

telemarketer for payment purposes (not for purposes of "identification," or to prove "eligibility" for a prize or offer, for example). But in most instances, the Commission leaves it up to sellers to determine what procedures to employ in order to meet the requirement for obtaining express informed consent. As explained below, however, in certain particularly problematic scenarios, the Commission does impose specific procedures.

Having treated the overall problem of unauthorized billing in new § 310.4(a)(6), the Commission has included additional subsections to address problems particularly associated with preacquired account telemarketing. As noted in the NPRM, evidence shows that, at least to date, unquestionably the greatest risk of harm (i.e., unauthorized charges) to consumers is associated with telemarketing involving the combination of preacquired account information with an offer involving a "free-to-pay conversion."⁴⁶⁷ NAAG describes the "free-to-pay conversion" offer (which it refers to as an "opt-out free trial" offer) as the "constant companion" of the preacquired account telemarketer in state law enforcement efforts to date.⁴⁶⁸ Indeed, as of the date

of this notice, all of the law enforcement actions taken by the Commission and by the states that involved telemarketing using preacquired account information also involved an offer with a "free-to-pay conversion" feature.⁴⁶⁹

It is noteworthy that the coupling of preacquired account information with a "free-to-pay conversion" offer is not limited to outbound telephone calls. In *FTC v. Smolev*,⁴⁷⁰ for example, the defendants were alleged to have lured consumers to call by offering an inexpensive lighting product in general media advertisements, obtaining account information from the consumer in the initial transaction, and then upselling a "free-to-pay conversion"

understand the way in which they would be billed after listening carefully to a sales offer involving preacquired account information and a "free-to-pay conversion" feature. See MemberWorks-Supp. at 1. In addition, after asking whether the billing methods were understandable, the callers asked two questions structured in ways that strongly suggested the desired result: first they asked, "And if you agree to join, and receive a welcome kit with all of the rules in writing, who is responsible if you forget to cancel and are billed," then "If the company tells you three times on the telephone call and then tells you twice in writing that you can cancel your program membership anytime, but if you don't cancel, you will be charged, is the company acting fairly or not." *Id.* (emphasis added). Moreover, regardless of the merits of the survey results, they do little to offset the extensive evidence of consumer injury from this practice, the continuing flow of complaints into the offices of consumer groups and law enforcement officials at both the state and federal levels, and the AARP survey evidence of consumer perceptions and opinions about preacquired account telemarketing. See notes 424-25 and 449 above.

⁴⁶⁹ For example, MemberWorks, Inc. (Assurances of Discontinuance with the States of Nebraska and New York; Consent Judgments with the States of California and Minnesota) (primarily "free-to-pay conversion" membership clubs); BrandDirect Mktg. Corp. (Assurances of Discontinuance with the States of Connecticut and Washington) ("free-to-pay conversion" membership clubs); Cendant Membership Servs. (Consent Judgment with State of Wisconsin) (same); Signature Fin. Mktg. (Assurance of Discontinuance with State of New York) (same); Damark Int'l, Inc. (Assurances of Discontinuance with States of Minnesota and New York) ("free-to-pay conversion" buyers club); *Illinois v. Blitz Media, Inc.*, No. 2001-CH-592 (Sangamon County) ("free-to-pay conversion" membership club); *New York v. Ticketmaster and Time, Inc.* (Assurance of Discontinuance) ("free-to-pay conversion" magazine subscription); Triad Discount Buying Service (sued by 29 states and the Commission) ("free-to-pay conversion" membership clubs); *Minnesota v. U.S. Bancorp, Inc.*, No. 99-872 (Consent Judgment, D. Minn) (account information provider to seller/telemarketer of "free-to-pay conversion" membership/buyers clubs); *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001) (same, plus insurance packages); *FTC v. Technobrand, Inc.*, No. 3:02-cv-00086 (E.D. Va. 2002) ("free-to-pay conversion" membership clubs); *U.S. v. Prochnow*, No. 1:02-cv-917-JLF (N.D. Ga. 2002) (inbound calls from direct mail solicitations, upsold "free-to-pay conversion" membership clubs).

⁴⁷⁰ (a/k/a Triad Disc. Buying Serv.) No. 01-8922 CIV ZLOCH (S.D. Fla. 2001).

buyers club membership.⁴⁷¹ In fact, the majority of companies that have been targeted by state or FTC law enforcement action market their "free-to-pay conversion" products or services via upsells, sometimes exclusively, and other times also using outbound telephone calls.⁴⁷²

Consequently, the Commission has determined that in any transaction involving both preacquired account information and a "free-to-pay conversion," the evidence of abuse is so clear and abundant that comprehensive requirements for obtaining express informed consent in such transactions are warranted.⁴⁷³ Specifically, § 310.4(a)(6)(i) provides that a seller or telemarketer making an offer involving both preacquired account information and a "free-to-pay conversion" must (1) obtain from the customer, at a minimum, the last four digits of the account number to be charged; (2) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account for which the consumer provided the four digits; and (3) make and maintain an audio recording of the *entire* telemarketing transaction. Thus, in every instance where the combination of preacquired account information and "free-to-pay conversion" is involved in a telemarketing transaction, the customer must be required to reach into his or her wallet, and provide at least a portion of the account number to be charged.⁴⁷⁴ It

⁴⁷¹ Thus, the assertion of some commenters that "the potential for abuse or confusion as to where the [account] information was obtained does not exist in upsells," see, e.g., ANA-NPRM at 6, is not supported by the record, at least in the context of offers with a "free-to-pay conversion" feature, as was the case in *Smolev*.

⁴⁷² Unfortunately, the argument made by several commenters that the abusive use of preacquired account information is limited to a discrete number of bad actors (see ATA-NPRM at 19; ERA-NPRM at 16; MPA-NPRM at 23-24) is not supported by the record. Law enforcement actions alleging injuries caused by abuses of preacquired account telemarketing have been brought against well-known, national companies and financial institutions, including but not limited to: U.S. Bancorp, Fleet Mortgage Corporation, MemberWorks, Ticketmaster, and Time. See NAAG-NPRM at 30, n.73.

⁴⁷³ NAAG recommended prohibiting the use of preacquired account information, even if that information was previously obtained by the same seller or telemarketer from the consumer, in solicitations involving a "free-to-pay conversion" feature. NAAG-NPRM at 39. The Commission declines to adopt this recommendation at this time, and is confident that the solution adopted will provide consumers the information and command over these transactions they need to protect themselves from unauthorized charges.

⁴⁷⁴ See note 449 above. Moreover, industry's argument that there is no evidence of problems where there is a transfer of account information

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⁴⁶⁷ The Commission has inserted a definition of "free-to-pay conversion" at § 310.2(o) of the amended Rule, which states that "free-to-pay conversion" means: "in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period." See discussion of § 310.2(o) above.

⁴⁶⁸ NAAG-NPRM at 32. Accord AARP-NPRM at 6. CCC attempted to counter this finding by presenting the results of a survey, conducted on behalf of MemberWorks, in April of 2001 by the Luntz Research Companies (the "Luntz Survey"). CCC-NPRM at 10; June 2002 Tr. II at 127; MemberWorks-Supp. *passim*. In the survey, the caller told the consumer that the caller would read an offer, and would ask for the consumer's reaction. So, it was clear to the consumer that he or she was not buying anything, and instead that the consumer should listen carefully to the terms of the offer so that he or she could answer the caller's questions. Then, the caller read a script involving a "free-to-pay conversion" feature (the script was not submitted with the survey results for the public record). The caller then asked several questions about what the consumer just heard. CCC argued that the results of this survey showed that 85 percent of the respondents said the billing methods were understandable, and that the seller was acting fairly. CCC-NPRM at 10. Examination of the Luntz survey in greater detail suggests that the survey does little to support these assertions. First, in fact, none of the respondents said that the billing methods were understandable. According to the survey, 52 percent of the respondents said the billing methods were "mostly" understandable, while 33 percent said they were "somewhat" understandable, and 13 percent said they were not understandable. This means that at least 46 percent of the respondents did not even "mostly"