

have been rendered; and (5) “requesting or receiving payment for an advance fee loan when a seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit.”

The first two of these are directly consistent with the Act’s emphasis on privacy protection, and with the intent, made explicit in the legislative history, that the TSR address these particular practices.³⁹⁵ In the SBP for the original Rule, the Commission stated, with respect to the prohibition on threats, intimidation, profane and obscene language, that these tactics “are clearly abusive in telemarketing transactions.”³⁹⁶ The Commission also noted that the commenters supported this view, and specifically cited the fact that “threats are a means of perpetrating a fraud on vulnerable victims, and [that] many older people can be particularly vulnerable”³⁹⁷

The remaining three abusive practices identified in the Rule—relating to credit repair services, recovery services, and advance fee loan services—were included in the Rule under the Telemarketing Act’s grant of authority for the Commission to prescribe rules prohibiting other unspecified abusive telemarketing acts or practices. The Act gives the Commission broad authority to identify and prohibit additional abusive telemarketing practices beyond the specified practices that implicate privacy concerns,³⁹⁸ and gives the Commission discretion in exercising this authority.³⁹⁹

As noted above, some of the practices prohibited as abusive under the Act flow directly from the Telemarketing Act’s emphasis on protecting consumers’ privacy. When the Commission seeks to identify practices

as abusive that are less distinctly within that parameter, the Commission now thinks it appropriate and prudent to do so within the purview of its traditional unfairness analysis, as developed in Commission jurisprudence⁴⁰⁰ and codified in the FTC Act.⁴⁰¹ This approach constitutes a reasonable exercise of authority under the Telemarketing Act, and provides an appropriate framework for several provisions of the original Rule. Whether privacy-related intrusions or concerns might independently give rise to a Section 5 violation outside of the Telemarketing Act’s purview is not addressed or affected by this analysis.

The abusive practices relating to credit repair services, recovery services, and advance fee loan services each meet the criteria for unfairness. An act or practice is unfair under Section 5 of the FTC Act if it causes substantial injury to consumers, if the harm is not outweighed by any countervailing benefits, and if the harm is not reasonably avoidable.⁴⁰² An important characteristic common to credit repair services, recovery services, and advance fee loan services is that in each case the offered service is fundamentally bogus. It is the essence of these schemes to take consumers’ money for services that the seller has no intention of providing and in fact does not provide. Each of these schemes had been the subject of large numbers of consumer complaints and enforcement actions,⁴⁰³ and in each case

caused substantial injury to consumers. Amounting to nothing more than outright theft, these practices conferred no potentially countervailing benefits. Finally, having no way to know these offered services were illusory, consumers had no reasonable means to avoid the harm that resulted from accepting the offer. Thus, these practices meet the statutory criteria for unfairness, and accordingly, the remedy imposed by the Rule to correct them is to prohibit requesting or receiving payment for these services until after performance of the services is completed.

§ 310.4(a) — Abusive conduct generally

Section 310.4(a) of the original Rule sets forth specific conduct that is considered to be an “abusive telemarketing act or practice” under the Rule. None of the comments in the Rule Review recommended that changes be made to the original wording of §§ 310.4(a)(1)-(3); nor had the Commission’s enforcement experience revealed any difficulty with these provisions that would warrant amendment.⁴⁰⁴ Although one

or twenty-four in terms of number of complaints received by the NFIC). NCL-RR at 11. The Commission continues to take action against fraudulent credit repair schemes; for example, in August 2000, the FTC, the Department of Justice and forty-seven other federal, state and local law enforcement and consumer protection agencies surfed the Web looking for illegal scams that promise consumers that they can restore their creditworthiness for a fee. Over 180 websites were put on notice that their credit repair claims may violate state and federal laws. See “Surf’s Up for Crack Down on ‘Credit Repair’ Scams,” FTC press release dated Aug. 21, 2000). Unfortunately, complaints about advance fee loan schemes rose from a number fifteen ranking in 1995 to the number two ranking in 1998, with about 80 percent of the advance fee loan companies reported to the NFIC located in Canada. NCL-RR at 12. RR Tr. at 378. The Commission and the state Attorneys General continue to launch law enforcement “sweeps” targeting corporations and individuals that promise loans or credit cards for an advance fee, but never deliver them. A sweep was announced June 20, 2000, involving five cases filed by the FTC, 13 actions taken by state officials, and three cases filed by Canadian law enforcement authorities. See “FTC, States and Canadian Provinces Launch Crackdown on Outfits Falsely Promising Credit Cards and Loans for an Advance Fee,” FTC press release dated June 20, 2000. Among the most recent FTC cases targeting advance fee loans, four involved advance fee credit card schemes: *FTC v. Fin. Servs. of N. Am.*, No. 00-792 (GEB) (D.N.J. filed June 9, 2000); *FTC v. Home Life Credit*, No. CV00-06154 CM (Ex) (C.D. Cal. filed June 8, 2000); *FTC v. First Credit Alliance*, No. 300 CV 1049 (D. Conn. filed June 8, 2000); and *FTC v. Credit Approval Serv.*, No. G-00-324 (S.D. Tex. filed June 7, 2000). In addition, another case against a fraudulent credit card loss protection seller also included elements of illegal advance fee credit card fees. *FTC v. First Capital Consumer Membership Servs., Inc.*, Civil No. 00-CV-0905C(F) (W.D.N.Y. filed Oct. 23, 2000).

⁴⁰⁴ Section 310.4(a)(1) prohibits as an abusive practice “threats, intimidation, or the use of profane

³⁹⁵ “With respect to the bill’s reference to ‘other abusive telemarketing activities’ . . . the Committee intends that the Commission’s rulemaking will include proscriptions on such inappropriate practices as threats or intimidation, obscene or profane language, refusal to identify the calling party, continuous or repeated ringing of the telephone, or engagement of the called party in conversation with an intent to annoy, harass, or oppress any person at the called number. The Committee also intends that the FTC will identify other such abusive practices that would be considered by the reasonable consumer to be abusive and thus violate such consumer’s right to privacy.” H.R. REP. NO. 103-20 at 8 (1993).

³⁹⁶ 60 FR at 30415.

³⁹⁷ *Id.*

³⁹⁸ 15 U.S.C. 6102(a)(1). The ordinary meaning of “abusive” is (1) “wrongly used; perverted; misapplied; catachrestic;” (2) “given to or tending to abuse,” (which is in turn defined as “improper treatment or use; application to a wrong or bad purpose”). Webster’s International Dictionary, Unabridged 1949.

³⁹⁹ 15 U.S.C. 6102(a)(1).

⁴⁰⁰ See Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, appended to *Int’l Harvester Co.*, 104 F.T.C. 949, 1064 (1984); Letter from the FTC to Hon. Bob Packwood and Hon. Bob Kasten, Committee on Commerce, Science and Transportation, United States Senate, reprinted in *FTC Antitrust & Trade Reg. Rep.* (BNA) No. 1055, at 568-70 (Mar. 5, 1982); *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1363-68, *reh’g denied*, 859 F.2d 928 (11th Cir. 1988), *cert. denied*, 488 U.S. 1041 (1989).

⁴⁰¹ 15 U.S.C. 45(n).

⁴⁰² *Id.*

⁴⁰³ During 1995 and 1996, the Commission brought or settled lawsuits against numerous individuals and companies involved in nearly a dozen recovery room operations. See, e.g., *FTC v. Meridian Capital Mgmt.*, No. CV-S-96-63-PMP (RLH) (D. Nev. filed Nov. 20, 1996). The Commission’s efforts against recovery rooms have borne fruit. The volume of consumer complaints concerning recovery rooms logged into the FTC Telemarketing Complaint System in 1996 plummeted to 153—less than one-fifth the record high volume of 869 complaints recorded in 1995. See “1995-1996 Staff Summary of FTC Activities Affecting Older Americans” (Mar. 1998). Complaints about “recovery” schemes have continued to decline dramatically, from a number three ranking in 1995 to a number twenty-five ranking in 1999, while complaints about credit repair have remained at a relatively low level since 1995 (steadily ranking about number twenty-three