

310.3(a)(3) also avoids unduly burdening legitimate industry's nondeceptive use of various payment systems.⁶³

2. *Assisting and Facilitating.* Section 310.3(b) received substantial attention from commenters. Law enforcement and consumer groups generally were favorable but some suggested including a more general prohibition against assisting and facilitating.⁶⁴ Industry comments raised concerns that the knowledge standard in the initially proposed Rule was too vague or harsh and that the liability for assisting and facilitating should attach only where the assistance or support is directly linked and material to the Rule violation.⁶⁵ Some industry commenters suggested that the Rule include exemptions for certain practices and that this Section not impose any affirmative duties on third parties.⁶⁶ All commenters raised valid and important issues that the Commission has considered.

To address concerns that the "knew or should have known" standard initially proposed may have swept too broadly and exposed those only casually associated with deceptive telemarketing to liability as assistors or facilitators, the Commission now proposes the "actual knowledge or conscious avoidance" standard advanced by a number of participants in the public workshop.⁶⁷ This standard is similar to the knowledge standard applicable in actions under Section 13(b) of the FTC Act governing individual liability to pay restitution to consumers for injury resulting from law violations of a corporation controlled by the individual⁶⁸—a type of vicarious liability somewhat analogous to assistor

and facilitator liability. The Commission intends that this revision delineate the scope of assistor and facilitator liability more clearly and more narrowly than did the "knew or should have known" standard.

The Commission also believes it appropriate to specify that there be some connection between the substantial assistance provided to a deceptive telemarketer and resulting violations of core provisions of the revised proposed Rule. Revised proposed Section 310.3(b) therefore requires that there be substantial assistance related to the commission or furtherance of a core rule violation. The provision now reads as follows:

It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any 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 §§ 310.3 (a) or (c) or 310.4 of this Rule and such substantial assistance is related to the commission or furtherance of that act or practice.

Section 310.3(b)(2) of the initially proposed Rule set forth five specific examples of conduct deemed to meet the "substantial assistance" prong of the two-prong test for "assisting and facilitating" set forth in Section 310.3(b)(1), which, when coupled with knowledge required by the second prong, would constitute a violation of this Rule. The prevailing view among industry commenters was that this list of examples would be interpreted as condemning a range of commercial activities that, in and of themselves, are not injurious to consumers or unlawful.⁶⁹ The resulting chilling effect could result in unnecessary costs to industry, which, of course, would ultimately be borne by consumers. This detrimental effect, combined with the potential for the Section to be construed as limiting the scope of assisting and facilitating to *only* the listed activities, and thus hindering effective law enforcement efforts, outweighed any benefits such intended guidance could likely provide. The Commission has eliminated examples from the prohibition, but still considers the acts or practices enumerated in former Section 310.3(b)(2) to be illustrative of those that provide substantial assistance to Rule violators when coupled with knowledge and a relationship to a specified Rule violation. Acts of substantial assistance that could meet the Section 310.3(b) liability standard include: providing lists of contacts to a seller or telemarketer that identify

persons over the age of 55, persons who have bad credit histories, or persons who have been victimized previously by deceptive telemarketing or direct sales; providing any certificate or coupon which may later be exchanged for travel-related services; providing any script, advertising, brochure, promotional material, or direct marketing piece used in telemarketing; or providing an appraisal or valuation of a good or service sold through telemarketing when such an appraisal or valuation has no reasonable basis in fact or cannot be substantiated at the time it is rendered.

3. *Credit Card Laundering.* The Commission received very few comments that offered changes or that were critical of Section 310.3(c), which pertains to credit card laundering. Comments that did address this Section suggested that agents, licensees, and independent contractors and subcontractors be included under the definition of "merchant."⁷⁰ Visa and MasterCard stated that they believed this Section to be "well designed to attack a critical link in telemarketing fraud," but proposed adding language that would not prohibit access to the credit card system if the credit card system permits such access through means other than a written merchant agreement.⁷¹

The Commission believes that the distinction between "launderers" and others who exploit the credit card system, and "merchants" and others who make legitimate use of such systems, rests on whether the operator of the system has given permission for such access. For example, some merchants have the permission of their credit card system operator to permit lessees to deposit their sales transactions through the merchant's account. On the other hand, the hallmark of prohibited laundering is providing access to a merchant account to an entity not *authorized* by the system operator to have such access. Based on the foregoing, the Commission does not believe it is wise to broaden the definition of "merchant." An underlying purpose of this Section is to delineate clearly, in accordance with legitimate industry standards, those persons who are deemed to properly have access to the credit card system. However, the comments of Visa and MasterCard point out a way that the provision can be modified to allow for situations where a credit card system expressly permits access to the applicable system, other than through a

⁶³ Several commenters and workshop participants provided information tending to refute the proposition that demand drafts are characteristic solely of deceptive telemarketers. See, e.g., NAPA; Autoscribe; Olan.

⁶⁴ See generally NCL at 8; USPS at 7-8.

⁶⁵ See, e.g., WFNNB at 2; MPA at 11-13; ATA at 6; DMA at 22-24; NRF at 29; Monex at 11-13.

⁶⁶ See generally PMAA; ADS; LCS; DMA; ISA.

⁶⁷ See e.g., Tr. at 372-73 (Monex); 382-85 (DMA).

⁶⁸ Under these cases, the knowledge requirement is well-established and can be fulfilled by showing either actual knowledge, reckless indifference to the truth or falsity of the representation, or an awareness of a high probability of fraud coupled with an intentional avoidance of the truth. E.g., *FTC v. American Standard Credit Systems, Inc.*, CV 93-2623 LGB (JRx) (C.D. Cal. Aug. 15, 1994); *FTC v. Amy Travel Serv.*, 875 F.2d 564, 573-74 (7th Cir.), cert. denied, 493 U.S. 954 (1989); *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1292 (D. Minn. 1985); *FTC v. International Diamond Corp.*, 1983-2 Trade Cas. (CCH)

65,725 at 69,707 (N.D. Cal. 1983). This knowledge standard has not imposed any unduly onerous problems of proof on the Commission in its Section 13(b) telemarketing fraud cases and has not impeded the Commission's ability to obtain restitution from individual defendants.

⁶⁹ See generally DMA; PMAA.

⁷⁰ E.g., DMA at 24; NRF at 30.

⁷¹ See MasterCard at 10-11.