

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)).