

the proposed Rule unchanged, apart from renumbering: “caller identification service,” “donor,” “telemarketer,”<sup>85</sup> 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.<sup>86</sup>

### § 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.”<sup>87</sup>

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.<sup>88</sup> Comments from consumer groups generally favored the “billing information” definition, noting that the breadth of the term would prove beneficial to consumers.<sup>89</sup> 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.”<sup>90</sup> 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.<sup>91</sup> Industry commenters, on the other hand, argued precisely the opposite, requesting that the definition be narrowed and that it specifically exclude encrypted data,<sup>92</sup> or other

specified items unique to that commenter’s business practices.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> However,

<sup>88</sup> 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.

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

<sup>90</sup> AARP-NPRM at 7.

<sup>91</sup> 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.

<sup>92</sup> 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.

<sup>93</sup> 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.’”)

<sup>94</sup> 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.

<sup>95</sup> 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

<sup>85</sup> 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).

<sup>86</sup> 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.

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