



Vol. 78
No. 131

Tuesday,
July 9, 2013

Part II

Federal Trade Commission

16 CFR Part 310
Telemarketing Sales Rule; Proposed Rule

identity of the seller or telemarketer⁸

The Telemarketing Act authorizes the Commission to promulgate rules “prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.”⁹ Section 310.3 of the TSR targets deceptive telemarketing acts or practices. It contains provisions requiring certain disclosures during telemarketing calls,¹⁰ prohibiting specific material misrepresentations,¹¹ and imposing liability on third parties that provide substantial assistance to telemarketers that violate the Rule.¹² Section 310.4 of the TSR focuses on abusive telemarketing acts or practices. It includes provisions intended to curb the deleterious effects these acts or practices may have on consumers. This section of the Rule delineates five categories of abusive conduct: (1) Conduct related to a pattern of calls, including conduct prohibited under the Rule’s Do Not Call provisions;¹³ (2) violations of the Rule’s calling time restrictions;¹⁴ (3) failure to make required oral disclosures in the sale of goods or services;¹⁵ (4) failure to make required oral disclosures in charitable solicitations;¹⁶ and (5) other abusive telemarketing acts or practices.¹⁷

⁸ Advanced Notice of Proposed Rulemaking, 75 FR 78179 (Dec. 15, 2010).

⁹ note 3.

¹⁰ The TSR requires that telemarketers soliciting sales of goods or services promptly disclose several key pieces of information during a telephone call: (1) The identity of the seller; (2) the fact that the purpose of the call is to sell goods or services; (3) the nature of the goods or services being offered; and (4) in the case of prize promotions, that no purchase or payment is necessary to win. 16 CFR 310.3(a)(1). In addition, telemarketers must, in any telephone sales call, disclose the total costs and material restrictions on the purchase of any goods or services that are the subject of the sales offer. 16 CFR 310.3(a)(1). In telemarketing calls soliciting charitable contributions, the Rule requires prompt disclosure of the identity of the charitable organization on behalf of which the request is being made and that the purpose of the call is to solicit a charitable contribution. 16 CFR 310.3(d).

¹¹ The TSR prohibits misrepresentations about, among other things, the cost and quantity of the offered goods or services. 16 CFR 310.3(a)(2). It also prohibits making a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution. 16 CFR 310.3(a)(4).

¹² The TSR prohibits any person from providing substantial assistance or support to a seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates sections 310.3(a), (c) or (d), or section 310.4 of the Rule. 16 CFR 310.3(b).

¹³ 16 CFR 310.4(b).

¹⁴ 16 CFR 310.4(c).

¹⁵ 16 CFR 310.4(d).

¹⁶ 16 CFR 310.4(e).

¹⁷ 16 CFR 310.4(a) (prohibiting the use of threats, intimidation, or profane or obscene language; requesting or receiving an advance fee for credit

repair, debt settlement, and recovery services or for the arrangement of a loan or other extension of credit when the telemarketer guarantees or represents a high likelihood of success; disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor; and failure to transmit Caller ID information).¹⁸ note 3.

In interpreting its rulemaking authority over “other abusive telemarketing acts or practices,”¹⁸ the Commission has determined that its authority includes acts or practices “within the purview of its traditional unfairness analysis as developed in Commission jurisprudence.”¹⁹ Thus, the Commission employs its unfairness analysis when identifying a telemarketing practice as abusive.²⁰ An act or practice is unfair under Section 5 of the FTC Act if it causes or is likely to cause substantial injury to consumers, if the harm is not outweighed by any countervailing benefits to consumers or competition, and if the harm is not reasonably avoidable.²¹

II. Retail Payment Methods Susceptible to Fraud in Telemarketing

The following section of this Notice explores the features and vulnerabilities of four types of novel payment methods used in telemarketing, with a particular focus on the use of a consumer’s bank account and routing number to withdraw funds from the account without authorization.²² Noncash retail payment mechanisms used in telemarketing can be divided into two major categories: “Conventional

payment methods” and “novel payment methods.” As used in this Notice, the term “conventional payment method” includes credit cards, debit cards, and other types of electronic fund transfers, which are processed or cleared electronically through networks that can be monitored systematically for fraud.²³ In addition, federal laws subject such conventional payments to procedural limitations on a consumer’s liability for certain disputed transactions.²⁴

As used in this Notice, the term “novel payment method” refers to four types of noncash payments—remotely created checks,²⁵

repair, debt settlement, and recovery services or for the arrangement of a loan or other extension of credit when the telemarketer guarantees or represents a high likelihood of success; disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor; and failure to transmit Caller ID information).

¹⁸ note 3.

¹⁹ 2002 Notice of Proposed Rulemaking, 67 FR at 4511.

²⁰ 2010 TSR Amendments, 75 FR at 48469 (discussing the Commission’s use of unfairness standard in determining whether a practice is “abusive”); 15 U.S.C. 45(n) (codifying the Commission’s unfairness analysis, set forth in a letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, 104 F.T.C. 949, *95–101 (1984)) (“Unfairness Policy Statement”).

²¹ 15 U.S.C. 45(n).

²² In addition to the payment methods discussed below, the Commission recognizes that there are additional noncash payment alternatives used in telemarketing transactions, including the use of billing and collection systems of mortgage, telephone, mobile phone, or utility companies and online payment intermediaries. These particular payments are not the subject of this NPRM, which focuses on payment alternatives that offer fraudulent telemarketers the most accessible and anonymous method of extracting money from consumers and for which the Commission has a record of fraud. However, the Commission continues to monitor complaints regarding the use of other billing platforms and payment methods in telemarketing fraud.

As used in this Notice, the term “novel payment method” refers to four types of noncash payments—remotely created checks,²⁵

As used in this Notice, the term “novel payment method” refers to four types of noncash payments—remotely created checks,²⁵

²³ Credit card transactions are processed through the credit card payment systems, operated by companies such as American Express, MasterCard, and Visa. Many debit card transactions are processed through the payment card systems, such as those operated by MasterCard and Visa. In addition, some debit card transactions, and other types of electronic fund transfers, may be cleared by the Automated Clearinghouse (“ACH”) Network, a nationwide, interbank electronic clearing house for processing and clearing electronic payments for participating financial institutions. note 50 (describing other types of electronic fund transfers that are processed as ACH debits). ACH transactions are governed by operating rules implemented and enforced by NACHA—The Electronic Payments Association (“NACHA”), a private, self-regulatory trade association comprised of financial institutions and regional payment associations. There are two ACH operators: the Federal Reserve Bank (“FedACH”) and The Electronic Payments Network (“EPN”), the only remaining private sector operator. Terri Bradford, Payment System Research Briefing, Federal Reserve Bank of Kansas (Dec. 2007), [http://www.frb.org/pubs/2007/pubs_07_01/pubs_07_01_01.pdf](#).

²⁴ Credit card transactions are subject to the Truth-in-Lending Act (“TILA”), 15 U.S.C. 1601–1607, and Regulation Z, 12 CFR part 1026. Debit card transactions, ACH debits, and other types of electronic fund transfers involving a consumer’s account at a financial institution are governed by the Electronic Fund Transfer Act (“EFTA”), 15 U.S.C. 1693–1699, and Regulation E, 12 CFR 1005.

²⁵ note 35 (definition of remotely created check).

²⁶ note 39 (definition of remotely created payment order).

²⁷ note 122 and Section IV.A (discussing the proposed definition of cash-to-cash money transfer, which includes the electronic transfer of cash from one person to another person in a different location that is conducted through a money transfer provider and is received in cash).

²⁸ Section II.B (discussing the function of a cash reload mechanism, which acts as a virtual deposit slip that a person uses to convert cash into electronic format that can be added to any existing prepaid card within the same prepaid network).

²⁹ See note 54 and accompanying text (discussing the Uniform Commercial Code applicable to checks and remotely created checks); notes 129 through 134 (discussing final Remittance Transfer Rule aimed at insuring the transparency and accuracy of cross-border remittance transfers, issued by the Consumer Financial Protection Bureau ("CFPB") in 2012).

³⁰ See Section IV.E (discussing proposed amendments to the general media and direct mail exemptions in sections 310.6(b)(5) and (6)).

³¹ 16 CFR 310.3(a)(3). In 2003, the Commission explained that requiring express verifiable consent was necessary "when consumers are unaware that they may be billed via a particular method, when that method lacks legal protection against unlimited unauthorized charges, and when the method fails to provide dispute resolution rights." 2003 TSR Amendments, 68 FR at 4606. Thus, section 310.3(a)(3) of the TSR requires telemarketers and sellers to obtain a consumer's express verifiable authorization for all telemarketing transactions where payment is made by a method other than a credit card or a debit card. 16 CFR 310.3(a)(3). This includes ACH debits and other forms of electronic fund transfers subject to the EFTA, as well as payment methods that are not subject to the EFTA.

³² Other law enforcers and regulators have expressed concerns about the fraudulent use of remotely created checks. See, e.g., NACHA Discussion Paper, *Remotely Created Checks* (May 1, 2008) (noting that law enforcement and consumer protection agencies continue to alert NACHA about the fraudulent use of remotely created checks, and confirming that, "[a]s the electronic payments networks have implemented risk management and anti-fraud programs, it appears that some fraudulent activity has migrated to this form of payment"); *Remotely Created Checks*, *Public*

Comment filed with the Federal Reserve by the National Association of Attorneys General, the National Consumer Law Center, Consumer Federation of America, Consumers Union, the National Association of Consumer Advocates, and

despite the absence of the account holder's signature.

³⁶ "As a result, they are vulnerable to misuse by fraudsters who can, for example, use [a remotely created check] to debit a victim's account without receiving proper authorization or delivering the goods or services. The risk of fraudulent [remotely created checks] is amplified in one-time purchase scenarios where the merchant is relatively unknown to the customer." Crystal D. Carroll, Federal Reserve Bank of Atlanta, Retail Payments Risk Forum, *Remotely Created Checks* (July 6, 2009),

2009/07/06 - 10:00 AM - 10:00 AM

³⁷ To comply with processing standards at banks that use magnetic ink character recognition line data from the bottom of a check, remotely created checks must be printed using special check paper stock and magnetic ink. Telemarketers often employ third-party processing firms to create and deposit the checks, which are accepted for deposit by the firms' bank. *Remotely Created Checks*, *Public* (), Civ. No. 07-5147 (E.D. Pa. Aug. 11,

U.S. Public Interest Research Group in Docket No. R-1226 (May 9, 2005) (advocating the elimination of remotely created checks in favor of electronic fund transfers covered by the EFTA); Federal Reserve Bank of Atlanta, *Remotely Created Checks* (Oct. 6-7, 2008) ("Anecdotally, telemarketers turned to remotely created checks as better ACH risk controls came online."); *Remotely Created Checks*, *Public* (Oct. 6-7, 2008).

³³ See notes 91-99 (citing injury estimates in cases brought by the Commission).

³⁴ Because payment for goods or services sold through telemarketing occurs immediately over the telephone, traditional paper checks are not commonly used in telemarketing transactions. Nevertheless, in most circumstances, a consumer's written signature on a check would satisfy the express verifiable authorization requirement of section 310.3(a)(3)(i) of the TSR.

³⁵ A remotely created check, also commonly referred to as a "demand draft," "bank check," or "bank draft," is defined by Regulation CC (Availability of Funds and Collection of Checks), 12 CFR 229.2(ff), as "a check that is not created by the paying bank and that does not bear a signature applied, or purported to be applied, by the person on whose account the check is drawn." Thus, checks generated by an account holder's bank on the request of the account holder through the bank's bill pay service are not remotely created checks,

scanned images of paper-based checks, including remotely created checks, into the check clearing system.

Electronic image exchange also has resulted in an "all-electronic" version of the remotely created check—the "remotely created payment order"—a remotely created check that exists in printed paper form.³⁹ Like traditional checks and remotely created checks, remotely created payment orders are deposited into and cleared through the check clearing system.⁴⁰ As with remotely created checks, remotely created payment orders are created by the merchant (payee), not the consumer (payor). In the case of remotely created payment orders, a telemarketer or seller simply enters a bank account number and bank routing number into an electronic file that is transmitted to a financial institution for processing via the check clearing system.⁴¹ As a result,

³⁹The proposed definition of "remotely created payment order," therefore, closely tracks the proposed definition of remotely created check:

a payment instruction or order drawn on a person's account that is initiated or created by the payee and that does not bear a signature applied, or purported to be applied, by the person on whose account the order is drawn, and which is cleared through the check clearing system. The term does not include payment orders cleared through the Automated Clearinghouse Network or subject to the Truth in Lending Act, 15 U.S.C. 1601, and Regulation Z, 12 CFR part 1026.

Section IV.A.

⁴⁰In 2011, while proposing certain amendments to Regulation CC (Availability of Funds and Collection of Checks), the Board of Governors of the Federal Reserve System ("Federal Reserve Board") used the term "electronically-created item" to describe any all-electronic image of a check that is sent through the check clearing system. P. 76 FR 16862, 16865 (Mar. 25, 2011). As such, the term encompasses "remotely created payment orders" (also known as "electronic RCCs," "virtual drafts," "paperless checks," and "non-check RCCs"), as well as smart-phone checks where the consumer "signs" a digital image of a check that can be emailed to a merchant or the merchant's bank. Among other things, the Federal Reserve Board proposed amendments to Regulation CC that would provide such electronically-created items with the same interbank warranty and liability provisions as remotely created checks.

note 53 (explaining interbank warranty and liability provisions applicable to remotely created checks). To date, the Board has taken no further action on this proposal.

The Commission's proposed ban would extend to remotely created payment orders. Importantly, the ban would not prohibit the use of other "electronically-created items," as defined by the Federal Reserve Board's proposed amendments to Regulation CC.

⁴¹FFIEC, P. 2010, at 16 (Feb. 2010) ("P. 2010"). "Unlike traditional checks or RCCs [remotely created checks], electronically created payment orders do not begin with a paper item. However, they are similar to RCCs in that they bear no direct evidence of the customer's authorization. Because these transactions are not

remotely created payment orders are at least as susceptible to fraud as remotely created checks.⁴²

The Commission previously considered the risks associated with the use of remotely created checks (then known as "demand drafts") in telemarketing during the initial promulgation of the Rule and subsequent rulemaking proceedings culminating in the 2003 amendments. At the time of those prior rulemaking proceedings, there were few, if any, convenient and safe payment alternatives available for consumers without access to credit cards. Consequently, prohibiting the use of remotely created checks in telemarketing would have imposed hardships on those consumers.⁴³ In the past decade, however, there has been a dramatic proliferation of noncash payment alternatives for consumers, and electronic payments now surpass paper checks in popularity as noncash means of payment.⁴⁴ In light of these changes in the marketplace, the Commission preliminarily finds that the risks from using these payment methods in telemarketing transactions exceed the benefits of permitting their use. At the same time, the Commission wishes to explore whether there might be legitimate reasons that telemarketers use these payment methods instead of other available payment mechanisms.⁴⁵ To

originally captured from paper check items, the laws and regulations pertaining to check collection do not apply." P. 61-62 and accompanying text (noting the uncertain regulatory framework for remotely created payment orders deposited into the check clearing system).

⁴²In inbound telemarketing calls, the same account information could be used to initiate an electronic fund transfer through the ACH Network. Fraudulent telemarketers and unscrupulous payment processors prefer, however, to use remotely created payment orders to evade the ACH Network and exploit the weaknesses inherent in the check clearing system. P. v. Civ. No. 3:13-cv-00056-RJ-WGC (D. Nev. Feb. 5, 2013) (Stip. Perm. Inj.); P. v. Civ. No. 4:11-00826 (E.D. Tex. Dec. 15, 2011) (Stip. Perm. Inj.).

⁴³Original TSR, 60 FR at 43850.

⁴⁴Federal Reserve System, P. 2010, at 4 (April 5, 2011) ("P. 2010"). ("Electronic payments (those made with cards and by ACH) now collectively exceed three quarters of all noncash payments while payments by check are now less than one-quarter. The increase in electronic payments and the decline of checks can be attributed to technological and financial innovations that influenced the payment instrument choices of consumers and businesses." (Citation omitted)). P. 2010.

⁴⁵The 2010 Federal Reserve Payments Study concluded that "[t]he decline in [consumer-to-business] check writing reflects, among other things, the replacement of consumer checks by

understand any potential problems posed for legitimate businesses by the proposed ban on the use of remotely created checks and remotely created payment orders, the Commission welcomes comments from the public in response to the questions posed in Section VIII.

1. Absence of Federal Consumer Protection Regulation of Remotely Created Checks and Remotely Created Payment Orders

A complicated interplay between federal and state laws results in uneven regulation of different payment methods. The type of payment mechanism used by a consumer in a particular transaction determines the level of legal protection against unauthorized charges the consumer receives. Consumers generally are not aware of the differing legal protections pertaining to the various payment methods. Significantly, consumers who provide bank debiting information to a telemarketer have virtually no control over how the telemarketer chooses to process their payment. Once a telemarketer obtains a consumer's bank account and routing number, the telemarketer (not the consumer) may choose to use that information to initiate payment via ACH debit, remotely created check, or remotely created payment order⁴⁶—a choice that determines what level of protections the consumer receives.

When a remotely created check or a remotely created payment order is cleared through the check clearing system, consumers receive none of the federal protections that safeguard conventional payments that are processed through the credit card system or the ACH Network. Consider the protections the law affords to credit card transactions and electronic fund transfers, such as debit card and ACH transactions. Federal law subjects credit card transactions to a prescribed billing error resolution process⁴⁷ and statutory limitations on a cardholder's liability for certain transactions.⁴⁸ Similarly, when

electronic payments, such as online bill payments through the ACH, or point-of-sale purchases with debit cards." P. at 11.

⁴⁶P. note 42.

⁴⁷Fair Credit Billing Act, 15 U.S.C. 1666 (correction of billing errors). Within 60 days of the financial institution's transmittal of her credit card account statement, a consumer may dispute a charge for goods or services with her credit card company, and withhold payment while the dispute is pending. Billing errors include failure of a merchant to deliver goods or services as agreed.

⁴⁸Truth-In-Lending Act, 15 U.S.C. 1643 (liability of holder of credit card); Regulation Z, 12 CFR 1026.12(b)(2) (liability of cardholder for unauthorized use).

⁴⁹The EFTA also covers payroll cards, and some prepaid debit cards (also referred to as “general purpose reloadable” or “GPR” cards) that are linked to an account at a financial institution. In addition, section 401 of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (“Credit CARD Act”), 15 U.S.C. 1693l–1, created new section 915 of the EFTA, subjecting other types of non-GPR cards (e.g., gift cards) to some, but not all, requirements of the EFTA.

In May 2012, the CFPB requested public comment on whether (and to what extent) EFTA coverage should be provided to all GPR cards. Advanced Notice of Proposed Rulemaking: Electronic Fund Transfers (Regulation E) and General Purpose Reloadable Prepaid Cards (“ANPR Electronic Fund Transfers and GPR Cards”), 77 FR 30923 (May 24, 2012). In a comment submitted the CFPB, Commission staff expressed support for protecting users of GPR cards and for the CFPB’s proposal to solicit information about the costs and benefits of extending additional protections to these cards. Comment, Staff of the Bureau of Consumer Protection, ANPR Electronic Fund Transfers and GPR Cards, Dkt. No. CFPB–2012–00196 (July 23, 2012), <http://www.consumerfinance.gov/2012/07/120730>. The Commission will continue to monitor complaints regarding the use of prepaid debit cards in telemarketing fraud to determine whether additional amendments of the TSR would protect consumers.

⁵⁰Examples of such electronic check conversions include point-of-purchase (“POP”) and accounts receivable conversion (“ARC”). A POP entry is created for an in-person purchase of goods or services when a retailer uses a consumer’s paper check as a source document to electronically enter the consumer’s bank routing and account number to initiate an ACH debit to the consumer’s bank account. An ARC entry also uses a consumer’s paper check as a source document to initiate an ACH debit, but the check is not received at the point-of-purchase. Instead, “a biller receives the consumer’s check in the mail, or at a lockbox location for payment of goods and services.” Karen

⁸⁰In an attempt to quantify the number of remotely created checks being automatically processed through the check clearing system, in 2007, the Federal Reserve System conducted a check sampling study of 30,000 randomly-selected checks. The study required “three independent investigators to ‘interrogate,’ i.e., systematically collect information from, each sampled check.” Federal Reserve System, *Check Sampling Study* (2007) : [http://www.federalreserve.gov/monetarypolicy/2007checkstudy.htm](#), 8 (Mar. 2008) (“2007 Check Sample Study”).

2008) (stipulated permanent injunction against defendants that allegedly used remotely created checks to defraud elderly consumers out of nearly \$10 million in connection with high-pressure, deceptive sales of products that purportedly help blind and disabled workers). In just two months, Handicapped & Disabled Workshops' telemarketers allegedly used unauthorized remotely created checks to withdraw over \$5,513.55 (including \$1,025.90 in a single day) from an 82 year old woman's bank account. . . Decl. of Patricia W. Bunge, ¶ 6 (Apr. 15, 2008).

⁹³ . . . v. . . , Civ. No. 08-2215 (E.D. Pa. Mar. 28, 2013) (Summ. J.); . . . v. 6554962 . . . , Civ. No. 1:08-02309 (N.D. Ill. Aug. 19, 2009) (Default J.); . . . v. 9107 4021 . . . , Civ. No. 08-1051 (E.D. Ohio July 17, 2009) (Stip. Perm. Inj.). . . v. . . , Cr. No. 1:08-00196 (N.D.N.Y. sentenced Dec. 3, 2009) (defendant pleaded guilty and was sentenced to 56 months' imprisonment in connection with a fake medical benefits telemarketing scheme that used remotely created checks to bilk elderly consumers).

⁹⁴ . . . v. 3 . . . Civ. No. S-04-0712 (D. Nev. July 19, 2005) (Default J.) (complaint alleged telemarketers initiated \$10 million in unauthorized remotely created checks and other debits from more than 90,000 consumers' accounts in three months for fraudulent discount pharmacy cards).

⁹⁵ . . . v. 4086465 . . . , Civ. No. 04-1351 (N.D. Ohio Nov. 7, 2005) (stipulated permanent injunction against telemarketers allegedly used unauthorized remotely created checks as payment for fake consumer protection service that promised to protect consumers from telemarketing and unauthorized banking).

⁹⁶ . . . note 84.
⁹⁷ . . . v. . . , Cr. No. 1:10-0012 (W.D.N.Y. Jan. 26, 2010) (defendant pled guilty to wire fraud in connection with Integrated Check Technologies' processing of remotely created checks for fraudulent Canadian telemarketers);

. . . v. . . , Cr. No. 1:09-347 (W.D.N.Y. Jun. 27, 2011) (sentenced to 24 months in prison and fined \$100,000 for his involvement in Integrated Check Technologies' payment processing scheme); . . . v. . . , Cr. No. 1:10-324 (W.D.N.Y. Jan 6, 2012) (same, sentenced to 18 months); . . . note 37; P . . . P . . . note 37; . . . v. . . , Civ. No. 2:06-01644 (D. Nev. 2007);

. . . v. . . , Civ. No. 1:96-615 (N.D. Ga. 1996); . . . P . . . note 74; . . . v. . . note 74;

. . . v. . . , Civ. No. 04-90507 (S.D. Iowa filed Sept. 17, 2004). . . v. . . 598 F. Supp. 2d 1104 (S.D. Cal. Sept. 16, 2008), . . . 604 F.3d 1150, 1158 (9th Cir. 2010) (defendants' Internet-based business facilitated fraudulent operations that created more than 150,000 unauthorized checks totaling more than \$400 million).

⁹⁸ As the FFIEC has advised, "[s]ome higher-risk merchants routinely use third parties to process their transactions because of the difficulty they have in establishing a direct bank relationship."

FFIEC, . . . : . . . (/ 1 2 1 0 * (,) / 1 2 1 -0- 7 . 5 1

¹⁰⁴ *Wachovia Bank, National Association v. United States*, Cr. No. 10-20165 (S.D. Fla. Mar. 16, 2010) (alleging that defendant maintained account relationships with certain payment processors that deposited more than \$418 million using remotely-created checks into Wachovia accounts on behalf of fraudulent telemarketers).

¹⁰⁵ According to the press release announcing the deferred prosecution, "Wachovia admitted that it failed to identify, detect, and report the suspicious transactions in the third-party payment processor accounts, as required by the BSA [Bank Secrecy Act, 31 U.S.C 1051 *et seq.*], due to deficiencies in its anti-money laundering program. Specifically, Wachovia failed to conduct appropriate customer due diligence by delegating most of this responsibility to business units instead of

¹¹⁴ 15 U.S.C. 45(n).

¹¹⁵ Remotely created checks are subject to the UCC and lack both dispute resolution rights and protection against unlimited liability for unauthorized charges, which compounds the injury caused by fraudulent telemarketing. As previously discussed, it remains unclear whether remotely

¹²⁴ GAO Report, note 123, at 10–11.

¹²⁵ MoneyGram's Web site states: "In the absence of a proper ID, test questions can serve as an identification method for most transaction[s] below a certain dollar amount. Test questions can be included in a transaction, and should address something only the receiver could answer."

MoneyGram, www.moneygram.com, www.moneygram.com/faq (located under the "MoneyGram" tab and "Receiving a Money Transfer").

¹²⁶ Currently, Green Dot's MoneyPak is the only cash reload mechanism accepted by PayPal as a funding source. PayPal,

www.paypal.com/merchpot/show/id/0 (last visited July 8, 2013).

¹²⁷ Green Dot also enables MoneyPak consumers to make same-day payments to certain billers using a MoneyPak. However, only approved billing partners are authorized to accept MoneyPak authorization codes directly from consumers as a method of payment. GreenDot MoneyPak,

www.moneygram.com, www.moneygram.com/faq. In contrast, scam artists must load the funds onto a prepaid card before they can withdraw the money at an ATM or spend down the balance.

¹²⁸ Unlike cash-to-cash money transfers which can be completely anonymous, electronic fund transfers to and from accounts maintained at financial institutions or with online payment service providers require senders and recipients to open and maintain accounts, which may be identified and traced to a particular person or entity. FFIEC,

www.ffiec.gov/press/20090908.htm.

www.paypal.com/merchpot/show/id/0 (last visited July 8, 2013).

* ()

already vanished with the money. 100,000, FTC
Consumer Alert, 100,000 (Nov.
2012), 100,000 // 100,000 / 100,000 /
100,000 / 100,000 / 151.

reload mechanisms in telemarketing is not outweighed by the benefit to consumers or competition.

As discussed above, the enforcement experience of the Commission and other federal and state authorities, as well as consumer complaint evidence and industry guidance to consumers, indicate that telemarketers committing fraud engage in the prevalent and widespread use of cash-to-cash money transfers¹⁶² and they are increasingly turning to cash reload mechanisms.¹⁶³ At the same time, the Commission wishes to explore whether there might be legitimate reasons that telemarketers use these payment methods instead of other available payment alternatives. To understand any potential problems posed for legitimate businesses by the proposed ban on the use of cash-to-cash money transfers and cash reload mechanisms, the Commission welcomes comments from the public in response to the questions posed in Section VIII. In particular, the Commission seeks information and data describing any type of legitimate commercial telemarketing transactions for which these payment methods are needed, including the types of products involved, whether the telemarketing calls are inbound or outbound, and whether the need is limited to certain groups of consumers—, those who do not have bank accounts. In addition, the Commission seeks information as to why these transactions could not be conducted using safer and less anonymous payment alternatives, including what additional costs, if any, would result from using such payment methods.

¹⁶² Because of the well-documented abuse of money transfers in telemarketing, the Commission, law enforcement, and consumer advocates contend that consumers should never use money transfers to send money to a stranger or in response to a telemarketing offer. *See*, e.g., FTC Videos, *Telemarketing: How to Avoid Scams* (Aug. 22, 2012), <http://www.ftc.gov/ftc/videos/1402334883001>; FTC Consumer Alert, *Telemarketing Scams: How to Avoid Them* (Oct. 2009), <http://www.ftc.gov/ftc/alerts/17968/034>; FBI, *Telemarketing Scams: How to Avoid Them* (Oct. 2009), <http://www.fbi.gov/newsroom/2008/0808>; Kayce T. Ataiyero & Jon Yates, AARP, *Telemarketing Scams: How to Avoid Them* (Jan. 1, 2009), <http://www.aarp.org/2009/01-01-2009/>.

¹⁶³ *See*, e.g., notes 140–142 (alerts and consumer warnings about the risks of fraud-induced cash reload mechanisms in telemarketing schemes).

III. Abusive Telemarketing of Recovery Services

Telemarketers pitching “recovery services” contact consumers who have lost money, failed to win a promised prize, or never received merchandise purchased in a previous scam. They promise to recover the lost money, or obtain the promised prize or merchandise, in exchange for a fee paid in advance. After the fee is paid, consumers rarely receive the promised services or recoup their losses. To protect consumers from this abusive practice, the Rule prohibits any telemarketer or seller from requesting or receiving payment for such recovery services “until seven (7) business days after such money or other item is delivered to that person.”¹⁶⁴

As originally proposed in the 1995 Notice of Proposed Rulemaking, the recovery services provision was not limited to the recovery of money or value lost as the result of a telemarketing transaction.¹⁶⁵ The provision was revised in the Final Rule, however, to address the concerns of several commenters, including one who opined that this section, as proposed, could impair the ability of newspapers to accept classified advertisements for lost and found items.¹⁶⁶ Moreover, at the time the original Rule was promulgated, the Commission’s experience with recovery services was limited to the recovery of money lost through telemarketing fraud.¹⁶⁷ Thus, the scope of this provision was restricted to services claiming to recover money consumers lost “in a previous telemarketing transaction.”¹⁶⁸

Since then, numerous advances in technology, including the widespread commercial use of the Internet, have increased the communication channels used by wrongdoers to defraud their victims.¹⁶⁹ Consumer complaints and

¹⁶⁴ 16 CFR 310.4(a)(3).

¹⁶⁵ 1995 Notice of Proposed Rulemaking, 60 FR 8313, 8330 (Feb. 14, 1995).

¹⁶⁶ 1995 Revised Notice of Proposed Rulemaking, 60 FR 30406, 30416 (June 8, 1995).

¹⁶⁷ During 1995 and 1996, the Commission initiated or settled lawsuits involving nearly a dozen recovery services operations. 68 FR at 4614 n.403. *See*, e.g., *Telemarketing Services, Inc. v. [redacted]*, Civ. No. S–96–63 (D. Nev. Nov. 20, 1996) (Stip. Perm. Inj.); *Telemarketing Services, Inc. v. [redacted]*, Civ. No. S–96–191 (D. Nev. July 30, 1996) (Default J.); *Telemarketing Services, Inc. v. [redacted]*, Civ. No. 96–344 (E.D. Okla. Dec. 9, 1996) (Stip. Perm. Inj.).

¹⁶⁸ 16 CFR 310.4(a)(3).

¹⁶⁹ For example, Internet (E-commerce) sales accounted for 50.6 percent of the more than \$260 billion of 2010 non-store merchandise sales, indicating how common such purchases have become. U.S. Census Bureau, *2010 E-commerce Sales and Revenue* (2010), http://www.census.gov/commerce/retail/e-commerce/2010_e-commerce_sales_and_revenue.html.

the Commission’s law enforcement experience reveal that such Internet transactions are susceptible to the same unfair and deceptive acts and practices as telemarketing transactions. For example, in 2011 the Department of Justice (upon referral from the Commission) sued Business Recovery Services and its principal, Brian Hessler, for allegedly telemarketing recovery services to consumers who lost money to business opportunity and work-at-home scams.¹⁷⁰ Although the defendants targeted victims of both online and telemarketing scams, the TSR counts of the complaint were necessarily limited to the victims of prior telemarketing fraud.

The Commission’s Consumer Sentinel data show that the vast majority of companies identified 4e.oi3of both 1022 Tre neca4 (could s of bot85 486.48eion 4l Tre)Tj T* (n

Telemarketing Services, Inc. v. [redacted], 2010 WL 2009 (May 10, 2012), http://www.ftc.gov/2010/05/20100510_tmsi.

¹⁷⁰ *Telemarketing Services, Inc. v. [redacted]*, Civ. No. 2:11–0390–PHX–JAT (D. Ariz. Apr. 15, 2011) (Prelim. Inj.).

¹⁷¹ FTC, *Telemarketing Services, Inc. v. [redacted]*, 2012 WL 2012, at 9 (Feb. 13, 2012) (“2012 IC3”), http://www.ftc.gov/2012/02/20120213_tmsi.

¹⁷² IC3 is a joint operation of the National White Collar Crime Network and the FBI.

¹⁷³ IC3, 2011 WL 2011, at 2 (2011), http://www.ftc.gov/2011/03/20110303_ic3.

¹⁷⁴ Lost and found advertisements are not likely to qualify for coverage under the Rule, which applies to sellers or telemarketers engaged in "telemarketing," as defined in section 310.2(dd).

¹⁷⁵ Section IV of the preamble was edited to meet the requirements for official publication in the **Federal Register**. Text setting out verbatim proposed changes to the current TSR text can be viewed at <http://www.federalregister.gov/2013/05/130521>

¹⁷⁶ In 2011, the Commission issued a technical amendment to make minor corrections to the text of TSR. <http://www.federalregister.gov/2011/09/22/2011-24361>

¹⁷⁷ Regulation CC, 12 CFR 229.2(a).
¹⁷⁸ Commentary to Regulations J and CC, 12 CFR parts 210 and 229, at 8 (Nov. 21, 2005),

check that is either initiated or signed by a consumer, for example, via a smart-phone application, would not be covered by the definition because it is not created by the merchant and it is signed by the consumer.

The terms “cash-to-cash money transfer” and “cash reload mechanism” are referenced in proposed section 310.4(a)(10), which would prohibit telemarketers or sellers from accepting or receiving payment via a cash-to-cash money transfer or cash reload mechanism for goods or services or charitable contributions in telemarketing. The proposed definition of “cash-to-cash money transfer” is limited to transfers of cash—and excludes any transfers that are electronic fund transfers under the EFTA, and thus subject to the full protections of that Act, as amended by section 1073 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).¹⁸⁰ Unlike the transfers covered by the new Remittance Rule, however, the proposed TSR provision includes no geographic limitations. Thus, the proposed ban against the receipt of such money transfers in telemarketing would extend to those sent within or outside of the U.S., whether or not such transfers are also covered by the Remittance Rule.

Accordingly, the Commission proposes to define “cash-to-cash money transfer” as the electronic (as defined in section 106(2) of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7006(2)) transfer of the value of cash received from one person to another person in a different location that is sent by a money transfer provider and received in the form of cash. The term includes a remittance transfer, as defined in section 919(g)(2) of the Electronic Fund Transfer Act (“EFTA”), 15 U.S.C. 1693a, that is a cash-to-cash transaction; however it does not include any transaction that is (1) an electronic fund transfer as defined in section 903 of the EFTA; (2) covered by Regulation E, 12 CFR 1005.20, pertaining to gift cards; or (3) subject to the Truth in Lending Act, 15 U.S.C. 1601. For purposes of this definition, money transfer provider means any person or financial institution that provides cash-to-cash money transfers for a person in the normal course of its business, whether or not the person holds an account with such person or financial institution.

The proposed definition of “cash reload mechanism” would include virtual deposit slips that enable

consumers to convert cash into electronic form, so that it can be loaded onto an existing prepaid card or an online account with a payment intermediary, such as PayPal. As described above, the cash reload mechanism does not function as a prepaid card that can be swiped at retail locations or ATMs, and it is not intended for use in purchasing goods and services. To implement the proposed ban against the use of cash reload instruments in telemarketing, the Commission proposes to define “cash reload mechanism” as a mechanism that makes it possible to convert cash into an electronic (as defined in section 106(2) of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7006(2)) form that a person can use to add money to a general-use prepaid card, as defined in Regulation E, 12 CFR 1005.2, or an online account with a payment intermediary. For purposes of this definition, a cash reload mechanism (1) is purchased by a person on a prepaid basis, (2) enables access to the funds via an authorization code or other security measure, and (3) is not itself a general-use prepaid card.

Section 310.3(a)(3) prohibits sellers and telemarketers from billing for telemarketing purchases or donations without a customer’s or donor’s “express verifiable authorization,” unless payment is made by a credit or debit card. Section 310.3(a)(3)(ii) permits the use of an audio recording to produce the required verification of an express oral authorization, provided that the recording “evidences clearly both the customer’s or donor’s authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction,” and the customer’s or donor’s receipt of specified material information about the transaction.¹⁸¹

Section 310.3(a)(3) prohibits sellers and telemarketers from billing for telemarketing purchases or donations without a customer’s or donor’s “express verifiable authorization,” unless payment is made by a credit or debit card. Section 310.3(a)(3)(ii) permits the use of an audio recording to produce the required verification of an express oral authorization, provided that the recording “evidences clearly both the customer’s or donor’s authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction,” and the customer’s or donor’s receipt of specified material information about the transaction.¹⁸¹

¹⁸¹ 16 CFR 310.3(a)(3)(ii). This section also specifies additional disclosures the seller or telemarketer must make and include in the recording; namely, the number of debits, charge or payments (if more than one; the date(s) the debit(s), charge(s), or payment(s) will be submitted for payment; the amount(s) of the debit(s), charges(s), or payment(s); the customer’s or donor’s name; the customer’s or donor’s billing information identified with sufficient specificity that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction; a telephone number for customer or donor inquiry that is answered during normal business hours; and the date of the customer’s or donor’s oral authorization. . at 310.3(a)(3)(ii)(A)–(G).

Although it is difficult to imagine how a verification recording could “evidence clearly” a payment authorization “for the goods or services or charitable contribution that are the subject of the telemarketing transaction” without mentioning the goods, services, or charitable contribution, Commission staff have found that sellers and telemarketers often omit this information from their audio recordings, contrary to this provision’s mandate to include it. In fact, the Commission’s law enforcement record indicates that in some cases the omission has been intentional and has concealed from consumers the real purpose of the verification recording and the fact that they will be charged.¹⁸²

Accordingly, in order to make explicit the requirement that a verification recording describe the goods, services or charitable contribution for which payment authorization is sought, the Commission proposes to amend section 310.3(a)(3)(ii) by adding a requirement that the telemarketer or seller include an accurate description, clearly and conspicuously stated, of the goods or services or charitable contribution for which payment authorization is sought.

Section 310.4(a)(3) P.

1. Proposed Section 310.4(a)(3)—Expansion of Advance Fee Ban on Recovery Services

To protect consumers from unscrupulous telemarketers that have adapted their methods to defraud consumers, the Commission proposes to expand the scope of the Rule’s advance fee ban on recovery services. Accordingly, the text of the proposed amended section 310.4(a)(3) would be amended to eliminate the word “telemarketing” from the phrase “previous telemarketing transaction”.

¹⁸² *V. v. V.*, Civ. No. 8:08–914 (M.D. Fla. Dec. 5, 2008) (stipulated permanent injunction preventing corporate defendants from allegedly changing pre-sale description of promised general purpose credit cards in their verification recordings); *v.* note 93 (defendants used deception to obtain recorded verifications from defrauded consumers); *v. P.* Civ. No. 2:08–00620 (D. Nev. Apr. 7, 2010) (summary judgment against defendants that allegedly changed material terms of initial offer of free or low-cost magazine subscriptions in verification call); *v. 4086465*, Civ. No. 10:4–1351 (N.D. Ohio Nov. 7, 2005) (stipulated permanent injunction preventing defendants from allegedly misrepresenting themselves as government or bank officials to obtain recorded authorizations after falsely representing that goods or services were free or would be charged in low monthly payments).

¹⁸⁰ note 129 and accompanying text (explaining the new Remittance Transfer Rule).

2. Proposed Sections 310.4(a)(9) and
(10)—Prohibitions Against Use of
-1hibitiodule

¹⁸⁵ 16 CFR 310.4(b)(1)(ii) (emphasis added).

¹⁸⁶ FTC, *Guidelines for the Use of Endorsements and Testimonials* (February 2011), <http://www.ftc.gov/bcp/condo/201102/110201.pdf>.

¹⁸⁷ 16 CFR 310.4(b)(1)(ii) (emphasis added).

¹⁸³ 16 CFR 310.3(a)(4).

¹⁸⁴ 16 CFR 310.3(a)(3).

¹⁹³ 16 CFR 310.8(c).

¹⁹⁴ 2003 TSR Amendments, 68 FR at 45136 n.27 (citing 47 CFR 64.1200(c)(2)(i)(E), as amended July 3, 2003).

¹⁹⁵ 5 U.S.C. 603(a), 604(a).

¹⁹⁶ The RFA definition of "small entity" refers to the definition provided in the Small Business Act, which defines a "small-business concern" as a business that is "independently owned and operated and which is not dominant in its field of operation." 15 U.S.C. 632(a)(1).

by the Commission; (2) the requirement in 16 CFR 310.3(a)(3)(ii) that any recording made to memorialize a customer's or donor's express verifiable authorization must include an accurate description, clearly and conspicuously stated, of the goods or services or charitable contribution for which payment authorization is sought; (3) that the business-to-business exemption in 16 CFR 310.6(b)(7) extends only to calls inducing a sale or contribution from the business itself, and not to calls inducing sales or contributions from individuals employed by the business; (4) that under 16 CFR 310.8(c) no person can participate in an arrangement to share the cost of accessing the National Do Not Call Registry; and (5) the types of impermissible burdens on consumers that violate 16 CFR 310.4(b)(1)(ii) by denying or interfering with their right to be placed on a seller's or telemarketer's entity-specific do-not-call list. A related amendment would specify that a seller's or telemarketer's failure to obtain the information necessary to honor a consumer's request to be placed on a seller's entity-specific do-not-call list pursuant to 16 CFR 310.4(b)(1)(ii) will disqualify it from relying on the safe harbor in 16 CFR 310.4(b)(3) for isolated or inadvertent violations.

The classes of small entities affected by the proposed amendments are those that are required to obtain consent from consumers before recording a call to memorialize a sale or contribution from the business itself, and those that are required to obtain consent from consumers before recording a call to induce a sale or contribution from the business itself. The proposed amendments would also affect those sellers and telemarketers that are required to obtain consent from consumers before recording a call to induce a sale or contribution from individuals employed by the business. The proposed amendments would also affect those sellers and telemarketers that are required to obtain consent from consumers before recording a call to induce a sale or contribution from the business itself, and those that are required to obtain consent from consumers before recording a call to induce a sale or contribution from individuals employed by the business.

(b)(3) The proposed amendments would also affect those sellers and telemarketers that are required to obtain consent from consumers before recording a call to induce a sale or contribution from the business itself, and those that are required to obtain consent from consumers before recording a call to induce a sale or contribution from individuals employed by the business.

consumer's request to be placed on a seller's entity-specific do-not-call list

NoFR rule 16 CFR 310.4(b)(1)(ii) would disqualify it from relying on the safe harbor in 16 CFR 310.4(b)(3) for isolated or inadvertent violations.

advtg information

²⁰³ 44 U.S.C. 3501–3521. The PRA also addresses reporting requirements, but neither the TSR nor the proposed amendments present them.

²⁰⁴ 16 CFR 310.6(b)(5)–(6).

²⁰⁵ Even though some sellers and telemarketers, in order to prove that they are eligible for the safe harbor, might seek to document the fact that they have honored such requests, neither the proposed amendment nor the TSR requires them to do so.

²⁰⁶ 16 CFR 1.26(b)(5).

financial information which is obtained from any person and which is privileged or confidential," as provided in Section

²⁰⁷ In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

transfers, and cash reload mechanisms sufficient for use in telemarketing by consumers who lack access to credit or traditional debit cards? If not, please describe the reasons why these novel payment methods are necessary and the types of telemarketing transactions for which these novel payment methods are necessary, including the types of products or services involved, whether the telemarketing calls are inbound or outbound, etc.

17. What, if any, adverse effect would a prohibition on the use of remotely created checks and remotely created payment orders in telemarketing have on legitimate electronic bill payment transactions?

18. Do banks have any feasible way of distinguishing among traditional checks, remotely created checks, images of remotely created checks and remotely created payment orders flowing through the check clearing system?

19. Is it feasible to obtain systematic, centralized monitoring of the volume, use, or return rates of remotely created checks and remotely created payment orders flowing through the check clearing system?

20. Do payment processors and depository banks typically receive additional fees when processing payments and returns for merchants with high return rates? Do they incur additional costs in dealing with merchants with high return rates? Please describe the nature and amount of any such fees and costs, including how the additional fees charged compare to the increased costs incurred by the payment processors and banks.

21. Do consumers generally understand the differences among different payment options for purchases with regard to their dispute resolution rights and ability to recover payments procured by fraud?

22. Are there legitimate uses for cash-to-cash money transfers and cash reload mechanisms in telemarketing? If so, please describe the reasons why such transfers are necessary and the types of telemarketing transactions for which such transfers are necessary, including the types of products involved, whether the telemarketing calls are inbound or outbound, and whether the need is limited to certain groups of consumers—i.e., those who do not have bank accounts. In addition, please provide information as to why these transactions could not be conducted using alternative payment mechanisms such as electronic fund transfers or debit or credit cards, including what additional costs, if any, would result from using such payment alternatives.

23. What specific costs and burdens would the proposed prohibition on the use of remotely created checks, remotely created payment orders, cash-to-cash money transfers, and cash reload mechanisms in telemarketing impose on industry and individual firms (including small businesses) that would be required to comply with the prohibition, or on consumers?

24. Is the harm caused by remotely created checks, remotely created payment orders, cash-to-cash money transfers, and cash reload mechanisms in telemarketing outweighed by countervailing benefits to consumers or competition? If so, please identify and quantify the countervailing benefits.

25. Are there other payment mechanisms used in telemarketing that cause or are likely to cause unavoidable consumer harm without countervailing benefits to consumers or competition that the Commission should consider prohibiting or restricting?

Advance Fees for Recovery Services

26. Is there any material difference between telemarketing sales and Internet sales that would require the use of advance fees for recovery services aimed at victims of Internet fraud?

27. What, if any, specific costs and burdens would the proposed expansion of the advance fee ban on recovery services impose on industry and individual firms (including small businesses)?

28. Please describe the types of businesses that seek advance fees for recovery services, and whether these businesses require significant capital or labor outlays prior to providing the services.

General Media Exemption

29. How many sellers and how many telemarketers that accept payment by remotely created checks, remotely created payment orders, cash-to-cash money transfers, or cash reload mechanisms solicit calls from consumers by means of general media advertisements?

30. What specific costs or burdens, if any, would the proposed exclusion from the general media exemption for calls to sellers or telemarketers that accept payment by remotely created checks, remotely created payment orders, cash-to-cash money transfers, or cash reload mechanisms impose on industry, on individual firms (including small businesses) that would be required to comply with the prohibition, or on consumers?

31. Does the TSR's general media exemption have so many exclusions that

the Commission should consider eliminating the exemption entirely?

Direct Mail Exemption

32. How many sellers and how many telemarketers that accept payment by remotely created checks, remotely created payment orders, cash-to-cash money transfers, or cash reload mechanisms solicit calls from consumers by means of direct mail offers?

33. What specific costs or burdens, if any, would the proposed amendment to the direct mail exemption impose on industry, on individual firms (including small businesses) that would be required to comply with the prohibition, or on consumers?

34. Should the proposed changes to the direct mail exemption be limited to certain types of industries (or goods or services) that are susceptible to abuse?

IX. Proposed Rule

List of Subjects in 16 CFR Part 310

Telemarketing, trade practices.

For the reasons set forth in the preamble, the Federal Trade Commission proposes to amend title 16, Code of Federal Regulations, as follows:

PART 310—TELEMARKETING SALES RULE 16 CFR PART 310

■ 1. The authority citation for part 310 continues to read as follows:

Authority: 15 U.S.C. 6101–6108.

■ 2. Amend § 310.2 by redesignating paragraphs (f) through (z) as paragraphs (h) through (bb), redesignating paragraphs (aa) through (ee) as paragraphs (ee) through (ii), and adding new paragraphs (f) through (g) and (cc) through (dd), to read as follows:

§ 310.2 Definitions.

* * * * *

(f) - - - - - means the electronic (as defined in section 106(2) of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7006(2)) transfer of the value of cash received from one person to another person in a different location that is sent by a money transfer provider and received in the form of cash. The term includes a remittance transfer, as defined in section 919(g)(2) of the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. 1693a, that is a cash-to-cash transaction; however it does not include any transaction that is:

- (1) An electronic fund transfer as defined in section 903 of the EFTA;
- (2) Covered by Regulation E, 12 CFR 1005.20, pertaining to gift cards; or
- (3) Subject to the Truth in Lending Act, 15 U.S.C. 1601 et seq. For purposes

of this definition, means any person or financial institution that provides cash-to-cash money transfers for a person in the normal course of its business, whether or not the person holds an account with such person or financial institution.

(g) makes it possible to convert cash into an electronic (as defined in section 106(2) of the Electronic Signatures in Global and National Commerce Act (15 U.S.C.

7006(2)) form that include an electronic signature, as defined in 16 CFR 101.118, and a digital signature, as defined in 16 CFR 101.118, for the purpose of transmitting or receiving such information in electronic form.

(g) means that the person or financial institution provides the person with the means to convert cash into an electronic form (as defined in section 106(2) of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7006(2))) form that include an electronic signature, as defined in 16 CFR 101.118, and a digital signature, as defined in 16 CFR 101.118, for the purpose of transmitting or receiving such information in electronic form.

⁶For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(6) Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1), for any goods or services offered in the direct mail solicitation, and that contains no material misrepresentation regarding any item contained in § 310.3(d) for any requested charitable contribution;

however, that this exemption does not apply to:

(i) Calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, debt relief services, business opportunities other than business arrangements covered by the Franchise Rule or Business Opportunity Rule, or goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)–(4);

(ii) Calls to sellers or telemarketers that do not comply with the prohibitions in § 310.4(a)(9) or (10); or

(iii) Any instances of upselling included in such telephone calls; and

(7) Telephone calls between a telemarketer and any business to induce the purchase of goods or services or a charitable contribution by the business, except calls to induce the retail sale of nondurable office or cleaning supplies;

however, that § 310.4(b)(1)(iii)(B) and § 310.5 shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

■ 6. Amend § 310.8 by revising paragraph (c) to read as follows:

§ 310.8 Fee for access to the National Do Not Call Registry.

* * * * *

(c) The annual fee, which must be paid by any person prior to obtaining access to the National Do Not Call Registry, is \$54 for each area code of data accessed, up to a maximum of \$14,850; provided, however, that there

shall be no charge to any person for accessing the first five area codes of data, and provided further, that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing area codes of data in the National Do Not Call Registry if the person is permitted to access, but is not required to access, the National Do Not Call Registry under this Rule, 47 CFR 64.1200, or any other Federal regulation or law. No person may participate in any arrangement to share the cost of accessing the National Do Not Call Registry, including any arrangement with any telemarketer or service provider to divide the costs to access the registry among various clients of that telemarketer or service provider.

* * * * *

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2013–12886 Filed 7–8–13; 8:45 am]