

written merchant agreement. Because such a modification will give rise to no foreseeable problems of proof to law enforcement efforts, the Commission concludes that this modification is appropriate.⁷² The Commission therefore has determined that the modifications needed to Section 310.3(c) are to add language to the preamble to state that "except where expressly permitted by the applicable credit card system * * *" and to add similar language to the end of Section 310.3(c)(3).

Section 310.4 Abusive Telemarketing Acts or Practices

1. *Abusive Conduct Generally.* Section 310.4(a) of the initially proposed Rule set forth eight different prohibited abusive telemarketing acts or practices. The revised proposed Rule deletes four of those provisions, and amends the other four prohibited practices. Each of these practices will be discussed in turn.

(a) *Threats, intimidation, or the use of profane or obscene language.* The initially proposed Rule prohibited threats or intimidation in Section 310.4(a)(1). The Commission believes such acts are clearly abusive in telemarketing transactions, and this prohibition remains in the revised proposed Rule. Commenters noted that threats are a means of perpetrating a fraud on vulnerable victims, and that many older people can be particularly vulnerable to threats and intimidation.⁷³ Other commenters expressed the view that the terms "threats" and "intimidation" are vague and need to be defined.⁷⁴ The Commission does not believe further definition of these terms is necessary in the text of the Rule; as drafted, this Section clearly contemplates that all threats be covered, including those particularly stressed by NCL—threats of bodily injury and financial ruin and threats to ruin credit. It also prohibits intimidation—acts

which put undue pressure on a consumer or which call into question a person's intelligence, honesty, reliability, or concern for family. Repeated calls to an individual who has declined to accept an offer may also be an act of intimidation.⁷⁵

The Commission has also added under this Section a prohibition against the use of profane or obscene language. The legislative history of the Telemarketing Act indicates that the Commission should consider prohibiting such abusive practices, and should "draw upon its experience in enforcing standards established under the Fair Debt Collection Practices Act ["FDCPA"], 15 U.S.C. 1692, in defining these terms."⁷⁶ The FDCPA includes a specific prohibition on the use of profane or obscene language,⁷⁷ and the Commission believes such a prohibition is equally appropriate in this Rule.

(b) *Courier pickups.* The initially proposed Rule prohibited any seller or telemarketer from providing for or directing a courier to pick up payment from a customer.⁷⁸ Law enforcement and consumer representatives generally applauded this provision.⁷⁹ IA DOJ noted: "A critical component of a fraudulent telemarketing scheme is getting the victim's money before the victim has the opportunity to reconsider, or before a third party, such as a relative, banker, or law enforcement authority becomes involved."⁸⁰ In addition, NCL stated that over 45% of all telemarketing complaints it receives involve shipment by private courier, and almost all of these shipments contain personal checks. According to NCL, a personal check sent via a private courier is the single most popular method of removing money from the pockets of victims.⁸¹

On the other hand, many industry representatives opposed this provision.⁸² Commenters noted various ways this prohibition would harm legitimate businesses, including: prohibiting C.O.D. transactions;⁸³ preventing newspaper carriers from making door-to-door collections on their paper routes;⁸⁴ eliminating the

merchant coupon book industry;⁸⁵ and precluding cable operators and others from using couriers to pick up payments from customers who are in arrears and who wish to avoid disconnection of their service.⁸⁶

After reviewing these comments, the Commission agrees that a ban on the use of courier pickups of consumer payments is unworkable. There is nothing inherently deceptive or abusive about the use of couriers by legitimate business, and the comments show that many legitimate businesses use them. While fraudulent telemarketers often use couriers to obtain quickly the spoils of their deceit, such telemarketers engage in other acts or practices that clearly are deceptive or abusive, and that are prohibited by this Rule. Thus, the prohibition of courier use is unnecessary, and it has been deleted from the revised proposed Rule.

(c) *Credit repair services.* Section 310.4(a)(3) of the initially proposed Rule prohibited any seller or telemarketer from requesting or receiving payment of any fee or consideration for goods or services represented to improve a person's credit history, credit record, or credit rating until the contract for the services had expired and the promised results had been achieved.⁸⁷ A number of commenters strongly supported this prohibition as a necessary limitation on the telemarketing of deceptive credit repair services.⁸⁸ The Commission agrees, and is retaining this provision in the revised proposed Rule, with the following two amendments suggested by commenters.

First, NCL suggested, and the Commission agrees, that the prohibition on advance payments should extend to services that promise to remove derogatory information from a consumer's credit record, in addition to those services that simply promise to improve a person's credit history, record or rating.⁸⁹ Second, the revised proposed Rule will not permit, as documentation that the promised results have been achieved, records from the original furnisher or provider of the derogatory information to the consumer reporting agency. As noted by NYSCPB, the original furnisher of such information cannot control the actions of the consumer reporting agencies.⁹⁰

⁷² NCL requested in its comments pertaining to credit card laundering that the Commission consider protections relating to the use of "credit card checks" and "credit card cash advances." See NCL at 31. NCL expressed concern that credit card protections contemplated in Section 310.3(c) and the Fair Credit Billing Act ["FCBA"], 15 U.S.C. 1666, do not extend to those alternative credit methods. There is no indication in the legislative history or the Telemarketing Act that Congress intended to include under credit card laundering the alternative credit methods NCL describes. Moreover, the Commission does not have the authority under the Act to expand or affect the scope of the FCBA. The Commission believes, however, that transactions effected through the use of the alternative credit methods NCL described are adequately protected under the FCBA dispute procedures. *Id.*

⁷³ IA DOJ at 13; AARP at 14.

⁷⁴ ADC at 1; ARDA at 21.

⁷⁵ NCL at 32–33. *Accord*, USPS at 11.

⁷⁶ See, e.g., House Report at 8.

⁷⁷ Section 806(2) of the FDCPA, 15 U.S.C. 1692d(2).

⁷⁸ Initially proposed Rule Section 310.4(a)(2).

⁷⁹ See, e.g., NAAG at 23–24; USPS at 11–12; CFA at 3; AARP at 14–15.

⁸⁰ IA DOJ at 6.

⁸¹ NCL at 33–35.

⁸² See, e.g., Monex at 13–14; A-Mark at 10.

⁸³ DMA at 25; PMAA at 84; DMSI at 5; MRG at 4; UPS at 2.

⁸⁴ CFI at 1; CA at 3; Cox at 11; Gannet at 6; NAA at 15; Washington at 17.

⁸⁵ AWMi at 1; GGP at 2; GCM at 1; MGC at 1; MP at 1.

⁸⁶ Comcast at 5, n.5.

⁸⁷ Revised proposed Rule Section 310.4(a)(2).

⁸⁸ NAAG at 24; CFA at 3; USD at 4; NCL at 37; USPS at 12. ABA "commends" the Commission for this provision. ABA at 9.

⁸⁹ NCL at 38.

⁹⁰ NYSCPB at 8.