

§ 310.3(a)(2) — Prohibited misrepresentations in the sale of goods or services

Section 310.3(a)(2) in the original Rule prohibits a seller or telemarketer from misrepresenting certain material information in a telemarketing transaction, including: total cost; any material restrictions; any material aspect of the performance, efficacy, nature, or central characteristics of the goods or services offered; any material aspect of the seller's refund policy; any material aspect of a prize promotion; any material aspect of an investment opportunity; and a seller's or telemarketer's affiliation with, or endorsement by, any governmental or third-party organization.²⁷³

In the NPRM, the Commission proposed three changes to the provision. First, the phrase "in the sale of goods or services" was added to the section to clarify that these prohibited misrepresentations apply only in that context. This change was made because, pursuant to the mandate of the USA PATRIOT Act, the Commission proposed adding to the Rule § 310.3(d), which delineates misrepresentations prohibited in the specific context of charitable solicitations. Second, § 310.3(a)(2)(vii) was modified slightly to conform with proposed § 310.3(d)(7) which is an almost identical provision, but in the charitable solicitation context. Finally, the Commission proposed an additional prohibited misrepresentation regarding credit card loss protection plans.²⁷⁴

The Commission received no comments regarding the first two changes, and thus retains these in the amended Rule.

§ 310.3(a)(2)(viii) — Misrepresentations regarding credit card loss protection plans

As discussed in detail above, the telemarketing of credit card loss protection plans has been a persistent source of a significant number of complaints about fraud and, as a result, has been the target of numerous law enforcement actions by both the Commission and the state Attorneys General.²⁷⁵ In the NPRM, the Commission proposed two new provisions to address this practice. The first provision, in § 310.3(a)(1)(vi), discussed above, requires that sellers or telemarketers of such plans 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. This provision is retained unchanged in the amended Rule.

In addition to advising consumers of their rights, the Commission also believes that additional protection is needed to curb the misrepresentations that are prevalent in the sale of credit card loss protection plans. Telemarketers often misrepresent various aspects of the credit card loss protection plan to consumers, especially the existing legal limits on consumer liability if their cards are lost or stolen.²⁷⁶ Therefore, the Commission proposed to add a second provision — § 310.3(a)(2)(viii) — which 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, which limits a cardholder's liability for unauthorized charges.²⁷⁷

The Commission received little comment on this proposed provision. Those commenters who addressed the Commission's proposal strongly supported the provision's method of addressing problems with these plans, noting that complaints about the fraudulent sale of credit card loss protection plans have continued unabated since the original Rule became effective.²⁷⁸ Therefore, the Commission has determined that it is a deceptive telemarketing act or practice to misrepresent that any customer needs particular goods or services in order to have protections provided pursuant to 15 U.S.C. § 1643, and has adopted § 310.3(a)(2)(viii), which prohibits a seller or telemarketer from misrepresenting that any consumer needs to purchase protections that they already have under 15 U.S.C. § 1643.

§ 310.3(a)(2)(ix) — Misrepresentations regarding negative option feature offers

The original Rule did not specifically require disclosures or prohibit misrepresentations regarding negative option features in telemarketing offers. However, as noted above, in the discussion of § 310.3(a)(1)(vii), as a

result of the more narrowly-tailored approach to the problems associated with preacquired account telemarketing, a newly focused approach to the problems related to negative option features is also required. This includes specific disclosure requirements, which are set forth in § 310.3(a)(1)(vii) and explained above. Consistent with the structure of the Rule to date, and to ensure that the disclosures are not only made, but made truthfully, the amended Rule includes a mirroring provision to these disclosure requirements, at § 310.3(a)(2)(ix), which prohibits misrepresentations regarding "[a]ny material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s)."

§ 310.3(a)(3) — Express verifiable authorization

Section 310.3(a)(3) of the original Rule requires that a seller or telemarketer obtain express verifiable authorization in sales involving payment by demand drafts or similar negotiable paper.²⁷⁹ The Rule also provides that authorization is deemed verifiable if any of three specified means are employed to obtain it: (1) express written authorization by the customer, including signature; (2) express oral authorization that is tape recorded and made available upon request to the customer's bank; or (3) written confirmation of the transaction, sent to the customer before submission of the draft for payment. If the telemarketer chooses to use the taped oral authorization method, the Rule requires the telemarketer to provide, upon request, tapes evidencing the customer's oral authorization, including the customer's receipt of the following information: the number, date(s) and amount(s) of payments to be made; date of authorization; and a telephone number for customer inquiry that is answered during normal business hours.²⁸⁰

In the NPRM, the Commission proposed to amend the express verifiable authorization provision to

²⁷⁶ See discussion of § 310.3(a)(1)(vi) above, and notes 249 and 253.

²⁷⁷ As noted above, this approach parallels the TSR'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.

²⁷⁸ 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; and discussion of § 310.3(a)(1)(vi) above.

²⁷⁹ The use of demand drafts, or "phone checks," enables a merchant to obtain funds from a person's bank account without that person's signature on a negotiable instrument.

²⁸⁰ See original Rule § 310.3(a)(3). Section 310.3(a)(3)(iii)(A) of the original Rule requires that all information required to be included in a taped oral authorization be included in any written confirmation of the transaction.

²⁷³ See 16 CFR 310.3(a)(2).

²⁷⁴ Proposed Rule § 310.3(a)(2)(viii).

²⁷⁵ See note 256 above.