

commenter suggested amendments to § 310.4(a)(4), the Commission determined that no amendment was needed to the language of that provision.⁴⁰⁵ Therefore, the language in these provisions was unchanged in the proposed Rule.

As noted in the NPRM, however, the Rule amendments mandated by the USA PATRIOT Act expand the reach of § 310.4(a) to encompass the solicitation of charitable contributions. The section begins with the statement "It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in [the conduct specified in subsections (1) through (6) of this provision of the Rule]."⁴⁰⁶ The proposed Rule modified the definitions of "telemarketing," and, by association, "telemarketer," to encompass the solicitation of charitable contributions. Consequently § 310.4(a) of the proposed Rule would have applied to all telemarketers, including those engaged in the solicitation of charitable contributions. Each of the prohibitions in § 310.4(a) will therefore now apply to those telemarketers soliciting on behalf of either sellers or charitable organizations. As noted in the NPRM, the Commission believes it unlikely that §§ 310.4(a)(2)-(4) will have any significant impact on telemarketers engaged in the solicitation of charitable contributions, since those sections all deal with practices that are commercial in nature and not associated with charitable solicitations. Sections 310.4(a)(1), (5), (6), (7) and (8) of the proposed Rule, however, addressed practices that are not necessarily confined to telemarketing to induce purchases of goods or services. They therefore may have had an impact upon

or obscene language." Section 310.4(a)(2) prohibits requesting advance payment for so-called "credit repair" services. Section 310.4(a)(3) prohibits requesting advance payment for the recovery of money lost by a consumer in a previous telemarketing transaction.

⁴⁰⁵ Section 310.4(a)(4) prohibits requesting advance payment for obtaining a loan or other extension of credit when the seller or telemarketer has represented a high likelihood that the consumer will receive the loan or credit. NCL reported in its Rule Review comment that the number of complaints it received about such advance fee loan schemes had risen steeply in the five years since the Rule was promulgated. NCL also speculated that consumers may be confused about whether and under what circumstances fees are legitimately required for different types of loans, as evidenced by the numerous complaints about advance fee credit cards. NCL-RR at 11. The Commission noted in the NPRM its belief that the language of § 310.4(a)(4) already prohibits such advance fee credit card offers via telemarketing and that numerous federal and state law enforcement efforts have been directed at such offers. See discussion at 67 FR at 4510.

⁴⁰⁶ Original and amended Rule § 310.4(a).

telemarketers engaged in the solicitation of charitable contributions.

The Commission received many comments discussing the proposed modifications to § 310.4(a), and significant time was devoted to these issues at the June 2002 Forum. A summary of the major points on the record regarding the proposed amendments is provided below.

§ 310.4(a)(1) — Threats and intimidation

Section 310.4(a)(1), unchanged in the proposed Rule, specifies that it is an abusive telemarketing practice to engage in threats, intimidation, or the use of profane or obscene language. None of the comments in response to the NPRM recommended that changes be made to the wording of § 310.4(a)(1), although ICFA did request clarification of the term "intimidation," arguing that "a person could potentially claim to have been 'intimidated' simply because a pre-need caller suggested meeting to discuss funeral arrangements."⁴⁰⁷ The Commission believes that under the language of the Rule, which focuses on the telemarketer's behavior, to "engage in . . . intimidation" could not reasonably be extended to cover the situation where a telemarketer merely invites a consumer to discuss funeral arrangements, even if the person called finds the prospect of funeral planning an "intimidating" one. Rather, as the Commission noted in the TSR Compliance Guide, this provision is meant to prohibit "intimidation, including acts which put undue pressure on a consumer, or which call into question a person's intelligence, honesty, reliability or concern for family."⁴⁰⁸ The Commission believes further clarification is unnecessary, and thus declines to include in the amended Rule a definition of "intimidation." Therefore, the language in this provision remains unchanged in the amended Rule. However, the USA PATRIOT Act expansion of the TSR brings within the ambit of this provision telemarketers soliciting charitable contributions.

§ 310.4(a)(2) — Credit repair

Section 310.4(a)(2) prohibits requesting or receiving a fee or consideration for goods or services represented to improve a person's creditworthiness until: 1) the time frame within which the seller has represented that the promised services will be provided has expired; and 2) the seller

⁴⁰⁷ ICFA-NPRM at 3.

⁴⁰⁸ TSR Compliance Guide at 23 (noting that "[r]epeated calls to an individual who has declined to accept an offer may also be an act of intimidation").

has provided the consumer with evidence that the services were successful—that is, that the consumer's creditworthiness has improved. No change to this section was incorporated in the proposed Rule, except to note its expanded coverage as a result of the USA PATRIOT Act.⁴⁰⁹ The only comment received in response to the NPRM was from DBA, which requested that debt collectors be specifically exempted from compliance with this section.⁴¹⁰ As DBA itself noted, debt collection activities do not fall within the Rule's ambit in any event because they are outside the definition of "telemarketing."⁴¹¹ Therefore, it is unnecessary to exempt debt collectors from compliance with this provision.

§ 310.4(a)(5) — Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing

The Commission has added a new provision, § 310.4(a)(5), which specifies that it is an abusive practice and a violation of the Rule to disclose or receive, for consideration, unencrypted consumer account numbers for use in telemarketing.

As mentioned above, since the original Rule was promulgated, consumer concern over encroachments on their privacy has become widespread. One response to privacy concerns was passage of the GLBA⁴¹² and its related regulations,⁴¹³ under which financial institutions, and the third parties with which they do business, may provide consumer account information to other third parties only in encrypted form for marketing purposes. To do otherwise is not only a violation of the GLBA and its related regulations,⁴¹⁴ but is construed by consumers as a breach of the financial institution's promise to consumers to keep the consumer's account information confidential and secure.⁴¹⁵

⁴⁰⁹ 67 FR at 4512 (noting that "[i]t is unlikely that [this section] will have any significant impact on telemarketers engaged in the solicitation of charitable contributions. . .").

⁴¹⁰ DBA-NPRM at 2-4.

⁴¹¹ *Id.*

⁴¹² Gramm-Leach-Bliley Act, see note 64 above.

⁴¹³ See 16 CFR 313.65 (2000) (FTC's Privacy Regulation). See also 17 CFR 160; 12 CFR 332; 12 CFR 715; 12 CFR 40; 12 CFR 573; and 17 CFR 248.

⁴¹⁴ See, e.g., 12 CFR 313.12.

⁴¹⁵ See AARP-Supp. at 2 (describing the results of a survey AARP conducted in which the majority of consumers reported that they did not believe telemarketers could or should freely share their account information). See also Dave Finlayson (Msg. 491) ("I will cease doing business with any firm which gives out my personal private information."); BL (Msg. 1175) ("I also agree that

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