

upsells.<sup>445</sup> As DMA noted, “it is a significant benefit to consumers for second businesses in an upsell to obtain and use information such as address and credit card information. This eliminates the need for a consumer to have to restate the information just provided. Transfer of information in such scenarios with informed consent is inherently efficient for both the merchant and the consumer.”<sup>446</sup> The final benefit cited in several comments was that preacquired account telemarketing helped consumers by enabling them to avoid the inconvenience of having to pull out their wallets in order to make a purchase.<sup>447</sup> This alleged benefit was sharply questioned by consumer advocates, who argued that whatever time savings or convenience may accrue from the use of preacquired account information does not offset the potential harm from its use.<sup>448</sup> The record makes clear, in fact, that it is the very act of pulling out a wallet and providing an account number that consumers generally equate with consenting to make a purchase, and that this is the most reliable means of ensuring that a consumer has indeed consented to a transaction.<sup>449</sup>

<sup>445</sup> Associations-Supp. at 5-6; DMA-NPRM at 40. See also PMA-NPRM at 18-19; Time-NPRM at 8.

<sup>446</sup> DMA-NPRM at 40. See also Time-NPRM at 8.

<sup>447</sup> Assurant-NPRM at 6; June 2002 Tr. II at 125 (CCC).

<sup>448</sup> See, e.g., June 2002 Tr. II at 131 (AARP) (“To imply that . . . it’s more inconvenient for the consumer to get their credit card than to have an unknown source debit their account without their knowledge, I don’t think any consumer would ever agree with that statement.”)

<sup>449</sup> Covington-Supp. at 2-5;

“The Commission is also correct that the best way to be certain that a consumer really wants to make a purchase is to see if the consumer is willing to reach into a purse or pocket, open a wallet, take out a credit card, and read from it. When that happens, there is nothing ambiguous about what’s taking place; there can be no misunderstanding. . . . Even during a chaotic dinner hour, a consumer cannot open a wallet, pull out a credit card, and read from it without knowing that he or she is making some kind of purchase. . . . This short-hand method for consumers to signal assent to a deal leaves complete control of the transaction in the hands of the consumer while preventing the industry burden from being any greater than necessary.”

Indeed, this conclusion derives from the actual experience of a telemarketing firm that engages in preacquired account telemarketing. See Letter from Stephen Calkins to the FTC, dated October 28, 2002 (“Calkins Letter”). This firm attempted to cure the high customer return rates generated by this practice in several ways, including adjusting the disclosures and reading at least four digits of the account number to the consumers during the call. *Id.* at 2. The firm found that none of these attempted cures ensured that consumers “knowingly consented” to the purchase while maintaining a competitive level of sales. *Id.* at 1-2. Only when the firm began requesting a portion of the account number from the consumer herself did complaint rates drop significantly, without an unacceptable drop in sales. According to the commenter, “Sales

As it stated in the NPRM, the Commission still believes that whenever preacquired account information enables a seller or telemarketer to cause charges to be billed to a consumer’s account without the necessity of persuading the consumer to demonstrate his or her consent by divulging his or her account number, the customary dynamic of offer and acceptance is inverted. In such a case, what is customarily under the sole control of the consumer—whether to divulge one’s account number, thereby determining whether to accept the offer and how to pay for it—is now in the hands of the seller or telemarketer.<sup>450</sup> This reversal in the traditional paradigm is not one that is generally expected or

were about 25% lower than when the telemarketer read those digits to the consumer, but consumers really understood that they were making purchases . . . . My client believes that consumer complaints pertaining to their intent to purchase dropped, and that his seller clients now experience an acceptable level of product returns.” *Id.* at 2-3. See also June 2002 Tr. II at 139-44 (NAAG); NACAA-NPRM at 6 (“That the consumer has to provide this information to the seller provides a check on the transaction, and an assurance that the consumer does indeed wish to enter the transaction.”); Vermont-Supp. *passim* and attachment. AARP commissioned a survey by telephone on June 14-19, 2002, among a nationally representative sample of 1,240 respondents 18 years of age and older. Participants were asked a handful of questions, such as, “Often telemarketers ask you to buy something with a credit card or debit card. Do you think telemarketers are able to cause charges to your credit card or debit card without getting your credit or debit card numbers directly from you?” Only 30 percent of respondents stated that they were aware that telemarketers have the ability to cause a charge to their credit or debit card accounts without getting the account numbers from them. AARP-Supp. at 2. That number was higher in the instance of upsells, but still less than half of the respondents understood that it was possible to be charged without providing account information to a seller or telemarketer. *Id.* Additionally, the majority (80 percent) of respondents stated that they thought telemarketers should only be able to cause charges to their credit or debit card accounts if the consumers expressly provide their account numbers to the seller or telemarketer. *Id.* at 4; Vermont-Supp. at 2-3. The survey addresses a fairly complex issue in broad terms. For example, it does not tease out the specific instances where a consumer might actually have an expectation that the seller will retain and reuse the consumer’s account information, such as the contact lens seller who, with the consumer’s permission, retains the consumer’s account information to facilitate quarterly lens purchases. The results do, however, provide insight into the general expectations of consumers when engaging in telemarketing transactions.

<sup>450</sup> State law enforcers, consumers and consumer groups, as well as some industry members, consistently voiced concerns over the shift of control over a transaction from the consumer to the seller or telemarketer, and noted consumer disbelief that purchases could actually be made without their ever disclosing payment information. See 67 FR at 4513; June 2002 Tr. II at 130-32 (AARP); Covington-Supp. at 2, 5; EPIC-NPRM at 9; NAAG-RR at 10-11; NAAG-NPRM 30-31; June 2002 Tr. II at 139-44 (NAAG). But see CMC-NPRM at 13 (questioning this proposition).

avored by consumers, who consistently state that, as a general proposition, they do not believe it is or should be possible for them to be charged if they do not provide their account number in a transaction.<sup>451</sup> The Commission understands this to mean that, generally speaking, consumers believe they ordinarily signal their consent to an offer by providing their account information to the seller or telemarketer.

Although some commenters argue that this shift in the normal paradigm of offer and acceptance is, in and of itself, inherently unfair,<sup>452</sup> the record overall suggests that, in general, it is not preacquired account telemarketing *per se* that is harmful, but rather the abuse of preacquired account information that causes the harm.<sup>453</sup> Commenters persuasively note that there are many transactions involving preacquired account information that are beneficial to, indeed sometimes expected by, consumers. For example, as noted in the NPRM, “a customer who places

<sup>451</sup> See 67 FR at 4513; AARP-Supp. at 4 (see note 449 above, describing survey showing that the majority of consumers do not believe their accounts can, or should, be charged by telemarketers without obtaining the account number directly from the consumers); June 2002 Tr. II at 131-32 (AARP); EPIC-NPRM at 9; NAAG-RR at 10-11; NAAG-NPRM 30-31; Vermont-Supp. at 2-3. As Minnesota explained during the June 2002 Forum:

“In a preacquired situation, the consumer doesn’t have that control because we have shorthand ways of signaling consent in our society. We aren’t many lawyers out there. Josh, who . . . has a trade school degree and comes home from a job and Esther is sitting on the couch at 85 years old doesn’t understand all this. . . . They just get a call from somebody. What they know is I’ve got to sign my name, I’ve got to give somebody my credit card or in the context of a telemarketing transaction, I have to read my account number to the person or I have to pay cash, and what this does is by circumventing those forms of consent, it makes it impossible for consumers to control the transactions.”

June 2002 Tr. II at 140. See also James Andris (Msg. 171) (“Our mortgage company has been deducting a monthly premium, via our mortgage payment, to a 3rd party insurance policy. I have written a letter demanding refunds for the payments for 16 months. We, my wife and I, never gave written or verbal permission for such payments to either parties [sic].”); Albert Bruce Crutcher (Msg. 229) (“I also favor not allowing my credit card and account numbers to be given out by anyone other than ME!”); Harold D. Howlett (Msg. 300) (“Do not allow telemarketers to obtain and use credit card or other account information from anyone except the consumer. . . .”); Carole & Cory Walker (Msg. 810) (“Every year we have at least one unauthorized charge to our card and we are extremely cautious with our information.”).

<sup>452</sup> See, e.g., EPIC-NPRM at 9; NAAG-NPRM at 30; NCL-NPRM at 6-7.

<sup>453</sup> ERA-NPRM at 16; Household Auto-NPRM at 5; PMA-NPRM at 17. Other commenters asserted that using preacquired account information is not inherently fraudulent. See Allstate-Supp. at 2; Associations-NPRM at 4; ATA-NPRM at 19; ATA-Supp. at 5-6; ERA/PMA-Supp. at 10; ITC-NPRM at 5; NCTA-NPRM at 11; Noble-NPRM at 3; NATN-NPRM at 3; NSDI-NPRM at 3; PMA-NPRM at 13-16; Technion-NPRM at 4; TRC-NPRM at 3; Time-NPRM at 7.