

Commenters noted that the various privacy regulations under the GLBA prohibit sharing account numbers with telemarketers, but provide exceptions for encrypted information, sale of an entity's own product through an agent, and co-branding and affinity programs. Thus, they argued, "since the proposed Rule fails to include these exceptions, it is inconsistent with the GLBA regulations, rendering the regulations irrelevant."⁴³⁴ NAAG challenged these arguments, pointing out that the goals of the GLBA and the TSR are very different. NAAG expressed the view that the GLBA did not address the economic injury to consumers caused by preacquired account telemarketing, as it was focused on the privacy of account information; thus there is no conflict between the regulations, as they are aimed at different consumer harms.⁴³⁵ According to NAAG:

The essential characteristic of [preacquired account telemarketing] is the ability of the telemarketer to charge the consumer's account without traditional forms of consent. . . . The key is how the agreement between a company controlling access to a consumer's account and the telemarketer who preacquired the ability to charge a consumer's account affects the bargaining power between the telemarketer and the consumer. GLBA and implementing regulations do not address this relationship. . . . [Indeed as] a result of the [GLBA and implementing regulations] . . . vendors . . . can still send through charges to consumers' accounts without consumers giving their credit card numbers. . . . This allows the same [preacquired account telemarketing] process to continue. . . .⁴³⁶

Another common theme in industry comments on this issue was that the use of preacquired account information in telemarketing provides protection for consumers from identity theft perpetrated by individual telemarketing agents, and assuages consumers' concerns about divulging their account information.⁴³⁷ According to one such

commenter, having consumers provide billing information over the telephone:

will actually operate to introduce account numbers into broader circulation. As customers provide account numbers, employees of telemarketers, processors and others in the distribution chain may have access to them. This practice will actually increase the chances for unauthorized use. . . . Sophisticated encryption processes keep account numbers out of circulation, and out of the hands of potential unauthorized users.⁴³⁸

A number of commenters pointed out that the GLBA implementing regulations assume the confidentiality benefits of transferring encrypted account information so that consumers would not have to provide such information during the marketing transaction.⁴³⁹ Other commenters noted some contradiction in industry's identity theft argument, suggesting it is illogical to assert that a telemarketer cannot be trusted with a consumer's account information, but that same telemarketer can be trusted to tell the seller truthfully that the consumer has provided express informed consent to the purchase, absent obtaining any part of the account number from the consumer.⁴⁴⁰ One such

⁴³⁸ AmEx-NPRM at 8. *Accord* Assurant-NPRM at 5; Bank One-NPRM at 3-4. Additionally, several commenters suggested that the blanket prohibition was "inconsistent with the longstanding and well considered advice [of the Commission and other consumer protection groups and law enforcement agencies] that they not release their account numbers to telemarketers. . . ." MasterCard-NPRM at 7. *Accord* BofA-NPRM at 7; Bank One-NPRM at 3. *See also* ABA-NPRM at 8; Metris-NPRM at 6. In fact, the Commission's advice has not been to refuse to divulge account information in any telemarketing transaction, but rather only to divulge such information when the seller is known to the consumer. *See, e.g.,* "Facts for Consumers: Are You a Target of . . . Telephone Scams," <http://www.ftc.gov/bcp/conline/pubs/tmark/target.htm>; and "Consumer Alert: Customized Cons Calling," <http://www.ftc.gov/bcp/conline/pubs/alerts/consalrt.htm>. Moreover, the reason for this advice is not to avoid identity theft, but to protect consumers from fraudulent telemarketers selling bogus goods or services. *Id.* In the identity theft context, the danger identified by the Commission and discussed in its publications is not the potential misuse of account information that a consumer has provided in the course of a sale of goods or services, but rather "pretexting"—i.e., the practice of eliciting a consumer's personal information under false pretenses, such as claiming to be from the consumer's bank, calling to confirm the consumer's account information. *See* "Pretexting: Your Personal Information Revealed," <http://www.ftc.gov/bcp/conline/pubs/credit/pretext.htm>.

⁴³⁹ Bank One-NPRM at 4; Cendant-NPRM at 7; Household Auto-NPRM at 2-3; Metris-NPRM at 5; E-Commerce Coalition-NPRM at 3; VISA-NPRM at 6-7.

⁴⁴⁰ June 2002 Tr. II at 130-31 (AARP), 143 (NAAG), and 205 (NCL). Indeed, in both their Rule Review and NPRM comments, NAAG provided several examples of instances where obviously confused elderly consumers were charged for products or services using preacquired account information, despite no clear evidence of consent

commenter further suggested that the best protection against individual telemarketers perpetrating identity theft is proper screening, training, monitoring and supervision of salespeople.⁴⁴¹ In addition, the vast majority of non-cash transactions in both telemarketing and face-to-face retail situations entail the consumer's disclosure of his or her account number to the seller's representative.⁴⁴² The record does not reveal any reason to support the notion that the risk of identity theft is any different in these transactions than in transactions where the seller has opted to make use of preacquired account information.

The third recurring theme in industry comments on this issue was the existence of a variety of efficiencies for both sellers and consumers. Among the most common examples cited was avoiding error in the transmission of account numbers from consumer to telemarketer, as either the consumer misstates or the telemarketer miskeys the account number.⁴⁴³ Another benefit cited by numerous industry commenters was the reduction of time on the telephone to complete the transaction in the initial call,⁴⁴⁴ particularly in

during the telemarketing call. NAAG-RR at 11 and Exs. 2 - 4 attached thereto; NAAG-NPRM at 32, and Ex. B attached thereto. *See also* Synergy Global-NPRM at 1-2 (comments from a former teleservices agent stating that he was encouraged by his superiors to "falsify sales in an attempt to artificially inflate the statistics compiled nightly").

⁴⁴¹ NCL-NPRM at 7.

⁴⁴² NAAG-RR at 10. Indeed, NEMA described its own current procedures, under the Uniform Business Practices guidelines created for the retail energy market, whereby it obtains complete billing information directly from each customer as proof of the customer's intent to switch utility providers. NEMA-NPRM at 8-9.

⁴⁴³ ABA-NPRM at 8; Assurant-NPRM at 3-4; BofA-NPRM at 7; Cendant-NPRM at 7; Cox-NPRM at 33; Metris-NPRM at 7.

⁴⁴⁴ *See, e.g.,* MPA-NPRM at 24 ("The Commission must also not underestimate the economic efficiencies such practices afford to businesses. . . . It is estimated that requiring consumers to retrieve and repeat their entire account number and verifying this information will increase the length of the call substantially, with one provider estimating an increase of 35 seconds and additional evidence suggesting that increase could be 60 seconds or more.") *See also* Cox-NPRM at 33; Metris-NPRM at 6-7; NCTA-NPRM at 12; Tribune-NPRM at 8. MPA's argument on this point is somewhat contradicted by its recommended alternative to the prohibition, express verifiable authorization, which involves additional expense, regardless of the method of express verifiable authorization selected. *See* MPA-NPRM at 26-29. NCL challenged this proposition, suggesting that, on the contrary, "[r]equiring telemarketers to ask for [the consumer's account number] would benefit both parties by helping to confirm a consumer's intention to make the purchase and the correct account that will be used for that purchase, reducing the potential for billing disputes later." NCL-NPRM at 7.

GLBA and the Commission's privacy rule impose.").

⁴³⁴ ABA-NPRM at 8. *See also* ABIA-NPRM at 2 (arguing that the proposed provision "would . . . disrupt a coordinated body of federal and state privacy laws and regulations enacted since passage of GLBA"); AFSA-NPRM at 11; AmEx-NPRM at 4; BofA-NPRM at 7; Bank One-NPRM at 3; Cendant-NPRM at 6-7; CMC-NPRM at 13.

⁴³⁵ NAAG-NPRM at 41-43.

⁴³⁶ *Id.* at 43. *Accord* Covington-Supp. at 2-5.

⁴³⁷ ABA-NPRM at 8; AmEx-NPRM at 5; Assurant-NPRM at 4; BofA-NPRM at 7; Bank One-NPRM at 3-4; Capital One-NPRM at 9; Cendant-NPRM at 7; Household Auto-NPRM at 2, 5; Household Bank-NPRM at 2, 7; Household Finance-NPRM at 2, 7; MasterCard-NPRM at 7; MPA-NPRM at 24; Metris-NPRM at 2, 5-7; NRF-NPRM at 20; Time-NPRM at 8-9; VISA-NPRM at 6-7; Wells Fargo-NPRM at 3. *See also* June 2002 Tr. II at 124-25 (CCC); *Id.* at 133 (PMA) and 194-95 (DialAmerica).