

enunciated by the Commission in the NPRM for the heightened knowledge requirement.³⁶⁶ But AARP reiterated its concern that the conscious avoidance standard places too high a burden on law enforcement, and urged the Commission to substitute a “knew or should have known” standard for the assisting and facilitating provision.³⁶⁷ NACAA also urged the Commission to adopt a “knew or should have known” standard in the amended Rule.³⁶⁸ NAAG made a similar recommendation, noting that the current standard results in “both federal and state authorities [being] unduly hampered in trying to reduce telemarketing fraud.”³⁶⁹ NAAG also noted that this provision is critical in addressing the participation of those United States-based entities, such as sellers of victim lists, fulfillment house operators, and credit card launderers, who provide necessary assistance to fraudulent telemarketers, many of whom have begun operating from outside the country.³⁷⁰

The Commission declines, on the record evidence, to lower the standard for assisting and facilitating under the Rule. The Commission continues to believe the “conscious avoidance” standard is the appropriate one in instances when liability to pay redress or civil penalties rests on another person’s violation of the Rule. Further, the Commission believes the “conscious avoidance” standard is one that can be met in situations where third parties provide substantial assistance to fraudulent telemarketers. As stated in the original SBP, this standard “is intended to capture the situation where actual knowledge cannot be proven, but there are facts and evidence that support an inference of deliberate ignorance.”³⁷¹ In the hypothetical situations posed in NAAG’s comment, the Commission believes it would be possible to demonstrate such “deliberate ignorance” on the part of, for example, a fulfillment house that ships only inexpensive prizes on behalf of a telemarketer about whom it receives numerous complaints. The Commission itself has brought several cases successfully using the assisting and facilitating provision, and has found the

provision to be a useful tool in combating fraudulent telemarketing.³⁷²

§ 310.3(c) — Credit card laundering

In the NPRM, the Commission retained the original Rule provision addressing credit card laundering, but noted that the coverage of the provision in the proposed Rule would expand to cover credit card laundering in the solicitation of charitable contributions, pursuant to the mandate of the USA PATRIOT Act.³⁷³ Although the proposed Rule was issued with this provision unmodified, the Commission expressed concern that the provision’s “usefulness may be unduly restricted by the phrases ‘[e]xcept as expressly permitted by the applicable credit card system,’ in the preamble to § 310.3(c), and ‘when such access is not authorized by the merchant agreement or the applicable credit card system,’ in § 310.3(c)(3).”³⁷⁴

Having received no comment regarding the credit card laundering provision generally, or regarding the Commission’s specific concerns, the Commission has determined to retain this provision in its original form. The Commission will continue to monitor its effectiveness, however, and may reconsider modifications at the next Rule Review.

§ 310.3(d) — Prohibited deceptive acts or practices in the solicitation of charitable contributions

Pursuant to § 1011(b)(1) of the USA PATRIOT Act, the Commission proposed in the NPRM to include in the Rule new prohibited misrepresentations in the solicitation of charitable contributions.³⁷⁵ The amended Rule retains § 310.3(d) unchanged, with the following exceptions. First, the phrase “after any administrative or fundraising expenses are deducted” has been deleted from § 310.3(d)(4). The Commission believes that the provision is clearer absent this qualifying phrase, and thus has stricken it in the amended Rule. Second, § 310.3(d)(6), the prohibited misrepresentation regarding advertising sales has been deleted. As discussed below, in the section addressing § 310.6(b)(7), the Commission has determined to exempt from the Rule’s coverage business-to-

business calls to induce a charitable solicitation. As a result, the prohibition against misrepresentations regarding the sale of advertising, which would occur in a business-to-business context, is no longer necessary. Finally, proposed § 310.3(d)(7), prohibiting misrepresentations regarding a charitable organization’s or telemarketer’s affiliation with, or endorsement or sponsorship by, any person or government entity, is renumbered in the amended Rule as § 310.3(d)(6).

Section 310.3(d) prohibits misrepresentations regarding certain material information that a telemarketer might choose to convey to a donor to induce a charitable contribution.³⁷⁶ The goal of the prohibition on these misrepresentations is to ensure that donors solicited for charitable contributions are not deceived, a purpose squarely in line with the mandate of the USA PATRIOT Act, which directed the Commission to include “fraudulent charitable solicitations” in the deceptive practices prohibited by the TSR.³⁷⁷ Deception occurs if there is a representation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances, and the representation, omission, or practice is material.³⁷⁸ As set forth in the NPRM, the Commission believes that if any of the items listed in this section are misrepresented, donors are likely to be misled, as false representations of material facts are likely to mislead.³⁷⁹ Moreover, the Commission’s enforcement experience shows that often such representations are express, and therefore presumptively material. If implied, such representations are still likely to influence a donor’s decision whether to contribute. Therefore, “misrepresentation of any of these [] categories of material information is deceptive, in violation of section 5 of the FTC Act.”³⁸⁰

In response to the NPRM, some commenters expressed their general support for the USA PATRIOT Act amendments, which extended the Rule’s coverage to for-profit telemarketers soliciting charitable donations. AARP, for example, noted its support for the general purposes of the USA PATRIOT Act, stating that the amendments would

³⁷² See 67 FR at 4509, n.155. See also *FTC v. Allstate Bus. Distrib’n. Ctr., Inc.*, No. 00-10335AHM (CTX) (C.D. Cal. 2001); *FTC v. Sweet Song Corp.*, No. CV-97-4544 LGB (Jgx) (C.D. Cal. 1997); *FTC v. Walton (d/b/a Pinnacle Fin. Servs.)*, No. CIV98-0018 PCT SMM (D. Ariz. Jan. 1998).

³⁷³ See 67 FR at 4509.

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 4509-10 (discussing the reasoning behind the prohibited misrepresentations included in proposed Rule § 310.3(d)).

³⁷⁶ Amended Rule § 310.3(d)(1)-(7).

³⁷⁷ USA PATRIOT Act § 1011(b)(1).

³⁷⁸ See *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165, appeal dismissed sub nom., *Koven v. FTC*, No. 84-5337 (11th Cir. 1984).

³⁷⁹ See *Thompson Med. Co.*, 104 F.T.C. 648, 818 (1984), *aff’d* 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

³⁸⁰ 67 FR at 4510.

³⁶⁶ ARDA-NPRM at 6.

³⁶⁷ AARP-NPRM at 8.

³⁶⁸ NACAA-NPRM at 8.

³⁶⁹ NAAG-NPRM at 56.

³⁷⁰ *Id.* (suggesting that liability for those who assist and facilitate is particularly important when the fraudulent telemarketer holds no assets in the United States).

³⁷¹ 60 FR at 43852.