

preacquired account telemarketing.⁴²⁴ The proposal also arose from the Commission's law enforcement experience in this area, as well as that of the states, which demonstrates the consumer harm that can result from this practice.⁴²⁵ The comments received in response to the NPRM, however, demonstrate that much preacquired account telemarketing does not necessarily give rise to consumer injury—specifically, unauthorized charges—and in fact may benefit consumers. With this in mind, the Commission has focused more narrowly on the tangible harm, and has crafted precise solutions to the specific abuses evident in instances involving preacquired account information.

Section 310.4(a)(6) of the amended Rule is one of a number of provisions that collectively address the harm caused by certain forms of preacquired account telemarketing. The scope of this section, however, extends beyond the context of preacquired account telemarketing to any instance where the seller or telemarketer causes a charge to be submitted for payment without first obtaining the express informed consent of the customer or donor to be charged, and to be charged using a particular account or payment mechanism. This provision, along with several new definitions (amended Rule § 310.2(o) “free-to-pay conversion,” § 310.2(t) “negative option feature,” and § 310.2(w) “preacquired account information”), a new provision requiring specific disclosures of material information in any telemarketing transaction involving a negative option feature (amended Rule § 310.3(a)(1)(vii)), and a new provision prohibiting misrepresentations regarding any material aspect of a negative option feature (amended Rule § 310.3(a)(2)(ix)), together are designed to address in a more narrowly-tailored manner the problem originally targeted by the blanket prohibition against receiving account information from any person other than the consumer or disclosing that information for use in telemarketing.

The blanket prohibition proposed in the NPRM, and the issue of preacquired account telemarketing generally, received substantial comment. Consumer groups and law enforcement agencies strongly supported the proposal, citing continued evidence of substantial consumer injury resulting

from abusive preacquired account telemarketing practices.⁴²⁶ Their comments strongly criticized a distinctive feature of preacquired account telemarketing—that is, that it fundamentally changes the customary bargaining relationship between seller and consumer by giving the seller the means to bill charges to the consumer's account without the consumer divulging his or her account number to evidence consent to the transaction.⁴²⁷

Industry commenters opposed the proposed provision, making a number of legal and factual arguments. Several industry members suggested that without specific legislative authority, the Commission could not prohibit the transfer of account information under the TSR.⁴²⁸ A few commenters argued that the Commission lacked record evidence sufficient to support the proposed prohibition.⁴²⁹ It bears noting that, although business and industry representatives acknowledged during the Rule Review that the practice of preacquired account telemarketing was quite common, maintaining that it was “very important” to them, they provided scant information that would

help to quantify the benefits conferred by this practice or better explain how these benefits might outweigh the substantial consumer harm it can cause.⁴³⁰ By contrast, the record of consumer injury arising from preacquired account telemarketing scenarios was extensive at the time of the Rule Review.⁴³¹

Three arguments echoed throughout virtually all industry comments received in response to the NPRM. First, financial institutions, as well as other industry members, argued that the proposal was unnecessary or improper in light of the enactment of the GLBA and the various regulations thereunder.⁴³² Specifically, these commenters argued that the issue of releasing account information for marketing purposes already has been dispositively addressed in the GLBA and its implementing regulations, with a different result from that proposed by the Commission in the TSR.⁴³³

⁴³⁰ See 67 FR at 4512-14; and June 2002 Tr. II at 211-12 (E. Harrington) (“One of the reasons that the Commission has proposed a prohibition is because it looked very carefully at the record of the request for justification for the practice and found it is sorely wanting. Why this needs to happen, in other words, has been a real mystery to us, why it is that companies should be permitted to get account information from third parties and have it at the time that they call a prospective customer, charge that account information and oftentimes not obtain consent for that.”).

⁴³¹ See 67 FR at 4512-14. Moreover, the evidence continues to mount as the Commission and states continue to bring law enforcement actions involving these practices. See, e.g., NAAG-NPRM at 30, n.73; Minnesota-Supp. *passim*; Illinois-Supp. *passim*.

⁴³² Advanta-NPRM at 3; Allstate-Supp. at 2; ABA-NPRM at 8; ABIA-NPRM at 1; AFSA-NPRM at 11-12; AmEx-NPRM at 4-5; ATA-Supp. at 5; Assurant-NPRM at 6; BofA-NPRM at 7; Bank One-NPRM at 2-3; Capitol One-NPRM at 8; Cendant-NPRM at 6-7; CBA-NPRM at 9; Citigroup-NPRM at 8-9; CCC-NPRM at 9; CMC-NPRM at 13; Discover-NPRM at 5-6; E-Commerce Coalition-NPRM at 2; Eagle Bank-NPRM at 4; FSR-NPRM at 7-8; Fleet-NPRM at 4-5; Household Auto-NPRM at 5; Household Bank-NPRM at 2, 7-9; Household Finance-NPRM at 2, 5; HSBC-NPRM at 3; KeyCorp-NPRM at 4; MasterCard-NPRM at 7; MBA-NPRM at 3; MBNA-NPRM at 5; Metris-NPRM at 2-4; NRF-NPRM at 21; PCIC-NPRM at 2; VISA-NPRM at 6; Wells Fargo-NPRM at 3; Letter from Reps. Ney, Sandlin, Jones, Cantor, and Shows to Chairman Timothy Muris, dated Apr. 15, 2002; Letter from Sens. Hagel, Johnson, and Carper to Chairman Timothy Muris, dated Apr. 17, 2002. See also Letter from Rep. Manzullo to Chairman Timothy Muris, dated Apr. 12, 2002 (suggesting that the blanket prohibition on transferring or receiving billing information “seems excessive”); and Letter from Sen. Inhofe to Chairman Timothy Muris, dated Mar. 22, 2002 (same).

⁴³³ ABA-NPRM at 8; BofA-NPRM at 7; Bank One-NPRM at 2-3; CBA-NPRM at 9; Discover-NPRM at 5. See also CMC-NPRM at 14 (“We see no reason why financial institutions should be subject to any more stringent rules in connection with the use of consumer information for telemarketing purposes than for other purposes, and for this reason, we think the Rule should impose no more stringent limits on the sharing of billing information than the

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⁴²⁴ See 67 FR at 4512-14.

⁴²⁵ See, e.g., *FTC v. Smolev*, No. 01-8922 CIV ZLOCH (S.D. Fla. 2001); *FTC v. Technobrand, Inc.*, No. 3:02 cv 00086 (E.D. Va. 2002); NAAG-NPRM at 30, n.73; Illinois-Supp. *passim*.

⁴²⁶ AARP-NPRM at 6-7; AARP-Supp. at 4; EPIC-NPRM at 9; Horick-NPRM at 1 (endorsing EPIC's NPRM comment); NAAG-NPRM at 30-41; NCLC-NPRM at 12-13. See also Covington-Supp. at 2-5; and NCL-NPRM at 6 (“Checks and money orders are no longer the most common methods of payment in telemarketing complaints made to the NFIC. As NCL noted earlier, demand drafts, credit cards, debit cards, utility bills, and other types of accounts are increasingly used for payments. Sometimes consumers contend that they never provided their account numbers to the telemarketers; many of these complaints say they never even heard of the companies before they received their bills or bank statements.”).

⁴²⁷ NAAG-NPRM at 30; NCL-NPRM at 7. See also Covington-Supp. at 2-5.

⁴²⁸ ATA-NPRM at 18 (arguing that, because the Telemarketing Act made no reference to preacquired account telemarketing, the Commission cannot regulate it); Cendant-NPRM at 6 (similar argument to ATA); CCC-NPRM at 8; DMA-NPRM at 41-42 (arguing that the Commission lacks authority under Telemarketing Act to establish a law violation based on unfairness standard); ERA-NPRM at 20 (same argument as DMA); Green Mountain-NPRM at 29-31; Household Auto-NPRM at 5; PMA-NPRM at 16 (same argument as DMA and ERA). Contrary to these assertions, the Commission has the authority to define and restrict deceptive and abusive telemarketing acts or practices, pursuant to the Telemarketing Act. Moreover, the Commission has analyzed proposed Rule provisions addressing abusive practices under the FTC Act's unfairness standard to narrow, not expand, the scope of activities brought under the purview of the statute. 67 FR at 4511. The unfairness standard requires that several specific elements be met before an act or practice may be deemed “unfair” under the FTC Act. See 15 U.S.C. 45(n) and discussion of § 310.4(a) above. If anything, the Commission is taking a more conservative approach in analyzing what constitutes an “abusive practice” than is required under the Telemarketing Act.

⁴²⁹ DMA-NPRM at 39, 41; Household Auto-NPRM at 5; MPA-NPRM at 21-22.