 5-6. See also Not-for-Profit Coalition-NPRM at 41.

¹⁰⁶ The USA PATRIOT Act is consistent with a basic common law distinction between charities and political organizations. “Gifts or trusts for political purposes or the attainment of political objectives generally have been regarded as not charitable in nature. Also . . . a trust to promote the success of a political party is not charitable in nature.” 15 Am. Jur. 2d *Charities* § 60 (2002). In this regard, it is noteworthy that Congress elsewhere has established a regulatory scheme applicable to political fundraising. 2 U.S.C. §§ 431-455.

⁹⁸ 67 FR at 4499.

⁹⁹ See, e.g., EPIC-NPRM at 11; ARDA-NPRM at 4. ARDA suggested that the definition be expanded to allow transmission of the name and number of “any party whom the telephone subscriber may contact” regarding being placed on the company’s “do-not-call” list. As noted in the subsequent discussion of this provision, § 310.4(a)(7) of the amended Rule permits telemarketers to substitute a customer service number on the caller identification transmission.

¹⁰⁰ 15 U.S.C. 6106(4).

¹⁰¹ 15 U.S.C. 6106(4) (amended by § 1011(b)(3) of the USA PATRIOT Act, Pub. L. 107-56 (Oct. 26, 2001)).

(presumably non-profit) political club or constituted religious organization were to engage in a “plan, program, or campaign” involving more than one interstate telephone call to induce a purchase of goods or services or a charitable contribution, that activity would be within the scope of the TSR. But if such a for-profit telemarketer on behalf of the same client made calls that were not for the purpose of inducing a purchase of goods or services or a charitable contribution, those calls would not be within the scope of the TSR.

Commenters also addressed the scope of the term “or any thing of value” in the definition of “charitable contribution” in the proposed Rule, suggesting exemptions to limit this definition. Red Cross urged the Commission to exempt blood from the definition of “charitable contribution” because, it argued, “blood donations are not ‘a thing of value’ in a fiduciary sense.”¹⁰⁷ Blood Centers agreed with this position, arguing that while “the donor’s blood is of great value to the recipient of the blood donation . . . the donor is not being asked to part with anything other than his or her *time*.”¹⁰⁸ Blood Centers also argued that donations of blood are of grave importance to save lives, and so are distinguishable from typical commercial and even charitable telemarketing calls.¹⁰⁹ Another argument raised by Blood Centers in support of its position that a blood donation should be excluded from the definition of “charitable contribution” is that blood donation programs are highly regulated by the Food and Drug Administration (“FDA”).¹¹⁰ March of Dimes also requested that volunteers’ time not be considered a “thing of value” under the Rule, noting that their organization often uses the telephone to contact volunteers who then solicit contributions from their friends and neighbors.¹¹¹

The Commission believes that the text of the USA PATRIOT Act provision expanding the definition of telemarketing to include calls to induce “a charitable contribution, donation, or gift of money or any other thing of value” is broad in scope and plain in meaning. The USA PATRIOT Act specifically uses the term “or any other thing of value” in addition to the terms “charitable contribution, donation, or

gift of money,” ensuring that it will encompass non-money contributions. The Commission believes that, while blood donors are asked for blood and not money, the blood they donate is clearly a “thing of value.”¹¹² Similarly, although volunteers are asked to give time rather than money, the Commission believes that a donation of time is a “thing of value.”¹¹³ Therefore, the Commission cannot exempt from the definition of “charitable contribution” either blood or time volunteered. The Commission believes, however, that legitimate concern about inclusion of blood in the definition should be alleviated by the exemption of charitable solicitation telemarketing from the “do-not-call” registry provisions. The remaining provisions that will apply to telemarketing to solicit blood donations are neither burdensome nor likely to impede the mission of the non-profit organizations that seek such donations.

NAAG and NASCO suggested that the Commission “state that the word ‘charitable’ does not limit the character of the recipient of the contribution.”¹¹⁴ According to these commenters, it is important to ensure that donations solicited by or on behalf of public safety organizations are considered “charitable contributions” for regulatory purposes, and that those contributions solicited by sham charities are still “charitable contributions” under the amended Rule.¹¹⁵ The Commission believes that the current definition, which closely tracks the USA PATRIOT Act definition, is clear as to what is covered.¹¹⁶ Its focus is on the donation, rather than the solicitor, and it is sufficiently broad in scope to encompass donations solicited on behalf of any organization.

NAAG and NASCO also requested that the Commission explicitly address the situation where a call involves “‘percent of purchase’ situations, where contributions are sought in the form of the purchase of goods or services, [and] where a portion of the price will, according to the solicitor, be dedicated to a charitable cause.”¹¹⁷ These

commenters urged the Commission to ensure that such hybrid transactions are covered, either as sales of goods or services or as charitable contributions, or both, under the Rule.¹¹⁸ The Commission believes that when the transaction predominantly is an inducement to make a charitable contribution, such as when an incentive of nominal value is offered in return for a donation, the telemarketer should proceed as if the call were exclusively to induce a charitable contribution. Similarly, if the call is predominantly to induce the purchase of goods or services, but, for example, some portion of the proceeds from this sale will benefit a charitable organization, the telemarketer should adhere to the portions of the Rule relevant to sellers of goods or services. The Commission believes that further elaboration on the differences between these scenarios is unnecessary because, in either case, the requirements are similar, consisting primarily of avoiding misrepresentations, and promptly disclosing information that would likely be disclosed in the ordinary course of a telemarketing call.

§ 310.2(m) — Donor

The proposed Rule contained a definition of “donor” in order to effectuate the goals of the USA PATRIOT Act amendments. Under that definition, a “donor” is “any person solicited to make a charitable contribution.”¹¹⁹ Throughout the proposed Rule, wherever the word “customer” was used, the Commission added the word “or donor” where appropriate, to indicate that the provision was also applicable to the solicitation of charitable contributions. The Commission received very few comments on this definition. The March of Dimes expressed the concern that “[t]he definition of a ‘donor’ does not accurately reflect the nomenclature used by the industry.”¹²⁰ Rather, the March of Dimes suggested, the term “donor,” as used in philanthropic circles, “connotes an established relationship with the non-profit charitable organization.”¹²¹ The March of Dimes recommended replacing the terms “customer” and “donor” in the Rule with the term “consumer.”

The Commission believes that the term “consumer” is too broad and non-specific to substitute for the terms

¹⁰⁷ Red Cross-NPRM at 3.

¹⁰⁸ Blood Centers-NPRM at 2.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 2-3.

¹¹¹ March of Dimes-NPRM at 2. *See also* AFP-NPRM at 5.

¹¹² *See* Maryland Health Care, Fall 2000 at 4, http://www.mdhospitals.org/MarylandPubs/MDHlthCr_1100.pdf (noting the blood shortages had driven up the price of blood from \$145.24 per unit to \$174.10 per unit in a single year).

¹¹³ Presumably, organizations that rely on volunteers would, absent their donations of time, be forced to pay labor costs associated with the work done by volunteers. Therefore, the time donated is a “thing of value,” equivalent to the labor cost saved.

¹¹⁴ NAAG-NPRM at 52; NASCO-NPRM at 5-6.

¹¹⁵ *Id.*

¹¹⁶ 15 Am. Jur. 2d *Charities* § 60 (2002).

¹¹⁷ NAAG-NPRM at 52. *See also* NASCO-NPRM at 5-6.

¹¹⁸ *Id.*

¹¹⁹ Proposed Rule § 310.2(m), 67 FR at 4540.

¹²⁰ March of Dimes-NPRM at 3.

¹²¹ *Id.* (noting that the term “prospect” is used to mean a potential donor).

“customer” and “donor.”¹²² The Rule uses these more targeted terms to capture the varied nature of transactions between sellers or telemarketers and individuals who are, or may be, required to pay for something as the result of a telemarketing solicitation. Thus, it is the intent of the Commission that the term “donor” as used in the Rule encompass not only those who have agreed to make a charitable contribution, but also any person who is solicited to do so, to be consistent with its use of the term “customer.” Therefore, the Commission has determined that the term “donor” is necessary and appropriate, and has retained the definition of “donor” in the amended Rule without modification.

§ 310.2(n) — Established business relationship

The Commission has determined to add to the Rule a definition of “established business relationship.” This new definition comes into play in § 310.4(b)(1)(iii), which now exempts from the national “do-not-call” registry calls from sellers with whom the consumer has an “established business relationship” (unless that consumer has asked to be placed on that seller’s company-specific “do-not-call” list). This definition limits the exemption to relationships formed by the consumer’s purchase, rental, or lease of goods or services from, or financial transaction with, the seller within eighteen months of the telephone call (or, in the case of inquiries or applications, within three months of the call).

Industry comments were nearly unanimous in emphasizing that it is essential that sellers be able to call their existing customers.¹²³ Although the initial comments from consumer groups opposed an exemption for “established business relationships,”¹²⁴ their

¹²² The term “consumer” is defined generally as “one that utilizes economic goods.” Merriam-Webster’s Collegiate Dictionary, at: <http://www.merriamwebster.com/cgi-bin/dictionary#>. This broader term is used in the Rule in the definition of “established business relationship,” § 310.2(n), and in the provision banning the transfer of unencrypted account numbers, § 310.4(a)(5). In each of these instances, the Commission has consciously used the broader term “consumer” to effect broader Rule coverage.

¹²³ See, e.g., AFSA-NPRM at 13-14; AmEx-NPRM at 3; ANA-NPRM at 5; ARDA-NPRM at 17; ATA-NPRM at 29; BofA-NPRM at 4; Best Buy-NPRM at 1; DialAmerica-NPRM at 12; DMA-NPRM at 33-34; DSA-NPRM at 7-8; ERA-NPRM at 36-37; Gottschalks-NPRM at 1; NCTA-NPRM at 6; NRF-NPRM at 13; PMA-NPRM at 28; Roundtable-NPRM at 5; SIIA-NPRM at 2-3; Time-NPRM at 6-7; VISA-NPRM at 3. See also, e.g., ARDA-Supp. at 1; ICTA-Supp. at 2.

¹²⁴ See, e.g., EPIC-NPRM at 20-21; NCL-NPRM at 10. Among other things, consumer advocates opposed such an exemption because of the

statements during the June 2002 Forum and in their supplemental comments expressed the view that such an exemption would be acceptable, as long as it was narrowly-tailored and limited to current, ongoing relationships.¹²⁵ Moreover, state law enforcement representatives’ comments on their experience with state “do-not-call” laws that have an exemption for “established business relationships” suggest that this type of exemption is consistent with consumer expectations.¹²⁶ While the Commission is persuaded that an “established business relationship” exemption is necessary and appropriate, it believes that the exemption must be narrowly crafted and clearly defined to avoid a potential loophole that could

difficulty in defining a “pre-existing business relationship” without creating significant loopholes in the protections provided by the national “do-not-call” registry (described in the discussion of amended Rule § 310.4(b)(1)(iii) below). See NCL-NPRM at 10. Furthermore, they did not agree with industry’s argument that consumers want to hear from companies with whom they have an existing relationship. NCL stated that the fact that a consumer may have had a relationship with a company does not necessarily mean that he or she wishes to receive calls, or to continue to receive calls, from that company. NCL-NPRM at 10. Consumer advocates believed the FTC had taken the right approach: the burden should lie with the seller to show specific consent to receive calls. NCL-NPRM at 10; EPIC-NPRM at 20-21; PRC-NPRM at 2.

¹²⁵ June 2002 Tr. I at 110 (NCL) (“This would have to be . . . really narrowly defined in order to protect consumers so that if somebody had something that was ongoing . . . that would be in a different category.”). See also AARP-Supp. at 3 (“AARP recognizes that there may be an expectation by consumers that they will be in contact with businesses with whom they have current, ongoing, voluntary relationship; calls from such businesses are not necessarily unwanted or unsolicited. Calls made from a business with which consumers had a prior relationship are a different matter altogether. In situations where the consumer has chosen not to continue a business relationship, it cannot be presumed they wish to be solicited by that business again. Therefore, AARP believes that any exemption for an existing business relationship must be limited to those situations where the relationship is current, ongoing, voluntary, involves an exchange of consideration, and has not been terminated by either party.”).

¹²⁶ June 2002 Tr. I at 110-19. See also June 2002 Tr. I at 119-22, in which participants discussed an AARP survey conducted in conjunction with the Missouri Attorney General’s Office, which showed that three-fourths of consumers did not feel an established business relationship was justified. However, representatives from the Missouri Attorney General’s Office explained that the results were less a measure of consumer condemnation of such an exemption, than an indication that consumers were receiving calls from businesses with whom they did not perceive that they had such a relationship. According to the Missouri representatives, businesses took a broader view of the relationship than did consumers. As noted in more detail below, consumers appear to be comfortable with an exemption for “established business relationships” once its parameters are explained to them.

defeat the purpose of the national “do-not-call” registry.

In adopting the “do-not-call” provisions of the original Rule, the Commission considered, among other things, the approach taken by Congress and the FCC in the TCPA and its implementing regulations.¹²⁷ In crafting an “established business relationship” definition, it is useful again to consider the TCPA, which specifically exempts calls “to any person with whom the caller has an established business relationship.”¹²⁸ The House Report on the TCPA’s “established business relationship” exemption confirms that Congress intended for the reasonable expectation of the consumer to be the touchstone of the exemption:

In the Committee’s view, an “established business relationship” also could be based upon any prior transaction, negotiation, or inquiry between the called party and the business entity that has occurred during a reasonable period of time. . . . By requiring this type of relationship, the Committee expects that otherwise objecting consumers would be less annoyed and surprised by this type of unsolicited call since the consumer would have a recently established interest in the specific products or services. . . . In sum, the Committee believes the test to be applied must be grounded in the consumer’s expectation of receiving the call.¹²⁹

When it promulgated its rules pursuant to the TCPA, the FCC included the following definition of “established business relationship” with regard to its company-specific “do-not-call” requirements:

The term *established business relationship* means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.¹³⁰

Consideration of state approaches to the “established business relationship”

¹²⁷ 60 FR at 43855.

¹²⁸ 47 U.S.C. 227(a)(3)(B). The legislative history of the TCPA shows that Congress exempted “established business relationship” calls “so as not to foreclose the capacity of businesses to place calls that build upon, follow-up, or renew, within a reasonable period of time, what had once been an existing customer relationship.” H.R. REP. NO. 102-317 at 13 (1991). Throughout the House Report discussing the exemption for “established business relationship,” the point is stressed that the exemption is intended to reach only those relationships that are *current or recent*. The Report consistently refers to an “established business relationship” in terms of “the existence of the relationship at the time of the solicitation, or within a reasonable time prior to it.” *Id.* at 13-15. (emphasis added).

¹²⁹ *Id.* at 14, 15.

¹³⁰ 47 CFR 64.1200(f)(4).

exemption is also instructive. Most state "do-not-call" laws have some form of exemption for "established business relationships," and several of these are modeled on the language of the FCC's exemption.¹³¹ However, there is an important difference between the FCC approach and that of many of the states, in that many state law exemptions circumscribe the scope of an "established business relationship" by specifying the amount of time after a particular event (like a purchase) during which such a relationship may be deemed to exist.¹³² The Commission believes that this approach is more in keeping with consumer expectations than an open-ended exemption. As discussed in more detail below, many consumers favor an exemption for companies with whom they have an established relationship. Consumers also might reasonably expect sellers with whom they have recently dealt to call them, and they may be willing to accept these calls. A purchase from a seller ten years ago, however, would not likely be a basis for the consumer to expect or welcome solicitation calls from that seller.

In addition, specific time limits for an "established business relationship" are particularly appropriate for a general "do-not-call" registry such as the one to be maintained by the Commission, as opposed to the company-specific "do-not-call" lists for which the FCC definition was crafted. The Commission believes that an "established business relationship" exemption in a national list applying to many sellers and telemarketers should be carefully and narrowly crafted to ensure that appropriate companies are covered while excluding those from whom consumers would not expect to receive calls. A specific time limit balances the privacy needs of consumers and the need of businesses to contact their current customers.

Comments received in response to the NPRM stress the importance of extending such an exemption to current, existing relationships and prior relationships that occurred within a

reasonable period of time.¹³³ Throughout the comments from industry stressing the need for an "established business relationship" exemption, a consistent theme is that *such an exemption is necessary for "existing customers" or someone with whom sellers "currently do business,"* and there seems to be a common understanding regarding what constitutes an "existing" relationship.¹³⁴ There is less consensus when it comes to the issue of how long a business relationship lasts *following* a transaction between a seller and consumer. Many states have attempted to provide some clarity regarding how long after dealings between a consumer and seller have ceased that a residual "established business relationship" could be deemed still to exist.

Twelve of the states that have an "established business relationship" exemption limit it to a specific time period after a transaction has occurred, ranging from six months to 36 months.¹³⁵ Industry commenters suggested various time periods to limit the exemption. Several suggested 24 to 36 months, while others stated that a shorter period (12 months) would be more appropriate.¹³⁶ The Commission

¹³³ The comments received on "established business relationship" came primarily from the business community. On the other hand, there was little comment from consumer advocates and state regulators on how such an exemption would be formulated because the proposed Rule did not include an "established business relationship" exemption. However, the NPRM did ask about the effect on companies and charitable organizations with whom consumers had a pre-existing business or philanthropic relationship of the proposal to allow companies to call consumers on the "do-not-call" registry if they had given their express verifiable authorization to call (67 FR at 4539, question 9). As discussed in more detail above in note 124, those few consumer advocates who did mention such an exemption were opposed to it.

¹³⁴ See, e.g., ABA-NPRM at 10; Community Bankers-NPRM at 2; AmEx-NPRM at 3; ANA-NPRM at 5; Associations-NPRM at 2; ARDA-NPRM at 17; Bank One-NPRM at 4; BofA-NPRM at 4; Best Buy-NPRM at 1; Cendant-NPRM at 5-6; Citigroup-NPRM at 4; Comcast-NPRM at 3; CMC-NPRM at 6; Cox-NPRM at 2, 4; DMA-NPRM at 33, 34; Eagle Bank-NPRM at 2; Roundtable-NPRM at 5; Gottschalks-NPRM at 1; NCTA-NPRM at 4; NRF-NPRM at 13; SIAA-NPRM at 2-3; Time-NPRM at 6; VISA-NPRM at 3.

¹³⁵ Six months (Louisiana, Missouri); 12 months (Pennsylvania, Tennessee); 18 months (Colorado, Illinois); 24 months (Alaska, Massachusetts, Oklahoma); 36 months (Arkansas, Kansas). In addition, New York apparently has adopted an 18-month time period: the New York statute does not contain a time limit; however, at the June 2002 Forum, NYSCPB stated that New York applies an 18-month time limit. June 2002 Tr. 1 at 115 ("We have two separate exemptions. . . . The second thing is a prior business relationship, which we define as an exchange of goods and services for consideration within the preceding 18 months. . . ."). Indiana's statute does not have an exemption for "established business relationships."

¹³⁶ Industry commenters generally supported a 24-month time period, but did not submit data that

believes, based on the record evidence and statements from Congress regarding the TCPA's "established business relationship," that a company should be able to claim the exemption only if there has been a relatively recent transaction between the customer and the seller sufficient to support the existence of an "established business relationship."

Based on the comments, the Commission finds little support for a 36-month time period. Most of the commenters who suggested that time period did so as part of a joint comment filed by five associations.¹³⁷ In the comments the individual associations filed separately, however, they suggested a time period of 24 months.¹³⁸ NAA initially suggested 24 months, but expanded that to 36 months in its supplemental comment. Industry commenters who advocate 24 months provide little support for their assertion that it is the appropriate length of time by which to measure "reasonableness;" nor did they submit data that would show that a shorter time period would not serve their purposes. Other industry members (such as Bank of America, Consumer Mortgage Coalition, and Federated Department Stores) suggested shorter time periods. The Commission does not believe that a relationship which terminated or lapsed two years ago would constitute a relationship that had recently terminated or lapsed. The Commission believes that if consumers received a call from a company with whom the most recent purchase, rental, lease or financial transaction occurred or lapsed two years ago or longer, consumers would likely be surprised by that call and find it to be unexpected.

The Commission believes that 18 months is an appropriate time frame because it strikes a balance between industry's needs and consumers' privacy rights and reasonable expectations about who may call them and when. By extending beyond a single annual sales cycle, the 18-month period allows sufficient time for businesses to renew contact with prospects who may only purchase once a year. Moreover,

would tend to show that a shorter time period would not serve their purposes. The breakdown of suggested time periods is as follows: "recently terminated or lapsed" (New Orleans-NPRM at 14-15); 12 months (BoFA-NPRM at 4; CMC-NPRM at 6-7); 24 months (ATA-Supp. at 8; ERA-NPRM at 38; ERA-Supp. at 19; MPA-Supp. at 11; NAA-NPRM at 11; June 2002 Tr. 1 at 109 (PMA)); 36 months (ARDA-NPRM at 20; Associations-Supp. at 3-4). In a supplement to their comment, FDS supported limiting telemarketing sales calls to customers who have made a purchase in the past 12 months, while allowing strictly informational calls to persons who have had a transaction within the past 36 months. Federated-Supp. at 1-2.

¹³⁷ See Associations-NPRM at 3-4.

¹³⁸ See note 136 above.

¹³¹ Fourteen state "do-not-call" statutes are open-ended and do not contain a time limit for tolling the established business relationship: Alabama, California, Connecticut, Florida, Georgia, Idaho, Kentucky, Maine, Minnesota, Oregon, Texas, Vermont, Wisconsin, and Wyoming. Three of these "open-ended" state statutes incorporate the FCC definition either in whole or in part: California, Texas, and Wyoming. In addition, four other states incorporate the FCC definition in whole or in part, but limit the time period during which a business may claim an "established business relationship" once the relationship has lapsed: Colorado, Kansas, Oklahoma, and Pennsylvania. See note 592 below for citations to all state "do-not-call" statutes.

¹³² See discussion and note 135 below.

limiting the “established business relationship” to 18 months from the date of the last purchase or transaction would be at least as restrictive as the majority of states that have such an exemption, thus achieving greater consistency for both industry and consumers. The experience of states that have an “established business relationship” exemption in their “do-not-call” laws indicates that a relatively limited “established business relationship” exemption does not conflict with consumers’ expectations. At the June 2002 Forum, the representatives from New York and Missouri spoke about consumer expectations in connection with their states’ “do-not-call” lists.¹³⁹ Both noted that consumers appeared to be comfortable with such an exemption because they had received few complaints from consumers regarding companies with whom they had an established relationship.¹⁴⁰ The states’ experience is not contradicted by the comments of individual consumers in response to a specific question included on the Commission’s website inviting email comments from the public. Although 60 percent of consumers who responded to this question stated that they opposed an exemption for “established business relationship,” 40 percent favored such an exemption.¹⁴¹

Furthermore, a study conducted in 2002 by the Information Policy Institute found that consumers preferred a “nuanced approach” to the “do-not-call” issue, wanting to limit some calls to their household, but not all calls.¹⁴²

¹³⁹ See June 2002 Tr. I at 110-21.

¹⁴⁰ *Id.* at 118-19 (New York: “Well, [consumers are not unhappy], and a lot of times they complain, and you could say they’re [sic] prima facie evidence they’re unhappy. We call them back and say, gee, did you have a transaction with these folks? They claim you did on X, Y and Z, and they furnished us this paperwork. And then they say, oh, yeah. They don’t seem to be mad.”) (Missouri: “Most people when you call them back are delighted that 70 to 80 percent of their phone calls have been caused to not come in, so when we explain to them that you had a relationship or you explain to them that some of these calls are exempt, they understand when you explain that to them, and they’re delighted, because our anecdotal information shows that 70 to 80 percent of the calls people had been receiving, they’re not receiving now.”).

¹⁴¹ Analysis of consumer email comments in the Commission’s TSR comment database indicates that about 860 favored an exemption for calls from firms with whom they already have an established relationship, while about 1,080 opposed such an exemption. Furthermore, over 13,000 of the 14,971 comments submitted by Gottschalks’ customers supported allowing Gottschalks to call them even if they signed up on a “do-not-call” registry to block other calls.

¹⁴² Michael A. Turner, “Consumers, Citizens, Charity and Content: Attitudes Toward Teleservices” (Information Policy Institute, June 2002) at 4, 8 (hereinafter “Turner study”).

According to the study, 50 percent of consumers surveyed supported regulations that would allow local or community-based organizations to call during specific hours of the day.¹⁴³ Furthermore, slightly less than half of the respondents supported legislation that would allow calls, but only from local or community-based organizations with whom they have an existing relationship.¹⁴⁴ The survey showed that consumers were less likely to welcome calls from national companies, although 40 percent indicated that they would allow calls from national organizations with whom they had an existing relationship.¹⁴⁵

In sum, consumers are split over whether they favor an “established business relationship” exemption. Given the difference of opinion among consumers, and industry’s convincing arguments regarding the detrimental effects the lack of an exemption would cause, the Commission is persuaded to provide an exemption for “established business relationships.”

The definition of “established business relationship” in the amended Rule would limit the exemption in the case of inquiries and applications to three months after the date of the application or inquiry (except with the consumer’s express consent or permission to continue the relationship). The Commission believes that a consumer’s reasonable expectations are different in the case of inquiries and applications as compared to purchase, rental, and lease transactions. A simple inquiry or application would reasonably lead to an expectation of a prompt follow-up telephone contact close in time to the initial inquiry or application, not one after an extended period of time. Comments from NYSCPB at the June 2002 Forum also warned of possible abuse in the creation of an “established business relationship” based on inquiries from consumers.¹⁴⁶ The Commission believes three months should be a sufficient time frame in

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ [146]: June 2002 Tr. I at 116 (NYSCPB) (“[D]oes a mere inquiry constitute a business relationship? And our answer to that is no, because we have had some what I would say are really sleazy operators. They will call up and leave a message on your phone. They won’t even identify who they are. They will simply say ‘Call us back, it’s very important.’ You call back out of curiosity or whatever, okay, and then all of a sudden they feel free to bombard you for the next few years with calls.”). The Commission intends that such a practice would not entitle a seller or telemarketer to make calls to consumers by claiming to have an “established business relationship.”

which to respond to a consumer’s inquiry or application.

The amended Rule allows for an 18-month time limit where there has been a purchase, rental or lease, or other financial transaction between the customer and seller. The 18-month time limit for an “established business relationship” based on a purchase, lease, rental, or financial transaction runs from the date of the last payment or transaction, not from the first payment. In instances where consumers pay in advance for future services (*e.g.*, purchase a two-year magazine subscription or health club membership), the seller may claim the exemption for 18 months from the last payment or shipment of the product. For such ongoing relationships, it makes little difference to likely consumer expectations whether the purchase was financed over time or paid for up front. Sellers who provide products or services where the consumer is required to pay in advance can also get the consumer’s express agreement to call, as provided in § 310.4(b)(1)(iii)(B)(i).

Several financial services industry commenters urged that any “established business relationship” exemption should encompass all affiliates of a seller.¹⁴⁷ These commenters noted that regulatory requirements often dictate the corporate structure of financial institutions, which must market products and services across holding company affiliates and subsidiaries.¹⁴⁸ For that reason, they suggested that any exemption for an “established business relationship” should extend to all members of a corporate family, including affiliates and subsidiaries, so long as the individual has an “established business relationship” with any member of that corporate family.¹⁴⁹ They also suggested that agents of the seller be included within the exemption if the consumer reasonably would expect the agent to be included under the exception.¹⁵⁰

The Commission believes that such a broad definition of “established business relationship” is inappropriate in the context of a “do-not-call” registry which is intended to protect consumers’ privacy. As stated earlier, the Commission believes that such an exemption must be narrowly crafted to avoid defeating the purpose of the “do-not-call” registry. In determining whether affiliates or subsidiaries should

¹⁴⁷ See, *e.g.*, BofA-NPRM at 4; Bank One-NPRM at 4; Eagle Bank-NPRM at 2; Roundtable-NPRM at 5; Fleet-NPRM at 4; VISA-NPRM at 3-4.

¹⁴⁸ See Bank One-NPRM at 4; Fleet-NPRM at 4.

¹⁴⁹ See Eagle Bank-NPRM at 2; HSBC-NPRM at 2; Roundtable-NPRM at 5.

¹⁵⁰ See Roundtable-NPRM at 5.

be encompassed within an “established business relationship,” the Commission looks to consumer expectations: If consumers received a call from a company that is an affiliate or subsidiary of a company with whom they have a relationship, would consumers likely be surprised by that call and find it inconsistent with having placed their telephone number on the national “do-not-call” registry?

The Commission used similar reasoning in resolving this issue in connection with the definition of “seller” in the original Rule. In the discussion on the definition of “seller,” the Commission stated that there were several factors that it would consider in determining how it would view the Rule’s application to diversified companies or divisions within one parent organization. Among those factors was “whether the nature and type of goods or services offered by the division are substantially different from those offered by other divisions of the corporation or the corporate organization as a whole.”¹⁵¹ This distinction looks to consumer expectations and whether a consumer would perceive the division to be the same as or different from other divisions or from the corporate organization as a whole. For example, a consumer who had purchased aluminum siding from Company A’s aluminum and vinyl siding subsidiary would likely not be surprised to receive a call from kitchen remodeling service also owned by, and operating under the name of, Company A.

Thus, under the amended Rule, some but not all affiliates will be able to take advantage of the “established business relationship” exemption to the national “do-not-call” registry. The Commission intends that the affiliates that fall within the exemption will only be those that the consumer would reasonably expect to be included given the nature and type of goods or services offered and the identity of the affiliate. The consumer’s expectations of receiving the call are the measure against which the breadth of the exemption must be judged.

§ 310.2(o) — Free-to-pay conversion

Section 310.2(o) of the amended Rule sets out a new definition:—“free-to-pay conversion.” In connection with an offer or agreement to sell or provide goods or services, a “free-to-pay conversion” is “a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take

affirmative action to cancel before the end of that period.” The term “free-to-pay conversion” is the terminology commonly used in the telemarketing industry to describe what was referred to throughout the Rule Review proceeding as a “free trial offer.”¹⁵²

A “free-to-pay conversion” is a form of “negative option feature”—a term that is also newly defined in the amended Rule and is discussed below. The term “free-to-pay conversion” comes into play in the amended Rule in three provisions. First, as a form of negative option feature, any “free-to-pay conversion” is subject to the newly-added disclosure requirements in § 310.3(a)(1)(vii). Second, where a telemarketing offer involves a “free-to-pay conversion,” and is accepted by a consumer using a payment method subject to the express verifiable authorization requirements of § 310.3(a)(3), the seller or telemarketer may not use the written confirmation form of authorization generally available under § 310.3(a)(3)(iii). Third, under the new unauthorized billing provision at § 310.4(a)(6), the amended Rule sets forth specific requirements to obtain express informed consent in any transaction involving preacquired account information and a “free-to-pay conversion.” Each of these provisions is discussed in detail below.

§ 310.2(q)—Material

The amended Rule retains unchanged the definition of “material” from the original Rule, except for extending it to charitable contributions pursuant to the mandate of the USA PATRIOT Act. The Commission received no comments on this definition in response to the NPRM. The amended Rule has deleted the designations for subsections (a) and (b) that had been proposed in the NPRM. This is merely a formatting change and does not alter the substantive content of the definition. The amended Rule’s definition of “material,” therefore, reads: “likely to affect a person’s choice of, or conduct regarding, goods or services or a charitable contribution.”

§ 310.2(t)—Negative option feature

The amended Rule includes new requirements in § 310.3(a)(1)(vii) for specific material disclosures necessary to avoid misleading consumers with respect to offers that entail incurring an

obligation to pay a seller due to the consumers’ non-action. To describe the circumstances when these disclosures must be made, the amended Rule employs the term “negative option feature” and, accordingly, provides a definition of that term in § 310.2(t). A “negative option feature” is any provision under which the consumer’s silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer. This provision includes, but is not limited to, “free-to-pay conversions,” (which are discussed above), as well as negative option plans¹⁵³ and continuity plans.¹⁵⁴ Section 310.3(a)(1)(vii) below provides a detailed discussion of the definition of “negative option feature” and the disclosures necessary when such a provision is a part of an offer to sell goods or services.

§ 310.2(u)—Outbound telephone call

Based on a review of the record, the Commission has decided to retain the definition of “outbound telephone call” that was in the original Rule, and not to expand the definition to include “upsell” transactions, as proposed in the NPRM. Many commenters noted that, by including upselling in the proposed Rule’s definition of “outbound telephone call,” the proposal brought upselling transactions within all of the provisions relating to outbound calls,

¹⁵³ Under a “negative option plan,” the customer agrees to purchase a specific number of items in a specified period of time. The customer receives periodic announcements of the selections; each announcement describes the selection, which will be sent automatically and billed to the customer unless the customer tells the company not to send it. See the Commission’s Rule governing “Use of Negative Option Plans by Sellers in Commerce,” 16 CFR 425.

¹⁵⁴ A “continuity plan” consists of a subscription to a collection or series of goods. Customers are offered an introductory selection and agree to receive additional selections on a regular basis until they cancel their subscription. Unlike negative option plans, customers do not agree to buy a specified number of additional items in a specified time period, but may cancel their subscriptions at any time. Continuity plans resemble negative option plans in that customers are sent announcements of selections and those selections are shipped automatically to the customer unless the customer advises the company not to send them. Unlike negative option plans, however, customers are not billed for the selection when it is shipped, but only if they do not return the selection within the time specified for the free examination period. See, e.g., FTC Facts for Consumers, “Continuity Plans: Coming to You Like Clockwork,” (June 2002), <http://www.ftc.gov/bcp/online/pubs/products/continue.htm>. See also FTC, “Pre-Notification Negative Option Plans” (May 2001) (distinguishing these plans from continuity plans), <http://www.ftc.gov/bcp/online/pubs/products/negative.htm>; and FTC, “Facts for Business: Complying with the Telemarketing Sales Rule,” <http://www.ftc.gov/bcp/online/pubs/buspubs/tsr.htm>.

¹⁵² See, e.g., Electronic Retailing Association, GUIDELINES FOR ADVANCE CONSENT MARKETING, http://www.retailing.org/regulatory/publicpolicy_consent.html; Magazine Publishers of America, Resources - Research: “Advance Consent Subscription Plans,” http://www.magazine.org/resources/advance_consent.html.

which led to unintended and undesirable consequences, such as subjecting upsells to the calling time restrictions and national “do-not-call” registry provisions.¹⁵⁵ The amended Rule addresses upselling transactions separately, rather than attempting to sweep them within the definition of “outbound telephone call.”¹⁵⁶ The amended Rule reinstates the original definition of “outbound telephone call,” with only a modification to reflect the expanded reach of the Rule to charitable contributions pursuant to the USA PATRIOT Act. In the amended Rule, then, an “[o]utbound telephone call” means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.”

§ 310.2(w)—Preacquired account information

The amended Rule adds a definition of “preacquired account information” to address the problems that have been associated with telemarketing transactions where the telemarketer already has access to the customer’s billing information at the time the outbound call is placed.¹⁵⁷ The NPRM discussed these problems at length. The Commission used the term “preacquired account telemarketing” in the NPRM during its discussion of the proposed ban on disclosing or receiving billing information for use in telemarketing, but did not use the term itself in the proposed Rule, and so did not define it.¹⁵⁸ In response, several industry commenters asked for more specificity as to what the Commission intends the term to mean.¹⁵⁹ Thus, the definition of “preacquired account information” also serves to address these commenters’ concerns about clarifying the concept of preacquired account telemarketing.

As explained in detail in the discussion of § 310.4(a)(6) below, the amended Rule sets forth specific requirements for obtaining express informed consent in any telemarketing transaction that involves “preacquired account information.” To clarify the

situations where these requirements come into play, the amended Rule defines “preacquired account information” as:

any information that enables a seller or telemarketer to cause a charge to be placed against a customer’s or donor’s account without obtaining the account number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged.

The Commission intends this definition to be construed broadly. The definition includes any type of billing information, encrypted or unencrypted,¹⁶⁰ that enables a seller or telemarketer to cause a charge to be placed on any customer’s or donor’s account without obtaining the account number directly from the customer or donor. It obviously covers instances where the seller or telemarketer is in actual possession of account information, whether by virtue of some prior relationship with the consumer or otherwise. It also is intended specifically to address affinity marketing campaigns where, for example, through a joint marketing arrangement, Seller A provides access to its customer base and those customers’ accounts or account numbers to Seller B in exchange for a percentage of the proceeds from each sale.¹⁶¹

Some industry members expressed their belief that this second class of transactions does not involve preacquired account information at all because, in such affinity marketing campaigns, Seller B may possess only encrypted account numbers, or no account numbers at all prior to initiating the call to the consumer.¹⁶² The Commission intends to clarify that such an arrangement *does* involve

¹⁶⁰ By “unencrypted,” the Commission means both unencrypted readable account information, and encrypted information in combination with a decryption key. See discussion of amended Rule § 310.4(a)(5) below.

¹⁶¹ See 67 FR at 4513.

¹⁶² ERA/PMA-Supp. at 14; June 2002 Tr. II at 134 (ERA). ERA described such a scenario during the June 2002 Forum:

“What typically might occur is L.L. Bean might enter into some type of [affinity] agreement with Timberland to say, We would like you to sell your boots . . . to our customers. . . . So L.L. Bean would provide the name and telephone number . . . and they might provide some unique identifier, it could be a four digit code. It might be an encrypted code that’s used solely for the purpose of matching back, but the account billing number or any information that would provide access to the account is not transmitted to the telemarketer when you make that call. They make the call to the consumer. They ask the consumer if they want to order the boots. If the customer says yes, that information is then transferred to Timberland. Timberland would go back to L.L. Bean and say, This customer has accepted our offer. We would now like to get the account information to bill the consumer for something that they’ve authorized.”

June 2002 Tr. II at 136-37.

“preacquired account information,” since the seller or telemarketer does not have to obtain the account number from the customer or donor in order to cause a charge to be placed on the customer’s or donor’s account.

Finally, this definition would apply to upsell transactions, because the seller or telemarketer in the upsell transaction may either already possess the account information from the initial transaction, or would, by virtue of a joint marketing or other arrangement, have access to that information, so as to be able to charge the customer without getting the account number directly from the customer in the upsell transaction.

§ 310.2(cc) — Telemarketing

The Commission received very few comments on its proposed definition of “telemarketing,”¹⁶³ but those it did receive expressed agreement that the definition should continue to include the phrase “by use of one or more telephones,” to ensure that large and small telemarketing operations are covered by the Rule.¹⁶⁴ Based on the Commission’s review of the record in this proceeding, the amended Rule retains unchanged the definition of “telemarketing” that was proposed in the NPRM. This definition is virtually the same as that in the original Rule, except that it now includes the phrase “or a charitable contribution” following “goods or services,” pursuant to the mandate of the USA PATRIOT Act.

§ 310.2(dd) — Upselling

As described above in § 310.2(u), the Commission proposed in the NPRM to modify the Rule’s definition of “outbound telephone call” to include most upsell transactions.¹⁶⁵ The majority of commenters who addressed this issue, including both industry members and consumer groups,

¹⁶³ Although few commenters directly addressed this definition, many who commented on the USA PATRIOT Act amendments discussed the expansion of the Rule to cover the solicitation of charitable contributions. These comments are addressed above, in the discussion of amended Rule § 310.1 relating to the scope of the Rule.

¹⁶⁴ DOJ-NPRM at 1 (noting its experience with fraudulent telemarketers operating using only one or two telephones); Patrick-NPRM at 2 (urging that the practice of subcontracting telemarketing to individual sales agents who work from their homes using their home phones continue to be captured by the Rule).

¹⁶⁵ Specifically, the Commission proposed amending the definition to mean “any telephone call to induce the purchase of goods or services or to solicit a charitable contribution, when such telephone call: (1) is initiated by a telemarketer; (2) is transferred to a telemarketer other than the original telemarketer; or (3) involves a single telemarketer soliciting on behalf of more than one seller or charitable organization.” Proposed Rule § 310.2(t), 67 FR at 4541.

¹⁵⁵ See, e.g., ABA-NPRM at 4; AmEx-NPRM at 6; AFSA-NPRM at 16; Associations-NPRM at 3; Cendant-NPRM at 2; CCC-NPRM at 13; Cox-NPRM at 6; KeyCorp-NPRM at 6; Metris-NPRM at 9; MBA-NPRM at 4; NBCECP-NPRM at 2; NCTA-NPRM at 13-14; PCIC-NPRM at 1; PMA-NPRM at 10-11; Time-NPRM at 10; VISA-NPRM at 8; Wells Fargo-NPRM at 5-6.

¹⁵⁶ See § 310.2(dd), defining the term “upselling” in the amended Rule.

¹⁵⁷ See discussions of amended Rule § 310.4(a)(5) and (6) below.

¹⁵⁸ See 67 FR at 4512-14.

¹⁵⁹ See, e.g., June 2002 Tr. II at 123-24 (CCC), 133-34 (ERA) and 173 (ATA); PMA-NPRM at 13-14; MPA-Supp. at 5; PRA-NPRM at 13-14.

supported the proposition that upsells should be expressly included in the Rule.¹⁶⁶ Most of these commenters, however, suggested that the Commission's proposal to address the problem by expanding the definition of "outbound telephone call" to include upselling was not the most effective way to achieve this goal.¹⁶⁷ Instead, many commenters recommended treating upsells as a distinct type of transaction by adding a definition of "upselling" to the Rule and specifying a unique set of disclosures required in upsell transactions.¹⁶⁸ Others suggested retaining the expanded definition of "outbound telephone call" but amending it to avoid application of certain provisions unnecessary or inappropriate to the upselling context,¹⁶⁹ such as application of the "do-not-call" and calling time provisions of the Rule, to upsells.¹⁷⁰ The Commission does not intend for upselling to be subject to the "do-not-call" requirements or the calling time restrictions in the Rule.¹⁷¹ The goal of

¹⁶⁶ See, e.g., AmEx-NPRM at 6 ("We agree with the Commission that the disclosure requirements of the TSR should apply whenever a new offer is made to the consumer, whether by the original telemarketer or a telemarketer to whom a call is transferred. Consumers should always be informed of material terms and conditions before they purchase a product."); ERA-NPRM at 8, 11 ("The ERA is cognizant of the fact that the practice of upselling has increased dramatically since the Rule was originally promulgated in 1995. . . . The ERA acknowledges the Commission's desire to include upsells within the ambit of the Rule and supports the position that, in instances where solicitations are made during a single telephone call on behalf of multiple unaffiliated entities, there should be a clear disclosure. . . ."); ERA-Supp. at 6; LSAP-NPRM at 6; NAAG-NPRM at 36; NCL-NPRM at 3; PMA-NPRM at 4, 8 ("PMA acknowledges that the practice of marketing products and services via upsell offers has increased in recent years and that the existing TSR does not provide express guidance regarding responsible marketing practices via the upsell channel."); June 2002 Tr. II at 213-15, 249-50. *But see* CCC-NPRM at 15-16; CMC-NPRM at 7; Household Auto-NPRM at 3; Keycorp-NPRM at 5-6; Noble-NPRM at 3; NATN-NPRM at 3-4; NSDI-NPRM at 4; PCIC-NPRM at 1-2; Technion-NPRM at 5.

¹⁶⁷ AmEx-NPRM at 6; ARDA-NPRM at 4; DMA-NPRM at 38; ERA-NPRM at 8, 12; Household Auto-NPRM at 3; ICT-NPRM at 2; E-Commerce Coalition-NPRM at 2; NCTA-NPRM at 14; PMA-NPRM at 8-10; SIIA-NPRM at 3; Time-NPRM at 9; June 2002 Tr. II at 213-14.

¹⁶⁸ See, e.g., ERA-NPRM at 14-15; ERA-Supp. at 6; PMA-NPRM at 8-10.

¹⁶⁹ ARDA-NPRM at 4; Cox-NPRM at 36; Discover-NPRM at 5; Eagle Bank-NPRM AT 4; NCL-NPRM at 3.

¹⁷⁰ ABA-NPRM at 4-5; AFSA-NPRM at 15; ARDA-NPRM at 4; CCC-NPRM at 13; DMA-NPRM at 38; Eagle Bank-NPRM at 4; NCTA-NPRM at 14; PMA-NPRM at 10; SIIA-NPRM at 3; Time-NPRM at 10. The "do-not-call" provision is found at proposed and amended Rules § 310.4(b)(1)(iii), while the calling time restrictions are at proposed and amended Rules § 310.4(c).

¹⁷¹ June 2002 Tr. II at 213-15.

the initial proposal,¹⁷² and the focus of the current amendments, is to ensure that consumers in upselling transactions receive the same information and protections as consumers in other telemarketing transactions subject to the Rule.

Based upon the comments received during the rulemaking period and the Commission's law enforcement experience, the Commission has taken a two-fold approach to upselling in the amended Rule. The Commission has added a definition of "upselling," which, in combination with certain amendments to §§ 310.4(d) and 310.6 of the Rule,¹⁷³ provides important protections to consumers who, after completing one transaction, are offered goods or services in an additional telemarketing transaction during the same telephone call.¹⁷⁴ By including the definition, the Commission intends to clarify that upsells are subject to all of the Rule's requirements except the "do-not-call" and calling time restrictions in §§ 310.4(b)(1)(iii) and 310.4(c).¹⁷⁵ With this definitional shift, the "do-not-call" regime no longer applies to upsells, since the "do-not-call" provisions specifically prohibit "initiating outbound telephone calls" to anyone

¹⁷² See 67 FR at 4500.

¹⁷³ Section 310.4(d) now includes the phrase "or internal or external upsell" after "outbound telephone call" to clearly state that the basic disclosure requirements of that provision—the identity of the seller, that the purpose of the call is to sell goods or services, the nature of the goods or services, and disclosures related to prize promotions—must be made in any upsell associated with an initial telephone transaction. Sections 310.6(b)(4), (5) and (6) have been amended to expressly exclude upsells from these exemptions.

¹⁷⁴ The provisions relating to "upselling" address the practices which the Commission had proposed to address in the NPRM through modification of the definition of "outbound telephone call." Because the amended Rule addresses the practice of "upselling" in a different manner, the amended Rule retains unchanged the wording in the original Rule for the definition of "outbound telephone call" (now expanded to cover calls to induce charitable contributions, pursuant to the USA PATRIOT Act). See § 310.2(u) of the amended Rule.

¹⁷⁵ In the NPRM, the Commission noted that in addition to the disclosure requirements of § 310.4(d) (and the proposed disclosures of § 310.4(e)), the disclosures in § 310.3(a)(1):

"would, of course, also have to be made by each telemarketer. In fact . . . the Commission believes that [in any upsell] it is necessary for this transaction to be treated as separate for the purposes of complying with the TSR. Therefore, in such an instance, the telemarketer should take care to ensure that the customer/donor is provided with the necessary disclosures for the primary solicitation, as well as any further solicitation. Similarly, express verifiable authorization for each solicitation, when required, would be necessary. Of course, even absent the Rule's requirement to obtain express verifiable authorization, telemarketers must always take care to ensure that the consumer's or donor's explicit consent to the purchase or contribution is obtained."

67 FR at 4500, n.71.

who has placed their telephone numbers on a company-specific "do-not-call" list or on the FTC's "do-not-call" registry.¹⁷⁶ Second, the amended Rule expressly excludes upsell transactions from the exemptions in §§ 310.6(b)(4), (5) and (6)—*i.e.*, where the initial transaction is exempted from the Rule because the call was initiated by the consumer unilaterally or because it was initiated in response to a direct mail solicitation or general media advertisement.¹⁷⁷

The definition of "upselling" encompasses any solicitation for goods or services that follows an initial transaction of any sort in a single telephone call. Thus, both solicitations made by or on behalf of the same seller involved in the initial transaction, and those made by or on behalf of a different seller are considered upsells, and both types of transactions are covered by the Rule.¹⁷⁸ 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 sales offers, customer service calls initiated by either the seller or telemarketer or the consumer, consumer inquiries, or responses to general media advertisements or direct mail solicitations. The upsell is defined as a "separate telemarketing transaction, not a continuation of the initial transaction" to emphasize that an upsell is to be treated as a new telemarketing call, independently requiring adherence to all relevant provisions of the Rule.¹⁷⁹

Upselling occurs in a wide variety of circumstances—as an addendum to a customer service call, or after an initial

¹⁷⁶ See § 310.4(b)(1)(iii).

¹⁷⁷ Treating upsells as "outbound telephone calls" meant that they were implicitly not covered by any of these exemptions (which all involve inbound telephone calls of one sort or another). Creating a separate definition for "upselling" requires that the Commission explicitly address which of the exemptions in § 310.6 of the Rule do not apply to upselling.

¹⁷⁸ In the NPRM, the Commission focused its analysis of upselling on whether there were one or two telemarketers or sellers involved in the upsell transaction. After reviewing the record in this matter, the Commission believes that the salient distinction is whether a separate offer is made in the course of a single telephone call.

¹⁷⁹ This definition also addresses the concerns of some telemarketers that simply transferring a consumer-initiated call to the individual most qualified to address the consumer's inquiry would trigger the application of the Rule to that otherwise exempt transaction. See, e.g., CMC-NPRM at 7-8; Cox-NPRM at 35; Eagle Bank-NPRM at 4; HSBC-NPRM at 2. Instead of focusing on the transfer of a call, the definition of "upselling" centers on the instigation of an offer for sale of goods or services subsequent to an initial transaction. Thus, where a consumer calls a company, makes an inquiry, and is *immediately* transferred in direct response to that inquiry, that transfer would not fall within the definition of "upselling" and would not be subject to the Rule.

offer of goods or services via an inbound or outbound telephone call, for example.¹⁸⁰ The upsell can be made by or on behalf of the same seller involved in the initial transaction (“internal upsell”), or a different seller (“external upsell”).¹⁸¹ Commenters argue that upsell transactions provide benefits to both sellers and consumers. According to some industry commenters, sellers can reduce costs associated with telemarketing by linking transactions together in a single call,¹⁸² and are more likely to make successful sales to consumers already predisposed to the transaction.¹⁸³ Consumers can benefit from the convenience of such transactions, and from receiving more targeted marketing offers.¹⁸⁴ Industry commenters also suggested that sellers’ reduced costs in such transactions are passed along as savings to consumers.¹⁸⁵

Despite these benefits, upsells are no less vulnerable to abuse than other telemarketing practices, and provide the potential for harm to consumers. Some industry commenters argued that this is not the case, suggesting that, particularly when the call is initiated by the consumer: “The consumer calling a

¹⁸⁰ See, e.g., NAAG-NPRM at 33 (“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. . . . Some examples are the upsell of membership programs, magazines and the like or a television solicitation to buy an inexpensive lighting product that includes an upsell of a costly membership program, consumers sold a membership program when attempting to purchase United States flags following the September 11, 2001, tragedy, or tickets to entertainment events.”) (citations omitted). Industry commenters emphasized the prevalence of upselling in the inbound call context generally. See, e.g., CCC-NPRM at 12; ERA-NPRM at 11-12; PMA-NPRM at 9-10.

¹⁸¹ The NPRM described these forms of upselling as “internal” and “external.” 67 FR at 4496. Some commenters, such as ERA, noted that the industry refers to multiple offers by a single seller—what the Commission calls an “internal upsell”—as a “cross sell,” and to multiple offers by separate sellers—what the Commission calls an “external upsell”—as an “upsell.” ERA-NPRM at 9, n.3. The Commission’s approach, however, does not appear to have caused any confusion in the industry, or on the consumer side. So, for the sake of consistency both within the rulemaking process and with existing law enforcement cases, the Commission has decided to retain these terms as originally proposed.

¹⁸² See, e.g., PMA-NPRM at 9.

¹⁸³ CCC determined that 14 billion inbound calls are made per year, of which 40 percent have an upsell associated with them. June 2002 Tr. II at 218. ERA estimated, based on a 12 percent conversion rate, that approximately \$1.5 billion in sales are generated through inbound upsells alone each year. ERA-NPRM at 11. Aegis estimated the conversion rate for consumers accepting upsell offers at between 25 and 30 percent. Aegis-NPRM at 4.

¹⁸⁴ DMA-NPRM at 40; PMA-NPRM at 10; SIIA-NPRM at 3.

¹⁸⁵ ERA-NPRM at 12; PMA-NPRM at 10; SIIA-NPRM at 3.

business voluntarily puts herself in a business environment and knows that she is doing so. It should come as no surprise to the consumer if, once in that environment, she is solicited for products and services provided by affiliates or partners of the business . . .”¹⁸⁶

According to NCL, however, “[c]omplaints to the NFIC [National Fraud Information Center] indicate that abuses can occur when consumers who respond to an advertisement for one thing are then solicited for something else, especially if the new offer is significantly different than the original one or is from another vendor. In these situations, the only information that consumers have on which to decide whether to make a purchase or donation is that which is provided during the call.”¹⁸⁷ In other words, in any upsell, the seller or telemarketer initiates the offer; it is not the consumer who solicits or requests the transaction. This means that the consumer is hearing the terms of that 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. This makes an upsell very much akin to an outbound telephone call from the consumer’s perspective, even when the seller is someone with whom the consumer is familiar. Thus, as NCL noted, every consumer needs “the same basic disclosures about who they’re dealing with, what they’re buying and the terms and conditions [of the offer]” regardless of the nature of the telephone sale.¹⁸⁸ The disclosure provisions of §§ 310.3(a) and 310.4(d) were designed to ensure that consumers know they are being offered goods or services for sale, and receive all information material to their decision to accept an offer before they pay for the purchase.

Moreover, it should be noted that the introductory paragraphs of §§ 310.3(a), 310.4(a) and 310.5 do not distinguish between types of telemarketing transactions.¹⁸⁹ The Rule is clear that its

¹⁸⁶ CMC-NPRM at 9. See also Citigroup-NPRM at 6-7; Fleet-NPRM at 5; Household Auto-NPRM at 4.

¹⁸⁷ NCL-NPRM at 3. Accord ERA-NPRM at 11 (“The ERA is . . . aware of the fact that there have been some marketers who have engaged in unscrupulous marketing practices in soliciting purchases via upsells, particularly when such upsells involve a free trial offer and/or other advance consent marketing technique.”).

¹⁸⁸ June 2002 Tr. II at 221-22.

¹⁸⁹ Section 310.3(a) states “it is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the

requirements and prohibitions apply to *all sellers and telemarketers* that are subject to the Commission’s jurisdiction. Thus, a seller or telemarketer subject to the Rule must abide by the requirements of these sections, regardless of whether they are engaged in an initial telemarketing transaction or in an upsell transaction. Indeed, the Commission assumes that, where the initial transaction is subject to the Rule, most sellers and telemarketers treat the upsell as subject to the Rule as well, and comply with the Rule’s requirements in both segments of the telephone call.¹⁹⁰

The Commission also finds that consumers should have the Rule’s billing protections in each of these transactions. CCC suggested that, at least in inbound calls that include upsells, consumers have “the highest level of consumer protection because the consumer is specifically asked and consents to the additional goods or services being charged to the same billing source the consumer provided and/or accessed just moments before.”¹⁹¹ However, the Commission’s and states’ law enforcement experience does not support CCC’s assertion that, by giving consent to the use of an account number in an initial transaction, the consumer in an upsell is afforded protection from deception or unauthorized billing.¹⁹²

following conduct.” (emphasis added). Similarly, § 310.4(a) states “it is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct.” (emphasis added). Section 310.5(a) states “any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities.”

¹⁹⁰ The record suggests, however, that the opposite is true when upsells are appended to calls that are otherwise exempt from the Rule. In these instances, the upsells have been treated as part of the exempt telemarketing transaction and, thus, consumers are not receiving the protections the Rule requires when a consumer receives an outbound telephone call, despite the fact that upsells are similar to outbound calls from the consumer’s perspective. See, e.g., PCIC-NPRM at 1-2. The Commission believes that the protections provided a consumer in an upsell should be the same as the protections accorded to consumers receiving an outbound telephone call, regardless of whether the upsell is appended to an exempt telemarketing transaction or to a transaction subject to the Rule. As noted above, consumer advocates and the FTC’s law enforcement experience confirm that upselling can be equally or more problematic, and thus sellers and telemarketers engaged in upselling should be required to provide the basic disclosures mandated by the Rule. In addition, there is no evidence to suggest that upsells should not be subject to any other part of the Rule (other than the “do-not-call” and calling time restrictions).

¹⁹¹ CCC-NPRM at 12.

¹⁹² Indeed, law enforcement experience indicates that the fact that the consumer has already provided or authorized use of his or her billing information

Continued

Other recommendations

Limitations to the definition of "upselling." Some commenters suggested that the definition of "upselling" be limited to "external upselling" transactions (*i.e.*, where there are two different sellers in the two transactions).¹⁹³ They argued that any requirements that the Commission might apply to "upselling" should not include upsells made by or on behalf of the same seller.¹⁹⁴ However, the Commission believes that law enforcement experience indicates that "internal upsells" (where both transactions are by or on behalf of the same seller) have as much potential for deception and abuse as other types of telemarketing transactions that are subject to the Rule's requirements.¹⁹⁵ Therefore, the Commission has not adopted this suggestion.

Other commenters argued that the definition of "upselling" should not include upsells by "affiliates."¹⁹⁶ Still others made more specific requests to exempt banks, their affiliates and non-affiliated third parties who provide services on the banks' behalf or with whom the banks have joint marketing relationships;¹⁹⁷ to exempt agents or affiliates of common carriers;¹⁹⁸ and to exempt affiliates of insurance companies.¹⁹⁹ However, once again, there is scant support justifying such an approach. On the contrary, the record as

in an initial transaction may actually result in greater risk of abuse during the second transaction. For example, in actions by the FTC and several states against Triad Discount Buying Service, Inc., and related entities, the Commission and the states alleged that the defendants crafted a marketing campaign designed to lure consumers to call solely for the purpose of upselling them. *See FTC v. Smolev*, No. 01-8922-CIV ZLOCH (S.D. Fla. 2001). Specifically, the Commission and states alleged that the defendants ran an advertising campaign for a free product, inviting consumers to call a toll-free number. When they called, consumers were asked to provide account information to pay for shipping and handling for the free product, and then were upsold a "free trial" in a membership club or buyers club, that was then charged, without the consumer's knowledge or consent, to the account provided by the consumer to pay for the shipping of the first product. *See also* NAAG-NPRM at 30, n.73 (*citing*, among others such cases, *Illinois v. Blitz Media, Inc.* (Sangamon County, No. 2001-CH-592) and *New York v. Ticketmaster and Time, Inc.*, (Assurance of Discontinuance)).

¹⁹³ ERA-NPRM at 9; NCTA-NPRM at 14.

¹⁹⁴ *Id.*

¹⁹⁵ *See* NAAG-NPRM at 30, n.73, *citing* cases involving internal upsells, including but not limited to *Illinois v. Blitz Media, Inc.* (Sangamon County, Case No. 2001-CH-592); *Triad Discount Buying Serv., Inc.* [a/k/a *Smolev*] and related entities; and *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001).

¹⁹⁶ ABIA-NPRM at 5; AFSA-NPRM at 15; NFC-NPRM at 6.

¹⁹⁷ ABIA-NPRM at 5; MBA-NPRM at 3.

¹⁹⁸ SBC-NPRM at 2, 5, 8.

¹⁹⁹ PCIC-NPRM at 1-2.

a whole and law enforcement experience indicate that upsells by affiliates and non-affiliated third parties with whom there is a joint marketing relationship have as much potential for deception and abuse as other types of telemarketing transactions that are subject to the Rule's requirements.²⁰⁰

The Commission has made it very clear that the Rule does not apply to entities or activities that fall outside the Commission's authority under the FTC Act, such as banks, savings associations and federal credit unions; regulated common carriers, and the business of insurance. However, the Commission has also made it very clear that the exemption enjoyed by those entities does not extend to any third-party telemarketers who may make or receive calls on behalf of those exempt entities. As the Commission stated in the SBP for the original Rule:

The Commission is not aware of any reason why the Final Rule should create a special exemption for such companies where the FTC Act does not do so. Accordingly, the Final Rule does not include special provisions regarding exemptions of parties acting on behalf of exempt organizations; where such a company would be subject to the FTC Act, it would be subject to the Final Rule as well.²⁰¹

Clarification of "seller" in an upsell transaction. ERA and PMA recommended that the Commission clarify what is meant by "seller" in the context of upselling.²⁰² First, ERA and PMA suggested that "seller" be construed as the marketer who will submit the charge for payment against the consumer's account.²⁰³ As ERA stated:

[A] marketer might offer (and bill) a consumer for a product that it obtains on a wholesale basis from a manufacturer (in many instances, the marketer may not even take possession of the product, but rather have the manufacturer ship directly to the purchaser). Both the marketer and the manufacturer receive consideration in exchange for providing, or arranging for the other to provide, the product to the consumer. Thus, both entities are arguably 'sellers.' However, only the marketer will bill the consumer for the sale. As such, there should be no need to identify both entities

²⁰⁰ *See* NAAG-NPRM at 30, n.73 ("States have taken actions against companies using preacquired information as part of an upsell of membership programs or magazines. *See* note 188. *See also* *New York v. Ticketmaster and Time, Inc.* (Assurance of Discontinuance)").

²⁰¹ 60 FR at 43843.

²⁰² ERA-NPRM at 9-10; PMA-NPRM at 12-13. *See also* VISA-NPRM at 9 (requesting clarification of the term in all transactions, not just those involving upselling).

²⁰³ ERA-NPRM at 10; PMA-NPRM at 13.

to the consumer. In fact it would likely be confusing to the consumer to do so.²⁰⁴

The Commission has retained in the amended Rule the definition of "seller," which states that a "seller" is "any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration."²⁰⁵ The Commission believes that this definition makes clear that, for purposes of the Rule, a "seller" is not necessarily the manufacturer of a product, nor the sole financial beneficiary from its sale. Rather, the definition of "seller" is predicated upon a person's provision of goods or services—whether consummated, merely offered, or even simply "arranged for"—to the customer. Therefore, in the case of an upselling transaction, or, indeed, any telemarketing transaction, the marketer or other entity who provides, offers to provide, or arranges for the provision of the goods or services that are the subject of the offer would be the "seller" for purposes of the Rule.

Second, both ERA and PMA, as well as a number of other commenters, suggested that the Commission "clarify that affiliated entities do not constitute separate sellers."²⁰⁶ To this end, ERA recommended looking to the Commission's Privacy of Consumer Financial Information Rule,²⁰⁷ while PMA and NRF suggested using the standard laid out by the FCC for "do-not-call" purposes.²⁰⁸ NCL and AARP disagreed. NCL stated:

We believe affiliates have to be treated as second sellers. They may be selling totally different products with different terms and conditions. Consumers don't have any way of knowing what is an affiliate of that company and what isn't, and ultimately it doesn't really matter to them because they need the same basic disclosures about who they're dealing with, what they're buying and the terms and conditions, whether it's entirely a different seller or an affiliate of the original one.²⁰⁹

²⁰⁴ ERA-NPRM at 11.

²⁰⁵ Amended Rule § 310.2(z).

²⁰⁶ ERA-NPRM at 10. *See also* June 2002 Tr. II at 222 (ATA); PMA-NPRM at 13; SBC-NPRM at 9.

²⁰⁷ The Privacy of Consumer Financial Information Rule, 16 CFR 313.3(a), defines an affiliate as "any company that controls, is controlled by or is under common control with another company," (quoted in ERA-NPRM at 11).

²⁰⁸ The applicable definition in the FCC's regulations is found at 47 CFR 64.1200(e)(2)(v). PMA-NPRM at 13 ("Thus, we suggest that corporate affiliates be exempt in those situations where the consumer would reasonably expect such affiliates to be related to the original seller."). *See also* June 2002 Tr. II at 217-18; and at 226-28 (NRF).

²⁰⁹ June 2002 Tr. II at 221-22; and at 228 (AARP).

The Commission shares this viewpoint. As discussed above, the record in this matter, as well as law enforcement experience, indicate that upsells by affiliates and non-affiliated third parties with whom there is a joint marketing relationship have as much potential for deception and abuse as other types of telemarketing transactions that are subject to the Rule's requirements. For that reason, the Commission believes that affiliates should be treated as separate sellers for purposes of upsell transactions.

C. Section 310.3 — Deceptive Telemarketing Acts or Practices.

Section 310.3 of the original Rule sets forth required disclosures that must be made in every telemarketing call; prohibits misrepresentations of material information; requires that a telemarketer obtain a customer's express verifiable authorization before obtaining or submitting for payment a demand draft; prohibits false and misleading statements to induce the purchase of goods or services; holds liable anyone who provides substantial assistance to another in violating the Rule; and prohibits credit card laundering in telemarketing transactions.

In the NPRM, the Commission proposed amendments to require that disclosures made pursuant to this section be made "truthfully;" require additional disclosures regarding prize promotions and in the sale of credit card loss protection plans; prohibit misrepresentations in the sale of credit card loss protection plans; expand the reach of the express verifiable authorization provision to include all methods of payment lacking certain key consumer protections; and make certain changes pursuant to the USA PATRIOT Act, which extends the coverage of the Rule to include the inducement of a charitable solicitation.

Based on the record in this proceeding, the Commission has determined to make additional modifications in the amended Rule. These changes, and the reasoning supporting the Commission's decisions, are set forth below.

§ 310.3(a)(1) — Required disclosures

Section 310.3(a)(1) of the original Rule requires the seller or telemarketer to disclose, in a clear and conspicuous manner, certain material information before a customer pays for goods or services offered.²¹⁰ The NPRM proposed to make a minor modification to the

wording, by adding the word "truthfully" to clarify that it is not enough that the disclosures be made; the disclosures must also be true. The Commission received no comment on this proposed change, and therefore has determined to retain this additional wording in amended § 310.3(a)(1).

The few comments that the Commission received on § 310.3(a)(1) in response to the NPRM focused primarily on the timing of the required disclosures. AARP argued that, to be meaningful, the disclosures required by this section must be given before payment is requested, not merely before it is "collected."²¹¹ According to AARP, "[s]uch information is key to making truly informed buying decisions," and so all the necessary disclosures should be given before a consumer is requested to pay for goods and services.²¹² DOJ commented that the use of money-transmission services, rather than couriers, is increasingly popular in fraudulent telemarketing schemes, and recommended that the Commission amend the current footnote addressing the meaning of "before the customer pays" to state: "Similarly, when a seller or telemarketer directs a customer to use a money-transmission service to wire payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before directing the customer to take money to an office or agent of a money-transmission service to wire payment."²¹³

In the SBP for the original Rule, the Commission noted that for a telemarketer to make the required disclosures "before a customer pays," the disclosures must be made "before the consumer sends funds to a seller or telemarketer or divulges to a telemarketer or seller credit card or bank account information."²¹⁴ In the original Rule's TSR Compliance Guide, the Commission further clarified that the disclosures required by § 310.3(a)(1) must be made "[b]efore a seller or telemarketer obtains a consumer's consent to purchase, or persuades a consumer to send any full or partial payment. . . ."²¹⁵ The Guide goes on to say that "[a] seller or telemarketer also must provide the required information before requesting any credit card, bank account, or other information that a seller or telemarketer will or could use to obtain payment."²¹⁶ The Commission believes that its statements to date on

the meaning of the term "before the customer pays" are sufficiently clear and declines to modify this provision.

§ 310.3(a)(1)(i) — Disclosure of total costs

Section 310.3(a)(1)(i) of the original Rule requires a seller or telemarketer to disclose the total costs to purchase, receive, or use the goods or services. As noted in the TSR Compliance Guide, "[i]t is sufficient to disclose the total number of installment payments, and the amount of each payment, to satisfy this requirement."²¹⁷ Some commenters in the Rule Review urged the Commission to require, in sales involving monthly installment payments, the disclosure of the total cost of the entire contract, not just the amount of the periodic installment.²¹⁸ In the NPRM, the Commission declined to modify the provision, but clarified that "the disclosure of the number of installment payments and the amount of each must correlate to the billing schedule that will actually be implemented. Therefore, to comply with the Rule's total cost disclosure provision, it would be inadequate to state the cost per week if the installments are to be paid monthly or quarterly."²¹⁹ The NPRM further noted that the best practice to ensure compliance with the clear and conspicuous standard governing all the § 310.3(a)(1) disclosures is to "do the math" for the consumer, stating the total cost of the contract whenever possible.²²⁰ The Commission acknowledged that such a statement might not be possible in an open-ended installment contract, and stated that in such contracts, "particular care must be taken to ensure that the cost disclosure is easy for the consumer to understand."²²¹

In response to the NPRM, the Commission again received some comments urging that the Commission affirmatively mandate that, in installment sales contracts, the total cost of the contract be disclosed, rather than the number and amount of payments.²²² For example, LSAP opined that "it is illogical to maintain a provision that demands a subjective determination of whether or not a disclosure meets a 'clear and conspicuous' standard when an objective and unambiguous standard

²¹⁷ *Id.* at 12.

²¹⁸ *See* 67 FR at 4502.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at n.92.

²²² *See, e.g.*, LSAP-NPRM at 6-8; NACAA-NPRM at 7-8; NCL-NPRM at 3-4; NCLC-NPRM at 13.

²¹¹ AARP-NPRM at 8.

²¹² *Id.*

²¹³ DOJ-NPRM at 2.

²¹⁴ 60 FR at 4384.

²¹⁵ TSR Compliance Guide at 11.

²¹⁶ *Id.*

²¹⁰ *See* ARDA-NPRM at 5 (noting that ARDA members support the current disclosures required by this section).

can be adopted.”²²³ NACAA suggested that the Commission require disclosure of the total cost of the contract, noting that consumers do not always have the time or ability to “do the math” during a telemarketing call.²²⁴ NCL concurred with LSAP and NACAA, and noted that since the seller or telemarketer would know the total contract price in an installment offer, it would impose no undue burden on industry members to mandate disclosure of the total contract price.²²⁵

The Commission declines to adopt the recommendations to modify the total cost disclosure provision. The Commission believes that its interpretation, set forth in the NPRM, allows sellers and telemarketers the flexibility necessary to make a truthful and meaningful disclosure when goods or services are offered in conjunction with an open-ended installment agreement. The Commission’s interpretation makes clear, however, that, at a minimum, the total number of payments and the amount of each must be clearly and conspicuously disclosed in order to satisfy the requirements of § 310.3(a)(1)(i). Although the Commission continues to believe that the best practice is for the telemarketer or seller to disclose the full amount of payments under of the contract whenever possible, it declines to impose such a requirement, which would be unworkable in the context of open-ended contracts, such as negative option plans.²²⁶

The Commission also declines to adopt the recommendation that the Commission explicitly state that for electricity sales, it is permissible to disclose the price per kilowatt hour.²²⁷ The Commission recognizes that a vast number of goods and services can be sold through telemarketing, and believes it unnecessary to specify, for each, the specific terms that must be disclosed. Rather, the Commission believes that the language of § 310.3(a)(1)(i), which requires that the disclosure of total costs (among others) be made “truthfully, and in a clear and conspicuous manner,” provides sufficient guidance for sellers who must make these disclosures, without necessitating explicit approval from the Commission for each of the

myriad variations of “total cost” disclosures for the many kinds of goods and services sold through telemarketing. Therefore, § 310.3(a)(1)(i) is retained unchanged in the amended Rule.

§ 310.3(a)(1)(ii) — Disclosure of material restrictions

Section 310.3(a)(1)(ii) requires the disclosure of “[a]ll material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer.” In response to the Rule Review, NAAG recommended that this provision explicitly state that the illegality of the goods or services offered is a material term. NAAG’s concern arose out of the numerous cross-border foreign lottery scams in which U.S. citizens are offered the sale of foreign lottery chances.²²⁸ The Commission declined to modify the Rule, stating its position that the term “material” is “sufficiently clear and broad enough to encompass the illegality of goods or services offered.”²²⁹

In response to the NPRM, DOJ supported NAAG’s reasoning, and recommended that the Commission add to § 310.3(a)(1)(ii) “a specific and unambiguous reference to the illegality of goods and services that the seller or telemarketer is offering,” noting that such an amendment would enhance law enforcement and consumer education efforts regarding foreign lottery scams.²³⁰ The Commission remains confident that the breadth of the term “material,” as used in the Rule, would necessarily encompass the underlying illegality of goods or services offered in telemarketing.²³¹ Therefore, the Commission declines to modify the language in this provision and the amended Rule retains unchanged the original text of § 310.3(a)(1)(ii).

§ 310.3(a)(1)(iv) — Disclosures regarding prize promotions

Section 310.3(a)(1)(iv) requires that, in any prize promotion, a telemarketer must disclose, before a customer pays, the odds of being able to receive the prize, that no purchase or payment is required to win a prize or participate in a prize promotion, and the no-purchase/no-payment method of participating in the prize promotion. In the NPRM, the Commission proposed adding a disclosure that making a purchase will

not improve a customer’s chances of winning,²³² which would make the TSR’s disclosure provision consistent with the requirements for direct mail solicitations under the Deceptive Mail Prevention and Enforcement Act of 1999 (“DMPEA”).²³³ After reviewing the record in this matter, the Commission has determined to amend the Rule by adding this disclosure requirement to two provisions: in § 310.3(a)(1) (governing all telemarketing calls), and in § 310.4(d) (governing outbound telemarketing).²³⁴

As noted in the NPRM, the Commission believes that this disclosure will prevent consumer deception. The legislative history of the DMPEA suggests that without such a disclosure, many consumers reasonably interpret the overall presentation of many prize promotions to convey the message that making a purchase will enhance their chances of winning the touted prize.²³⁵ Such a message is likely

²³² 67 FR at 4503. Although NCL originally made this suggestion with respect to § 310.4(d), which governs oral disclosures required in outbound telemarketing calls, the rationale and purpose of the proposed disclosure applies with equal force to all telemarketing, as covered by § 310.3(a). See NCL-RR at 9. See also the discussion below in the section on sweepstakes disclosures within the analysis of § 310.4(d).

²³³ 67 FR at 4503. The DMPEA is codified at 39 U.S.C. 3001(k)(3)(A)(II). See also “The DMA Guidelines for Ethical Business Practice,” revised Aug. 1999, at <http://www.the-dma.org/library/guidelines/dotherighthing.shtml#23> (Article #23, Chances of Winning). In this regard, it is noteworthy that the DMA’s Code of Ethics advises that “[n]o sweepstakes promotion, or any of its parts, should represent . . . that any entry stands a greater chance of winning a prize than any other entry when this is not the case.”

²³⁴ See discussion below regarding the disclosure in § 310.4(d).

²³⁵ See SEN. REP. NO. 106-102 (1999); and H. REP. NO. 106-431 (1999). Law enforcement actions since enactment of DMPEA further support this conclusion. For example, Publishers Clearing House (“PCH”) agreed to settle an action brought by 24 states and the District of Columbia alleging, among other things, that the PCH sweepstakes mailings deceived consumers into believing that their chances of winning the sweepstakes would be improved by buying magazines from PCH. As part of the settlement, PCH agreed to include disclaimers in its mailings stating that buying does not increase the consumer’s chances of winning, and pay \$18.4 million in redress. In 2001, PCH agreed to pay \$34 million in a settlement with the remaining 26 states. See, e.g., *Missouri ex rel. Nixon v. Publishers Clearing House*, Boone County Circuit Ct., No. 99 CC 084409 (2002); *Ohio ex rel. Montgomery v. Publishers Clearing House*, Franklin County Ct. of Common Pleas, No. 00CVH-01-635 (2001). Similarly, in 1999, American Family Publishers (“AFP”) settled several multi-state class actions that alleged the AFP sweepstakes mailings induced consumers to buy magazines to better their chances of winning a sweepstakes. The original suit, filed by 27 states, was settled in March 1998 for \$1.5 million, but was reopened and expanded to 48 states and the District of Columbia after claims that AFP had violated its agreement. The state action was finally settled in August 2000 with AFP agreeing to pay an additional \$8.1 million in

²²³ LSAP-NPRM at 7.

²²⁴ NACAA-NPRM at 7-8 (citing, as an example of the harm that would persist absent such a provision, the sale of purportedly “free” magazines, for which consumers are billed exorbitant “shipping and handling” fees).

²²⁵ NCL-NPRM at 3-4.

²²⁶ See 60 FR at 43846 (noting that the total cost of a contract cannot be ascertained in negative option or continuity plans).

²²⁷ See Green Mountain-NPRM at 7.

²²⁸ 67 FR at 4502-03.

²²⁹ *Id.* at 4503.

²³⁰ DOJ-NPRM at 3.

²³¹ As the Commission noted in the NPRM, the definition of “material” under the Rule comports with the Commission’s Deception Statement and established Commission precedent. See 67 FR at 4503.

to influence these consumers' purchasing decisions, inducing them to purchase a product or service they otherwise would not purchase just so they can increase their chances of winning. For this reason, the Commission believes that entities using these promotions must disclose that a purchase will not enhance the chance of winning, to ensure that consumers are not deceived.

Commenters who addressed this proposal generally were supportive of adding the disclosure.²³⁶ NAAG supported the additional disclosure, but asked the Commission to go further. First, NAAG suggested that any telemarketer using a prize promotion should be required to disclose the actual or estimated odds—not simply how the odds might be calculated.²³⁷ Second, NAAG recommended that the original Rule's definition of "prize"²³⁸ be made consistent with state laws and regulations, and the several multi-state settlements with large promotional sweepstakes companies.²³⁹ Third, they recommended that the Commission track provisions in the recent settlements between the states and PCH, which would ensure that the means by which a consumer might enter a sweepstakes without making a purchase is not more difficult than if a purchase were made.²⁴⁰ Each of these suggestions is discussed below.

As noted in the SBP for the original Rule, the Commission continues to believe that, in many instances, actual odds cannot be calculated in advance. In such circumstances, the Commission believes that requiring prize promoters to disclose "estimated" odds has greater potential for abuse than a disclosure of the method used to calculate those odds.²⁴¹ Furthermore, in many

instances, such a requirement to disclose odds would reveal that virtually every entrant gets a "prize." The Commission believes that the better course is to require prize promoters to disclose the method by which odds are calculated. With regard to the suggestions to revise the definition of "prize" and the ease of entry for non-purchasers, the record provides no evidence on why the difference between a "prize" and a "free gift" would be material to consumers. The Commission believes that its authority to reach deceptive or unfair acts or practices under the FTC Act has been sufficient to address any deceptive prize promotions that have not been reachable under the Rule.²⁴² The Commission's requirements regarding prize promotion disclosures are not inconsistent and do not conflict with the more restrictive state laws. Therefore, the Commission declines to adopt NAAG's recommendations.

PMA maintained that the disclosure that making a purchase would not improve a customer's chances of winning was unnecessary and that there was no evidence on the record to support its addition to the Rule.²⁴³ They suggested that the disclosure makes sense in the context of direct mail, but not in the types of representations more often found in telemarketing.²⁴⁴ Nonetheless, the PMA stated that, as a gesture of good faith, they would not oppose the change.²⁴⁵

Therefore, the Commission has determined that it is a deceptive telemarketing act or practice to fail to disclose before the customer pays, in any prize promotion, the odds of being able to receive the prize, that no purchase or payment is required to win a prize or participate in a prize promotion, that any purchase or payment will not increase the person's chances of winning, and the no-purchase/no-payment method of participating in the prize promotion.

for activity that does not cause consumer injury, since it is hard to imagine what harm is caused to consumers by *underestimating* the odds of winning.

²⁴² See, e.g., *FTC v. Landers*, No. 100-CV-1582 (N.D. Ga. filed June 22, 2000); *New World Bank Servs., Inc.*, No. CV-00-07225-GHK (C.D. Cal. filed July 5, 2001); *Global Network Enters., Inc.*, No. 00-625 (GET) (ANX) (C.D. Cal. 2001).

²⁴³ PMA-NPRM at 4-8.

²⁴⁴ *Id.* See also June 2002 Tr. II at 104-05.

²⁴⁵ PMA-NPRM at 5, 7. See also June 2002 Tr. II at 106, 108 (PMA and ARDA, each stating that they do not oppose the disclosure). ARDA stated in its comment that, while it is inconvenient to include additional verbiage in a telephone call, it did not find the additional disclosure unduly burdensome. ARDA-NPRM at 5.

§ 310.3(a)(1)(v) — Required disclosure of material costs in prize promotions

NACAA expressed concern that original and proposed Rule § 310.3(a)(1)(v) requires that a prize promoter disclose to consumers all "material costs or conditions to receive or redeem a prize that is the subject of the prize promotion" when there should be no costs to receive a prize.²⁴⁶ NACAA suggests removing the "material costs" portion of subsection (v). The Commission agrees that there should be no costs to receive or redeem a prize. In fact, § 310.3(a)(1)(iv) requires a disclosure that "no purchase or payment is required to win a prize or to participate in a prize promotion." Moreover, § 310.3(a)(2)(v) prohibits misrepresentations "that a purchase or payment is required to win a prize or participate in a prize promotion." Thus the Rule is unequivocal in forbidding conditioning a "prize" on a payment or purchase. Section 310.3(a)(1)(v) is intended to further clarify that *any* incidental cost that a consumer must incur—not merely a purchase or payment—must be disclosed in advance to avoid deception and to comply with the Rule. Despite NACAA's comment, the Commission does not believe there is any confusion regarding the role of this provision. Therefore, the Commission has determined to retain the original wording of this provision.

§ 310.3(a)(1)(vi) — Required disclosures in the sale of credit card loss protection

The telemarketing of credit card loss protection plans has been a persistent source of a significant number of complaints about fraud.²⁴⁷ Telemarketers of credit card loss protection plans represent to consumers that these plans will limit the consumer's liability if his credit card is lost or stolen.²⁴⁸ These telemarketers frequently misrepresent themselves as being affiliated with the consumer's credit card issuer, or misrepresent either affirmatively or by omission that the consumer is not currently protected against credit card fraud, or that the consumer has greater potential legal liability for unauthorized use of his or her credit cards than he or she actually

²⁴⁶ NACAA-NPRM at 6-7 (pointing out that, if there are costs, then the "prize offer" becomes a sales pitch for add-ons, not a prize).

²⁴⁷ See, e.g., NCL-NPRM at 6.

²⁴⁸ Credit card loss protection plans are distinguished from credit card registration plans, in which consumers pay a fee to register their credit cards with a central party, who agrees to contact the consumers' credit card companies if the consumers' cards are lost or stolen.

damages. See, e.g., *Washington v. Am. Family Publishers*, King County Super. Ct., No. 99-09354-2 SEA (2000).

²³⁶ ARDA-NPRM at 5; NAAG-NPRM at 54-55; NACAA-NPRM at 6-7; NCL-NPRM at 4; DOJ-NPRM at 3-4. See also June 2002 Tr. II at 105-15.

²³⁷ NAAG-NPRM at 54. NACAA also recommended that the Commission require more specificity in the disclosure regarding the odds. NACAA-NPRM at 6-7; and discussion regarding the disclosure of odds, June 2002 Tr. II at 113-15. DOJ recommended that the Commission include a brief explanation in the Rule or in a footnote of what is meant by the phrase "the odds of being able to receive a prize," and clarify that the disclosure must give the odds for each prize. DOJ-NPRM at 3-4.

²³⁸ Original Rule § 310.2(v).

²³⁹ NAAG-NPRM at 54. NAAG recommended that "prize" be defined to be an item of value and that it not be an item that substantially all entrants in the promotion will receive.

²⁴⁰ *Id.* at 54-55.

²⁴¹ Ironically, requiring accurate disclosure of the odds of winning also is likely to subject some sellers and telemarketers to liability under the Rule

does under the law.²⁴⁹ In fact, federal law limits this liability to no more than \$50.²⁵⁰

In the NPRM, the Commission proposed two new provisions to address this practice. The first provision—§ 310.3(a)(1)(vi)—requires the seller or telemarketer of credit card loss protection plans to disclose, before the customer pays, the limit, pursuant to 15 U.S.C. § 1643, on a cardholder's liability for unauthorized use of a credit card. Since many consumers appear to be unaware of the protection they have, the Commission reasoned that a disclosure of the limits of their liability would deter many consumers from paying for protection that duplicates the free protection they already have under federal law. The second provision—§ 310.3(a)(2)(viii)—prohibits sellers or telemarketers from misrepresenting that any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. § 1643.²⁵¹

The Commission received little comment on these proposed provisions. Those commenters who addressed the disclosure provision strongly supported it, noting that complaints about the fraudulent sale of credit card loss protection plans have continued unabated since the original Rule became effective.²⁵² In its NPRM comment, NCL reported that fraudulent solicitations for credit card loss protection plans ranked eighth among the most numerous complaints to the NFIC in 2001.²⁵³ The Commission's complaint-handling experience is consistent with that of NCL, with credit card loss protection plans continuing to be a source of consumer complaints. In its comment, NCL pointed out that fraud in the sale

of credit card protection plans is particularly pernicious because it usually involves blatant misrepresentations and scare tactics about consumers' liability for lost or stolen credit cards.²⁵⁴ Furthermore, the fraud is especially egregious because these schemes appear disproportionately to affect older consumers: in 2001, NCL reported, 55 percent of the victims of credit card loss protection plans were age 60 or older, while that age group accounted for only 26 percent of telemarketing fraud victims overall.²⁵⁵ As noted in the NPRM, large numbers of complaints have prompted both the Commission and the state Attorneys General to devote substantial resources to bringing cases that challenge the deceptive marketing of credit card loss protection plans.²⁵⁶

NCL supported the Commission's decision to require disclosures and prohibit misrepresentations in the sale of credit card loss protection plans. However, NCL also recommended that the Commission go further and mandate requirements similar to those under the Credit Repair Organizations Act²⁵⁷—*i.e.*, written disclosures regarding the consumer's rights, coupled with a written agreement or an agreement signed by the buyer who has three days to cancel.²⁵⁸ The Commission believes that disclosures coupled with the prohibition against misrepresentation are appropriate and sufficient remedies to cure the problems associated with deceptive sales of credit card loss protection plans. The likely outcome of enforcement of these remedies is that

²⁵⁴ *Id.*

²⁵⁵ *Id.* In its Rule Review comment, NCL reported that in 1999, over 71 percent of the complaints about these schemes were from consumers over 50 years of age. NCL-RR at 10.

²⁵⁶ See, e.g., *FTC v. Consumer Repair Servs., Inc.*, No. 00-11218 (C.D. Cal. filed Oct. 23, 2000); *FTC v. Forum Mktg. Servs., Inc.*, No. 00 CV 0905C(F) (W.D.N.Y. filed Oct. 23, 2000); *FTC v. 1306506 Ontario, Ltd.*, No. 00 CV 0906A (SR) (W.D.N.Y. filed Oct. 23, 2000); *FTC v. Advanced Consumer Servs.*, No. 6-00-CV-1410-ORL-28-B (M.D. Fla. filed Oct. 23, 2000); *Capital Card Servs., Inc.* No. CIV 00 1993 PHX ECH (D. Ariz. filed Oct. 23, 2000); *FTC v. First Capital Consumer Membership Servs., Inc.*, No. 00-CV-0905C(F) (W.D.N.Y. filed Oct. 23, 2000); *FTC v. Universal Mktg. Servs., Inc.*, No. CIV-00-1084L (W.D. Okla. filed June 20, 2000); *FTC v. Liberty Direct, Inc.*, No. 99-1637 (D. Ariz. filed Sept. 13, 1999); *FTC v. Source One Publ'ns, Inc.*, No. 99-1636 PHX RCP (D. Ariz. filed Sept. 14, 1999); *FTC v. Creditmart Fin. Strategies, Inc.*, No. C99-1461 (W.D. Wash. filed Sept. 13, 1999); *FTC v. NCCP Ltd.*, No. 99 CV-0501 A(Sc) (W.D.N.Y. filed July 22, 1999); *FTC v. S. Fla. Bus. Ventures*, No. 99-1196-CIV-T-17F (M.D. Fla. filed May 24, 1999); *FTC v. Bank Card Sec. Ctr., Inc.*, No. 99-212-Civ-Orl-18C (M.D. Fla. filed Feb. 26, 1999); *FTC v. Tracker Corp. of Am.*, No. 1:97-CV-2654-JEC (N.D. Ga. filed Sept. 11, 1997).

²⁵⁷ 15 U.S.C. 1679.

²⁵⁸ NCL-NPRM at 6.

consumers will decline to purchase such plans once they know that they duplicate free protection the law already provides them. The Commission will continue to monitor complaints regarding the sale of these plans to ensure that these provisions are adequate to remedy this problem.

Therefore, the Commission has determined that it is a deceptive telemarketing act or practice to fail to disclose the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. § 1643, and has adopted § 310.3(a)(1)(vi), to require that this information be disclosed.

§ 310.3(a)(1)(vii) — Disclosures regarding negative option features

The amended Rule adds a new provision, § 310.3(a)(1)(vii), which requires sellers and telemarketers to disclose certain material information any time a seller or telemarketer makes an offer including any "negative option feature" as that term is defined under new § 310.2(t) of the amended Rule. This disclosure, like all of those listed in § 310.3(a)(1), must be made before a customer pays for goods or services. This new provision requires disclosure of all material terms and conditions of the negative option feature.

During the Rule Review, several commenters recommended that the Commission specifically address the problems associated with "free" or "trial" offers that include a negative option feature, particularly when the telemarketer already possesses the consumer's billing information.²⁵⁹ These offers frequently are presented to consumers as "low involvement marketing decisions" in which they are simply "previewing" the product or service. However, the Rule Review record, as well as federal and state law enforcement experience, show that consumers frequently are confused about their obligations in these transactions, mistakenly believing that, because they did not provide any billing information to the telemarketer, they are under no obligation unless they take some additional affirmative step to consent to the purchase.²⁶¹ As a result,

²⁵⁹ See, e.g. NACAA-RR at 2; NAAG-RR at 11-12, 16-17; NCL-RR at 5-6.

²⁶⁰ NAAG-RR at 11.

²⁶¹ 67 FR at 4501, citing *FTC v. Triad Disc. Buying Serv., Inc.*, No. 01-8922 CIV ZLOCH (S.D. Fla. 2001); *New York v. MemberWorks, Inc.*, Assurance of Discontinuance (Aug. 2000); *Minnesota v. MemberWorks, Inc.*, No. MC99-010056 (4th Dist. Minn. June 1999); *Minnesota v. Damark Int'l, Inc.*, Assurance of Discontinuance (Ramsey County Dist. Ct. Dec. 3, 1999); *FTC v. S.J.A. Soc'y, Inc.*, No. 2:97 CM 472 (E.D. Va. filed May 31, 1997). To this list may be added several more law enforcement actions, including but not limited to actions by state

²⁴⁹ NCL-RR at 10. See, e.g., *FTC v. Universal Mktg. Servs., Inc.*, No. CIV-00-1084L (W.D. Okla. filed June 20, 2000); *FTC v. NCCP Ltd.*, No. 99 CV-0501 A(Sc) (W.D.N.Y. filed July 22, 1999); *S. Fla. Bus. Ventures*, No. 99-1196-CIV-T-17F (M.D. Fla. filed May 24, 1999); *Tracker Corp. of Am.*, No. 1:97-CV-2654-JEC (N.D. Ga. filed Sept. 11, 1997).

²⁵⁰ Under § 133 of the Consumer Credit Protection Act, the consumer's liability for unauthorized charges is limited to \$50 when there is a signature involved. For transactions where no signature was involved (e.g., where the transaction did not take place face-to-face), the consumer has zero liability for unauthorized charges. 15 U.S.C. 1643.

²⁵¹ This approach parallels the Rule's treatment of cost and quantity of goods (§§ 310.3(a)(1)(i) and 310.3(a)(2)(i)), material restrictions, limitations, or conditions (§§ 310.3(a)(1)(ii) and 310.3(a)(2)(ii)), refund policy (§§ 310.3(a)(1)(iii) and 310.3(a)(2)(iv)), and prize promotions (§§ 310.3(a)(1)(iv) & (v) and 310.3(a)(2)(v)). In each case, material facts must be disclosed, and misrepresentations of those facts are prohibited. See additional discussion below regarding § 310.3(a)(2)(viii).

²⁵² DOJ-NPRM at 4; LSAP-NPRM at 7-8; NAAG-NPRM at 55; NCL-NPRM at 6. See also June 2002 Tr. II at 104.

²⁵³ NCL-NPRM at 6.

such scenarios have resulted in significant abuse as consumers discover they have been charged for something they did not realize they had been deemed to have consented to purchase.²⁶²

In the NPRM, the Commission proposed a broad prohibition on the receipt or disclosure of a consumer's billing information from any source other than the consumer herself. This expansive approach would have obviated the need for a more narrowly-tailored remedy specifically addressing negative options.²⁶³ The Commission believed that without preacquired account information, telemarketers' ability to exploit the negative option scenario to bill charges to consumers' accounts without their knowledge or consent would have been eliminated. The seller or telemarketer would have been required to obtain the account information directly from the consumer, thus putting the consumer on notice that he is agreeing to purchase something.²⁶⁴

Based on the entire record in this proceeding, however, the Commission has determined that a blanket prohibition on preacquired account telemarketing sweeps too broadly, curtailing much activity that has not generated a record of consumer harm. As explained in detail below in § 310.4(a)(6) of this SBP, the Commission has refocused this aspect of the amended Rule on the core problem of preacquired account telemarketing, which is to ensure that a customer's consent is obtained before charges are billed to the customer's account, regardless of the source from which the seller or telemarketer obtained the customer's billing information. Therefore, the amended Rule contains a new provision, § 310.4(a)(6), that prohibits charging a customer's account without the customer's express informed consent. As a result of the more narrowly-tailored approach to the problems associated with preacquired account telemarketing, a new solution to the problems associated with negative option features is also required.

Attorneys General against BrandDirect Marketing Corp. (Assurances of Discontinuance with the States of Connecticut and Washington); Cendant Membership Services (Consent Judgment with State of Wisconsin); Signature Fin. Mktg. (Assurance of Discontinuance with State of New York); *Illinois v. Blitz Media, Inc.* (Sangamon County, No. 2001-CH-592); *New York v. Ticketmaster and Time, Inc.* (Assurance of Discontinuance), and additional actions by New York and California against MemberWorks, and by New York against Damark Int'l. See NAAG-NPRM at 30, n.73.

²⁶² See 67 FR 4513-14, citing NAAG-RR at 11-12.

²⁶³ *Id.* at 4514.

²⁶⁴ *Id.* at 4512-14.

The amended Rule now takes a two-pronged approach to remedying the harms associated with offers involving negative option features, either alone or in combination with preacquired account telemarketing. Although the record shows that the greatest consumer injury occurs when these two practices occur together,²⁶⁵ each practice can, and often does, occur without the other,²⁶⁶ and both, alone or in combination, can be problematic for consumers. Thus, the amended Rule sets forth separate requirements specific to each practice—disclosure requirements for offers with a negative option feature, in § 310.3(a)(1)(vii); and, separately, consent requirements for offers where the telemarketer possesses preacquired account information, in § 310.4(a)(6). The application of these two separate provisions depends on the details of the transaction, thus addressing with greater precision different potential telemarketing scenarios.

Commenters stressed one issue: the need for consumers to clearly understand and consent to the precise terms of the negative option feature of an offer.²⁶⁷ The problematic aspect of an offer with a negative option feature is that the consumer's inaction—not an affirmative action taken by the consumer—is deemed to signal acceptance (or continuing acceptance) of an offer for goods or services. By accepting the initial offer (*e.g.*, to try a membership in a buying club service for 30 days, or to receive a daily newspaper for six months) and doing nothing further, the consumer actually contracts to pay for something more (*e.g.*, an automatic annual membership fee or long-term newspaper subscription renewal). In these circumstances, it is crucial that consumers clearly understand the precise terms of such a negative option feature before they agree to accept the initial "free offer" or purchase, since this agreement subjects them to continuing charges, often long-term, if they fail to understand that they must take action to decline the offer or terminate the agreement.

²⁶⁵ See discussion of § 310.4(a)(6) below.

²⁶⁶ For example, the seller or telemarketer of a magazine or newspaper subscription, who does not have preacquired account information, may make an offer for a subscription that includes an automatic annual renewal by obtaining account information or payment directly from the consumer in the initial transaction. Or, as noted in the NPRM, a customer may have an ongoing relationship with a particular contact lens retailer, in which he expects the retailer to retain account information for future similar purchases, none of which involve a negative option feature. See 67 FR 4513, n.196.

²⁶⁷ NACAA-RR at 2; NAAG-RR at 11-12; NCL-RR at 5-6; NAAG-NPRM at 32-33. See also ERA-NPRM at 2-3, 16; June 2002 Tr. II at 209-10 (ERA).

Therefore, new § 310.3(a)(1)(vii) requires that the following disclosures must be made if an offer includes any negative option feature, as that term is defined under § 310.2(t): (1) the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s); (2) the date(s) the charge(s) will be submitted for payment; and (3) the specific steps the customer must take to avoid the charge(s).²⁶⁸ As noted above in the discussion of § 310.2(t) defining "negative option feature," that term is intended to reach any provision under which a consumer's failure to take affirmative action to reject the goods or services will be deemed by the seller to constitute acceptance (or continuing acceptance) of goods or services. Thus, the term includes, but is not limited to, "free-to-pay conversions," automatic renewal offers, and continuity plans.²⁶⁹

The required material disclosures must be made truthfully, and in a clear and conspicuous manner, before a customer pays.²⁷⁰ Under the amended Rule's treatment of preacquired account telemarketing,²⁷¹ "before a customer pays" shall be construed as meaning before a customer provides express informed consent to be charged for the goods or services offered, and to be charged using a specifically identified account.²⁷² Thus, § 310.3(a)(1)(vii), and indeed, all of § 310.3(a)(1), must be read in conjunction with new § 310.4(a)(6), which prohibits any seller or telemarketer from causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer.

²⁶⁸ These disclosures are similar to those required in the Commission's Rule concerning "Prenotification Negative Option Plans." See 16 CFR 425.2(a)(1).

²⁶⁹ Each of these terms describes a form of negative option feature, as discussed in this SBP at § 310.2(t), regarding the definition of "negative option feature," and § 310.2(o), regarding the definition of "free-to-pay conversion."

²⁷⁰ 16 CFR 310.3(a)(1).

²⁷¹ The Commission has determined to include provisions prohibiting the disclosure, for consideration, of unencrypted account information for use in telemarketing in § 310.4(a)(5), and prohibiting unauthorized billing in § 310.4(a)(6) of the amended Rule. As explained below in the discussion of these new provisions, these provisions address the harm caused by sellers or telemarketers who possess preacquired account information, as well as the broader abuse of charging a consumer's account without the consumer's express informed consent, regardless of the nature of the telemarketing transaction.

²⁷² See discussion of § 310.4(a)(6) below.

§ 310.3(a)(2) — Prohibited misrepresentations in the sale of goods or services

Section 310.3(a)(2) in the original Rule prohibits a seller or telemarketer from misrepresenting certain material information in a telemarketing transaction, including: total cost; any material restrictions; any material aspect of the performance, efficacy, nature, or central characteristics of the goods or services offered; any material aspect of the seller's refund policy; any material aspect of a prize promotion; any material aspect of an investment opportunity; and a seller's or telemarketer's affiliation with, or endorsement by, any governmental or third-party organization.²⁷³

In the NPRM, the Commission proposed three changes to the provision. First, the phrase "in the sale of goods or services" was added to the section to clarify that these prohibited misrepresentations apply only in that context. This change was made because, pursuant to the mandate of the USA PATRIOT Act, the Commission proposed adding to the Rule § 310.3(d), which delineates misrepresentations prohibited in the specific context of charitable solicitations. Second, § 310.3(a)(2)(vii) was modified slightly to conform with proposed § 310.3(d)(7) which is an almost identical provision, but in the charitable solicitation context. Finally, the Commission proposed an additional prohibited misrepresentation regarding credit card loss protection plans.²⁷⁴

The Commission received no comments regarding the first two changes, and thus retains these in the amended Rule.

§ 310.3(a)(2)(viii) — Misrepresentations regarding credit card loss protection plans

As discussed in detail above, the telemarketing of credit card loss protection plans has been a persistent source of a significant number of complaints about fraud and, as a result, has been the target of numerous law enforcement actions by both the Commission and the state Attorneys General.²⁷⁵ In the NPRM, the Commission proposed two new provisions to address this practice. The first provision, in § 310.3(a)(1)(vi), discussed above, requires that sellers or telemarketers of such plans disclose, before the customer pays, the limit, pursuant to 15 U.S.C. § 1643, on a cardholder's liability for unauthorized

use of a credit card. This provision is retained unchanged in the amended Rule.

In addition to advising consumers of their rights, the Commission also believes that additional protection is needed to curb the misrepresentations that are prevalent in the sale of credit card loss protection plans. Telemarketers often misrepresent various aspects of the credit card loss protection plan to consumers, especially the existing legal limits on consumer liability if their cards are lost or stolen.²⁷⁶ Therefore, the Commission proposed to add a second provision — § 310.3(a)(2)(viii) — which prohibits sellers or telemarketers from misrepresenting that any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. § 1643, which limits a cardholder's liability for unauthorized charges.²⁷⁷

The Commission received little comment on this proposed provision. Those commenters who addressed the Commission's proposal strongly supported the provision's method of addressing problems with these plans, noting that complaints about the fraudulent sale of credit card loss protection plans have continued unabated since the original Rule became effective.²⁷⁸ Therefore, the Commission has determined that it is a deceptive telemarketing act or practice to misrepresent that any customer needs particular goods or services in order to have protections provided pursuant to 15 U.S.C. § 1643, and has adopted § 310.3(a)(2)(viii), which prohibits a seller or telemarketer from misrepresenting that any consumer needs to purchase protections that they already have under 15 U.S.C. § 1643.

§ 310.3(a)(2)(ix) — Misrepresentations regarding negative option feature offers

The original Rule did not specifically require disclosures or prohibit misrepresentations regarding negative option features in telemarketing offers. However, as noted above, in the discussion of § 310.3(a)(1)(vii), as a

²⁷⁶ See discussion of § 310.3(a)(1)(vi) above, and notes 249 and 253.

²⁷⁷ As noted above, this approach parallels the TSR's treatment of cost and quantity of goods (§§ 310.3(a)(1)(i) and 310.3(a)(2)(i)), material restrictions, limitations, or conditions (§§ 310.3(a)(1)(ii) and 310.3(a)(2)(ii)), refund policy (§§ 310.3(a)(1)(iii) and 310.3(a)(2)(iv)), and prize promotions (§§ 310.3(a)(1)(iv) & (v) and 310.3(a)(2)(v)). In each case, material facts must be disclosed, and misrepresentations of those facts are prohibited.

²⁷⁸ DOJ-NPRM at 4; LSAP-NPRM at 7-8; NAAG-NPRM at 55; NCL-NPRM at 6. See also June 2002 Tr. II at 104; and discussion of § 310.3(a)(1)(vi) above.

result of the more narrowly-tailored approach to the problems associated with preacquired account telemarketing, a newly focused approach to the problems related to negative option features is also required. This includes specific disclosure requirements, which are set forth in § 310.3(a)(1)(vii) and explained above. Consistent with the structure of the Rule to date, and to ensure that the disclosures are not only made, but made truthfully, the amended Rule includes a mirroring provision to these disclosure requirements, at § 310.3(a)(2)(ix), which prohibits misrepresentations regarding "[a]ny material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s)."

§ 310.3(a)(3) — Express verifiable authorization

Section 310.3(a)(3) of the original Rule requires that a seller or telemarketer obtain express verifiable authorization in sales involving payment by demand drafts or similar negotiable paper.²⁷⁹ The Rule also provides that authorization is deemed verifiable if any of three specified means are employed to obtain it: (1) express written authorization by the customer, including signature; (2) express oral authorization that is tape recorded and made available upon request to the customer's bank; or (3) written confirmation of the transaction, sent to the customer before submission of the draft for payment. If the telemarketer chooses to use the taped oral authorization method, the Rule requires the telemarketer to provide, upon request, tapes evidencing the customer's oral authorization, including the customer's receipt of the following information: the number, date(s) and amount(s) of payments to be made; date of authorization; and a telephone number for customer inquiry that is answered during normal business hours.²⁸⁰

In the NPRM, the Commission proposed to amend the express verifiable authorization provision to

²⁷⁹ The use of demand drafts, or "phone checks," enables a merchant to obtain funds from a person's bank account without that person's signature on a negotiable instrument.

²⁸⁰ See original Rule § 310.3(a)(3). Section 310.3(a)(3)(iii)(A) of the original Rule requires that all information required to be included in a taped oral authorization be included in any written confirmation of the transaction.

²⁷³ See 16 CFR 310.3(a)(2).

²⁷⁴ Proposed Rule § 310.3(a)(2)(viii).

²⁷⁵ See note 256 above.

require that the seller or telemarketer obtain the customer's express verifiable authorization in any telemarketing transaction where the method of payment lacks the protections provided by, or comparable to those available under, the Fair Credit Billing Act ("FCBA") and the Truth in Lending Act ("TILA"). In addition, the proposed amendment would have required that the customer receive two additional pieces of information in order for authorization to be deemed verifiable: the name of the account to be charged and the account number, which would have been required to have been recited by either the customer or donor, or the telemarketer. The Commission also proposed to delete § 310.3(a)(3)(iii), which allowed a seller or telemarketer to obtain express verifiable authorization by confirming a transaction in writing, provided the confirmation was sent to the customer prior to the submission of the customer's billing information for payment. Finally, the Commission proposed in the NPRM, pursuant to the USA PATRIOT Act, to bring charitable contributions within the coverage of the express verifiable authorization provision.²⁸¹

Based on the record in this proceeding, the Commission has decided to modify the proposed express verifiable authorization provision. The amended Rule prohibits "[c]ausing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the TILA and Regulation Z,²⁸² or a debit card subject to the protections of the Electronic Fund Transfer Act ("EFTA") and Regulation E."²⁸³ This modified language draws a "bright line" to simplify compliance. The amended Rule retains the express written authorization and oral authorization provisions (§§ 310.3(a)(3)(i) and (ii) of the original and proposed Rules), with slight modifications, and has reinstated the provision of the original Rule allowing written confirmation, with certain additional requirements and limitations.

In addition, certain modifications to this express verifiable authorization provision have been adopted in the

amended Rule pursuant to the mandate of the USA PATRIOT Act. First, where the term "customer" appeared in the original Rule, that term has been replaced in the amended Rule with the phrase "customer or donor" (including, where applicable, the plural form). Similarly, where the phrase "goods or services" had been used in the Rule, it has been replaced with the phrase "goods or services or charitable contribution" to reflect the expansion of the Rule to cover charitable solicitations. And, the term "telemarketing transaction" has been substituted for the term "sales offer," again to reflect the expansion of the provision to cover authorization in the context of a charitable solicitation.

The Commission received numerous comments addressing the proposed amendments to § 310.3(a)(3). In addition, the topic was the subject of extensive discussion at the June 2002 Forum.²⁸⁴ The major themes that emerged from the record are summarized below.

Express verifiable authorization for novel payment methods. In the NPRM, the Commission noted two separate rationales in support of the requirement that a customer's express verifiable authorization be obtained any time the payment method used lacks certain protections against unauthorized charges and fails to provide dispute resolution rights. First, the Commission stated its belief that the use of novel payment methods may lead to unauthorized billing.²⁸⁵ If consumers fail to understand that a telemarketer has the ability to place a charge using a novel payment method (such as utility or mortgage account billing), based on this misperception, they may be induced to divulge billing information that enables such charges. Second, the Commission noted that many emerging payment methods lack both dispute resolution rights and protection against unlimited liability for unauthorized charges.²⁸⁶ These two facts—that consumers can be charged unwittingly by means of novel payment methods and that the resulting injury due to unauthorized charges is magnified when dispute resolution procedures and liability limits are absent—persuaded the Commission that it was appropriate to require express verifiable authorization when protections

pursuant or comparable to TILA and FCBA are absent.²⁸⁷

Comments on the requirement for express verifiable authorization in novel payment method scenarios were many and varied. Some industry commenters—with the notable exception of DialAmerica—rejected the notion that novel payment methods should be subject to more stringent requirements under the Rule, arguing that, as long as the consumer has a clear understanding that he or she is purchasing a particular product or service and that the purchase will be charged to a particular account, nothing further should be required of the telemarketer.²⁸⁸ NACHA advocated scaling back the proposed express verifiable authorization requirement, which it argued was "overly broad" in its coverage of payment methods, such as debit cards, with protections comparable to TILA and FCBA.²⁸⁹ EFSC noted its concern that emerging payment methods would be disadvantaged because they would be subject to the express verifiable authorization provision.²⁹⁰

NAAG, on the other hand, supported the Commission's proposed approach.²⁹¹ Some consumer groups urged the Commission to take an even more stringent approach than it did in the NPRM, and require express verifiable authorization in *all* telemarketing transactions. For example, NCL argued that since most telemarketers use audio recordings to verify authorizations anyway, it would hardly be burdensome to require express verifiable authorization, which

²⁸⁷ *Id.*

²⁸⁸ See, e.g., Aegis-NPRM at 4; Green Mountain-NPRM at 27 ("there is little danger that consumers will give their [debit card] account numbers to telemarketers without knowing that their accounts will be debited"); ITC-NPRM at 5; NATN-NPRM at 4; Noble-NPRM at 4; NSDI-NPRM at 4; and Technion-NPRM at 5. *But see* June 2002 Tr. III at 22 (DialAmerica representative noting that his company declines to use novel payment methods because it "had experience with charging people's bank accounts and [] also [with] LEC billing, and they have not been good experiences.').

²⁸⁹ NACHA-NPRM at 2.

²⁹⁰ EFSC-NPRM at 7. *See also* NATN-NPRM at 4; June 2002 Tr. III at 39. The Commission notes that it was in part because of this concern that the original Rule did not require written authorization in every instance for demand drafts. *See* 60 FR at 43850-51. The amended Rule's allowance for obtaining express verifiable authorization by any of three means, including written confirmation, should obviate concerns about the burden imposed on sellers who choose to accept novel payment methods. Further, the Commission believes, for the reasons stated above, that it is precisely when such novel methods—unfamiliar to the consumer and devoid of legally-mandated consumer protections—are used that express verifiable authorization of a consumer's acquiescence to the transaction is critical.

²⁹¹ *See* NAAG-NPRM at 48.

²⁸¹ Proposed Rule § 310.3(a)(3), 67 FR at 4542.

²⁸² TILA, 15 U.S.C. 1601 *et seq.* (including the FCBA amendments, at 15 U.S.C. 1637 *et seq.*), and Regulation Z, 12 CFR part 226.

²⁸³ EFTA, 15 U.S.C. 1693 *et seq.*, and Regulation E, 12 CFR part 205.

²⁸⁴ *See* June 2002 Tr. III at 4-52.

²⁸⁵ *See* 67 FR at 4507. This concern was also articulated by the Commission in the original rulemaking in connection with the use of demand drafts as a payment method. 60 FR at 43850-51.

²⁸⁶ *See* 67 FR at 4507.

can be evidenced by such a recording, in every instance.²⁹² In support of this position, NCL offered statistics showing that complaints to the NFIC for 2001 show that 60 percent of the payments for fraudulent buyers club offers—a “category in which nearly all of the consumers said they never agreed to purchase the service”—were made by credit card.²⁹³ According to NCL, even when the payment method used by consumers may be subject to legal protections, “all consumers whose accounts will be billed should have the basic protections that such [express verifiable authorization] provides.”²⁹⁴ LSAP concurred, suggesting that the Rule would better serve all consumers if express verifiable authorization were required in every purchase.²⁹⁵ Similarly, NCLC urged the Commission to extend the express verifiable authorization requirements to cover all transactions, or at least those not subject to the protection of FCBA and TILA.²⁹⁶

The Commission declines to require in every transaction that a seller or telemarketer obtain the express verifiable authorization of a customer or donor prior to submitting billing information for payment. As it made clear in the original rulemaking, the Commission believes that the burden of requiring express verifiable authorization is justified in limited circumstances; namely, when consumers are unaware that they may be billed via a particular method, when that method lacks legal protection against unlimited unauthorized charges, and when the method fails to provide dispute resolution rights.²⁹⁷ However, the Commission agrees that consumers could benefit from a more explicit Rule provision mandating what should be obvious: a transaction is valid only when the telemarketer has obtained the consumer’s express informed consent to be charged, and to be charged using a

particular account. Therefore, as is discussed in detail below, new § 310.4(a)(6) of the Rule explicitly requires, in every telemarketing transaction, that the seller or telemarketer obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution that is the subject of the transaction. This more explicit treatment will achieve the goals of consumer groups without unduly burdening industry members with the recordkeeping required by the express verifiable authorization provision.

The comments from consumer groups addressing the express verifiable authorization issue opposed the “comparability” standard set out in the proposed amended Rule, *i.e.*, the provision which would have exempted from the requirement to obtain express verifiable authorization any payment method with protections comparable to those available under FCBA and TILA. Some commenters stated that it would be too difficult for merchants to determine, during the course of each telemarketing transaction, whether a given payment method had protections comparable to those available under TILA.²⁹⁸ NCL and NCLC argued that the impermanent nature of voluntary policies, such as the “zero liability” guarantees made by MasterCard and VISA, makes them a poor substitute for legal protection.²⁹⁹ NCLC further argued that such an amendment would “invite sham internal review procedures,”³⁰⁰ thereby making it deleterious to consumers, by placing the power of determining which transactions required express verifiable authorization in the hands of the merchant.³⁰¹

Industry commenters, on the other hand, urged the Commission to clarify that “comparable protection,” whether in the form of a business rule or private contract, should be sufficient to relieve sellers and telemarketers of requirement to obtain express verifiable authorization.³⁰² In this regard, some industry commenters noted the “zero

liability” protection for unauthorized charges provided by the two main issuers of debit cards, VISA and MasterCard, as a voluntary initiative.³⁰³ MasterCard and VISA noted that their respective “zero liability policies” provided greater protection to cardholders than is provided by federal law.³⁰⁴ Similarly, Fleet urged the Commission to take note of the unauthorized use liability provisions that VISA and MasterCard offer for debit cards.³⁰⁵ Other commenters requested that the Commission explicitly state that certain other protections are “comparable.”³⁰⁶

Based on the record evidence, the Commission has decided to eliminate the “comparability” language from the express verifiable authorization provision. The comments made clear that it is far more desirable to

²⁹² *Id.*

²⁹³ See MasterCard-NPRM at 4; VISA-NPRM at 5. The Commission notes, however, that the “zero liability” protection offered by MasterCard and VISA does not come into play in all circumstances. For example, MasterCard extends this protection only to a consumer whose account is in good standing and who has not reported two or more instances of unauthorized use in the past year. See http://www.mastercard.com/general/zero_liability.html. VISA offers its coverage only for “VISA credit and debit card transactions processed over the VISA network,” and allows the financial institution that issued the card to determine liability for transactions processed over other networks. See http://www.usa.visa.com/personal/secure_with_visa/zero_liability.html?it=f2_/personal/secure_with_visa/.

²⁹⁴ See Fleet-NPRM at 5. See also KeyCorp-NPRM at 5; June Tr. III at 11 (DMA) (endorsing voluntary protections).

²⁹⁵ See Capital One-NPRM at 7 (exempt transactions subject to the UCC); CMC-NPRM at 12 (state that protections under the Real Estate Settlement Procedures Act (“RESPA”) and EFTA are comparable to those under the FCBA and TILA); Fleet-NPRM at 5 (exempt transactions where the goods or services are subject to a “liberal refund policy”); KeyCorp-NPRM at 5 (exempt transactions subject to the UCC); NACHA-NPRM at 2 (exempt transactions subject to the NACHA Rules); VISA-NPRM at 5 (exempt transactions subject to UCC when the revisions to Article 4 are complete). The Commission declines, at this time, to exclude from the express verifiable authorization requirement transactions subject to RESPA. While the Commission recognizes that RESPA provides important protections for consumers, it does not believe that most real estate transactions would be subject to the TSR at all. And, in instances of mortgage billing, which *would* be subject to the Rule, the Commission believes that consumers, unfamiliar with this method of billing for anything other than their mortgage payment, need the protections of the express verifiable authorization provision. The Commission also declines to exclude transactions subject to the UCC from the requirements of express verifiable authorization, but may revisit this issue when modifications to the UCC are completed. The Commission also declines to exempt transactions subject to the NACHA Rules or for which the seller provides a liberal refund policy, believing that it is preferable to limit exemptions and thus maintain a “bright line” rule to simplify compliance.

²⁹² NCL-NPRM at 5.

²⁹³ *Id.*

²⁹⁴ *Id.* (noting that even when legal protections exist to protect consumers from unauthorized charges, consumers must still bear the burden to “contest the charges in the required manner and time frame to assert their rights”); see also LSAP at 10.

²⁹⁵ LSAP-NPRM at 9-11.

²⁹⁶ NCLC-NPRM at 8.

²⁹⁷ See 60 FR at 43850-51. The Commission notes that despite its request for detailed evidence regarding the cost of obtaining express verifiable authorization and the prevalence of each of the three methods allowed by the original Rule, see, e.g., 67 FR 4537; June Tr. III at 32, there remains a dearth of specific record evidence regarding such costs. Industry commenters who did address the cost merely stated that creating and maintaining audio recordings of express verifiable authorization was “expensive.” See, e.g., Capital One-NPRM at 7; June Tr. III at 38 (CCC).

²⁹⁸ See NCLC-NPRM at 2, 4 (noting the exemption from express verifiable authorization for methods of payment with protections comparable to TILA and FCBA “essentially sanctions an on-the-spot judgment made by telemarketers regarding a complex and much disputed legal issue. . .”). Some industry members also noted that the comparability standard was too vague to be useful. See, e.g., CMC-NPRM at 12; EFSC-NPRM at 4 (noting that the vagueness could inhibit the use of novel payment methods).

²⁹⁹ See NCL-NPRM at 5; NCLC-NPRM at 8.

³⁰⁰ NCLC-NPRM at 7.

³⁰¹ See NCLC-NPRM at 4-5.

³⁰² See, e.g., ABA-NPRM at 7-8; BofA-NPRM at 6; Capital One-NPRM at 7; Citigroup-NPRM at 10; DMA-NPRM at 56-57.

implement a “bright line” rule in this instance to avoid the costs to businesses and consumers of requiring a telemarketer to make a real-time determination of whether a payment method provides adequate protection while on the telephone with a consumer. Moreover, the Commission is persuaded that the impermanent nature of voluntary consumer protections makes them ill-suited as a predicate for circumventing the express verifiable authorization provision.³⁰⁷ Therefore, the amended Rule requires express verifiable authorization in all transactions where payment is made by a method other than a debit card subject to Regulation E, or a credit card subject to Regulation Z.

Several industry commenters specifically urged the Commission to ensure that express verifiable authorization not be required when a consumer uses a debit card to pay for goods and services offered, or a charitable contribution solicited, through telemarketing. Commenters raised several arguments in support of this position. First, commenters noted that debit cards are not “novel” payment methods.³⁰⁸ Commenters contended that, on the contrary, debit cards are widely accepted and used by consumers, who understand that by providing their debit card number in a telemarketing transaction, the account with which the card is associated will be debited.³⁰⁹ Second, commenters argued that debit cards are subject to the protections of the EFTA and its implementing regulation, Regulation E, which provide similar, although not identical, protection to that available under TILA.³¹⁰ Third, commenters

³⁰⁷ See June 2002 Tr. III at 29 (NCL) (noting receipt of complaints about the enforceability of these voluntary protections).

³⁰⁸ See, e.g., ABA-NPRM at 6; DMA-NPRM at 57; and ERA-NPRM at 47.

³⁰⁹ See, e.g., Collier Shannon-NPRM at 16; Green Mountain-NPRM at 27; June 2002 Tr. III at 24 (ERA).

³¹⁰ See, e.g., ABA-NPRM at 2-7; AFSA-NPRM at 18-19; BofA-NPRM at 5-6; Citigroup-NPRM at 10; Collier Shannon-NPRM at 11; KeyCorp-NPRM at 5; MasterCard-NPRM at 4; NACHA-NPRM at 2. Some commenters suggested that any method of payment subject to Regulation E be exempted from the express verifiable authorization requirements. See Citigroup-NPRM at 10 (exempt all electronic fund transfers, including wire transfers); EFSC (exempt automated clearinghouse (“ACH”) transactions, as well as other novel payments, such as prepaid smart cards). The Commission declines to exempt all electronic fund transfers subject to Regulation E. The record does not support exclusion of other methods of payment subject to Regulation E; and the Commission believes that, despite any consumer protections available, many emerging payment methods covered by Regulation E are still relatively unknown to consumers who will thus benefit from express verifiable authorization when these payment methods are used.

argued that distant sellers cannot distinguish between a debit and credit card until, in the best case scenario, the consumer reads the entire number.³¹¹ Finally, commenters noted that VISA has an “honor all cards” policy that would prohibit a merchant from declining to accept VISA-branded debit cards if it accepted VISA-branded credit cards.³¹² These commenters contended that the practical result of requiring express verifiable authorization for debit cards would be that express verifiable authorization would have to be obtained in all transactions—whether payment was made by credit or debit card, demand draft, or any other method.³¹³

Based on the extensive record on this issue, and on the Commission’s law enforcement experience, the Commission has determined to modify the express verifiable authorization provision in the amended Rule. The Commission is persuaded that debit cards should not be subject to the express verifiable authorization provision, based on their wide consumer acceptance and the fact that they are subject to the protections of the EFTA and Regulation E. The Commission believes that debit cards are so commonly used that it cannot persuasively be argued that consumers do not understand that when they provide their debit card account number to a telemarketer, their account can be debited by using that number.³¹⁴

³¹¹ BofA-NPRM at 6; Collier Shannon-NPRM at 6 (“Merchants who process credit and debit card transactions over the phone do not have the ability to differentiate between credit cards and debit cards.”); ERA-NPRM at 48; June 2002 Tr. III at 11 (DMA) (noting that “it is impossible for a marketer to know whether it’s a debit card or a credit card, in the best instance, until after the entire number has been given”); June 2002 Tr. III at 18 (NRF) (stating that “remote sellers cannot distinguish a debit card from the credit card with any great degree of reliability pre-purchase”).

³¹² June 2002 Tr. III at 19-20 (NRF) (noting that VISA and MasterCard “have what’s called an Honor-All-Cards rule” that requires that merchants accept any card branded with these issuers’ logos as a condition of being able to accept the VISA and MasterCard branded credit cards).

³¹³ Collier Shannon-NPRM at 6-7; June 2002 Tr. III at 11 (DMA) (noting that “[i]n some instances you don’t even know [whether a number provided by a consumer is for a debit or credit card] when the number is given, which would force marketers to have express verifiable authorization for everything. . .”). Some commenters argued that such a provision would have the effect of eliminating or reducing the use of debit cards as a form of payment. See Gannett-NPRM at 1-2; Intuit-NPRM at 19.

³¹⁴ This is not to say, of course, that an unscrupulous telemarketer could not misrepresent the purpose for which it needed such an account number, leading to consumer injury. Section 310.3(a)(4) of the Rule, which prohibits making a false or misleading statement to induce any person to pay for goods or services, would come into play in such situations. Moreover, the record and the Commission’s consumer protection experience

Moreover, the Commission is persuaded that the practical result of requiring express verifiable authorization when a consumer pays using a debit card would be to require it in all instances when a debit or credit card is used, because it is not currently possible to distinguish these methods in a distance transaction.³¹⁵

Regulation E provides protections that are similar, though not identical, to those provided under TILA. Some commenters argued that express verifiable authorization should be required for debit cards because Regulation E’s three-tiered liability scheme for unauthorized use, with increasing liability when the unauthorized use is reported after two business days, is less advantageous for consumers than the TILA protections, which cap a consumer’s losses, in all instances, at \$50.³¹⁶ The Commission believes that this disparity will not disadvantage consumers who face unauthorized charges pursuant to a telemarketing transaction. Both Regulation Z and Regulation E provide that, in a situation where the consumer retains control of the card, no liability shall attach; Regulation Z does so unconditionally,³¹⁷ while Regulation E provides such protection on condition that the consumer reports the unauthorized charge within 60 days of transmittal of the consumer’s statement.³¹⁸ The Commission believes that, despite the reporting requirement imposed by Regulation E, consumers who face unauthorized charges due to telemarketing fraud have important fundamental protections whether they use a debit or credit card. The Commission will continue its campaign to educate consumers about their varying obligations in reporting unauthorized charges involving both debit and credit cards, and will monitor the effectiveness of this provision from

suggest that, while consumers do understand that their debit cards can be used as a method of payment, it is not clear that consumers understand the varying degrees of consumer protection afforded by credit versus debit cards. See June 2002 Tr. III at 24-25. The Commission has issued consumer education materials to reinforce the material differences in protection under federal law for debit and credit cards. See, e.g., FTC Facts for Consumers, Credit, ATM and Debit Cards: What to do if They’re Lost or Stolen, <http://www.ftc.gov/bcp/online/pubs/credit/atmcard.htm>.

³¹⁵ See note 311 above.

³¹⁶ Compare Regulation E, 12 CFR 205.6(b) to Regulation Z, 12 CFR 226.12(b).

³¹⁷ See Regulation Z, 12 CFR 226.12(b)(2)(iii), Official Staff Interpretation, Suppl. I.

³¹⁸ See Regulation E, 12 CFR 205.6(b)(3). The 60-day notification period is somewhat flexible. Section 205.6(b)(4) notes that “[i]f the consumer’s delay in notifying the financial institution was due to extenuating circumstances, the institution shall extend the [time limit] to a reasonable period.”

the implementation of the amended Rule through the next Rule Review, making any modifications as necessary.

The record reflects a variety of viewpoints on whether dispute resolution rights are essential to the determination of whether a payment method should be excluded from the requirement of obtaining express verifiable authorization.³¹⁹ The Commission continues to believe that dispute resolution protection is a key predicate for excluding a payment method from coverage under the express verifiable authorization provision, to ensure that consumers are not unduly burdened during the investigation of any claim of unauthorized billing. The Commission believes that, although the substantive dispute resolution protections of Regulation E are somewhat less extensive than those of Regulation Z,³²⁰ the core protections provided by Regulation E—allowing a consumer to report an unauthorized electronic fund transfer and to receive a provisional credit of the disputed amount within ten business days of the financial institution's receipt of such notice—will afford sufficient basic protection to consumers who choose to use debit cards to pay for goods or services or charitable contributions in telemarketing transactions.

Furthermore, the Commission notes that its decision not to require express verifiable authorization for payments made by debit card is based in part on the practical reality that it is currently impossible for merchants to distinguish

credit cards from debit cards, particularly in distance transactions. The Commission believes that the appropriate balance of protecting consumers without unduly burdening industry is best met by excluding debit cards from the requirements of the express verifiable authorization provision, for to do otherwise would result in requiring express verifiable authorization for all credit card payments, an unnecessary and costly burden.³²¹ The core dispute resolution protection provided by Regulation E, in conjunction with its critical protection against unauthorized charges, will provide a vital safety net for consumers who choose to pay by debit card. Thus, the Commission has determined that express verifiable authorization will be required only in instances when the payment method is not a credit card subject to the protections of Regulation Z or a debit card subject to the protections of Regulation E.³²²

Express written authorization. Section 310.3(a)(3)(i) of the proposed Rule states that authorization will be deemed verifiable if it is by “express written authorization . . . which includes the customer's or donor's signature.” The footnote to this section of the Rule notes that “the term ‘signature’ shall include a verifiable electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.”

The Commission received few comments on this provision overall. AARP reiterated its long-standing position that all express verifiable authorizations should be in writing.³²³ The Commission maintains its position that to require written authorization in every instance would unduly burden sellers and telemarketers, potentially impede the growth of new payment mechanisms, and not provide meaningful benefits to consumers above and beyond those ensured by the other two means of obtaining authorization under the Rule. Therefore, the Commission declines to require written authorization of a transaction in every instance. Another commenter requested

clarification that a signed check would meet the requirements of § 310.3(a)(3)(i) of the amended Rule.³²⁴ The original Rule's express verifiable authorization only pertained to demand drafts; and, as the Commission noted in the TSR Compliance Guide, “[a]ny form of written authorization from a consumer is acceptable,” including “a ‘voided’ signed check.”³²⁵ While the language of the amended Rule is arguably broad enough to cover payment methods such as check and money order, the customer's or donor's signed check or money order would, in every instance, be sufficient to serve as written authorization pursuant to 310.3(a)(3)(i).

A handful of commenters addressed the interplay between the E-SIGN Act³²⁶ and the Rule. One industry commenter urged that the Commission explicitly state that the E-SIGN Act governs transactions under the TSR,³²⁷ and another requested the amended Rule expressly adopt the definitions of “electronic record” and “electronic signature” used in the E-SIGN Act.³²⁸ In particular, commenters expressed concern over the Commission's use of the term “verifiable”³²⁹ as a modifier in discussing what would constitute a valid signature under the Rule. While the Commission declines at this time to expressly incorporate the E-SIGN Act's definitions into the Rule, it has determined that deleting the term “verifiable” from the amended Rule will alleviate the concerns expressed by industry, without compromising the protections afforded to consumers.³³⁰

NCLC suggested that the Rule incorporate the procedures set forth in § 101(c) of the E-SIGN Act for using electronic records to provide a consumer with written disclosures

³¹⁹ See ABA-NPRM at 5, 7 (encouraging the Commission to delete from the express verifiable authorization provision the requirement that any exempt payment mechanism include dispute resolution procedures); Collier Shannon-NPRM at 11-15 (noting that the dispute resolution protections under Regulations E and Z are similar).

³²⁰ For example, unlike Regulation Z, Regulation E does not provide that a consumer may assert against a financial institution all claims (other than tort) and defenses arising out of the transaction and relating to the failure to resolve the dispute. See Regulation Z, 12 CFR 226.12(c). However, Collier Shannon argued that, in some instances, Regulation E provides greater consumer dispute resolution rights. For example, Collier Shannon noted that investigations under Regulation E must be completed within ten days of the financial institution's receipt of the consumer's complaint, or a provisional credit must be issued. Collier Shannon also noted that the coverage of the regulations diverges in some instances because some of the dispute resolution protections available under Regulation Z only make sense in the context of a credit transaction, such as the provision that a creditor may not seek to collect funds or issue a negative statement on a consumer's credit report). See Collier Shannon-NPRM at Appendix F. The Commission notes, in regard to the argument made by Collier Shannon regarding the shorter time period allowed for investigations under Regulation E, that a shorter time frame is entirely appropriate because the funds at issue are the consumer's, not the funds of a credit card lender.

³²¹ See June 2002 Tr. III at 11 (DMA) (noting that requiring express verifiable authorization in all instances would be “highly expensive.”).

³²² Cendant requested that the Commission explicitly note in the Rule that the marketer can rely upon the statement by the consumer identifying the type of billing mechanism that the customer is using to pay. Cendant-NPRM at 9. The Commission believes that its modified approach, exempting from the express verifiable authorization provision both credit and debit cards, obviates the need for such a statement to be included in the Rule.

³²³ AARP-NPRM at 7.

³²⁴ Tribune at 7.

³²⁵ TSR Compliance Guide at 19.

³²⁶ Electronic Signatures in Global and National Commerce Act (“E-SIGN Act”), Pub. L. No. 106-229, 106th Cong. 2d Sess., 114 Stat. 464 (2000), codified at 15 U.S.C. § 7001 *et seq.*

³²⁷ EFSC-NPRM at 9-10.

³²⁸ Intuit-NPRM at 22.

³²⁹ 67 FR 4542. In the NPRM, the Commission noted, in a footnote to § 310.3(a)(3)(i), that “[f]or purposes of this Rule, the term ‘signature’ shall include a verifiable electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.” (emphasis added).

³³⁰ The Commission believes that the remaining language regarding signatures makes plain that sellers and telemarketers who choose to obtain express verifiable authorization using the express written authorization method, and who wish to use digital or electronic signatures, will need to comply with applicable federal law and state contract law. The Commission believes, by way of example, that a seller or telemarketer who obtained a signature that would be valid under the E-SIGN Act's standards would meet its burden under this provision of the Rule.

required by the Rule.³³¹ Under § 101(c), the consumer must, among other things, affirmatively consent to such use of electronic records and acknowledge that he or she has the hardware and software necessary to access the requisite information electronically. The Commission is deferring any determination at this time as to the specific manner in which the Rule should incorporate these statutory procedures until it has clearer evidence or experience from which to develop an appropriate and effective regulatory interpretation, consistent with the E-SIGN Act, to ensure that written disclosures required under the Rule are provided clearly and conspicuously to consumers if and when a seller or telemarketer uses electronic means to provide such disclosures.³³²

Finally, NCLC suggested that the Commission require that the information set forth in § 310.3(a)(3)(ii)(A)-(G), be required when the written method of express verifiable authorization is used.³³³ The Commission declines to adopt this suggestion because the record does not support the argument that such a requirement is necessary in instances when the consumer controls the method of payment, and provides written authorization, including a signature, to the seller or telemarketer prior to the submission for payment of the consumer's billing information.

Oral authorization. The proposed Rule modified and expanded the list of information that must be recited in order for oral authorization to be deemed verifiable. In particular, the proposed Rule added the requirement that the specific billing information of the customer or donor, including the name of the account and the account number that will be used to collect payment for the transaction, must be identified as part of the express verifiable authorization process. Finally, certain wording changes were proposed to address the expansion of the express verifiable authorization provision to cover not just demand drafts, but all methods of payment that lacked specific protections under TILA and FCBA. In

addition, the information was reorganized.³³⁴

In § 310.3(a)(3)(ii) of the amended Rule, the Commission has retained the proposed oral authorization provision, with three minor wording changes. First, the broader term "other billing entity" replaces the term "credit card company," which was included in the proposed Rule as an example of an entity to whom a seller or telemarketer would need to make available a recording of a customer's or donor's express oral authorization. Second, the phrase "authorization of payment for goods or services or charitable contribution" is inserted to reflect the expansion of this provision to reach charitable solicitations. Third, the term "sales offer" has been replaced with "telemarketing transaction." These last two changes are intended to conform this provision to the mandate of the USA PATRIOT Act.

Few comments were prompted by this section generally, or by any of the specific proposed disclosures required to satisfy the oral authorization provision. One commenter noted that the audio recording method of obtaining express verifiable authorization may require the consent of the customer or donor in states that require two-party consent to record telephone calls.³³⁵ The Commission notes that determining compliance with state law taping requirements has been and will continue to be the responsibility of those sellers and telemarketers who choose to use this method of authorization. Another commenter asked the Commission to state explicitly that "a telemarketer cannot circumvent a writing requirement [such as required by EFTA for recurring drafts] by holding up the express oral authorization in the [TSR]."³³⁶ Clearly, compliance with the EFTA and compliance with the TSR are separate obligations, and to the extent that an entity is subject to both regulations, it must determine how best to comply with both. Therefore, the Commission declines to modify the Rule to include such guidance.

Another commenter, ARDA, requested that § 310.3(a)(3)(ii)(A), which requires disclosure of the number of debits, charges or payments, be

modified. ARDA requested that the parenthetical phrase "if more than one" be reinstated in the Rule to ensure that this disclosure is only made in instances where there will be multiple debits, charges, or payments; to do otherwise, ARDA argued, would be a burden on industry to state what would likely be presumed by consumers—that is, that only a single payment will be required.³³⁷ The Commission agrees that the benefit to consumers of disclosing that there will only be a single payment does not outweigh the burden on sellers and telemarketers to have to make such a disclosure. Therefore, the Commission has reinstated the phrase "(if more than one)" at the end of § 310.3(a)(3)(ii)(A). No comments in the record suggest modification of proposed § 310.3(a)(3)(ii)(C) (requiring disclosure of the amount of the debit(s), charge(s), or payment(s)); (D) (disclosure of the customer's or donor's name); (F) (the disclosure of a telephone number for customer or donor inquiry); or (G) (the date of the customer's or donor's oral authorization). Therefore, these sections are retained in the amended Rule without alteration.

Proposed § 310.3(a)(3)(ii)(B) required that "the date of the debit(s), charge(s), or payment(s)" be recited for oral authorization to be deemed verifiable. This proposal drew criticism from members of industry, including MasterCard and KeyCorp, who noted that, in many instances, telemarketers would not possess this information, and suggested that the frequency of the payment could be recited instead.³³⁸ The Commission agrees that in at least some instances the exact date of payment—that is, the date on which the charge will appear on a customer's or donor's billing statement or be debited from a customer's or donor's account—may be unknown at the time of the transaction. Therefore, the amended Rule provision requires instead that the seller or telemarketer recite the date on which the debit(s), charge(s), or payment(s) will be submitted for payment. The Commission believes that this piece of information is, or without much burden can be, known to a seller or telemarketer, and that providing this date to the customer or donor will supply a means for determining approximately when such debit(s), charge(s), or payment(s) will be posted to the customer's or donor's account.

Several commenters also expressed concern about the requirement, in § 310.3(a)(3)(ii)(E), that, as part of oral authorization, a customer or donor

³³¹ NCLC-NPRM at 3.

³³² See generally FTC and Dept. of Commerce, *Report to Congress on the Electronic Signatures in Global and National Commerce Act: The Consumer Consent Provision in Section 101(c)(1)(C)(ii)*, June 2001 (noting that nearly all participants in a workshop held to discuss the provision agreed that further study of the provision and its role in the marketplace was necessary). See also E-SIGN Act § 104 (preserving agency authority to interpret § 101).

³³³ NCLC-NPRM at 10-11.

³³⁴ See Proposed Rule § 310.3(a)(3)(ii)(A)-(D), (F)-(G). For example, the term "draft," used in the original provision, was replaced with the phrase "debit(s), charge(s), or payment(s)" in the proposed version, to reflect that methods of payment other than demand draft would now be covered by the Rule. For the same reason, and because of the mandate of the USA PATRIOT Act, the term "payor's" was replaced by the phrase "customer's or donor's."

³³⁵ Worsham-NPRM at 6.

³³⁶ NCLC-NPRM at 11.

³³⁷ ARDA-NPRM at 5-6.

³³⁸ MasterCard-NPRM at 6-7; KeyCorp-NPRM at 5.

receive his or her specific billing information, including the name of the account and the account number to be charged.³³⁹ These commenters stated that there are dangers inherent in having a telemarketing sales representative recite or receive from the consumer the consumer's full account number over the telephone.³⁴⁰

On the other hand, comments from consumer groups were generally supportive of the expanded disclosures required as a predicate for oral authorization to be deemed verifiable. NCL noted that billing disputes are prevalent in connection with deceptive or abusive telemarketing, and

³³⁹ See, e.g., AFSA-NPRM at 17-18; CCC-NPRM at 12 (recommending § 310.3(a)(3)(ii)(E) be deleted entirely); DialAmerica-NPRM at 27 (noting its support for the disclosure of the account name); Fleet-NPRM at 6; KeyCorp-NPRM at 5; MasterCard-NPRM at 5 (noting that if the provision is not deleted, the amended Rule should at least exempt from compliance entities subject to the privacy provisions of the GLBA); Wells Fargo-NPRM at 3.

³⁴⁰ See, e.g., KeyCorp-NPRM at 5; MasterCard-NPRM at 5. These commenters expressed concern about identity theft and unauthorized charges occurring as a result of the express disclosure of this information. Several commenters noted that consumers are disinclined to provide their account numbers in telemarketing, in part due to the success of consumer protection education campaigns that have stressed that a consumer should only provide his or her account number in telemarketing if the consumer knows the seller with whom he or she is dealing. See, e.g., Bank One-NPRM at 4; Cendant-NPRM at 7; Household Auto-NPRM at 2-3; VISA-NPRM at 6-7. Some commenters noted that marketers will not have such account numbers in some instances, such as in preacquired account telemarketing involving a joint marketing program, and thus will be unable to ensure the customer's "receipt" of this information. See, e.g., Household Auto-NPRM at 4; NEMA-NPRM at 8-10 (noting that the "receipt" language directly contradicts the NEMA's guidelines to ensure that the customer "disclose" such information before processing a charge, and will result in duplicative information being exchanged); Green Mountain-NPRM at 26 (requesting an exemption because the energy industry is highly regulated). As discussed below, the Commission decided to delete the requirement that the account number be disclosed, and therefore the Commission anticipates that this will ameliorate the concern about preacquired account telemarketing. In every instance, the seller or telemarketer should be able to tell the customer or donor the name of the billing vehicle and enough other information to ensure that the customer or donor knows what account will be used to collect payment. As to NEMA's and, to some extent, Green Mountain's concern about redundancy, it is true that in a non-preacquired account call, some information, such as the customer's or donor's billing information, will initially be unknown to the telemarketer. It is equally true that some of the information a customer must receive under § 310.3(a)(3)(ii) is known only to the telemarketer, such as the date a charge will be submitted for payment and a customer or donor service number. The Commission believes that, for payment methods that are novel and lacking in certain consumer protections, it is critical for the customer to authorize the payment. If a seller or telemarketer chooses the express oral authorization method, then it is incumbent upon them to ensure that a consumer receives this information, even if redundant, as part of the recorded authorization.

complaints about such disputes often arise when a consumer has been duped into providing his or her billing information for some bogus purpose, such as "verification," or to enable the seller purportedly to deposit sweepstakes winnings to the consumer's account.³⁴¹ NCL also noted that consumers may provide their account information in conjunction with a payment for a particular item, but then be billed for additional goods or services that they did not authorize.³⁴² Based on its experience, NCL "believes that it is important to verify both the account that will be billed and the fact that the consumer is agreeing to purchase specific products or services using that account."³⁴³ NAAG concurred, stating that the proposed Rule's express requirements to recite the account name and number would be beneficial to consumers who, as law enforcement experience demonstrates, may otherwise be unaware of this critical information.³⁴⁴

Based on the record, the Commission has decided to modify the proposed provision to limit the required amount of information about an account that must be received by a customer or donor to comply with the express verifiable authorization provision. The amended Rule requires that the customer or donor receive "billing information, identified with sufficient specificity that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution."³⁴⁵ This more flexible standard takes into account concern about identity theft, but still mandates that the customer receive information sufficient to understand what account is being used to process payment for the transaction. It will allow telemarketers the option to state, for example, the name and the last four digits of the account to be charged, rather than the full account number.

Written confirmation. The Commission received several comments regarding its proposal to delete § 310.3(a)(3)(iii) from the Rule. This section of the original Rule allows a

³⁴¹ NCL-NPRM at 4.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ NAAG-NPRM at 48-49.

³⁴⁵ Amended Rule § 310.3(a)(3)(ii)(E). The requirement that the account be identified with sufficient specificity that the customer or donor understands what account will be used to collect payment mirrors the provision in amended Rule § 310.4(a)(6)(ii)(A), requiring that, in telemarketing transactions involving preacquired account information, a seller or telemarketer obtain express informed consent by identifying the account to be charged with specificity such that the customer or donor understands what account will be charged.

seller or telemarketer to obtain express verifiable authorization by sending written confirmation of the transaction to the customer prior to submitting the customer's billing information to be charged. In general, industry commenters opposed the Commission's proposal to delete this provision from the Rule, arguing that, contrary to the evidence presented during the Rule Review, this method of authorization is commonly used in telemarketing.³⁴⁶ Aegis noted that there is nothing "inherently fraudulent, abusive, or problematic" with this method of obtaining express verifiable authorization, and urged the Commission to retain it.³⁴⁷ Industry commenters urged the Commission to retain this provision, especially because it provides a low-cost alternative to recording a customer's oral authorization.³⁴⁸

Consumer groups and law enforcement officials expressed their support for deleting this provision from the Rule, or modifying it to ensure that consumers are better protected when this method is used.³⁴⁹ NAAG, for example, noted the potential danger inherent in the written confirmation provision as it is worded in the original Rule. Specifically, NAAG opined that consumers are likely to overlook a confirmation that appears to be yet

³⁴⁶ See, e.g., ARDA-NPRM at 5 (noting that the written confirmation method may actually increase in popularity if the additional requirements during oral authorization are adopted in a final Rule); ARDA-Supp. at 1 (noting that the Rule should allow for flexibility given the rapid technological changes in payment methods); CCC-NPRM at 14 (asserting that "this method is readily available, straightforward, reliable and is currently used by many marketers."); CNHI-NPRM at 1 (noting that eliminating this method would place newspapers at "an unfair competitive disadvantage"); EFSC-NPRM at 8; NAA-NPRM at 16 ("many newspapers regularly and legitimately used this method" and would incur considerable expense using the written or oral authorization methods instead).

³⁴⁷ Aegis-NPRM at 4. *Accord* Noble-NPRM at 4 (arguing there is nothing inherently fraudulent about this method of authorization); PMA-NPRM at 20 (suggesting that the record does not support elimination of this method of authorization); Technion-NPRM at 5 (arguing there is nothing "wrong with" this method of authorization).

³⁴⁸ See, e.g., Capital One-NPRM at 8; Gannett-NPRM at 1; Intuit-NPRM at 19-20; MPA-NPRM at 27; PMA-NPRM at 20 (urging that this method be retained in part to reduce costs for inbound call centers who, under proposed revisions to address upselling, would need to conduct express verifiable authorization and may not be equipped to do so by taping); June 2002 Tr. III at 40-42 (CCC, noting that written confirmation "is the cheapest way of effectuating a transaction;" ERA, stating that reinstating the written confirmation method will "help balance the additional costs" incurred due to the expansion of the express verifiable authorization requirement).

³⁴⁹ See, e.g., NAAG-NPRM at 49.

another piece of “junk mail,”³⁵⁰ and recommended that the Rule be amended to specifically require that any confirmation document sent pursuant to this method of authorization be clearly and conspicuously labeled as such.³⁵¹ NAAG also suggested that, if reinstated, the written confirmation method should not be considered a “verifiable” means of obtaining consumers’ authorization in circumstances when the consumer is already vulnerable, such as when the goods or services to be paid for are offered in conjunction with a “free-to-pay conversion” or “negative option feature,” or when the seller or telemarketer has preacquired account information prior to the initiation of the call.³⁵² MPA suggested that perhaps this method could be reinstated if used in the sale of goods or services for which a liberal refund policy exists.³⁵³ NAAG raised the concern that there might exist a material inconsistency between the disclosures made in the sales portion of the call and those sent as part of a post-call confirmation.³⁵⁴

In response to this range of comment, the Commission has decided to reinstate the written confirmation method of obtaining express verifiable authorization, with certain modifications. After balancing the concerns enunciated by consumer groups against industry’s strongly-stated desire to reinstate this economical means of obtaining express verifiable authorization, the Commission has determined to modify the provision to enhance the likelihood that consumers will receive these written confirmations in a timely manner and will recognize the confirmations as important documents that should not be thrown away unopened. The amended Rule continues to require that the written confirmation disclose all of the information contained in § 310.3(a)(3)(ii)(A)-(G), as well as a statement of the procedures by which the customer can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate. However, the amended Rule requires that the written confirmation be “clearly and conspicuously labeled” as such, on the outside of the envelope in which it is sent, and that it be sent to the customer

by first class mail³⁵⁵ prior to the submission for payment of the customer’s or donor’s billing information.³⁵⁶ The Commission will continue to monitor the use of the post-sale written confirmation method of express verifiable authorization and may revisit this issue in a subsequent Rule Review should circumstances warrant.

The amended Rule also proscribes the use of the post-sale method of authorization when the goods or services that are the subject of the transaction are offered in conjunction with a “free-to-pay conversion” feature and preacquired account information. The record is replete with evidence, detailed in the section below discussing new § 310.4(a)(6), that “free-to-pay conversion” offers, particularly when coupled with the use of preacquired account information, have often resulted in unauthorized charges to consumers.³⁵⁷ Given this evidence, coupled with NAAG’s observation that “[a] consumer who does not believe they entered into a transaction would be less likely to even open mail from a company whose offer he or she had recently ‘declined,’”³⁵⁸ the Commission will require that authorization in such situations must be obtained pursuant to either § 310.3(a)(3)(i) or (ii).

§ 310.3(a)(4) — Prohibition of false and misleading statements to induce the purchase of goods or services or a charitable contribution

The only proposed modification of this provision in the NPRM was to expand it, pursuant to the mandate of the USA PATRIOT Act, to encompass misrepresentations made to induce a charitable contribution.³⁵⁹ The

³⁵⁵ The requirement that such confirmations be sent via first class mail should cause industry to incur no additional expense. According to the DMA representative at the June 2002 Forum, federal postal regulations require that such confirmations be sent via first class mail. See June 2002 Tr. III at 45; see also June 2002 Tr. III at 47 (CCC) (noting that company practice is to ensure that written confirmations are clearly and conspicuously labeled). This change to the Rule, then, will merely echo the postal regulations, which require that personalized business correspondence be sent via first class mail. See 39 CFR 3001.68, App. A.

³⁵⁶ The Commission has declined, at this time, to follow the suggestion by Capital One that the written confirmation method should be reinstated, “provided that the confirmation is delivered 30 days prior to submission for payment, and the customer is permitted to repudiate the sale within that time by calling a toll-free number,” because the record provides too little evidence to suggest that these additional protections are necessary to prevent consumer injury. See Capital One-NPRM at 8.

³⁵⁷ See discussion of amended Rule § 310.4(a)(6), below. See also June 2002 Tr. III at 42-43 (NAAG).

³⁵⁸ NAAG-NPRM at 49.

³⁵⁹ Proposed Rule § 310.3(a)(4). See 67 FR 4508.

Commission received few comments on this section, and none opposing this proposed expansion.³⁶⁰ Therefore, the Commission adopts the wording of proposed § 310.3(a)(4) unchanged in the amended Rule.

§ 310.3(b) — Assisting and facilitating

Section 310.3(b) of the original Rule prohibits a person from providing substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is violating certain provisions of the Rule. During the Rule Review, the Commission received comments from consumer protection and law enforcement groups who argued that the “conscious avoidance” standard adopted in the original Rule should be modified to a “knew or should have known standard.”³⁶¹ The Commission noted that it continued to support the “conscious avoidance” standard, believing that such a standard is appropriate “in a situation where a person’s liability to pay redress or civil penalties for a violation of this Rule depends on the wrongdoing of another person.”³⁶² Although the provision was retained in the proposed Rule without amendment, its coverage was expanded to cover assisting and facilitating in the solicitation of charitable contributions pursuant to the USA PATRIOT Act. The Commission invited additional comment on, and proposed alternatives to, the assisting and facilitating standard.³⁶³

In response to the NPRM, VISA noted that although this provision was retained unchanged in the proposed Rule, “the expanded scope of the Proposed Rule, including provisions that conflict with the GLBA privacy rules, could require financial institutions to police the activities of third parties, many of whom are themselves regulated entities.”³⁶⁴ The Commission believes that the modifications to the preacquired account telemarketing provisions in the amended Rule obviate the concerns expressed by VISA.³⁶⁵

ARDA expressed its support for retaining the “conscious avoidance” standard, endorsing the rationale

³⁶⁰ See, e.g., Make-A-Wish-NPRM, *passim* (detailing complaints received by Make-A-Wish, which does not solicit donations by telephone, regarding fraudulent telemarketers claiming or implying that they are calling from or affiliated with Make-A-Wish).

³⁶¹ See 67 FR at 4508-09.

³⁶² *Id.* at 4509.

³⁶³ *Id.*

³⁶⁴ VISA-NPRM at 12.

³⁶⁵ See discussion of amended Rule §§ 310.4(a)(5) and (6) below.

³⁵⁰ *Id.* (noting that such confirmations “tend to go unnoticed or unrecognized by consumers, thereby failing in their function of ‘authorizing’ a payment”).

³⁵¹ *Id.*

³⁵² See June 2002 Tr. III at 42-43 (NAAG).

³⁵³ *Id.* at 44 (MPA).

³⁵⁴ *Id.* at 48-49 (NAAG).

enunciated by the Commission in the NPRM for the heightened knowledge requirement.³⁶⁶ But AARP reiterated its concern that the conscious avoidance standard places too high a burden on law enforcement, and urged the Commission to substitute a “knew or should have known” standard for the assisting and facilitating provision.³⁶⁷ NACAA also urged the Commission to adopt a “knew or should have known” standard in the amended Rule.³⁶⁸ NAAG made a similar recommendation, noting that the current standard results in “both federal and state authorities [being] unduly hampered in trying to reduce telemarketing fraud.”³⁶⁹ NAAG also noted that this provision is critical in addressing the participation of those United States-based entities, such as sellers of victim lists, fulfillment house operators, and credit card launderers, who provide necessary assistance to fraudulent telemarketers, many of whom have begun operating from outside the country.³⁷⁰

The Commission declines, on the record evidence, to lower the standard for assisting and facilitating under the Rule. The Commission continues to believe the “conscious avoidance” standard is the appropriate one in instances when liability to pay redress or civil penalties rests on another person’s violation of the Rule. Further, the Commission believes the “conscious avoidance” standard is one that can be met in situations where third parties provide substantial assistance to fraudulent telemarketers. As stated in the original SBP, this standard “is intended to capture the situation where actual knowledge cannot be proven, but there are facts and evidence that support an inference of deliberate ignorance.”³⁷¹ In the hypothetical situations posed in NAAG’s comment, the Commission believes it would be possible to demonstrate such “deliberate ignorance” on the part of, for example, a fulfillment house that ships only inexpensive prizes on behalf of a telemarketer about whom it receives numerous complaints. The Commission itself has brought several cases successfully using the assisting and facilitating provision, and has found the

provision to be a useful tool in combating fraudulent telemarketing.³⁷²

§ 310.3(c) — Credit card laundering

In the NPRM, the Commission retained the original Rule provision addressing credit card laundering, but noted that the coverage of the provision in the proposed Rule would expand to cover credit card laundering in the solicitation of charitable contributions, pursuant to the mandate of the USA PATRIOT Act.³⁷³ Although the proposed Rule was issued with this provision unmodified, the Commission expressed concern that the provision’s “usefulness may be unduly restricted by the phrases ‘[e]xcept as expressly permitted by the applicable credit card system,’ in the preamble to § 310.3(c), and ‘when such access is not authorized by the merchant agreement or the applicable credit card system,’ in § 310.3(c)(3).”³⁷⁴

Having received no comment regarding the credit card laundering provision generally, or regarding the Commission’s specific concerns, the Commission has determined to retain this provision in its original form. The Commission will continue to monitor its effectiveness, however, and may reconsider modifications at the next Rule Review.

§ 310.3(d) — Prohibited deceptive acts or practices in the solicitation of charitable contributions

Pursuant to § 1011(b)(1) of the USA PATRIOT Act, the Commission proposed in the NPRM to include in the Rule new prohibited misrepresentations in the solicitation of charitable contributions.³⁷⁵ The amended Rule retains § 310.3(d) unchanged, with the following exceptions. First, the phrase “after any administrative or fundraising expenses are deducted” has been deleted from § 310.3(d)(4). The Commission believes that the provision is clearer absent this qualifying phrase, and thus has stricken it in the amended Rule. Second, § 310.3(d)(6), the prohibited misrepresentation regarding advertising sales has been deleted. As discussed below, in the section addressing § 310.6(b)(7), the Commission has determined to exempt from the Rule’s coverage business-to-

business calls to induce a charitable solicitation. As a result, the prohibition against misrepresentations regarding the sale of advertising, which would occur in a business-to-business context, is no longer necessary. Finally, proposed § 310.3(d)(7), prohibiting misrepresentations regarding a charitable organization’s or telemarketer’s affiliation with, or endorsement or sponsorship by, any person or government entity, is renumbered in the amended Rule as § 310.3(d)(6).

Section 310.3(d) prohibits misrepresentations regarding certain material information that a telemarketer might choose to convey to a donor to induce a charitable contribution.³⁷⁶ The goal of the prohibition on these misrepresentations is to ensure that donors solicited for charitable contributions are not deceived, a purpose squarely in line with the mandate of the USA PATRIOT Act, which directed the Commission to include “fraudulent charitable solicitations” in the deceptive practices prohibited by the TSR.³⁷⁷ Deception occurs if there is a representation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances, and the representation, omission, or practice is material.³⁷⁸ As set forth in the NPRM, the Commission believes that if any of the items listed in this section are misrepresented, donors are likely to be misled, as false representations of material facts are likely to mislead.³⁷⁹ Moreover, the Commission’s enforcement experience shows that often such representations are express, and therefore presumptively material. If implied, such representations are still likely to influence a donor’s decision whether to contribute. Therefore, “misrepresentation of any of these [] categories of material information is deceptive, in violation of section 5 of the FTC Act.”³⁸⁰

In response to the NPRM, some commenters expressed their general support for the USA PATRIOT Act amendments, which extended the Rule’s coverage to for-profit telemarketers soliciting charitable donations. AARP, for example, noted its support for the general purposes of the USA PATRIOT Act, stating that the amendments would

³⁷² See 67 FR at 4509, n.155. See also *FTC v. Allstate Bus. Distrib’n. Ctr., Inc.*, No. 00-10335AHM (CTX) (C.D. Cal. 2001); *FTC v. Sweet Song Corp.*, No. CV-97-4544 LGB (Jgx) (C.D. Cal. 1997); *FTC v. Walton* (d/b/a Pinnacle Fin. Servs.), No. CIV98-0018 PCT SMM (D. Ariz. Jan. 1998).

³⁷³ See 67 FR at 4509.

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 4509-10 (discussing the reasoning behind the prohibited misrepresentations included in proposed Rule § 310.3(d)).

³⁷⁶ Amended Rule § 310.3(d)(1)-(7).

³⁷⁷ USA PATRIOT Act § 1011(b)(1).

³⁷⁸ See *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165, appeal dismissed sub nom., *Koven v. FTC*, No. 84-5337 (11th Cir. 1984).

³⁷⁹ See *Thompson Med. Co.*, 104 F.T.C. 648, 818 (1984), *aff’d* 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

³⁸⁰ 67 FR at 4510.

³⁶⁶ ARDA-NPRM at 6.

³⁶⁷ AARP-NPRM at 8.

³⁶⁸ NACAA-NPRM at 8.

³⁶⁹ NAAG-NPRM at 56.

³⁷⁰ *Id.* (suggesting that liability for those who assist and facilitate is particularly important when the fraudulent telemarketer holds no assets in the United States).

³⁷¹ 60 FR at 43852.

prevent fraudulent charitable solicitations while still allowing "legitimate fundraising appeals."³⁸¹ Similarly, NCL noted that the new provisions in the TSR regarding for-profit fundraisers will be "very helpful in curbing deceptive and abusive practices."³⁸²

Very few comments were received specifically on § 310.3(d) of the proposed Rule. One such comment, from NCL, noted that "[t]he proposed list of prohibited practices covers most of the common abuses that are reported by consumers and businesses."³⁸³ NCL did suggest adding an additional prohibited misrepresentation on "sound-alikes," or the use of a name similar or identical to that of a legitimate charity in an attempt to benefit from that charity's good will.³⁸⁴ Similarly, Make-A-Wish proposed prohibiting misrepresentations of the "identity" of the entity on whose behalf the charitable solicitation is being sought.³⁸⁵ NAAG and NASCO suggested that the Commission clarify that proposed § 310.3(d)(7), which prohibits misrepresentations regarding "[a] seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity," would prohibit misrepresentations of a seller's or telemarketer's affiliation with any charity.³⁸⁶ The Commission believes that proposed § 310.3(d)(7), renumbered as § 310.3(d)(6) in the amended Rule, is broad enough to prohibit the "sound-alike" misrepresentation NCL raised, as well as to prohibit a misrepresentation regarding one's affiliation with any charity. Therefore, the Commission declines to add a further misrepresentation to specifically address the "sound-alike" scenario, or add the "identity" of the charity to the prohibited misrepresentations.

NAAG and NASCO also proposed one further modification: the addition of a prohibited misrepresentation of "[t]he address or location of the charitable organization, and where the organization conducts its activities."³⁸⁷ NAAG stated that the addition of such a provision would ensure that telemarketers do not misrepresent that the charities on whose behalf they are soliciting are "local" or that their activities are local, since the local character of a charity or its programs often is material to prospective donors.

According to NAAG, because many prospective donors prefer to support organizations that will benefit their own community, fundraisers sometimes take advantage of that sentiment by using a local post office box or other local address as their return address, to make it seem as if the charity is based close to the donors.³⁸⁸

The Commission believes that any misrepresentation of the charitable organization's location, or the location where the funds are to be used, would likely violate § 310.3(d)(3), which prohibits misrepresentation of the "purpose for which any charitable contribution will be used." Therefore, the Commission declines to include a specific prohibited misrepresentation regarding the address or location of a charity.

D. Section 310.4 — Abusive Telemarketing Acts or Practices.

The Telemarketing Act authorizes the Commission to prescribe rules "prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices."³⁸⁹ The Act does not define the term "abusive telemarketing act or practice." It directs the Commission to include in the TSR provisions prohibiting three specific "abusive" telemarketing practices, namely, for any telemarketer to: 1) "undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy;" 2) make unsolicited phone calls to consumers during certain hours of the day or night; and 3) fail to "promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services."³⁹⁰ The Act does not limit the Commission's authority to address abusive practices beyond these three practices legislatively determined to be abusive.³⁹¹ Accordingly, the Commission adopted a Rule that addresses the three specific practices

mentioned in the statute, and, additionally, five other practices that the Commission determined to be abusive under the Act.

Each of the three abusive practices enumerated in the Act implicates consumers' privacy. In fact, with respect to the first of these practices, the explicit language of the statute directs the FTC to regulate "calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."³⁹² Similarly, by directing that the Commission regulate the times when telemarketers could make unsolicited calls to consumers in the second enumerated item,³⁹³ Congress recognized that telemarketers' right to free speech is in tension with consumers' right to privacy within the sanctity of their homes, but that a balance must be struck between the two that meshes with consumers' expectations while not unduly burdening industry. The calling times limitation protects consumers from telemarketing intrusions during the late night and early morning, when the toll on their privacy from such calls would likely be greatest. The third enumerated practice³⁹⁴ also relates to privacy, in that it requires the consumer be given information promptly that will enable him to decide whether to allow the infringement on his time and privacy to go beyond the initial invasion. Congress provided authority for the Commission to curtail these practices that impinge on consumers' right to privacy but are not likely deceptive under FTC jurisprudence. This recognition by Congress, that even non-deceptive telemarketing business practices can seriously impair consumers' right to be free from harassment and abuse, and its directive to the Commission to rein in these tactics lie at the heart of § 310.4 of the TSR.

The practices not specified as abusive in the Act, but determined by the Commission to be abusive and thus prohibited in the original rulemaking are: (1) threatening or intimidating a consumer, or using profane or obscene language; (2) "causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person;" (3) requesting or receiving payment for credit repair services prior to delivery and proof that such services have been rendered; (4) requesting or receiving payment for recovery services prior to delivery and proof that such services

³⁸⁸ *Id.*

³⁸⁹ 15 U.S.C. 6102(a)(1) (emphasis added).

³⁹⁰ 15 U.S.C. 6102(a)(3).

³⁹¹ See KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.2 (3d ed. 1994) (noting that agencies have the power to "fill any gaps" that Congress either expressly or implicitly left to the agency to decide pursuant to the decision in *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). It is, therefore, permissible for agencies to engage in statutory construction to resolve ambiguities in laws directing them to act, and courts must defer to this administrative policy decision.

³⁹² 15 U.S.C. 6102(a)(3)(A) (emphasis added).

³⁹³ 15 U.S.C. 6102(a)(3)(B).

³⁹⁴ 15 U.S.C. 6102(a)(3)(C).

³⁸¹ AARP-NPRM at 4.

³⁸² NCL-NPRM at 2.

³⁸³ *Id.* at 5.

³⁸⁴ *Id.*

³⁸⁵ Make-A-Wish-NPRM at 5.

³⁸⁶ NAAG-NPRM at 53. See also NASCO-NPRM at

7.

³⁸⁷ NAAG-NPRM at 53.

have been rendered; and (5) “requesting or receiving payment for an advance fee loan when a seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit.”

The first two of these are directly consistent with the Act’s emphasis on privacy protection, and with the intent, made explicit in the legislative history, that the TSR address these particular practices.³⁹⁵ In the SBP for the original Rule, the Commission stated, with respect to the prohibition on threats, intimidation, profane and obscene language, that these tactics “are clearly abusive in telemarketing transactions.”³⁹⁶ The Commission also noted that the commenters supported this view, and specifically cited the fact that “threats are a means of perpetrating a fraud on vulnerable victims, and [that] many older people can be particularly vulnerable”³⁹⁷

The remaining three abusive practices identified in the Rule—relating to credit repair services, recovery services, and advance fee loan services—were included in the Rule under the Telemarketing Act’s grant of authority for the Commission to prescribe rules prohibiting other unspecified abusive telemarketing acts or practices. The Act gives the Commission broad authority to identify and prohibit additional abusive telemarketing practices beyond the specified practices that implicate privacy concerns,³⁹⁸ and gives the Commission discretion in exercising this authority.³⁹⁹

As noted above, some of the practices prohibited as abusive under the Act flow directly from the Telemarketing Act’s emphasis on protecting consumers’ privacy. When the Commission seeks to identify practices

³⁹⁵ “With respect to the bill’s reference to ‘other abusive telemarketing activities’ . . . the Committee intends that the Commission’s rulemaking will include proscriptions on such inappropriate practices as threats or intimidation, obscene or profane language, refusal to identify the calling party, continuous or repeated ringing of the telephone, or engagement of the called party in conversation with an intent to annoy, harass, or oppress any person at the called number. The Committee also intends that the FTC will identify other such abusive practices that would be considered by the reasonable consumer to be abusive and thus violate such consumer’s right to privacy.” H.R. REP. NO. 103-20 at 8 (1993).

³⁹⁶ 60 FR at 30415.

³⁹⁷ *Id.*

³⁹⁸ 15 U.S.C. 6102(a)(1). The ordinary meaning of “abusive” is (1) “wrongly used; perverted; misapplied; catachrestic;” (2) “given to or tending to abuse;” (which is in turn defined as “improper treatment or use; application to a wrong or bad purpose”). Webster’s International Dictionary, Unabridged 1949.

³⁹⁹ 15 U.S.C. 6102(a)(1).

as abusive that are less distinctly within that parameter, the Commission now thinks it appropriate and prudent to do so within the purview of its traditional unfairness analysis, as developed in Commission jurisprudence⁴⁰⁰ and codified in the FTC Act.⁴⁰¹ This approach constitutes a reasonable exercise of authority under the Telemarketing Act, and provides an appropriate framework for several provisions of the original Rule. Whether privacy-related intrusions or concerns might independently give rise to a Section 5 violation outside of the Telemarketing Act’s purview is not addressed or affected by this analysis.

The abusive practices relating to credit repair services, recovery services, and advance fee loan services each meet the criteria for unfairness. An act or practice is unfair under Section 5 of the FTC Act if it causes substantial injury to consumers, if the harm is not outweighed by any countervailing benefits, and if the harm is not reasonably avoidable.⁴⁰² An important characteristic common to credit repair services, recovery services, and advance fee loan services is that in each case the offered service is fundamentally bogus. It is the essence of these schemes to take consumers’ money for services that the seller has no intention of providing and in fact does not provide. Each of these schemes had been the subject of large numbers of consumer complaints and enforcement actions,⁴⁰³ and in each case

⁴⁰⁰ See Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, appended to *Int’l Harvester Co.*, 104 F.T.C. 949, 1064 (1984); Letter from the FTC to Hon. Bob Packwood and Hon. Bob Kasten, Committee on Commerce, Science and Transportation, United States Senate, reprinted in FTC Antitrust & Trade Reg. Rep. (BNA) No. 1055, at 568-70 (Mar. 5, 1982); *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1363-68, *reh’g denied*, 859 F.2d 928 (11th Cir. 1988), *cert. denied*, 488 U.S. 1041 (1989).

⁴⁰¹ 15 U.S.C. 45(n).

⁴⁰² *Id.*

⁴⁰³ During 1995 and 1996, the Commission brought or settled lawsuits against numerous individuals and companies involved in nearly a dozen recovery room operations. See, e.g., *FTC v. Meridian Capital Mgmt.*, No. CV-S-96-63-PMP (RLH) (D. Nev. filed Nov. 20, 1996). The Commission’s efforts against recovery rooms have borne fruit. The volume of consumer complaints concerning recovery rooms logged into the FTC Telemarketing Complaint System in 1996 plummeted to 153—less than one-fifth the record high volume of 869 complaints recorded in 1995. See “1995-1996 Staff Summary of FTC Activities Affecting Older Americans” (Mar. 1998). Complaints about “recovery” schemes have continued to decline dramatically, from a number three ranking in 1995 to a number twenty-five ranking in 1999, while complaints about credit repair have remained at a relatively low level since 1995 (steadily ranking about number twenty-three

caused substantial injury to consumers. Amounting to nothing more than outright theft, these practices conferred no potentially countervailing benefits. Finally, having no way to know these offered services were illusory, consumers had no reasonable means to avoid the harm that resulted from accepting the offer. Thus, these practices meet the statutory criteria for unfairness, and accordingly, the remedy imposed by the Rule to correct them is to prohibit requesting or receiving payment for these services until after performance of the services is completed.

§ 310.4(a) — Abusive conduct generally

Section 310.4(a) of the original Rule sets forth specific conduct that is considered to be an “abusive telemarketing act or practice” under the Rule. None of the comments in the Rule Review recommended that changes be made to the original wording of §§ 310.4(a)(1)-(3); nor had the Commission’s enforcement experience revealed any difficulty with these provisions that would warrant amendment.⁴⁰⁴ Although one

or twenty-four in terms of number of complaints received by the NFIC). NCL-RR at 11. The Commission continues to take action against fraudulent credit repair schemes; for example, in August 2000, the FTC, the Department of Justice and forty-seven other federal, state and local law enforcement and consumer protection agencies surfed the Web looking for illegal scams that promise consumers that they can restore their creditworthiness for a fee. Over 180 websites were put on notice that their credit repair claims may violate state and federal laws. See “Surf’s Up for Crack Down on ‘Credit Repair’ Scams,” FTC press release dated Aug. 21, 2000). Unfortunately, complaints about advance fee loan schemes rose from a number fifteen ranking in 1995 to the number two ranking in 1998, with about 80 percent of the advance fee loan companies reported to the NFIC located in Canada. NCL-RR at 12. RR Tr. at 378. The Commission and the state Attorneys General continue to launch law enforcement “sweeps” targeting corporations and individuals that promise loans or credit cards for an advance fee, but never deliver them. A sweep was announced June 20, 2000, involving five cases filed by the FTC, 13 actions taken by state officials, and three cases filed by Canadian law enforcement authorities. See “FTC, States and Canadian Provinces Launch Crackdown on Outfits Falsely Promising Credit Cards and Loans for an Advance Fee,” FTC press release dated June 20, 2000. Among the most recent FTC cases targeting advance fee loans, four involved advance fee credit card schemes: *FTC v. Fin. Servs. of N. Am.*, No. 00-792 (GEB) (D.N.J. filed June 9, 2000); *FTC v. Home Life Credit*, No. CV00-06154 CM (Ex) (C.D. Cal. filed June 8, 2000); *FTC v. First Credit Alliance*, No. 300 CV 1049 (D. Conn. filed June 8, 2000); and *FTC v. Credit Approval Serv.*, No. G-00-324 (S.D. Tex. filed June 7, 2000). In addition, another case against a fraudulent credit card loss protection seller also included elements of illegal advance fee credit card fees. *FTC v. First Capital Consumer Membership Servs., Inc.*, Civil No. 00-CV-0905C(F) (W.D.N.Y. filed Oct. 23, 2000).

⁴⁰⁴ Section 310.4(a)(1) prohibits as an abusive practice “threats, intimidation, or the use of profane

commenter suggested amendments to § 310.4(a)(4), the Commission determined that no amendment was needed to the language of that provision.⁴⁰⁵ Therefore, the language in these provisions was unchanged in the proposed Rule.

As noted in the NPRM, however, the Rule amendments mandated by the USA PATRIOT Act expand the reach of § 310.4(a) to encompass the solicitation of charitable contributions. The section begins with the statement “It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in [the conduct specified in subsections (1) through (6) of this provision of the Rule].”⁴⁰⁶ The proposed Rule modified the definitions of “telemarketing,” and, by association, “telemarketer,” to encompass the solicitation of charitable contributions. Consequently § 310.4(a) of the proposed Rule would have applied to all telemarketers, including those engaged in the solicitation of charitable contributions. Each of the prohibitions in § 310.4(a) will therefore now apply to those telemarketers soliciting on behalf of either sellers or charitable organizations. As noted in the NPRM, the Commission believes it unlikely that §§ 310.4(a)(2)-(4) will have any significant impact on telemarketers engaged in the solicitation of charitable contributions, since those sections all deal with practices that are commercial in nature and not associated with charitable solicitations. Sections 310.4(a)(1), (5), (6), (7) and (8) of the proposed Rule, however, addressed practices that are not necessarily confined to telemarketing to induce purchases of goods or services. They therefore may have had an impact upon

or obscene language.” Section 310.4(a)(2) prohibits requesting advance payment for so-called “credit repair” services. Section 310.4(a)(3) prohibits requesting advance payment for the recovery of money lost by a consumer in a previous telemarketing transaction.

⁴⁰⁵ Section 310.4(a)(4) prohibits requesting advance payment for obtaining a loan or other extension of credit when the seller or telemarketer has represented a high likelihood that the consumer will receive the loan or credit. NCL reported in its Rule Review comment that the number of complaints it received about such advance fee loan schemes had risen steeply in the five years since the Rule was promulgated. NCL also speculated that consumers may be confused about whether and under what circumstances fees are legitimately required for different types of loans, as evidenced by the numerous complaints about advance fee credit cards. NCL-RR at 11. The Commission noted in the NPRM its belief that the language of § 310.4(a)(4) already prohibits such advance fee credit card offers via telemarketing and that numerous federal and state law enforcement efforts have been directed at such offers. See discussion at 67 FR at 4510.

⁴⁰⁶ Original and amended Rule § 310.4(a).

telemarketers engaged in the solicitation of charitable contributions.

The Commission received many comments discussing the proposed modifications to § 310.4(a), and significant time was devoted to these issues at the June 2002 Forum. A summary of the major points on the record regarding the proposed amendments is provided below.

§ 310.4(a)(1) — Threats and intimidation

Section 310.4(a)(1), unchanged in the proposed Rule, specifies that it is an abusive telemarketing practice to engage in threats, intimidation, or the use of profane or obscene language. None of the comments in response to the NPRM recommended that changes be made to the wording of § 310.4(a)(1), although ICFA did request clarification of the term “intimidation,” arguing that “a person could potentially claim to have been ‘intimidated’ simply because a pre-need caller suggested meeting to discuss funeral arrangements.”⁴⁰⁷ The Commission believes that under the language of the Rule, which focuses on the telemarketer’s behavior, to “engage in . . . intimidation” could not reasonably be extended to cover the situation where a telemarketer merely invites a consumer to discuss funeral arrangements, even if the person called finds the prospect of funeral planning an “intimidating” one. Rather, as the Commission noted in the TSR Compliance Guide, this provision is meant to prohibit “intimidation, including acts which put undue pressure on a consumer, or which call into question a person’s intelligence, honesty, reliability or concern for family.”⁴⁰⁸ The Commission believes further clarification is unnecessary, and thus declines to include in the amended Rule a definition of “intimidation.” Therefore, the language in this provision remains unchanged in the amended Rule. However, the USA PATRIOT Act expansion of the TSR brings within the ambit of this provision telemarketers soliciting charitable contributions.

§ 310.4(a)(2) — Credit repair

Section 310.4(a)(2) prohibits requesting or receiving a fee or consideration for goods or services represented to improve a person’s creditworthiness until: 1) the time frame within which the seller has represented that the promised services will be provided has expired; and 2) the seller

⁴⁰⁷ ICFA-NPRM at 3.

⁴⁰⁸ TSR Compliance Guide at 23 (noting that “[r]epeated calls to an individual who has declined to accept an offer may also be an act of intimidation”).

has provided the consumer with evidence that the services were successful—that is, that the consumer’s creditworthiness has improved. No change to this section was incorporated in the proposed Rule, except to note its expanded coverage as a result of the USA PATRIOT Act.⁴⁰⁹ The only comment received in response to the NPRM was from DBA, which requested that debt collectors be specifically exempted from compliance with this section.⁴¹⁰ As DBA itself noted, debt collection activities do not fall within the Rule’s ambit in any event because they are outside the definition of “telemarketing.”⁴¹¹ Therefore, it is unnecessary to exempt debt collectors from compliance with this provision.

§ 310.4(a)(5) — Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing

The Commission has added a new provision, § 310.4(a)(5), which specifies that it is an abusive practice and a violation of the Rule to disclose or receive, for consideration, unencrypted consumer account numbers for use in telemarketing.

As mentioned above, since the original Rule was promulgated, consumer concern over encroachments on their privacy has become widespread. One response to privacy concerns was passage of the GLBA⁴¹² and its related regulations,⁴¹³ under which financial institutions, and the third parties with which they do business, may provide consumer account information to other third parties only in encrypted form for marketing purposes. To do otherwise is not only a violation of the GLBA and its related regulations,⁴¹⁴ but is construed by consumers as a breach of the financial institution’s promise to consumers to keep the consumer’s account information confidential and secure.⁴¹⁵

⁴⁰⁹ 67 FR at 4512 (noting that “[i]t is unlikely that [this section] will have any significant impact on telemarketers engaged in the solicitation of charitable contributions. . .”).

⁴¹⁰ DBA-NPRM at 2-4.

⁴¹¹ *Id.*

⁴¹² Gramm-Leach-Bliley Act, see note 64 above.

⁴¹³ See 16 CFR 313.65 (2000) (FTC’s Privacy Regulation). See also 17 CFR 160; 12 CFR 332; 12 CFR 715; 12 CFR 40; 12 CFR 573; and 17 CFR 248.

⁴¹⁴ See, e.g., 12 CFR 313.12.

⁴¹⁵ See AARP-Supp. at 2 (describing the results of a survey AARP conducted in which the majority of consumers reported that they did not believe telemarketers could or should freely share their account information). See also Dave Finlayson (Msg. 491) (“I will cease doing business with any firm which gives out my personal private information.”); BL (Msg. 1175) (“I also agree that

Indeed, trading in unencrypted consumer account numbers has been uniformly condemned by virtually all parties who participated in this rulemaking proceeding. Although there was substantial debate regarding the Commission's proposal for a blanket prohibition on the transfer or receipt of consumers' billing information (*i.e.*, "preacquired account information"),⁴¹⁶ there was no disagreement among commenters and forum participants about the notion that trafficking in lists of consumer account numbers was improper, in many cases illegal, and should be a violation of the Rule.⁴¹⁷ As ERA explained during the forum:

[I]f there is a transfer of consumer information without knowledge of and prior to the consumers' consent, which would encompass, for example, your scenario where a list is compiled and a marketer [sold] its list with its credit card numbers to another marketer without telling the consumers on that list that they sold the list of account numbers, I think everyone at this table would agree . . . that this is a violation. . . . We've said in our comments that we would agree to a ban on that. Legitimate marketers don't do that. They don't sell consumer credit card numbers for money.⁴¹⁸

Given that there is no legitimate reason to purchase unencrypted credit card numbers, the Commission believes there is a strong likelihood that telemarketers who engage in this practice will misuse the information in a manner that results in unauthorized charges to consumers. This conclusion is consistent with the Commission's law enforcement experience.⁴¹⁹ Consumers

they should not get a credit card or other account number except from the consumer who chooses to deal with them. . . . This should include not SELLING (not just sharing as stated in our newspaper article) these numbers."); Anonymous (Msg. 3457) ("This is not what any reasonable person would consider "public information." . . . Why would ANYONE consider this information that they can "share" without the customer's express permission?").

⁴¹⁶ Over 50 of the major organizational commenters addressed the issue of preacquired account telemarketing, as did over 200 consumer commenters. In addition, a session of the June 2002 Forum was dedicated to the topic, and generated extensive discussion. See June 2002 Tr. II at 116-212.

⁴¹⁷ See, e.g., ERA/PMA-Supp. at 14-15; PMA-NPRM at 14; June 2002 Tr. II at 183 (ERA). See also ATA-Supp. at 6; NCTA-NPRM at 12 ("[T]he trafficking of customer account information by unscrupulous telemarketers is a legitimate concern."). Also, the GLBA prohibits this practice on the part of financial institutions. 15 U.S.C. 6802(d); and see, e.g. 12 CFR 313.12.

⁴¹⁸ June 2002 Tr. II at 183.

⁴¹⁹ See, e.g., *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176 (C.D. Cal. 2000) (in which, outside the telemarketing context, defendant purchased unencrypted lists of consumer account numbers, which it used to charge consumers, purportedly for visits to adult websites, despite the fact that many of those charged did not even own computers). In

cannot avoid the injury because they likely are unaware that their credit card numbers have been purchased and that a telemarketer possesses that information when they receive a telemarketing call. In addition, there is no evidence on the record of any countervailing benefits to consumers or competition by trafficking in lists of account numbers. As a result, the Commission concludes that the practice of selling unencrypted lists of credit card numbers is likely to cause substantial and unavoidable consumer injury in the form of unauthorized charges without any countervailing benefits. Thus, the Commission has determined to add Section 310.4(a)(5). This provision is consistent with the basic prohibition in the GLBA, and in essence, extends the ban on this practice beyond financial institutions and ensures that all sellers and telemarketers subject to the TSR are prohibited from this practice.

The prohibition in § 310.4(a)(5) is not limited to compilation and disclosure of lists of account numbers. Rather, any disclosure (or receipt) of unencrypted account information violates the Rule, unless the disclosure is for purposes of processing a payment for a transaction to which the consumer has consented after receiving all disclosures and other protections of the Rule. A seller or telemarketer could not, for example, provide or receive account numbers one at a time in order to circumvent this provision. Nor could a telemarketer obtain account information from consumers on behalf of one seller, and then retain it for sale or disclosure to another seller in another telemarketing campaign.⁴²⁰

In addition, given the evidence that preacquired account telemarketing involving encrypted account information can result in unauthorized charges (as discussed in more detail below), the Commission believes that there is an even greater likelihood of consumer injury when telemarketers have purchased consumers' actual credit card numbers before contacting consumers about an offer.

⁴²⁰ See, e.g., *FTC v. Capital Club*, No. 94-6335 (D.N.J. 1994). According to the FTC complaint in that case, two companies, National Media and Media Arts, which marketed products through infomercials, allegedly sold or rented their customer lists to third-party service companies that sold products and services such as memberships in shopping and travel clubs. The lists contained customers' names, addresses, and telephone numbers, as well as their credit-card types, account numbers and expiration dates. The lists were provided to the service companies without the customers' knowledge or authorization. Some of the Capital Club defendants' roles included maintaining the lists, marketing them to the service companies, and conducting telemarketing calls on behalf of the service companies, according to the complaint. Industry representatives at the June 2002 Forum registered agreement that the Capital Club scenario would run afoul of a ban on trafficking in consumer account information. See June 2002 Tr.

By "unencrypted," the Commission means the actual account number, or lists of actual account numbers, or encrypted information with a key to unencrypt the data.⁴²¹ "Consideration" is not limited to cash payment for a list of account numbers. "Consideration" can take a variety of forms, including receiving a percentage of every "sale" using the unencrypted account information.

This provision allows processing a properly obtained payment for goods or services pursuant to a transaction. In addition, pursuant to the USA PATRIOT Act's expansion of the TSR to cover charitable solicitations, the provision also allows for the disclosure or receipt of a donor's account number to process a payment for a charitable contribution pursuant to a transaction. By "transaction," the Commission means a telemarketing transaction that complies with all applicable sections of the Rule, including new § 310.4(a)(6), discussed below, which prohibits any seller or telemarketer from causing a charge to be placed against a customer's or donor's account without that customer's or donor's express informed consent to the charge.⁴²²

§ 310.4(a)(6) — Causing a charge to be submitted for payment without the consumer's express informed consent

In the NPRM, the Commission proposed a prohibition on "receiving from any person other than the consumer or donor for use in telemarketing any consumer's or donor's billing information, or disclosing any consumer's or donor's billing information to any person for use in telemarketing."⁴²³ This proposed provision was prompted by extensive comments during the Rule Review concerning the severity and the scope of harm to consumers related to

II at 193 (ERA) ("[T]hat's exactly the scenario that we're talking about that would be prohibited because when that third-party telemarketer retained that account information, it did so as an agent for the seller, so it was not that telemarketer's account information to begin with. They were capturing that for the seller on whose behalf that call was made, so if that telemarketer were then to call a consumer without knowledge and prior consent and use that credit card information again, that would be the kind of a transfer prior to and without consumer consent that we're talking about.")

⁴²¹ This, too, is consistent with the financial privacy regulations issued pursuant to the GLBA. See 12 CFR 313.12(c)(1) ("An account number, or similar form of access number or access code, does not include a number or code in an encrypted form, as long as you do not provide the recipient with a means to decode the number or code.") (emphasis added).

⁴²² See amended Rule § 310.4(a)(6) and discussion of that provision, below.

⁴²³ Proposed Rule § 310.4(a)(5), 67 FR at 4543.

preacquired account telemarketing.⁴²⁴ The proposal also arose from the Commission's law enforcement experience in this area, as well as that of the states, which demonstrates the consumer harm that can result from this practice.⁴²⁵ The comments received in response to the NPRM, however, demonstrate that much preacquired account telemarketing does not necessarily give rise to consumer injury—specifically, unauthorized charges—and in fact may benefit consumers. With this in mind, the Commission has focused more narrowly on the tangible harm, and has crafted precise solutions to the specific abuses evident in instances involving preacquired account information.

Section 310.4(a)(6) of the amended Rule is one of a number of provisions that collectively address the harm caused by certain forms of preacquired account telemarketing. The scope of this section, however, extends beyond the context of preacquired account telemarketing to any instance where the seller or telemarketer causes a charge to be submitted for payment without first obtaining the express informed consent of the customer or donor to be charged, and to be charged using a particular account or payment mechanism. This provision, along with several new definitions (amended Rule § 310.2(o) “free-to-pay conversion,” § 310.2(t) “negative option feature,” and § 310.2(w) “preacquired account information”), a new provision requiring specific disclosures of material information in any telemarketing transaction involving a negative option feature (amended Rule § 310.3(a)(1)(vii)), and a new provision prohibiting misrepresentations regarding any material aspect of a negative option feature (amended Rule § 310.3(a)(2)(ix)), together are designed to address in a more narrowly-tailored manner the problem originally targeted by the blanket prohibition against receiving account information from any person other than the consumer or disclosing that information for use in telemarketing.

The blanket prohibition proposed in the NPRM, and the issue of preacquired account telemarketing generally, received substantial comment. Consumer groups and law enforcement agencies strongly supported the proposal, citing continued evidence of substantial consumer injury resulting

from abusive preacquired account telemarketing practices.⁴²⁶ Their comments strongly criticized a distinctive feature of preacquired account telemarketing—that is, that it fundamentally changes the customary bargaining relationship between seller and consumer by giving the seller the means to bill charges to the consumer's account without the consumer divulging his or her account number to evidence consent to the transaction.⁴²⁷

Industry commenters opposed the proposed provision, making a number of legal and factual arguments. Several industry members suggested that without specific legislative authority, the Commission could not prohibit the transfer of account information under the TSR.⁴²⁸ A few commenters argued that the Commission lacked record evidence sufficient to support the proposed prohibition.⁴²⁹ It bears noting that, although business and industry representatives acknowledged during the Rule Review that the practice of preacquired account telemarketing was quite common, maintaining that it was “very important” to them, they provided scant information that would

⁴²⁶ AARP-NPRM at 6-7; AARP-Supp. at 4; EPIC-NPRM at 9; Horick-NPRM at 1 (endorsing EPIC's NPRM comment); NAAG-NPRM at 30-41; NCLC-NPRM at 12-13. *See also* Covington-Supp. at 2-5; and NCL-NPRM at 6 (“Checks and money orders are no longer the most common methods of payment in telemarketing complaints made to the NFIC. As NCL noted earlier, demand drafts, credit cards, debit cards, utility bills, and other types of accounts are increasingly used for payments. Sometimes consumers contend that they never provided their account numbers to the telemarketers; many of these complaints say they never even heard of the companies before they received their bills or bank statements.”).

⁴²⁷ NAAG-NPRM at 30; NCL-NPRM at 7. *See also* Covington-Supp. at 2-5.

⁴²⁸ ATA-NPRM at 18 (arguing that, because the Telemarketing Act made no reference to preacquired account telemarketing, the Commission cannot regulate it); Cendant-NPRM at 6 (similar argument to ATA); CCC-NPRM at 8; DMA-NPRM at 41-42 (arguing that the Commission lacks authority under Telemarketing Act to establish a law violation based on unfairness standard); ERA-NPRM at 20 (same argument as DMA); Green Mountain-NPRM at 29-31; Household Auto-NPRM at 5; PMA-NPRM at 16 (same argument as DMA and ERA). Contrary to these assertions, the Commission has the authority to define and restrict deceptive and abusive telemarketing acts or practices, pursuant to the Telemarketing Act. Moreover, the Commission has analyzed proposed Rule provisions addressing abusive practices under the FTC Act's unfairness standard to narrow, not expand, the scope of activities brought under the purview of the statute. 67 FR at 4511. The unfairness standard requires that several specific elements be met before an act or practice may be deemed “unfair” under the FTC Act. *See* 15 U.S.C. 45(n) and discussion of § 310.4(a) above. If anything, the Commission is taking a more conservative approach in analyzing what constitutes an “abusive practice” than is required under the Telemarketing Act.

⁴²⁹ DMA-NPRM at 39, 41; Household Auto-NPRM at 5; MPA-NPRM at 21-22.

help to quantify the benefits conferred by this practice or better explain how these benefits might outweigh the substantial consumer harm it can cause.⁴³⁰ By contrast, the record of consumer injury arising from preacquired account telemarketing scenarios was extensive at the time of the Rule Review.⁴³¹

Three arguments echoed throughout virtually all industry comments received in response to the NPRM. First, financial institutions, as well as other industry members, argued that the proposal was unnecessary or improper in light of the enactment of the GLBA and the various regulations thereunder.⁴³² Specifically, these commenters argued that the issue of releasing account information for marketing purposes already has been dispositively addressed in the GLBA and its implementing regulations, with a different result from that proposed by the Commission in the TSR.⁴³³

⁴³⁰ *See* 67 FR at 4512-14; and June 2002 Tr. II at 211-12 (E. Harrington) (“One of the reasons that the Commission has proposed a prohibition is because it looked very carefully at the record of the request for justification for the practice and found it is sorely wanting. Why this needs to happen, in other words, has been a real mystery to us, why it is that companies should be permitted to get account information from third parties and have it at the time that they call a prospective customer, charge that account information and oftentimes not obtain consent for that.”).

⁴³¹ *See* 67 FR at 4512-14. Moreover, the evidence continues to mount as the Commission and states continue to bring law enforcement actions involving these practices. *See, e.g.*, NAAG-NPRM at 30, n.73; Minnesota-Supp. *passim*; Illinois-Supp. *passim*.

⁴³² Advanta-NPRM at 3; Allstate-Supp. at 2; ABA-NPRM at 8; ABIA-NPRM at 1; AFSA-NPRM at 11-12; AmEx-NPRM at 4-5; ATA-Supp. at 5; Assurant-NPRM at 6; BofA-NPRM at 7; Bank One-NPRM at 2-3; Capitol One-NPRM at 8; Cendant-NPRM at 6-7; CBA-NPRM at 9; Citigroup-NPRM at 8-9; CCC-NPRM at 9; CMC-NPRM at 13; Discover-NPRM at 5-6; E-Commerce Coalition-NPRM at 2; Eagle Bank-NPRM at 4; FSR-NPRM at 7-8; Fleet-NPRM at 4-5; Household Auto-NPRM at 5; Household Bank-NPRM at 2, 7-9; Household Finance-NPRM at 2, 5; HSBC-NPRM at 3; KeyCorp-NPRM at 4; MasterCard-NPRM at 7; MBA-NPRM at 3; MBNA-NPRM at 5; Metris-NPRM at 2-4; NRF-NPRM at 21; PCIC-NPRM at 2; VISA-NPRM at 6; Wells Fargo-NPRM at 3; Letter from Reps. Ney, Sandlin, Jones, Cantor, and Shows to Chairman Timothy Muris, dated Apr. 15, 2002; Letter from Sens. Hagel, Johnson, and Carper to Chairman Timothy Muris, dated Apr. 17, 2002. *See also* Letter from Rep. Manzullo to Chairman Timothy Muris, dated Apr. 12, 2002 (suggesting that the blanket prohibition on transferring or receiving billing information “seems excessive”); and Letter from Sen. Inhofe to Chairman Timothy Muris, dated Mar. 22, 2002 (same).

⁴³³ ABA-NPRM at 8; BofA-NPRM at 7; Bank One-NPRM at 2-3; CBA-NPRM at 9; Discover-NPRM at 5. *See also* CMC-NPRM at 14 (“We see no reason why financial institutions should be subject to any more stringent rules in connection with the use of consumer information for telemarketing purposes than for other purposes, and for this reason, we think the Rule should impose no more stringent limits on the sharing of billing information than the

Continued

⁴²⁴ *See* 67 FR at 4512-14.

⁴²⁵ *See, e.g.*, *FTC v. Smolev*, No. 01-8922 CIV ZLOCH (S.D. Fla. 2001); *FTC v. Technobrand, Inc.*, No. 3:02 cv 00086 (E.D. Va. 2002); NAAG-NPRM at 30, n.73; Illinois-Supp. *passim*.

Commenters noted that the various privacy regulations under the GLBA prohibit sharing account numbers with telemarketers, but provide exceptions for encrypted information, sale of an entity's own product through an agent, and co-branding and affinity programs. Thus, they argued, "since the proposed Rule fails to include these exceptions, it is inconsistent with the GLBA regulations, rendering the regulations irrelevant."⁴³⁴ NAAG challenged these arguments, pointing out that the goals of the GLBA and the TSR are very different. NAAG expressed the view that the GLBA did not address the economic injury to consumers caused by preacquired account telemarketing, as it was focused on the privacy of account information; thus there is no conflict between the regulations, as they are aimed at different consumer harms.⁴³⁵ According to NAAG:

The essential characteristic of [preacquired account telemarketing] is the ability of the telemarketer to charge the consumer's account without traditional forms of consent. . . . The key is how the agreement between a company controlling access to a consumer's account and the telemarketer who preacquired the ability to charge a consumer's account affects the bargaining power between the telemarketer and the consumer. GLBA and implementing regulations do not address this relationship. . . . [Indeed as] a result of the [GLBA and implementing regulations] . . . vendors . . . can still send through charges to consumers' accounts without consumers giving their credit card numbers. . . . This allows the same [preacquired account telemarketing] process to continue. . . .⁴³⁶

Another common theme in industry comments on this issue was that the use of preacquired account information in telemarketing provides protection for consumers from identity theft perpetrated by individual telemarketing agents, and assuages consumers' concerns about divulging their account information.⁴³⁷ According to one such

GLBA and the Commission's privacy rule impose.").

⁴³⁴ ABA-NPRM at 8. See also ABIA-NPRM at 2 (arguing that the proposed provision "would . . . disrupt a coordinated body of federal and state privacy laws and regulations enacted since passage of GLBA"); AFSA-NPRM at 11; AmEx-NPRM at 4; BofA-NPRM at 7; Bank One-NPRM at 3; Cendant-NPRM at 6-7; CMC-NPRM at 13.

⁴³⁵ NAAG-NPRM at 41-43.

⁴³⁶ *Id.* at 43. Accord Covington-Supp. at 2-5.

⁴³⁷ ABA-NPRM at 8; AmEx-NPRM at 5; Assurant-NPRM at 4; BofA-NPRM at 7; Bank One-NPRM at 3-4; Capital One-NPRM at 9; Cendant-NPRM at 7; Household Auto-NPRM at 2, 5; Household Bank-NPRM at 2, 7; Household Finance-NPRM at 2, 7; MasterCard-NPRM at 7; MPA-NPRM at 24; Metris-NPRM at 2, 5-7; NRF-NPRM at 20; Time-NPRM at 8-9; VISA-NPRM at 6-7; Wells Fargo-NPRM at 3. See also June 2002 Tr. II at 124-25 (CCC); *Id.* at 133 (PMA) and 194-95 (DialAmerica).

commenter, having consumers provide billing information over the telephone:

will actually operate to introduce account numbers into broader circulation. As customers provide account numbers, employees of telemarketers, processors and others in the distribution chain may have access to them. This practice will actually increase the chances for unauthorized use. . . . Sophisticated encryption processes keep account numbers out of circulation, and out of the hands of potential unauthorized users.⁴³⁸

A number of commenters pointed out that the GLBA implementing regulations assume the confidentiality benefits of transferring encrypted account information so that consumers would not have to provide such information during the marketing transaction.⁴³⁹ Other commenters noted some contradiction in industry's identity theft argument, suggesting it is illogical to assert that a telemarketer cannot be trusted with a consumer's account information, but that same telemarketer can be trusted to tell the seller truthfully that the consumer has provided express informed consent to the purchase, absent obtaining any part of the account number from the consumer.⁴⁴⁰ One such

⁴³⁸ AmEx-NPRM at 8. Accord Assurant-NPRM at 5; Bank One-NPRM at 3-4. Additionally, several commenters suggested that the blanket prohibition was "inconsistent with the longstanding and well considered advice [of the Commission and other consumer protection groups and law enforcement agencies] that they not release their account numbers to telemarketers. . . ." MasterCard-NPRM at 7. Accord BofA-NPRM at 7; Bank One-NPRM at 3. See also ABA-NPRM at 8; Metris-NPRM at 6. In fact, the Commission's advice has not been to refuse to divulge account information in any telemarketing transaction, but rather only to divulge such information when the seller is known to the consumer. See, e.g., "Facts for Consumers: Are You a Target of . . . Telephone Scams," <http://www.ftc.gov/bcp/confine/pubs/tmark/target.htm>; and "Consumer Alert: Customized Cons Calling," <http://www.ftc.gov/bcp/confine/pubs/alerts/consalrt.htm>. Moreover, the reason for this advice is not to avoid identity theft, but to protect consumers from fraudulent telemarketers selling bogus goods or services. *Id.* In the identity theft context, the danger identified by the Commission and discussed in its publications is not the potential misuse of account information that a consumer has provided in the course of a sale of goods or services, but rather "pretexting"—*i.e.*, the practice of eliciting a consumer's personal information under false pretenses, such as claiming to be from the consumer's bank, calling to confirm the consumer's account information. See "Pretexting: Your Personal Information Revealed," <http://www.ftc.gov/bcp/confine/pubs/credit/pretext.htm>.

⁴³⁹ Bank One-NPRM at 4; Cendant-NPRM at 7; Household Auto-NPRM at 2-3; Metris-NPRM at 5; E-Commerce Coalition-NPRM at 3; VISA-NPRM at 6-7.

⁴⁴⁰ June 2002 Tr. II at 130-31 (AARP), 143 (NAAG), and 205 (NCL). Indeed, in both their Rule Review and NPRM comments, NAAG provided several examples of instances where obviously confused elderly consumers were charged for products or services using preacquired account information, despite no clear evidence of consent

commenter further suggested that the best protection against individual telemarketers perpetrating identity theft is proper screening, training, monitoring and supervision of salespeople.⁴⁴¹ In addition, the vast majority of non-cash transactions in both telemarketing and face-to-face retail situations entail the consumer's disclosure of his or her account number to the seller's representative.⁴⁴² The record does not reveal any reason to support the notion that the risk of identity theft is any different in these transactions than in transactions where the seller has opted to make use of preacquired account information.

The third recurring theme in industry comments on this issue was the existence of a variety of efficiencies for both sellers and consumers. Among the most common examples cited was avoiding error in the transmission of account numbers from consumer to telemarketer, as either the consumer misstates or the telemarketer miskeys the account number.⁴⁴³ Another benefit cited by numerous industry commenters was the reduction of time on the telephone to complete the transaction in the initial call,⁴⁴⁴ particularly in

during the telemarketing call. NAAG-RR at 11 and Exs. 2 - 4 attached thereto; NAAG-NPRM at 32, and Ex. B attached thereto. See also Synergy Global-NPRM at 1-2 (comments from a former teleservices agent stating that he was encouraged by his superiors to "falsify sales in an attempt to artificially inflate the statistics compiled nightly").

⁴⁴¹ NCL-NPRM at 7.

⁴⁴² NAAG-RR at 10. Indeed, NEMA described its own current procedures, under the Uniform Business Practices guidelines created for the retail energy market, whereby it obtains complete billing information directly from each customer as proof of the customer's intent to switch utility providers. NEMA-NPRM at 8-9.

⁴⁴³ ABA-NPRM at 8; Assurant-NPRM at 3-4; BofA-NPRM at 7; Cendant-NPRM at 7; Cox-NPRM at 33; Metris-NPRM at 7.

⁴⁴⁴ See, e.g., MPA-NPRM at 24 ("The Commission must also not underestimate the economic efficiencies such practices afford to businesses. . . . It is estimated that requiring consumers to retrieve and repeat their entire account number and verifying this information will increase the length of the call substantially, with one provider estimating an increase of 35 seconds and additional evidence suggesting that increase could be 60 seconds or more.") See also Cox-NPRM at 33; Metris-NPRM at 6-7; NCTA-NPRM at 12; Tribune-NPRM at 8. MPA's argument on this point is somewhat contradicted by its recommended alternative to the prohibition, express verifiable authorization, which involves additional expense, regardless of the method of express verifiable authorization selected. See MPA-NPRM at 26-29. NCL challenged this proposition, suggesting that, on the contrary, "[r]equiring telemarketers to ask for [the consumer's account number] would benefit both parties by helping to confirm a consumer's intention to make the purchase and the correct account that will be used for that purchase, reducing the potential for billing disputes later." NCL-NPRM at 7.

upsells.⁴⁴⁵ As DMA noted, “it is a significant benefit to consumers for second businesses in an upsell to obtain and use information such as address and credit card information. This eliminates the need for a consumer to have to restate the information just provided. Transfer of information in such scenarios with informed consent is inherently efficient for both the merchant and the consumer.”⁴⁴⁶ The final benefit cited in several comments was that preacquired account telemarketing helped consumers by enabling them to avoid the inconvenience of having to pull out their wallets in order to make a purchase.⁴⁴⁷ This alleged benefit was sharply questioned by consumer advocates, who argued that whatever time savings or convenience may accrue from the use of preacquired account information does not offset the potential harm from its use.⁴⁴⁸ The record makes clear, in fact, that it is the very act of pulling out a wallet and providing an account number that consumers generally equate with consenting to make a purchase, and that this is the most reliable means of ensuring that a consumer has indeed consented to a transaction.⁴⁴⁹

⁴⁴⁵ Associations-Supp. at 5-6; DMA-NPRM at 40. See also PMA-NPRM at 18-19; Time-NPRM at 8.

⁴⁴⁶ DMA-NPRM at 40. See also Time-NPRM at 8.

⁴⁴⁷ Assurant-NPRM at 6; June 2002 Tr. II at 125 (CCC).

⁴⁴⁸ See, e.g., June 2002 Tr. II at 131 (AARP) (“To imply that . . . it’s more inconvenient for the consumer to get their credit card than to have an unknown source debit their account without their knowledge, I don’t think any consumer would ever agree with that statement.”)

⁴⁴⁹ Covington-Supp. at 2-5:

“The Commission is also correct that the best way to be certain that a consumer really wants to make a purchase is to see if the consumer is willing to reach into a purse or pocket, open a wallet, take out a credit card, and read from it. When that happens, there is nothing ambiguous about what’s taking place; there can be no misunderstanding. . . . Even during a chaotic dinner hour, a consumer cannot open a wallet, pull out a credit card, and read from it without knowing that he or she is making some kind of purchase. . . . This short-hand method for consumers to signal assent to a deal leaves complete control of the transaction in the hands of the consumer while preventing the industry burden from being any greater than necessary.”

Indeed, this conclusion derives from the actual experience of a telemarketing firm that engages in preacquired account telemarketing. See Letter from Stephen Calkins to the FTC, dated October 28, 2002 (“Calkins Letter”). This firm attempted to cure the high customer return rates generated by this practice in several ways, including adjusting the disclosures and reading at least four digits of the account number to the consumers during the call. *Id.* at 2. The firm found that none of these attempted cures ensured that consumers “knowingly consented” to the purchase while maintaining a competitive level of sales. *Id.* at 1-2. Only when the firm began requesting a portion of the account number from the consumer herself did complaint rates drop significantly, without an unacceptable drop in sales. According to the commenter, “Sales

As it stated in the NPRM, the Commission still believes that whenever preacquired account information enables a seller or telemarketer to cause charges to be billed to a consumer’s account without the necessity of persuading the consumer to demonstrate his or her consent by divulging his or her account number, the customary dynamic of offer and acceptance is inverted. In such a case, what is customarily under the sole control of the consumer—whether to divulge one’s account number, thereby determining whether to accept the offer and how to pay for it—is now in the hands of the seller or telemarketer.⁴⁵⁰ This reversal in the traditional paradigm is not one that is generally expected or

were about 25% lower than when the telemarketer read those digits to the consumer, but consumers really understood that they were making purchases My client believes that consumer complaints pertaining to their intent to purchase dropped, and that his seller clients now experience an acceptable level of product returns.” *Id.* at 2-3. See also June 2002 Tr. II at 139-44 (NAAG); NACAA-NPRM at 6 (“That the consumer has to provide this information to the seller provides a check on the transaction, and an assurance that the consumer does indeed wish to enter the transaction.”); Vermont-Supp. *passim* and attachment. AARP commissioned a survey by telephone on June 14-19, 2002, among a nationally representative sample of 1,240 respondents 18 years of age and older. Participants were asked a handful of questions, such as, “Often telemarketers ask you to buy something with a credit card or debit card. Do you think telemarketers are able to cause charges to your credit card or debit card without getting your credit or debit card numbers directly from you?” Only 30 percent of respondents stated that they were aware that telemarketers have the ability to cause a charge to their credit or debit card accounts without getting the account numbers from them. AARP-Supp. at 2. That number was higher in the instance of upsells, but still less than half of the respondents understood that it was possible to be charged without providing account information to a seller or telemarketer. *Id.* Additionally, the majority (80 percent) of respondents stated that they thought telemarketers should only be able to cause charges to their credit or debit card accounts if the consumers expressly provide their account numbers to the seller or telemarketer. *Id.* at 4; Vermont-Supp. at 2-3. The survey addresses a fairly complex issue in broad terms. For example, it does not tease out the specific instances where a consumer might actually have an expectation that the seller will retain and reuse the consumer’s account information, such as the contact lens seller who, with the consumer’s permission, retains the consumer’s account information to facilitate quarterly lens purchases. The results do, however, provide insight into the general expectations of consumers when engaging in telemarketing transactions.

⁴⁵⁰ State law enforcers, consumers and consumer groups, as well as some industry members, consistently voiced concerns over the shift of control over a transaction from the consumer to the seller or telemarketer, and noted consumer disbelief that purchases could actually be made without their ever disclosing payment information. See 67 FR at 4513; June 2002 Tr. II at 130-32 (AARP); Covington-Supp. at 2, 5; EPIC-NPRM at 9; NAAG-RR at 10-11; NAAG-NPRM 30-31; June 2002 Tr. II at 139-44 (NAAG). *But see* CMC-NPRM at 13 (questioning this proposition).

favored by consumers, who consistently state that, as a general proposition, they do not believe it is or should be possible for them to be charged if they do not provide their account number in a transaction.⁴⁵¹ The Commission understands this to mean that, generally speaking, consumers believe they ordinarily signal their consent to an offer by providing their account information to the seller or telemarketer.

Although some commenters argue that this shift in the normal paradigm of offer and acceptance is, in and of itself, inherently unfair,⁴⁵² the record overall suggests that, in general, it is not preacquired account telemarketing *per se* that is harmful, but rather the abuse of preacquired account information that causes the harm.⁴⁵³ Commenters persuasively note that there are many transactions involving preacquired account information that are beneficial to, indeed sometimes expected by, consumers. For example, as noted in the NPRM, “a customer who places

⁴⁵¹ See 67 FR at 4513; AARP-Supp. at 4 (see note 449 above, describing survey showing that the majority of consumers do not believe their accounts can, or should, be charged by telemarketers without obtaining the account number directly from the consumers); June 2002 Tr. II at 131-32 (AARP); EPIC-NPRM at 9; NAAG-RR at 10-11; NAAG-NPRM 30-31; Vermont-Supp. at 2-3. As Minnesota explained during the June 2002 Forum:

“In a preacquired situation, the consumer doesn’t have that control because we have shorthand ways of signaling consent in our society. We aren’t many lawyers out there. Josh, who . . . has a trade school degree and comes home from a job and Esther is sitting on the couch at 85 years old doesn’t understand all this. . . . They just get a call from somebody. What they know is I’ve got to sign my name, I’ve got to give somebody my credit card or in the context of a telemarketing transaction, I have to read my account number to the person or I have to pay cash, and what this does is by circumventing those forms of consent, it makes it impossible for consumers to control the transactions.”

June 2002 Tr. II at 140. See also James Andris (Msg. 171) (“Our mortgage company has been deducting a monthly premium, via our mortgage payment, to a 3rd party insurance policy. I have written a letter demanding refunds for the payments for 16 months. We, my wife and I, never gave written or verbal permission for such payments to either parties [sic].”); Albert Bruce Crutcher (Msg. 229) (“I also favor not allowing my credit card and account numbers to be given out by anyone other than ME!”); Harold D. Howlett (Msg. 300) (“Do not allow telemarketers to obtain and use credit card or other account information from anyone except the consumer. . . .”); Carole & Cory Walker (Msg. 810) (“Every year we have at least one unauthorized charge to our card and we are extremely cautious with our information.”).

⁴⁵² See, e.g., EPIC-NPRM at 9; NAAG-NPRM at 30; NCL-NPRM at 6-7.

⁴⁵³ ERA-NPRM at 16; Household Auto-NPRM at 5; PMA-NPRM at 17. Other commenters asserted that using preacquired account information is not inherently fraudulent. See Allstate-Supp. at 2; Associations-NPRM at 4; ATA-NPRM at 19; ATA-Supp. at 5-6; ERA/PMA-Supp. at 10; ITC-NPRM at 5; NCTA-NPRM at 11; Noble-NPRM at 3; NATN-NPRM at 3; NSDI-NPRM at 3; PMA-NPRM at 13-16; Technion-NPRM at 4; TRC-NPRM at 3; Time-NPRM at 7.

quarterly orders for contact lenses by calling a particular lens retailer may provide her billing information in an initial call, with the understanding and intention that the telemarketer will retain it so that, in any subsequent call, the retailer has access to this billing information."⁴⁵⁴ Similarly, a customer who provides his account number to make a purchase in an initial telemarketing transaction may be frustrated to have to repeat that account information to consummate certain upsell transactions, particularly when the upsell is offered by the same telemarketer. In that case, there may be an expectation that the telemarketer will have retained, and be able to reuse, the account information the customer provided only moments ago.⁴⁵⁵ As another commenter pointed out during the Rule Review, the key to such transactions is the fact that the consumer makes the decision to supply the billing information to the seller, and understands and expects that the information will be retained and reused for an additional purchase, should the consumer consent to that purchase.⁴⁵⁶

The record shows that the specific harm resulting from the use of preacquired account telemarketing is manifested in unauthorized charges.⁴⁵⁷ These may appear not only on consumers' credit card or checking accounts, but also on mortgage statements and other account sources

⁴⁵⁴ 67 FR at 4513.

⁴⁵⁵ See, e.g., June 2002 Tr. II at 196 (Time) ("[T]he catalog clients that we deal with that are . . . selling our magazines on our behalf . . . tell us that the cost would be loss of sales of the catalog products because the customers would just be so annoyed about having to give the credit card number again that they just gave.")

⁴⁵⁶ 67 FR at 4513, n.196.

⁴⁵⁷ In its supplemental comment, Minnesota argued that evidence gathered in its law enforcement actions showed that consumers consistently stated that they had not authorized charges arising out of preacquired account telemarketing, particularly when the offers involved "free-to-pay conversion" features:

"The data we have reviewed in our investigations uniformly supports our impression that underlying the high cancellation rates with preacquired account telemarketing is consumer sentiment that the charges were unauthorized. In addition to the survey of Fleet Mortgage Corporation customer service representatives presented in the prior NAAG Comments [see NAAG-NPRM at 31-32], an investigation of a subsidiary of another of the nation's largest banks revealed a similar pattern. During a thirteen month period, this bank processed 173,543 cancellations of membership clubs and insurance policies sold by preacquired account sellers. Of this number of cancellations, 95,573, or 55 percent, of the consumers stated unauthorized billing as the reason for the request to remove the charge. The other primary reason given for canceling (by 56,794 customers, or 32% of the total) was a general "request to cancel" code that may have also included many consumers claiming unauthorized charges."

Minnesota-Supp. at 4.

not traditionally used to pay for purchases.⁴⁵⁸ Of course, unauthorized charges are not exclusively associated with preacquired account telemarketing. The Commission has brought numerous law enforcement actions against sellers and telemarketers alleging violations of the FTC Act for the unfair practice of billing unauthorized charges to consumers' accounts in a variety of contexts not involving preacquired account information, including but not limited to: advanced fee credit card offers,⁴⁵⁹ sweepstakes,⁴⁶⁰ vacation or travel packages,⁴⁶¹ credit card loss protection offers,⁴⁶² and magazine subscriptions.⁴⁶³ Thus, in essence, preacquired account telemarketing has proven in certain circumstances to be an additional, but not the only, vehicle for imposing unauthorized charges on consumers in telemarketing transactions.

One of the problems, therefore, with the proposed prohibition on receiving billing information from a source other than the consumer or sharing it with others for the purposes of telemarketing is that it fails to remedy patterns of unauthorized billing that occur even though preacquired account information is not used. As our cases amply demonstrate, the practice unequivocally

⁴⁵⁸ NAAG-NPRM at 31 ("Fleet Mortgage Corporation, for instance, entered into contracts in which it agreed to charge its customer-homeowners for membership programs and insurance policies sold using preacquired account information. If the telemarketer told Fleet that the homeowner had consented to the deal, Fleet added the payment to the homeowner's mortgage account.")

⁴⁵⁹ See, e.g., *FTC v. Corporate Mktg. Solutions*, No. CIV-02 1256 PHX RCB (D. Ariz. filed July 8, 2002); *FTC v. Capital Choice*, No. 02-21050-CIV-Ungaro-Benages (S.D. Fla. filed Apr. 15, 2002); *FTC v. Fin. Servs. of N. Am.*, No. 00792 (GEB) (D.N.J. filed June 9, 2000); *FTC v. SureChek Sys., Inc.*, No. 1:97-CV-2015-JTC (N.D. Ga. filed July 9, 1997); *FTC v. Thornton Communications, Inc.*, No. 1 97-CV-2047 (N.D. Ga. filed July 14, 1997).

⁴⁶⁰ See, e.g., *FTC v. New World Servs., Inc.*, No. CV-00-625 (GLT) (C.D. Cal. filed July 5, 2000); *FTC v. Hold Billing, Ltd.*, No. SA-98-CA-0629-FB (W.D. Tex. filed July 15, 1998).

⁴⁶¹ See, e.g., *FTC v. Lubell*, No. 3-96-CV-80200 (S.D. Iowa filed Dec. 1996); *FTC v. Disc. Travel*, No. 88-113-CIV-FIM-15C (M.D. Fla. filed Aug. 8, 1988); *Citicorp Credit Servs.*, 116 F.T.C. 87 (1993).

⁴⁶² See, e.g., *FTC v. Andrews*, No. 6:00-CV-1410-ORL-28-B (M.D. Fla. filed Oct. 2000); *FTC v. First Capital Consumer Membership Servs.*, No. 00 CV 0905C(F) (W.D.N.Y. filed Oct. 23, 2000); *FTC v. Consumer Repair Servs., Inc.*, No. 00-11218 CM(RZx) (C.D. Cal. filed Oct. 23, 2000); *FTC v. Capital Card Servs.*, No. CV 00 1993 PHX EHC (D. Ariz. filed Oct. 23, 2000); *FTC v. Forum Mktg. Servs.*, No. 00CV0905C(F) (W.D.N.Y. filed Oct. 26, 2000); *FTC v. 1306506 Ontario, Ltd.*, No. 00-CV-906 (W.D.N.Y. filed Oct. 23, 2000); *FTC v. OPCO Int'l Agencies, Inc.*, No. CO1-2053R (W.D. Wash. filed Feb. 2001).

⁴⁶³ See, e.g., *FTC v. Diversified Mktg. Servs. Corp.*, No. 1:96-CV-615-FM (W.D. Okla. filed Mar. 12, 1996); *FTC v. Windward Mktg.*, No. 1:9 6-CV-615-FM (N.D. Ga. filed May 26, 1996); *FTC v. S.J.A. Soc'y*, No. X97 0061 (E.D. Va. filed May 1997).

meets the criteria for unfairness, and therefore violates Section 5 of the FTC Act.⁴⁶⁴ Yet until now, the Rule has not specified that unauthorized billing is an abusive practice and a Rule violation.⁴⁶⁵ The Commission therefore has decided to add § 310.4(a)(6) to correct that deficiency. The new provision specifies that it is an abusive practice and a violation of the Rule to cause a charge to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. This prohibition is not limited to instances of unauthorized charges resulting from preacquired account telemarketing. Rather, this provision is applicable whenever a seller or telemarketer subject to the Rule causes a charge to be submitted against a customer's or donor's account without obtaining the customer's or donor's express informed consent to do so. This broader prohibition on unauthorized billing is supported by the Commission's extensive law enforcement record of instances of unauthorized billing in telemarketing transactions.

Section 310.4(a)(6) also specifies that, in every transaction, the seller or telemarketer must obtain the consumer's express informed consent to be charged for the goods or services or charitable contribution, and to be charged using the identified account. "Express" consent means that consumers must affirmatively and unambiguously articulate their consent. Silence is not tantamount to consent; nor does an ambiguous response from a consumer equal consent.⁴⁶⁶ Consent is "informed" only when customers or donors have received all required material disclosures under the Rule, and can thereby gain a clear understanding that they will be charged, and of the payment mechanism that will be used to effect the charge. Of course, the best evidence of "consent" is consumers' affirmatively stating that they do agree to purchase the goods or services (or make the donation), identifying the account they have selected to make the purchase, and providing part or all of that account number to the seller or

⁴⁶⁴ See discussion and note 400 above of § 310.4 generally, and 67 FR at 4511, regarding the Commission's determination that, in specifying practices as abusive when they do not directly implicate the privacy concerns embodied in the Telemarketing Act, it will demand that the practice meet the criteria for unfairness codified in § 5(n) of the FTC Act, 15 U.S.C. 45(n).

⁴⁶⁵ Section 310.3(a)(4) specifies that it is a deceptive practice to induce any person to pay for goods or services."

⁴⁶⁶ See Electronic Retailing Association, GUIDELINES FOR ADVANCE CONSENT MARKETING, http://www.retailing.org/regulatory/publicpolicy_consent.html ("ERA Guidelines").

telemarketer for payment purposes (not for purposes of "identification," or to prove "eligibility" for a prize or offer, for example). But in most instances, the Commission leaves it up to sellers to determine what procedures to employ in order to meet the requirement for obtaining express informed consent. As explained below, however, in certain particularly problematic scenarios, the Commission does impose specific procedures.

Having treated the overall problem of unauthorized billing in new § 310.4(a)(6), the Commission has included additional subsections to address problems particularly associated with preacquired account telemarketing. As noted in the NPRM, evidence shows that, at least to date, unquestionably the greatest risk of harm (i.e., unauthorized charges) to consumers is associated with telemarketing involving the combination of preacquired account information with an offer involving a "free-to-pay conversion."⁴⁶⁷ NAAG describes the "free-to-pay conversion" offer (which it refers to as an "opt-out free trial" offer) as the "constant companion" of the preacquired account telemarketer in state law enforcement efforts to date.⁴⁶⁸ Indeed, as of the date

of this notice, all of the law enforcement actions taken by the Commission and by the states that involved telemarketing using preacquired account information also involved an offer with a "free-to-pay conversion" feature.⁴⁶⁹

It is noteworthy that the coupling of preacquired account information with a "free-to-pay conversion" offer is not limited to outbound telephone calls. In *FTC v. Smolev*,⁴⁷⁰ for example, the defendants were alleged to have lured consumers to call by offering an inexpensive lighting product in general media advertisements, obtaining account information from the consumer in the initial transaction, and then upselling a "free-to-pay conversion"

understand the way in which they would be billed after listening carefully to a sales offer involving preacquired account information and a "free-to-pay conversion" feature. See MemberWorks-Supp. at 1. In addition, after asking whether the billing methods were understandable, the callers asked two questions structured in ways that strongly suggested the desired result: first they asked, "And if you agree to join, and receive a welcome kit with all of the rules in writing, who is responsible if you forget to cancel and are billed," then "If the company tells you three times on the telephone call and then tells you twice in writing that you can cancel your program membership anytime, but if you don't cancel, you will be charged, is the company acting fairly or not." *Id.* (emphasis added). Moreover, regardless of the merits of the survey results, they do little to offset the extensive evidence of consumer injury from this practice, the continuing flow of complaints into the offices of consumer groups and law enforcement officials at both the state and federal levels, and the AARP survey evidence of consumer perceptions and opinions about preacquired account telemarketing. See notes 424-25 and 449 above.

⁴⁶⁹ For example, MemberWorks, Inc. (Assurances of Discontinuance with the States of Nebraska and New York; Consent Judgments with the States of California and Minnesota) (primarily "free-to-pay conversion" membership clubs); BrandDirect Mktg. Corp. (Assurances of Discontinuance with the States of Connecticut and Washington) ("free-to-pay conversion" membership clubs); Cendant Membership Servs. (Consent Judgment with State of Wisconsin) (same); Signature Fin. Mktg. (Assurance of Discontinuance with State of New York) (same); Damark Int'l, Inc. (Assurances of Discontinuance with States of Minnesota and New York) ("free-to-pay conversion" buyers club); *Illinois v. Blitz Media, Inc.*, No. 2001-CH-592 (Sangamon County) ("free-to-pay conversion" membership club); *New York v. Ticketmaster and Time, Inc.* (Assurance of Discontinuance) ("free-to-pay conversion" magazine subscription); Triad Discount Buying Service (sued by 29 states and the Commission) ("free-to-pay conversion" membership clubs); *Minnesota v. U.S. Bancorp, Inc.*, No. 99-872 (Consent Judgment, D. Minn.) (account information provider to seller/telemarketer of "free-to-pay conversion" membership/buyers clubs); *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001) (same, plus insurance packages); *FTC v. Technobrand, Inc.*, No. 3:02-cv-00086 (E.D. Va. 2002) ("free-to-pay conversion" membership clubs); *U.S. v. Prochnow*, No. 1:02-cv-917-JLF (N.D. Ga. 2002) (inbound calls from direct mail solicitations, upsold "free-to-pay conversion" membership clubs).

⁴⁷⁰ (a/k/a Triad Disc. Buying Serv.) No. 01-8922 CIV ZLOCH (S.D. Fla. 2001).

buyers club membership.⁴⁷¹ In fact, the majority of companies that have been targeted by state or FTC law enforcement action market their "free-to-pay conversion" products or services via upsells, sometimes exclusively, and other times also using outbound telephone calls.⁴⁷²

Consequently, the Commission has determined that in any transaction involving both preacquired account information and a "free-to-pay conversion," the evidence of abuse is so clear and abundant that comprehensive requirements for obtaining express informed consent in such transactions are warranted.⁴⁷³ Specifically, § 310.4(a)(6)(i) provides that a seller or telemarketer making an offer involving both preacquired account information and a "free-to-pay conversion" must (1) obtain from the customer, at a minimum, the last four digits of the account number to be charged; (2) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account for which the consumer provided the four digits; and (3) make and maintain an audio recording of the entire telemarketing transaction. Thus, in every instance where the combination of preacquired account information and "free-to-pay conversion" is involved in a telemarketing transaction, the customer must be required to reach into his or her wallet, and provide at least a portion of the account number to be charged.⁴⁷⁴ It

⁴⁷¹ Thus, the assertion of some commenters that "the potential for abuse or confusion as to where the [account] information was obtained does not exist in upsells," see, e.g., ANA-NPRM at 6, is not supported by the record, at least in the context of offers with a "free-to-pay conversion" feature, as was the case in *Smolev*.

⁴⁷² Unfortunately, the argument made by several commenters that the abusive use of preacquired account information is limited to a discrete number of bad actors (see ATA-NPRM at 19; ERA-NPRM at 16; MPA-NPRM at 23-24) is not supported by the record. Law enforcement actions alleging injuries caused by abuses of preacquired account telemarketing have been brought against well-known, national companies and financial institutions, including but not limited to: U.S. Bancorp, Fleet Mortgage Corporation, MemberWorks, Ticketmaster, and Time. See NAAG-NPRM at 30, n.73.

⁴⁷³ NAAG recommended prohibiting the use of preacquired account information, even if that information was previously obtained by the same seller or telemarketer from the consumer, in solicitations involving a "free-to-pay conversion" feature. NAAG-NPRM at 39. The Commission declines to adopt this recommendation at this time, and is confident that the solution adopted will provide consumers the information and command over these transactions they need to protect themselves from unauthorized charges.

⁴⁷⁴ See note 449 above. Moreover, industry's argument that there is no evidence of problems where there is a transfer of account information

Continued

⁴⁶⁷ The Commission has inserted a definition of "free-to-pay conversion" at § 310.2(o) of the amended Rule, which states that "free-to-pay conversion" means: "in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period." See discussion of § 310.2(o) above.

⁴⁶⁸ NAAG-NPRM at 32. Accord AARP-NPRM at 6. CCC attempted to counter this finding by presenting the results of a survey, conducted on behalf of MemberWorks, in April of 2001 by the Luntz Research Companies (the "Luntz Survey"). CCC-NPRM at 10; June 2002 Tr. II at 127; MemberWorks-Supp. *passim*. In the survey, the caller told the consumer that the caller would read an offer, and would ask for the consumer's reaction. So, it was clear to the consumer that he or she was not buying anything, and instead that the consumer should listen carefully to the terms of the offer so that he or she could answer the caller's questions. Then, the caller read a script involving a "free-to-pay conversion" feature (the script was not submitted with the survey results for the public record). The caller then asked several questions about what the consumer just heard. CCC argued that the results of this survey showed that 85 percent of the respondents said the billing methods were understandable, and that the seller was acting fairly. CCC-NPRM at 10. Examination of the Luntz survey in greater detail suggests that the survey does little to support these assertions. First, in fact, none of the respondents said that the billing methods were understandable. According to the survey, 52 percent of the respondents said the billing methods were "mostly" understandable, while 33 percent said they were "somewhat" understandable, and 13 percent said they were not understandable. This means that at least 46 percent of the respondents did not even "mostly"

must be clear that the customer is providing that account number to authorize a purchase. This means that, at a minimum, the disclosures required in § 310.3(a)(1) in general, and also § 310.3(a)(1)(vii) in particular, must be provided to the customer before the customer provides express informed consent—which, in the case of preacquired account telemarketing and a “free-to-pay conversion” feature, means before the customer provides account information and express agreement to be charged for the goods or services on the account provided. It must also be clear that the customer agrees that the charge be placed on the account whose digits the customer provided. The Commission expects that, to comply with this requirement, the seller or telemarketer shall expressly identify the account to be charged, and inform the customer that it possesses the customer’s account number already, or has the ability to charge that account without obtaining the full account number from the customer.

Finally, the Commission is requiring that the entire sales transaction be recorded. The record evidence shows that it is not adequate in offers involving both preacquired account information and “free-to-pay conversions” to record a portion of the call that allegedly includes some or all of the required disclosures regarding cost and payment.⁴⁷⁵ Often, what law enforcement efforts have gleaned is that the necessary disclosures are grouped together during the “verification” process, at the end of a lengthy telemarketing pitch during which consumers are led to reasonably believe that they are not committing to a purchase. As one commenter explained:

[C]onsumers are led to believe that they are agreeing to accept materials in the mail, preview a program along with a free gift, or the like. As one telemarketer explicitly stated in its scripts: ‘we’re sending you the information through the mail, so you don’t have to make a decision over the phone.’ Only at the tail end of a lengthy call does the telemarketer obliquely disclose that the consumer’s preacquired account will be charged. By this time, many consumers have already concluded that they understood the deal to require their consent only after they review the mailed materials. . . . Preacquired account telemarketing verification taping typically is preceded by statements

“after consent” is belied by the record of law enforcement actions in this area. *See, e.g., FTC v. Smolev*, No. 01-8922 CIV ZLOCH (S.D. Fla. 2001). In fact, in virtually all of the state and federal law enforcement actions in this area, consumers stated that they did not recognize the billing entity or understand how that seller obtained their account information. *See notes 450-51 above.*

⁴⁷⁵ NAAG-NPRM at 32-33 (discussing ineffectiveness of verification).

suggesting that the taping is ‘to prevent clerical error’ and critical information is revealed in ways that many consumers will not grasp at the end of a conversation.⁴⁷⁶

Thus, not only the material terms provided the consumer, but also the context and manner in which the offer is presented are vital to determining that the consumer’s consent is both express and informed. Moreover, consumers’ confusion about the nature of “free-to-pay conversion” offers—particularly in the context of preacquired account telemarketing—is evidenced by the steady stream of complaints, as well as evidence uncovered in law enforcement actions by the states.⁴⁷⁷ Further, the record contains compelling evidence of cancellation patterns for membership programs offered on a “free-to-pay conversion” basis in preacquired account telemarketing transactions. As explained by the Minnesota Attorney General,

[c]onsumers canceling within the 30-day free trial period likely indicate that [they] understood (either during the phone call or with the follow-up material or both) the terms of the deal. If all consumers understood the free trial offer, one would expect to see a significant cancellation rate within the 30 day free trial offer period followed by a scattered pattern of later cancellations. The data we have reviewed [from two financial institutions of cancellation dates relative to date of enrollment for Minnesota consumers charged by the institutions as a result of preacquired account telemarketing transactions involving a “free-to-pay conversion”] suggest this is not the typical pattern. . . . The overall pattern of [the data from each institution] is strikingly similar. The largest concentration of cancellations occurs immediately after the free trial period but coincident with the first account charge for the service. The cancellation rate in the free trial period is less than half the cancellation rate in the 31-90 day period, when consumers have been billed for the service. This result is consistent with the pattern of consumer complaints alleging unauthorized charges received by Attorneys General and with the data suggesting that most consumers cancel these charges because they believe they are unauthorized.⁴⁷⁸

⁴⁷⁶ *Id.*

⁴⁷⁷ *See* Illinois-NPRM at 2 (In Illinois’ lawsuit against Blitz Media, Inc., the attorney general initially received 146 consumer complaints. After initiating the litigation, the Illinois attorney general found that approximately 45,000 Illinois consumers had been enrolled in Blitz Media’s buyers club, but only about 8,000 of them remain “active” members of the buyers club, since the rest had discovered these charges and cancelled the membership, or initiated a chargeback, claiming the charge was unauthorized.).

⁴⁷⁸ Minnesota-Supp. at 4-5. One industry commenter submitted the results of a telephone survey, which it asserted showed that consumers do, in fact, understand the terms of these “free-to-pay conversion” features. *See note 469 above.* The data received in litigation from the institutions

Consequently, to ensure that the consent provided by the consumer is not only “express” but is also “informed” in this limited, but problematic, context of “free-to-pay conversion” features in preacquired account telemarketing offers, the amended Rule requires that an audio recording of the entire transaction, from start to finish, be created and maintained. A handful of commenters argued that such audio recording would be prohibitively expensive, particularly in the inbound context, where some sellers and telemarketers have not traditionally recorded the telemarketing calls.⁴⁷⁹ Given the narrow category of calls to which this requirement applies, and the rapidly growing use of inexpensive and efficient digital audio recording technology,⁴⁸⁰ the Commission believes that this requirement will not pose a significant burden to sellers and telemarketers who freely choose to market their goods or services using a “free-to-pay conversion” feature and preacquired account information. Moreover, the record is compelling that any incremental costs to industry of these requirements are likely outweighed by the benefit to consumers of curtailing the practice as it is currently employed in the marketplace.

In addition to the requirements noted above, in any telemarketing transaction involving preacquired account information (but not a “free-to-pay conversion” feature), § 310.4(a)(6)(ii) specifically requires that the seller or telemarketer (1) at a *minimum*, identify the account to be charged with

participating in these telemarketing campaigns, however, belies the purported conclusions of this survey. *See note 457 above.*

⁴⁷⁹ ERA/PMA-Supp. at 3, 7 (“We understand from certain of our members that imposing the record keeping requirement[s] on inbound [upsells] may require substantial investments of money and resources to develop the systems necessary to comply with these requirements.”).

⁴⁸⁰ *See generally* Contract Digital Recorder, by Data-Tel Info Solutions, at <http://www.datatel-info.com/digicorder.html> (describing affordable digital recording system for telemarketing operations); Veritape Call Centre-Case Study 2, at <http://www.veritape.com/veritape/vtcccase.htm> (describing a US call center that saved \$70,000 annually by switching from analog taping process to digital recording); Ron Elwell, *Streamlining Call Center Operations*, Teleprofessional, Sept. 1998, at 130-34 (discussing “how CTI-enabled digital recording technology is helping call centers of all types be more productive and profitable”); Teleprofessional, Inc., *CCPN’s System Owner Shootout*, CALL CENTER PRODUCT NEWS, Fall 1998, at 52-54, 56 (explanations by several telemarketers’ systems professionals of savings and efficiencies experienced using improved digital recording and monitoring systems); Michael Binder, *The Evolution of Digital Recording in the Call Center*, TELEMARKETING & CALL CENTER SOLUTIONS, Nov. 1997, at 38. *Cf.* Duncan Furness, *Choosing a Tape Technology*, COMPUTER TECHNOLOGY REVIEW, Nov. 2000, at 40.

sufficient specificity for the customer or donor to understand what account will be charged, and (2) obtain from the customer or donor his or her express agreement to be charged for the goods or services *and* to be charged using the account number identified during the transaction. Again, the Commission intends this to mean that the telemarketer expressly inform the customer that the seller or telemarketer already has the number of the customer's specifically identified account or has the ability to charge that account without getting the account number from the customer.

The Commission has taken a targeted approach in the amended Rule, focusing on the tangible harm caused by the practices identified as problematic in the rulemaking proceeding. It bears noting, however, that the Commission recognizes preacquired account telemarketing as an emerging practice, one that will receive close attention from the Commission, and, no doubt, the state Attorneys General. The Commission wishes to emphasize that, particularly in transactions involving "free-to-pay conversion" offers, so long as preacquired account information is involved, there exists that fundamental shift in the bargaining relationship discussed above, and therefore potential for abuse.⁴⁸¹ While the Commission is confident that the majority of industry members will abide by the new provisions, and that doing so will provide consumers the information and control needed to shield them from the abuses encountered in the past with these transactions, it also notes that the best practice in such circumstances is to ensure that the seller or telemarketer does not have the ability to cause a charge to a consumer's account without getting the account number from the consumer herself. This practice would, in effect, be self-enforcing, as the control over the transaction (absent misrepresentations by the telemarketer) would truly be with the consumer, where it belongs. Should it become apparent that the remedies imposed by the amended Rule are insufficient, or that preacquired account telemarketing practices have evolved further in such a way as to cause additional harm to consumers, the Commission will not hesitate to revisit its approach to the practice and revise the Rule accordingly.

Other Recommendations

Other than those commenters who suggested deleting the prohibition

entirely,⁴⁸² industry commenters' primary recommendation was to substitute the express verifiable authorization provision of § 310.3(a)(3), or some variation on a disclosure and "consent" requirement,⁴⁸³ for the proposed blanket prohibition on the transfer of billing information.⁴⁸⁴ The general theme was that disclosures and "consent" were sufficient to remedy the harm being caused consumers by the misuse of preacquired account information. It is unclear what these commenters mean by "consent" in this context, as they also recommended that sellers and telemarketers be permitted to use any of the three existing avenues for achieving express verifiable authorization, including providing consumers a written confirmation after terminating the telephone call. In the context of "free-to-pay conversions," the record shows, in no uncertain terms, that disclosures are not sufficient to prevent widespread consumer injury.⁴⁸⁵ Most sellers and telemarketers have been telling consumers at some point in the conversation, in greater or lesser detail, that they will be charged at some point for the goods or services being offered on a "free-to-pay conversion" basis; but, as noted above, these disclosures come late in the conversation, and do not resonate with consumers who understand "free" to mean "free" and that to obligate oneself to purchase something, the buyer must provide a payment mechanism to the seller.⁴⁸⁶ Often, these disclosures come in writing in a "membership package" sent to the consumer some time after the call. Law enforcement experience has

⁴⁸² ABA-NPRM at 8-9; ABIA-NPRM at 4; CMC-NPRM at 9-10; MBNA-NPRM at 6.

⁴⁸³ See, e.g., DMA-NPRM at 39-40 (specific to upselling) (the Commission "should instead require that notice of transfer of billing information be disclosed to the consumer and that consent be given by the consumer prior to the transfer").

⁴⁸⁴ See ATA-NPRM at 20; ATA-Supp. at 5-6; CCC-NPRM at 11-12; ERA-NPRM at 24-25; ERA/PMA-Supp. at 11-15; ITC-NPRM at 5; MPA-NPRM at 26-29; MPA-Supp. at 5-6; NATN-NPRM at 3 (Supporting ERA Guidelines and recommendation); Noble-NPRM at 3 (same); NSDI-NPRM at 3 (same); PMA-NPRM at 19 (same). See also Associations-Supp. at 6.

⁴⁸⁵ Review of taped verifications obtained as evidence in the Commission's law enforcement actions and in similar state actions convincingly demonstrates the inadequacy of disclosures in this context.

⁴⁸⁶ See NCL-NPRM at 7 ("Merely requiring telemarketers to disclose that they have already obtained the billing account information from another source or that they may share that information with other marketers would not provide consumers with adequate protection from abuse. Express verifiable authorization to use the billing account information is not enough in these instances because it comes into play *after the fact*; it does not give consumers prior knowledge of or control over who has their account information.")

shown that these disclosures are meaningless to consumers—who either never receive the packets, or assume they are junk mail and discard them.⁴⁸⁷ Moreover, in any telemarketing transaction, but most especially in preacquired account telemarketing, it is imperative that the seller or telemarketer ensure that the consumer actively, and unequivocally, provides his or her consent to be charged, and to be charged using a particular payment mechanism. The Commission has determined, therefore, that prohibiting unauthorized charges, and laying out what is required to obtain express informed consent in certain circumstances, is the most appropriate solution not only to the harm caused by preacquired account telemarketing abuses, but also by other exploitative billing methods in telemarketing.

§ 310.4(a)(7) — Failing to transmit caller identification information

Section 310.4(a)(7) of the amended Rule addresses transmission of caller identification ("Caller ID") information. This section prohibits any seller or telemarketer from "failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call." A proviso to this section states that it is not a violation to substitute the actual name of the seller or charitable organization on whose behalf the call is placed for the telemarketer's name, or to substitute the seller's customer service number or the charitable organization's donor service number that is answered during regular business hours for the number the telemarketer is calling from or the number billed for making the call. Full compliance with the Caller ID provision will be required by January 29, 2004.

The record includes several key principles supporting the Commission's decision to adopt this approach to Caller ID information. First, transmission of Caller ID information is not a technical impossibility, as some commenters had argued or implied. Second, telemarketers are able to transmit this information at no extra cost, or minimal cost. Third, consumers will receive substantial privacy protection as a result of this provision.⁴⁸⁸ Fourth, consumers and telemarketers will both benefit from the increased accountability in telemarketing that will result from this

⁴⁸⁷ See discussion of § 310.3(a)(3)(iii) above.

⁴⁸⁸ EPIC-NPRM at 11-12.

⁴⁸¹ NAAG-NPRM at 30; Covington-Supp. at 4-5.

provision.⁴⁸⁹ Fifth, law enforcement groups will benefit from a vital new resource from the required transmission of Caller ID information in telemarketing.⁴⁹⁰

Background. The original Rule did not address the issue of Caller ID, or the feasibility or desirability of requiring telemarketers to transmit Caller ID information. During the Rule Review, however, the Commission received numerous comments from consumers and others expressing frustration about telemarketers' routine failure to transmit Caller ID information.⁴⁹¹ Commenters complained that when telemarketers called, consumers' Caller ID devices would show a phrase like "unknown," "out of area," or "unavailable," instead of displaying the name and telephone number of the telemarketer or seller on whose behalf the call was made.⁴⁹² Based on the Rule Review record, the Commission proposed in the NPRM to prohibit blocking, circumventing, or altering the transmission of Caller ID information.⁴⁹³

In support of this proposal, the Commission discussed in the NPRM the benefits that accrue to consumers from transmission of Caller ID information and the technical considerations implicated by transmission of this information.⁴⁹⁴ Consumers benefit because Caller ID information allows them to screen out unwanted callers and identify companies that have contacted them so that they can place "do not call" requests to those companies. These features of Caller ID enable consumers to protect their privacy and are clearly within the ambit of the Telemarketing Act's mandate, set forth in 15 U.S.C. § 6302(a)(3)(A), to prohibit telemarketers from undertaking a pattern of unsolicited telephone calls which a reasonable consumer would consider coercive or abusive of their right to privacy.⁴⁹⁵ The fact that consumers

⁴⁸⁹ Make-A-Wish-NPRM at 6; Associations-Supp. at 7; DialAmerica-Supp. at 2.

⁴⁹⁰ Make-A-Wish-NPRM at 6; McClure-NPRM at 2; NACAA-NPRM at 9; NYSCPBNPRM at 4; Patrick-NPRM at 2-3; TRA-NPRM at 11.

⁴⁹¹ See, e.g., Baressi-RR at 1; Bell Atlantic-RR at 8; Blake-RR at 1; Collision-RR at 1; Lee-RR at 1; LeQuang-RR at 1; Mack-RR at 1; Sanford-RR at 1.

⁴⁹² See, e.g., Baressi-RR at 1; Blake-RR at 1; Collision-RR at 1; Lee-RR at 1; LeQuang-RR at 1; Mack-RR at 1; Sanford-RR at 1.

⁴⁹³ The Caller ID provision is found at § 310.4(a)(7) of the proposed Rule; discussion of the proposed Rule provision is found at 67 FR at 4514-16.

⁴⁹⁴ 67 FR at 4514-16. The Commission also asked whether trends in telecommunications might one day permit the transmission of full Caller ID information when the caller uses a trunk line or PBX system. *Id.* at 4538.

⁴⁹⁵ 67 FR at 4514. DMA argued that the Commission lacks authority to require Caller ID

greatly value the privacy protection provided by receipt of Caller ID information is evidenced by the fact that, as of the year 2000, nearly half of all Americans subscribed to a Caller ID service.⁴⁹⁶

The Commission noted in the NPRM the conflict in opinion during the Rule Review regarding the feasibility of requiring Caller ID transmission by telemarketers.⁴⁹⁷ Based on its assessment of the information on the record at the close of the Rule Review, the Commission expressed its uncertainty that telemarketers using "T-1" trunk lines could transmit Caller ID information, and the Commission therefore did not at that time propose to mandate such transmission.⁴⁹⁸ The NPRM also acknowledged telemarketers' argument that, even if they could transmit Caller ID information, they would still face the challenge of transmitting a number that would be useful to consumers.⁴⁹⁹

The Commission received numerous comments in response to the NPRM's discussion of Caller ID. Some industry representatives simply posited that transmission of Caller ID information was not possible, or argued that it was possible to transmit a telephone number, but that it was impossible or prohibitively expensive to transmit a telephone number that consumers could use to call the telemarketer that had called them.⁵⁰⁰ Consumer groups and law enforcement representatives urged the Commission not to accept telemarketers' claims that mandatory Caller ID transmission is impossible or prohibitively expensive without carefully examining the technical considerations involved.⁵⁰¹ A number of consumers expressed frustration with

transmission. DMA-NPRM at 48-49. However, the NPRM clearly explains that the harm to consumers that arises from failure to transmit Caller ID information falls within the areas of abuse that the Telemarketing Act explicitly aimed to address. 67 FR at 4514-16. The Commission therefore rejects DMA's "lack of authority" argument.

⁴⁹⁶ Dina ElBoghdady, *Ears Wide Shut: Researchers Get Punished for Telemarketers' Crimes*, WASH. POST, Sept. 8, 2002, at H 2.

⁴⁹⁷ 67 FR at 4515.

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.* Some telemarketers asserted that the telephone number that would likely be displayed on consumers' Caller ID services would be the telemarketer's central switchboard or trunk exchange, rather than a customer service number or a number where consumers could submit a "do not call" request.

⁵⁰⁰ ANA-NPRM at 6; Associations-NPRM at 3; DMA-NPRM at 49; NAA-NPRM at 17; Nextel-NPRM at 25; Synergy Solutions-NPRM at 3-4; Teledirect-NPRM at 3; Associations-Supp. at 7. See also AFSA-NPRM at 19; Assurant-NPRM at 6. *But see* EPIC-NPRM at 11, 13; NAAG-NPRM at 45.

⁵⁰¹ EPIC-NPRM at 11-12; NAAG-NPRM at 45; AARP-NPRM at 5-6.

telemarketers who fail to transmit Caller ID information.⁵⁰²

Industry commenters generally supported the proposed prohibition on blocking Caller ID, but urged the Commission not to require Caller ID transmission,⁵⁰³ although one telemarketer very strongly advocated that the Commission do so in order to remove the cloak of anonymity from telemarketers and thus promote accountability for the greater benefit of the industry as a whole.⁵⁰⁴ A number of industry commenters wanted to make sure that "the prohibited practice is the deliberate manipulation of the Caller-ID signal" and that "[a]s long as no overt actions are taken to disrupt the information, there is no violation."⁵⁰⁵ Several commenters expressly urged that purchasing or using telephone equipment that lacks Caller ID functionality should not be a violation of the Rule.⁵⁰⁶

Technical feasibility of mandatory transmission of Caller ID information. The rulemaking record as a whole shows that telemarketers' failure to transmit Caller ID information need not be the result of their blocking its transmission or some other affirmative measure on their part.⁵⁰⁷ Rather, the record indicates that non-transmission

⁵⁰² See, e.g., Robert Hawrylak (Msg. 3382); Carl Wallander (Msg. 861); George Kapnas (Msg. 2243); Tom Kaufmann (Msg. 2433); Bob Schmitt (Msg. 3494); Bradley Davis (Msg. 3890); Toroface (Msg. 19744). In all, more than 200 consumers stated that the Commission's proposed approach in the NPRM was not adequate to protect consumers' right to privacy.

⁵⁰³ ABA-NPRM at 9; ARDA-NPRM at 6; ANA-NPRM at 6; Associations-NPRM at 3; BofA-NPRM at 7; CBA-NPRM at 10; Comcast-NPRM at 4; DMA-NPRM at 48; ERA-NPRM at 48-49; Green Mountain-NPRM at 27; ITC-NPRM at 3; Lenox-NPRM at 6; MPA-NPRM at 49; NAA-NPRM at 17; Nextel-NPRM at 24-25; Synergy Solutions-NPRM at 3-4; Tribune-NPRM at 10; VISA-NPRM at 13. In the NPRM, the Commission specifically asked, among other things, whether it would "be desirable to propose a date in the future by which all telemarketers would be required to transmit Caller ID information." 67 FR at 4538.

⁵⁰⁴ DialAmerica-NPRM at 24; DialAmerica-Supp. at 10; June 2002 Tr. II at 83 (DialAmerica).

⁵⁰⁵ Synergy Solutions-NPRM at 3. See also Nextel-NPRM at 25; Noble-NPRM at 4; NATN-NPRM at 4; NSDI-NPRM at 4; ITC-NPRM at 3.

⁵⁰⁶ AFSA-NPRM at 19; Comcast-NPRM at 4; CBA-NPRM at 10; Cox-NPRM at 37; Household Bank-NPRM at 16; Nextel-NPRM at 25; Thayer-NPRM at 5; Wells Fargo-NPRM at 3. *But see* EPIC-NPRM at 11, 13-14; McClure-NPRM at 1; Patrick-NPRM at 2-3; Thayer-NPRM at 5 (Commenter raises issue of whether Internet telephony users could transmit Caller ID information. There is nothing in the record indicating that telemarketers use Internet telephony. If they do use such technology, they are reminded that all telemarketers subject to the Rule must transmit Caller ID information. The FTC's own telephone system uses IP telephones, which do provide Caller ID information.)

⁵⁰⁷ ATA-Supp. at 16-17; Chicago ADM-NPRM at 1; Lenox-NPRM at 6; NRF-NPRM at 19.

of Caller ID information may be a by-product of purchasing or using telephone equipment that lacks Caller ID transmission functionality.⁵⁰⁸

In concluding that required transmission of Caller ID information is technically feasible and not costly for telemarketers, the Commission was persuaded in part by the example provided by DialAmerica. In its written comments and at the June 2002 Forum, DialAmerica explained how it transmits Caller ID information to the consumers it calls.⁵⁰⁹ DialAmerica's carrier assigns a telephone number to each of DialAmerica's call centers. When a sales representative from a particular call center calls a consumer, that call center's assigned telephone number is transmitted to the consumer's Caller ID service. SBC, a large provider of common carriage services, provided support for the availability of DialAmerica's model.⁵¹⁰ DialAmerica stated at the June 2002 Forum that it does not pay its carrier any extra amount to transmit this assigned telephone number to consumers.⁵¹¹

The Commission believes the argument by telemarketers that required transmission of Caller ID information would be impossible or prohibitively expensive is based substantially on an erroneous supposition that telemarketers would be required to transmit the specific telephone number from which a sales representative placed a given call. The Commission's citation to DialAmerica's approach should make it clear that the Commission is not requiring this level of specificity. Under the amended Rule's Caller ID provision, telemarketers

may transmit any number associated with the telemarketer that allows the called consumer to identify the caller. This includes a number assigned to the telemarketer by its carrier, the specific number from which a sales representative placed a call, or a number used by the telemarketer's carrier to bill the telemarketer for a given call. In the alternative, a telemarketer may transmit the seller's customer service number or the charitable organization's donor service number, provided that this number is answered during regular business hours.

Not every telemarketer will need to follow DialAmerica's approach for transmission of Caller ID information. The record reflects various options in calling equipment used by telemarketers.⁵¹² A telemarketer's choice of calling equipment is determined in part by the telemarketer's size. The smallest telemarketers, most likely placing calls from home, may contact consumers using a "plain old telephone service" ("POTS") line. A telemarketer calling consumers with a POTS line will have no difficulty transmitting Caller ID information.⁵¹³ This is also true if, to call consumers, the telemarketer uses Integrated Services Digital Network-Basic Rate Interface ("ISDN-BRI") technology, which, like POTS lines, is likely to be utilized only by the smallest telemarketers.⁵¹⁴

Larger telemarketers commonly use a "private branch exchange" switch ("PBX"), which enables them to place large volumes of calls more efficiently.⁵¹⁵ For telemarketers using a PBX, the primary determinant in transmitting Caller ID information is the telemarketer's connection to its telephone company. A telemarketer using a PBX connects to its telephone

company through a "trunk."⁵¹⁶ The more modern type of trunk used in telemarketing is an "Integrated Services Digital Network-Primary Rate Interface" ("ISDN-PRI") trunk.⁵¹⁷ It is clear from the record that a telemarketer using such an "ISDN-PRI" trunk has no difficulty in transmitting Caller ID information to a consumer.⁵¹⁸

The older kind of trunk used in telemarketing is a "T-1" trunk.⁵¹⁹ Telemarketers using a "T-1" trunk are perhaps most likely to follow DialAmerica's model by having their carriers assign a telephone number to the trunk for transmission to consumers' Caller ID services. This is true because, in contrast to "ISDN-PRI" trunks, "T-1" trunks do not routinely transmit the caller's telephone number to Caller ID devices.⁵²⁰ Some telemarketers stated that it may be technically feasible (but costly) for them to upgrade, reconfigure, or replace their PBX switches or their "T-1" trunks in order to transmit a specific sales representative's telephone number.⁵²¹ However, the Commission's approach does not require this level of precision. Consequently, telemarketers will not have to absorb the expense associated with achievement of this level of precision.

Regardless of telemarketers' calling systems and carriers' ability to assign a telephone number to a telemarketer's call center, there are occasions in which Caller ID information does not reach the called consumer even when telemarketers arrange for the transmission of that information.⁵²² Two situations would seem to be outside the control of the telemarketer. First, the route traveled by a call could pass through a switch that lacks Caller ID functionality, essentially dropping

⁵⁰⁸ EPIC-NPRM at 11; TRA-NPRM at 11. As is discussed below, non-transmission may also result from errors in telephone companies' equipment.

⁵⁰⁹ DialAmerica-Supp., Att. A at 1-2. See also June 2002 Tr. II at 81-83. According to one of DialAmerica's written comments: "Caller ID information can be delivered over T-1's today. We have been doing it for over two years. If the Commission does not mandate the delivery of Caller ID information, those who would want the Commission to believe that it cannot be done will have been successful." DialAmerica-Supp. at 10. See also DialAmerica-NPRM at 25 ("The conclusion stated in the NPRM . . . that trunk or T-1 lines will only display a term like 'unavailable' is not correct.") and NAAG-NPRM at 45 ("We have been advised that all trunk lines . . . should be capable of supporting Caller ID.")

⁵¹⁰ See SBC-Supp. at 8-10; June 2002 Tr. II at 80-83. See also Cox-NPRM at 37; DMA-NPRM at 49; Green Mountain-NPRM at 28; Associations-Supp. at 7.

⁵¹¹ June 2002 Tr. II at 83 (DialAmerica). Moreover, other moderate-sized telemarketers reported that they currently transmit Caller ID information. Because they are not compelled to do this, the Commission believes that doing so is not cost-prohibitive. See Aegis-NPRM at 5; Lenox-NPRM at 6. See also ANA-NPRM at 6; ARDA-NPRM at 6. But see ATA-Supp. at 18.

⁵¹² See, e.g., Nextel-NPRM at 25 (proprietary dialers); DialAmerica-Supp., Att. A at 1 (regular trunk groups provisioned by carrier); Fiber Clean-NPRM at 1 (telemarketers working from home).

⁵¹³ SBC-Supp. at 8.

⁵¹⁴ <http://www.bell-labs.com/technology/access/ISDN-BRI.html>. ISDN-BRI essentially uses a caller's existing wiring to transmit calls digitally. As such, its capability to transmit Caller ID information is akin to a POTS line's capability.

⁵¹⁵ SBC-Supp. at 8-9. This is also true of telemarketers using predictive dialers. Predictive dialers used by many telemarketers contain features similar to a PBX, and the capacity of such a predictive dialer to transmit Caller ID information is essentially the same as the capacity of a PBX to do so. See, e.g., Sytel-NPRM at 8 (arguing that telemarketers using predictive dialers should transmit Caller ID information. This comment suggests that predictive dialers are capable of transmitting Caller ID information). See also <http://www.pbinfo.com/portal/modules.php?op=modload&name=Sections&file=index&req=viewarticle&artid=8>.

⁵¹⁶ SBC-Supp. at 8-9. An alternative to PBX available to telemarketers (but not widely used) is called "Centrex." Telemarketers using Centrex connect to their telephone company using a telephone line; telemarketers using a PBX connect to their telephone company using a trunk. Because Centrex users use a line rather than a trunk, telemarketers using Centrex (like telemarketers using a POTS line or ISDN-BRI) should not find it difficult to transmit Caller ID information. See http://www.granitestatetelephone.com/sfb_centrex.html.

⁵¹⁷ June 2002 Tr. II at 76-77 (SBC).

⁵¹⁸ EPIC-NPRM at 12; SBC-Supp. at 8-9; June 2002 Tr. II at 80-81 (SBC).

⁵¹⁹ Some telemarketers may use a "T3" or "DS3" trunk. This kind of trunk is essentially a collection of "T-1" trunks; as such, it operates in a manner similar to a T-1 for purposes of Caller ID functionality. See <http://www.hal-pc.org/~ascend/MaxTNT/hwinst/tnt3.htm>.

⁵²⁰ SBC-Supp. at 8-9.

⁵²¹ Synergy Solutions-NPRM at 4; TeleDirect-NPRM at 3. But see EPIC-NPRM at 11-12.

⁵²² See, e.g., ABA-NPRM at 9; Chicago ADM-NPRM at 1; IMC-NPRM at 9; Lenox-NPRM at 6; TeleDirect-NPRM at 3; Associations-Supp. at 7; ATA-Supp. at 17.

the Caller ID data but forwarding the rest of the call transmission.⁵²³ Second, a malfunction within a carrier's system could result in the failure to transmit Caller ID information in a given call.⁵²⁴ Because these phenomena are outside the control of the telemarketer, the telemarketer would not be held liable for violating this provision of the Rule when the failure to transmit Caller ID information results from such an occurrence. However, to avoid liability in such a case, a telemarketer must be able to establish that it has taken all available steps to "transmit or cause the transmission of" identifying information. This includes employing technical means within the telemarketer's operation, ensuring that the telemarketer's telephone company is equipped to transmit Caller ID information, and not using any means to block Caller ID transmission.

A very small number of telemarketers may be located in areas of the country that are served only by telephone companies that are not capable of transmitting Caller ID information or assigning a telephone number to the telemarketer that can be transmitted to a called consumer.⁵²⁵ The Commission does not intend to require such telemarketers to relocate to areas of the country that are served by telephone companies that do provide Caller ID capability. Nonetheless, in enforcing this provision, the Commission would take into account any telemarketer's relocation from an area where it can transmit Caller ID information to a location where it cannot. However, the Commission believes it is unlikely that a telemarketer would go to such lengths in order to avoid compliance with this new requirement.

The Commission recognizes that transmission of Caller ID information does not depend on technical capability alone. Telemarketers who currently possess Caller ID capability may deliberately decline to transmit this information to the consumers they solicit. There is record evidence to support legitimate explanations for deliberate blocking of Caller ID

transmission.⁵²⁶ Fiber Clean, for example, uses telemarketers working from home; it advocates Caller ID blocking to protect its employees' privacy.⁵²⁷ Other telemarketers may block Caller ID transmission because they are unable to transmit a telephone number which would be useful to consumers.⁵²⁸

The Commission has concluded that some flexibility regarding what telephone number and name the telemarketer may transmit best accommodates the current state of telemarketing.⁵²⁹ A telemarketing service bureau calling on behalf of more than one seller, for example, may benefit from the option of transmitting the seller's name and telephone number rather than its own.⁵³⁰ Under § 310.4(a)(7), telemarketers have the option of transmitting a telephone number associated with them that enables the consumer to identify who called, or, in the alternative, the seller's customer service number or the charitable organization's donor service number. If the telemarketer transmits its own number, that number ideally should enable the consumer to communicate with the caller to assert a company-specific "do not call" request. Alternatively, telemarketers can forward consumers' return calls to a customer service line.⁵³¹ At-home callers with a POTS line cannot alter, but they can acquire a second line for business calls, which would allay privacy concerns associated with transmission of the caller's residential number.

Consumers benefit from transmission of Caller ID information. The record, taken as a whole, establishes that it is neither technically nor economically infeasible for telemarketers to transmit Caller ID information. On the other side of the equation, consumers derive

substantial benefit from receiving Caller ID information. Moreover, as the Commission explained in the NPRM, the transmission of Caller ID information is necessary to protect consumers' privacy under the Telemarketing Act.⁵³² Consumers in large numbers subscribe to, and pay for, Caller ID services offered by their telephone companies.⁵³³ Many of these consumers subscribe to Caller ID specifically to identify incoming calls from telemarketers and screen out unwanted telemarketing calls.⁵³⁴ Indeed, according to Private Citizen, consumers spend an aggregate of \$1.4 billion annually on Caller ID services to limit unwanted telemarketing calls.⁵³⁵ Consumers who commented on the record expressed frustration at the failure of telemarketers to provide Caller ID information.⁵³⁶ These consumers have, over time, come to the conclusion that an incoming call that fails to provide Caller ID information is commonly a telemarketing call.⁵³⁷ As a result, some consumers decline to answer these calls.⁵³⁸ In an attempt to protect their privacy from incoming calls with no Caller ID information provided, other consumers have gone beyond call screening with services such as Caller Intercept and Privacy Manager, both of which are offered by telephone companies for a fee, that intercept incoming calls with no Caller ID information and require such callers to identify themselves before their call will be connected.⁵³⁹ At present, Caller ID services are an ineffective solution from consumers' perspective: many

⁵³² 67 FR at 4514.

⁵³³ Dina ElBoghady, *Ears Wide Shut: Researchers Get Punished for Telemarketers' Crimes*, WASH. POST, Sept. 8, 2002, at H2 (Noting that, according to a survey conducted in 2000, nearly half of all Americans subscribe to caller ID); ACUTA-NPRM at 2.

⁵³⁴ McClure-NPRM at 3; Private Citizen-NPRM at 2; Susannah Fox (Msg. 3624), CN Rhodine (Msg. 480), Gautham Achar (Msg. 596), Brenda Hall (Msg. 825), Carl Wallander (Msg. 861). *See also* 67 FR at 4515, n.223 (citing Bell Atlantic survey finding that three out of four residential customers buy Caller ID to help stop abusive telephone calls).

⁵³⁵ Private Citizen-NPRM at 2. *See also* Associated Press, *Phone Companies Act as Double Agents in Telemarketing War*, CHI. TRIB., Oct. 27, 2002, at C4.

⁵³⁶ *See, e.g.*, Robert Hawrylak (Msg. 3382), Patricia Frank (Msg. 223), Jo Ann Kilmer (Msg. 530), Jim Kelly (Msg. 541), Carl Wallander (Msg. 861), John G. Talafous (Msg. 1236), Louis Sarvary (Msg. 1319), George M. Kapnas (Msg. 2243), Bob Greene (Msg. 2716), FarmGirl16F3 (Msg. 14015).

⁵³⁷ *See, e.g.*, Karen Peters (Msg. 3814), Chuck Jackson (Msg. 209).

⁵³⁸ *See, e.g.*, E Pereira (Msg. 214), Brenda Hall (Msg. 825), Victoria Brigman (Msg. 3889).

⁵³⁹ *See, e.g.*, http://www22.verizon.com/ForYourHome/SAS/res_fam_identify.asp; Private Citizen-NPRM at 2; DC-NPRM at 5; EPIC-NPRM at 11; McClure-NPRM at 2.

⁵²⁶ Fiber Clean-NPRM at 1; Cox-NPRM at 37-38; NRF-NPRM at 19. *But see* ERA-NPRM at 48; Teledirect-NPRM at 3; ATA-Supp. at 16.

⁵²⁷ Fiber Clean-NPRM at 1.

⁵²⁸ Cox-NPRM at 37-38; NRF-NPRM at 19.

⁵²⁹ ARDA-NPRM at 6; Assurant-NPRM at 6; ATA-Supp. at 16; DMA-NPRM at 50; ERA-NPRM at 49; IMC-NPRM at 8; MPA-NPRM at 9, 49-50. *See also* Assurant-NPRM at 6 (Commenter asked that the Rule do more to prevent transmission of misleading Caller ID information. The Commission believes that the amended Rule addresses this concern.). *But see* AARP-NPRM at 6; NCL-NPRM at 8; Patrick-NPRM at 10 (telemarketer should be required to transmit the seller's name whenever possible). *See also* EPIC-NPRM at 12; Make-A-Wish-NPRM at 5-6; Worsham-NPRM at 4 (telemarketer should identify itself rather than the seller). *See also* BellSouth-NPRM at 4-5 (no flexibility in transmitted number should be permitted).

⁵³⁰ MPA-NPRM at 9; DMA-NPRM at 50. *See also* Green Mountain at 28; ATA-Supp. at 16.

⁵³¹ DialAmerica provides a model for the use of call forwarding in this context. *See* DialAmerica-Supp., Att. A at 2.

⁵²³ ATA-Supp. at 16; SBC-Supp. at 13.

⁵²⁴ SBC-Supp. at 13.

⁵²⁵ The record reflects that with the exception of some small interexchange carriers ("IXCs"), competitive local exchange carriers ("CLECs"), and some incumbent local exchange carriers ("ILECs") serving rural pockets of the country, all telephone companies can pass along Caller ID information. *See* June 2002 Tr. II at 78-79; FCC First Report and Order in the Matter of Access Charge Reform, CC Docket No. 96-262 (May 7, 1997), para. 137; <http://www.ss7.net>: Carriers connected to the Signaling System 7 ("SS7") network can transmit Caller ID information. SS7 is the predominant signaling system, and its use is increasing. *But see* Green Mountain-NPRM at 28.

consumers pay added costs simply to find out who is calling them, yet this investment is useless when the identifying information is not made available.⁵⁴⁰

With the exception of Fiber Clean, which argued in favor of allowing at-home telemarketers to block Caller ID transmission, comments from industry members on the whole did not argue that telemarketers have a reason to block Caller ID transmission which might override the substantial privacy protection afforded to consumers when their Caller ID service shows them who is calling.⁵⁴¹ To the contrary, comments from industry members supported the privacy principle behind the Rule's Caller ID provision, but took issue with the proposition that they should be required to transmit or cause transmission of Caller ID information.⁵⁴² Therefore, there is strong support for the Commission's position that requiring Caller ID transmission in telemarketing calls will help promote consumers' privacy by allowing them to know who is calling them at home.

Transmission of Caller ID information will also promote accountability throughout the industry—a goal championed by consumers⁵⁴³ and industry members⁵⁴⁴ alike. The Commission is persuaded by the argument DialAmerica presented in favor of requiring transmission of Caller ID in telemarketing calls. According to DialAmerica: “[d]elivery of Caller ID information, that will be displayed on a consumer's Caller ID device or that can be accessed through such services as *69, is essential to create accountability in the outbound telemarketing industry.”⁵⁴⁵

⁵⁴⁰ AARP-NPRM at 5; EPIC-NPRM at 11; McClure-NPRM at 3. *But see* Lynn Gaubatz (Msg. 2769) (Consumer prefers current state of affairs where “most” telemarketers block transmission of Caller ID information because her Caller ID is programmed to refuse calls from parties who block such transmission. Using this arrangement, the consumer reports receiving few telemarketing calls.)

⁵⁴¹ Several comments from industry groups asserted that the Commission should yield to the FCC's standard on Caller ID blocking, under which the calling party's ability to block Caller ID transmission is preserved. *See, e.g.*, DMA-NPRM at 48-49; SBC Supp. at 10-11. As is discussed below, however, the concerns at stake in the FCC's regulation—law enforcement and safety—are not implicated by telemarketing calls.

⁵⁴² DMA-NPRM at 48; IMC-NPRM at 8.

⁵⁴³ *See, e.g.*, Teresa Vargas (Msg. 1292) (“I think telemarketers should NOT be able to block their phone numbers on Caller ID screens or *69. This will make the telemarketers more accountable, particularly if their tactics are in violation of a “do-not-call” request or if, [sic] the telemarketers successfully scam consumers.”); Lisa Bellanca (Msg. 2007).

⁵⁴⁴ *See, e.g.*, DialAmerica-Supp. at 2; June 2002 Tr. II at 91-92 (ERA).

⁵⁴⁵ DialAmerica-Supp. at 2.

Commenters noted that the increase in accountability that would accrue from requiring transmission of Caller ID information in telemarketing would provide particular benefit in addressing abandoned calls.⁵⁴⁶ Consumers whose privacy has been abused by dead air and call abandonment find it difficult, if not impossible, to ascribe those practices to a particular telemarketer unless Caller ID information is provided.⁵⁴⁷ As explained by DialAmerica, mandatory transmission of Caller ID information will provide “a strong incentive for companies to keep abandonment rates low and eliminate ‘dead air,’” as these companies do not want to engage in practices that might encourage consumers to invoke their company-specific “do-not-call” rights.⁵⁴⁸

The enhanced accountability provided by Caller ID transmission extends beyond complaints about call abandonment and dead air. Caller ID information provides a record of identification that endures beyond the telemarketing call. The prompt disclosures required by 310.4(d) provide consumers with a needed introduction to a solicitation call, but do not provide an enduring record of identifying information, as most consumers do not answer the phone with pen and paper at the ready to write down the name of the calling party. Moreover, just as industry comments did not dispute the privacy protections provided by Caller ID transmission, neither did they present a rebuttal to the argument that such transmission will promote accountability in telemarketing. Indeed, the large majority of telemarketers—entities built upon good business practices and compliance with the Rule—will benefit from a provision designed to respond to deceptive and abusive practices aided by anonymity in telemarketing.⁵⁴⁹

By eliminating anonymity in telemarketing, the Caller ID provision will serve a third, equally important goal: it will provide law enforcement with a significant new resource.⁵⁵⁰ In the years following promulgation of the original Rule, the Commission and the states have created a substantial record of enforcement.⁵⁵¹ However,

⁵⁴⁶ DialAmerica-NPRM at 25; Sytel-NPRM at 8; AARP-NPRM at 9; ARDA-NPRM at 15.

⁵⁴⁷ <http://www.opc-marketing.com/predictive.htm> (“[I]t is assumed that abandoned calls to anonymous consumers do not harm the call center's business.”).

⁵⁴⁸ DialAmerica-Supp. at 3.

⁵⁴⁹ *See, e.g.*, AARP-NPRM at 6.

⁵⁵⁰ TRA-NPRM at 11; EPIC-NPRM at 11-12.

⁵⁵¹ FTC law enforcement actions alone total over 139 cases, resulting in total judgments of over \$200 million since the Rule's inception.

enforcement efforts concerning some Rule provisions have been frustrated because of difficulty in identifying violators.⁵⁵² Sellers and telemarketers that have failed to honor “do-not-call” requests have been particularly hard to identify.⁵⁵³ A number of comments in the record noted the need for greater ability to identify possible violators, and the advantages of Caller ID information in filling that need.⁵⁵⁴ AARP noted that required transmission of Caller ID information will also enable consumers to contact government agencies and the Better Business Bureau to verify the legitimacy of the telemarketer, which will help to prevent fraud before it occurs.⁵⁵⁵ Therefore, the transmission of Caller ID information likely will aid law enforcement's ability to enforce the TSR, and increase the Rule's effectiveness.

Consistency with FCC regulations. FCC regulations require carriers using SS7⁵⁵⁶ to provide a mechanism by which a line subscriber can block the display of his or her telephone number on a Caller ID device.⁵⁵⁷ SBC referenced the FCC's approach to Caller ID blocking to argue that calling parties' interest in privacy “outweighs the general usefulness of Caller ID service.”⁵⁵⁸ As the NPRM made clear, the FCC's requirement that common carriers be able to allow Caller ID blocking is meant to address specific calling situations in which protecting the calling party's privacy takes on particular urgency.⁵⁵⁹ Cited examples include undercover law enforcement operations and calls placed from battered women's shelters.⁵⁶⁰ No such privacy justification suggests itself in the case of telemarketers. Moreover, there is no conflict between the amended Rule's Caller ID provision and FCC regulations. The FTC's provision requires sellers and telemarketers to transmit Caller ID information; it does not create an obligation or a prohibition for common carriers. FCC regulations require certain carriers to provide a mechanism for blocking display of Caller ID information; they do not grant

⁵⁵² June 2002 Tr. II at 21.

⁵⁵³ Donald Munson (Msg. 25516); EPIC-NPRM at 11; NYSCPB-NPRM Att. A at 4-5.

⁵⁵⁴ DialAmerica-NPRM at 25-26; EPIC-NPRM at 11-12; Patrick-NPRM at 2-3; TRA-NPRM at 11; CN Rhodine (Msg. 480); Charles Goodwin (Msg. 2079); Donald Munson (Msg. 25516).

⁵⁵⁵ AARP-NPRM at 6.

⁵⁵⁶ *See* note 526 above for more on SS7 technology.

⁵⁵⁷ 47 CFR 64.1601.

⁵⁵⁸ SBC-Supp. at 10-11.

⁵⁵⁹ 67 FR at 4515, n.228. *See also* ATA-Supp. at 16; EPIC-NPRM at 14.

⁵⁶⁰ *Id.*

sellers and telemarketers the right to block transmission of that information.

§ 310.4(b) — Pattern of calls

Section 310.4(b)(1) of the original Rule specifies that “[i]t is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in,” several practices deemed to be abusive of consumers. The proposed Rule contained some modifications to various subsections of this provision. The responses received in response to the NPRM, and the discussion at the June 2002 Forum, are set forth below.

§ 310.4(b)(1)(i) — Calling repeatedly or continuously

Section 310.4(b)(1)(i) specifies that it is an abusive telemarketing act or practice to cause any telephone to ring, or to engage any person in telephone conversation, repeatedly or continuously, with intent to annoy, abuse, or harass any person at the called number. None of the comments recommended that changes be made to the current wording of § 310.4(b)(1)(i).⁵⁶¹ Therefore, the language in that provision remains unchanged in the amended Rule.⁵⁶² However, the expansion in the scope of the Rule effectuated by the USA PATRIOT Act brings within the ambit of this provision telemarketers soliciting charitable contributions.

§ 310.4(b)(1)(ii) — Denying or interfering with “do-not-call” rights

In the NPRM, the Commission proposed to prohibit a telemarketer from denying or interfering in any way with a person’s right to be placed on a “do-not-call” list, including hanging up the telephone when a consumer initiates a request that he or she be placed on the seller’s list of consumers who do not wish to receive calls made by or on behalf of that seller.⁵⁶³ In setting out the proposed prohibition, the Commission noted that during the Rule Review, numerous individual consumers had complained about being hung up on when they asked to be placed on a “do-

not-call” list. In other instances, consumers complained that the telemarketer had used other means to hamper or impede these consumers’ attempts to be placed on a “do-not-call” list. Participants in both the “Do-Not-Call” Forum and the Rule Review Forum echoed these complaints.⁵⁶⁴

A seller or telemarketer has an affirmative duty under the Rule to accept a “do-not-call” request, and to process that request. Failure to do so by impeding, denying, or otherwise interfering with an attempt to make such a request clearly would defeat the purpose of the “do-not-call” provision, and would frustrate the intent of the Telemarketing Act to curtail telemarketers from undertaking unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of the consumer’s right to privacy.⁵⁶⁵

Those commenters who addressed this provision strongly supported the prohibition.⁵⁶⁶ For example, NAAG stated that an express prohibition against denying or interfering with a consumer’s right to be added to a company-specific “do-not-call” list clarifies the seriousness of the telemarketer’s obligation to process the consumer’s request and will raise confidence in the system.⁵⁶⁷

NAAG noted that the consumer who receives the telemarketing call generally must rely exclusively on the telemarketer’s truthful disclosure of his or her identity and the nature of the call, and that consumers are often confused because many company names are very similar.⁵⁶⁸ In this respect, the Commission’s determination to require telemarketers to transmit Caller ID information, discussed above, will provide a valuable tool to both consumers and law enforcement agencies in identifying those telemarketers who fail to comply with their obligation to process the consumer’s request.

Therefore, the Commission has determined that it is an abusive telemarketing act or practice to deny or interfere in any way with a person’s right to be placed on a “do-not-call” list, including hanging up on the individual when he or she initiates such a request. Section 310.4(b)(1)(ii) of the amended Rule prohibits this practice, and encompasses both telemarketers soliciting the purchase of goods or

services and those soliciting charitable contributions in accordance with the USA PATRIOT Act amendments.⁵⁶⁹ In addition, § 310.4(b)(1)(ii) prohibits anyone from directing another person to deny or interfere with a person’s right to be placed on a “do-not-call” list. This aspect of the provision is intended to ensure that sellers who use third-party telemarketers cannot shield themselves from liability under this provision by suggesting that the violation was a single act by a “rogue” telemarketer where there is evidence that the seller caused the telemarketer to deny or defeat “do-not-call” requests.⁵⁷⁰

§ 310.4(b)(1)(iii) — “Do-not-call”

The original Rule prohibited a seller or telemarketer from calling a person who had previously asked not to be called by or on behalf of the seller whose goods or services were offered.⁵⁷¹ The proposed Rule added a second “do-not-call” provision that would prohibit a seller or telemarketer from calling a consumer who had placed his or her name and/or telephone number on a centralized registry maintained by the Commission, unless the consumer had provided express authorization for the seller to call him or her.⁵⁷² To effectuate the USA PATRIOT Act amendments, the Commission also proposed that for-profit telemarketers who solicit charitable donations be subject to the proposed national registry.⁵⁷³

The national “do-not-call” registry proposal generated extensive comment.⁵⁷⁴ Consumer and privacy advocates, as well as individual consumers, overwhelmingly supported the creation of such a registry.⁵⁷⁵

⁵⁶⁹ Moreover, the Rule Review yielded evidence that, in some instances, telemarketers soliciting charitable contributions are unwilling to honor donors’ “do-not-call” requests, even when threatened with withdrawal of future support. See Peters-RR at 1.

⁵⁷⁰ Because the USA PATRIOT Act amendments do not give the Commission jurisdiction over non-profit organizations, the prohibition against causing a telemarketer to deny or defeat “do-not-call” requests applies only to sellers of goods or services, not to non-profit organizations.

⁵⁷¹ 16 CFR 310.4(b)(1)(ii). This is termed a “company-specific” approach to eliminating unwanted telephone solicitations.

⁵⁷² Proposed Rule §§ 310.4(b)(1)(iii)(B) and 310.4(b)(1)(iii)(B)(1) and (2).

⁵⁷³ 67 FR at 4516, 4519.

⁵⁷⁴ As discussed above, the Commission received about 64,000 written and electronic comments in response to the NPRM, including over 45 supplemental comments from organizations and individuals and almost 15,000 comments from Gottschalks’ customers that were submitted by Gottschalks as its supplemental comment. The vast majority of comments touched, at least in part, on the proposed national “do-not-call” registry.

⁵⁷⁵ See, e.g., DOJ-NPRM at 4-5; EPIC-NPRM at 2-3; LSAP-NPRM at 12; NAAG-NPRM at 4, 6, 12, 29; NACAA-NPRM at 2; NCLC-NPRM at 13; NCL-

⁵⁶¹ In its comments in the Rule Review, NASAA stated that this provision strikes directly at one of the manipulative techniques used in high-pressure sales to coerce consumers to purchase a product, and noted that the organization advises consumers that one of the “warning signs of trouble” is the “three-call” technique used by fraudulent sellers of securities. NASAA-RR at 2.

⁵⁶² Section 310.4(b)(1)(i) of the amended Rule prohibits as an abusive practice “causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.”

⁵⁶³ 67 FR at 4516.

⁵⁶⁴ *Id.*

⁵⁶⁵ 15 U.S.C. 6102(a)(3)(A).

⁵⁶⁶ See, e.g., ARDA-NPRM at 6; Assurant-NPRM at 7; NAAG-NPRM at 44; NCL-NPRM at 8; NYSCPB-NPRM at 5-6; Proctor-NPRM at 4.

⁵⁶⁷ NAAG-NPRM at 44. See also NCL-NPRM at 8.

⁵⁶⁸ NAAG-NPRM at 44.