

FEDERAL TRADE COMMISSION

16 CFR Part 310

Telemarketing Sales Rule

AGENCY: Federal Trade Commission.

ACTION: Revised notice of proposed rulemaking.

SUMMARY: In this document, the Federal Trade Commission ("FTC" or "Commission") issues a revised notice of proposed rulemaking to implement the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act" or "the Act"). Section 3 of that 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 June 30, 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.

ADDRESSES: Six paper copies of each written comment should be submitted to the Office of the Secretary, Room 159, Federal Trade Commission, Washington, D.C. 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 of comments in electronic form. Submissions should be captioned: "Proposed Telemarketing Sales Rule," FTC File No. R411001.

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

SUPPLEMENTARY INFORMATION:

Section A. Background

On August 16, 1994, the President signed into law the Telemarketing Act,¹ which directs the Commission to prescribe rules, within 365 days of

enactment of the Act, prohibiting deceptive and abusive telemarketing acts or practices. The Commission published a notice of proposed rulemaking ("NPR") in the **Federal Register** on February 14, 1995.²

In response to the NPR, the Commission received over 300 comments from industry, law enforcement and consumer representatives, as well as from individual consumers and businesses.³ In general, consumers commented that the initially proposed Rule did not go far enough to stop unwanted telemarketing calls. Law enforcement officials uniformly praised the Commission's proposal for its thorough and useful treatment of the various means employed by fraudulent telemarketers to get consumers' money through deception or abuse. Finally, most industry representatives generally maintained that the initially proposed Rule unnecessarily burdened legitimate businesses, adding needless costs through overbroad proposals that failed to aim specifically at deceptive and abusive telemarketing practices.

Between April 18 and 20, 1995, staff of the Commission conducted a public workshop conference in Chicago, Illinois. Twenty associations or individual businesses, each with an affected interest and ability to represent others with similar interests, were selected to engage in a roundtable discussion.⁴ Howard Bellman served as the conference facilitator. Participants discussed various aspects of the initially proposed Rule, addressed each other's comments and questions, and responded to questions from Commission staff members. The conference was open to the public, and more than 150 observers attended. Oral comments from members of the public were invited each day, and 37 individuals spoke during the course of the three-day conference. The entire proceeding was transcribed, and the transcript was placed on the public record.⁵

On May 3, 1995, Commission staff briefed all the Commissioners, in an open meeting, about the rulemaking process, the issues raised in the written comments and the public workshop,

² 60 FR 8313-33.

³ A list of the commenters, and the acronyms which will be used to identify each commenter in this notice, is appended to Section A of this notice.

⁴ The selected participants were: AARP, ATA, ATFA, APAC, ANA, DMA, DSA—Nev., DSA, EMA, ISA, ICTA, MPA, Monex, NAAG, NACAA, NAPA, NCL, NRF, PMAA, and USPS.

⁵ References to the conference transcript are cited as "Tr." followed by the appropriate page designation. References to comments are cited as "[acronym of commenter] at [page number]."

and stated possible approaches to address the issues commenters raised. The briefing was transcribed and the transcript was placed on the public record. The entire public record to date, including the comments, the conference transcript, and the Commission open briefing transcript is available on CD-ROM and has been placed on the Internet.⁶

Based on the Act's legislative history, the written comments received, and the information learned at the workshop conference, the Commission has decided to modify its regulatory approach in this revised proposed Rule. The Commission believes this modification is necessary to effectuate appropriately Congress' directive that the FTC in its rulemaking "develop criteria of behavior" and "issue a * * * rule [that is] flexible enough to encompass the changing nature of [deceptive] activity, while at the same time providing telemarketers with guidance as to the general nature of the prohibited conduct."⁷ The Commission's revised approach addresses many commenters' concerns that the initially proposed Rule cast too broad a net and imposed unnecessary burdens on the legitimate telemarketing industry without adequately focussing on deceptive and abusive telemarketing practices. Additionally, the revised proposed Rule addresses law enforcement concerns that the Rule needs to provide enough enforcement flexibility to reach deceptive and abusive telemarketing acts or practices currently unknown. The Commission believes additional public comment on a revised proposal will assist in producing a final Rule that most effectively prohibits deceptive and abusive telemarketing practices, while not unduly burdening legitimate businesses.

Section B of this notice discusses, on a section-by-section basis, the Commission's revised proposed Rule.

Appendix

List of Commenters and Acronyms

Acronym and Commenter

ADS ADS Teleservices
 ADVANTA Advanta Corp.
 ALIC Allstate Life Insurance Co.
 AMCI Allstate Motor Club., Inc.
 A-MARK A-Mark Precious Metals, Inc.
 AAF American Advertising Federation

⁶ The FTC gopher server address is CONSUMER.FTC.GOV 2416. For World Wide Web access, the URL is GOPHER://CONSUMER.FTC.GOV:2416.

⁷ H. R. Rep. No. 20, 103rd Cong., 1st Sess. 8; S. Rep. No. 80, 103rd Cong., 1st Sess. 9 (hereinafter referred to as "House Report" and "Senate Report," respectively).

¹ 15 U.S.C. 6101-08.

- AAAA American Association of Advertising Agencies, Inc.
- AARP American Association of Retired Persons
- ABA American Bankers Association
- ACRA American Car Rental Association
- ACA American Cemetery Association
- ADC American Distributing Company
- AMEX American Express Company
- AFSA American Financial Services Association
- AIG American Impact Group
- APN American Publishers Network, Inc.
- ARDA American Resort Development Association
- ASAE American Society of Association Executives
- ASTA American Society of Travel Agents
- ATA American Telemarketing Association
- ATFA American Telephone Fundraisers Association
- AWMI American West Marketing, Inc.—Barry Engels
- AWMI American West Marketing, Inc.—Sandra Sawyer
- AMERINET AmeriNet, Inc.
- ANDREWS Andrews Satellite & Home Theater
- ANN ARBOR Ann Arbor News
- APAC APAC TeleServices
- ABI Archbold Buckeye, Inc.
- AMOC Arizona Mail Order Company, Inc.
- ARA Arizona Retailers Association
- A&H Arter & Hadden
- ACB Associated Credit Bureaus, Inc.
- AAP Association of American Publishers
- AIMS Association of Independent Television Stations, Inc.
- ANA Association of National Advertisers
- ATLANTA Atlanta Journal & Atlanta Constitution
- AT&T AT&T Corp.
- AUTOSCRIBE AutoScribe Corporation
- BAGGS Baggs, Andrew
- BAGWELL Bagwell, Linda L.
- BOB Bank of Boston
- BAY CITY Bay City Times
- BELLEVILLE Belleville News-Democrat
- BMCA Beneficial Management Corporation of America
- BNC Birmingham News Company
- BRADLEY Bradley, MJP
- BRANTLEY Brantley, Lamar
- BREWSTER Brewster, The Honorable Bill K.
- BFC Brown Forman Corporation
- BPIA Business Products Industry Association
- SAMPLER Business Sampler Advertising, Inc.
- BSA Business Software Alliance
- CAPITAL Capital Press
- CAPUTO Caputo, Harriet Q.
- CCA Career College Association
- CME Center for Media Education
- CHASE Chase Manhattan Bank (USA)
- CHEMICAL Chemical Bank
- CHERNIKOFF Chernikoff, J.D.
- CDI Circulation Development, Inc
- CITICORP Citicorp/Citibank
- COALITION "Coalition"—various companies
- CPA Colorado Press Association
- CHC Columbia House Company
- COMCAST Comcast Corporation/Jones Intercable
- CA Commercial Appeal
- CBA Consumer Bankers Association
- CFA Consumer Federation of America
- CONWAY Conway National Bank
- CORNELL Cornell Group
- CMOR Council for Marketing and Opinion Research
- COX Cox Newspapers, Inc.
- CRILLY Crilly, Thomas W.
- CUCI CUC International
- DCR Daily Court Review
- DAILY NEWS Daily News
- DMBE Department of Marketing and Business Environment, Florida International University
- DMI DialAmerica Marketing, Inc.
- DMT&H Dickinson, Mackaman, Tyler & Hagan, P.C.
- DW&Z Dierman, Wortley & Zola, Inc.
- DSA-NEV. Direct Sales Association of Nevada
- DSI Direct Sales International (2 copies of letter, 1 of comment)
- DMA Direct Marketing Association
- DMSI Direct Marketing Services, Inc.
- DSA Direct Selling Association
- DIVERSIFIED Diversified Marketing Service, Inc.
- DONREY Donrey Media Group
- DOUBLEDAY Doubleday Book & Music
- DOW JONES Dow Jones & Co., Inc.
- OREGONIAN East Oregonian
- BAUER Eddie Bauer, Inc.
- EDMUND Edmund Scientific Company
- EMA Electronic Messaging Association
- EMMONS Emmons, Ethel B.
- EQUIFAX Equifax Credit Information Services, Inc.
- EHRlich Ehrlich, The Honorable Robert L., Jr.
- ERIE Erie Construction Mid-West, Inc.
- ERNST Ernst, Michael
- F&W F&W Publications
- FedEx Federal Express
- FRB Federal Reserve Banks
- FRB-SF Federal Reserve Bank of San Francisco
- FINGERHUT The Fingerhut Companies
- FLINT Flint Journal
- FORNEY Forney Messenger Inc.
- FRANKLIN Franklin Mint
- GABRIEL Gabriel, Mrs. Harry J., Jr.
- GANNET Gannett Co., Inc.
- GE GE Appliances
- GA OCA Georgia Office of Consumer Affairs
- GRA Georgia Retail Association
- GIBSON Gibson, Stewart & Jean
- GGP Gift Gallery Promotions
- GCM Good Cents Marketing
- GREENE Greene, Russ
- GRIDER Grider, Felicia
- GROLIER Grolier TeleMarketing, Inc.
- GHA Group Health Association of America
- GUTHY Guthy-Renker
- HHDM Harte-Hanks Direct Marketing
- HHMS Harte-Hanks Marketing Services
- HAWES Hawes Center, Inc.
- HEAD Head, W.L.
- HEARST Hearst Magazines
- HNM&T Hearst New Media & Technology
- HELMS Helms, The Honorable Jesse
- HERRERA Herrera, Barbara
- HERTZ Hertz Corporation
- HSN Home Shopping Network
- HOUSEHOLD Household Bank
- HFC Household Finance Corp.
- HII Household International, Inc.
- H&H Howe & Hutton, Ltd.—March 14 comment
- H&H Howe & Hutton, Ltd.—March 30 comment
- HUDSON Hudson City Savings Bank
- HUNTINGTON Huntington National Bank
- HUNTSVILLE Huntsville Times/Huntsville News
- IDAG Idaho Attorney General
- IMSP IMS Promotions
- IRC Indiana Retail Council, Inc.
- ICTA Industry Council for Tangible Assets
- IMC InfoCision Management Corporation
- INFOMALL Infomall TV Network
- IMSI Infomercial Monitoring Service, Inc.
- INSP Inspirational Network
- ISA Interactive Services Association
- IBM International Business Machines Corporation
- IFI International Fabricare Institute
- IFA International Franchise Association
- IMS International Magazine Service of Northern California
- IRL International Readers League of Indianapolis
- IH Investment Hotlines
- IA DOJ Iowa Department of Justice
- ITI ITI Marketing Services, Inc.
- PENNEY J.C. Penney Company, Inc.
- JACKSON Jackson Citizen Patriot
- RIVERS Joan Rivers Products, Inc.
- JOHNSTON Johnston, Gloria
- KALAMAZOO Kalamazoo Gazette
- KAPLAN Kaplan, Jules
- KIKENDALL Kikendall, Thomas J.
- KLEID Kleid Company
- KNIGHT Knight Ridder
- KNOXVILLE Knoxville News Sentinel Co.—Mashburn
- KNOXVILLE Knoxville News Sentinel Co.—Stevens
- LANDMARK Landmark Community Newspapers, Inc.
- LARK Lark In The Morning
- LAURENZA Laurenza, Joseph
- LCS LCS Direct Marketing Service
- LEIBACHER Leibacher, Philip J. (2 copies)
- LENOX Lenox, Inc.
- LA TIMES The Los Angeles Times
- LOWE'S Lowe's Studio
- MPA Magazine Publishers of America
- MSSC Magazine Subscription Sales Coalition
- MRG Marketing Response Group & Laser Co., Inc.
- MARKETLINK Marketlink
- MARTIN Martin Direct
- MASTERCARD Mastercard Int'l, Inc. & Visa USA, Inc.
- MBNA MBNA America Bank, N.A.
- MCI MCI Telecommunications Corporation
- MCKNIGHT McKnight Management Company
- MELLON Mellon Bank Corporation
- MELTON Melton, Carol A.
- MM Merchant Masters
- MS Merchant Sampler
- MGCB Merchants Gift Check Book
- MGC Merchants Golden Checks
- MP Merchants Promotions
- M-I Messenger-Inquirer
- MRA Michigan Retailers Association
- MILLS Mills, Susan
- MS PRESS The Mississippi Press

MOPA Missouri Press Association	PCI Private Citizen, Inc. (initial letter & comment)	T-I Times-Independent
MORA Missouri Retailers Association	Private Citizen (addendum)	TP Times Picayune
MOBILE Mobile Media	PCH Programmers Clearing House	TITUS Titus, The Honorable Dina (2 letters)
MPR Mobile Press Register	PMAA Promotional Marketing Association of America & Incentive Federation	TMG TMG (Television Marketing Group)
MONEX MONEX	PRUDENTIAL Prudential Home Mortgage	TMW TMW Marketing
WARD Montgomery Ward	PCH Publishers Clearing House	TMO Total Marketing Outbound, Inc.
MMC Moore Medical Corporation	PDW Publishers Discount Warehouse—Barclay Fisher	TUPPERWARE Tupperware Worldwide (2 copies)
MORSE Morse, Larry E.	PDW Publishers Discount Warehouse—Gina Lewis	TVMARKET TV Marketplace, Inc.
MBAA Mortgage Bankers Association of America	PDW Publishers Discount Warehouse—J.B. Owen	UCI United Color, Inc.
MPG MPG Newspapers	PDW Publishers Discount Warehouse—David Rains	UPS United Parcel Service, Inc.
MTD MTD Services	PDW Publishers Discount Warehouse—Jimmy Riggle	USTA United States Telephone Association
MURRAY Murray Ledger & Times	P&C Pullman & Comley	UMI Universal Media Inc.
MUSKEGON Muskegon Chronicle	QUICKCARD QuickCard Systems	USD University of San Diego, Center for Public Interest Law
MUTUAL Mutual of Omaha Companies	QVC QVC, Inc.	USCE U.S. Coin Exchange
NAAG National Association of Attorneys General	RDA Reader's Digest Association, Inc.	U.S. Coin Exchange (addendum)
NACAA National Association of Consumer Agency Administrators	SEARCHLIGHT Record Searchlight—Kjellin	USPS U.S. Postal Service
NAR National Association of Realtors	SEARCHLIGHT Record Searchlight—Dawson	USWI US West, Inc.
NAPA National Automated Payment Association	REGAL COMM Regal Communications Corporation	VIACOM Viacom International
NAMA National Automatic Merchandising Association	REGAL GROUP Regal Group	VINCENT Vincent, Chorey, Taylor & Feil
NBR National Bank of the Redwoods	REICHWEIN Reichwein, Kay	VIRGINIA Virginia State Corporation Commission
NCTA National Cable Television Association, Inc.	RPOA Resort Property Owners Association	WACHOVIA Wachovia Corporation
NCL National Consumers League	RPI Resource Publications, Inc.	WASHINGTON The Washington Post
NCMC National Credit Management Corporation	RICE Rice, Rodger D. and Barbara L.	WAUGH Waugh, John C.
NFIB National Federation of Independent Business	RICH Rich, David G.	WTO West Telemarketing Outbound
NFN National Federation of Nonprofits	RITCHIE Ritchie Swimwear	WU Western Union
NFA National Futures Association	RMH RMH Telemarketing	WESTVACO Westvaco, Corp.
NNA National Newspaper Association	RODRIGUEZ Rodriguez, Ann	WILLIAMS Williams Television Time
NPS National Promotional Services	ROLLINS Rollins Inc. (2 copies)	WTC Wilmington Trust Company
NRF National Retail Federation	RPS Rollins Protective Services	WILSON Wilson Daily Times
NSF National Science Foundation	WEBER Ron Weber and Associates	WINCHESTER Winchester Sun
NB NationsBank	ROTENBERG Rotenberg, Marion	WINDSOR Windsor Vineyards
NIE Nationwide Insurance Enterprise	SSI SafeCard Services, Inc.	WINONA Winona Post
NPC Neighborhood Periodical Club	SAGINAW Saginaw News	WFNNB World Financial Network National Bank
NETWORK Network Direct	SFNA San Francisco Newspaper Agency	YOUNGBERG Youngberg, Arthur D.
NHI New Hampton, Inc.	SEARS Sears Merchandise Group	
NYSCPBB New York State Consumer Protection Board	SIASSR Securities Industry Association	
NYTC New York Times Company	SCIC Service Contract Industry Council (SCIC)	
NEWS News Publishing Company	SHI Shop at Home	
NAA Newspaper Association of America	SHULMAN Shulman, Betty	
NIMA NIMA International	SIGNATURE The Signature Group	
NORDSTROM Nordstrom	S&S Simpson & Simpson, P.C.	
NARDA North American Retail Dealers Association	SMITH Smith, R.	
NASAA North American Securities Administrators Association	SDRA South Dakota Retailers Association	
NYNEX NYNEX	SBTC Southwestern Bell Telephone Company	
OHIO Ohio Health Care Products, Inc.	SPIEGEL Spiegel, Inc.	
OLAN Olan Mills, Inc.	SPRINT Sprint Corporation	
GLOBE Old Globe	STAR Star-Ledger	
OPC Oregonian Publishing Company	SIA Staten Island Advance	
ORKIN Orkin Lawn Care	SMSI Strategic Marketing Specialists, Inc.	
ORKIN Orkin Maid	STUART Stuart News	
ORKIN Orkin Pest Control—March 23 comment	S&W Sullivan & Worcester	
ORKIN Orkin Pest Control—March 30 comment	SUN Sun Newspapers	
ORKIN Orkin Plantscaping	SSE Superstar Satellite Entertainment	
PACESETTER Pacesetter Corporation	SUTTON Sutton Marketing	
PTG Pacific Telesis Group	SYRACUSE Syracuse Newspapers	
PATRIOT Patriot News	TALK800 Talk800	
PEPPERTREE Peppertree Resorts, Ltd.	TMGI Telatron Marketing Group, Inc.	
PLP Personal Legal Plans	TELENATIONAL Telenational Marketing	
PETERSON,P Peterson, Phyllis G.	TCPS Telephone Check Payment Systems	
PETERSON,R Peterson, Rosie Marie	TPA Tennessee Press Association, Inc.	
PPI Phone Programs Inc.	TEZANOS Tezanos, Maritza	
PLAIN Plain Dealer	TCI Thomas Cook, Inc.	
Plantscaping (see Orkin)	TIEDT Tiedt, Thomas N.	
	TIMEWARNER Time Warner	

Section B. Discussion of the Revised Proposed Rule

Section 310.1 Scope of the Regulations

Section 310.1 of the revised proposed Rule makes clear that this Rule does not apply to any activity excluded from the Commission's jurisdiction.⁸ Thus, pursuant to the following jurisdictional limitations set forth in Section 5(a)(2) of the Federal Trade Commission Act ["FTC Act"],⁹ this Rule does not apply to:

Banks, savings and loan institutions described in section 18(f)(3),¹⁰ Federal credit unions described in section 18(f)(4),¹¹ common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as

⁸The Telemarketing Act states that "no activity which is outside the jurisdiction of the [FTC] Act shall be affected by this Act." 15 U.S.C. 6105(a).

⁹15 U.S.C. 45(a)(2).

¹⁰Section 18(f)(3) of the FTC Act, 15 U.S.C. 57(f)(3), describes "savings associations as defined in section 3 of the Federal Deposit Insurance Act," 12 U.S.C. 1811 *et seq.*

¹¹Section 18(f)(4) of the FTC Act, 15 U.S.C. 57(f)(4), describes "Federal credit unions under sections 120 and 206 of the Federal Credit Union Act (12 U.S.C. 1766 and 1786)."

amended, except as provided in Section 406(b) of said Act.

In addition, this Rule does not apply to any entity that is not "organized to carry on business for its own profit or that of its members."¹² Finally, this Rule does not apply to any entity engaged in the business of insurance to the extent that such business is regulated by State law.¹³

Section 310.2 Definitions

The revised proposed Rule amends, adds, or deletes certain definitions. The following definitions were deleted: "business venture," "goods or services," "premium," and "verifiable retail sales price." The Commission amended the definitions of: "credit card," "credit card sales draft," "credit card system," "investment opportunity," "merchant," "merchant agreement," "prize," "prize promotion," "seller," "telemarketer," "telemarketing, and "telephone solicitation." A definition for the term "credit" was added. Each of these changes, as well as a discussion of the definition of the term "material," are discussed below.

1. *Business venture.* Section 310.2(a) of the initially proposed Rule defined the term "business venture" as any "business arrangement, however denominated, including * * * 'a franchise' as * * * defined in the Commission's Franchise Rule * * *"¹⁴ 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, trade name, advertising, or other commercial symbol); and (2) the promise of more than nominal assistance * * * 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."¹⁵ This definition came into play in Section 310.3(a)(3) of the initially proposed Rule, which prohibited sellers or telemarketers from misrepresenting important information in connection with the offer, offer for sale or sale of any business venture. In addition, the initially proposed rule, at Section 310.4(a)(8), prohibited certain abusive practices concerning the use of skills in the sale of business ventures.

The Commission's Franchise Rule contains requirements and prohibitions that apply to franchises and business opportunities. Subsequent to the

publication of the NPR in this proceeding, the Commission issued a request for comments on the Franchise Rule as part of its periodic regulatory review of Commission trade regulation rules and guides.¹⁶ The Commission believes it is more appropriate to consider within the framework of that review process whether any new regulatory action is needed to address the sale of business ventures. Following this approach, the Commission ensures that any new regulatory requirement or prohibition applicable to franchises or business ventures will be codified in one regulation—the Franchise Rule—not spread out over two separate Rules. Accordingly, the definition of "business venture," as well as the Sections of the initially proposed Rule prohibiting misrepresentations and abusive practices described above, have been deleted from the revised proposed Rule.

2. *Credit-related definitions.* The initially proposed Rule defined various credit-related terms that are used primarily in Section 310.3(c) relating to credit card laundering. These terms include "acquirer," "cardholder," "credit card," "credit card sales draft," "credit card system," "merchant," and "merchant agreement." Very few commenters expressed concern about the foregoing proposed definitions, but some did suggest minor technical changes to reflect more accurately the credit card industry's terminology and practices.¹⁷ Based on those comments, the Commission proposes the following changes.

The Commission proposes adding under Section 310.2(e) a definition of the term "credit" to mean "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." This definition has been added to clarify the scope of Section 310.3(c) relating to credit card laundering. It was apparent from several comments that clarification was necessary. Some commenters wanted to include all electronic payment systems under credit card laundering.¹⁸ Based on the plain language of the statute and its legislative history,¹⁹ however, Congress clearly meant to prohibit credit card laundering predicated upon the definition of "credit" used throughout the consumer credit statutes, and did not contemplate coverage of all electronic payment systems. Therefore, the proposed definition of "credit" tracks the statutory definition of

"credit" under the Truth in Lending Act ["TILA"],²⁰ conforming the scope of Section 310.3(c) to that intended by Congress.

Based on comments similar to those that prompted the addition of the definition of the term "credit," the Commission has modified the term "credit card" in Section 310.2(f) to make it consistent with the term as defined in the TILA, thereby explicitly limiting Section 310.3(c) to credit card laundering. The revised definition of "credit card" states: "Credit card means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit." The revised definition is identical to the statutory definition of "credit card" contained in the TILA.²¹

The Commission has revised Section 310.2(g) defining the term "credit card sales draft" to drop any reference to specific forms of records. The revised definition states: "Credit card sales draft means any record or evidence of a credit card transaction." This revision is designed to be flexible enough to anticipate future technological changes in how credit card transactions are handled. The modification is not intended to contract the range of recordkeeping formats that would be acceptable under the Rule.

The Commission also has modified the definition of the term "credit card system" in Section 310.2(h) to address concerns Visa and MasterCard raised that the initially proposed definition could be construed to cover any system put in place, including a system put in place by a deceptive telemarketer.²² Visa and MasterCard suggested language that would preclude such an outcome by clarifying the intention to include only a credit card system to process credit card transactions involving credit cards issued or licensed by the credit card system operator. The Commission agrees with the observations and suggested language advanced by Visa and MasterCard. The revised proposed definition states: "Credit card system means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system."

In Sections 310.2 (l) and (m),²³ the Commission has revised the definitions of "merchant" and "merchant agreement." In the initially proposed Rule, these definitions used the phrase

¹² See 15 U.S.C. 44.

¹³ See Section 2 of the McCarran-Ferguson Act, 15 U.S.C. 1012(b).

¹⁴ The term "franchise" is defined in the FTC's "Franchise Rule," 16 CFR 436.2(a).

¹⁵ 60 FR 8328.

¹⁶ 60 FR 17656 (April 7, 1995).

¹⁷ See generally MasterCard; NAAAG; USPS; NCL.

¹⁸ See, e.g., MasterCard at 5.

¹⁹ See generally House Report at 2; Senate Report at 2, 10.

²⁰ 15 U.S.C. 1603(e).

²¹ 15 U.S.C. 1603(k).

²² See MasterCard at 6.

²³ Initially proposed Rule Sections 310.2 (m) and (n), respectively.

“honor or accept, transmit or process credit cards in payment for goods or services.” Visa’s and MasterCard’s comments pointed out that, according to prevailing industry usages, a merchant “honors or accepts” a credit card for payment, but does not “transmit or process” credit cards. By the same token, a merchant “transmits or processes” credit card payments, but does not “honor or accept” credit card payments.²⁴ Therefore, the language of these definitions has been redrafted to reflect more precisely these distinctions.

3. *Goods or services.* Many commenters expressed confusion over the scope of the definition of the term “goods or services.”²⁵ The Commission initially included a definition of “goods or services”²⁶ intending to clarify that all tangible and intangible goods and services are covered under the initially proposed Rule, including leases, licenses, memberships, and certain charitable solicitations. Based on the confusion that this attempt at “clarification” engendered, the Commission has deleted the definition of “goods or services” from the revised proposed Rule. That deletion does not reflect any intention to contract the scope of coverage of the Rule; nor does it mean that any of the foregoing goods or services and similar intangible goods or services are not covered under the Rule.

4. *Investment opportunity.* The initially proposed Rule defined the term “investment opportunity”²⁷ to include “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.”²⁸ A number of commenters suggested that this definition should be based solely on

the objective test set forth in the second part of the definition; namely, the representations made by the seller.²⁹ In this way, sellers will be given clear notice that their products are covered by the Rule. These commenters believed that the first part of the definition, based on the customer’s subjective intent in making a purchase, should be eliminated. The Commission agrees with this suggestion, and the revised proposed definition is now based solely on the express or implied representations about income, profit or appreciation.

The initially proposed definition also expressly stated that 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.” Upon further consideration, the Commission believes this clause is unnecessary because government-issued licenses or interests derived from such licenses are indisputably within the jurisdiction of the Commission. The Commission therefore has deleted the foregoing extraneous clause from the revised proposed Rule, but has added clarification that the definition of the term, “investment opportunity” *does not* include “sales of franchises subject to the Commission’s [Franchise Rule] (cite omitted).”

5. *Material.* Some commenters expressed uncertainty as to what specifically is meant by the term “material,” as used in Section 310.2(k).³⁰ The Commission intends this term and its definition to comport with the Commission’s Deception Statement and established Commission precedent. *Cliffdale Associates*, 103 FTC 110 (1984); *Thompson Medical Co.*, 104 FTC 648 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 107 S.Ct. 1289 (1987); and the Commission’s Deception Statement attached as an appendix to *Cliffdale Associates*. The Commission believes that further explanation of the term in the Rule is unnecessary given the comprehensible guidance in the cited case law and policy statement.

6. *Premium.* The Commission, in its revised proposed Rule, has deleted the initially proposed Rule provisions relating to premiums. The Commission believes that those deletions obviate the need to define this term. The deletion of

the definition of the term “premium” and its associated provisions are not intended to be construed to eliminate from the Rule’s coverage the misrepresentation of a premium’s value in a telemarketing transaction.

7. *Prize and prize promotion.* Some modifications have been made to the initially proposed definition of the term “prize.”³¹ NAAG suggested in its comment that the reference to “no obligation to purchase” should be deleted from the definition.³² NAAG pointed out that many fraudulent telemarketers seek to create the impression that consumers must purchase something in order to receive a prize, even though the promotion technically does not include such a requirement. In such cases, it may be difficult for law enforcement authorities to prove that there was “no obligation to purchase,” making inapplicable the definition of “prize” and the protections the revised proposed Rule would provide for consumers with respect to prize promotions. The Commission believes this is a valid concern and, because the limiting language about an obligation to purchase is not necessary to accomplish the definition’s purpose, has deleted the language from the definition.

Another concern addressed in the revised proposed Rule involves the element of chance in the definition of “prize.” USPS noted that a typical deceptive prize scheme will involve a solicitation listing four or five items, with the consumer being told, without specificity, that he or she is guaranteed to receive one of them.³³ Because a consumer is “guaranteed” to receive one of the stated items, it could be construed that there is no element of “chance” involved in the offer and the item therefore is not a “prize.” The Commission believes this concern should be addressed and has therefore clarified the term “chance” included in the revised proposed definition of “prize.” The revised definition of the term “prize” states that “chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.”

The initially proposed Rule defined “prize promotion”³⁴ to include

³¹ The initially proposed Rule defined “prize” as “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.” Initially proposed Rule Section 310.2(q).

³² NAAG at 9. See also IA DOJ at 20.

³³ USPS at 3.

³⁴ Initially proposed Rule Section 310.2(r).

²⁴ See MasterCard at 6.

²⁵ See, e.g., IFI at 1–2; ATFA at 8–12.

²⁶ Initially proposed Rule Section 310.2(j).

²⁷ Initially proposed Rule Section 310.2(k).

²⁸ As noted in the NPR, Sections 3(d) and (e) of the Telemarketing Act, 15 U.S.C. 6102(d) and (e), 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.

²⁹ E.g., ICTA at 28–30; Monex at 6; A-Mark at 2–4.

³⁰ See generally TMW; Monex. In the initially proposed Rule, the definition of “material” was numbered Section 310.2(l).

traditional sweepstakes or other games 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. The currently proposed definition has been revised slightly, (Section 310.2(g) of the revised proposed Rule), to make clear that the representations about winning may be either express or implied. This addresses a concern, raised by NAAG,³⁵ that fraudulent telemarketers often artfully craft their sales pitches to avoid express representations while delivering an implied message that a consumer has won a prize.

8. *Seller and telemarketer.* Another definition that elicited comments was the term "seller."³⁶ Many commenters expressed the view that the definition needed clarification as to what constitutes a "seller" under the Rule, particularly with respect to its application to diversified companies or divisions within one parent organization. For example, as it explained during the workshop conference, ANA represents many members that have divisions of large diversified companies, such as Orkin.³⁷ ANA explained that in addition to pest and termite control that people are familiar with, Orkin also offers a number of other services unrelated to pests and termites.³⁸

After careful consideration, the Commission believes that the definition of the term "seller" is clear. The Commission intends that this definition encompass distinct corporate divisions as separate "sellers." The determination as to whether distinct divisions of a single corporate organization will be treated as separate sellers will depend on such factors as: (1) Whether there exists substantial diversity between the operational structure of the division and other divisions or the corporate organization and (2) whether the nature or type of goods or services offered by the division are substantially different from those offered by other divisions or the corporate organization.

The term "telemarketer," included in revised Section 310.2(t),³⁹ also elicited numerous requests for clarification. The Commission believes that the definition is clear. The Commission intends that the definition of the term "telemarketer" apply to persons making a telephone call to, or receiving a telephone call

from, a customer⁴⁰ in connection with or about the purchase of goods or services. It does not include persons making or receiving customer service calls or similar tangential telephone contacts unless a sales offer is made and accepted during such calls. To provide industry with further guidance as to the intended scope of the term "telemarketer," the Commission has substituted the phrase "telephone calls to" in place of "telephonic communication."

Commenters also raised concerns about whether sellers and telemarketers should be held jointly liable under the Rule for the actions of the other. The Commission finds nothing in the statute or legislative history to support the view that it is the intent of Congress to impose joint and several liability between a seller and a telemarketer. Nor does the Commission intend such a result. However, the revised proposed Rule's provisions state that a seller or a telemarketer can be held liable for violating various parts of the Rule if either engages in the prohibited acts or practices. Additionally, liability can be imposed on a seller or telemarketer for assisting and facilitating a Rule violation if either meets the standard set forth in Section 310.3(b). Therefore, although the Rule does not impose joint and several liability, a seller or telemarketer can be held liable if either engages directly, or substantially assists or facilitates the other, in any violation of this Rule.

9. *Telemarketing.* The definition of "telemarketing," in Section 310.2(u),⁴¹ engendered more comments by far than any other definition. Based on the comments submitted by law enforcement and industry representatives, the Commission proposes a revised definition of "telemarketing." The revised definition states:

Telemarketing means a plan, program, or campaign which is conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call. 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 or in a substantially similar catalog.

The revised definition of "telemarketing" follows more closely the statutory definition set forth by Congress in the Telemarketing Act.⁴² The Commission has carefully considered suggestions that the initially proposed definition exceeded the Commission's statutory authority and has determined that closer adherence to the statutory language is the more appropriate approach.⁴³ This change also limits the definition of "telemarketing" to telephone calls and excludes from coverage other "telephonic mediums." After considering many comments that objected to the Rule's coverage of on-line services, the Commission acknowledges that it does not have the necessary information available to it to support coverage of on-line services under the Rule.⁴⁴

The revised definition of "telemarketing" also eliminates specific language relating to coverage of inbound calls. Many commenters expressed concern that inclusion of such calls went beyond the Commission's statutory authority.⁴⁵ As will be discussed further in the discussion of Section 310.6, given the abundant, unambiguous legislative history on this point,⁴⁶ and the omission from the statute of any indication that inbound calls are not within its ambit, the Commission rejects this view. Other commenters⁴⁷ stated that including inbound calls in the proposed definition caused confusion about the applicability

⁴² 15 U.S.C. 6106(4).

⁴³ The Commission, however, does not adopt the view that the definition of "telemarketing" in the initially proposed Rule went beyond the Telemarketing Act. In enacting the Telemarketing Act, Congress clearly intended to cover purchases of tangible as well as intangible goods or services, including leases and licenses. House Report at 11; Senate Report at 8. In any "purchase" there is an exchange of consideration, in other words a "payment." Because deceptive telemarketers could construe the term "purchase" to apply only to the acquisition of a "tangible" good or service, the Commission substituted the term "payment" for "purchase." The Commission intended to clarify that sales of intangible goods or services were included in the term "telemarketing," as they still are under the revised proposed Rule.

⁴⁴ Such media remain subject to the Commission's jurisdiction under the FTC Act, 15 U.S.C. 41 *et seq.* See, e.g., *FTC v. Corzine, dba Chase Consulting No. CIV-S-94-1146-DLF JFM* (E.D. Cal. Dec. 1994).

⁴⁵ See, e.g., DSA at 6; NRF at 20-21.

⁴⁶ House Report at 2; Senate Report at 7-8.

⁴⁷ E.g., DMA at 17-18; MPA at 8-9.

³⁵ NAAG at 10.

³⁶ Initially proposed Rule Section 310.2(s).

³⁷ Tr. at 666.

³⁸ *Id.*

³⁹ Initially proposed Rule Section 310.2(u).

⁴⁰ Revised Section 310.2(i) defines "customer" as "any person who is or may be required to pay for goods or services offered through telemarketing."

⁴¹ Initially proposed Rule Section 310.2(v).

of the proposed general advertising exemption contained in Section 310.6 of the initially proposed Rule. Because the definition of "telemarketing" encompasses coverage of inbound calls under the Rule, it is no longer necessary to include such calls explicitly within the revised definition of "telemarketing." Furthermore, the inbound call exemption has been clarified in Section 310.6 to eliminate the confusion expressed in the comments. The revised proposed Rule's coverage, however, extends to inbound calls.

Many industry comments addressed the term "further solicitation" used in the part of the "telemarketing" definition that exempts from coverage solicitation of sales through the mailing of a catalog.⁴⁸ Numerous industry commenters suggested that reputable catalog companies have substantially similar catalogs in the public domain that mirror each other but may also be targeted to a particular season, activity, or product. For example, a mail order clothing seller may have summer and spring catalogs that include many of the same products, but they are different catalogs nevertheless. Commenters suggested that offering a caller goods or products contained in a catalog substantially similar to the catalog that generated the call should not trigger Rule coverage for a catalog seller.⁴⁹ Counterbalancing this point is the Commission's concern that exemptions from coverage be narrowly drawn to discourage exploitation of a perceived loophole by unscrupulous telemarketers. The revised proposed Rule therefore is modified to accommodate legitimate industry's practice of regularly mailing seasonal and similar catalogs, at the same time limiting the exemption to those catalogs that are "substantially similar" to the catalog that generated the customer's call.

Several commenters also expressed uncertainty as to whether "telemarketing" included calls to schedule appointments for subsequent face-to-face sales presentations and calls to inform persons about upcoming store sales or promotions.⁵⁰ The Commission believes that the definition clearly reflects the intention to cover those telephone calls that result in the sale of goods or services over the telephone without any opportunity by the customer to examine the goods or services. Obviously, a face-to-face sales presentation provides such an

opportunity and the notification of upcoming sales or promotions inviting a customer to come into a store or other in-person setting does not culminate in a telephone sale.

10. *Telephone solicitation.* The initially proposed Rule included a definition of the term "telephone solicitation." As noted in the NPR, the definition was "intended to include only outbound sales calls, i.e., telephone calls that are initiated by a telemarketer to a customer to induce payment for goods or services."⁵¹ Based on the comments received about other Sections of the initially proposed Rule that used the term "telephone solicitation," the intended coverage of only outbound sales calls was not clear.⁵² In order to clarify this point, the revised proposed Rule now defines the term "outbound telephone call" in Section 310.2(n) to mean "a telephone call initiated by a telemarketer to induce the purchase of goods or services," and uses it in every instance where the initially proposed Rule used the term "telephone solicitation."

11. *Verifiable retail sales price.* The initially proposed Rule defined the term "verifiable retail sales price."⁵³ The Commission has deleted all references to "verifiable retail sales price" in the revised proposed Rule. The Commission does not believe including a definition of "verifiable retail sales price" is necessary in this revised proposed Rule. Where appropriate, the Commission has used the term "value" in the Rule. The Commission intends that any represented value have a reasonable basis in fact.

Section 310.3 Deceptive Telemarketing Acts or Practices

1. *Prohibited Deceptive Telemarketing Acts or Practices.* Revised Section 310.3(a) continues to require affirmative disclosures and prohibits misrepresenting material information. As in the initial version of the proposed Rule, Section 310.3(a)(1) requires affirmative disclosures of general categories of material information. Many industry commenters, however, expressed concern about the uncertain scope of the affirmative disclosure obligation embodied in Section 310.3(a)(1).⁵⁴ The Commission has carefully considered these concerns and revised the proposed Rule accordingly. Specifically, the initially proposed rule required disclosure of "the total costs,

terms, and material restrictions, limitations, or conditions of receiving any goods or services." Revised Section 310.3(a)(1) now requires disclosure of "the total costs * * * [and] all material restrictions, limitations, or conditions to purchase, receive or use any goods or services that are the subject of the sales offer." This revision is intended to narrow and clarify the scope of the disclosure obligation. The initially proposed rule also specified that the disclosures required by Section 310.3(a)(1) be made "before payment is requested * * * and in the same manner and form as the payment request." In response to strong industry urging for greater flexibility in the manner and timing of essential disclosures,⁵⁵ the revised proposed rule specifies only that the disclosures be made "before a customer pays" and that they be made "in a clear and conspicuous manner." These disclosures may be made either orally or in writing. The determining factor for when a customer pays, regardless of whether by cash, check, credit card, demand draft, or otherwise, is when a customer sends funds by any means or provides credit card or bank account information to the seller or telemarketer to purchase goods or services. Additionally, Section 310.3(a)(1) no longer requires an affirmative disclosure of a seller's refund, cancellation, exchange, or repurchase policies, unless the seller or telemarketer chooses to make representations relating to such policies a part of the sales offer. If a seller or telemarketer chooses to make such policies a part of the sales offer, then the seller or telemarketer must disclose all the *material aspects* of the terms and conditions of such policies, orally or in writing, before a customer pays for the goods or services offered. Finally, a seller or telemarketer must disclose that no purchase is necessary to win if a prize promotion is offered in conjunction with a sales offer of goods or services.

Section 310.3(a)(2) continues to prohibit misrepresentations of several categories of material information. The information deemed material under Section 310.3(a)(2) is based on established case law and the Commission's deception policy statement. The Commission, however, has determined to drop the lengthy enumeration of specific prohibited misrepresentations contained in Sections 310.3(a)(2)(viii)-(xxiv) of the initially proposed Rule. These specific prohibited misrepresentations, each of

⁵¹ 60 FR at 8315.

⁵² See, e.g., MPA at 19; NRF at 35.

⁵³ Initially proposed Rule Section 310.2(x).

⁵⁴ See NIMA at 11; ACAR at 12; TR. at 292 (Monex), 296-97 (PMAA), 303-05 (ICTA)

⁵⁵ See PMAA at 80; OPC at 2-3; ADS at 1; MORA at 1.

⁴⁸ See, e.g., APAC at 9; NRF at 23-25; MPA at 10.

⁴⁹ E.g., NRF at 24.

⁵⁰ See, e.g., WFNNB at 1.

which was based on allegations in complaints filed in recent years by the Commission under Section 13(b) of the FTC Act,⁵⁶ are no longer necessary because they are subsumed in the general prohibitions against misrepresentations set forth in Section 310.3(a)(2) of the revised proposed Rule. No inference should be drawn that these deletions in any way alter the Commission's view that the misrepresentations enumerated initially in proposed Sections 310.3(a)(2)(viii)-(xxiv) would violate the FTC Act as well as the revised proposed Rule. The Commission believes that this more concise regulatory approach effectuates Congress' legislative intent and addresses the concerns of many commenters, consumer groups,⁵⁷ law enforcement,⁵⁸ and industry⁵⁹ alike, who asserted that a general standard of deception was necessary either in addition to or instead of the enumerated acts or practices.

Sections 310.3(a)(2)(i)-(ii) prohibit misrepresenting information required to be disclosed under Section 310.3(a)(1). The scope of Sections 310.3(a)(2)(i)-(ii) has been delineated more precisely than their counterparts in the initially proposed Rule Sections 310.3(a)(2)(i)-(iii). Revised Sections 310.3(a)(2)(i)-(ii) now include the limiting phrases "to purchase, receive, or use" and "that are the subject of a sales offer." The same clarifying phrases have been added to revised Section 310.3(a)(2)(iii), which specifies that misrepresenting "any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of the sales offer" violates this Rule. Commission case law and policy are clear that such information is material to a person's choice of or conduct regarding the purchase of goods or services. Similarly, representations as to a seller's refund, cancellation, exchange, or repurchase policies are material to a person's purchase decision. Section 310.3(a)(2)(iv) (identical to Section 310.3(a)(2)(v) of the initially proposed Rule) therefore prohibits misrepresenting the latter category of information.

Section 310.3(a)(2)(v) of the revised proposed Rule prohibits misrepresenting "any material aspect of a prize promotion, including but not limited to the odds of winning, the nature or value of a prize, or that

payment is required to receive a prize." The Commission has enumerated specific examples of material aspects of a prize promotion based on misrepresentations that the Commission has alleged in complaints filed under Section 13(b) of the FTC Act. The Commission believes that treating prize promotions as a separate general category is warranted given the great number of deceptive prize promotions and the distinct characteristics associated with such promotions.⁶⁰ Moreover, the legislative history clearly shows that Congress specifically intended that the Rule cover prizes or awards.⁶¹ Because there are certain aspects of a prize promotion that could be construed to be outside the scope of provisions narrowly limited to "the subject of a sales offer," the Commission believes that it is necessary to include revised Section 310.3(a)(2)(v). The prohibitions against prize promotion misrepresentations under Section 310.3(a)(2)(v) are in addition to the other prohibitions set forth in Section 310.3(a)(2).

Similarly, Section 310.3(a)(2)(vi) prohibits misrepresenting material aspects of an investment opportunity. The legislative history reflects Congress' recognition that deceptive investment opportunities account for a considerable percentage of deceptive telemarketing.⁶² Moreover, since 1991, deceptive investment scams account for approximately 43% of the Commission's telemarketing cases. The amount at risk for a consumer is generally far greater in investment scams than in deceptive schemes involving other types of consumer goods or services. Thus, investment opportunities are an area of heightened concern for consumers and the Commission. The revised proposed rule includes Section 310.3(a)(2)(vi), prohibiting misrepresentation of specified aspects of investment opportunities. This provision is included to obviate any possible construction that might exclude investment opportunities from the scope of Sections 310.3(a)(2)(i)-(iii). These general initial provisions are designed to embrace a limitless range of goods or services but are narrowly drawn to prohibit misrepresentations centered on purchase, receipt or use, or upon "performance, efficacy, nature, or central characteristics," which are unlike investment-specific attributes such as risk, liquidity, earnings

potential, or profitability. The prohibitions on misrepresentations under Section 310.3(a)(2)(vi) are in addition to, not in lieu of, other provisions under Section 310.3(a)(2).

Finally, the Commission has included Section 310.3(a)(2)(vii) that prohibits misrepresenting "a seller's or telemarketer's affiliation with, or endorsement by, any government or third-party organization." The Commission believes that this Section is necessary based on its own experience in law enforcement actions against deceptive telemarketers as well as the information state law enforcement agencies provided. Based on the Commission's enforcement experience, deceptive telemarketers bolster their credibility by misrepresenting that they are endorsed by or affiliated with charitable, police, civic, or similar organizations. A separate category is required because these types of misrepresentations, again, could be construed as outside the apparent scope of Sections 310.3(a)(2)(i)-(iii). However, Section 310.3(a)(2)(vii) is in addition to, not in lieu of, other provisions under Section 310.3(a)(2).

The Commission has deleted Section 310.3(a)(3) relating to business ventures. The Commission, as stated in Section 310.2, believes it is more appropriate to consider business ventures in the context of the Commission's recently-initiated Franchise Rule review. This should not be construed to mean, however, that if a business venture is sold through telemarketing and does not meet the coverage requirements under the Franchise Rule as currently in effect, it is exempt under this Rule. Such a "business venture" will still be deemed to be covered under this Rule as a good or service and be subject to the Rule's disclosure requirements and prohibitions.

Revised Section 310.3(a)(3) generally prohibits "making a false or misleading statement to induce any person to pay for goods or services." This general provision subsumes Sections 310.3(a)(4) and (5) of the initially proposed Rule. Former Section 310.3(a)(4) required written authorization before taking any funds from a consumer's checking, savings, or similar account. Former Section 310.3(a)(5) required express authorization before "obtaining any amount of money from a person through any means." The revised Section, through more economical means, reflects how deceptive sellers and telemarketers gain access to consumers' money through false and misleading statements regardless of the payment system used. While addressing those deceptive practices, revised Section

⁵⁶ 15 U.S.C. 53(b).

⁵⁷ See, e.g., AARP at 10.

⁵⁸ See, e.g., USPS at 4.

⁵⁹ See, e.g., APAC at 2; ATA at 5; DMA at 19; Monex at 8-9.

⁶⁰ Almost 32% of the 141 telemarketing cases brought by the Commission since 1991 related to deceptive prize promotions.

⁶¹ See Senate Report at 8.

⁶² See Senate Report at 8.

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

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

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

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

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

It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3 (a) or (c) or 310.4 of this Rule and such substantial assistance is related to the commission or furtherance of that act or practice.

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

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

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

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

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

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

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

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

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

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

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

⁶⁹ See generally DMA; PMAA.

⁷⁰ E.g., DMA at 24; NRF at 30.

⁷¹ See MasterCard at 10-11.

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

Section 310.4 Abusive Telemarketing Acts or Practices

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

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

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

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

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

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

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

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

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

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

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

⁷³ IA DOJ at 13; AARP at 14.

⁷⁴ ADC at 1; ARDA at 21.

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

⁷⁶ See, e.g., House Report at 8.

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

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

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

⁸⁰ IA DOJ at 6.

⁸¹ NCL at 33–35.

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

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

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

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

⁸⁶ Comcast at 5, n.5.

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

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

⁸⁹ NCL at 38.

⁹⁰ NYSCPB at 8.

Thus, for a variety of reasons, a consumer's credit report may not be changed, even though the original furnisher has documentation requesting such a change to occur. The Commission, therefore, has revised the initially proposed Rule to require the examination of a consumer's credit report, to determine if the services have been provided, before the seller or telemarketer may request or receive payment from the customer.

A number of commenters suggested amending this Section to clarify that it does not apply to credit monitoring services.⁹¹ The Commission did not intend to limit the actions of such legitimate services, and does not believe this Section would prohibit such services.

Other commenters stated that this provision may inadvertently prohibit the telemarketing of secured credit cards, harming consumers who use such cards to develop a satisfactory credit record.⁹² In fact, these commenters suggested an exemption to this provision for the telemarketing of secured credit cards by depository institutions. The Commission does not believe such an exemption is necessary, because banks, savings and loans, and Federal credit unions are outside of the jurisdiction of the FTC, and are therefore not covered by the Rule.⁹³

(d) *Recovery room services.* The next abusive practice prohibited by the initially proposed Rule involved recovery room scams.⁹⁴ In these operations, a fraudulent telemarketer will call a consumer who has lost money in a previous scam and make false promises that the telemarketer can recover that money, in exchange for a fee paid in advance. After the fee is paid, the promised services are never provided. As law enforcement commenters noted, the recovery scheme is especially abusive, targeting particularly vulnerable victims, including the elderly.⁹⁵

A number of financial institutions requested clarification that this Section does not apply to legitimate debt collection activities.⁹⁶ In addition, another commenter opined that this Section, as proposed, could impair the ability of newspapers to accept

classified ads for lost and found items.⁹⁷ The Commission believes that changing the phrase "induce payment" to "induce purchase" in the definition of "telemarketing" clarifies that debt collection practices are not the types of telemarketing practices at issue in this Rule. Furthermore, the Commission is revising this Section to make it applicable only to recovery services that promise the return of money or other items of value paid for or promised to the consumer *in a previous telemarketing transaction*. Thus, this Section will not apply to attempts to recover money or items lost outside of telemarketing.

The initially proposed Rule prohibited sellers or telemarketers from requesting or receiving payment of any fee for recovery services until three days after the recovered money or other item is delivered to the consumer. AARP noted that the three-day period may be insufficient to protect consumers, and asked that the Rule allow the minimum time necessary for out-of-state checks to clear.⁹⁸ The Commission agrees, and has lengthened the time period that must elapse before providers of such services can request payment from consumers to seven business days after delivery of the recovered money or other item of value.

Finally, the initially proposed Rule provided an exemption from this Section for licensed attorneys or licensed private investigators pursuant to a written agreement with the consumer. Some commenters believed that private investigators should not be exempt, because such an exemption would only lead to fraudulent recovery services signing up with unscrupulous private investigators as a method of evading this prohibition.⁹⁹ The Commission agrees, and has removed the exemption for private investigators.

(e) *Advance fee loans.* Section 310.4(a)(5) of the initially proposed Rule prohibited any seller or telemarketer 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.¹⁰⁰ DMA urged that the Commission clarify that this Section does not apply to services, such as monitoring or counseling, that are not represented to improve a person's credit history.¹⁰¹ The Commission did not intend for such services to be covered, and is changing the phrase "credit service," used in the initially proposed Rule, to "extension of credit." In this manner, the application of this prohibition only to loans or other extensions of credit will be clearer.¹⁰²

(f) *Prize distribution.* The next prohibited abusive practice included in the initially proposed Rule concerned the distribution of prizes during a prize promotion. Section 310.4(a)(6) of the initially proposed Rule required any seller or telemarketer conducting such promotions to distribute all prizes or purported prizes offered within 18 months of the initial offer to any person. The Commission believes that this practice is adequately covered by the prohibition against misrepresenting any material aspect of a prize promotion in Section 310.3(a)(2)(v) of the revised proposed Rule. Because the practices included in this Section of the initially proposed Rule are addressed by other prohibitions, it has been deleted from the revised proposed Rule.

(g) *Reloading.* Section 310.4(a)(7) of the initially proposed Rule prohibited 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 transaction have been fulfilled, including but not limited to the distribution of all prizes or premiums offered in conjunction with the initial transaction.

This provision of the initially proposed Rule elicited nearly unanimous negative comments from industry representatives. The Commission learned from these comments that many legitimate businesses call their customers before full satisfaction has been made on a prior transaction. Indeed, cultivating established customers in this way is regarded as one of the most effective selling techniques by legitimate sellers. Commenters noted that the Section as proposed would preclude a seller or

⁹⁷ Washington at 17.

⁹⁸ AARP at 15-16. Fraudulent recovery rooms may use checks, not backed by sufficient funds for them to be paid by the out-of-town banks on which they are drawn, to show consumer victims that the money has been "recovered."

⁹⁹ NAAG at 24; DSA-Nev., Tab B at 8; NCL at 39-40. Both DSA-Nev. and NCL also believed that licensed attorneys should not be exempt from this Section of the Rule. The Commission does not wish to hinder legitimate activities by licensed attorneys to recover funds lost by consumers through fraudulent telemarketing, and thus does not believe this prohibition should be applied to their services.

⁹¹ ATA at 7; CUCI at 7; DMA at 25; Spiegel at 4.

⁹² ABA at 8; Citicorp at 8-9; MasterCard at 11.

⁹³ See 15 U.S.C. 45(a)(2); revised proposed Rule Section 310.1.

⁹⁴ Initially proposed Rule Section 310.4(a)(4); revised proposed Rule Section 310.4(a)(3).

⁹⁵ See, e.g., IA DOJ at 13-15; USPS at 13; NAAG at 24. In fact, NACAA believes there should be an outright prohibition against contacting any consumer to offer these services. NACAA at 4.

⁹⁶ Chase at 4; Chemical at 6; MasterCard at 11.

¹⁰⁰ Revised proposed Rule Section 310.4(a)(4).

¹⁰¹ DMA at 25.

¹⁰² Prudential noted that this Section could cover a bank's offer to a consumer of pre-approved loans. The Commission believes that revised Section 310.1 will address Prudential's concerns by clarifying that banks are excluded from coverage of the Rule because they are outside of the Commission's jurisdiction under the FTC Act, 15 U.S.C. 45(a)(2).

telemarketer from calling customers to renew subscriptions, warranties, service contracts, and a host of other ongoing services prior to their expiration.¹⁰³ Commenters also noted that this prohibition would be particularly burdensome for large, diversified companies with multiple divisions, sales offices and product lines.¹⁰⁴

Given the fact there is nothing about this practice, in and of itself, that is inherently injurious to consumers, and given the widespread use of this practice by legitimate telemarketers, the Commission has dropped from the revised proposed Rule any attempt to restrict this practice. Reloading is a problem when there is deception in the sales offer. Because such deception is prohibited by the revised proposed Rule under Section 310.3(a), a separate prohibition of "reloading" is unnecessary. Accordingly, it has been deleted from the revised proposed Rule.

(h) *The Use of Shills.* Section 310.4(a)(8) of the initially proposed Rule prohibited identifying a person as a reference for a business venture unless: (1) Such person actually purchased the business venture; (2) such person operated that business venture for at least six months, or the seller or telemarketer disclosed the length of time the person operated such business venture; and (3) such person did not receive consideration for any statements made to prospective business venture purchasers. As stated in the discussion of Section 310.2 of the definition of "business venture," the Commission believes that consideration of such a prohibition is more appropriately included as part of its regulatory review of the Franchise Rule.

2. *Pattern of Calls.* Section 310.4(b)(1)(i) of the proposed Rule prohibited a seller or telemarketer from making a sales call to a person's residence more than once within any three month period. Many commenters stated that this was an unreasonable and arbitrary prohibition that was difficult to comply with, and that should be eliminated.¹⁰⁵ In addition, commenters noted that consumers already have the protections of the Telephone Consumer

Protection Act ["TCPA"] rules, which require telemarketers to establish and maintain a "do not call" list of consumers who do not wish to be contacted by that seller.¹⁰⁶ Given the fact that calls more frequent than once per month are not, in and of themselves, injurious to consumers, and given the consumer protections afforded by the "do not call" requirements of the TCPA¹⁰⁷ and this Rule, the Commission agrees that this provision is unnecessary and has therefore deleted it.

In its place, the Commission proposes in revised Rule Section 310.4(b)(i) to prohibit any seller or telemarketer to cause any telephone to ring, or engage any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. Such a prohibition is included in the FDCPA,¹⁰⁸ and the legislative history of the Telemarketing Act states that the Commission should consider the FDCPA in establishing prohibited abusive acts or practices.¹⁰⁹

Section 310.4(b)(1)(ii) of the initially proposed Rule set forth the prohibition on calling a person's residence when that person previously has stated that he or she does not wish to receive such a call made by or on behalf of the seller whose goods or services are being offered. The Commission continues to believe that such a limitation, which is fully consistent with and complementary to similar provisions under the TCPA,¹¹⁰ will effectively implement the Telemarketing Act's directive to include in this Rule "a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."¹¹¹ This Section did not elicit many comments; the only change made to this Section responds to the comments suggesting that the prohibition should apply to a particular person or telephone number, not to a residence (as the initially proposed version of this provision stated), because a residence may have more than

one person who is a customer of a particular seller.¹¹² The revised proposed Rule states that the prohibition applies to calls made to a person, rather than a person's residence.

Section 310.4(b)(2) of the initially proposed Rule provided a limited safe harbor against liability for violating the "do not call" prohibitions included in Section 310.4(b)(1)(ii). This Section stated that a seller or telemarketer will not be liable for such violations in any calendar year per person called if: (1) It has established and implemented written procedures to comply with the "do not call provisions"; (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; and (4) any subsequent call is the result of administrative error.

Two changes have been made to this Section. First, some commenters suggested that the safe harbor should not be limited to a certain number of violations per consumer or per year.¹¹³ These commenters maintained that if the other enumerated steps are taken by a telemarketer in a reasonable manner, and a call is made erroneously, a Rule violation should not be found. The Commission agrees, and has deleted this limitation to the safe harbor. Second, the safe harbor will apply if the subsequent call is the result of any error, not just an administrative error. This responds to concerns raised that unintentional or accidental calls should also be covered by the safe harbor.¹¹⁴

3. *Calling Time Restrictions.* The initially proposed Rule prohibited any telemarketer from calling a person's residence, without the prior consent of the person, at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location. The Commission included this provision in the initially proposed Rule in response to the Telemarketing Act's directive that the Rule should include "restrictions on the hours of the day and night when unsolicited telephone calls can be made to consumers."¹¹⁵ While some commenters suggested different time

¹⁰³ ATA at 7-8; ANA at 14; DMA at 27-28; MPA at 14-15; Cox at 9-10; DMSI at 6; Hearst at 2; MSSC at 20; NAA at 13-14; AMCI at 2 (motor club memberships); CUCI at 8; ASAE at 15-16 (association memberships); GE at 4-6; IBM at 19-22 (computer leases); NCTA at 11-12 (cable services); Viacom at 10-11.

¹⁰⁴ ANA at 15; DMA at 27; NRF at 31; AmEx at 1-2.

¹⁰⁵ ATA at 8; APAC at 6; DMA at 28; DSA at 15; MPA at 16-18; NRF at 33; PMAA at 75-77; CUCI at 8; Fingerhut at 25; ADS at 1; AmEx at 1-2; AT&T at 20; NCL at 45-46; APAC at 6; AMCI at 1; IBM at 23; ANA at 17.

¹⁰⁶ See, e.g., ANA at 17; Franklin at 1; Olan at 13. The FCC's rules, established pursuant to the TCPA, 47 U.S.C. 227, are codified at 47 CFR 64.1200. The revised proposed Rule includes similar "do not call" protections at Section 310.4(b)(1)(ii), discussed *infra*.

¹⁰⁷ 47 U.S.C. 227.

¹⁰⁸ 15 U.S.C. 1692d(5).

¹⁰⁹ See, e.g., House Report at 8. Moreover, commenters suggested that such a provision would be appropriate. See, e.g., NAA at 20; Cox at 10 (*abusive conduct involves multiple calls over a short period of time, such as five calls in a day, or ten calls in a week*).

¹¹⁰ See 47 U.S.C. 227; 47 CFR 64.1200(e).

¹¹¹ 15 U.S.C. 6102(a)(3)(A).

¹¹² See, e.g., NRF at 33; Pacesetter at 4.

¹¹³ See, e.g., IBM at 24; SBTC at 10-11.

¹¹⁴ NRF at 35; PMAA at 83; MSSC at 21. Other commenters suggested that the term "administrative error" was too broad, and that a clear definition should be provided. NACAA at 5; NAAG at 27; USD at 5. The Commission believes that any error should be excused here, as long as the seller or telemarketer is complying in good faith with the other requirements of the safe harbor.

¹¹⁵ 15 U.S.C. 6102(a)(3)(B).

restrictions,¹¹⁶ the FCC has established these calling time hours in its regulations implementing the TCPA,¹¹⁷ and the Commission has been presented with no compelling reasons to change them. Accordingly, no substantive changes to Section 310.4(c) are proposed.¹¹⁸

4. Required Oral Disclosures.

(a) *All outbound telephone calls.* The Telemarketing Act requires the Commission to include in this Rule the following:

A requirement that any person engaged in telemarketing for the sale of goods or services shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make other such disclosures as the Commission deems appropriate.¹¹⁹

The initially proposed Rule, at Section 310.4(d)(1)(i), implemented this legislative directive by requiring all outbound telephone calls (or telephone solicitations, as they previously were called), to begin with the disclosure of the caller's true first and last name, the seller's name, and a statement that the purpose of the call is to sell goods or services. The divergence between the statutory language and that of the initially proposed Rule elicited significant comment.

Many industry representatives objected to these disclosures being required "at the beginning," rather than "promptly and clearly."¹²⁰ According to these commenters, requiring disclosures at the beginning disturbs the normal flow of a telephone call,¹²¹ allows no time for a seller to establish, or reestablish, a relationship with the consumer,¹²² infringes on the seller's ability to design and implement effective telemarketing sales presentations,¹²³ and is in effect a "kill message" that will result in most

consumers hanging up when they hear the required disclosures.¹²⁴

After considering these comments, the Commission has determined that requiring these disclosures "at the beginning" may be too rigid a standard for achieving the statutory purpose of providing important information to consumers while permitting the use of the telephone in making sales.¹²⁵ The revised proposed Rule adheres to the statutory requirement that the disclosures be prompt and clear. By adhering more closely to the statutory language, the Commission intends to permit some flexibility in the seller's telemarketing presentation. For example, a prompt disclosure would not preclude the seller or telemarketer from establishing some initial rapport with the customer before stating the purpose of the call. However, in "multiple purpose calls," where one purpose is to sell goods or services, the sales purpose must be disclosed promptly.

The requirement that all outbound telephone calls include the disclosure of the caller's true first and last name also elicited significant comment. Commenters noted that "desk names" are commonly used in the industry to protect the safety and privacy of employees, and to protect against potential prejudice or harassment.¹²⁶ Upon reconsideration, the Commission has determined that disclosure of the seller's identity is sufficient. Therefore, disclosure of the caller's identity need not be included in this Rule.

In addition to the disclosure of the identity of the seller and the fact that the purpose of the call is to sell goods or services, Section 310.4(d) of the revised proposed Rule now requires the prompt and clear disclosure of the nature of the goods and services that are the subject of the call. The Commission revised the language of Section 310.4(d) to more accurately reflect language from Section 3(a)(3)(C) of the Telemarketing Act setting forth those additional disclosures.

¹²⁴ See, e.g., Citicorp at 8; Time Warner at 37-38. Not all industry representatives agreed. One telemarketer stated that requiring the disclosures at the beginning is very reasonable. "Rather than impeding business, disclosure of the information proposed by the Commission adds credibility to the legitimacy of the caller and increases consumer confidence [and] responsiveness to its telemarketing calls." TMGI at 2, 4.

¹²⁵ The Senate Report stated that the "prompt" disclosure requirement was added to the Telemarketing Act to address concerns raised by the market research industry (those who conduct surveys and public opinion polls without selling goods or services) that telemarketing calls should not be made under the guise of being calls solely for survey research or similar purposes. See Senate Report at 4.

¹²⁶ See, e.g., ANA at 21; Cox at 7-8; APAC at 6; ADS at 2.

Section 310.4(d)(1)(ii) of the initially proposed Rule required a number of disclosures in any telephone solicitation that included a charitable solicitation.¹²⁷ Upon careful review of the comments, it is clear that separate treatment of such charitable solicitations is unnecessary. As ATFA suggested at the workshop, the sale of goods or services that includes a representation that a portion of the money paid for such goods or services will go to charity could be treated under the Rule as a sale of goods or services, rather than a charitable solicitation.¹²⁸ As a result, such a sale would be covered under the Rule without having to expressly cover charitable solicitations or donations. Because the initially proposed Rule attempted to encompass these specific types of sales, and given that such sales will be covered under the Rule's definition of "telemarketing," the Commission has decided to delete Section 310.4(d)(1)(ii) from the revised proposed rule.

Additionally, many comments indicated that former Section 310.4(d)(1)(ii) engendered a great deal of confusion on the part of nonprofit entities as to their coverage under the Rule. In including former Section 310.4(d)(1)(ii), the Commission did not intend to regulate nonprofit entities.¹²⁹ The Commission is mindful of the limitations on its jurisdiction in this area. Specifically, Section 4 of the FTC Act gives the Commission jurisdiction over corporations that are operated for their own profit or that of their members and over the business aspects of the activities of organizations serving both nonprofit and for-profit purposes.¹³⁰ Federal courts have construed this to bar the Commission from suing any *bona fide* nonprofit organization under the FTC Act, thereby removing most charitable organizations from the scope of the FTC's authority.¹³¹ Section 6(a) of

¹²⁷ The definition of "goods or services" in Section 310.2(j) of the initially proposed Rule included a statement that the term included "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."

¹²⁸ See Tr. at 188-93 (ATFA).

¹²⁹ See generally ATFA; NFN.

¹³⁰ See *American Medical Ass'n v. FTC*, 94 F.T.C. 701, 982-93, *aff'd*, 638 F.2d 443, 448 (2d Cir. 1980), *aff'd mem. by equally divided court*, 455 U.S. 676 (1982).

¹³¹ This jurisdictional limitation, however, does not prevent the Commission from suing a for-profit company that engages in deceptive practices to solicit charitable contributions from consumers. To this end, the Commission has recently sued several allegedly deceptive "telefunders"—companies that solicit charitable contributions by telephone—which allegedly misrepresented the use to which donations would be directed and allegedly misrepresented the value of certain prizes. See *FTC*

¹¹⁶ DSA-Nev Tab B at 11 (7 a.m. to 10 p.m.); Monex at 15 (no restrictions for the precious metals market); NACAA at 5 and GA OCA at 2 (5:00 p.m. to 9:00 p.m. to protect vulnerable older consumers); NAAG at 27 (no calls before noon on Sunday).

¹¹⁷ See 47 CFR 64.1200(e)(1).

¹¹⁸ Certain commenters suggested that the safe harbor provisions of Section 310.4(b)(2) should apply to the calling time restrictions as well as the "do not call" requirements. See, e.g., NRF at 35; ARDA at 31. The Commission believes that the calling time restrictions do not present the administrative compliance difficulties that the "do not call" restrictions impose, and therefore does not believe a safe harbor is necessary here.

¹¹⁹ 15 U.S.C. 6102(a)(3)(C).

¹²⁰ ATA at 9; ANA at 21; NRF at 36; DMA at 30; Chemical at 7; CUCI at 9; Gannet at 4; Olan at 16.

¹²¹ See, e.g., NRF at 36.

¹²² See, e.g., ADS at 2.

¹²³ Ann Arbor at 2 (with numerous other newspapers submitting a substantially similar comment).

the Telemarketing Act states that "no activity which is outside the jurisdiction of [the FTC Act] shall be affected by this Act."¹³² Accordingly, as explicitly stated in Section 310.1 of the revised proposed rule, the jurisdictional limitations of Section 4 of the FTC Act, including those regarding nonprofit organizations, will apply to the Telemarketing Sales Rule.

(b) *Verification calls.* The initially proposed Rule stated that if a caller verifies a telemarketing sale, that caller must repeat certain disclosures.¹³³ Many commenters argued forcefully that this Section was unnecessary and unduly burdensome, requiring duplicative disclosures that would add to the cost of the call and annoy potential customers.¹³⁴ In addition, commenters stated that this disclosure would discourage firms from making verification calls, due to increased costs.¹³⁵ After considering these comments, the Commission has determined that requiring duplicative verification disclosures is unnecessary and would unfairly burden legitimate telemarketers. It has therefore deleted this Section from the revised proposed Rule.

(c) *Outbound telephone calls that include a prize promotion.* The initially proposed Rule required the following three additional oral disclosures for any telemarketing that includes a prize promotion: (1) The fact that no purchase or payment is necessary to win; (2) 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 (3) the odds of winning each prize offered.¹³⁶

The comments elicited by these requirements stressed the unnecessary costs that would result from duplicative disclosure requirements.¹³⁷ The Commission wishes to avoid imposing unnecessary requirements for oral disclosures that increase both the length and the cost of calls without a very clear

consumer benefit.¹³⁸ Because the benefit to be derived from repeated disclosures of the same information is questionable, the Commission has narrowed the amount of information that must be disclosed orally. Oral disclosures now encompass only information that promises a clear-cut consumer benefit and that is not outweighed by the costs it imposes on legitimate industry. The revised proposed Rule requires a telemarketer making an outbound telephone call which includes a prize promotion to disclose clearly, in addition to the other disclosures required under revised proposed Rule Section 310.4(d), the fact that no purchase is necessary to win.

The Commission believes that this disclosure is so critical to consumer protection in a prize promotion that it should be stated during an outbound telephone call. In addition, the Commission, in response to concerns raised by NAAG, has specified in the revised proposed Rule that this disclosure must be made before the prize is described to the person called.¹³⁹ Such a disclosure will clearly inform consumers that a true, legitimate "prize" awarded in a game of chance does not require any purchase.¹⁴⁰ This disclosure will help dispel the false information provided during fraudulent prize promotions that a consumer must purchase some item in order to win the "fabulous" prize offered. In order to make this "no purchase necessary" disclosure meaningful, the revised proposed Rule also requires the telemarketer to disclose the no-purchase entry method for the prize promotion, if requested by the person called.

(d) *Outbound telephone calls that include a premium.* The initially proposed Rule required any telemarketing that includes an offer of a premium to 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 \$20.00.¹⁴¹ A number of commenters stated that this Section should be eliminated. They claimed that many premiums offered by legitimate telemarketers generally are not available for retail sale, and attempting to determine a retail sales price may be difficult and costly. They also predicted

that this added cost may result in the elimination of premiums being offered, to the detriment of consumers.¹⁴²

The Commission is persuaded by these arguments; in and of itself, non-disclosure of the value of an offered premium is not likely to be injurious to consumers, and imposition of the potential costs associated with such a disclosure requirement is not justified. The prohibition against misrepresentations in Section 310.3 is sufficient to protect consumers against false and misleading claims about the value of a premium.

5. *Other Required Disclosures.* The initially proposed Rule prohibited any seller or telemarketer conducting a prize promotion from requesting or accepting any payment from a person without first providing that person with a written disclosure, in duplicate, and receiving from that person a written acknowledgement that the person has read the disclosure.¹⁴³ Numerous commenters stated that such a written acknowledgement requirement would effectively ban prize promotions in telemarketing sales by increasing costs and negating the efficiency of those sales.¹⁴⁴ The Commission is persuaded that such an outcome would limit consumers' choices and would be inconsistent with Commission policy. Prize promotions in telemarketing, in and of themselves, are not deceptive, do not cause injury to consumers, and may, in fact, provide consumer benefits. The Commission has determined that these requirements would likely produce nominal consumer benefits that would be outweighed by the potential detrimental effects, and has therefore dropped them from the revised proposed Rule.

The initially proposed Rule also imposed written disclosure requirements on investment opportunities very similar to those for prize promotions. Specifically, any seller or telemarketer selling an investment opportunity was prohibited from requesting or accepting any payment from a person without first providing that person with a written disclosure, in duplicate, and receiving from that person a written acknowledgement that the person had read the disclosure.¹⁴⁵ Industry

v. *The Baylis Co.*, No. 94-0017-S-LMB (D. Idaho 1994); *FTC v. NCH, Inc.*, No. CV-S-94-00138-LDG (LRL) (D. Nev. 1994); *FTC v. International Charity Consultants*, No. CV-S-94-00195-DWH (LRL) (D. Nev. 1994); *FTC v. Heritage Publishing*, No. LR-C-94-416 (E.D. Ark. 1994). In addition, the Commission may sue a sham charity that is actually a for-profit enterprise. *FTC v. Voices for Freedom*, No. 91-1542-A (E.D. Va. July 13, 1992) (consent decree entered).

¹³² 15 U.S.C. 6105(a).

¹³³ Section 310.4(d)(2) of the initially proposed Rule.

¹³⁴ ATA at 9; MPA at 20-21; ARDA at 33; NAA at 19; Spiegel at 5; ALIC at 3; MSSC at 22.

¹³⁵ AT&T at 22-23; MCI at 12; PCH at 4; SBTC at 13.

¹³⁶ Initially proposed Rule Section 310.4(d)(3).

¹³⁷ See generally PMAA, DMA; IMSP.

¹³⁸ See, e.g., MPA at 21-22.

¹³⁹ NAAG at 28-29.

¹⁴⁰ See e.g., 18 U.S.C. 1301. Additionally, PMAA, stated during the workshop that such a requirement would not be overly burdensome and would accurately distinguish deceptive prize promotions from legitimate prize promotions. Tr. at 608-10 (PMAA).

¹⁴¹ Initially proposed Rule Section 310.4(d)(4).

¹⁴² See, e.g., MPA at 22-23; NAA at 19-20; MasterCard at 13-14; MBNA at 1.

¹⁴³ Initially proposed Rule Section 310.4(e)(1).

¹⁴⁴ See, e.g., DMA at 33; MPA at 23-24; NRF at 38; PMAA at 49-51; CUCI at 10; IBM at 26; ITI at 8-10; Spiegel at 5-6; ADS at 3; SDRA at 1. In fact, one commenter noted that 73 percent of prize winners do not return an affidavit permitting the distribution of prizes to them. DW&Z at 2.

¹⁴⁵ Initially proposed Rule Section 310.4(e)(2).

representatives again stated that a signed acknowledgement from consumers is unjustifiably burdensome in advance of all investment transactions.¹⁴⁶ They also stated that the delay caused by this requirement is unfair to both the customer and the seller in certain volatile markets.¹⁴⁷

After reviewing the comments in this area, and upon further reflection, the Commission, for reasons similar to those that prompted deletion of the written prize promotion disclosures, has deleted requirements for additional written disclosures for telemarketing investment opportunities. While the Commission is mindful that both prize promotions and investment opportunities are a major area of telemarketing fraud,¹⁴⁸ the costs imposed on legitimate industry by these mandatory disclosures is not justified. In addition, the prohibitions on misrepresentations, as well as the disclosures required before a customer pays for goods or services, included in Section 310.3 are sufficient to prohibit the deceptive conduct found in the telemarketing of prize promotions and investment opportunities.

6. *Distribution of Lists.* The initially proposed Rule prohibited any person who is subject to any federal court order resolving a case in which the complaint alleged a violation of certain provisions of the Rule, and in which the court did not dismiss or strike all such allegations from the case, from selling, renting, publishing, or distributing any list of customer contacts from that person.¹⁴⁹ Industry commenters stated that the original proposal was too great a penalty for Rule violations, would preclude settlements of law enforcement actions, and should be eliminated.¹⁵⁰ On the other hand, law enforcement and consumer representatives commented that the proposed provision does not go far enough, and should extend to all rule violations and to FTC enforcement actions.¹⁵¹

After considering the comments, the Commission believes that such a prohibition is better left to the discretion of law enforcement agencies to seek, and the courts to order, in individual law enforcement actions. This Section therefore has been deleted from the revised proposed Rule.

Section 310.5 Recordkeeping Requirements

The initially proposed Rule required any seller or telemarketer to keep certain records relating to telemarketing activities for a period of 24 months from the date the record is produced.

Many industry commenters stated that the 24-month retention period was burdensome and suggested that the period be shortened.¹⁵² Others suggested that the recordkeeping provision be dropped altogether because Congress did not mandate that records be kept,¹⁵³ and because fraudulent telemarketers will most likely ignore the requirements. Those commenters suggested that recordkeeping requirements would only burden legitimate business.¹⁵⁴ On the other hand, law enforcement and consumer representatives commented that the recordkeeping provisions would be extremely helpful in preserving evidence of compliance, in identifying customers who may have been injured, and in identifying persons who might have been involved in any deceptive or abusive telemarketing practices.¹⁵⁵ In fact, several commenters suggested that the record retention period be lengthened to 36 months, which would parallel the IRS retention requirements.¹⁵⁶

After careful consideration of the comments, the Commission has decided to keep a recordkeeping requirement in the revised proposed Rule. Without the required records, it would be difficult to ensure that sellers and telemarketers are complying with the requirements of the revised proposed Rule, or identify persons who are involved in the practices, or identify customers who may have been injured.

The Commission also has decided to leave the record retention period at 24 months in the revised proposed Rule. A record retention period shorter than a two-year period would be inadequate for the Commission and the States to complete investigations of noncompliance. Consumers who complain to an agency about alleged deceptive or abusive telemarketing practices often do not do so immediately. Therefore, there may already be a substantial "lag time"

between the time the alleged violations occur and the time the Commission learns of the alleged violations. A two-year record retention period allows the Commission and State law enforcement agencies to gather information needed to pursue enforcement actions and to identify those persons who have most recently suffered injury from the alleged deceptive or abusive telemarketing practices.

The Commission is mindful, however, of the burden on business in maintaining these records. Therefore, the revised proposed Rule incorporates many of the suggestions from industry on how to minimize the recordkeeping burden.

First, the revised proposed Rule specifies that the records may be kept "in any form." This language addresses the suggestions from many commenters that the burden could be reduced if the sellers and telemarketers could keep the required records in electronic storage.¹⁵⁷

Second, the revised proposed Rule specifies that sellers and telemarketers need to retain only *substantially different* advertising, brochures, telemarketing scripts, and promotional materials. Several commenters proposed this change in order to reduce the paper burden of maintaining large quantities of virtually identical documents.¹⁵⁸

Third, the revised proposed Rule incorporates the suggestions of many commenters by requiring sellers and telemarketers to maintain a record only of the *last known* address of prize recipients, customers, and of current and former employees.¹⁵⁹

Fourth, the revised proposed Rule sets a *de minimis* amount of \$25 for record retention on prizes, as was suggested by at least one commenter.¹⁶⁰ Sellers and telemarketers will not have to maintain records on prize recipients and prizes awarded for prizes that have a value less than \$25.00.

Fifth, the revised proposed Rule adds the requirement that sellers and telemarketers maintain a record of any fictitious name used by any current or former employee directly involved in telemarketing sales. This requirement would prevent deceptive telemarketers from hiding behind a fictitious identity and would aid law enforcement agencies in identifying possible defendants.

Some commenters requested clarification of certain recordkeeping

¹⁴⁶ See, e.g., A-Mark at 2, 11-12; AFSA at 7-8.

¹⁴⁷ See, e.g., Monex at 16-17.

¹⁴⁸ Approximately 60 percent of all telemarketing complaints received by NCL involve prize offers, while investment opportunities account for the greatest dollar volume of losses reported. NCL at 49-51.

¹⁴⁹ Initially proposed Rule Section 310.4(f).

¹⁵⁰ APAC at 7; DMA at 34; MSSC at 24-25; Spiegel at 6; Monex at 19; NRF at 38-39.

¹⁵¹ AARP at 22; NACAA at 5 (apply it to state orders as well); GA OCA at 2.

¹⁵² See, e.g., DMA at 35; ANA at 24; IBM at 27; Olan at 14; NRF at 40; MSSC at 25; Ann Arbor at 2.

¹⁵³ Section 3(a)(3) of the Telemarketing Act authorizes the Commission to include recordkeeping requirements in the Rule. 15 U.S.C. 6102(a)(3).

¹⁵⁴ See, e.g., RPI at 1; BSA at 14.

¹⁵⁵ See, e.g., NCL at 54; USPS at 24; AARP at 23; NAAG at 36; CFA at 6.

¹⁵⁶ See, e.g., NAAG at 36-37; CFA at 6.

¹⁵⁷ See, e.g., ANA at 24; NRF at 40; Olan at 14; NCL at 54; IBM at 27-28; USPS at 24.

¹⁵⁸ See, e.g., DMA at 35; Tr. at 761, 767, and 769.

¹⁵⁹ See, e.g., ATA at 9-10; NRF at 40; Olan at 14; SCIC at 6; IBM at 27.

¹⁶⁰ See ARDA at 36-37.

requirements in order to reduce the burden on business. For example, several parties read the recordkeeping requirements to require them to maintain records of *all* customer contacts, regardless of whether the customer actually made a purchase.¹⁶¹ They recommended that businesses only be required to maintain records relating to customers who actually made a purchase of goods or services. The Commission did not add clarifying language addressing this concern because it believes that the plain language in Section 310.5(a)(3) of the revised proposed Rule is sufficiently clear that only records relating to *actual sales* need be maintained. That Section specifically requires information to be maintained regarding the sales transaction: the identity of the goods or services purchased, the fulfillment, and the amount paid by the customer.

Other commenters asked that, in connection with the requirement to maintain employee records, the revised proposed Rule more clearly define who is "directly involved in telephone sales" in order to minimize the burden of maintaining records on employees who might be only tangentially involved in telemarketing activities.¹⁶² In addition, some commenters asked that the Commission clarify that records on former employees be kept only on those persons who are employees on or after the effective date of the final Rule.¹⁶³

The revised proposed Rule does not add clarifying language addressing these concerns. The Commission believes that the Rule is sufficiently clear about the types of telemarketing activities that would be subject to the Rule's provisions as to minimize the number and type of employees on whom records must be maintained. In addition, the Commission intends that any Rule requirements, including recordkeeping requirements, will commence with the effective date of the final Rule. Therefore, any records relating to employees and former employees would be required only for those persons who are or become employees or former employees on or after the effective date of the Rule.

The revised proposed Rule incorporates suggestions from some commenters to clarify that the seller and telemarketer need not duplicate those records that are already maintained in the ordinary course of business.¹⁶⁴ Additionally, Section 310.5(c) of the

revised Rule permits a seller and telemarketer to allocate between themselves, by written agreement, responsibility for complying with the recordkeeping requirements. The revised proposed Rule further clarifies a seller's and a telemarketer's recordkeeping responsibilities. Under revised Section 310.5(d), absent a written agreement described in Section 310.5(c), a seller is responsible for complying with Sections 310.5(a) (1)–(3) and a telemarketer is responsible for complying with Section 310.5(a)(4). Revised Section 310.5(d) allows sellers and telemarketers to keep the required records in any manner, format, or place as they keep such records in the ordinary course of business.

Several commenters expressed concern that sellers and telemarketers may not have access to all of the information required to be maintained, and requested that the Rule set out which parties should have responsibility for maintaining certain types of records.¹⁶⁵ After considering these comments, the Commission has determined that the language in Section 310.5(b) is already sufficiently clear to convey that the parties may enter into a written agreement allocating responsibility for maintaining records. Thus, there is nothing in Section 310.5(b) that would prohibit the parties from maintaining only those records to which they would normally have access, as long as each of the required types of information is maintained by at least one of the parties. Indeed, several commenters supported this Section, noting that it strikes a reasonable balance between maintaining necessary documentation and avoiding overly burdensome requirements, as well as noting that it is consistent with the contractual nature of the relationship between sellers and telemarketers.¹⁶⁶

Finally, the Commission has deleted former Section 310.5(a)(5) that required that "any written notices, disclosures, and acknowledgements required to be provided or received under this Rule" be kept. The Commission deleted this Section because the revised proposed Rule no longer requires specific written disclosures and acknowledgements.

Section 310.6 Exemptions

Section 310.6 of the initially proposed Rule exempts certain acts or practices from the Rule's provisions. This Section prompted considerable comment.

Law enforcement and consumer groups cautioned against any exemptions because of the additional

burden of proof exemptions place on law enforcement and because of the potential danger that deceptive telemarketers will seize upon any perceived loophole to avoid coverage under the Rule.¹⁶⁷ At the workshop conference, DSA-Nev. explained Nevada's negative experience with legislative exemptions. DSA-Nev. stated that Nevada's telemarketing legislation exempted charitable solicitations. Shortly after its enactment, Nevada saw fraudulent telemarketers rushing to switch their operations to fraudulent "telefunding" in order to take advantage of that exemption.¹⁶⁸

The business community, however, suggested that the Commission formulate exemptions that specifically differentiate between deceptive and legitimate telemarketing because of the broad coverage of the initially proposed Rule.¹⁶⁹ Industry suggested that the Commission take one or both of the following courses: (1) narrow the definition of "telemarketing" to include only outbound telephone calls;¹⁷⁰ or (2) if the Commission decides to continue including inbound telephone calls, set forth additional exemptions that would allow the legitimate telemarketing industry to operate without the restraints of additional regulation.¹⁷¹

After careful consideration, the Commission has decided that narrowly-tailored exemptions are necessary to avoid unduly burdening legitimate businesses and sales transactions that Congress specifically intended not to cover under the Rule. Section 310.6 enumerates these exemptions. The Commission determined the advisability of each exemption after considering the following factors: (1) Whether the conduct or business in question already is regulated extensively by Federal or State law; (2) whether Congress intended that a certain type of telemarketing activity be exempt from the Rule; (3) whether, based on the Commission's enforcement experience, the conduct or business lends itself easily to deception or abuse; and (4) whether requiring businesses to comply with the Rule would be unduly burdensome when weighed against the likelihood that deceptive sellers or telemarketers would use an exemption to circumvent the Rule's coverage.

¹⁶⁷ See, e.g., NCL at 54–55; NAAG at 37. See also Tr. at 254–256, 704, and 725.

¹⁶⁸ Tr. at 82–84.

¹⁶⁹ See, e.g., NRF at 9; Time Warner at 4–7; DMA at 10–12. See also Tr. at 79–81, 702–703, and 710–711.

¹⁷⁰ See, e.g., MPA at 8–10; MSSC at 9–10; Olan at 19–20; ANA at 10; ACRA at 6–7.

¹⁷¹ See, e.g., NRF at 20–21; ICTA at 31–35; Time Warner at 28.

¹⁶¹ See, e.g., Wachovia at 3; ARDA at 37; IBM at 27.

¹⁶² See, e.g., DMA at 35–36; ARDA at 37.

¹⁶³ See, e.g., NB at 5; Citicorp at 9; ARDA at 37.

¹⁶⁴ See, e.g., Comcast at 6.

¹⁶⁵ See, e.g., MPA at 25; DSA at 21; OPC at 4.

¹⁶⁶ See, e.g., NRF at 41; ARDA at 37–38.

The revised proposed Rule incorporates the suggestions of numerous commenters and exempts transactions that are subject to extensive requirements under other Commission rules.¹⁷² Section 310.6(a) exempts pay-per-call services subject to the FTC's 900 Number Rule.¹⁷³ Additionally, the Commission has clarified the definition of "investment opportunity" in Section 310.2(j) of the revised proposed Rule to expressly state that the term does not include sales of franchises subject to the FTC's Franchise Rule.¹⁷⁴

Many commenters suggested exemptions based on other FTC rules, statutes, and regulations, for example, the Negative Option Rule, 16 CFR Part 425, FDCPA, 15 U.S.C. 1692, and the TILA, 15 U.S.C. 1601 *et seq.*¹⁷⁵ The Commission believes that changing the phrase "induce payment" to "induce purchase" in the definition of "telemarketing" clarifies that debt collection practices are not covered by this Rule. With regard to credit statutes such as the TILA and the Consumer Leasing Act ["CLA"], 15 U.S.C. 1667, the Commission believes that the revised proposed Rule's disclosure requirements do not conflict or overlap with those statutes. It is therefore unnecessary to specifically exempt transactions subject to the TILA and CLA from the provisions of this Rule. Similarly, the Commission believes that the disclosure provisions of the Negative Option Rule do not conflict or overlap with the provisions of this Rule and therefore there is no need to exempt those transactions.

Other commenters asked that the Commission exempt those entities that are not subject to the FTC Act.¹⁷⁶ The revised proposed Rule has added language to Section 310.1 that clarifies the scope of the Rule in accordance with those comments. Many of these commenters, however, also asked that agents of exempt entities or of entities engaging in exempt activities similarly be exempted from the Rule's provisions.¹⁷⁷ The Commission rejects such an extension. Exemptions under the FTC Act are either based on

"status," or a specific activity.¹⁷⁸ Exempting agents is contrary to the Commission's assertion of its jurisdiction under established case law. This Rule will cover sellers and telemarketers who do not fall within those status or activity-based exemptions of the FTC Act. Moreover, the Commission's decision is consistent with Congressional intent that the Telemarketing Act neither expand nor contract the Commission's authority.¹⁷⁹

Section 310.6(b) of the revised proposed Rule exempts "telephone calls in which the sale of goods or services is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation by the seller during which the customer has the opportunity to examine the goods or services offered." In addition to Congress' clear intent not to cover such transactions,¹⁸⁰ numerous commenters explained how face-to-face sales are not the type of telemarketing transactions that Congress was concerned about in passing the Telemarketing Act.¹⁸¹ The Commission agrees that such face-to-face contacts where consumers have the opportunity to examine the goods or services should be exempt under the Rule. This exemption also applies to telephone contacts made subsequent to a face-to-face sales presentation to the extent such contacts are for the sole purpose of consummating the sale of goods or services that the customer had the opportunity to examine.

Section 310.6(c) of the revised proposed Rule exempts telephone calls initiated by a customer that are not the result of any solicitation by the seller or telemarketer. The Commission added this exemption to address many commenters' concerns that the definition of telemarketing might include an inbound call from a customer to make hotel, airline, car rental or similar reservations, to place carry-out or restaurant delivery orders, obtain information or customer technical support, or other incidental uses of the telephone that were not in response to a direct solicitation.¹⁸² This

exemption is consistent with Congress' intent not to cover transactions involving incidental use of the telephone.¹⁸³

The Commission has replaced former Section 310.6(c) with revised Sections 310.6(d) and (e). Section 310.6(c) of the initially proposed Rule had exempted telephone contacts made 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." Many commenters expressed confusion over what was meant by "initial sales contact" or "directed to that particular person," and requested that the Commission clarify the scope of this exemption.¹⁸⁴ The Commission agrees that clarification is needed as to the scope of this exemption. Revised proposed Sections 310.6(d) and (e) now treat separately calls prompted by advertisements in any media, other than direct mail solicitations, and calls prompted by direct mail solicitations. Revised Section 310.6(d) exempts "telephone calls initiated by a customer in response to an advertisement through any media, other than direct mail solicitations; provided, however, that this exemption does not apply to calls initiated by a customer in response to an advertisement relating to investment opportunities, goods or services described in Sections 310.4(a)(2)-(3), or advertisements that guarantee or represent a high likelihood of success in obtaining or arranging for extensions of credit, if payment of a fee is required in advance of obtaining the extension of credit." The revised language of Section 310.5(d) addresses some commenters' concerns that calls in response to television commercials, infomercials, magazine and newspaper advertisements, and other forms of mass media advertising would be covered by the Rule.¹⁸⁵ The Commission does not intend that telephone contacts in response to general media advertising be covered under the Rule. Rather, deceptive general media advertising will continue to be subject to enforcement actions under the FTC Act.

On the other hand, the Commission knows that some fraudulent sellers and telemarketers use mass media or general advertising to entice their victims to call, particularly in relation to the sale of investment opportunities, specific credit-related programs, and recovery rooms. Given the Commission's

¹⁷² See, e.g., IFA at 4; Time Warner at 44-45; CHC at 7; ISA at 20-27; PMAA at 34-38.

¹⁷³ "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992," 16 CFR Part 308.

¹⁷⁴ "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 16 CFR Part 436.

¹⁷⁵ See, e.g., BOB at 2; ANA at 14; ABA at 3; ACA at 1; Advanta at 2; MBNA at 1.

¹⁷⁶ See, e.g., GHAA at 3; AT&T at 6-13; AmEx at 3; ABA at 1; BOB at 1; ASAE at 2; SCIC at 7.

¹⁷⁷ See, e.g., ABA at 1; Advanta at 1; Chase at 2; Citicorp at 3; NFN at 2.

¹⁷⁸ See 15 U.S.C. 44 and 45(a)(2). For examples of status exemptions, see *FTC v. Green Tree Acceptance Corp.*, No. CA-4-86-469-K, slip op. (N.D. Tex. Sep. 30, 1987); *Official Airlines Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980); *FTC v. Miller*, 549 F.2d 452 (7th Cir. 1977); *Breen Air Freight, Ltd. v. Air Cargo, Inc.*, 470 F.2d 767 (2d Cir. 1972). For an example of an activity exemption, see *Community Blood Bank of Kansas City, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969).

¹⁷⁹ See Senate Report at 14.

¹⁸⁰ House Report at 7; Senate Report at 7-8.

¹⁸¹ See, e.g., DSA.

¹⁸² See, e.g., ACRA at 6; DSA at 5; Olan at 19-20; Viacom at 6-7; MCI at 5-6.

¹⁸³ Senate Report at 8.

¹⁸⁴ See, e.g., ANA at 10-11; Viacom at 6-7; Olan at 27; AFSA at 3-4; QVC at 13-14; DMA at 37; MPA at 9; Time Warner at 26-27.

¹⁸⁵ See, e.g., INTV at 4; QVC at 2-3; NAA at 10-12; ANA at 10-11.

experience with these fraudulent telemarketing schemes being marketed through television commercials, infomercials, magazine and newspaper advertisements, and other forms of mass media advertising, the Commission has excluded these activities from the general media advertising exemption.

The revised proposed Rule no longer excludes "prize promotions" from the general media exemption because the Commission believes that the majority of fraudulent prize promotions do not employ mass media or general advertising. In addition, the revised proposed Rule has dropped "employment services" as one of the exceptions to the general media exemption. Although the Commission and other law enforcement agencies have brought actions against advance fee employment services that use mass media advertising, many legitimate employment services use the same type of mass media advertising and also require advance fees. The Commission believes that neither the legislative history of the Telemarketing Act nor the rulemaking record for the Rule provide a sufficient basis for singling out the employment service industry for an exception to the general media advertising exemption. Deceptive employment opportunity advertising will, however, still be subject to enforcement actions under the FTC Act.

Section 310.6(e) exempts telephone calls initiated by a customer in response to "a direct mail solicitation that clearly and conspicuously discloses all material information listed in Section 310.3(a)(1) of this Rule for any item offered in the direct mail solicitation; provided, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to investment opportunities, goods or services described in Sections 310.4(a)(2)-(3), or direct mail solicitations that guarantee or represent a high likelihood of success in obtaining or arranging for extensions of credit, if payment of a fee is required in advance of obtaining the extension of credit." Some commenters suggested that the Commission include under the general media exemption all direct mail solicitations—which, in effect, would have excluded all inbound calls from coverage under the Rule. However, the Commission's enforcement experience demonstrates that deceptive telemarketers frequently use direct mail solicitations as an integral part of their fraudulent schemes. Inbound calls prompted by such solicitations frequently result in the caller being subjected to the deceptive practices the Telemarketing Act is designed to

address. Therefore, the Commission has determined that including all direct mail solicitations within the general media exemption is unworkable. The Commission acknowledges, however, that most direct mail solicitations are not deceptive. In particular, the likelihood of deception is greatly diminished when direct mail solicitations contain all material information about the offered goods or services. Revised Section 310.6(e) therefore exempts only those direct mail solicitations that disclose, clearly and conspicuously, all the information specified in Section 310.3(a)(1) as material to a person's purchase decision. As in the general media exemption, revised Section 310.6(e) excludes from this exemption direct mail solicitations relating to investment opportunities, specific credit-related programs, and recovery rooms because of the Commission's enforcement experience in these areas.

The Commission decided to delete the "de minimis" exemption for incidental telemarketing activity contained in former Section 310.6(a). Comments indicate that neither the law enforcement nor the business communities found such an exemption helpful or workable. Law enforcement agencies believed that the exemption would hamper quick law enforcement, while providing a loophole for fraudulent telemarketers who specialize in high-price scams directed at only a few victims.¹⁸⁶ The business community found the exemption to be so restrictive that it would be of little significance.¹⁸⁷ The Commission agrees with those observations and believes that revisions made elsewhere in the revised proposed Rule, including exemptions in Section 310.6, eliminate the need for this specific exemption.

Comments about the initially proposed "business-to-business" exemption¹⁸⁸ fell to opposite extremes. Several industry commenters asked that the exemption be expanded to include entities other than businesses.¹⁸⁹ Other commenters asked that the Commission clarify the type of office supplies excluded from the exemption.¹⁹⁰ Still other industry commenters suggested that a "business-to-business" exemption was only defensible if provided on an across-the-board basis, without exceptions.¹⁹¹ On the other hand, law

enforcement and consumer agencies urged the Commission to exclude additional goods or services from the business-to-business exemption.¹⁹²

Because the Commission has extensive enforcement experience pertaining to deceptive telemarketing directed to businesses, it does not believe that an across-the-board exemption for business-to-business contacts is appropriate. The Commission does agree, however, that clarification of the goods or services that are excluded from this exemption is necessary. Revised Section 310.6(f) states that only the retail sale of nondurable office or cleaning supplies are excluded from the exemption.¹⁹³

Many commenters suggested an exemption for transactions where the customer is able to examine the goods or services before paying for them but does not involve a face-to-face sales presentation.¹⁹⁴ The Commission does not believe such an exemption is necessary, given the changes elsewhere in the revised proposed Rule, as noted above.

Many commenters suggested an exemption based on a prior business relationship with the customer.¹⁹⁵ The Commission does not believe that such an exemption would be workable in the context of telemarketing fraud. A fraudulent telemarketer need only obtain an initial purchase from an unsuspecting victim to claim a "prior business relationship" exemption.

In addition, many commenters suggested an exemption for "established businesses," including businesses that offer basic customer protection policies such as a moneyback guarantee.¹⁹⁶ The Commission agrees with the comments of other law enforcement agencies that such broad-based "safe harbor" provisions are not appropriate.¹⁹⁷

Such a "safe harbor" or "established business" exemption might have an anticompetitive effect on new businesses entering the market. In addition, the experience of law enforcement agencies indicates that much telemarketing fraud is perpetrated by so-called "established businesses." Furthermore, the existence of policies such as a moneyback guarantee is no assurance that the company is not fraudulent. Law enforcement agencies are well aware that fraudulent

¹⁸⁶ See, e.g., NYSCPB at 13; NACAA at 6; NAAG at 38-40; IA DOJ at 21.

¹⁸⁷ See, e.g., DMA at 36; Olan at 27; ICTA at 57; AAAA at 6.

¹⁸⁸ Initially proposed Rule Section 310.6(b).

¹⁸⁹ See, e.g., Viacom at 9.

¹⁹⁰ See, e.g., IBM at 28; BPIA at 4.

¹⁹¹ See DMA at 36-37.

¹⁹² See NAAG at 41; ID AG at 2; USPS at 25.

¹⁹³ See, e.g., IBM at 28; BPIA at 4.

¹⁹⁴ See, e.g., CHC at 8, 12.

¹⁹⁵ See, e.g., ARDA at 39; ACRA at 9-10; MSSC at 27; Time Warner at 44; ADC at 2; DMA at 38.

¹⁹⁶ See, e.g., Time Warner at 23-26; DMA at 38; AmEx at 2; APAC at 1-2,6; Viacom at 6; Olan at 28; ACRA at 10; ARDA at 40; NRF at 17-18.

¹⁹⁷ See, e.g., Tr. at 705-26.

telemarketers often tout their "moneyback guarantees" and refund policies as part of the sales solicitation. Unfortunately, such companies rarely honor those moneyback guarantees. Therefore, the Commission has decided not to include a broad "safe harbor" or "established business" exemption in the revised proposed Rule. The Commission believes that changes made elsewhere in the revised proposed Rule, including exemptions set forth in Section 310.6, obviate the need for such an exemption or safe harbor.

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.¹⁹⁸ Section 310.7 of the initially proposed Rule set forth the notice such parties must provide to the Commission concerning those actions. The language regarding the notice has not changed in the revised proposed Rule. However, the revised proposed Rule has added Section 310.7(b), which clarifies that the Rule does not vest State officials or private persons with jurisdiction over any person or activity outside the jurisdiction of the FTC Act.

The Commission added this language in response to questions from a number of commenters regarding the scope of the Rule and the authority to bring actions for violations of the Rule.¹⁹⁹ When coupled with the new language in section 310.1 on the scope of the Rule, the language in Section 310.7(b) clarifies that the Rule does *not* apply to any person outside the jurisdiction of the FTC Act, and that neither the Commission nor any other party authorized to bring suit for violations of the Rule may bring an action against such persons.

This restriction on the scope of the Rule and authority to bring actions under the Rule tracks Section 6(b) of the Telemarketing Act: "[N]o activity which is outside the jurisdiction of [the FTC] Act shall be affected by this Act."²⁰⁰ The language also is consistent with the legislative history of the Telemarketing Act and reflects the intent of Congress:

[T]he legislation * * * does not vest the FTC, the State attorneys general, or private parties with jurisdiction over any person over whom the FTC does not otherwise have authority.²⁰¹

¹⁹⁸ See 15 U.S.C. 6103 and 6104.

¹⁹⁹ See, e.g., AARP at 3; ABA at 1; BOB at 2.

²⁰⁰ 15 U.S.C. 6105(b).

²⁰¹ Senate Report at 14.

Section 310.8 Federal Preemption

Section 310.8 of the initially proposed Rule stated 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. Several commenters asked that this Section clarify that the Rule establishes a threshold requirement that State laws can exceed as long as they do not conflict with the Rule's requirements.²⁰² At least one commenter expressed concern that they would be subject to making State-required disclosures that are similar to the Rule's requirements but not directly in conflict.²⁰³

The Commission does not believe any changes are necessary to this Section. The language in this Section is clear and provides sufficient guidance that additional State requirements and prohibitions would be permitted as long as they do not conflict directly with the Rule. Thus, State registration, certification, or licensing requirements for telemarketing most likely would not be preempted because they would not be in direct conflict with any provisions of this Rule.

Effective Date

The NPR asked for comments on whether 30 days would provide sufficient time to come into compliance with the initially proposed Rule provisions.²⁰⁴ Most of the parties who commented on the effective date indicated that 30 days would be insufficient given the need "to make system changes, establish training programs [for] employees involved in telephone sales * * *, develop new recordkeeping procedures, prepare written disclosure and acknowledgement forms, draft and negotiate new contracts with service bureaus, [and] develop internal monitoring programs."²⁰⁵ Most of the commenters who believed 30 days was insufficient suggested a 6-month time frame in order to achieve compliance.²⁰⁶ NCL noted that some of the prohibited deceptive and fraudulent practices could be instituted immediately (for example, the prohibitions against misrepresentations), but that industry might need additional time to comply

²⁰² See, e.g., AARP at 25; NYSCPB at 13-14; NAAG at 41-42; NACAA at 6.

²⁰³ See Prudential at 4.

²⁰⁴ 60 FR at 8328.

²⁰⁵ NRF at 41. See also APAC at 9; NCL at 55; Olan at 29; NAA at 24; DMA at 40; SCIC at 71; ARDA at 41; Time Warner at 41. *But see* USPS at 26.

²⁰⁶ See, e.g., DMA at 40; Olan at 29; NRF at 41; SCIC at 7; Time Warner at 41.

with certain other requirements of the initially proposed Rule.²⁰⁷

Because the revised proposed Rule eliminates many of the disclosure requirements that generated the foregoing compliance time predictions, the Commission proposes to set the effective date at 30 days from the date the final Rule is published. Thirty days should not unduly burden legitimate industry because, based on information provided by industry, legitimate sellers and telemarketers already comply with the revised proposed Rule. For example, legitimate industry represented that it already makes the affirmative disclosures required under Section 310.3(a)(1); it does not misrepresent material information pertaining to the sale of goods or services prohibited under Section 310.3(a)(2); it does not knowingly provide substantial assistance or support to deceptive sellers or telemarketers prohibited under Section 310.3(b); and it does not engage in credit card laundering prohibited under Section 310.3(c). Further, telemarketers have been required to comply with the TCPA since 1992 and should already have in place and be implementing the "do not call" procedures required under that Act. Such procedures therefore would comply with Section 310.4(b)(2) of this Rule, as well. Finally, the Commission understands from the workshop that participants already maintain the records required under Section 310.5. Because the Commission does not require that records be kept in any special form, legitimate industry is most likely already in compliance with Section 310.5 of the Rule. Based on the foregoing, the Commission does not believe that a further delayed effective date for the Rule is reasonable.

Section C. Invitation To Comment

Before adopting this revised proposed Rule as final, consideration will be given to any written comments submitted to the Secretary of the Commission on or before June 30, 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, NW., Washington, DC 20580.

²⁰⁷ NCL at 55.

Section D. 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 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 E. Regulatory Flexibility Act

During the comment period, only a few commenters²⁰⁸ asserted that the initially proposed Rule might have a significant economic impact on a substantial number of small entities. However, based on the revised proposed Rule's modified regulatory approach, 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 revised 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 revised proposed rule exempts pay-per-call services subject to the Commission's "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992," exempts telephone calls in which a payment is not required until after a face-to-face sales presentation has occurred, telephone calls initiated by a customer that are not in response to any solicitation, and customer telephone calls that are in response to mass media advertising.

As a result of these statutory and regulatory limitations, the Commission believes 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 revised 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.

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. This part does not apply to any activity outside the jurisdiction of the Federal Trade Commission Act, 15 U.S.C. 41, et seq.

§ 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) *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.

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

(e) *Credit* means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(f) *Credit card* means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(g) *Credit card sales draft* means any record or evidence of a credit card transaction.

(h) *Credit card system* means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.

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

(j) *Investment opportunity* means anything, tangible or intangible, that is offered, offered for sale, sold, or traded based wholly or in part on representations, either expressed or implied, about past, present, or future income, profit, or appreciation. The term "investment opportunity" does not include sales of franchises subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions

²⁰⁸ See generally Olan; ATFA; ANA; ABA.

Concerning Franchising and Business Opportunity Ventures," 16 CFR part 436.

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

(l) *Merchant* means a person who is authorized under a written contract with an acquirer to honor or process for payment credit card payments, for the purchase of goods or services.

(m) *Merchant agreement* means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services.

(n) *Outbound telephone call* means a telephone call initiated by a telemarketer to induce the purchase of goods or services.

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

(p) *Prize* means anything offered, or purportedly offered, and given, or purportedly given, to a person by chance. For purposes of this definition, chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.

(q) *Prize promotion* means:

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

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

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

(s) *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.

(t) *Telemarketer* means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer.

(u) *Telemarketing* means a plan, program, or campaign which is conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call. 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 or in a substantially similar catalog.

§ 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 part for any seller or telemarketer to engage in the following conduct:

(1) Before a customer pays for goods or services offered, failing to disclose, in a clear and conspicuous manner, the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer;

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

(iii) All material terms and conditions of the seller's refund, cancellation, exchange, or repurchase policies if a representation about any such policy is made a part of the sales offer; and

(iv) That no purchase is necessary to win if a prize promotion is offered in conjunction with a sales offer of goods or services;

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

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

(ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;

(iii) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;

(iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

(v) Any material aspect of a prize promotion including, but not limited to, the odds of winning, the nature or value of a prize, or that payment is required to receive a prize;

(vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability; or

(vii) A seller's or telemarketer's affiliation with, or endorsement by, any government or third-party organization; and

(3) Making a false or misleading statement to induce any person to pay for goods or services.

(b) *Assisting and facilitating.* It is a deceptive telemarketing act or practice and a violation of this part for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates § 310.3 (a) or (c), or § 310.4 of this part, and such substantial assistance is related to the commission or furtherance of that act or practice.

(c) *Credit card laundering.* Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice, and a violation of this part, 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 or the applicable credit card system.

§ 310.4 Abusive telemarketing acts or practices.

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

(1) Threats, intimidation, or the use of profane or obscene language;

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or

improve, a person's credit history, credit record, or credit rating until:

(i) The 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 in the form of a consumer report from a 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 part should be construed to affect 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;

(3) Requesting or receiving payment of any fee or consideration from a person, for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business 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

(4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person.

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

(i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number; or

(ii) Initiating an outbound telephone call to a person when that person previously has stated that he or she does not wish to receive an outbound telephone call 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)(ii) if:

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

(iv) Any subsequent call is the result of 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 part for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 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 part for a telemarketer in an outbound telephone call to fail to disclose promptly and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase is necessary to win if a prize promotion is offered in conjunction with a sales offer of goods or services. This disclosure must be made before the prize is described to the person called. If requested by that person, the telemarketer must disclose the no-purchase entry method for the prize promotion.

§ 310.5 Recordkeeping requirements.

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

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

(2) The name and last known address of each prize recipient and the prize awarded for prizes that have a value of \$25.00 or more;

(3) The name and last known 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; and

(4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales.

(b) Failure to keep all records required by § 310.5(a) shall be a violation of this part.

(c) The seller and the telemarketer calling on behalf of the seller may, by written agreement, allocate responsibility between themselves 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, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If the agreement is unclear as to who must maintain any required record(s), the seller shall be responsible for keeping such records.

(d) Absent a written agreement described in section 310.5(c) between the seller and the telemarketer, the seller shall be responsible for complying with § 310.5(a) (1), (2) and (3); the telemarketer shall be responsible for complying with § 310.5(a)(4). The seller and telemarketer may keep any required records in the manner, format, or place as they keep such records in the ordinary course of business.

(e) 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 telemarketing acts or practices are exempt under this part:

(a) Pay-per-call services subject to the Commission's "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992," 16 CFR part 308.

(b) Telephone calls in which the sale of goods or services is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation by the seller during which the customer has the opportunity to examine the goods or services offered.

(c) Telephone calls initiated by a customer that are not the result of any solicitation by a seller or telemarketer.

(d) Telephone calls initiated by a customer in response to an advertisement through any media, other than direct mail solicitations; provided, however, that this exemption does not apply to calls initiated by a customer in response to an advertisement relating to investment opportunities, goods or services described in § 310.4(a)(2) or (3), or advertisements that guarantee or represent a high likelihood of success in obtaining or arranging for extensions of credit, if payment of a fee is required in advance of obtaining the extension of credit.

(e) Telephone calls initiated by a customer in response to a direct mail

solicitation that clearly and conspicuously discloses all material information listed in § 310.3(a)(1) of this part for any item offered in the direct mail solicitation; provided, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to investment opportunities, goods or services described in § 310.4(a)(2) or (3), or direct mail solicitations that guarantee or represent a high likelihood of success in obtaining or arranging for extensions of credit, if payment of a fee is required in advance of obtaining the extension of credit.

(f) Telephone calls between a telemarketer and any business, except calls involving the retail sale of nondurable office or cleaning supplies.

§ 310.7 Actions by States and private persons.

(a) 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 part. 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.

(b) This part does not vest the attorney general of any State or any private person with jurisdiction over any person or activity outside the jurisdiction of the Federal Trade Commission Act.

§ 310.8 Federal preemption.

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

§ 310.9 Severability.

The provisions of this part 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.

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