

quarterly orders for contact lenses by calling a particular lens retailer may provide her billing information in an initial call, with the understanding and intention that the telemarketer will retain it so that, in any subsequent call, the retailer has access to this billing information.”⁴⁵⁴ Similarly, a customer who provides his account number to make a purchase in an initial telemarketing transaction may be frustrated to have to repeat that account information to consummate certain upsell transactions, particularly when the upsell is offered by the same telemarketer. In that case, there may be an expectation that the telemarketer will have retained, and be able to reuse, the account information the customer provided only moments ago.⁴⁵⁵ As another commenter pointed out during the Rule Review, the key to such transactions is the fact that the consumer makes the decision to supply the billing information to the seller, and understands and expects that the information will be retained and reused for an additional purchase, should the consumer consent to that purchase.⁴⁵⁶

The record shows that the specific harm resulting from the use of preacquired account telemarketing is manifested in unauthorized charges.⁴⁵⁷ These may appear not only on consumers’ credit card or checking accounts, but also on mortgage statements and other account sources

not traditionally used to pay for purchases.⁴⁵⁸ Of course, unauthorized charges are not exclusively associated with preacquired account telemarketing. The Commission has brought numerous law enforcement actions against sellers and telemarketers alleging violations of the FTC Act for the unfair practice of billing unauthorized charges to consumers’ accounts in a variety of contexts not involving preacquired account information, including but not limited to: advanced fee credit card offers,⁴⁵⁹ sweepstakes,⁴⁶⁰ vacation or travel packages,⁴⁶¹ credit card loss protection offers,⁴⁶² and magazine subscriptions.⁴⁶³ Thus, in essence, preacquired account telemarketing has proven in certain circumstances to be an additional, but not the only, vehicle for imposing unauthorized charges on consumers in telemarketing transactions.

One of the problems, therefore, with the proposed prohibition on receiving billing information from a source other than the consumer or sharing it with others for the purposes of telemarketing is that it fails to remedy patterns of unauthorized billing that occur even though preacquired account information is not used. As our cases amply demonstrate, the practice unequivocally

meets the criteria for unfairness, and therefore violates Section 5 of the FTC Act.⁴⁶⁴ Yet until now, the Rule has not specified that unauthorized billing is an abusive practice and a Rule violation.⁴⁶⁵ The Commission therefore has decided to add § 310.4(a)(6) to correct that deficiency. The new provision specifies that it is an abusive practice and a violation of the Rule to cause a charge to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. This prohibition is not limited to instances of unauthorized charges resulting from preacquired account telemarketing. Rather, this provision is applicable whenever a seller or telemarketer subject to the Rule causes a charge to be submitted against a customer’s or donor’s account without obtaining the customer’s or donor’s express informed consent to do so. This broader prohibition on unauthorized billing is supported by the Commission’s extensive law enforcement record of instances of unauthorized billing in telemarketing transactions.

Section 310.4(a)(6) also specifies that, in every transaction, the seller or telemarketer must obtain the consumer’s express informed consent to be charged for the goods or services or charitable contribution, and to be charged using the identified account. “Express” consent means that consumers must affirmatively and unambiguously articulate their consent. Silence is not tantamount to consent; nor does an ambiguous response from a consumer equal consent.⁴⁶⁶ Consent is “informed” only when customers or donors have received all required material disclosures under the Rule, and can thereby gain a clear understanding that they will be charged, and of the payment mechanism that will be used to effect the charge. Of course, the best evidence of “consent” is consumers’ affirmatively stating that they do agree to purchase the goods or services (or make the donation), identifying the account they have selected to make the purchase, and providing part or all of that account number to the seller or

⁴⁵⁴ 67 FR at 4513.

⁴⁵⁵ See, e.g., June 2002 Tr. II at 196 (Time) (“[T]he catalog clients that we deal with that are . . . selling our magazines on our behalf . . . tell us that the cost would be loss of sales of the catalog products because the customers would just be so annoyed about having to give the credit card number again that they just gave.”)

⁴⁵⁶ 67 FR at 4513, n.196.

⁴⁵⁷ In its supplemental comment, Minnesota argued that evidence gathered in its law enforcement actions showed that consumers consistently stated that they had not authorized charges arising out of preacquired account telemarketing, particularly when the offers involved “free-to-pay conversion” features:

“The data we have reviewed in our investigations uniformly supports our impression that underlying the high cancellation rates with preacquired account telemarketing is consumer sentiment that the charges were unauthorized. In addition to the survey of Fleet Mortgage Corporation customer service representatives presented in the prior NAAG Comments [see NAAG-NPRM at 31-32], an investigation of a subsidiary of another of the nation’s largest banks revealed a similar pattern. During a thirteen month period, this bank processed 173,543 cancellations of membership clubs and insurance policies sold by preacquired account sellers. Of this number of cancellations, 95,573, or 55 percent, of the consumers stated unauthorized billing as the reason for the request to remove the charge. The other primary reason given for canceling (by 56,794 customers, or 32% of the total) was a general “request to cancel” code that may have also included many consumers claiming unauthorized charges.”

Minnesota-Supp. at 4.

⁴⁵⁸ NAAG-NPRM at 31 (“Fleet Mortgage Corporation, for instance, entered into contracts in which it agreed to charge its customer-homeowners for membership programs and insurance policies sold using preacquired account information. If the telemarketer told Fleet that the homeowner had consented to the deal, Fleet added the payment to the homeowner’s mortgage account.”)

⁴⁵⁹ See, e.g., *FTC v. Corporate Mktg. Solutions*, No. CIV-02 1256 PHX RCB (D. Ariz. filed July 8, 2002); *FTC v. Capital Choice*, No. 02-21050-CIV-Ungaro-Benages (S.D. Fla. filed Apr. 15, 2002); *FTC v. Fin. Servs. of N. Am.*, No. 00792 (GEB) (D.N.J. filed June 9, 2000); *FTC v. SureChek Sys., Inc.*, No. 1:97-CV-2015-JTC (N.D. Ga. filed July 9, 1997); *FTC v. Thornton Communications, Inc.*, No. 1 97-CV-2047 (N.D. Ga. filed July 14, 1997).

⁴⁶⁰ See, e.g., *FTC v. New World Servs., Inc.*, No. CV-00-625 (GLT) (C.D. Cal. filed July 5, 2000); *FTC v. Hold Billing, Ltd.*, No. SA-98-CA-0629-FB (W.D. Tex. filed July 15, 1998).

⁴⁶¹ See, e.g., *FTC v. Lubell*, No. 3-96-CV-80200 (S.D. Iowa filed Dec. 1996); *FTC v. Disc. Travel*, No. 88-113-CIV-FIM-15C (M.D. Fla. filed Aug. 8, 1988); *Citicorp Credit Servs.*, 116 F.T.C. 87 (1993).

⁴⁶² See, e.g., *FTC v. Andrews*, No. 6:00-CV-1410-ORL-28-B (M.D. Fla. filed Oct. 2000); *FTC v. First Capital Consumer Membership Servs.*, No. 00 CV 0905C(F) (W.D.N.Y. filed Oct. 23, 2000); *FTC v. Consumer Repair Servs., Inc.*, No. 00-11218 CM(RZx) (C.D. Cal. filed Oct. 23, 2000); *FTC v. Capital Card Servs.*, No. CV 00 1993 PHX EHC (D. Ariz. filed Oct. 23, 2000); *FTC v. Forum Mktg. Servs.*, No. 00CV0905C(F) (W.D.N.Y. filed Oct. 26, 2000); *FTC v. 1306506 Ontario, Ltd.*, No. 00-CV-906 (W.D.N.Y. filed Oct. 23, 2000); *FTC v. OPCO Int’l Agencies, Inc.*, No. CO1-2053R (W.D. Wash. filed Feb. 2001).

⁴⁶³ See, e.g., *FTC v. Diversified Mktg. Servs. Corp.*, No. 1:96-CV-615-FM (W.D. Okla. filed Mar. 12, 1996); *FTC v. Windward Mktg.*, No. 1:9 6-CV-615-FM (N.D. Ga. filed May 26, 1996); *FTC v. S.J.A. Soc’y*, No. X97 0061 (E.D. Va. filed May 1997).

⁴⁶⁴ See discussion and note 400 above of § 310.4 generally, and 67 FR at 4511, regarding the Commission’s determination that, in specifying practices as abusive when they do not directly implicate the privacy concerns embodied in the Telemarketing Act, it will demand that the practice meet the criteria for unfairness codified in § 5(n) of the FTC Act, 15 U.S.C. 45(n).

⁴⁶⁵ Section 310.3(a)(4) specifies that it is a deceptive practice to make “a false or misleading statement to induce any person to pay for goods or services.”

⁴⁶⁶ See Electronic Retailing Association, GUIDELINES FOR ADVANCE CONSENT MARKETING, http://www.retailing.org/regulatory/publicpolicy_consent.html (“ERA Guidelines”).