

competitiveness, and employment of small entities.

Subsequent to the receipt of public comments, it will be decided whether the preparation of a final regulatory flexibility analysis is warranted.

In light of the above, it is certified that the proposed amendments will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b) (1982). This notice serves as certification to that effect for the purposes of the Small Business Administration.

#### List of Subjects in 16 CFR Part 307

Health warnings, Smokeless tobacco, Trade practices.

Accordingly, it is proposed that part 307 of 16 CFR be amended as follows:

#### PART 307—REGULATIONS UNDER THE COMPREHENSIVE SMOKELESS TOBACCO HEALTH EDUCATION ACT OF 1986

1. The authority for part 307 continues to read as follows:

**Authority:** 15 U.S.C. 4401 *et seq.*

2. Section 307.12 is amended by revising paragraph (b) to read as follows:

#### § 307.12 Rotation, display, and dissemination of warning statements in smokeless tobacco advertising.

[b] Each manufacturer, packager, or importer of a smokeless tobacco product must submit a plan to the Commission or its designated representative that ensures that the three warning statements are rotated every 4 months in alternating sequence. There may be more than one system, however, that complies with the Act and these regulations. For example, a plan may require all brands to display the same warning during each 4-month period or require each brand to display a different warning during a given 4-month period. A plan shall describe the method of rotation and shall include a list of the designated warnings for each 4-month period during the first year for each brand. A plan shall describe the method that will be used to ensure the proper rotation in different advertising media in sufficient detail to ensure compliance with the Act and these regulations, although a number of different methods may satisfy these requirements. For example, a satisfactory plan for advertising in newspapers, magazines, or other periodicals could provide for rotation according to either the cover or closing date of the publication. A satisfactory plan for posters and placards, other than billboard advertising, could provide for rotation

according to either the scheduled or the actual appearance of the advertising. A satisfactory plan for point-of-sale and non-point-of-sale promotional materials each as leaflets, pamphlets, coupons, direct mail circulars, paperback book inserts, or non-print items, or for utilitarian objects, could provide for rotation according to the date the materials or objects are ordered by the smokeless tobacco manufacturer, or the date the objects or materials are scheduled to be disseminated, provided that the production of such materials or objects is carried out in a manner consistent with customary business practices.

\* \* \* \* \*

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

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#### 16 CFR Part 310

#### Telemarketing Sales Rule

**AGENCY:** Federal Trade Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** In this document, the Federal Trade Commission ("FTC" or "Commission") proposes to implement the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act" or "the Act"). Section 3 of the Act directs the FTC to prescribe rules, within 365 days of enactment of the Act, prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.

**DATES:** Written comments must be submitted on or before March 31, 1995. Due to the time constraints of this rulemaking proceeding, the Commission does not contemplate any extensions of this comment period or any additional periods for written comment or rebuttal comment.

Following the period for written comments, Commission staff plan to conduct a Public Workshop Conference to afford Commission staff and interested parties an opportunity to explore and discuss issues raised during the comment period. Notification of interest in representing an affected, interested party at the Public Workshop-Conference must be submitted on or before March 6, 1995. A list of affected interests appears in Section D of the Supplementary Information section.

The Public Workshop-Conference will be held in Chicago, Illinois on April 18 through 20, 1995, from 9 a.m. until 5 p.m. each day.

**ADDRESSES:** Five paper copies of each written comment should be submitted to the Office of the Secretary, Room 159, Federal Trade Commission, Washington, DC 20580. To encourage prompt and efficient review and dissemination of the comments to the public, all comments also should be submitted, if possible, in electronic form, on either a 5¼ or a 3½ inch computer disk, with a label on the disk stating the name of the commenter and the name and version of the word processing program used to create the document. (Programs based on DOS are preferred. Files from other operating systems should be submitted in ASCII text format to be accepted.) Individuals filing comments need not submit multiple copies or comments in electronic form. Submissions should be captioned: "Proposed Telemarketing Sales Rule," FTC File No. R411001.

Notification of interest in the Public Workshop-Conference should be submitted in writing to Carole Danielson, Division of Marketing Practices, Federal Trade Commission, Washington, D.C. 20580.

The Public Workshop-Conference will be held in Chicago, Illinois, at the Chicago Hilton Hotel, 720 South Michigan Avenue, Chicago, Illinois 60605.

**FOR FURTHER INFORMATION CONTACT:** David M. Torok, (202) 326-3140, or Judith M. Nixon, (202) 326-3173, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580.

#### SUPPLEMENTARY INFORMATION:

##### Section A. Background

On August 16, 1994, the President signed into law the Telemarketing Act, Public Law No. 103-297. In enacting the Telemarketing Act, Congress made the following findings, set forth in section 2 of the Act:<sup>1</sup>

(1) Telemarketing differs from other sales activities in that it can be carried out by sellers across State lines without direct contact with the consumer. Telemarketers also can be very mobile, easily moving from State to State.

(2) Interstate telemarketing fraud has become a problem of such magnitude that the resources of the Federal Trade Commission are not sufficient to ensure adequate consumer protection from such fraud.

(3) Consumers and others are estimated to lose \$40 billion a year in telemarketing fraud.

(4) Consumers are victimized by other forms of telemarketing deception and abuse.

<sup>1</sup> 15 U.S.C. 6101.

(5) Consequently, Congress should enact legislation that will offer consumers necessary protection from telemarketing deception and abuse.

Based on the above findings, Congress directed the Commission to issue a rule, within 365 days from the date of enactment of the Act, prohibiting deceptive and abusive telemarketing acts and practices.<sup>2</sup> The Act specifies that the rule shall contain a definition of deceptive telemarketing acts or practices.<sup>3</sup> According to the statute, this definition may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering.<sup>4</sup> The Act further specifies that, in order to prohibit other abusive acts or practices, the rule shall include:

- (1) A requirement prohibiting a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy;
- (2) Restrictions on the hours when unsolicited telephone calls can be made to consumers; and
- (3) A requirement that telemarketers promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services, and make any other disclosures the Commission deems appropriate, including the nature and price of the goods or services being sold.<sup>5</sup> The Act also directs the Commission to consider recordkeeping requirements.<sup>6</sup>

Enforcement actions for violations of the final rule will be brought by the Commission in the same manner as for other rules with respect to unfair or deceptive acts or practices under section 5 of the FTC Act.<sup>7</sup> In addition, Section 4 of the Telemarketing Act<sup>8</sup> authorizes the attorneys general of the States to enforce compliance with the final rule by instituting Federal court enforcement actions, after serving prior written notice upon the Commission when feasible. Moreover, Section 5 of the Telemarketing Act<sup>9</sup> authorizes actions, in Federal district court, by private persons adversely affected by any pattern or practice of telemarketing which violates the final rule, where the amount in controversy exceeds \$50,000

in actual damages for each such person. As with State actions, such private persons must give prior written notice to the Commission, when feasible.

Section B of this notice discusses the proposed rule that the Commission has drafted pursuant to the Telemarketing Act.

## Section B. Discussion of the Proposed Rule

### Section 310.1 Scope of the Regulations

Section 310.1 states that this part implements the Telemarketing Act, and shall be referred to as the "Telemarketing Sales Rule."

### Section 310.2 Definitions

Section 310.2 of the proposed rule defines the following terms: Acquirer; attorney general; business venture; cardholder; Commission; credit card; credit card sales draft; credit card system; customer; goods or services; investment opportunity; material; merchant; merchant agreement; person; premium; prize; prize promotion; seller; State; telemarketer; telemarketing; telephone solicitation; and verifiable retail sales price.

The definition of "telemarketing" sets the parameters of the proposed rule's coverage. It tracks the definition of "telemarketing" included in the Telemarketing Act, with certain additions noted below.<sup>10</sup> As set forth in the Act, telemarketing is defined as any plan, program, or campaign which is conducted to induce payment for goods or services by use of one or more telephones and which involves more than one interstate telephone call.<sup>11</sup> One addition to the definition in the proposed rule clarifies that telemarketing includes the use of a facsimile machine, computer modem, or any other telephonic medium.<sup>12</sup> Another addition to the definition explicitly states that telemarketing includes not just calls initiated by telemarketers, but also calls initiated by persons in response to any form of promotional messages used by or on

behalf of the seller, including postcards, brochures and advertisements.

The Telemarketing Act and the proposed rule exempt from the definition of telemarketing all solicitations of sales through the mailing of a catalog,<sup>13</sup> when the person making the solicitation does not call customers but only receives calls from customers in response to the catalog and only takes orders during those calls, without further solicitation. The proposed rule states that during such calls from customers, the person taking the order may provide further information to the customer about, or may try to sell, any other item included in the same catalog which prompted the customer's calls without losing the exemption from the definition of "telemarketing."

A number of terms are used in the proposed rule's prohibitions on credit card laundering. The term "acquirer" is defined, in § 310.2(a) of the proposed rule, to include any business organization, financial institution, or agent of such organization or institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for anything of value. The term "credit card" is defined expansively, in § 310.2(f), to include any instrument or device, however named, used by a cardholder to obtain money, goods, services, or anything else of value. § 310.2(g) defines a "credit card sales draft" as any record or evidence, including a writing or an electronic or magnetic transmission or record, of a credit card transaction. The term "credit card system" is defined, in § 310.2(h), as any method or procedure used to generate, transmit, or process for payment a credit card sales draft. For purposes of this rule, the term "merchant" is narrowly defined, in § 310.2(m), to include only those persons authorized under a written contract with an acquirer to honor or accept, transmit, or process credit cards in payment for goods or services. Finally, § 310.2(n) defines the term "merchant agreement" as the written contract between a merchant and an acquirer.

The proposed rule includes certain requirements for the telemarketing sale of business ventures and investment opportunities. The term "business venture" is defined, in § 310.2(c) of the

<sup>10</sup> See 15 U.S.C. 6106(4).

<sup>11</sup> The Act's definition of the term "telemarketing" states that the plan, program, or campaign must be conducted to induce the purchase of goods or services. The proposed rule states that the plan, program, or campaign must be conducted to induce payment for goods or services. This change is intended to make clear that the definition of telemarketing includes plans, programs, or campaigns conducted to induce rentals or leases, as well as certain donations.

<sup>12</sup> Since telemarketing includes the use of computer modems and other telephonic media, the proposed definition states that telemarketing involves not just telephone calls, but also telephone connections.

<sup>13</sup> The Telemarketing Act and the proposed rule require catalogs to include multiple pages of written descriptions or illustrations of the goods or services being offered for sale, to include a business address of the seller, and to be issued not less frequently than once a year.

<sup>2</sup> 15 U.S.C. 6102(b).

<sup>3</sup> 15 U.S.C. 6102(a)(2).

<sup>4</sup> *Id.*

<sup>5</sup> 15 U.S.C. 6102(a)(3).

<sup>6</sup> *Id.*

<sup>7</sup> 15 U.S.C. 45. The Telemarketing Act provides that the FTC rule shall be treated as a rule issued under section 18(a)(1)(B) of the FTC Act, 15 U.S.C. 57a(a)(1)(B).

<sup>8</sup> 15 U.S.C. 6103.

<sup>9</sup> 15 U.S.C. 6104.

proposed rule, to include any written or oral business arrangement, however named, including but not limited to franchises,<sup>14</sup> which consists of the payment of consideration for (1) the right or means to offer, sell, or distribute goods or services, and (2) the promise of more than nominal assistance in establishing, maintaining or operating a new business, or an existing business that is entering into a new line or type of business. The term "investment opportunity" is defined, in § 310.2(k), to include anything, tangible or intangible, except a business venture, that is offered, offered for sale, sold, or traded either for purposes of profit or income or based on express or implied representations about income, profit, or appreciation.<sup>15</sup> In addition, these two definitions state that any business arrangement in which persons acquire, or purportedly acquire, government-issued licenses, or interests in one or more businesses derived from the possession of such licenses, are considered to be an "investment opportunity," and not a "business venture."

The term "goods or services" is defined expansively, in § 310.2(j), to cover virtually any item for which payment can be induced over the telephone. A list of specific items is included in the definition for illustrative purposes only.<sup>16</sup>

The proposed definition for "material," in § 310.2(l), is taken from the Commission's deception

statement.<sup>17</sup> It states that material means likely to affect a consumer's choice of, or conduct regarding, goods or services.

The proposed rule defines "prize" and "premium" in a relatively parallel fashion. Section 310.2(q) states that a "prize" means anything offered, or purportedly offered, to a person at no cost and with no obligation to purchase goods or services and given, or purportedly given, by chance. A "premium," on the other hand, is defined in § 310.2(p) as anything offered or given, independent of chance, to customers as an incentive to purchase goods or services offered through telemarketing.

The proposed definition of "prize promotion," set forth in § 310.2(r), includes the traditional sweepstakes or other game of chance as well as any oral or written representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize. Thus, the definition of "prize promotion" covers not only legitimate contests or sweepstakes, but also fraudulent representations that a consumer has won a prize, when no such prize is to be distributed.

A "seller" is defined, in § 310.2(s) of the proposed rule, as any person who, in conjunction with telemarketing, provides or offers to provide goods or services in exchange for consideration or a donation. A "telemarketer," on the other hand, is defined in § 310.2(u) as any person who, in connection with telemarketing, initiates or receives a telephonic communication from a customer. Since many of the provisions in the proposed rule apply to both the seller and the telemarketer, these two definitions make clear that the proposed rule's obligations run not only to the person making or answering a telephone call or telephonic communication from a consumer, but also to the business providing the goods or services to be sold during that call.<sup>18</sup>

The definition of "telephone solicitation," in § 310.2(w) of the proposed rule, is intended to include only out-bound sales calls, i.e., telephone calls that are initiated by a telemarketer to a customer to induce payment for goods or services.

Finally, the definition of "verifiable retail sales price," in § 310.2(x), is based on the Commission's Guides Against Deceptive Pricing.<sup>19</sup> The term means the actual, bona fide price at which one or more retailers, in the area of the seller's principal place of business, has made a substantial number of sales. The seller must be able to document such a retail sales price.

### *Section 310.3 Deceptive Telemarketing Acts or Practices*

Section 310.3 of the proposed rule includes lists of specific, deceptive telemarketing acts or practices prohibited under the rule. It also sets forth prohibited acts or practices that assist and facilitate deceptive telemarketing. This Section ends with prohibitions on the practice of credit card laundering.

#### *1. Prohibited Deceptive Telemarketing Acts or Practices*

Section 310.3(a) of the proposed rule states that certain acts or practices, when conducted by any seller or telemarketer, are considered deceptive telemarketing acts or practices and violations of the rule. The first subsection prohibits the failure to disclose certain information before payment is requested for goods or services. The second subsection lists a series of prohibited misrepresentations covering all telemarketing transactions, while the third subsection lists prohibited misrepresentations in connection with the offer, offer for sale, or sale of any business venture. The final two subsections prohibit obtaining funds without proper authorization.

Section 310.3(a)(1) of the proposed rule states that it is a prohibited deceptive telemarketing practice for any seller or telemarketer to fail to disclose certain material information before payment is requested for goods or services offered.<sup>20</sup> These disclosures must be made in the same manner and form as the payment request. The information required to be disclosed is as follows: First, the total costs, terms and material restrictions, limitations, or conditions of receiving any goods or services; second, the quantity of any goods or services sold; and third, all material terms and conditions of the seller's refund, cancellation, exchange, or repurchase policies, including a

<sup>14</sup> The term "franchise" is defined in the FTC Franchise Rule, formally entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," at 16 CFR 436.2(a).

<sup>15</sup> The application of the proposed rule to investment opportunities is limited, to some extent, by sections 3(d) and (e) of the Telemarketing Act, 15 U.S.C. 6102(d) and (e), which exclude from rule coverage any of the following persons: A broker, dealer, transfer agent, municipal securities dealer, municipal securities broker, government securities broker, government securities dealer (as those terms are defined in section 3(a) of the Securities and Exchange Act of 1934, 15 U.S.C. 78c(a)), an investment adviser (as that term is defined in Section 202(a)(11) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-2(a)(11)), an investment company (as that term is defined in section 3(a) of the Investment Company Act of 1940, 15 U.S.C. 80a-3(a)), any individual associated with those persons, or any persons described in section 6(f)(1) of the Commodity Exchange Act, 7 U.S.C. 8, 9, 15, 13b, 9a.

<sup>16</sup> The term "goods or services" specifically includes any charitable service that is promoted in conjunction with any offer of a prize, chance to win a prize, or opportunity to purchase any other goods or services. Thus, plans, programs, or campaigns conducted to induce payment for such charitable services are the only charitable solicitations covered by the proposed rule. In addition, only charitable solicitations conducted by an entity "organized to carry on business for its own profit or that of its members" are within the jurisdiction of the Commission. See 15 U.S.C. 44.

<sup>17</sup> The Commission's Deception Statement, first set out in a letter dated October 14, 1983, to the Honorable John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, is attached as an appendix to Cliffdale Associates, 103 F.T.C. 110 (1984). See also Thompson Medical Co., 104 F.T.C. 648, 816 (1984).

<sup>18</sup> It is possible for a person to be both a seller and a telemarketer in the same transaction, if that person both provides the goods or services in exchange for consideration or a donation and engages in the telephone calls with consumers.

<sup>19</sup> 16 CFR Part 233.

<sup>20</sup> The proposed rule permits sellers or telemarketers to discuss the price of goods or services with potential customers before disclosing the required information, but they may not ask that payment be made until after the disclosures are made.

statement that no such policies exist, if that is the case.

Section 310.3(a)(2) sets forth 24 different misrepresentations prohibited in connection with telemarketing. The first five subsections go to the heart of any telemarketing sales transaction, prohibiting misrepresentations of the total costs, terms or material restrictions, limitations, or conditions<sup>21</sup> of receiving any goods or services. These subsections also prohibit misrepresentations of the quantity of any goods or services, or any material aspect of the performance, efficacy, or central characteristics of any goods or services. In addition, sellers and telemarketers are prohibited from misrepresenting the duration of any offer made, as well as the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies.

Sections 310.3(a)(2) (vi) through (viii) of the proposed rule prohibit misrepresentations about prizes. It is a violation of the proposed rule to misrepresent that any person has been selected to receive a prize, i.e. an item offered, or purportedly offered, at no cost and with no other obligation to make a purchase and given, or purportedly given, by chance. Therefore, a telemarketer could not claim that a consumer has won a prize, when in fact the consumer must pay shipping and handling charges to receive the prize. In addition, a seller or telemarketer is prohibited from misrepresenting that a premium is a prize. Thus, for example, a telemarketer could not claim that a consumer has "won" an item, when in fact many consumers will be given that item as an incentive to purchase goods or services, without any element of chance involved in selecting the "winners." Finally, a seller or telemarketer is prohibited from misrepresenting the odds of winning any prize.

The next three prohibited practices, in §§ 310.3(a)(2) (ix) through (xi) of the proposed rule, deal with misrepresentations about compliance with various laws or about an affiliation with law enforcement authorities. Any seller or telemarketer is prohibited from misrepresenting its compliance with any Federal, State, or local law, statute, regulation, or ordinance, or from falsely claiming that such compliance constitutes an endorsement or approval,

by the government agency, of the seller's or telemarketer's business or conduct. Thus, a telemarketer cannot falsely claim that it is registered with a State, or, even if registered, that such registration indicates that the State had approved the telemarketer's method of operation. In addition, it is also a violation of the proposed rule to misrepresent any affiliation, association, connection, or relationship with law enforcement, a public safety organization, or other Federal, State, or local government agency.

Under § 310.3(a)(2)(xii) of the proposed rule, any seller or telemarketer is prohibited from misrepresenting the purpose for which the seller or telemarketer will use information relating to a person's checking, savings, share, or similar account number, credit card account number, or social security number. This prohibits, for example, a telemarketer from asking for a consumer's credit card number "to verify" the consumer's identity, when in fact the telemarketer plans to charge a fee to that account.

Sections 310.3(a)(2)(xiii) and (xiv) of the proposed rule prohibit misrepresentations particularly common to certain charitable solicitations.<sup>22</sup> Any seller or telemarketer is prohibited from misrepresenting the seller's or telemarketer's non-profit, tax-exempt, or charitable status, purpose, affiliation, or identity. Also prohibited are misrepresentations that a person is eligible or likely to receive a tax deduction, loan, or other benefit if the person pays money to the seller or telemarketer.

It is a prohibited deceptive telemarketing act or practice, under § 310.3(a)(2)(xv) of the proposed rule, for any seller or telemarketer to misrepresent the nature, terms, or existence of any prior affiliation, association, connection, or relationship with any person. Under § 310.3(a)(2)(xvi), neither a seller nor a telemarketer may misrepresent the nature, terms, or existence of any prior purchase or agreement to purchase by any person. These sections prohibit, for example, claims that a telemarketer is calling to confirm a prior order, when no such order exists, or claims that a telemarketer is calling all of its customers to ask if they would like to purchase additional products, when in fact the person called was not a prior customer of that telemarketer.

Sections 310.3(a)(2)(xvii) through (xx) of the proposed rule prohibit misrepresentations concerning investment opportunities. Any seller or telemarketer is prohibited from misrepresenting key attributes of any investment opportunity, such as the level of risk, liquidity, markup over acquisition costs, past performance, earnings potential, or market value. Any seller or telemarketer is also prohibited from misrepresenting the likelihood that the market value for an investment opportunity will either increase or decrease. In addition, a seller or telemarketer cannot misrepresent the seller's success in assisting persons to liquidate goods or services they purchased from the seller, or the profit derived from such liquidation. Thus, for example, false claims about an ability to resell an investment opportunity for a profit are prohibited.

Sections 310.3(a)(2)(xxi) and (xxii) of the proposed rule address the problem of deceptive credit repair or credit opportunity telemarketing claims. Section 310.3(a)(2)(xxi) prohibits misrepresentations that certain goods or services can or are likely to improve a person's credit history, credit record, or credit rating, or that certain goods or services can result in a person obtaining credit. Section 310.3(a)(2)(xxii) prohibits misrepresentations about the eligibility or likelihood that a person, regardless of that person's credit history, will obtain a loan or other credit-related service.

Section 310.3(a)(2)(xxiii) of the proposed rule prohibits misrepresentations that a seller or telemarketer can recover or otherwise effect or assist in the return of money or any other item of value to a person. This would prohibit, for example, telemarketers from falsely claiming that for a fee, paid in advance, they can obtain a refund for a consumer who has been victimized in the past by a telemarketing scam.

Finally, § 310.3(a)(2)(xxiv) of the proposed rule prohibits the misrepresentation of any other information required to be disclosed under this rule. For example, a telemarketer cannot misrepresent the verifiable retail sales price of a prize or premium, or misrepresent that the sales price of a prize or premium is less than \$20.00, when that information is required to be disclosed under §§ 310.4(d)(3) and (4) of the proposed rule.

The next section of the proposed rule, § 310.3(a)(3), prohibits any seller or telemarketer from misrepresenting important information in connection with the offer, offer for sale, or sale of any business venture. This information

<sup>21</sup> Given the definition of the term "material," in Section 310.2(l) of the proposed rule, any seller or telemarketer would be prohibited from misrepresenting any restriction, limitation, or condition that would be likely to affect a consumer's choice of, or conduct regarding, goods or services.

<sup>22</sup> Based on the definition of "goods or services," in § 310.2(j) of the proposed rule, only charitable services promoted in conjunction with an offer of a prize, chance to win a prize, or opportunity to purchase any goods or services would be covered by these provisions.

includes the level of earnings for the business venture, the extent or nature of the market for the goods or services to be sold, and the nature or availability of any territory. Thus, a seller of business ventures could not falsely inflate the sales levels of previous owners, or incorrectly claim that a purchaser would obtain exclusive rights to market goods or services in a certain territory. The proposed rule also prohibits misrepresentations about (1) the existence, availability, or provision of retail outlets or accounts; (2) the locations or sites for vending machines, rack displays, or any other sales display; or (3) the nature or availability of any services offered to secure any such outlets, accounts, locations, sites or displays. Also prohibited are misrepresentations that any person owns or operates a business venture purchased from the seller, or that a person can give an accurate, independent description of his or her experience as an owner or operator of such a business venture. These provisions prohibit, for example, false claims that a shill—a phony reference that is paid to tout a business opportunity he does not own or operate—has actually purchased a business venture, or false claims about any person's experience as a business venture owner.

Under § 310.3(a)(4) of the proposed rule, it is a prohibited deceptive telemarketing act or practice for a seller or telemarketer to obtain or submit for payment from a person's checking, savings, share, or similar account, a check, draft, or other form of negotiable paper without that person's express written authorization. For example, a telemarketer cannot submit an unsigned draft on a consumer's bank account without that consumer's prior written authorization. Similarly, § 310.3(a)(5) of the proposed rule prohibits the collection of any amount of money from a person through any means, unless such amount is expressly authorized by the person. This section is intended to cover other forms of payment, in addition to unsigned drafts, and to prohibit misrepresentations of the amount collected. For example, if a consumer pays for goods or services by credit card, no amount may be charged to the consumer's account unless the consumer authorizes that charge. This authorization does not have to be in writing, however.

## 2. Assisting and Facilitating

Section 310.3(b)(1) of the proposed rule sets forth a general prohibition against assisting or facilitating deceptive telemarketing acts or practices. This

section states that it is a deceptive telemarketing act or practice, and a violation of the rule, for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or should know that the seller or telemarketer is engaged in any act or practice that violates the rule.

Section 310.3(b)(2) of the proposed rule lists five specific types of conduct that provide substantial assistance or support to telemarketing. This list is not meant to limit, in any way, the general scope of § 310.3(b)(1) concerning assisting or facilitating deceptive telemarketing acts or practices.<sup>23</sup> Assistors who engage in these activities will violate the rule if they know, or should know, that the person they are assisting is engaged in an act or practice that violates the rule.

The five types of assisting and facilitating activities listed in the proposed rule are as follows: First, providing lists of customer contacts to a seller or telemarketer (e.g., serving as a list broker); second, receiving consideration in exchange for providing a testimonial, endorsement, certification, appraisal, or financing, or for serving as a reference, with respect to any business venture or investment opportunity (e.g., acting as a paid shill or an art appraiser, or providing financing for a business opportunity); third, securing retail outlets or accounts for the sale of goods or services, or locations or sites for vending machines, rack displays, or any other sales displays, used in connection with any business venture (e.g., operating as a locating company); fourth, furnishing any certificate or coupon which may later be exchanged for goods or services (e.g., producing generic vacation certificates used in prize promotion scams); and fifth, providing any script, advertising, brochure, promotional material, or direct marketing piece to be used in telemarketing.

## 3. Credit Card Laundering

Section 310.3(c) of the proposed rule prohibits credit card laundering, or the practice of depositing into the credit card system a sales draft that is not the result of a credit card transaction between the cardholder and a merchant.<sup>24</sup> For example, credit card laundering involves a merchant with access to the credit card system

deceiving an acquirer by submitting for payment credit card transactions that are not the merchant's own. This deception is crucial for telemarketers engaged in fraud, since such telemarketers find it difficult, if not impossible, to obtain merchant accounts to process their credit card transactions. Credit card laundering facilitates deceptive telemarketing acts or practices by providing fraudulent telemarketers with ready access to cash through the credit card system.

This Section of the proposed rule is divided into three parts. Section 310.3(c)(1) of the proposed rule deals with merchants who engage in credit card laundering. Under this section, it is a deceptive telemarketing act or practice, and a violation of the rule, for a merchant to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant. It is also a deceptive act or practice for a merchant to cause another person to present to or deposit into the credit card system for payment such a credit card sales draft.

Section 310.3(c)(2) of the proposed rule deals with telemarketers, brokers, or others who employ merchants to engage in credit card laundering. This section states that it is a deceptive telemarketing act or practice, and a violation of the proposed rule, for any person to employ, solicit, or otherwise cause a merchant or an employee, representative, or agent of a merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant.

Finally, § 310.3(c)(3) prohibits joint ventures or other business relationships between a merchant and a telemarketer for the purpose of engaging in credit card laundering. Specifically, this section prohibits any person from obtaining access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement.

## Section 310.4 Abusive Telemarketing Acts or Practices

Section 310.4 of the proposed rule begins with a list of specific abusive conduct that is prohibited. This section also prohibits repeated telemarketing calls and calls to persons who have stated that they do not wish to receive such calls. In addition, this section sets

<sup>23</sup> Thus, practices not included on this list could still be found to provide substantial assistance or support to telemarketing.

<sup>24</sup> As defined in § 310.2(m), a merchant is the person who is under a contractual agreement with an acquirer to honor or accept, transmit, or process credit cards in payment for goods or services.

restrictions on the times when telemarketers may make calls, and includes oral and written disclosures that must be made. This Section of the proposed rule ends with a prohibition on the sale or distribution of lists of customer contacts by persons found to have violated certain provisions of this rule.

### 1. Abusive Conduct Generally

Section 310.4(a) of the proposed rule sets forth eight different abusive telemarketing acts or practices that are violations of the rule. The first such practice is the use of threats or intimidation in connection with telemarketing. The second prohibited practice is providing for or directing a courier to pick up a payment from a customer. This prohibition is intended to address a prevalent practice used by fraudulent telemarketers of sending an overnight courier to a consumer's home to pick up cash or a check shortly after a successful sales pitch. In this manner, the telemarketer obtains payment from the consumer before the consumer has adequate time to think about the transaction or obtain information about the telemarketer. The proposed rule would prohibit this practice.

Section 310.4(a)(3) of the proposed rule restricts the telemarketing of credit repair services. This section prohibits 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 has expired and the promised results have been achieved. Specifically, two events must occur before payment can be requested or received for these services: first, either the term of the contract or the time frame in which the seller has represented the goods or services will be provided has expired; and second, the seller has provided the purchaser with documentation showing that the promised results have been achieved. This documentation may be either (1) from the original furnisher or provider of the information to the consumer reporting agency, confirming that the promised results have been achieved; or (2) in the form of a consumer report from the consumer reporting agency demonstrating that the promised results have been achieved. Such a report must have been issued more than six months after the results were achieved.<sup>25</sup>

<sup>25</sup> The proposed rule makes clear that nothing in the rule alters the requirement in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose.

Recovery room scams are the focus of § 310.4(a)(4). In these operations, a telemarketer typically calls a consumer who has lost money in a previous scam, promising that, for a fee paid up front, the telemarketer can recover the money the consumer previously lost. After the consumer pays the requested fee, the promised services are not delivered. In fact, the consumer may never hear from the telemarketer again. This Section of the proposed rule prohibits any seller or telemarketer from requesting or receiving payment of any fee or consideration for goods or services represented to recover or otherwise effect or assist in the return of money or any other item of value to a person until three days after such money or other item is delivered to that person. The proposed rule states that this provision does not apply to goods or services provided to a person by a licensed attorney or licensed private investigator pursuant to a written agreement with that person.

Section 310.4(a)(5) of the proposed rule is intended to limit advance fee loan scams and similar practices, in which telemarketers guarantee that they will obtain a loan or other credit-related service for a consumer, if the consumer pays them a fee in advance. As with recovery room scams, after the consumer pays the fee, the promised services typically are not provided. Under this section of the proposed rule, any seller or telemarketer is prohibited from requesting or receiving payment of any fee or consideration in advance of obtaining a loan or any credit service when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or credit service for a person.

Prize promotions conducted through telemarketing are the subject of § 310.4(a)(6). Any seller or telemarketer conducting such promotions must distribute all prizes or purported prizes offered within 18 months of the initial offer to any person.

Section 310.4(a)(7) of the proposed rule addresses the problem of reloading, the practice of offering to sell additional goods or services to a person who previously has made a purchase from that seller. In deceptive telemarketing scams, consumers may be victimized numerous times by reloading that occurs prior to delivery of the first items sold, before realizing they have been deceived. This serial deception often occurs because consumers have not seen the goods or services already purchased, and therefore do not know that they were deceived in the previous transaction. The proposed rule prohibits

any seller or telemarketer from offering or selling goods or services through a telephone solicitation to a person who previously has paid the same seller for goods or services, until all terms and conditions of the initial sales transaction have been fulfilled.<sup>26</sup> The proposed rule makes clear that all prizes or premiums offered in conjunction with the initial transaction must also be distributed before a second offer or sale can be made.

The final abusive telemarketing act or practice prohibited by the proposed rule concerns the use of shells. Section 310.4(a)(8) of the proposed rule prohibits any seller or telemarketer from identifying a person as a reference for a business venture unless the following three criteria are satisfied: (1) Such person has actually purchased the business venture; (2) such person has operated the business venture for at least six months or the seller or telemarketer has disclosed the length of time the reference has operated the business venture; and (3) such person does not receive consideration for any statements made to prospective purchasers.

### 2. Pattern of Calls

Section 310.4(b) of the proposed rule deals with repeated telemarketing calls, and calls to persons who have indicated an unwillingness to receive such calls. This section prohibits a telemarketer from engaging in such calls, or a seller from causing a telemarketer to engage in such calls.<sup>27</sup> Specifically, this Section states that it is an abusive act or practice and a violation of the rule to call a person's residence to offer, offer for sale, or sell, on behalf of the same seller, the same or similar goods or services more than once within any three-month period. This prohibition does not apply if the person gives prior consent to more frequent calls,<sup>28</sup> or if the person is not reached during an earlier attempted call. It also does not apply to verification calls—those calls made solely to verify a previous telephone sale.

The proposed rule also prohibits calls to a person's residence when that person previously has stated that he or she does not wish to receive telephone solicitations made by or on behalf of the

<sup>26</sup> By limiting this prohibition to offering or selling goods or services through telephone solicitations, this Section does not prevent consumers from calling telemarketers to make an additional purchase before the first transaction is complete.

<sup>27</sup> A seller may cause a telemarketer to engage in such calls by providing the telemarketer with a customer contact list that includes customers that should not be called.

<sup>28</sup> The person may give prior consent either orally or in writing.

seller whose goods or services are being offered.

Sellers and telemarketers are given a limited safe harbor against liability for violating these provisions. Section 310.4(b)(2) of the proposed rule states that a seller or telemarketer will not be liable for such violations once in any calendar year per person called if the following four requirements are met: (1) It has established and implemented written procedures to comply with §§ 310.4(b)(1)(i) and (ii); (2) it has trained its personnel in those procedures; (3) the seller, or the telemarketer acting on behalf of the seller, has maintained and recorded lists of persons who may not be contacted, in compliance with §§ 310.4(b)(1)(i) and (ii); and (4) any subsequent call is the result of administrative error.

### 3. Calling Time Restrictions

Under § 310.4(c) of the proposed rule, any telemarketer is prohibited from engaging in telephone solicitations<sup>29</sup> to a person's residence at any time other than between 8 a.m. and 9 p.m. local time at the called person's location. This prohibition does not apply if the person called gives his or her prior consent to receive a call at a different time.<sup>30</sup>

### 4. Required Oral Disclosures

Section 310.4(d) of the proposed rule sets forth certain oral disclosures that must be made in telemarketing.<sup>31</sup> The preamble to this section states that it is an abusive telemarketing act or practice, and a violation of the rule, for a telemarketer to fail to make any of these required oral disclosures.

All telephone solicitations must begin by disclosing key information to the person called. This information includes the caller's true first and last name, the seller's name, and that the purpose of the call is to sell goods or services. The proposed rule does not require that the telemarketer's name be disclosed, if it is different from the seller's. In addition, the proposed rule does not set forth the exact language that must be used to convey the message that the purpose of the call is to sell goods or services. The choice of language is left to the telemarketer.

If the telephone solicitation includes a charitable solicitation, slightly different and additional information must be disclosed at the beginning of the call. Not only must the caller's true first and last name and the name of the seller or charity be disclosed, but the telemarketer's name also must be disclosed in these calls. In addition, the telemarketer's status as a paid professional fundraiser must be disclosed, as well as the fact that the purpose of the call is to solicit charitable donations. If other goods or services are offered for sale during the call, the caller must disclose that the purpose of the call is also to sell goods or services.

Section 310.4(d)(2) of the proposed rule states that if a caller verifies a telemarketing sale, either during the call containing the original sales presentation or in a separate call, the caller verifying the sale must repeat all of the disclosures required under § 310.3(a)(1).<sup>32</sup> In this fashion, consumers will hear all of the important terms and conditions of the sale at the time they are verifying that purchase.

Section 310.4(d)(3) of the proposed rule requires three additional oral disclosures for any telemarketing which includes a prize promotion. The first disclosure is that no purchase or payment is necessary to win.<sup>33</sup> Second, the caller must disclose the verifiable retail sales price of each prize offered, or a statement that the retail sales price of the prize offered is less than \$20.00.<sup>34</sup> The third required disclosure is the odds of winning each prize offered. A true statement that the odds of winning cannot be determined in advance, or that the odds of winning are determined by the number of entrants, would satisfy this requirement.

Under § 310.4(d)(4) of the proposed rule, any telemarketing which includes an offer of a premium must make the additional disclosure of the verifiable retail sales price of such premium or comparable item, or a statement that the retail sales price of the premium is less than \$20.00.

### 5. Written Disclosures/ Acknowledgements

Section 310.4(e) of the proposed rule states that it is an abusive telemarketing act or practice for a seller or telemarketer that conducts a prize promotion or offers for sale any investment opportunity to request or accept any payment from a person without first providing the person with a written disclosure, in duplicate, and receiving from the person a written acknowledgement that the person has read the disclosure. The information required to be disclosed must be printed in not less than 10-point type (unless otherwise noted), in a color or shade that readily contrasts with the background of the notice. The information in the investment opportunity disclosure must be segregated from all other information that may be included in the document, while the information in the prize promotion disclosure must be on one page.

Both disclosures must be sent in an envelope that contains no other enclosures except for a return envelope, if the seller or telemarketer wishes to include such an envelope. The envelope for the prize promotion disclosure may not contain any writing representing that the person to whom the envelope is addressed has been selected or may be eligible to receive a prize.

For prize promotions, the following information is required: (1) The seller's legal name and telephone number, and the complete street address of the seller's principal place of business; (2) if the seller has been in operation under any other name(s), each such name and the length of time the seller operated under each name; (3) the verifiable retail sales price of each prize offered, or a statement that the retail sales price of the prize offered is less than \$20.00; (4) the odds of winning each prize offered and the number of persons who will receive each prize; (5) the total amount and description of any shipping or handling fees or any other charges that must be paid to receive or use a prize; (6) a complete description of any restrictions, conditions, or limitations on eligibility to receive or use a prize, including all steps a person must take to receive the most valuable prize offered; (7) the statement: "No purchase or payment is necessary to win," with a description of the no-purchase entry method; (8) a statement that a list of winners is available and the address to which a person may write to obtain such a list; (9) a statement that it is a violation of this rule for the seller to accept payment in any form unless the

<sup>29</sup> Based on the definition of "telephone solicitation" in § 310.2(w) of the proposed rule, these calling time restrictions apply only to outbound telemarketing calls.

<sup>30</sup> As with the pattern of calls requirement in § 310.4(b)(1), the person may give prior consent either orally or in writing.

<sup>31</sup> The disclosures required by this section are in addition to the disclosures required under § 310.3(a)(1) of the proposed rule, which must be made before any payment is requested for goods or services.

<sup>32</sup> These disclosures include the total costs, terms, and material restrictions, limitations, or conditions of receiving any goods or services, the quantity of any goods or services, and all material terms and conditions of the seller's refund, cancellation, exchange, or repurchase policies.

<sup>33</sup> If a purchase or payment were required in a prize promotion that by definition involves a game of chance, that promotion would be an illegal lottery. See 18 U.S.C. 1301.

<sup>34</sup> Misrepresenting the retail sales price would be a violation of § 310.3(a)(2)(xxiv) of the proposed rule because such information is required to be disclosed under the rule.



seller has received from the person a written disclosure acknowledgement; and (10) the statement: "I have read and understand this disclosure." This final statement must be in at least 12-point bold face type, immediately preceding a signature block.

For investment opportunities, the following information must be included in the written disclosure: (1) The seller's legal name and telephone number, and the complete street address of the seller's principal place of business; (2) if the seller has been in operation under any other name(s), each such name and the length of time the seller operated under that name; (3) the complete cost to make the investment and a detailed list of all present charges and any anticipated future charges; (4) a description of all known risks associated with the investment opportunity, including the possibility that additional payments might be required for a person purchasing the investment opportunity to retain that person's interest in the investment opportunity, to realize the projected or stated returns of the investment opportunity, to prevent total loss of the investment opportunity, or for any other reason; (5) the length of time the seller has been in business and has offered the particular investment opportunity; (6) a statement disclosing whether or not the seller is licensed and, if so, with whom, the type of license, and the length of time the seller has held such license; (7) a statement that it is a violation of this rule for the seller to effect an investment transaction unless the seller has received from the person a written disclosure acknowledgement; and (8) the statement: "I have read and understand this disclosure." This final statement must be in at least 12-point bold face type, immediately preceding a signature block.

Additional written disclosures, provided in duplicate, are required for certain types of investment opportunities. If a seller or telemarketer offers for sale any investment opportunity involving tangible assets, § 310.4(e)(2)(ii) of the proposed rule requires the following additional information to be included in the written investment disclosure: (1) The percentage markup that the seller places on the item above its own cost in acquiring the item; and (2) an estimate of the value that persons would be likely to receive if they were to liquidate the asset through a market sale immediately following the purchase. The proposed rule makes clear that all such estimates must be substantiated by competent and reliable evidence.

If sellers or telemarketers offer for sale any investment opportunity involving tangible assets sold on credit or leverage, they must include in the written disclosure all of the information set forth in §§ 310.4(e)(2)(i) and (ii) of the proposed rule, as well as the following: (1) The percentage of a person's down payment that would be devoted to fees and costs by the end of the first six months after the investment is made; (2) the percentage of a person's down payment that would be devoted to fees and costs by the end of the first year after the investment is made; and (3) a statement that all such investment opportunities are extremely risky.

Finally, if a seller or telemarketer offers for sale any investment opportunity involving the acquisition of government-issued licenses or interests in businesses derived from the possession of such licenses, the following additional information must be included in the written disclosure set forth in § 310.4(e)(2)(i) of the proposed rule: (1) All material terms and limitations of any government-issued license(s) that serve as the basis for the investment opportunity, including whether and to whom the license or licenses have been issued; (2) the percentage of the person's payment that will be used to acquire any applicable license(s) from the licensee(s) or from any person or entity not affiliated in any way with the seller; and (3) the percentage of the person's payment that will be used to capitalize any business derived from such license(s).

#### 6. Distribution of Lists

The final abusive practice set forth in § 310.4 of the proposed rule involves the distribution of lists of customer contacts. Section 310.4(f) states that it is an abusive telemarketing act or practice, and a violation of the rule, for any person, subject to any federal court order resolving a case in which the complaint alleged a violation of § 310.3, 310.4(a), or 310.4(e) of this rule,<sup>35</sup> and the court did not dismiss or strike all such allegations from the case, to sell, rent, publish, or distribute any list of customer contacts from that person. In other words, any such person will be prohibited from circulating its customer contact lists in any fashion.

<sup>35</sup> The enumerated sections cover all of the prohibited deceptive telemarketing acts or practices, the eight general abusive telemarketing acts or practices, and the written disclosures and acknowledgements required for prize promotions and investment opportunities.

#### Section 310.5 Recordkeeping Requirements

Section 310.5 of the proposed rule requires any seller or telemarketer to keep, for 24 months from the date the record is produced, certain records relating to its telemarketing activities. Failure to keep those records shall be considered a violation of the rule. The seller and its telemarketer are not required to keep duplicative records, if they have entered into a written agreement allocating responsibility for the recordkeeping requirements of the proposed rule. The terms of any such agreement shall govern, unless those terms are unclear as to whom must maintain any required records. In that case, the responsibility for recordkeeping shall fall on the seller.

Section 310.5(c) of the proposed rule sets forth the parties responsible for maintaining records at the end of, or after a change in ownership of, the seller's or telemarketer's business. In the event of dissolution or termination of such business, the principal of the seller or telemarketer is required to maintain these records. On the other hand, in the event of any sale, assignment, succession, or other change in ownership of the seller's or telemarketer's business, the successor business is required to maintain the records.

#### Section 310.6 Exemptions

Certain acts or practices are exempt from the proposed rule. The first exemption, set forth in § 301.6(a), is for incidental telemarketing sales—that is, sales by any person who engages in fewer than ten sales each year through the use of the telephone. Second, telephonic contacts between businesses also are exempt, except for such contacts that involve the sale of office or cleaning supplies, or the inducement of payment for any charitable service promoted in conjunction with (1) an offer of a prize, (2) a chance to win a prize, or (3) the opportunity to purchase any goods or services. Finally, on § 310.6(c) of the proposed rule exempts any telephonic contact made solely by a person, when there has been no initial sales contact directed to that particular person, by telephone or otherwise, from the seller or telemarketer. However, this exemption does not apply to calls regarding employment services where the seller or telemarketer requests or receives payment prior to providing the promised services, business ventures, investment opportunities, prize promotions, or credit-related programs.

Given the definition of "telemarketing" in § 310.2(v) and the



exemptions set forth in this section, the proposed rule covers all outbound telephone calls intended to induce payment for goods or services, except for calls made by a person who engages in fewer than ten telephone sales each year, or for telephonic contacts made from one business to another that do not involve the sale of office or cleaning supplies or certain charitable solicitations. The only inbound telemarketing calls covered are those received from a person who is responding to an initial communication, other than a catalog, from the seller or telemarketer that was directed to that particular person. In addition, all inbound telemarketing calls related to business ventures, investment opportunities, prize promotions, or credit-related programs are covered.

#### *Section 310.7 Actions by States and Private Persons*

The Telemarketing Act permits certain State officials and private persons to bring civil actions in an appropriate Federal district court for violations of this rule.<sup>36</sup> Section 310.7 of the proposed rule sets forth the notice such parties must provide to the Commission concerning those actions. Such parties must serve written notice of its action on the Commission, if feasible, prior to initiating an action under this rule. The notice must include a copy of the complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the State official or private person must serve the Commission with the required notice immediately upon instituting its action.

#### *Section 310.8 Federal Preemption*

Section 310.8 of the proposed rule states that nothing in the rule shall be construed to preempt any State law that is not in direct conflict with any provision of the rule. Thus, State statutes concerning telemarketing that contain prohibitions or requirements that are not imposed by this rule would remain in effect, as long as those statutes do not conflict with this rule.

#### *Section 310.9 Severability*

Section 310.9 of the proposed rule sets forth the Commission's intent that the provisions of this rule be separate and severable from one another. Thus, if any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.

#### **Section C. Invitation to Comment**

Before adopting this proposed rule as final, consideration will be given to any

written comments submitted to the Secretary of the Commission on or before March 31, 1995. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and Commission regulations, on normal business days between the hours of 8:30 a.m. and 5 p.m. at the Public Reference Section, Room 130, Federal Trade Commission, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580.

#### **Section D. Public Workshop-Conference**

The FTC staff will conduct a Public Workshop-Conference to discuss written comments received in response to the Notice of Proposed Rulemaking. The purpose of the conference is to afford Commission staff and interested parties a further opportunity to openly discuss and explore issues raised in the rulemaking proceeding, and, in particular, to examine publicly any areas of significant controversy or divergent opinions that are raised in the written comments. The conference is not intended to achieve a consensus opinion among participants or between participants and Commission staff with respect to any issue raised in the rulemaking proceeding. Commission staff will consider the views and suggestions made during the conference, in conjunction with the written comments, in formulating its final recommendation to the Commission concerning the proposed rule.

Commission staff will select a limited number of parties, from among those who submit written comments, to represent the significant interests affected by the proposed regulations. These parties will participate in an open discussion of the issues. It is contemplated that the selected parties might ask and answer questions based on their respective comments.

In addition, the conference will be open to the general public. Members of the general public who attend the conference may have an opportunity to make a brief oral statement presenting their views on issues raised in the rulemaking proceeding. Oral statements of views by members of the general public will be limited to a few minutes in length. The time allotted for these statements will be determined on the basis of the time allotted for discussion of the issues by the selected parties, as well as by the number of persons who wish to make statements.

Written submissions of views, or any other written or visual materials, will not be accepted during the conference. The discussion will be transcribed and

the transcription placed on the public record.

To the extent possible, Commission staff will select parties to represent the following affected interests: Sellers; telemarketers; list providers; representatives of the credit card system; consumers; Federal, State and local law enforcement and regulatory authorities; and any other interests that Commission staff may identify and deem appropriate for representation.

Parties to represent the above-referenced interests will be selected on the basis of the following criteria:

1. The party submits a written comment during the 45-day comment period.

2. The party notifies Commission staff of its interest and authorization to represent an affected interest within 20 days of publication of the Notice of Proposed Rulemaking.

3. The party's participation would promote a balance of interests being represented at the conference.

4. The party's participation would promote the consideration and discussion of a variety of issues raised in the rulemaking proceeding.

5. The party has expertise in activities affected by the proposed regulations.

6. The party adequately reflects the views of the affected interest(s) which it purports to represent, not simply a single entity or firm within that interest.

7. The number of parties selected will not be so large as to inhibit effective discussion among them.

A neutral third-party facilitator will be retained for the conference. It will be held over the course of three consecutive days, on April 18-20, 1995. Parties interested in participating and authorized to represent an affected interest at the conference must notify Commission staff by March 6, 1995. Prior to the conference, parties selected to represent an affected interest will be provided with computer disks containing copies of the comments received in response to this notice.

#### **Section E. Communications by Outside Parties to Commissioners or Their Advisors**

Pursuant to Commission Rule 1.26(b)(5), communications with respect to the merits of this proceeding from any outside party to any Commissioner or Commissioner advisor during the course of this rulemaking shall be subject to the following treatment. Written communications, including written communications from members of Congress, shall be forwarded promptly to the Secretary for placement on the public record. Oral communications, not including oral

<sup>36</sup> See 15 U.S.C. 6103 and 6104.

communications from members of Congress, are permitted only when such oral communications are transcribed verbatim or summarized at the discretion of the Commissioner or Commissioner advisor to whom such oral communications are made and are promptly placed on the public record, together with any written communications and summaries of any oral communications relating to such oral communications. Oral communications from members of Congress shall be transcribed or summarized at the discretion of the Commissioner or Commissioner advisor to whom such oral communications are made and promptly placed on the public record, together with any written communications and summaries of any oral communications relating to such oral communications.

#### Section F. Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory analysis (5 U.S.C. 603, 604) are not applicable to this document because it is believed that these regulations, if promulgated, will not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605).

The Telemarketing Act requires the Commission to issue regulations, not later than 365 days after the date of enactment, prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices. The Act limits the scope of the regulations to entities that engage in telemarketing through one or more interstate telephone calls; telemarketing sales by local companies to local customers would most likely be intrastate calls and thus outside the parameters of the proposed rule. The Act also exempts certain catalog sales operations from the scope of the regulations. In addition, the proposed rule exempts incidental telemarketing sales, i.e., calls made by any person who engages in fewer than ten sales each year through the use of the telephone. The proposed rule also exempts certain contacts between businesses, and certain calls initiated by a person when there is no initial sales contact directed to that particular person from a seller or telemarketer.

As a result of these statutory and regulatory limitations, we believe that many small entities will fall outside the scope of the regulations. In addition, any economic costs imposed on small entities remaining within the parameters of the rule are, in many instances, specifically imposed by statute. Where they are not, efforts have

been made to make the proposed rule's requirements flexible, in part to minimize any unforeseen burden on small entities, as described elsewhere in this notice.

To ensure that no substantial economic impact is being overlooked, public comment is requested on the effect of the proposed regulations on the costs to, profitability and competitiveness of, and employment in small entities. Subsequent to the receipt of public comments, it will be decided whether the preparation of a final regulatory flexibility analysis is warranted. Accordingly, based on available information, the Commission hereby certifies under the Regulatory Flexibility Act, 5 U.S.C. 605(b), that the proposed regulations will not have a significant economic impact on a substantial number of small entities.

This notice serves as certification to that effect for the purposes of the Small Business Administration.

#### Section G. Questions on the Proposed Rule

The Commission seeks comments on various aspects of the proposed rule. Without limiting the scope of issues it seeks comment on, the Commission is particularly interested in receiving comments on the questions that follow. Responses to these questions should be itemized according to the numbered questions in this Notice. In responding to these comments, include detailed, factual supporting information whenever possible.

##### Section 310.2 Definitions

1. The proposed rule defines the following terms for use in the prohibition on credit card laundering: "acquirer," "cardholder," "credit card," "credit card sales draft," "credit card system," "merchant," and "merchant agreement."

a. Are these definitions clear, meaningful, and appropriate?

b. Are there other approaches to defining these terms that would be more useful?

2. The proposed rule defines the term "business venture."

a. Is this definition clear, meaningful, and appropriate? What are the advantages and disadvantages of defining the term in this manner?

b. Is the definition as drafted sufficiently comprehensive to encompass the types of business ventures which have been, are, or may be sold through telemarketing?

c. Are there other approaches to defining the term "business venture" that would be more useful?

3. The proposed rule defines the term "goods or services."

a. Is this definition clear, meaningful, and appropriate? What are the advantages and disadvantages of defining the term in this manner?

b. Is the definition as drafted sufficiently comprehensive to encompass the types of products, services, or other offers which have been, are, or may be sold through telemarketing?

c. Are there other approaches for defining the term "goods or services" that would be more useful?

4. The proposed rule defines the term "investment opportunity."

a. Is this definition clear, meaningful, and appropriate? What are the advantages and disadvantages of defining the term in this manner?

b. Is the definition as drafted sufficiently comprehensive to encompass the types of investment opportunities which have been, are, or may be sold or traded through telemarketing?

c. Are there other approaches to defining the term "investment opportunity" that would be more useful?

5. The proposed rule defines the terms "premium," "prize," and "prize promotion."

a. Are these definitions clear, meaningful, and appropriate? Are the distinctions between a "premium" and a "prize" clear, meaningful, and appropriate? What are the advantages and disadvantages of defining these terms in this manner?

b. Are the definitions as drafted sufficiently comprehensive to encompass the types of premiums, prizes, and prize promotions which have been, are, or may be offered through telemarketing?

c. Are there other approaches to defining these terms that would be more useful?

6. The proposed rule defines the terms "seller" and "telemarketer."

a. Are these definitions clear, meaningful, and appropriate? Are the distinctions between a "seller" and a "telemarketer" clear, meaningful, and appropriate? What are the advantages and disadvantages of defining these terms in this manner?

b. Are there other approaches to defining these terms that would be more useful?

c. Since most of the provisions of the proposed rule apply to sellers and/or telemarketers, do these definitions reflect the appropriate scope of the rule?

7. The proposed rule states that the term "telemarketing" includes the use of a facsimile machine, computer

modem, or any other telephonic medium, as well as calls initiated by persons in response to postcards, brochures, advertisements, or any other printed, audio, video, cinematic, or electronic communications by or on behalf of the seller.

a. Is this definition clear, meaningful, and appropriate?

b. Is the definition of "telemarketing" sufficiently broad to encompass current as well as future technology?

c. Are there other approaches to defining the term "telemarketing" that would be more useful?

8. The proposed definition of "telemarketing" includes within the rule's coverage on-line information services which a person accesses by computer modem.

a. Is such coverage appropriate?

b. Is the proposed rule as drafted sufficiently comprehensive to regulate the types of plans, programs, or campaigns for the sale of goods or services that have been, are, or may be conducted through such computer information services?

9. The proposed definition of "telemarketing" tracks the Telemarketing Act in exempting catalog sales from coverage under the rule. One of the requirements of this exemption is that "the person making the solicitation \* \* \* only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation." The proposed rule states that the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call.

a. Does the proposed rule sufficiently clarify the types of solicitation activities that are permitted in connection with catalog sales?

b. How much will the additional flexibility provided by this definition benefit catalog sellers? How will it affect law enforcement efforts to stop fraudulent or deceptive telemarketers?

10. The proposed rule defines the term "verifiable retail sales price."

a. Is this definition clear, meaningful, and appropriate?

b. Are there other approaches to defining this term that would be more useful?

### *Section 310.3 Deceptive Telemarketing Acts or Practices*

11. Section 310.3(a) of the proposed rule sets forth certain conduct that will be considered a deceptive telemarketing act or practice and a violation of the rule, including the failure to make

certain disclosures and the misrepresentation of certain information. Questions 13 through 18 seek comments on the particular types of acts and practices included in this Section of the proposed rule. Looking at § 310.3(a) as a whole:

a. Would it be appropriate to include in the final rule a general prohibition against material misrepresentations or the failure to disclose material information? What would be the advantages and disadvantages to this approach?

b. Are there other approaches to prohibiting deceptive telemarketing acts or practices that would be more useful to consumers? That would be more useful to law enforcement authorities? If so, how would these alternatives affect the burden the rule places on businesses forced to comply with it?

c. Are there other approaches to prohibiting deceptive telemarketing acts or practices that would reduce the burden imposed on legitimate businesses attempting to comply with the rule's requirements? If so, how would these alternatives affect the usefulness of the rule to consumers? To law enforcement authorities?

12. Section 310.3(a) of the proposed rule makes both the seller and the telemarketer equally liable for any deceptive telemarketing acts or practices.

a. Are there parts of this Section that should apply only to the seller or to the telemarketer? If so, what specific Sections should apply only to sellers? To telemarketers? Why are such limitations appropriate?

b. What are the benefits of making both sellers and telemarketers jointly liable for violations?

c. What additional costs or other burdens will the rule impose on sellers and/or telemarketers if the rule makes both liable for any violations of this Section? If the rule makes telemarketers jointly liable with sellers, will this reduce the ability of telemarketers to respond to the needs of their clients in a timely fashion?

d. If telemarketers are not jointly liable for deceptive practices of the sellers for whom they work, would some telemarketers simply seek to avoid knowledge of any questionable practices of the sellers from whom they work? Are there alternative ways to keep telemarketers from taking such an approach, without imposing full liability for all of the actions taken by their clients?

13. Section 310.3(a)(1) of the proposed rule requires that certain disclosures be made before payment is requested for any goods or services

offered, and that the disclosures be made in the same manner and form as the payment request.

a. Are there other disclosures that should be required? Are any of the required disclosures unnecessary?

b. Is the description of the information to be disclosed clear, meaningful, and appropriate?

c. What are the current practices of sellers and telemarketers regarding such disclosures?

d. What costs will this disclosure requirement impose on legitimate businesses?

e. What are the advantages or disadvantages of requiring these disclosures before payment is requested? Is it more appropriate to require these disclosures at some other time?

14. As part of the prohibition against deceptive telemarketing acts or practices, § 310.3(a)(2) of the proposed rule prohibits specific misrepresentations in connection with telemarketing.

a. Are there other misrepresentations that should be included in the prohibited list? Are any of the prohibited misrepresentations unnecessary?

b. Is the description of the prohibited misrepresentations clear, meaningful, and appropriate?

c. How will this section benefit consumers or law enforcement efforts? What, if any, costs will this Section impose on legitimate businesses?

15. As part of the prohibition against deceptive telemarketing acts or practices, § 310.3(a)(3) of the proposed rule prohibits specific misrepresentations in connection with the offer, offer for sale, or sale of any business venture.

a. Are there other misrepresentations that should be included in the prohibited list? Are any of the prohibited misrepresentations unnecessary?

b. Is the description of the prohibited misrepresentations clear, meaningful, and appropriate?

c. How will this section benefit consumers or law enforcement efforts? What, if any, costs will this Section impose on legitimate businesses?

16. Section 310.3(a)(4) of the proposed rule prohibits obtaining or submitting a check, draft, or other form of negotiable paper for payment from a person's checking, savings, share, or similar account without that person's express written authorization.

a. Is this prohibition clear, meaningful, and appropriate?

b. What are the advantages or disadvantages of this prohibition?

c. Is the proposed prohibition sufficiently broad to encompass all forms by which a person's account could be debited in this manner for payment of goods or services?

d. What will be the economic impact on sellers and telemarketers of requiring express written authorization prior to debiting a person's account in this manner?

e. What are the current practices of entities regarding authorizations for debiting a person's checking, savings, share, or similar account?

17. Section 310.3(a)(5) of the proposed rule prohibits obtaining any amount of money from a person through any means unless the amount is expressly authorized by the person.

a. Is this prohibition clear, meaningful, and appropriate?

b. What are the advantages or disadvantages of this prohibition?

c. Is the proposed prohibition sufficiently broad to encompass all forms by which a seller or telemarketer could obtain unauthorized amounts of money?

18. Under § 310.3(b)(1) of the proposed rule, it would be a deceptive telemarketing act or practice for any person to provide substantial assistance or support to any seller or telemarketer when that person knows or should know that the seller or telemarketer is engaged in any act or practice that violates the rule.

a. What are the advantages or disadvantages to providing such a general prohibition against "assisting and facilitating?"

b. Is this general prohibition against "assisting and facilitating" clear, meaningful, and appropriate?

c. Are there other approaches to prohibiting "assisting and facilitating" that would be more useful to consumers? That would be more useful to law enforcement authorities? If so, how would these alternatives affect the burden the rule places on businesses forced to comply with it?

d. Are there other approaches to prohibiting "assisting and facilitating" that would reduce the burden imposed on legitimate businesses attempting to comply with the rule's requirements? If so, how would these alternatives affect the usefulness of the rule to consumers? To law enforcement authorities?

19. Section 310.3(b)(2) of the proposed rule lists specific acts or practices that provide substantial assistance or support to telemarketing.

a. Is it appropriate to single out the acts and practices listed in this section?

b. Are there other acts or practices which should be included in this section?

c. Is the description of the listed acts or practices clear, meaningful, and appropriate?

20. Under § 310.3(c) of the proposed rule, certain acts or practices that constitute "credit card laundering" will be considered deceptive and a violation of the rule.

a. Is the description of prohibited acts or practices clear, meaningful, and appropriate?

b. What are the advantages or disadvantages of this provision?

c. Is the proposed prohibition sufficiently comprehensive to encompass all forms of credit card laundering which have been, are, or may be used in connection with telemarketing?

d. Are there other approaches to prohibiting credit card laundering that would be more useful to consumers? To law enforcement authorities? If so, how would these alternatives affect the burden the rule places on businesses required to comply with it?

e. Are there other approaches to prohibiting credit card laundering that would reduce the burden imposed on legitimate businesses attempting to comply with the rule's requirements? If so, how would these alternatives affect the usefulness of the rule to consumers? To law enforcement authorities?

f. Will the regulations against credit card laundering interfere with current practices of legitimate businesses?

#### *Section 310.4 Abusive Acts or Practices*

21. Section 310.4(a) of the proposed rule lists specific activities that will be considered to be abusive telemarketing acts or practices and a violation of the Telemarketing Sales Rule. Is there other conduct that should be included in § 310.4(a)?

22. Section 310.4(a) of the proposed rule makes both the seller and the telemarketer equally liable for engaging in the listed abusive telemarketing acts or practices.

a. Are there parts of this Section that should apply only to the seller or to the telemarketer? If so, what specific sections should apply only to sellers? To telemarketers? Why are such limitations appropriate?

b. What are the benefits of making both sellers and telemarketers jointly liable for violations?

c. What additional costs or other burdens will the rule impose on sellers and/or telemarketers if the rule makes both liable for any violations of this Section? If the rule makes sellers and telemarketers jointly liable, will this reduce the ability of telemarketers to

respond to the needs of their clients in a timely fashion?

d. If telemarketers are not jointly liable for abusive practices of the sellers for whom they work, would some telemarketers simply seek to avoid knowledge of any questionable practices of the sellers from whom they work? Are there alternative ways to keep telemarketers from taking such an approach, without imposing full liability for all of the actions taken by their clients?

23. Section 310.4(a)(1) of the proposed rule prohibits any seller or telemarketer from engaging in threats or intimidation.

a. Is it appropriate to include this practice as an abusive act or practice?

b. Is the description of the prohibited activity clear, meaningful, and appropriate?

c. Are there other approaches to prohibiting this type of activity?

d. Do the terms "threats" and "intimidation" need additional definition in order to specify the type of behavior that would violate the rule, or are the terms self-explanatory?

24. Section 310.4(a)(2) prohibits a seller or telemarketer from providing for or directing a courier to pick up payment from a customer.

a. Is it appropriate to include this practice as an abusive act or practice?

b. Is the description of the prohibited activity clear, meaningful, and appropriate?

c. Are there other approaches to prohibiting this type of activity?

d. What will be the economic impact, and the costs and benefits, of this provision?

e. Do legitimate telemarketers use couriers to pick up payments? If so, in what circumstances? How would these businesses be affected if they could not use couriers to pick up payments?

f. Will a prohibition on courier pickups be effective in reducing the consumer injury that results from telemarketing fraud? How will a fraudulent telemarketer adjust his or her practices in response to this prohibition?

25. Section 310.4(a)(3) of the proposed rule prohibits requesting or receiving payment of any fee or consideration for "credit repair" goods or services until the time frame in which the seller has represented the goods or services will be provided has expired and the seller has provided documentation that the promised results have been achieved.

a. Is it appropriate to include this practice as an abusive act or practice?

b. Is the description of the prohibited activity clear, meaningful, and appropriate?

c. Are there other approaches to prohibiting this type of activity?

d. What will be the economic impact, and the costs and benefits, of this provision?

e. Are there any legitimate services that could not be provided, or would be more costly to provide, if this prohibition were promulgated? If such services exist, how could the rule be crafted to prohibit deceptive credit repair services while still permitting these legitimate activities?

26. Section 310.4(a)(4) of the proposed rule prohibits requesting or receiving payment of any fee or consideration for goods or services represented to recover or otherwise assist in the return of money or any other item of value to a person until three days after such money or other item is delivered to that person. This provision does not apply to a licensed attorney or licensed private investigator who has a written agreement with that person.

a. Is it appropriate to include this practice as an abusive act or practice?

b. Is the description of the prohibited activity clear, meaningful, and appropriate?

c. Are there other approaches to prohibiting this type of activity?

d. What will be the economic impact, and the costs and benefits, of this provision?

e. Are there any legitimate services that could not be provided, or would be more costly to provide, if this prohibition were promulgated? If such services exist, how could the rule be crafted to prohibit deceptive recovery services while still permitting these legitimate activities?

f. Is it necessary, useful, and appropriate to exempt licensed attorneys and licensed private investigators from this provision?

g. Does this prohibition impact on legitimate businesses other than licensed attorneys or licensed private investigators?

27. Section 310.4(a)(5) of the proposed rule prohibits requesting or receiving payment of any fee or consideration in advance of obtaining a loan or any credit service when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or credit service for a person.

a. Is it appropriate to include this practice as an abusive act or practice?

b. Is the description of the prohibited activity clear, meaningful, and appropriate?

c. Are there other approaches to prohibiting this type of activity?

d. What will be the economic impact, and the costs and benefits, of this provision?

e. Are there any legitimate services that could not be provided, or would be more costly to provide, if this prohibition were promulgated? If such services exist, how could the rule be crafted to prohibit deceptive advance-fee loan schemes while still permitting these legitimate activities?

28. Section 310.4(a)(6) of the proposed rule prohibits failing to distribute all prizes or purported prizes offered in a telemarketing prize promotion within 18 months of the initial offer to any person.

a. Is it appropriate to include this practice as an abusive act or practice?

b. Is the description of the prohibited activity clear, meaningful, and appropriate?

c. Are there other approaches to prohibiting this type of activity?

d. What will be the economic impact, and the costs and benefits, of this provision?

e. What are the current practices of sellers or telemarketers regarding the time frame within which prizes are distributed in telemarketing prize promotions?

f. Is 18 months an appropriate period of time in which to require that all prizes or purported prizes be distributed?

29. Section 310.4(a)(7) of the proposed rule prohibits offering or selling goods or services through a telephone solicitation to a person who previously has paid the same seller for goods or services, until all terms and conditions of the initial transaction have been fulfilled, including the distribution of all prizes and premiums offered in conjunction with the initial transaction.

a. Is it appropriate to include this practice as an abusive act or practice?

b. Is the description of the prohibited activity clear, meaningful, and appropriate?

c. Are there other approaches to prohibiting this type of activity?

d. What will be the economic impact, and the costs and benefits, of this provision?

e. What are the current practices of sellers and telemarketers regarding making additional telephone solicitations before fulfilling the terms and conditions of the initial sales transaction?

f. Are there telemarketing activities for which this prohibition would not be feasible?

30. Section 310.4(a)(8) of the proposed rule prohibits identifying a person as a reference for a business venture unless certain requirements are met.

a. Is it appropriate to include this practice as an abusive act or practice?

b. Are the descriptions of the prohibited activity and of the stated requirements clear, meaningful, and appropriate?

c. Are there other approaches to prohibiting this type of activity?

d. What will be the economic impact, and the costs and benefits, of this provision?

e. What are the current practices of telemarketers regarding the use of references in the telemarketing of business ventures?

31. Section 310.4(b)(1) of the proposed rule prohibits more than one telephone solicitation in any three-month period to a person's residence to offer, offer for sale, or sell the same or similar goods or services on behalf of the same seller, without the person's prior consent. The requirement does not apply to calls made solely to verify previous sales or attempted calls which do not reach a person. This Section also would prohibit calling a person's residence when that person has stated that he or she does not wish to receive further telephone solicitations made by or on behalf of the seller.

a. Are the descriptions of the prohibited activities clear, meaningful, and appropriate?

b. Are there other approaches to prohibiting this type of activity?

c. Should these prohibitions be extended to business-to-business calls?

d. What will be the economic impact, and the costs and benefits, of prohibiting more than one telephone solicitation within any three-month period? Is a three-month period of time appropriate?

e. What will be the economic impact, and the costs and benefits, of prohibiting further calls after a person has asked not to receive telephone solicitations by or on behalf of the seller?

f. What are the current practices of sellers and telemarketers regarding the number of calls to a person's residence within a specified period of time for the same or similar goods or services on behalf of the same seller?

g. What are the current practices of sellers and telemarketers regarding identifying those persons who do not wish to receive further telephone solicitations by or on behalf of the seller?

32. Section 310.4(b)(2) of the proposed rule sets forth certain actions that a seller or telemarketer can take that would provide a defense against liability for violating §§ 310.4(b)(1).

a. Is it appropriate to provide a defense against potential liability with regard to these activities?

b. Is it appropriate to limit this defense to one erroneous call per person called in any calendar year?

c. Are there other requirements which should be included in the list of practices which provide a defense against potential liability? Are any of the activities required by the proposed rule inappropriate?

d. Is the description of the requirements to avoid liability clear, meaningful, and appropriate?

e. Are there other approaches to providing a defense for potential liability that would be more useful?

f. What will be the economic impact, and the costs and benefits, of taking the actions set forth in § 310.4(b)(2)?

g. What are the current practices of sellers or telemarketers with respect to the activities set forth in § 310.4(b)(2)?

33. Section 310.4(c) of the proposed rule prohibits telephone solicitations to a person's residence at any time other than between the hours of 8 a.m. and 9 p.m. local time at the called person's location, without the prior consent of the person being called.

a. Is the description of the prohibited activity clear, meaningful, and appropriate?

b. What will be the economic impact, and the costs and benefits, of this provision?

c. What are the current practices of telemarketers regarding the times during which telephone solicitations are made to residences?

d. Should the period when telephone solicitations are permitted be narrowed or expanded? Why or why not?

e. Should this prohibition be extended to contacts between businesses?

34. Section 310.4(d)(1) of the proposed rule requires that certain oral disclosures be made at the beginning of all telephone solicitations.

a. Are the descriptions of the required disclosures clear, meaningful, and appropriate?

b. Are there other oral disclosures that should be required? Are any of the required disclosures unnecessary?

c. What will be the economic impact of requiring these disclosures at the beginning of the telephone solicitation? If these disclosures are not required at the beginning of the telephone solicitation, when should they be required? What are the advantages or disadvantages of this alternative?

d. Are the disclosure requirements for those engaged in charitable solicitations necessary? Will these disclosure requirements provide useful

information to consumers? If so, how will this information be useful to consumers? What impact will these disclosure requirements have on professional fundraisers? What impact will these disclosure requirements have on charities that use these professional fundraisers?

e. Do telemarketers currently make the disclosures required by § 310.4(d)(1)? Why or why not?

f. The proposed rule would prohibit the use of aliases by persons making telephone solicitations. Is this appropriate? What are the costs and benefits of prohibiting the use of aliases? Is there an alternative approach that would permit the use of aliases while still ensuring that consumers and law enforcement authorities could identify a particular caller? What are the costs and benefits of such an alternative?

35. Section 310.4(d)(2) of the proposed rule requires that certain oral disclosures be made whenever a caller verifies a telemarketing sale.

a. Are the descriptions of the required disclosures clear, meaningful, and appropriate?

b. Are there other oral disclosures that should be required? Are any of the required disclosures unnecessary?

c. What will be the economic impact of requiring these disclosures in any verification call?

d. Do telemarketers currently make the disclosures required by § 310.4(d)(2)? Why or why not?

36. Sections 310.4(d)(3) and (4) of the proposed rule require additional disclosures where telemarketing includes a prize promotion or an offer of a premium.

a. Is it appropriate to classify the failure to make these additional disclosures as an abusive act or practice?

b. Are the descriptions of the required disclosures clear, meaningful, and appropriate?

c. Are there other oral disclosures that should be required? Are any of the required disclosures unnecessary?

d. What will be the economic impact of requiring these additional oral disclosures? Will these additional oral disclosures help consumers protect themselves from fraudulent or deceptive telemarketers?

e. Is it appropriate to require that these disclosures be made both orally and in writing, as is required by § 310.4(e)(1), or would it be sufficient to permit either an oral or a written disclosure alone? How would the economic costs of this Section be affected if the latter approach were adopted?

f. What are the current practices of telemarketers regarding the disclosure of the information required by §§ 310.4(d)(3) and (4)?

37. In addition to the oral disclosures required during telephone solicitations, § 310.4(e) of the proposed rule requires that written disclosures be provided in duplicate in connection with telemarketing involving a prize promotion or the offer for sale of any investment opportunity.

a. What are the advantages and disadvantages of these required disclosures? Are written disclosures appropriate or necessary?

b. Is it appropriate to include a failure to make these disclosures as an abusive act or practice?

c. Are the descriptions of the required disclosures, their timing, size, and other requirements clear, meaningful, and appropriate?

d. Are there other written disclosures that should be required? Are any of the required written disclosures unnecessary?

e. Are there any forms of prize promotions or investment opportunities for which the disclosures would not be feasible?

f. Section 310.4(e) specifies the size of the disclosures, what else can be included in the envelope with the disclosure, and, for prize promotions, what may appear on the face of the envelope. Are these specifications necessary to ensure the clarity of the disclosures and to ensure that consumers pay attention to them, or would a more general standard (e.g., clear and conspicuous) be equally or more effective? How would the costs of complying with the requirements of this Section be affected if the more general standard were employed?

g. Section 310.4(e)(2)(iii) of the proposed rule requires, for the sale of any investment opportunity involving tangible assets sold on credit or leverage, the written disclosure of the percentage of the purchaser's down payment that would be devoted to fees and costs by the end of both the first six months and the first year after the investment is made. Are these time frames useful and appropriate? Would it be better not to have a time frame in this disclosure requirement?

h. What will be the economic impact, and the costs and benefits, of requiring these disclosures? Of requiring a written acknowledgement prior to payment?

i. What are the current practices of telemarketers regarding the disclosures required in § 310.4(e)? Regarding written acknowledgement prior to payment?

j. What will be the economic impact, and the costs and benefits, of requiring that the written disclosures be provided in duplicate? Will this requirement ensure that consumers retain a copy of the required disclosure, or are there other approaches to achieve this goal? What are the costs and benefits of these alternative approaches?

k. How many telemarketing campaigns per year will be required to comply with the written disclosure requirements? How many prize promotions per year are conducted as part of telemarketing campaigns? How many people participate in the average prize promotion conducted via telemarketing?

l. How many telemarketing campaigns per year involve sales of investment goods? What particular investment goods are sold via telemarketing by legitimate sellers? On average, how many people buy investments as a result of a telemarketing campaign?

38. Section 310.4(f) of the proposed rule prohibits any person who is subject to any federal court order resolving a case in which the complaint alleged a violation of certain sections of the rule, and the court did not dismiss or strike all such allegations from the case, to sell, rent, publish, or distribute any list of customer contacts from that person.

a. Is this prohibition appropriate? Is the description of the prohibited activities clear, meaningful, and appropriate?

b. What will be the economic impact, and the costs and benefits, of prohibiting the sale of lists by such persons?

c. What are the current practices of telemarketers regarding the sale of lists? Specifically, under what circumstances do sellers or telemarketers sell or otherwise distribute lists to others?

d. What would be the effect if this prohibition only applied for a certain period of time after the court order was entered? How would this limitation hinder law enforcement efforts? What would be an appropriate period of time following the entry of an order to prohibit list sales?

e. Should this prohibition extend to a broader class of rule violations than that currently proposed? A narrower class?

39. In addition to or in lieu of some of the provisions in § 310.4 of the proposed rule, would it be more appropriate that telemarketing sales be subject to a cooling-off rule, or a period of time in which the purchaser can cancel a transaction? How would such a rule be structured? Should all telemarketing sales be subject to such a rule? What is an appropriate "cooling-off" time period? Should payment be

permitted at the time of sale, or should payment be prohibited until the end of the cooling-off period? Would it be more appropriate to impose a mandatory right to a refund in all telemarketing sales?

How long of a period would be appropriate for consumers to examine a product before returning it?

#### *Section 310.5 Recordkeeping Requirements*

40. Section 310.5(a) of the proposed rule requires sellers or telemarketers to keep certain records relating to their telemarketing activities for a period of 24 months from the date the record is produced.

a. Are the specified records appropriate to verify compliance with the rule? Are any of the required records unnecessary to verify compliance with the rule? Should any additional records be required? Specifically, should sellers and telemarketers keep copies of any consumer complaints they receive? How burdensome would it be to maintain such complaints? How many consumer complaints will the average legitimate firm have involving its telemarketing sales?

b. Is the 24-month record retention period appropriate? Why or why not? If not, what period is appropriate?

c. Are there other approaches to recordkeeping requirements that would be more useful?

d. What are the current record retention policies and practices of sellers and telemarketers with respect to the records listed in § 310.5?

Specifically, what records, required to be maintained by § 310.5(a), currently are maintained by sellers or telemarketers? How long are they maintained?

e. What will be the economic impact, and the costs and benefits, of these recordkeeping requirements?

f. If the records listed are not required to be retained, how would rule compliance be verified?

g. What has been the experience of State and local law enforcement agencies with respect to record retention requirements? Have such requirements been useful? If yes, how? If no, why not? What types of enforcement issues could arise if recordkeeping were not required?

h. What volume of records will have to be maintained to comply with the requirements of § 310.5(a)? In particular, how many telemarketing campaigns will the average firm conduct on an annual basis? How many different scripts are used during an average campaign? How many consumers are called during an average telemarketing campaign, and what percentage of the persons called

agree to buy goods or services? How many employee records will have to be maintained by the average firm engaged in telemarketing?

41. Under Section 310.5(b) of the proposed rule, a seller and a telemarketer calling on behalf of that seller need not keep duplicative records, but can enter into a written agreement allocating recordkeeping responsibilities between themselves. Section 310.5(c) of the proposed rule sets forth the recordkeeping requirements in the event of the dissolution, termination, or change in ownership of a seller or telemarketer.

a. Are these provisions clear, meaningful, and appropriate?

b. What are the advantages or disadvantages to these provisions?

c. What are the current practices of sellers and telemarketers regarding the distribution of responsibility for maintaining records? Regarding the maintenance of records in the event of the dissolution, termination, or change in ownership of a seller or telemarketer?

#### *Section 310.6 Exemptions*

42. The proposed rule exempts the solicitation of sales by any person who engages in fewer than ten telephone sales per year.

a. Is this proposed exemption clear, meaningful, and appropriate?

b. Is the scope of the proposed rule sufficiently limited to exempt those persons who do not regularly engage in telemarketing?

c. Are there other approaches to limiting the scope of the rule that would be more useful?

d. Does this exemption pose problems for law enforcement efforts to stop deceptive or abusive telemarketing acts or practices?

43. The proposed rule also exempts telephonic contacts between businesses, except such contacts involving the sale of office or cleaning supplies or certain charitable solicitations.

a. Is this proposed exemption clear, meaningful, and appropriate?

b. Are there other types of goods or services sold in business-to-business contacts which should not be exempted from the rule?

c. Are there other approaches to limiting the scope of the rule that would be more useful?

d. Does this exemption pose problems for law enforcement efforts to stop deceptive or abusive telemarketing acts or practices?

44. Finally, the proposed rule exempts a telephonic contact made solely by a person when there has been no initial sales contact directed to that particular person by the seller or



telemarketer, except for such contacts related to certain employment services, business ventures, investment opportunities, prize promotions, or credit-related programs.

a. Is this proposed exemption clear, meaningful, and appropriate?

b. Is the scope of the proposed rule sufficiently limited to exempt businesses, such as restaurants, car rental companies, travel agents, and providers of services, such as plumbers, that rely on the telephone for the taking of orders or the scheduling of appointments?

c. Is it appropriate to exclude from this exemption contacts related to employment services, business ventures, investment opportunities, prize promotions, or credit-related programs? Are there other types of goods or services sold through these types of contacts that should not be exempted from the rule?

d. Is this exemption appropriate for on-line computer information services? How would this exemption affect advertising on computer bulletin boards? Is it more appropriate to include all contacts made over computer information services in the rule?

e. Are there other approaches to limiting the scope of the rule that would be more useful?

f. Does this exemption pose problems for law enforcement efforts to stop deceptive or abusive telemarketing?

45. Are there other telemarketing activities, such as the sale of particular products or other particular kinds of telemarketing, currently covered by the proposed rule but which should be exempted? How would the exemption of these firms or activities affect the ability of law enforcement to stop deceptive or abusive telemarketing acts or practices? How would such exemptions affect consumers? How would they benefit the firms exempted from the rule's coverage? How many firms would be exempted from the coverage of the rule if any proposed change were adopted?

46. How many firms in the United States sell their products, either in whole or in part, through telemarketing, as that term is defined in the proposed rule? How many of these firms engage in telemarketing on their own behalf? How many employ others to engage in telemarketing for them? How would the number of firms subject to the rule be changed if one or more of the exemptions in § 310.6 were eliminated?

#### Section 310.8 Federal Preemption

47. Under § 310.8 of the proposed rule, State laws are preempted only when they are in direct conflict with any provision of the rule. Is this

preemption standard clear, meaningful, and appropriate?

#### Other

48. Is it appropriate for the proposed rule to take effect 30 days after its date of publication in the **Federal Register**?

a. Would 30 days be sufficient time to come into compliance with the rule? Why or why not?

b. For which specific provisions of the rule would compliance be possible within 30 days, and for which specific provisions would compliance take longer? Would a staggered effective date be more appropriate?

c. If 30 days is an insufficient period of time, what time period would be sufficient?

49. One of the findings which led Congress to pass the Telemarketing Act was that telemarketing differs from other sales activities because it can be carried out across State lines without direct, face-to-face contact with the consumer. Are there new types of technology by which sales can be made without direct contact between the buyer and seller? Is the proposed rule broad enough to encompass such forms of technology? Will the proposed rule requirements be appropriate and/or feasible for such other technology?

50. What kinds of technological changes may be anticipated in the area of telemarketing? Will the proposed rule requirements be appropriate and/or feasible after these technological changes are implemented?

51. As already noted in Section F, comment is invited on the effect of the proposed rule with regard to costs, profitability, competitiveness, and employment of small business entities.

52. To the extent not otherwise addressed by the questions above, are there any regulatory alternatives that would reduce any adverse economic impact of the proposed rule, yet fully implement the Telemarketing Act?

53. What are the aggregate costs and benefits of the proposed rule? Are there any provisions in the proposed rule that are not necessary to implement the statute or that impose costs not outweighed by benefits? Who will benefit and who will bear the cost? Can we expect either the costs or benefits of the rule to dissipate over time?

54. Does the proposed rule overlap or conflict with other Federal, State, or local government laws or regulations?

#### List of Subjects in 16 CFR Part 310

Telemarketing, Trade practices.

Accordingly, it is proposed that chapter I of 16 CFR be amended by adding a new part 310 to read as follows:

#### PART 310—TELEMARKETING SALES RULE

##### Sec.

310.1 Scope of regulations in this part.

310.2 Definitions.

310.3 Deceptive telemarketing acts or practices.

310.4 Abusive telemarketing acts or practices.

310.5 Recordkeeping requirements.

310.6 Exemptions.

310.7 Actions by states and private persons.

310.8 Federal preemption.

310.9 Severability.

**Authority:** 15 U.S.C. 6101–6108.

#### § 310.1 Scope of regulations in this part.

This part implements the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6101–6108).

#### § 310.2 Definitions.

(a) *Acquirer* means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.

(b) *Attorney General* means the chief legal officer of a State.

(c) *Business venture* means any written or oral business arrangement, however denominated, including but not limited to a “franchise,” as that term is defined in the “Franchise Rule,” 16 CFR 436.2(a), which consists of the payment of any consideration for:

(1) The right or means to offer, sell, or distribute goods or services (whether or not identified by a trademark, service mark, trade name, advertising, or other commercial symbol); and

(2) The promise of more than nominal assistance to any person or entity in connection with or incidental to the establishment, maintenance, or operation of a new business or the entry by an existing business into a new line or type of business.

The term “business venture” does not include any business arrangement in which persons acquire, or purportedly acquire, government-issued licenses or interests in one or more businesses derived from the possession of such licenses.

(d) *Cardholder* means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.

(e) *Commission* means the Federal Trade Commission.

(f) *Credit card* means any instrument or device, whether known as a credit

card, credit plate, bank service card, banking card, check guarantee card, charge card, or debit card, or by any other name, issued with or without a fee for the use of the cardholder in obtaining money, goods, services, or anything else of value.

(g) *Credit card sales draft* means any record or evidence of a credit card transaction, including but not limited to any paper, sales record, instrument, or other writing, or any electronic or magnetic transmission or record.

(h) *Credit card system* means any method or procedure used to generate, transmit, or process for payment a credit card sales draft.

(i) *Customer* means any person who is or may be required to pay for goods or services offered through telemarketing.

(j) *Goods or services* means any goods or services, including but not limited to: Any investment opportunity; any business venture; any certificate or coupon which may be later exchanged for a product or service; any membership; any license right; any timeshare or campground interest; any offer to list a timeshare or campground interest for sale; any real property interest; any offer to improve a person's credit record, history, rating, or to obtain an extension of credit; any charitable service promoted in conjunction with an offer of a prize, chance to win a prize, or the opportunity to purchase any other goods or services; any service promoted by an employment agency; any multi-level marketing service; and any offer of advice or assistance to a person.

(k) *Investment opportunity* means anything, tangible or intangible, excluding a business venture, that is offered, offered for sale, sold, or traded (1) to be held, wholly or in part, for purposes of profit or income; or (2) based wholly or in part on representations, either express or implied, about past, present or future income, profit, or appreciation. The term "investment opportunity" includes, but is not limited to, any business arrangement where persons acquire, or purportedly acquire, government-issued licenses or interests in one or more businesses derived from the possession of such licenses.

(l) *Material* means likely to affect a person's choice of, or conduct regarding, goods or services.

(m) *Merchant* means a person who is authorized under a written contract with an acquirer to honor or accept, transmit, or process credit cards in payment for goods or services.

(n) *Merchant agreement* means a written contract between a merchant and an acquirer authorizing the

merchant to honor or accept, transmit, or process credit cards in payment for goods or services.

(o) *Person* means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(p) *Premium* means anything offered or given, independent of chance, to customers as an incentive to purchase goods or services offered through telemarketing.

(q) *Prize* means anything offered, or purportedly offered, to a person at no cost and with no obligation to purchase goods or services and given, or purportedly given, by chance.

(r) *Prize promotion* means:

(1) A sweepstakes or other game of chance; or

(2) An oral or written representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.

(s) *Seller* means any person who, in connection with telemarketing, provides or offers to provide goods or services in exchange for consideration or a donation.

(t) *State* means any State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(u) *Telemarketer* means any person who, in connection with telemarketing, initiates or receives a telephonic communication from a customer.

(v) *Telemarketing* means a plan, program, or campaign which is conducted to induce payment for goods or services by use of one or more telephones (including the use of a facsimile machine, computer modem, or any other telephonic medium) and which involves more than one interstate telephone call or connection. The term includes, but is not limited to, calls initiated by persons in response to postcards, brochures, advertisements, or any other printed, audio, video, cinematic or electronic communications by or on behalf of the seller. The term does not include the solicitation of sales through the mailing of a catalog which: Contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the

term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call.

(w) *Telephone solicitation* means the initiation of a telephone call by a telemarketer to induce payment for goods or services.

(x) *Verifiable retail sales price* means the actual, bona fide price at which one or more retailers, in the area of the seller's principal place of business, has made a substantial number of sales, which the seller has documented.

### § 310.3 Deceptive telemarketing acts or practices.

(a) Prohibited deceptive telemarketing acts or practices.

It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Before payment is requested for goods or services offered, failing to disclose any of the following information in the same manner and form as the payment request:

(i) The total costs, terms, and material restrictions, limitations, or conditions of receiving any goods or services;

(ii) The quantity of any goods or services; and

(iii) All material terms and conditions of the seller's refund, cancellation, exchange, or repurchase policies, including, if applicable, a statement that no such policies exist;

(2) Misrepresenting, directly or by implication, any of the following:

(i) The total costs, terms, or material restrictions, limitations, or conditions of receiving any goods or services;

(ii) The quantity of any goods or services;

(iii) Any material aspect of the performance, efficacy, or central characteristics of any goods or services;

(iv) The duration of any offer made;

(v) The nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

(vi) That any person has been selected to receive a prize;

(vii) That a premium is a prize;

(viii) The odds of winning any prize;

(ix) That a seller or telemarketer is in compliance with any Federal, State, or local law, statute, regulation, or ordinance;

(x) That compliance with any Federal, State, or local law, statute, regulation, or ordinance constitutes an endorsement or approval of the seller's or telemarketer's business or conduct;

(xi) Any affiliation, association, connection, or relationship with law

enforcement, a public safety organization, or any Federal, State, or local government agency;

(xii) The purpose for which the seller or telemarketer will use a person's checking, savings, share, or similar account number, credit card account number, social security number, or related information;

(xiii) The nonprofit, tax-exempt, or charitable status, purpose, affiliation, or identity of the seller or telemarketer;

(xiv) A person's eligibility or likelihood to receive a tax deduction, loan, or other benefit if the person pays money to the seller or telemarketer;

(xv) The nature, terms, or existence of any prior affiliation, association, connection, or relationship with any person;

(xvi) The nature, terms, or existence of any prior purchase or agreement to purchase by any person;

(xvii) The level of risk, liquidity, markup over acquisition costs, past performance, or earnings potential of any investment opportunity;

(xviii) The market value of any investment opportunity;

(xix) The likelihood that the market value for an investment opportunity will either increase or decrease;

(xx) The seller's success in assisting persons to liquidate goods or services they purchased from the seller, or the profit derived from such liquidation;

(xxi) That goods or services can or are likely to improve a person's credit history, credit record, or credit rating, or result in a person obtaining credit;

(xxii) The eligibility of, or likelihood that, a person, regardless of that person's credit history, will obtain a loan or other credit-related service;

(xxiii) That a seller or telemarketer can recover or otherwise effect or assist in the return of money or any other item of value to a person; or

(xxiv) Any other information required to be provided under this Rule;

(3) Misrepresenting, directly or by implication, in connection with the offer, offer for sale, or sale of any business venture, any of the following:

(i) The level of earnings;

(ii) The extent or nature of the market for the goods or services to be sold;

(iii) The nature or availability of any territory;

(iv) The existence, availability, or provision of retail outlets or accounts for the sale of goods or services;

(v) The existence, availability, or provision of locations or sites for vending machines, rack displays, or any other sales display;

(vi) The nature or availability of any services offered to secure any retail outlets, accounts, sites, locations, or displays;

(vii) That any person owns or operates a business venture purchased from the seller; or

(viii) That a person can give an accurate, independent, description of his or her experience as an owner or operator of a business venture purchased from the seller;

(4) Obtaining or submitting for payment from a person's checking, savings, share, or similar account, a check, draft, or other form of negotiable paper without the person's express written authorization; or

(5) Obtaining any amount of money from a person through any means, unless such an amount is expressly authorized by the person.

(b) Assisting and facilitating. (1) 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 should know that the seller or telemarketer is engaged in any act or practice that violates this Rule.

(2) Substantial assistance or support to telemarketing for purposes of § 310.3(b)(1) includes, but is not limited to, the following:

(i) Providing lists of customer contacts to a seller or telemarketer;

(ii) Receiving consideration in exchange for providing a testimonial, endorsement, certification, appraisal, or financing, or for serving as a reference, with respect to any business venture or investment opportunity offered by a seller;

(iii) Securing retail outlets or accounts for the sale of goods or services, or locations or sites for vending machines, rack displays, or any other sales displays, used in connection with any business venture;

(iv) Providing any certificate or coupon which may later be exchanged for goods or services; or

(v) Providing any script, advertising, brochure, promotional material, or direct marketing piece to be used in telemarketing.

(c) Credit card laundering. It is a deceptive telemarketing act or practice, and a violation of this Rule, for:

(1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;

(2) Any person to employ, solicit, or otherwise cause a merchant or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a

credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

(3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement.

#### § 310.4 Abusive telemarketing acts or practices.

(a) Abusive conduct generally. It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Threats or intimidation;

(2) Providing for or directing a courier to pick up payment from a customer;

(3) 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:

(i) The term of the contract, or time frame in which the seller has represented all of the goods or services will be provided to that person, has expired; and

(ii) The seller has provided the person with documentation:

(A) From the original furnisher or provider of the information to the consumer reporting agency, confirming that the promised results have been achieved; or

(B) In the form of a consumer report from the consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Nothing in this Rule alters the requirement in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose.

(4) Requesting or receiving payment of any fee or consideration for goods or services represented to recover or otherwise assist in the return of money or any other item of value to a person until three (3) days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney or licensed private investigator pursuant to a written agreement with that person;

(5) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or any credit service when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or

arranging a loan or credit service for a person;

(6) Failing to distribute all prizes or purported prizes offered in a prize promotion, within 18 months of the initial offer to any person;

(7) Offering or selling goods or services through a telephone solicitation to a person who previously has paid the same seller for goods or services, until all terms and conditions of the initial transaction have been fulfilled, including but not limited to the distribution of all prizes or premiums offered in conjunction with the initial transaction; or

(8) Identifying a person as a reference for a business venture unless:

(i) Such person has actually purchased the business venture;

(ii) Such person has operated that business venture for a period of at least six (6) months, or the seller or telemarketer discloses the length of time the person has operated such business venture; and

(iii) Such person does not receive consideration for any statements made to prospective business venture purchasers.

(b) Pattern of calls. (1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

(i) Without a person's prior consent, calling that person's residence to offer, offer for sale, or sell, on behalf of the same seller, the same or similar goods or services more than once within any three (3) month period. This requirement does not apply to attempted calls which do not reach a person or to calls made solely to verify a previous telephone sale; or

(ii) Calling a person's residence when that person previously has stated that he or she does not wish to receive telephone solicitations made by or on behalf of the seller whose goods or services are being offered.

(2) A seller or telemarketer will not be liable for violating § 310.4(b)(1) once in any calendar year per person called if:

(i) It has established and implemented written procedures to comply with § 310.4(b)(1) (i) and (ii);

(ii) It has trained its personnel in the procedures established pursuant to § 310.4(b)(2)(i);

(iii) The seller, or the telemarketer acting on behalf of the seller, has maintained and recorded lists of persons who may not be contacted, in compliance with § 310.4(b)(1) (i) and (ii); and

(iv) Any subsequent call is the result of administrative error.

(c) Calling time restrictions. Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in telephone solicitations to a person's residence at any time other than between 8 a.m. and 9 p.m. local time at the called person's location.

(d) Required oral disclosures. It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to fail to make any oral disclosures set forth in this section.

(1) All telephone solicitations shall begin by disclosing:

(i) The caller's true first and last name, the seller's name, and that the purpose of the call is to sell goods or services; or

(ii) If a telephone solicitation includes a charitable solicitation, the caller's true first and last name, the telemarketer's name, the telemarketer's status as a paid professional fundraiser, the seller's name, that the purpose of the call is to solicit charitable donations, and if other goods or services are offered, that the purpose of the call is also to sell goods or services.

(2) If a caller verifies a telemarketing sale, the caller verifying the sale must repeat the disclosures required under § 310.3(a)(1).

(3) Any telemarketing which includes a prize promotion must disclose, in addition to all other disclosures required under this Section, the following information:

(i) That no purchase or payment is necessary to win;

(ii) The verifiable retail sales price of each prize offered or a statement that the retail sales price of the prize offered is less than \$20.00; and

(iii) The odds of winning each prize offered.

(4) Any telemarketing which includes an offer of a premium must disclose, in addition to all other disclosures required under this Section, the verifiable retail sales price of such premium or comparable item, or a statement that the retail sales price of the premium is less than \$20.00.

(e) Written disclosures/ acknowledgements. It is an abusive telemarketing act or practice and a violation of this Rule for a seller or telemarketer to fail to make any written disclosures set forth in this section.

(1) Prize promotions. If a seller or telemarketer conducts a prize promotion, the seller or telemarketer may not request that a person pay for goods or services, or accept a payment in any form from a person, without first providing the person with a written disclosure, in duplicate, and receiving

from the person a written acknowledgement that the person has read the disclosure. The information shall be disclosed on one page, in not less than 10-point type (unless otherwise noted), and of a color or shade that readily contrasts with the background of the notice. This disclosure shall be sent in an envelope that contains no writing representing that the person to whom the envelope is addressed has been selected or may be eligible to receive a prize and shall contain no other enclosures except for a return envelope, if the seller or telemarketer wishes to include such an envelope. This disclosure must contain the following information:

(i) The seller's legal name and telephone number, and the complete street address of the seller's principal place of business;

(ii) If the seller has been in operation under any other name(s), each such name and the length of time the seller has operated under each name;

(iii) The verifiable retail sales price of each prize offered or a statement that the retail sales price of the prize offered is less than \$20.00;

(iv) The odds of winning each prize offered and the number of persons who will receive each prize;

(v) The total amount and description of any shipping or handling fees or any other charges that must be paid to receive or use a prize;

(vi) A complete description of any restrictions, conditions, or limitations on eligibility to receive or use a prize, including all steps a person must take to receive the most valuable prize offered;

(vii) The statement: "No purchase or payment is necessary to win," with a description of the no-purchase entry method;

(viii) A statement that a list of winners is available and the address to which a person may write to obtain such a list;

(ix) A statement that it is a violation of this Rule for the seller to accept payment in any form unless the seller has received from the person the written disclosure acknowledgment required pursuant to § 310.4(e)(1); and

(x) The statement: "I have read and understand this disclosure," in at least 12-point bold face type immediately preceding a signature block.

(2) Investment opportunities. (i) If a seller or telemarketer offers for sale any investment opportunity, the seller or telemarketer may not request that a person pay, or accept a payment in any form from a person, for that investment opportunity without first providing the person with a written disclosure, in

duplicate, and receiving from the person a written acknowledgement that the person has read the disclosure. The information shall be disclosed in not less than 10-point type (unless otherwise noted), of a color or shade that readily contrasts with the background of the notice, and segregated from all other information. This disclosure shall be sent in an envelope that contains no other enclosures except for a return envelope, if the seller or telemarketer wishes to include such an envelope. This disclosure must contain the following information:

- (A) The seller's legal name and telephone number, and the complete street address of the seller's principal place of business;
  - (B) If the seller has been in operation under any other name(s), each such name and the length of time the seller has operated under each name;
  - (C) The complete cost to make the investment and a detailed list of all present charges and any anticipated future charges;
  - (D) A description of all known risks associated with the investment opportunity, including the possibility that additional payments might be required for a person purchasing the investment opportunity to retain that person's interest in the investment opportunity, to realize the projected or stated returns of the investment opportunity, to prevent total loss of the investment opportunity, or for any other reason;
  - (E) The length of time the seller has been in business and has offered the particular investment opportunity;
  - (F) A statement disclosing whether or not the seller is licensed and, if so, with whom, the type of license, and the length of time the seller has held such license;
  - (G) A statement that it is a violation of this Rule for the seller to effect an investment transaction unless the seller has received from the person the written disclosure acknowledgement required pursuant to § 310.4(e)(2); and
  - (H) The statement: "I have read and understand this disclosure," in at least 12-point bold face type immediately preceding a signature block.
- (ii) If a seller or telemarketer offers for sale any investment opportunity involving tangible assets, the following additional information must be included in the written disclosure set forth in § 310.4(e)(2)(i):
- (A) The percentage markup that the seller places on the item above its own cost in acquiring the item; and
  - (B) An estimate of the value that persons are likely to receive if they were

to liquidate the asset through a market sale immediately following the purchase. All such estimates must be substantiated by competent and reliable evidence.

(iii) If a seller or telemarketer offers for sale any investment opportunity involving tangible assets sold on credit or leverage, the following additional information, as well as the information set forth in § 310.4(e)(2)(ii), must be included in the written disclosure set forth in § 310.4(e)(2)(i):

- (A) The percentage of a person's down payment that would be devoted to fees and costs by the end of the first six months after the investment is made;
  - (B) The percentage of a person's down payment that would be devoted to fees and costs by the end of the first year after the investment is made; and
  - (C) A statement that all such investment opportunities are extremely risky.
- (iv) If a seller or telemarketer offers for sale any investment opportunity involving the acquisition of government-issued licenses or interests in businesses derived from the possession of such licenses, the following additional information must be included in the written disclosure set forth in § 310.4(e)(2)(i):
- (A) All material terms and limitations of any government-issued license(s) that serve as the basis for the investment opportunity, including but not limited to whether and to whom the license or licenses have been issued;
  - (B) The percentage of the person's payment that will be used to acquire any applicable license(s) from the licensee(s) or from any person or entity not affiliated in any way with the seller; and
  - (C) The percentage of the person's payment that will be used to capitalize any business derived from such license(s).

(f) Distribution of lists. It is an abusive telemarketing act or practice and a violation of this Rule for any person who is subject to any federal court order resolving a case in which the complaint alleged a violation of §§ 310.3, 310.4(a) or 310.4(e) of this Rule, and the court did not dismiss or strike all such allegations from the case, to sell, rent, publish, or distribute any list of customer contacts from that person.

#### § 310.5 Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

(1) All advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and address of each prize recipient and the prize awarded;

(3) The name and address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;

(4) The name, home address and telephone number, and job title(s) for all current and former employees directly involved in telephone sales; and

(5) Any written notices, disclosures, and acknowledgements required to be provided or received under this Rule.

(b) Failure to keep all records required by § 310.5(a) shall be a violation of this Rule. The seller and telemarketer calling on behalf of the seller are not required to keep duplicative records if the seller and telemarketer have entered into a written agreement allocating responsibility for the recordkeeping required by this Section. When a seller and telemarketer have entered into such an agreement, the terms of that agreement shall govern. If the agreement is unclear as to whom must maintain any required record(s), the seller shall be responsible for keeping such record(s).

(c) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer shall maintain all records as required under this Section. In the event of any sale, assignment, succession, or other change in ownership of the seller's or telemarketer's business, the successor business shall maintain all records required under this Section.

#### § 310.6 Exemptions.

The following acts or practices are exempt from this Rule:

(a) The solicitation of sales by any person who engages in fewer than ten (10) sales each year through the use of the telephone;

(b) Telephonic contacts between businesses, except such contacts involving the sale of office or cleaning supplies or the inducement of payment for any charitable service promoted in conjunction with an offer of a prize, chance to win a prize, or the opportunity to purchase any goods or services; and

(c) A telephonic contact made solely by a person when there has been no initial sales contact directed to that particular person, by telephone or otherwise, from the seller or telemarketer; provided, however, that this exemption does not apply to such

contacts related to employment services where the seller or telemarketer requests or receives payment prior to providing the promised services, business ventures, investment opportunities, prize promotions, or credit-related programs.

#### **§ 310.7 Actions by States and private persons.**

Any attorney general or other officer of a State authorized by the State to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, shall serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this Rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, and shall include a copy of the State's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the State or private person shall serve the Commission with the required notice immediately upon instituting its action.

#### **§ 310.8 Federal preemption.**

Nothing in this Rule shall be construed to preempt any State law that is not in direct conflict with any provision of this Rule.

#### **§ 310.9 Severability.**

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 95-3537 Filed 2-13-95; 8:45 am]

BILLING CODE 6750-01-P

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 63**

[AD-FRL-5155-2]

#### **Hazardous Air Pollutants: Provisions Governing Constructed, Reconstructed or Modified Major Sources**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Interpretive notice.

**SUMMARY:** This notice announces the EPA's revised interpretation of the

Clean Air Act's (Act) requirements regarding the effective date of section 112(g) of the Act. The interpretation adopted here postpones the effective date of section 112(g) until after the EPA has promulgated a rule addressing that provision.

**EFFECTIVE DATE:** February 14, 1995.

**FOR FURTHER INFORMATION CONTACT:** Ms. Kathy Kaufman at (919) 541-0102, Information Transfer and Program Integration Division (MD-12), U. S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Summary of EPA's Policy**

The Administrator of the EPA is today announcing the EPA's interpretation of the Act requirements regarding the effective date of section 112(g) during the period prior to promulgation of a Federal rule addressing implementation of that section. This notice effects changes from the view embodied in the preamble to the proposed rulemaking under section 112(g), **Federal Register** notices of proposed and final approvals of operating permits programs under title V of the Act, and in guidance issued by the EPA's Office of Air Quality Planning and Standards (OAQPS).

For the reasons set forth in this notice, the EPA now interprets section 112(g) not to take effect before the EPA issues notice and comment guidance addressing implementation of that section. In the interim period before this guidance is promulgated, States may, as a matter of State law, implement a program for the review of section 112(g) modifications, constructions, or reconstructions. However, the section 112(g) requirement that major source modifications, constructions, or reconstructions meet the maximum achievable control technology (MACT)—as determined on a case-by-case basis where no Federal standard for a source category has been set—will not take effect as a matter of Federal law until the section 112(g) rule is promulgated.

##### **II. Discussion**

###### **A. Requirements of Section 112(g). Previous Policy Position**

After the effective date of a title V permit program in a State, section 112(g) prohibits any person from constructing or reconstructing a major source of hazardous air pollutants (HAP), or modifying a major HAP's source, without a determination from "the Administrator (or the State)" that MACT will be met. The determination must be

on a case-by-case basis by "the Administrator (or the State)" if no MACT standard has been issued. Section 112(g)(1)(B) also provides that the Administrator "shall, after notice and opportunity for comment and not later than [May 15, 1992] publish guidance with respect to implementation of this subsection." The guidance must address the relative hazard of HAP in a manner "sufficient to facilitate the offset showing" allowed in the definition of "modification."

The EPA proposed a rule implementing section 112(g) on April 1, 1994 (59 FR 15504). The EPA currently anticipates promulgation of this rule during the summer of 1995. In anticipation of the fact that many title V permit programs would be approved before the section 112(g) rule was promulgated, the OAQPS issued a guidance memorandum on June 28, 1994<sup>1</sup> to assist States in their implementation of section 112(g) during this transition period. The guidance states that section 112(g) takes effect upon approval of a title V program in a State regardless of whether the EPA's rule has been promulgated. The guidance also offers suggestions for how States may implement section 112(g) during the transition period.

To date, the EPA has approved several title V programs, the first of which was for the State of Washington on November 9, 1994 (59 FR 55813). EPA also has proposed approval of numerous other programs. In each of these notices, the Agency has restated its position that the requirements of section 112(g) would take effect in these States upon approval of the title V program, and has described its understanding of how section 112(g) would be implemented in that State during the transition period.

###### **B. Reconsideration Based on Concerns Raised**

States and the regulated community have voiced considerable concern with the impracticality of implementation of section 112(g) during the transition period.<sup>2</sup> These concerns have focused on the provisions for determining the applicability of section 112(g), and in particular on provisions addressing *de minimis* levels and offsets for modifications, as well as the definition of "major source" for constructions and

<sup>1</sup> Guidance for the Initial Implementation of Section 112(g), Memorandum from John S. Seitz to EPA Regional Air Division Directors, June 28, 1994.

<sup>2</sup> For State and regulated community comments submitted on the proposed section 112(g) rule, see Docket Number A-91-64 inserts IV-D-199, IV-D-213, IV-D-217, IV-D-219, IV-D-222, IV-D-229, IV-D-255, IV-D-295, IV-D-323, IV-D-333, IV-D-337, IV-D-PH217, IV-D-199, IV-D-213, IV-D-295, IV-D-PH221, and IV-D-PH222.