

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.

²⁶ The 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.

²⁷ The 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.

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

²⁹ Relevant 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.

³⁰ Pub. 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

³¹ Specifically, § 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).

³² 67 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"

³³ Of 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.

³⁴ References 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.

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

³⁶ Much 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.