

prevent fraudulent charitable solicitations while still allowing "legitimate fundraising appeals."³⁸¹ Similarly, NCL noted that the new provisions in the TSR regarding for-profit fundraisers will be "very helpful in curbing deceptive and abusive practices."³⁸²

Very few comments were received specifically on § 310.3(d) of the proposed Rule. One such comment, from NCL, noted that "[t]he proposed list of prohibited practices covers most of the common abuses that are reported by consumers and businesses."³⁸³ NCL did suggest adding an additional prohibited misrepresentation on "sound-alikes," or the use of a name similar or identical to that of a legitimate charity in an attempt to benefit from that charity's good will.³⁸⁴ Similarly, Make-A-Wish proposed prohibiting misrepresentations of the "identity" of the entity on whose behalf the charitable solicitation is being sought.³⁸⁵ NAAG and NASCO suggested that the Commission clarify that proposed § 310.3(d)(7), which prohibits misrepresentations regarding "[a] seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity," would prohibit misrepresentations of a seller's or telemarketer's affiliation with any charity.³⁸⁶ The Commission believes that proposed § 310.3(d)(7), renumbered as § 310.3(d)(6) in the amended Rule, is broad enough to prohibit the "sound-alike" misrepresentation NCL raised, as well as to prohibit a misrepresentation regarding one's affiliation with any charity. Therefore, the Commission declines to add a further misrepresentation to specifically address the "sound-alike" scenario, or add the "identity" of the charity to the prohibited misrepresentations.

NAAG and NASCO also proposed one further modification: the addition of a prohibited misrepresentation of "[t]he address or location of the charitable organization, and where the organization conducts its activities."³⁸⁷ NAAG stated that the addition of such a provision would ensure that telemarketers do not misrepresent that the charities on whose behalf they are soliciting are "local" or that their activities are local, since the local character of a charity or its programs often is material to prospective donors.

According to NAAG, because many prospective donors prefer to support organizations that will benefit their own community, fundraisers sometimes take advantage of that sentiment by using a local post office box or other local address as their return address, to make it seem as if the charity is based close to the donors.³⁸⁸

The Commission believes that any misrepresentation of the charitable organization's location, or the location where the funds are to be used, would likely violate § 310.3(d)(3), which prohibits misrepresentation of the "purpose for which any charitable contribution will be used." Therefore, the Commission declines to include a specific prohibited misrepresentation regarding the address or location of a charity.

D. Section 310.4 — Abusive Telemarketing Acts or Practices.

The Telemarketing Act authorizes the Commission to prescribe rules "prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices."³⁸⁹ The Act does not define the term "abusive telemarketing act or practice." It directs the Commission to include in the TSR provisions prohibiting three specific "abusive" telemarketing practices, namely, for any telemarketer to: 1) "undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy;" 2) make unsolicited phone calls to consumers during certain hours of the day or night; and 3) fail to "promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services."³⁹⁰ The Act does not limit the Commission's authority to address abusive practices beyond these three practices legislatively determined to be abusive.³⁹¹ Accordingly, the Commission adopted a Rule that addresses the three specific practices

mentioned in the statute, and, additionally, five other practices that the Commission determined to be abusive under the Act.

Each of the three abusive practices enumerated in the Act implicates consumers' privacy. In fact, with respect to the first of these practices, the explicit language of the statute directs the FTC to regulate "calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."³⁹² Similarly, by directing that the Commission regulate the times when telemarketers could make unsolicited calls to consumers in the second enumerated item,³⁹³ Congress recognized that telemarketers' right to free speech is in tension with consumers' right to privacy within the sanctity of their homes, but that a balance must be struck between the two that meshes with consumers' expectations while not unduly burdening industry. The calling times limitation protects consumers from telemarketing intrusions during the late night and early morning, when the toll on their privacy from such calls would likely be greatest. The third enumerated practice³⁹⁴ also relates to privacy, in that it requires the consumer be given information promptly that will enable him to decide whether to allow the infringement on his time and privacy to go beyond the initial invasion. Congress provided authority for the Commission to curtail these practices that impinge on consumers' right to privacy but are not likely deceptive under FTC jurisprudence. This recognition by Congress, that even non-deceptive telemarketing business practices can seriously impair consumers' right to be free from harassment and abuse, and its directive to the Commission to rein in these tactics lie at the heart of § 310.4 of the TSR.

The practices not specified as abusive in the Act, but determined by the Commission to be abusive and thus prohibited in the original rulemaking are: (1) threatening or intimidating a consumer, or using profane or obscene language; (2) "causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person;" (3) requesting or receiving payment for credit repair services prior to delivery and proof that such services have been rendered; (4) requesting or receiving payment for recovery services prior to delivery and proof that such services

³⁸⁸ *Id.*

³⁸⁹ 15 U.S.C. 6102(a)(1) (emphasis added).

³⁹⁰ 15 U.S.C. 6102(a)(3).

³⁹¹ See KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.2 (3d ed. 1994) (noting that agencies have the power to "fill any gaps" that Congress either expressly or implicitly left to the agency to decide pursuant to the decision in *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). It is, therefore, permissible for agencies to engage in statutory construction to resolve ambiguities in laws directing them to act, and courts must defer to this administrative policy decision.

³⁸¹ AARP-NPRM at 4.

³⁸² NCL-NPRM at 2.

³⁸³ *Id.* at 5.

³⁸⁴ *Id.*

³⁸⁵ Make-A-Wish-NPRM at 5.

³⁸⁶ NAAG-NPRM at 53. See also NASCO-NPRM at 7.

³⁸⁷ NAAG-NPRM at 53.

³⁹² 15 U.S.C. 6102(a)(3)(A) (emphasis added).

³⁹³ 15 U.S.C. 6102(a)(3)(B).

³⁹⁴ 15 U.S.C. 6102(a)(3)(C).