

must be clear that the customer is providing that account number to authorize a purchase. This means that, at a minimum, the disclosures required in § 310.3(a)(1) in general, and also § 310.3(a)(1)(vii) in particular, must be provided to the customer before the customer provides express informed consent—which, in the case of preacquired account telemarketing and a “free-to-pay conversion” feature, means before the customer provides account information and express agreement to be charged for the goods or services on the account provided. It must also be clear that the customer agrees that the charge be placed on the account whose digits the customer provided. The Commission expects that, to comply with this requirement, the seller or telemarketer shall expressly identify the account to be charged, and inform the customer that it possesses the customer's account number already, or has the ability to charge that account without obtaining the full account number from the customer.

Finally, the Commission is requiring that the entire sales transaction be recorded. The record evidence shows that it is not adequate in offers involving both preacquired account information and “free-to-pay conversions” to record a portion of the call that allegedly includes some or all of the required disclosures regarding cost and payment.⁴⁷⁵ Often, what law enforcement efforts have gleaned is that the necessary disclosures are grouped together during the “verification” process, at the end of a lengthy telemarketing pitch during which consumers are led to reasonably believe that they are not committing to a purchase. As one commenter explained:

[C]onsumers are led to believe that they are agreeing to accept materials in the mail, preview a program along with a free gift, or the like. As one telemarketer explicitly stated in its scripts: ‘we’re sending you the information through the mail, so you don’t have to make a decision over the phone.’ Only at the tail end of a lengthy call does the telemarketer obliquely disclose that the consumer’s preacquired account will be charged. By this time, many consumers have already concluded that they understood the deal to require their consent only after they review the mailed materials. . . . Preacquired account telemarketing verification taping typically is preceded by statements

“after consent” is belied by the record of law enforcement actions in this area. *See, e.g., FTC v. Smolev*, No. 01-8922 CIV ZLOCH (S.D. Fla. 2001). In fact, in virtually all of the state and federal law enforcement actions in this area, consumers stated that they did not recognize the billing entity or understand how that seller obtained their account information. *See notes 450-51 above.*

⁴⁷⁵ NAAG-NPRM at 32-33 (discussing ineffectiveness of verification).

suggesting that the taping is ‘to prevent clerical error’ and critical information is revealed in ways that many consumers will not grasp at the end of a conversation.⁴⁷⁶

Thus, not only the material terms provided the consumer, but also the context and manner in which the offer is presented are vital to determining that the consumer’s consent is both express and informed. Moreover, consumers’ confusion about the nature of “free-to-pay conversion” offers—particularly in the context of preacquired account telemarketing—is evidenced by the steady stream of complaints, as well as evidence uncovered in law enforcement actions by the states.⁴⁷⁷ Further, the record contains compelling evidence of cancellation patterns for membership programs offered on a “free-to-pay conversion” basis in preacquired account telemarketing transactions. As explained by the Minnesota Attorney General,

[c]onsumers canceling within the 30-day free trial period likely indicate that [they] understood (either during the phone call or with the follow-up material or both) the terms of the deal. If all consumers understood the free trial offer, one would expect to see a significant cancellation rate within the 30 day free trial offer period followed by a scattered pattern of later cancellations. The data we have reviewed [from two financial institutions of cancellation dates relative to date of enrollment for Minnesota consumers charged by the institutions as a result of preacquired account telemarketing transactions involving a “free-to-pay conversion”] suggest this is not the typical pattern. . . . The overall pattern of [the data from each institution] is strikingly similar. The largest concentration of cancellations occurs immediately after the free trial period but coincident with the first account charge for the service. The cancellation rate in the free trial period is less than half the cancellation rate in the 31-90 day period, when consumers have been billed for the service. This result is consistent with the pattern of consumer complaints alleging unauthorized charges received by Attorneys General and with the data suggesting that most consumers cancel these charges because they believe they are unauthorized.⁴⁷⁸

⁴⁷⁶ *Id.*

⁴⁷⁷ *See* Illinois-NPRM at 2 (In Illinois’ lawsuit against Blitz Media, Inc., the attorney general initially received 146 consumer complaints. After initiating the litigation, the Illinois attorney general found that approximately 45,000 Illinois consumers had been enrolled in Blitz Media’s buyers club, but only about 8,000 of them remain “active” members of the buyers club, since the rest had discovered these charges and cancelled the membership, or initiated a chargeback, claiming the charge was unauthorized.).

⁴⁷⁸ Minnesota-Supp. at 4-5. One industry commenter submitted the results of a telephone survey, which it asserted showed that consumers do, in fact, understand the terms of these “free-to-pay conversion” features. *See note 469 above.* The data received in litigation from the institutions

Consequently, to ensure that the consent provided by the consumer is not only “express” but is also “informed” in this limited, but problematic, context of “free-to-pay conversion” features in preacquired account telemarketing offers, the amended Rule requires that an audio recording of the entire transaction, from start to finish, be created and maintained. A handful of commenters argued that such audio recording would be prohibitively expensive, particularly in the inbound context, where some sellers and telemarketers have not traditionally recorded the telemarketing calls.⁴⁷⁹ Given the narrow category of calls to which this requirement applies, and the rapidly growing use of inexpensive and efficient digital audio recording technology,⁴⁸⁰ the Commission believes that this requirement will not pose a significant burden to sellers and telemarketers who freely choose to market their goods or services using a “free-to-pay conversion” feature and preacquired account information. Moreover, the record is compelling that any incremental costs to industry of these requirements are likely outweighed by the benefit to consumers of curtailing the practice as it is currently employed in the marketplace.

In addition to the requirements noted above, in any telemarketing transaction involving preacquired account information (but not a “free-to-pay conversion” feature), § 310.4(a)(6)(ii) specifically requires that the seller or telemarketer (1) at a *minimum*, identify the account to be charged with

participating in these telemarketing campaigns, however, belies the purported conclusions of this survey. *See note 457 above.*

⁴⁷⁹ ERA/PMA-Supp. at 3, 7 (“We understand from certain of our members that imposing the record keeping requirement[s] on inbound [upsells] may require substantial investments of money and resources to develop the systems necessary to comply with these requirements.”).

⁴⁸⁰ *See generally* Contract Digital Recorder, by Data-Tel Info Solutions, at <http://www.datatel-info.com/digicorder.html> (describing affordable digital recording system for telemarketing operations); Veritape Call Centre-Case Study 2, at <http://www.veritape.com/veritape/vtcccase.htm> (describing a US call center that saved \$70,000 annually by switching from analog taping process to digital recording); Ron Elwell, *Streamlining Call Center Operations*, Teleprofessional, Sept. 1998, at 130-34 (discussing “how CTI-enabled digital recording technology is helping call centers of all types be more productive and profitable”); Teleprofessional, Inc., *CCPN’s System Owner Shootout*, CALL CENTER PRODUCT NEWS, Fall 1998, at 52-54, 56 (explanations by several telemarketers’ systems professionals of savings and efficiencies experienced using improved digital recording and monitoring systems); Michael Binder, *The Evolution of Digital Recording in the Call Center*, TELEMARKETING & CALL CENTER SOLUTIONS, Nov. 1997, at 38. *Cf.* Duncan Furness, *Choosing a Tape Technology*, COMPUTER TECHNOLOGY REVIEW, Nov. 2000, at 40.