

sufficient specificity for the customer or donor to understand what account will be charged, and (2) obtain from the customer or donor his or her express agreement to be charged for the goods or services *and* to be charged using the account number identified during the transaction. Again, the Commission intends this to mean that the telemarketer expressly inform the customer that the seller or telemarketer already has the number of the customer's specifically identified account or has the ability to charge that account without getting the account number from the customer.

The Commission has taken a targeted approach in the amended Rule, focusing on the tangible harm caused by the practices identified as problematic in the rulemaking proceeding. It bears noting, however, that the Commission recognizes preacquired account telemarketing as an emerging practice, one that will receive close attention from the Commission, and, no doubt, the state Attorneys General. The Commission wishes to emphasize that, particularly in transactions involving "free-to-pay conversion" offers, so long as preacquired account information is involved, there exists that fundamental shift in the bargaining relationship discussed above, and therefore potential for abuse.<sup>481</sup> While the Commission is confident that the majority of industry members will abide by the new provisions, and that doing so will provide consumers the information and control needed to shield them from the abuses encountered in the past with these transactions, it also notes that the best practice in such circumstances is to ensure that the seller or telemarketer does not have the ability to cause a charge to a consumer's account without getting the account number from the consumer herself. This practice would, in effect, be self-enforcing, as the control over the transaction (absent misrepresentations by the telemarketer) would truly be with the consumer, where it belongs. Should it become apparent that the remedies imposed by the amended Rule are insufficient, or that preacquired account telemarketing practices have evolved further in such a way as to cause additional harm to consumers, the Commission will not hesitate to revisit its approach to the practice and revise the Rule accordingly.

#### Other Recommendations

Other than those commenters who suggested deleting the prohibition

entirely,<sup>482</sup> industry commenters' primary recommendation was to substitute the express verifiable authorization provision of § 310.3(a)(3), or some variation on a disclosure and "consent" requirement,<sup>483</sup> for the proposed blanket prohibition on the transfer of billing information.<sup>484</sup> The general theme was that disclosures and "consent" were sufficient to remedy the harm being caused consumers by the misuse of preacquired account information. It is unclear what these commenters mean by "consent" in this context, as they also recommended that sellers and telemarketers be permitted to use any of the three existing avenues for achieving express verifiable authorization, including providing consumers a written confirmation after terminating the telephone call. In the context of "free-to-pay conversions," the record shows, in no uncertain terms, that disclosures are not sufficient to prevent widespread consumer injury.<sup>485</sup> Most sellers and telemarketers have been telling consumers at some point in the conversation, in greater or lesser detail, that they will be charged at some point for the goods or services being offered on a "free-to-pay conversion" basis; but, as noted above, these disclosures come late in the conversation, and do not resonate with consumers who understand "free" to mean "free" and that to obligate oneself to purchase something, the buyer must provide a payment mechanism to the seller.<sup>486</sup> Often, these disclosures come in writing in a "membership package" sent to the consumer some time after the call. Law enforcement experience has

shown that these disclosures are meaningless to consumers—who either never receive the packets, or assume they are junk mail and discard them.<sup>487</sup> Moreover, in any telemarketing transaction, but most especially in preacquired account telemarketing, it is imperative that the seller or telemarketer ensure that the consumer actively, and unequivocally, provides his or her consent to be charged, and to be charged using a particular payment mechanism. The Commission has determined, therefore, that prohibiting unauthorized charges, and laying out what is required to obtain express informed consent in certain circumstances, is the most appropriate solution not only to the harm caused by preacquired account telemarketing abuses, but also by other exploitative billing methods in telemarketing.

#### § 310.4(a)(7) — *Failing to transmit caller identification information*

Section 310.4(a)(7) of the amended Rule addresses transmission of caller identification ("Caller ID") information. This section prohibits any seller or telemarketer from "failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call." A proviso to this section states that it is not a violation to substitute the actual name of the seller or charitable organization on whose behalf the call is placed for the telemarketer's name, or to substitute the seller's customer service number or the charitable organization's donor service number that is answered during regular business hours for the number the telemarketer is calling from or the number billed for making the call. Full compliance with the Caller ID provision will be required by January 29, 2004.

The record includes several key principles supporting the Commission's decision to adopt this approach to Caller ID information. First, transmission of Caller ID information is not a technical impossibility, as some commenters had argued or implied. Second, telemarketers are able to transmit this information at no extra cost, or minimal cost. Third, consumers will receive substantial privacy protection as a result of this provision.<sup>488</sup> Fourth, consumers and telemarketers will both benefit from the increased accountability in telemarketing that will result from this

<sup>482</sup> ABA-NPRM at 8-9; ABIA-NPRM at 4; CMC-NPRM at 9-10; MBNA-NPRM at 6.

<sup>483</sup> See, e.g., DMA-NPRM at 39-40 (specific to upselling) (the Commission "should instead require that notice of transfer of billing information be disclosed to the consumer and that consent be given by the consumer prior to the transfer").

<sup>484</sup> See ATA-NPRM at 20; ATA-Supp. at 5-6; CCC-NPRM at 11-12; ERA-NPRM at 24-25; ERA/PMA-Supp. at 11-15; ITC-NPRM at 5; MPA-NPRM at 26-29; MPA-Supp. at 5-6; NATN-NPRM at 3 (Supporting ERA Guidelines and recommendation); Noble-NPRM at 3 (same); NSDI-NPRM at 3 (same); PMA-NPRM at 19 (same). See also Associations-Supp. at 6.

<sup>485</sup> Review of taped verifications obtained as evidence in the Commission's law enforcement actions and in similar state actions convincingly demonstrates the inadequacy of disclosures in this context.

<sup>486</sup> See NCL-NPRM at 7 ("Merely requiring telemarketers to disclose that they have already obtained the billing account information from another source or that they may share that information with other marketers would not provide consumers with adequate protection from abuse. Express verifiable authorization to use the billing account information is not enough in these instances because it comes into play *after the fact*; it does not give consumers prior knowledge of or control over who has their account information.").

<sup>487</sup> See discussion of § 310.3(a)(3)(iii) above.

<sup>488</sup> EPIC-NPRM at 11-12.

<sup>481</sup> NAAG-NPRM at 30; Covington-Supp. at 4-5.