

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.