

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

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”²⁶⁰ 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,

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.

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.

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