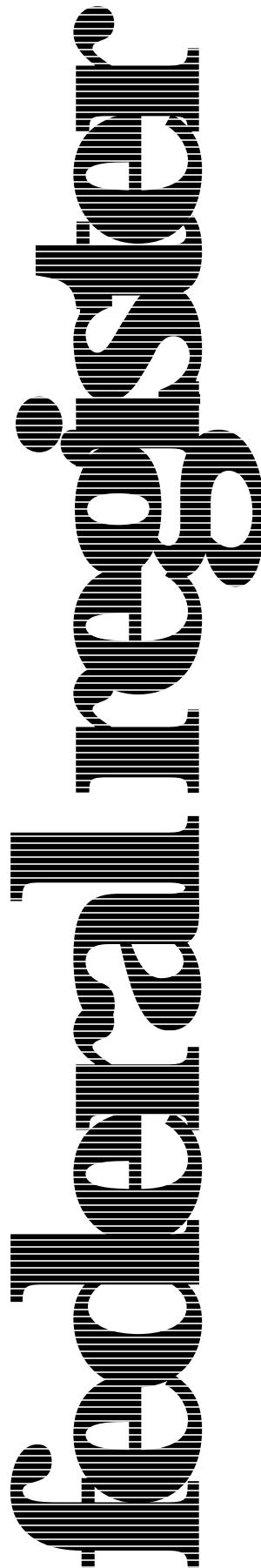

Wednesday
August 23, 1995



Part II

**Federal Trade
Commission**

**16 CFR Part 310
Prohibition of Deceptive and Abusive
Telemarketing Acts; Final Rule**

FEDERAL TRADE COMMISSION**16 CFR Part 310****Telemarketing Sales Rule****AGENCY:** Federal Trade Commission.**ACTION:** Statement of basis and purpose and final rule.

SUMMARY: The Federal Trade Commission ("Commission" or "FTC") issues its Statement of Basis and Purpose and Final Rule pursuant to the telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act" or the "Act"). Section 3 of the Act directs the FTC to prescribe regulations, within 365 days of enactment of the Act, prohibiting deceptive and abusive telemarketing acts or practices.

EFFECTIVE DATE: The Rule will become effective December 31, 1995.

ADDRESSES: Requests for copies of the Rule and the Statement of Basis and Purpose should be sent to Public Reference Branch, Room 130, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Division of Marketing Practices: Judith M. Nixon (202) 326-3173, David M. Torok (202) 326-3140, or Carole I. Danielson (202) 326-3115, Federal Trade Commission, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The Rule, in connection with any telemarketing transaction: (1) Requires clear and conspicuous disclosures of specified material information, orally or in writing, before a customer pays for goods or services offered; (2) prohibits misrepresenting, directly or by implication, specified material information relating to the goods or services that are the subject of a sales offer, as well as any other material aspects of a telemarketing transaction; (3) requires express verifiable authorization before submitting for payment a check, draft, or other form of negotiable paper drawn on a person's account; (4) prohibits false or misleading statements to induce payment for goods or services; (5) prohibits any person from assisting and facilitating certain deceptive or abusive telemarketing acts or practices; (6) prohibits credit card laundering; (7) prohibits specified abusive acts or practices; (8) imposes calling time restrictions; (9) requires specified information to be disclosed, truthfully, promptly, and in a clear and conspicuous manner, in an outbound telephone call; (10) requires that

specified records be kept; and (11) specifies certain acts or practices that are exempt from the Rule.

Statement of Basis and Purpose*I. Introduction*

On August 16, 1994, the President signed into law the Telemarketing Act,¹ which directs the Commission to prescribe regulations, within 365 days of enactment of the Act, prohibiting deceptive and abusive telemarketing acts or practices. The first step in meeting the Congressional directive was to publish a Notice of Proposed Rulemaking ("NPR") in the **Federal Register**.² The provisions of the initially proposed Rule published in the NPR were based on the legislative history of the Telemarketing Act,³ on the Commission's enforcement experience, and on information informally obtained from law enforcement and the telemarketing industry. The NPR gave interested persons 45 days to comment on the proposal. The comment period on the NPR closed on March 31, 1995. In response to the NPR, the Commission received over 350 comments from industry, law enforcement, consumer representatives, individual consumers, and businesses.⁴

From April 18 through 20, 1995, Commission staff conducted a public workshop conference in Chicago, Illinois, to discuss the issues raised in the NPR and the comments received in response to the NPR. Twenty associations or individual businesses were selected to engage in a roundtable discussion at the conference.⁵ These participants were selected based upon (1) their interest in the rulemaking based on the likely effect the Rule ultimately will have on them or their members, and (2) their ability to represent others with similar interests. Participants discussed key aspects of the initially proposed Rule, addressed each other's comments and questions, and responded to questions from Commission staff. The conference was open to the public, and more than 150 observers attended. Time was reserved for oral comments from members of the

¹ 15 U.S.C. 6101-08.

² 60 FR 8313-8333 (February 14, 1995).

³ H.R. Rep. No. 20, 103rd Cong., 1st Sess.; S. Rep. No. 80, 103rd Cong., 1st Sess. (hereinafter referred to as "House Report" and "Senate Report," respectively).

⁴ A list of the commenters to both the NPR and the Revised Notice of Proposed Rulemaking ("RNPRM"), including the acronyms used to identify each commenter in this Statement, is attached as an Appendix.

⁵ 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.

public each day, and 37 persons spoke during the course of the three-day conference. The entire proceeding was transcribed, and the transcript was placed on the public record.⁶

On May 3, 1995, in an open meeting, Commission staff briefed all the Commissioners about the rulemaking process, the issues raised in the written comments and the public workshop conference, and outlined possible approaches to address the issues commenters raised. The briefing was transcribed, and the transcript was placed on the public record.

On June 8, 1995, the Commission published in the **Federal Register** a Revised Notice of Proposed Rulemaking ("RNPRM")⁷ for additional public comment. The revised proposed Rule published in the RNPRM reflected continued consideration of the Act's legislative history, the written comments received in response to the NPR, and information learned at the workshop conference. The public comment period on the RNPRM closed on June 30, 1995. The Commission received over 350 comments to the RNPRM from interested parties, including industry, law enforcement, consumer representatives, individual consumers, and businesses.

Individual consumers who commented favored restricting telemarketing; some even urged the Commission to prohibit telemarketing completely. Industry and business comments were generally positive about the revised proposed Rule. Law enforcement and consumer groups, however, expressed concern that many of the provisions in the initially proposed Rule, which, they asserted, provided consumers with much needed protection, had been eliminated from the revised proposed Rule.

The entire public record to date, including the comments, the public workshop conference transcript, and the Commission open meeting transcript is available on CD-ROM. In addition, the public record up to, but not including the RNPRM and the comments received in response to the RNPRM, was placed on the Internet.⁸

⁶ 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]." Unless otherwise indicated, all comment references in this Statement are to the comments received in response to the RNPRM.

⁷ 60 FR 30406-30428 (June 8, 1995).

⁸ The FTC gopher server address is CONSUMER.FTC.GOV 2416. For World Wide Web access, the URL is GOPHER://CONSUMER.FTC.GOV:2416.

II. Discussion of the Rule

A. Section 310.1: Scope of the Regulations

Section 310.1 of the Final Rule states that this part implements the Telemarketing Act.

The Commission received a number of comments on the initially proposed Rule asking that the Commission expressly exempt those entities that are not subject to the Federal Trade Commission Act ('FTC Act'), 15 U.S.C. 41 *et seq.*⁹ In response to those comments, the revised proposed Rule added language to this Section that was intended to clarify that the Rule does not apply to any activity outside the jurisdiction of the FTC Act. In that regard, the Commission quoted the Telemarketing Act as follows:

[N]o activity which is outside the jurisdiction of (the FTC) Act shall be affected by this Act.¹⁰

After reviewing the record in this rulemaking, the Commission has decided to delete the additional language from the Final Rule. The Telemarketing Act makes clear that the Rule does not apply to any activity excluded from the Commission's jurisdiction; thus, restating this in the Rule is unnecessary. By deleting this language, the Commission does not intend to expand or contract its jurisdiction or the scope of the Rule's coverage. The Commission's jurisdictional limitations are set forth in section 5(a)(2) of the FTC Act;¹¹ accordingly, the Rule does not apply to:

banks, savings and loan institutions described in section 18(f)(3),¹² Federal credit unions described in section 18(f)(4),¹³ 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 amended, except as provided in section 406(b) of said Act.¹⁴

In addition, the Rule does not apply to any entity that is not "organized to carry on business for its own profit or that of its members."¹⁵ Finally, the Rule

⁹ See, e.g., initial comments: GHAA at 3; AT&T at 6-13; AmEx at 3; ABA at 1; BOB at 1; ASAE at 2; SCIC at 7.

¹⁰ 15 U.S.C. 6105(a).

¹¹ 15 U.S.C. 45(a)(2).

¹² Section 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.*

¹³ Section 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)."

¹⁴ 15 U.S.C. 45(a)(2).

¹⁵ See 15 U.S.C. 44.

does not apply to the business of insurance to the extent that such business is regulated by State law.¹⁶

Other commenters¹⁷ requested that the Final Rule expressly exclude from coverage those investment entities which were expressly excluded under the Telemarketing Act.¹⁸ Again, the Telemarketing Act clearly excludes such entities and the Rule need not reiterate the statutory exclusion.

The Commission also received comments expressing differing views on whether parties acting on behalf of organizations exempt under section 5 of the FTC Act should be expressly exempt from the Rule. Some commenters urged the Commission to exclude agents of exempt organizations from Rule coverage.¹⁹ The Commission does not see a need to provide broadly for the exemption of agents in the Rule. The FTC Act itself establishes exemptions from its coverage, and the Telemarketing Act provides that authority under the Rule may be no broader than under the FTC Act. Thus, for example, banks and airlines would not be subject to the Final Rule, because they are exempt under section 5 of the FTC Act.²⁰ Similarly, section 4 of the FTC Act exempts corporations that are not acting for their profit or that of their members.²¹ However, a nonbank company that contracts with a bank to provide services on behalf of the bank, and a non-airline company that contracts with an airline to provide services on behalf of the airline, are not exempt from the FTC Act.²² Similarly, a company that is acting for profit would be subject to the FTC Act even when

¹⁶ See Section 2 of the McCarran-Ferguson Act, 15 U.S.C. 1012(b).

¹⁷ See, e.g., CUNA at 3-4.

¹⁸ As noted in the RNPBM, 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, 19, 15, 13b, 9a.

¹⁹ See, e.g., Chase at 1; AT&T at 5-6; BOA at 1; IBAA at 1; Consortium at 2; ATFA at 3. See, e.g., initial comments: ABA at 1; Advanta at 1; Chase at 2; Citicorp at 3; NFN at 2.

²⁰ 15 U.S.C. 45(a)(2); *FTC v. Miller*, 549 F.2d 452 (7th Cir. 1977).

²¹ 15 U.S.C. 44; *Community Blood Bank v. FTC*, 405 F.2d 1011 (8th Cir. 1969).

²² See, e.g., *Official Airlines Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980); *FTC v. Miller*, 549 F.2d 452 (7th Cir. 1977).

providing services to a nonprofit corporation. The Commission is not aware of any reason why the Final Rule should create a special exemption for such companies where the FTC Act does not do so. Accordingly, the Final Rule does not include special provisions regarding exemptions of parties acting on behalf of exempt organizations; where such a company would be subject to the FTC Act, it would be subject to the Final Rule as well.

B. Section 310.2: Definitions

The revised proposed Rule defined the following terms: "acquirer," "attorney general," "cardholder," "Commission," "credit," "credit card," "credit card sales draft," "credit card system," "customer," "investment opportunity," "material," "merchant," "merchant agreement," "outbound telephone call," "person," "prize," "prize promotion," "seller," "state," "telemarketer," and "telemarketing." Only the terms "investment opportunity," "material," "seller," and "telemarketing" elicited much comment. Additionally, some commenters called for a definition of the term "clear and conspicuous," as that term is used in Sections 310.3(a)(1) and 310.4(d) of the revised proposed Rule.

In the Final Rule, the Commission has modified the definitions of "investment opportunity" and "seller." All other definitions have been adopted in the Final Rule without change from the revised proposed Rule. The Commission also has determined that the term "telemarketing" needs no further modification.

The Commission considered, but rejects, comments calling for a further definition of the phrase "clear and conspicuous."²³ The Commission believes it is unnecessary to define the term "clear and conspicuous" in the Rule because the concept is well-developed in Commission case law and policy statements.²⁴ Moreover, the Commission believes that mandating rigid "clear and conspicuous" criteria would be inconsistent with the goal of allowing businesses maximum flexibility as long as customers receive

²³ AARP at 12; CFA at 5-6; NCL at 12-13; USPS at 8.

²⁴ See, e.g., *Thompson Medical Co.*, 104 F.T.C. 648, 797-98 (1984); *The Kroger Co.*, 98 F.T.C. 639, 760 (1981); Statement of Enforcement Policy, "Clear and Conspicuous Disclosures in Television Advertising," Trade Regulation Reporter (CCH) ¶ 7569.09 (Oct. 21, 1970); Statement of Enforcement Policy, "Requirements Concerning Clear and Conspicuous Disclosures in Foreign Language Advertising and Sales Materials," 16 CFR 14.9.

the material information they need to make purchasing decisions.

1. Section 310.2(u): Definition of "Telemarketing"

The definition of "telemarketing" sets the parameters of the Final Rule. The definition in the Final Rule reflects the statutory definition set forth by Congress in section 7(4) of the Telemarketing Act.²⁵

Some commenters requested that the Commission exempt calls made by consumers in response to written advertisements and promotional materials sent by financial institutions or their agents that comply with the disclosure requirements in the Truth in Lending Act ("TILA"), 15 U.S.C. 1601 *et seq.*, and its implementing Regulation Z ("Reg. Z"), 12 CFR part 226.²⁶ The Commission has determined that such a broad exemption is inappropriate. The TILA and Reg. Z disclosures for credit and charge card solicitations, 15 U.S.C. 1631–1632; 12 CFR 226.5–226.5a, relate to specific costs and terms of credit, but do not contain many of the other protections that would be available to consumers under §§ 310.3 and 310.4 of this Rule. The Commission acknowledges, however, that certain credit disclosures required under sections 1631–1632 of the TILA and §§ 226.5–226.5a of Reg. Z are sufficient for compliance with some of the Final Rule's affirmative disclosures set forth in § 310.3(a)(1). Therefore, the Final Rule makes clear that compliance with the TILA and Reg. Z will suffice for purposes of compliance with § 310.3(a)(1)(i) of the Rule.

The Commission intends that the phrase "goods or services" contained in the definition of "telemarketing" cover any tangible and intangible goods or services including, but not limited to, leases, licenses, or memberships. Prizes and awards are also included as "goods or services" under the definition of "telemarketing." This is consistent with the legislative history of the Telemarketing Act²⁷ and reflects the Commission's enforcement experience in this area.

The Telemarketing Act and the Final Rule exempt from the definition of telemarketing all solicitations of sales through the mailing of a catalog,²⁸ when the person making the solicitation does

not call customers but only receives calls from customers in response to the catalog and only takes orders during those calls, without further solicitation. The Commission has determined that the term "without further solicitation" requires interpretation. Applied literally, the term could bar conduct that would not be deceptive or abusive, including asking catalog customers who have placed orders whether they wish to buy another item. There is no reason to suppose that Congress intended such a result. The Final Rule permits that, when catalog sellers receive calls from customers, the person taking the order may provide further information to the customer about, or may try to sell, any other item included in the same catalog which prompted the customer's call, or in a substantially similar catalog, without losing the exemption from the definition of "telemarketing." The Commission's experience in the area of catalog sales suggests that this clarification will burden neither legitimate catalog sellers nor expose their customers to a significant risk of the type of deception or abuse that the Final Rule is intended to address.

2. Section 310.2(j): Definition of "Investment Opportunity"

Section 310.2(j) of the Final Rule defines "investment opportunity" as 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 RNPRM clarified that the definition of the term "investment opportunity" did not include sales of franchises subject to the Commission's Franchise Rule, 16 CFR part 436. To clarify further that the Rule does *not* cover such franchise sales, the Commission has deleted that language from the Final Rule's definition of "investment opportunity" and has created an express exemption for such transactions in § 310.6(b).

3. Sections 310.2(r) and (t): Definitions of "Seller" and "Telemarketer"

In response to a suggestion from a commenter,²⁹ the Commission has modified the definition of "seller" to clarify that the term includes not only persons who, in connection with a telemarketing transaction, provide or offer to provide goods and services to the customer in exchange for consideration, but also persons who, in connection with a telemarketing transaction, arrange for others to provide goods or services to the

customer. The Commission made this change in order to clarify that the Rule's coverage cannot be avoided by structuring a sale so that someone other than the seller actually provides the goods or services directly to the customer.

Another commenter requested clarification of the definition of "seller" with respect to its application to diversified companies or divisions within one parent organization.³⁰ The Commission intends that distinct corporate divisions may be considered 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 corporate organization and the division that is selling the goods or services that are the subject of the offer, or between that division and the other divisions of the corporation; or (2) whether the nature or type of goods or services offered by the division are substantially different from those offered by other divisions of the corporation or the corporate organization as a whole.

Section 310.2(t) of the Final Rule defines "telemarketer" as "any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer." The Commission intends that the term "telemarketer" apply to persons making a telephone call to, or receiving a telephone call from, a customer in connection with the purchase of goods or services.³¹ It does not include persons making or receiving customer service calls or similar tangential telephone contacts, unless a sales offer is made or accepted during such calls.

One commenter asserted that sellers and telemarketers should be held jointly liable under the Rule for the actions of the other.³² NYSCPB stated that, absent legislative history indicating that joint and several liability is contrary to the intent of Congress, the Commission should apply joint and several liability.³³ NYSCPB pointed out that in many instances a telemarketer engaging in fraud may abscond before law enforcers can move against it. NYSCPB expressed concern that, in such cases, State law enforcers might not be able to move against others involved in the

²⁵ 15 U.S.C. 6106(4).

²⁶ See, e.g., Chase at 2.

²⁷ See House Report at 11; Senate Report at 8.

²⁸ The Telemarketing Act and the Final Rule require catalogs to include multiple pages of written descriptions or illustrations of the goods or services being offered for sale, to include a business address of the seller, and to be issued not less frequently than once a year.

²⁹ Rollins at 1–2.

³⁰ As previously stated in discussing the definition of "telemarketing," the Commission intends that a "prize," as that term is defined in § 310.2(p), is a good or service for purposes of this Rule.

³¹ NYSCPB at 3–4.

³² *Id.*

deceptive telemarketing scheme who remain within their reach.

The Commission declines to read joint and several liability for sellers and telemarketers into the Telemarketing Act. The assisting and facilitating provisions in § 310.3(b) of the Rule more appropriately provide a basis for an action by State enforcers in the situation described by NYSCPB.

4. Sections 310.2 (a), (c), (e), (f), (g), (h), (l), and (m): Credit-Related Definitions

The revised proposed Rule defined various credit-related terms that come into play primarily in § 310.3(c), which addresses credit card laundering. These terms are: "Acquirer," "cardholder," "credit," "credit card," "credit card sales draft," "credit card system," "merchant," and "merchant agreement." The Commission has adopted these definitions without change in the Final Rule. No further discussion is necessary in this Statement regarding the definitions of "acquirer," "cardholder," "merchant," and "merchant agreement."

Section 310.2(e) defines "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 delineates the scope of § 310.3(c), which prohibits credit card laundering. Several commenters urged the Commission to extend the scope of § 310.3(c) to include other payment devices such as debit cards because they believe such devices can be laundered as easily as credit card transactions.³⁴ Based on the language of the Telemarketing Act³⁵ and its legislative history,³⁶ however, the Commission believes that Congress 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 definition of "credit" tracks the statutory definition of "credit" under the TILA.³⁷

Section 310.3(f) of the Final Rule defines "credit card" as "any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit." This definition is identical to the statutory definition of "credit card" contained in the TILA.³⁸ Again, the Commission has defined "credit card" as it is used throughout

the consumer credit statutes for consistency and to clarify that § 310.3(c) does not include other payment devices.

Section 310.2(g) defines the term "credit card sales draft" as "any record or evidence of a credit card transaction." This definition is designed to be flexible enough to anticipate future technological changes in how credit card transactions are processed and handled and, therefore, does not refer to specific forms of records. This definition is intended to embody the broadest possible range of recordkeeping formats that will come within the scope of the Rule.

Section 310.2(h) of the Final Rule defines "credit card system" as "any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system." This definition does not include any in-house "system" that a seller or telemarketer may put in place. Rather, the Commission intends that this definition include only a credit card system to process credit card transactions involving credit cards issued or licensed by the credit card system operator.

5. Section 310.2(k): Definition of "Material"

The Final Rule states that the term "material" means "likely to affect a person's choice of, or conduct regarding, goods or services." In the RNPRM, the Commission responded to commenters' requests for clarification of the term "material" by stating that it intended that term to comport with the Commission's Deception Statement and established Commission precedent.³⁹ *Cliffdale Assocs.*, 103 F.T.C. 110 (1984); *Thompson Medical Co.*, 104 F.T.C. 648 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987); and the Commission's Deception Statement attached as an appendix to *Cliffdale Associates*. Nonetheless, several commenters on the revised proposed Rule requested additional clarification.⁴⁰ The Commission has considered these requests, but believes further clarification is unnecessary given the comprehensive guidance in the cited case law and policy statement.

6. Sections 310.2 (p) and (q): Definitions of "Prize" and "Prize Promotion"

The Final Rule, at § 310.2(p), adopts the revised proposed Rule's definition of "prize" as follows: "Anything offered, or purportedly offered, and given, or purportedly given, to a person by chance." Further tracking the revised

proposed Rule, the Final Rule also makes clear 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." This ensures that a typical deceptive prize scheme will be captured in the definition of "prize." In those schemes, consumers receive a solicitation typically listing four or five items, guaranteeing that they will receive one of them. Consumers, however, are not told which specific item they will receive. 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." That interpretation is eliminated by the definition as adopted.

Section 310.2(q) of the Final Rule defines "prize promotion" as either "(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." This definition makes clear that the representations about winning may be either express or implied. In this way, the Final Rule includes in the definition of "prize promotion" those deceptive telemarketing solicitations that are artfully crafted to avoid express representations while delivering an implied message that a consumer has won a prize.

7. Sections 310.2 (b), (d), (i), (n), (o), and (s): Other Definitions

The Commission received no comments in response to the RNPRM on the definitions of "Attorney General," "Commission," "customer," "outbound telephone call," "person," or "State." Therefore, these definitions are adopted unchanged.

C. Section 310.3: Deceptive Telemarketing Acts or Practices

1. Section 310.3(a): Prohibited Deceptive Telemarketing Acts or Practices

Section 310.3(a) of the Final Rule requires affirmative disclosures, prohibits misrepresenting material information, requires express verifiable authorization before submitting for payment a check, draft, or other form of negotiable paper drawn on a person's account, and prohibits false or misleading statements to induce payment for goods or services. In the Final Rule, the Commission has clarified the applicability of the

³⁴ E.g., Citicorp at 2; VISA at 2-4.

³⁵ 15 U.S.C. 6102(a)(2).

³⁶ See generally House Report at 2; Senate Report at 2, 10.

³⁷ 15 U.S.C. 1603(e).

³⁸ 15 U.S.C. 1603(k).

³⁹ 60 FR at 30410.

⁴⁰ See, e.g., NRF at 5-8; IBM at 11; CC at 1.

disclosure of "total cost and quantity" in transactions involving credit products. In addition, the Commission has modified the provision requiring disclosure of refund policies and has included additional disclosures that are required in connection with prize promotions. The Commission also has clarified that all required disclosures must be made before a customer pays for the goods or services that are the subject of the sales offer. Finally, the Commission has added requirements for express verifiable authorization for payments.

a. Section 310.3(a)(1): Affirmative Disclosures

Section 310.3(a)(1) requires affirmative disclosure of certain categories of material information before a customer pays for goods or services. The Final 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 timing of the disclosures prompted considerable comment. Two commenters expressed the view that the revised proposed Rule was ambiguous regarding when payment occurs in credit card transactions: Does "payment" occur when the customer provides a seller or telemarketer with his or her credit card information, or when the customer's credit card account is charged for the goods or services?⁴¹ NCL, for example, expressed concern that telemarketers might interpret this provision to permit delaying the disclosures until after the consumer has divulged his or her credit card or bank information and the funds have been withdrawn or transferred to a merchant credit card account.⁴² The Commission intends that the disclosures be made *before* the consumer sends funds to a seller or telemarketer or divulges to a telemarketer or seller credit card or bank account information. Thus, a telemarketer or seller who fails to provide the disclosures until the consumer's payment information is in hand violates the Rule.

AARP recommended that the Commission require that the disclosures be made at the time of sale to prevent deceptive telemarketers from providing the disclosures in a postcard sent to the customer weeks before making the sales call.⁴³ The Commission intends, by

requiring "clear and conspicuous" disclosures, that any outbound telephone call made after written disclosures have been sent to consumers must be made sufficiently close in time to enable the customer to associate the telephone call with the written document.

NAAG expressed a concern that permitting disclosures to be made "before a customer pays" will allow important disclosure information to be delayed until "after the con artist can so excite and entice the consumer that, when made, the disclosures become meaningless."⁴⁴ For example, NAAG stated that under the revised proposed Rule, a seller or telemarketer could delay making the required disclosures to consumers until the time that a courier arrives at the customer's door, ready to pick up payment for the goods or services. The Commission agrees that such tactics would evade the intent of the Rule that disclosures be given so as to be meaningful to a customer's purchase decision. The Commission also recognizes that deceptive telemarketers use couriers to a large extent and would most likely provide the required disclosures in the manner described by NAAG. Accordingly, the Final Rule makes clear, in a footnote to § 310.3(a)(1), that "when a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment." All required disclosures, therefore, must be made *before* a courier pick-up of payment or authorization for payment from a customer.⁴⁵

before payment is made, in order to ensure that consumers have all necessary material information before deciding whether to buy a product or service. CFA at 6-8. The Commission agrees that consumers should have material information about the product or service before making their purchasing decision. However, the Commission believes that "before a customer pays" permits sufficient time for the consumer to consider all of the material information before making a final decision whether to purchase and provide payment for the goods or services.

⁴⁴ NAAG at 10.

⁴⁵ Many law enforcement and consumer representatives urged the Commission to reinstate, in the Final Rule, the absolute prohibition on courier pick-ups of customer payments included in the initially proposed Rule. See, e.g., NAAG at 20; USPS at 5-6; VT AG at 2; IA DOJ at 11-12; NY DCA at 1; GA OCA at 2; NAPA DA at 1; SD DAG at 2; MA AG at 4; AARP at 17-21. As stated in the RNPRM, however, the Commission believes that there is nothing inherently deceptive or abusive about the use of couriers. In fact, a substantial number of legitimate businesses use them. See, e.g., initial comments: Monex at 13-14; DMA at 25; PMAA at 84. While fraudulent telemarketers often use couriers to obtain quickly the spoils of their

Section 310.3(a)(1)(i) requires disclosure of "the total costs * * * and the quantity of, any goods or services that are the subject of the sales offer." In response to numerous comments from industry,⁴⁶ the Final Rule, in a footnote to § 310.3(a)(1)(i), clarifies that, with regard to offers of credit products subject to the TILA and Reg. Z, compliance with the credit disclosure requirements and the timing of those disclosures mandated by the TILA and Reg. Z⁴⁷ will constitute compliance with the total cost and quantity disclosures required under § 310.3(a)(1)(i) of the Rule.

Several commenters also pointed out that total cost and quantity is not ascertainable in those telemarketing sales transactions involving negative option⁴⁸ or continuity plans⁴⁹ where the customer has the option to preview or purchase a series of products over time.⁵⁰ Under such plans, separate payments are made for each item in the series. In addition, the customer controls how many products he or she accepts and typically can decide to terminate the series at any time, or after a minimum number of items are purchased. Thus, in both continuity and negative option plans, neither the seller nor the customer necessarily knows the quantity of products the customer will ultimately purchase, or the total cost for those products.

deceit, such telemarketers engage in other acts or practices that clearly are deceptive or abusive and therefore can be reached through other provisions of this Rule. Thus, an absolute prohibition of courier use is outweighed by the undue burden it would impose on legitimate industry.

⁴⁶ Chase at 2; MBAA at 1; CBA at 2; Citicorp at 3; CUNA at 4; VISA at 4; NB at 1.

⁴⁷ 15 U.S.C. 1631-1632; 12 CFR 226.5-226.5a.

⁴⁸ Under a negative option plan, the customer agrees to purchase a specific number of items in a specified time period. The customer receives periodic announcements of the selections; each announcement describes the selection, which will be sent automatically and billed to the customer unless the customer tells the company not to send it. See also the Commission's Rule governing "Use of Negative Option Plans by Sellers in Commerce," 16 CFR part 425.

⁴⁹ "Continuity plans" offer subscriptions to collections of goods. Customers are offered an introductory selection and agree to receive selections on a regular schedule until they cancel their subscription. Unlike negative option plans, customers do not agree to buy a specified number of additional items in a specified time period, but may cancel their subscription at any time. Continuity plans resemble negative option plans in that customers are sent announcements of selections and those selections are shipped automatically to the customer unless the customer advises the company not to send it. Unlike negative option plans, however, customers are not billed for the selection when it is shipped, but only if they do not return the selection within the time specified for the free examination period.

⁵⁰ CHC at 2-4; ANA at 4; Time Warner at 3; DMA at 2.

⁴¹ ANA at 4; NCL at 12.

⁴² NCL at 12.

⁴³ AARP at 12. Similarly, CFA suggested that the Rule require the disclosures be made before a consumer makes a purchasing decision, rather than

The Commission recognizes that a seller or telemarketer may not be able to provide total cost and quantity information under such circumstances. Accordingly, in the case of negative option or continuity plans, the disclosures required under § 310.3(a)(1)(i) are satisfied if the seller or telemarketer discloses, before a customer pays for any of the goods or services offered, the total costs and quantity of goods or services that are part of the initial offer of the plan, the total quantity of additional goods or services, if any, that the customer must purchase over the duration of the plan, and the cost, or range of costs, to purchase each individual additional good or service.

Section 310.3(a)(1)(ii) requires sellers and telemarketers to disclose "all material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer." A number of industry commenters expressed concern that this requirement was ambiguous and asked the Commission to provide clarification.⁵¹ For example, SCIC states that, absent a clear definition of "material," prudent business practice would require the disclosure of *all* terms and conditions, which would not be practical in connection with the telemarketing of service contracts. The Commission does not intend that sellers and telemarketers disclose *all* terms and conditions, but only those that are material. The Commission believes that the Final Rule's definition of "material" provides sufficient guidance regarding those factors which must be evaluated in determining which restrictions, limitations, or conditions must be disclosed.

Section 310.3(a)(1)(iii) requires disclosure of a seller's refund, cancellation, exchange, or repurchase policies under certain circumstances. The Final Rule tracks the revised proposed Rule by requiring disclosure, before the customer pays, of all material terms and conditions of such policies *only if* the seller or telemarketer makes a representation relating to such policies. Section 310.3(a)(1)(iii) also requires a customer to be informed if there is a policy of *not* making refunds, cancellations, exchanges, or repurchases.

Many law enforcement and consumer groups urged the Commission to broaden this provision to require a disclosure of the seller's refund, cancellation, exchange, or repurchase policies in all telemarketing

transactions.⁵² These commenters were concerned that this provision might create an incentive for sellers and telemarketers to remain silent about their refund policies in order to avoid triggering the disclosure requirement. Law enforcement and consumer groups asserted that information regarding these policies is material to the consumer's purchasing decision, particularly because consumers generally assume that an unconditional refund is available from sellers if they are dissatisfied.⁵³

Historically, the Commission has not required sellers or advertisers to disclose material limitations or conditions applicable to a satisfaction guarantee or similar policy unless a solicitation mentions such a satisfaction guarantee or policy. The Commission's longstanding policy on this issue is set forth in the "Guides for the Advertising of Warranties and Guarantees," which states:

An advertisement that mentions a "Satisfaction Guarantee" or a similar representation should disclose, with such clarity and prominence as will be noticed and understood by prospective purchasers, any material limitations or conditions that apply to the "Satisfaction Guarantee" or similar representation.⁵⁴

Therefore, the Commission has retained in the Final Rule the requirement that all material terms and conditions of such policies be disclosed *only if* the seller or telemarketer makes a representation relating to a refund, cancellation, exchange, or repurchase policy.⁵⁵ Industry pointed out that many companies have a variety of refund, cancellation, exchange and repurchase policies, only some of which are referred to in advertising. The Commission does not intend that the seller or telemarketer disclose all of a seller's possible policies, but only the policies that relate to the specific goods or services that are the subject of the sales offer.

AARP suggested that, at a minimum, the Rule should require an affirmative disclosure if *no* refunds, exchanges, or

⁵² CFA at 8; USPS at 6; NJ DCA at 2-3; San Diego at 1; NACAA at 3; NCL at 13.

⁵³ For example, NJ DCA pointed out that the New Jersey Consumer Fraud Act requires retailers to post return policies in such a fashion that the consumer will be aware of such policies before they tender their money. N.J. Stat. Ann. 56:82.14 *et seq.* NJ DCA at 3.

⁵⁴ 16 CFR 239.3(b).

⁵⁵ A seller or telemarketer "makes a representation about a refund, cancellation, exchange or repurchase policy" if the seller or telemarketer introduces this subject or discusses it in response to a customer's inquiry about such policies. If asked, the seller or telemarketer must disclose the material terms or conditions of its policy.

cancellations are available.⁵⁶ AARP pointed out that this information is particularly important in the context of telemarketing sales because of the lack of direct contact between the seller and the consumer and because the consumer has no opportunity to examine the goods or services offered at the time of sale.⁵⁷ The Commission agrees that consumers may be misled if a seller fails, in a telemarketing transaction, to disclose that the sale is final. Therefore, the Commission has modified § 310.3(a)(1)(iii) of the Final Rule to require that the customer be informed if there is a policy of *not* making refunds, cancellations, exchanges, or repurchases.

Finally, § 310.3(a)(1) (iv) and (v) require a seller or telemarketer to disclose certain information in connection with prize promotions. Under the revised proposed Rule, sellers who offered a prize promotion were required to disclose only that no purchase was necessary to win. Law enforcement and consumer groups strongly urged the Commission to require disclosure of additional items of information to consumers.⁵⁸ They noted that deceptive prize promotions give rise to a large number of complaints, that they generate a very large amount of consumer injury, and that many State laws already require affirmative disclosure of more information than the revised proposed Rule required, including the odds of winning, the no-purchase method of entering, and the value of prizes. These commenters also noted that such State laws have provided law enforcement with a valuable tool in reaching deceptive prize promotions. In addition, several of these commenters noted that the disclosure "no purchase is necessary" is meaningless without requiring that the seller or telemarketer disclose the method for entering without a purchase.⁵⁹ Finally, USPS noted that the required disclosure should include, in addition to "no purchase is necessary," that "no payment is necessary" to enter a prize promotion or to win a prize. According to USPS, such a disclosure will cover those scams where the seller or telemarketer will not ask the customer to purchase goods or services in connection with the prize promotion, but instead will ask for some type of

⁵⁶ AARP at 12-13.

⁵⁷ See also NM AG at 4.

⁵⁸ See, e.g., NJ DCA at 3; NACAA at 3; NCL at 13; USPS at 7; NAAG at 14-15; IA DOJ at 14-15.

⁵⁹ See, e.g., USPS at 7; NAAG at 15.

payment in order to enter or win a prize.⁶⁰

The Commission's law enforcement experience is replete with examples of sellers and telemarketers using deceptive prize promotions to "hook" unsuspecting victims. Upon consideration of these comments, the Commission is persuaded that additional disclosures are needed to ensure that consumers are not misled by the promise of a prize or award. The Commission agrees that disclosure of the no-purchase/no-payment method of entry would serve to emphasize the message that no purchase or payment is necessary in order to participate in a prize promotion or to win a prize. If that disclosure were absent, the fact that no purchase or payment is necessary could more easily become "lost" in a sales pitch or promotional piece. The Commission is mindful, however, of the burden of making extensive disclosures and has attempted to provide industry with flexibility in making this disclosure to consumers. Therefore, for all telemarketing of prize promotions, the Final Rule requires, in addition to a statement that no purchase or payment is necessary to win, that sellers and telemarketers also disclose the no-purchase or no-payment method of entering the prize promotion by either providing full instructions on how to participate or by providing an address or local or toll-free telephone number that a customer may contact to obtain details.

The Commission is also persuaded that consumers should be made aware of the odds of being able to receive a specific prize. A truthful statement of the odds of receiving a prize helps to dispel the illusion that the consumer has been "specially selected" or is "guaranteed" to receive a particular prize. A statement of the odds also provides some indication of the value of each prize, since it is likely that the most valuable prizes would be awarded to the fewest people and the least valuable prizes would go to the most people. The Commission recognizes that in some prize promotions, sellers and telemarketers may not be able to calculate the odds in advance. Therefore, the Final Rule requires that the seller or telemarketer disclose the odds of being able to receive a prize, and if the odds are not calculable in advance, they must disclose the factors used in calculating the odds, such as a truthful statement that the odds depend on the number of entries received.

Finally, the Commission's enforcement history includes numerous

examples of prizes whose value has been limited by the additional costs or conditions that were necessary to receive or redeem the prize. For example, these "prizes" included vacation certificates that required consumers to spend substantial amounts of money on airfare or other expenses, or that had extensive restrictions on use. Therefore, in § 310.4(a)(1)(v), the Final Rule requires that the seller or telemarketer disclose all material costs or conditions to receive or redeem a prize.⁶¹

Several commenters urged the Commission to require affirmative disclosures in connection with investment opportunities.⁶² The Commission believes that the affirmative disclosures required under § 310.3(a)(1) are sufficient to cover the information relating to the sale of investment opportunities, which if undisclosed would be deceptive. These include the total costs to purchase, receive, or use the goods or services, and the material restrictions, limitations, or conditions to purchase, receive, or use the goods or services. Although some commenters urged the Commission to include specific affirmative disclosures relating to investment characteristics such as risk, profitability, liquidity, and earnings potential, the Commission declines to do so. Based on the Commission's enforcement experience, it believes the deception involving disclosure of investment information relating to risk, profitability, liquidity, or earnings potential can be addressed under § 310.3(a)(2)(vi) of the Final Rule. Therefore, the Commission has determined that additional affirmative disclosures for investment opportunities are unnecessary.

b. Section 310.3(a)(2): Prohibited Misrepresentations

Section 310.3(a)(2) prohibits misrepresentations of several categories of material information. The information deemed material under § 310.3(a)(2) is based on established case law and the Commission's policy statement on deception.⁶³ Several commenters urged the Commission to

⁶¹ Although legitimate awards, prizes, and prize promotions do not require a person to make a payment or purchase to enter a prize promotion or to win, there are instances when a person may be required to pay certain fees to receive or redeem a prize or award that they have already won.

⁶² See, e.g., CFA at 9; MA AG at 4; NJ DCA at 3.

⁶³ The Commission's Deception Statement, first set out in a letter to the Honorable John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, is attached as an appendix to *Cliffdale Associates*, 103 F.T.C. 110 (1984).

reinstate the list of specific prohibited practices that was contained in § 310.3(a)(2) of the initially proposed Rule.⁶⁴ Each of these prohibited misrepresentations was based on allegations in complaints filed in recent years by the Commission under section 13(b) of the FTC Act.⁶⁵ These commenters asserted that such a list provided the type of "bright line" guidance to industry, law enforcement, and consumers that Congress had directed the FTC to provide in the Rule. They also believed that the revised proposed Rule did not address several of the specific misrepresentations included in the initially proposed Rule and deleted in the revised proposed Rule, such as misrepresenting the non-profit or charitable status of a seller or telemarketer, or the purpose for which the seller or telemarketer will use a person's checking, savings, share, or similar account number, credit card account number, social security number, or related information.

The Commission has determined that it is unnecessary to enumerate the specific prohibited misrepresentations set forth in the initially proposed Rule. The enumerated misrepresentations in the initially proposed Rule are subsumed in the general prohibitions against misrepresentations set forth in § 310.3(a)(2) of the Final Rule. No inference should be drawn that these omissions from the Final Rule in any way alter the Commission's view that the misrepresentations set forth in § 310.3(a)(2) of the initially proposed Rule would violate the FTC Act as well as the Final Rule. The Commission believes that this more concise regulatory approach effectuates Congress's legislative intent. The Commission also believes that broad prohibitions will give law enforcement agencies the necessary flexibility to adapt to the changes that the deceptive telemarketing industry will undergo as a result of increased regulation.

Although some commenters requested that additional prohibited misrepresentations be included under § 310.3(a)(2),⁶⁶ few commenters raised concerns about or requested changes in the language of § 310.3(a)(2) as it appeared in the RNPRM. As a result, §§ 310.3(a)(2)(i)-(iv), (vi), and (vii) are adopted as set forth in the RNPRM. Sections 310.3(a)(2)(i)-(ii) prohibit misrepresenting certain information required to be disclosed under

⁶⁴ See, e.g., NACAA at 3-4; NJ DCA at 4; USPS at 2; GA OCA at 2; MA AG at 3; SC DCA at 2-3.

⁶⁵ 15 U.S.C. 53(b).

⁶⁶ See, e.g., USPS at 1-3; GA OCA at 2; AARP at 13-14; NACAA at 4; MA AG at 4; CFA at 9; NJ DCA at 3.

§§ 310.3(a)(1)(i) and (ii): total costs, quantity, and material restrictions, limitations, or conditions. Section 310.3(a)(2)(iii) specifies that a misrepresentation of "any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of the sales offer" violates the Rule.

Commission case law and policy are clear that such information is likely to affect a person's choice of, or conduct regarding, the purchase of goods or services. Similarly, representations about a seller's refund, cancellation, exchange, or repurchase policies are likely to affect a person's purchase decision. Section 310.3(a)(2)(iv), therefore, prohibits misrepresenting information regarding the material aspects of these policies.

Section 310.3(a)(2)(v) of the Final Rule prohibits misrepresenting "any material aspect of a prize promotion, including but not limited to, the odds of being able to receive a prize, the nature or value of a prize, or that a purchase or payment is required to win a prize or participate in a prize promotion." This provision is adopted in substantially the same form as it appeared in the revised proposed Rule. The provision enumerates specific examples of material aspects of a prize promotion that are frequently misrepresented by deceptive telemarketers. The Commission has targeted misrepresentation of these aspects of prize promotions in a number of complaints filed against deceptive telemarketers under section 13(b) of the FTC Act.⁶⁷ The Commission believes that a separate Rule provision is needed specifically prohibiting misrepresentations regarding prize promotions, given the great number of deceptive prize promotions and the distinct characteristics associated with such promotions.⁶⁸ The legislative history clearly shows that Congress specifically intended that the Rule cover prizes or awards.⁶⁹ The Commission intends that the telemarketing of prize promotions is not only subject to the prohibitions in § 310.3(a)(2)(v), but also to the other prohibitions against misrepresentations set forth in § 310.3(a)(2).

Although supportive of treating prize promotions separately in this Section, several commenters urged the Commission to expand the list of specific aspects relating to prize

promotions that sellers or telemarketers may not misrepresent, especially that a person has been specially selected to receive a prize or that a premium is a prize.⁷⁰ The Commission believes that the current list of specific aspects adequately covers those concerns. As discussed in connection with the affirmative disclosures for prize promotions, *supra*, a truthful statement of the odds of receiving a prize should help dispel the illusion that the consumer has been "specially selected" or is "guaranteed" to receive a particular prize. Furthermore, a principal distinction between a "premium" and a "prize" is that while premiums are given only in connection with the purchase of goods or services, no such purchase is required to receive a prize. Therefore, the prohibition against misrepresenting that purchase or payment is required to receive a prize should also cover misrepresenting that a premium is a prize. Finally, the Commission's use of the language "including but not limited to" is intended to indicate that the list of material aspects of a prize promotion is illustrative, but should not be considered exhaustive.

Misrepresentations of other material aspects of a prize promotion not listed here are also prohibited.

One minor change in wording has been adopted in § 310.3(a)(2)(v), namely, the phrase "the odds of winning" has been changed to "the odds of being able to receive a prize." This wording is intended to be broader and more general, and is based upon similar usage employed by the Commission in provisions of the Pay-Per-Call Rule, 16 CFR Part 308, that govern solicitations for 900-number services involving sweepstakes or games of chance.⁷¹ Another minor change is the addition of the language "or payment." This addition is consistent with similar language added to § 310.3(a)(1)(v).

Similarly, § 310.3(a)(2)(vi) prohibits misrepresenting material aspects of an investment opportunity. This Section remains unchanged from the RNPRM. The legislative history of the Telemarketing Act reflects Congress' recognition that deceptive investment opportunities account for a considerable percentage of deceptive telemarketing.⁷² In fact, 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 Final Rule includes § 310.3(a)(2)(vi), prohibiting misrepresentation of specified material aspects of investment opportunities, including risk, liquidity, earnings potential, or profitability. This provision is included to obviate any possible construction that might exclude investment opportunities from the scope of §§ 310.3(a)(2)(i)–(iii)—the general provisions of the Rule that center on purchase, receipt or use, or upon "performance, efficacy, nature, or central characteristics" of a limitless range of goods and services. The Commission believes that a separate provision, § 310.3(a)(2)(vi), is necessary to cover distinct attributes that are material to an investment decision, such as risk, liquidity, earnings potential, or profitability. The Commission intends that the telemarketing of investment opportunities is not only subject to the prohibitions in § 310.3(a)(2)(vi), but also to the prohibitions contained in other provisions set forth in § 310.3(a)(2).

Several commenters urged the Commission to expand the list of prohibited misrepresentations relating to specific aspects of investment opportunities to include markup over acquisition costs, past performance, marketability, and value.⁷³ The Commission's use of the language "including but not limited to" is intended to indicate that the list of prohibited material aspects of an investment opportunity that must not be misrepresented is illustrative, not exhaustive. Misrepresentations of other material aspects of an investment opportunity not listed are also prohibited.

Finally, the Commission maintains § 310.3(a)(2)(vii) as it was proposed in the revised proposed Rule. This section 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. Deceptive telemarketers often 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

⁶⁷ 15 U.S.C. 53(b).

⁶⁸ Almost 32% of the 141 telemarketing cases brought by the Commission since 1991 related to deceptive prize promotions.

⁶⁹ See Senate Report at 2, 8.

⁷⁰ See, e.g., AARP at 13; NACAA at 4; GA OCA at 2; NJ DCA at 3.

⁷¹ 16 CFR 308.3(c).

⁷² See Senate Report at 8.

⁷³ See, e.g., CFA at 9; MA AG at 4; NJ DCA at 3.

misrepresentations, again, could be construed as outside the apparent scope of §§ 310.3(a)(2)(i)–(iii). However, the prohibition contained in § 310.3(a)(2)(vii) is in addition to, not in lieu of, the prohibitions contained in the other provisions under § 310.3(a)(2).

Several commenters asked the Commission to include specific prohibitions against misrepresenting the non-profit or charitable status of a seller or telemarketer.⁷⁴ The Commission intends that many of these misrepresentations will be covered by the prohibition in § 310.3(a)(2)(vii) against misrepresenting affiliation or endorsements.

Several commenters asked the Commission to include specific prohibitions against misrepresenting that a seller can improve a consumer's credit rating, or can recover money lost by a consumer to a "dishonest" telemarketer.⁷⁵ The Commission believes that these misrepresentations are subsumed under the prohibition in § 310.3(a)(2)(iii) against misrepresenting any material aspect of the performance, efficacy, nature, or central characteristics of the goods or services.

In the initially proposed Rule there was a prohibition, omitted from the revised proposed Rule, against misrepresenting the purpose for which the seller or telemarketer will use a person's checking, savings, share, or similar account number, credit card account number, social security number, or related information. Several commenters on the revised proposed Rule urged the Commission to reinstate that prohibition, noting that it did not appear to be subsumed under the other prohibitions set out in § 310.3(a)(2).⁷⁶ The Commission, however, believes that such misrepresentations are covered under § 310.3(a)(4), which prohibits a seller or telemarketer from making a false or misleading statement to induce a person to pay for goods or services.

c. Section 310.3(a)(3): Verifiable Authorization

Section 310.3(a)(3) addresses the use of demand drafts, the practice of obtaining funds from a person's bank account without that person's signature on a negotiable instrument. Section 310.3(a)(4) of the initially proposed Rule required written authorization before a seller or telemarketer could take any funds from a consumer's checking, savings, or similar account. This provision was dropped from the revised proposed Rule because information

provided in comments to the initially proposed Rule and in oral workshop conference presentations tended to refute the proposition that demand drafts are characteristic solely of deceptive telemarketers.⁷⁷

In response to the NPR, the Commission received a number of comments from members of the automated payment industry—those companies that prepare demand drafts and submit such drafts to financial institutions for payment from consumers' bank accounts. These commenters noted that over 70 million Americans do not have credit cards.⁷⁸ Demand drafts can provide a means for those consumers to enjoy the same benefits of expeditious telephone transactions that use of a credit card provides.⁷⁹ Commenters noted that Fortune 500 companies, airlines, car rental companies, insurance companies, and other businesses characterized by quick turn-around transactions now use demand drafts because they recognize that not everyone has a credit card.⁸⁰ The automated payment industry also pointed out that requiring express written authorization for a demand draft is inconsistent with authorization requirements pertaining to an analogous payment method, electronic funds transfer.⁸¹ As commenters noted, the Electronic Funds Transfer Act (title IX of the Consumer Credit Protection Act) ("EFTA"), 15 U.S.C. 1601 *et seq.*, and its implementing Regulation E ("Reg. E"), 12 CFR part 205, permit authorization of electronic funds transfers by telephone, thereby permitting oral authorization.⁸² Commenters asserted that imposing more rigid authorization standards on the legitimate automated payment industry, an industry in its formative stages, could unduly hinder its development, restrain legitimate

⁷⁷ See generally initial comments: NAPA; Autoscribe; Olan.

⁷⁸ See initial comments: TCPS at 1; NBR at 1–2. See generally NAPA 2–4; Tr. at 64.

⁷⁹ NBR stated that in 1994, eighty-five percent of all consumer transactions were made by cash or check compared to fifteen percent by credit and debit cards. NBR initial comment at 2. TCPS similarly noted that nine of the current twenty service bureaus process approximately 38,000 demand drafts weekly, totalling over five million dollars for over 700 business clients throughout the country. TCPS initial comment at 1. Accelerated Payment Systems stated that it processes half a billion dollars a year through demand drafts. Tr. at 547.

⁸⁰ See initial comments: TCPS at 1–2; NAPA at 2; Olan at 9. Examples of businesses that use demand drafts include two of the baby Bells, GEICO, Citicorp, Telecheck, Equifax, Bank of America, Discovery Card, Dunn and Bradstreet, and First of America Bank. See Tr. at 547, 550–51.

⁸¹ See initial comments: ATA at 6; Olan at 10; DMA at 21–22.

⁸² 12 CFR 205(g).

competition, and deprive consumers of benefits afforded by this payment method.⁸³

In dropping the written authorization from the revised proposed Rule, the Commission noted in the RNPRM that the prohibition on any false or misleading statements to induce a person to pay for goods or services would address problems in this area.⁸⁴ In their comments on the revised proposed Rule, however, law enforcement and consumer groups strongly urged the Commission to reinstate restrictions on the use of demand drafts.⁸⁵

Law enforcement and consumer groups pointed out that demand drafts do not provide consumers with the same level of protection as credit cards, nor is there widespread awareness among consumers about the dangers of this payment method.⁸⁶ For example, in many instances deceptive telemarketers induce consumers to disclose certain bank account information, after which they withdraw funds from the consumers' bank accounts without the consumers authorizing such withdrawals or realizing that such withdrawals are occurring. In fact, the USPS pointed out that, as it became more difficult for deceptive telemarketers to access the credit card system, demand drafts have surfaced as the most frequent form of payment in deceptive telemarketing over the past two to three years.⁸⁷ In addition, the Federal Reserve Bank of San Francisco ("FRB-SF") strongly opposed deleting the prohibition, questioning whether a general "do not mislead" standard would prevent abuses.⁸⁸ FRB-SF noted that laws prohibiting misleading statements are already on the books, but have been of limited effectiveness. It also noted that any protections consumers might have under the current Uniform Commercial Code provisions⁸⁹ are illusory. FRB-SF stated that, in reality, banks have a pronounced disincentive to accept claims by a consumer that he or she did not authorize a particular draft because the banks must bear the loss of the amount of any draft that was unauthorized.

⁸³ See Tr. at 544–49 (Accelerated Payment Systems), 557–58 (TCPS), 578–80 (Check-Debit). See also initial comments: NAPA at 7–9; Olan at 10.

⁸⁴ 60 FR at 30413. That prohibition is found in § 310.3(a)(4) of the Final Rule and was found in § 310.3(a)(3) of the revised proposed Rule.

⁸⁵ See, e.g., NACAA at 4; IA DOJ at 10; AARP at 15–16; FRB-SF at 8; VBA at 1; NCL at 9; NJ DCA at 3; San Diego at 2.

⁸⁶ AARP at 15; NJ DCA at 3–4.

⁸⁷ USPS at 3.

⁸⁸ See generally FRB-SF.

⁸⁹ See UCC 1–201(39), 3–103(a)(6), 3–104(a), 3–401(a), 3–401(b), 3–402(a), 4–401 (1990 version).

⁷⁴ See, e.g., NACAA at 4; MA AG at 4.

⁷⁵ See, e.g., NACAA at 4; MA AG at 4.

⁷⁶ See, e.g., USPS at 2; AARP at 14.

FRB-SF described a variety of ways that banks can and do avoid authorizing a refund of a draft claimed by a consumer to be unauthorized. For example, banks may allege that consumers were negligent in giving out their bank information, or allege that consumers who have given such information have given apparent authority to issue any number of drafts in any amount.

Based on the extensive use of demand drafts by legitimate companies, the Commission is persuaded that demand drafts, in and of themselves, are not necessarily harmful, and, in fact may produce real benefits for consumers. The Commission also believes that requiring prior written authorization could be tantamount to eliminating this emerging payment alternative. Moreover, the Commission believes that it would be inconsistent to impose upon demand drafts a more stringent authorization mechanism than that imposed on electronic funds transfers under the EFTA and Reg. E. The Commission, however, is also persuaded by the comments on the revised proposed Rule that consumers need additional protections from abuse of this increasingly popular payment method. Therefore, the Final Rule includes certain restrictions on the use of demand drafts.

Section 310.3(a)(3) balances the benefits to consumers that may flow from the use of demand drafts against the costs arising from the known abuses of this payment method by deceptive telemarketers. Section 310.3(a)(3) requires "express verifiable authorization" before any seller or telemarketer obtains or submits "for payment a check, draft, or other form of negotiable paper drawn on a person's checking, savings, share, or similar account." To prevent deceptive telemarketers from abusing this mode of authorization, the Commission has included in the Final Rule specific requirements to establish what constitutes "verifiable authorization" under the Rule.

An authorization will be deemed verifiable if any of the following means are employed: (1) Express written authorization by the customer; (2) express oral authorization which is tape recorded⁹⁰ and made available to a customer's bank upon request, and which clearly evidences both the customer's authorization of payment for the goods or services that are the subject of the sales offer and the customer's

receipt of six specific items of information during the tape recording,⁹¹ or (3) written confirmation of the transaction sent to the customer, prior to submitting the draft for payment, containing the same six items of information required under the tape recording option. The written confirmation method also requires a seller or telemarketer to have in place, and to disclose to the customer in the confirmation, the procedures by which the customer can obtain a refund from the seller or telemarketer in the event the written confirmation is inaccurate. The Commission recognizes that the latter method of verifiable authorization may be susceptible to manipulation by deceptive sellers and telemarketers. However, any misrepresentation of the nature or terms of the refund policy will be actionable under § 310.3(a)(2)(iv), prohibiting misrepresentation of a seller's refund policy. The Final Rule also incorporates FRB-SF's suggestion that the taped verifiable authorization be made available to the customer's bank upon request.⁹² The Commission will monitor the effectiveness of this provision in preventing the deceptive use of demand drafts.

d. Section 310.3(a)(4): False or Misleading Statements To Induce Payment

Section 310.3(a)(4) generally prohibits "[m]aking a false or misleading statement to induce any person to pay for goods or services." The few comments on this Section questioned whether a general prohibition is an adequate substitute for a provision requiring express authorization for demand drafts: Unauthorized access often involves no inducement or purchase; the money is simply taken.⁹³ The Commission believes the Final Rule's express verifiable authorization requirement, § 310.3(a)(3), sufficiently addresses this concern.

Section 310.3(a)(4) also prohibits sellers and telemarketers from gaining access to consumers' money through false and misleading statements, regardless of the type of payment system used. This provides law enforcement with flexibility to address new ways that sellers and telemarketers engaged in fraud might attempt to take consumers' money.

⁹¹ The six items of information are: "(A) Date of the draft(s); (B) the amount of the draft(s); (C) the payor's name; (D) the number of draft payments (if more than one); (E) a telephone number for customer inquiry that is answered during normal business hours; and (G) the date of the customer's oral authorization."

⁹² FRB-SF at 8-9.

⁹³ See, e.g., AARP at 15.

2. Section 310.3(b): Assisting and Facilitating

Section 310.3(b) of the revised proposed Rule received substantial attention from commenters. Law enforcement objected to the inclusion of a requirement that the requisite substantial assistance or support be "related to the commission or furtherance" of a core rule violation.⁹⁴ NAAG viewed this as an unnecessary additional element of proof that would burden law enforcement, and feared that it could result in assisters and facilitators evading liability on the ground that their assistance was not "related to" an unlawful act, even where required showings of knowledge and substantial assistance could be made.⁹⁵ The Commission has determined that the "related to" requirement may be susceptible to the misapplication NAAG foresees, and has therefore deleted this requirement from the Final Rule. The Commission notes that knowledge of, and substantial assistance to, another's wrongdoing are a sufficient basis for liability in tort,⁹⁶ and were so in cases brought under the Securities and Exchange Act of 1934⁹⁷ until the recent Supreme Court decision in *Central Bank of Denver v. Interstate*

⁹⁴ NAAG at 23; NACAA at 5.

⁹⁵ NAAG at 23.

⁹⁶ Section 876(b) of the Restatement of Torts provides: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so as to conduct himself. * * * Restatement (Second) of Torts § 876(b) (1977).

⁹⁷ See, e.g., *Schatz v. Rosenberg*, 943 F.2d 485, 495 (4th Cir. 1991), cert. denied, 503 U.S. 936 (1992); *National Union Fire Ins. Co. v. Turtur*, 892 F.2d 199, 206-07 (2d Cir. 1989); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 188 (9th Cir. 1987); *Moore v. Fenex*, 809 F.2d 297, 303 (6th Cir. 1987), cert. denied, 483 U.S. 1006 (1987); *Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1045 (11th Cir. 1986), cert. denied, 480 U.S. 946 (1987); *Metge v. Baehler*, 762 F.2d 621, 624-25 (8th Cir. 1985), cert. denied, 474 U.S. 1057 (1986); *Woods v. Barnett Bank of Fort Lauderdale*, 765 F.2d 1004, 1009 (11th Cir. 1985); *Cleary v. Perfectune, Inc.*, 700 F.2d 774, 777 (1st Cir. 1983); *Armstrong v. McAlpin*, 699 F.2d 79, 91 (2d Cir. 1983); *Harmsen v. Smith*, 693 F.2d 932, 943 (9th Cir. 1982), cert. denied, 464 U.S. 822 (1983); *Stokes v. Lokken*, 644 F.2d 779, 782-83 (8th Cir. 1981); *ITV v. Cornfield*, 619 F.2d 909, 922 (2d Cir. 1980); *Monsen v. Consolidated Dressed Beef Co.*, 579 F.2d 793, 799 (3d Cir. 1978), cert. denied, 439 U.S. 930 (1978); *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 94 (5th Cir. 1975).

Many of these cases base their analysis upon the test laid down in *SEC v. Coffey*, 493 F.2d 1304, 1316 (6th Cir. 1974), cert. denied, 420 U.S. 908 (1975):

A person may be held as an aider and abettor only if some other party has committed a securities law violation, if the accused party had general awareness that his role was part of an overall activity that was improper, and if the accused aider-abettor knowingly and substantially assisted the violation.

⁹⁰ FRB-SF supported a requirement for tape recording customers' oral authorizations as an alternative to prior written authorization. See FRB-SF at 8-9.

*Bank of Denver.*⁹⁸ The Commission further believes that the ordinary understanding of the qualifying word "substantial" encompasses the notion that the requisite assistance must consist of more than mere casual or incidental dealing with a seller or telemarketer that is unrelated to a violation of the Rule.

Law enforcement and consumer groups also generally opposed the "knows or consciously avoids knowing" standard in this Section, arguing that it imposed a higher burden of proof on law enforcement than the "knows or should know" standard in the initially proposed Rule, and requires proof of the wrongdoer's mental state.⁹⁹ These commenters recommended that the Commission return to the "knows or should know" standard. At the other end of the spectrum, industry comments continued to raise concerns that the proposed knowledge standard was too vague or harsh.¹⁰⁰

As noted above, both in the law of tort and in a substantial body of pre-*Central Bank of Denver* aider and abettor case law developed under the Securities and Exchange Act of 1934, knowledge is a prerequisite for liability.¹⁰¹ The Commission recognizes that proving actual knowledge could be a formidable hurdle in some cases.¹⁰² The "knows or

⁹⁸ 114 S. Ct. 36, ____ U.S. ____ (1994). The Supreme Court held that there is no private cause of action for aiding and abetting under Rule 10(b) because the Securities and Exchange Act of 1934 does not expressly create such a cause of action. The Court's decision did not address the soundness of the rationale for the elements of aiding and abetting as developed in the cases. The Telemarketing Act, on the other hand, expressly authorizes "assisting and facilitating" as a violation of the Rule.

⁹⁹ See, e.g., NJ DCA at 4; NACAA at 5; AARP at 16; NCL at 11; USPS at 12.

¹⁰⁰ See, e.g., NAA at 2; MSSC at 4; HII at 2.

¹⁰¹ The level of knowledge required for aider and abettor liability under the Securities and Exchange Act of 1934 varied from circuit to circuit. For example, the standard enunciated in *SEC v. Coffey* (general awareness of impropriety, plus knowing and substantial assistance) applied in the Sixth Circuit, whereas actual knowledge or reckless disregard was required in the Ninth Circuit. *Levine v. Daimanthuset, Inc.*, 950 F.2d 1478, 1483 (9th Cir. 1991). The Second Circuit held that "something closer to an actual intent to aid in a fraud" must be demonstrated. *Edwards & Hanly v. Wells Fargo Sec. Clearance Corp.*, 602 F.2d 478, 485 (2d Cir. 1979), cert. denied, 444 U.S. 1045 (1980). See W. H. Kuehnle, *Secondary Liability Under the Federal Securities Laws—Aiding and Abetting, Conspiracy, Controlling Person, and Agency: Common-Law Principles and the Statutory Scheme*, 14 J. Corp. L. 313, 322 (1988); Note, *Liability for Aiding and Abetting Violations of Rule 10b-5: The Recklessness Standard in Civil Damage Actions*, 62 Tex. L. Rev. 1087 (1984).

¹⁰² The Commission noted in the RNPRM that case law under Section 13(b) of the FTC Act has developed a knowledge standard in the context of an analogous type of liability: individual liability to pay restitution to consumers for injury resulting

should know" standard is certainly the appropriate standard to use in framing allegations of third-party liability for unfair or deceptive acts or practices, in violation of section 5 of the FTC Act,¹⁰³ or in violation of State "Little FTC" Acts. However, in a situation where a person's liability to pay redress or civil penalties¹⁰⁴ for a violation of this Rule depends upon the wrongdoing of another person, the "conscious avoidance" standard is correct.¹⁰⁵

The "conscious avoidance" standard is intended to capture the situation where actual knowledge cannot be proven, but there are facts and evidence that support an inference of deliberate ignorance¹⁰⁶ on the part of a person that the seller or telemarketer is engaged in an act or practice that violates §§ 310.3(a) or (c), or § 310.4 of this Rule.

Some commenters recommended that the Commission reinstate the examples of "assisting and facilitating" that had been in § 310.3(b)(2) of the initially proposed Rule.¹⁰⁷ The Commission has declined to list in the Rule examples of substantial assistance, but still considers the acts or practices enumerated in former § 310.3(b)(2) of the initially proposed Rule to be illustrative of those that can constitute substantial assistance to Rule violators when coupled with

from law violations of a corporation controlled by the individual. The Commission has sought, and the courts have ordered, payment of consumer redress from individual defendants for injury resulting from law violations of corporations controlled by such individuals only where the Commission could show either that these individuals had actual knowledge of the unlawful practices of the corporation, were recklessly indifferent to such practices, or had an awareness of a high probability of fraud coupled with an intentional avoidance of the truth. *FTC v. American Standard Credit Systems, Inc.*, No. 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).

¹⁰³ See, e.g., *Citicorp Credit Services, Inc.*, FTC Dkt. No. C-3413 (Consent Order, Feb. 4, 1993).

¹⁰⁴ It is noteworthy that Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A), specifies that imposition of civil penalties for an act prohibited by a rule requires a showing of "actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule."

¹⁰⁵ Proof of conscious avoidance is widely accepted in criminal cases as fulfilling the requirement for proof of knowledge. See, e.g., *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1195-1196 (2d Cir.), cert. denied, 493 U.S. 933 (1989); *United States v. Diaz*, 864 F.2d 544, 549 (7th Cir.), cert. denied, 490 U.S. 1070 (1989); *United States v. Manriquez Arbizo*, 833 F.2d 244, 248 (10th Cir. 1987); *United States v. Rothrock*, 806 F.2d 318, 323 (1st Cir. 1986); *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir.), cert. denied, 426 U.S. 951 (1976).

¹⁰⁶ *U.S. v. Williams*, No. 90-3389, 1995 U.S. App. LEXIS 23546 (7th Cir. Aug. 26, 1994).

¹⁰⁷ See, e.g., AARP at 17.

knowledge or conscious avoidance of knowledge of a violation of §§ 310.3 (a) or (c) or § 310.4. These 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. Section 310.3(c): Credit Card Laundering

Section 310.3(c) of the Final Rule prohibits credit card laundering, the practice of depositing into the credit card system a sales draft that is not the result of a credit card transaction between the cardholder and a merchant.¹⁰⁸ The Commission received very few comments that offered changes or that were critical of this section. Those comments that did address this section suggested that it be expanded to include other payment devices, such as debit cards, because such devices can be laundered as easily as credit card transactions.¹⁰⁹ The Commission has rejected such an expansion for the reasons stated *supra* in the discussion regarding the definition of "credit."

The Act expressly cited credit card laundering as a type of assisting and facilitating that the Rule could prohibit.¹¹⁰ Credit card laundering is a pernicious practice because it enables deceptive telemarketers access to the credit card system that they would otherwise be unable to obtain. In order to obtain payment by credit card, a seller ("merchant" as is defined in § 310.2(l)) must first have established an account with a financial institution ("acquirer" as is defined in § 310.2(a)) that is authorized to accept credit card payments. A seller must have a written contract ("merchant agreement" as defined in § 310.2(m)) with the financial institution to be able to access the credit card system and obtain payment from a consumer's credit card account. When the seller accepts a credit card for

¹⁰⁸ As defined in § 310.2(l), a merchant is the person who is under a contractual agreement with 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.

¹⁰⁹ E.g., Citicorp at 2; Mastercard at 2-4.

¹¹⁰ 15 U.S.C. 6102(a)(2).

payment, the seller generates what is known as a credit card sales draft (as defined in § 310.2(g)). The seller then deposits the credit card sales draft into the seller's account with the financial institution and obtains the cash amount of the deposited drafts. The financial institution sends the credit card sales draft through the particular credit card system, e.g., Visa, which will post the charge to the consumer's credit card account.

Most deceptive telemarketers are unable to establish a merchant account with an acquirer. Therefore, to be able to accept payment by credit card, they must gain access to the credit card system through another's merchant account. Obtaining access to the credit card system through another merchant's account without the authorization of the financial institution is credit card laundering. Credit card laundering facilitates deceptive telemarketing acts or practices by providing telemarketers engaged in fraud with ready access to cash through the credit card system. Credit card laundering also costs legitimate credit card companies over \$300 million per year as a result of telemarketing fraud involving payment by credit card.¹¹¹

The underlying purpose of § 310.3(c) is to delineate clearly, in accordance with legitimate industry standards, those persons who are deemed to have proper access to the credit card system. The Commission believes that the distinction between persons who are "launderers" and persons who legitimately use credit card systems rests on whether the credit card system permits such persons access to its system. In their comments to the initially proposed Rule, Visa and MasterCard recommended that access be permitted under the Rule if it is expressly permitted by the applicable credit card system.¹¹² Therefore, the Commission proposed in the revised proposed Rule language to the preamble of § 310.3(c), that "except where expressly permitted by the applicable credit card system . . ." and added similar language to the end of § 310.3(c)(3). In the absence of comments on this section in the RNPRM, the Final Rule adopts § 310.3(c) without change.

Section 310.3(c) of the Final Rule is divided into three parts. Section 310.3(c)(1) deals with merchants who engage in credit card laundering. Under this Section, it is a deceptive telemarketing act or practice, and a violation of the Rule, for a merchant to

present to, or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and that merchant. It is also a deceptive act or practice for a merchant to cause another person to present to, or deposit into, the credit card system for payment such a credit card sales draft.

Section 310.3(c)(2) of the Final Rule deals with telemarketers, brokers, or others who employ merchants to engage in credit card laundering. This Section states that it is a deceptive telemarketing act or practice, and a violation of the Rule, for "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."

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

D. Section 310.4: Abusive Telemarketing Acts or Practices

1. Section 310.4(a): Abusive Conduct Generally

Section 310.4(a) of the Final Rule prohibits any seller or telemarketer from engaging in four enumerated abusive acts or practices. Each of these practices will be discussed in turn.¹¹³

a. Section 310.4(a)(1): Threats, Intimidation, or the Use of Profane or Obscene Language

Section 310.4(a)(1) of the Final Rule prohibits any seller or telemarketer from engaging in threats, intimidation, or the use of profane or obscene language. The legislative history of the Telemarketing Act indicates that the Commission should consider prohibiting such 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."¹¹⁴ The FDCPA includes a number of

prohibitions on various types of threats,¹¹⁵ and a specific prohibition on the use of profane or obscene language.¹¹⁶ The Commission believes such prohibitions are equally appropriate in this Rule.

This Section covers all types of threats, including threats of bodily injury and financial ruin, and threats to ruin credit. It also prohibits intimidation, including 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.

b. Section 310.4(a)(2): Credit Repair Services

Section 310.4(a)(2) of the Final Rule is intended to limit the telemarketing of deceptive credit repair services. Typically, these services promise consumers that, for a fee paid in advance, they will improve the consumer's credit record by removing negative information from that record. Once the fee is paid, however, the seller fails to deliver the promised services or achieve the promised results, and the consumer's credit record does not improve.

This section of the Final Rule states that, in selling any goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating, a seller or telemarketer is prohibited from requesting or receiving payment of any fee or consideration until two events occur. First, the time frame within which the seller has represented that all of the goods or services will be provided to the purchaser must have expired.¹¹⁷ Second, the promised results must have been achieved. In order to ensure the achievement of the promised results, the Final Rule requires the seller to provide

¹¹⁵ See FDCPA section 806(1), 15 U.S.C. 1692d(1) ("the use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person"); Section 807(5), 15 U.S.C. 1692e(5) ("the threat to take any action that cannot legally be taken or that is not intended that cannot be taken"); and section 808(6), 15 U.S.C. 1692f(6) ("taking or threatening to take any nonjudicial action to effect dispossession or disablement of property" in certain situations).

¹¹⁶ Section 806(2) of the FDCPA, 15 U.S.C. 1692d(2).

¹¹⁷ A seller or telemarketer can make such representations about the time for delivery of the credit repair goods or services either orally or in writing, including in the contract for the services. If any discrepancy exists between various representations by a credit repair seller, the longest time frame represented will determine when payment may be requested or received.

¹¹¹ Senate Report at 2.

¹¹² See initial comments: MasterCard at 10-11.

¹¹³ Section 310.4(a) remains unchanged from the RNPRM.

¹¹⁴ See, e.g., House Report at 8.

the purchaser with a consumer report from a consumer reporting agency that was issued more than six months after the results were achieved.¹¹⁸

A number of commenters stated that this section should not apply to the offering of secured credit cards.¹¹⁹ According to these commenters, secured credit cards often are marketed as credit products that can improve a consumer's credit history, if properly used. The abusive practice against which § 310.4(a)(2) is directed is the deceptive marketing and sale of bogus credit repair services; it is not directed at the nondeceptive telemarketing of secured credit cards.¹²⁰ In addition, the Commission does not intend that this Section apply to legitimate credit monitoring services.

c. Section 310.4(a)(3): Recovery Room Services

The next abusive practice prohibited by the Final Rule involves recovery room scams. In these operations, a deceptive telemarketer calls a consumer who has lost money, or who has failed to win a promised prize, in a previous scam. The recovery room telemarketer falsely promises to recover the lost money, or obtain the promised prize, in exchange for a fee paid in advance. After the fee is paid, the promised services are never provided. In fact, the consumer may never hear from the telemarketer again.

The Final Rule, at § 310.4(a)(3), prohibits any seller or telemarketer from "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 business days after such money or other item is delivered to that person." This prohibition does not apply, however, to goods or services provided by a licensed attorney. As stated in the RNPRM, the Commission does not wish to hinder legitimate activities by licensed attorneys to recover funds lost by consumers through deceptive telemarketing, and thus does not believe this prohibition should be applied to their services.

¹¹⁸ The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681, specifies certain permissible purposes for which a consumer report may be furnished. The Final Rule states that nothing in this Rule should be construed to affect those requirements set forth in the FCRA.

¹¹⁹ See, e.g., Mastercard at 6-7; BOA at 1-2.

¹²⁰ However, all other parts of this Rule, including all required disclosures and prohibitions against misrepresentations, apply to the telemarketing of secured credit cards.

The Commission also intends that this Section not cover debt collection practices, since debt collection is not "conducted to induce the purchase of goods or services,"—a prerequisite for Rule coverage as dictated by the definition of "telemarketing" in § 310.2(u). Furthermore, this section is 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.

d. Section 310.4(a)(4): Advance Fee Loans

Section 310.4(a)(4) of the Final Rule prohibits any seller or telemarketer from 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.¹²¹ This section is intended to prevent "advance fee loan" scams, in which a telemarketer promises to obtain a loan for a consumer, regardless of that consumer's credit history or credit record, in exchange for a fee, paid in advance. As with recovery room scams, after the consumer pays the fee, the promised services typically are not provided.

Two commenters stated that non-bank telemarketers may make "prescreened" unconditional offers of home equity credit lines or other forms of mortgage credit and urged that the Rule should not prohibit non-bank telemarketers from collecting, in connection with legitimate "prescreened" offers of credit, an application fee, credit report fee, and/or appraisal fee before the loan actually closes.¹²² Section 310.4(a)(4) is not directed at firm offers of credit by a creditor who properly uses a prescreened list in accordance with the FTC staff commentary on the FCRA.¹²³ Making an authentic firm offer of credit to every consumer on a prescreened list is not equivalent to the specious type of transaction involved in advance fee loan scams where a seller or telemarketer offers to obtain or arrange a loan or other extension of credit for a person.

¹²¹ By using the terms "loans or other extensions of credit," the Final Rule makes clear that this section does not apply to other types of credit services, such as monitoring or counseling services.

¹²² BOA at 2; P&C-1 at 2-3.

¹²³ Statement of General Policy or Interpretation; Commentary on the Fair Credit Reporting Act, 55 FR 18804, 18815 (May 4, 1990).

2. Section 310.4(b): Pattern of Calls

The Telemarketing Act directs the Commission 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."¹²⁴ Section 310.4(b) of the Final Rule sets forth two prohibitions on sellers and telemarketers which are intended to effectuate this requirement of the Act.

First, § 310.4(b)(1)(i) prohibits 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. Such a prohibition is included in the FDCPA,¹²⁵ and the legislative history of the Telemarketing Act states that the Commission should consider the FDCPA in establishing prohibited abusive acts or practices.¹²⁶

Several comments on the RNPRM suggested that this Section should be keyed to a reasonable consumer's belief of what is annoying, abusing, or harassing, rather than the caller's intent.¹²⁷ The Commission has taken this prohibition virtually verbatim from the FDCPA, and finds no reason to alter this language. The staff commentary to the FDCPA states that "continuously" means "making a series of telephone calls, one right after the other," and that "repeatedly" means "calling with excessive frequency under the circumstances."¹²⁸ The Commission believes that if a telemarketer calls a consumer continuously or repeatedly, as those terms have been defined, it is presumed that the caller's intent was to annoy, abuse, or harass the person being called. The few courts that have ruled on this provision of the FDCPA have been silent on the intent requirement, ultimately deciding the case simply on the repeated nature of the calls.¹²⁹

The second prohibition in the Final Rule intended to limit unsolicited telephone calls is the "do not call" requirement set forth in § 310.4(b)(ii). This section prohibits any telemarketer from initiating, or any seller to cause a telemarketer to initiate, an outbound telephone call to a person when that person previously has stated that he or

¹²⁴ 15 U.S.C. 6102(a)(3)(A).

¹²⁵ 15 U.S.C. 1692d(5).

¹²⁶ See, e.g., House Report at 8.

¹²⁷ See SD DAG at 2; AARP at 22-23.

¹²⁸ Statements of General Policy or Interpretation; Staff Commentary on the Fair Debt Collection Practices Act, 53 FR 50097, 50105 (Dec. 13, 1988).

¹²⁹ See, e.g., *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864 (D.N.D. 1981); *Venes v. Professional Service Bureau*, 353 N.W.2d 671 (Minn. Ct. App. 1984).

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 Telephone Consumer Protection Act ("TCPA")¹³⁰ and the regulations of the Federal Communications Commission ("FCC") implementing that Act¹³¹ include a similar "do not call" prohibition. A number of commenters asked the Commission to clarify that compliance with the TCPA's "do not call" procedures will constitute compliance with this section of the Telemarketing Sales Rule as well.¹³² The Commission cannot make such a blanket pronouncement due to the differences in enforcement of the TCPA and this Rule,¹³³ and the slight variations in the safe harbor provisions, discussed *infra*. On the other hand, in order to lessen compliance burdens, the Commission wishes to clarify that in order to comply with both the TCPA and this Rule, sellers and telemarketers need compile only one list of consumers who request not to be called by that seller or telemarketer.¹³⁴

One commenter asked the Commission to modify this Section of the Final Rule to focus the "do not call" prohibition on a particular good or service, rather than on a seller.¹³⁵ For example, this commenter stated that if it calls a consumer to sell termite control, and the consumer asks it not to call any more, the Final Rule should permit that same seller to call the consumer in the future to offer a deck treatment. The Commission disagrees. Once a consumer states that he or she does not wish to receive any additional calls from a particular seller, that seller may not call the consumer to sell any other product or service whatsoever. On the other hand, in the discussion of the definition of "seller,"¹³⁶ the

¹³⁰ 47 U.S.C. 227.

¹³¹ 47 CFR 64.1200(e).

¹³² See, e.g., Citicorp at 2; DMA at 4-5; NRF at 8; Mastercard at 7; Chase at 2-3.

¹³³ The Telemarketing Sales Rule will be enforced by the Commission, the States, and any person who suffers more than \$50,000 in actual damages caused by violations of this Rule. See 15 U.S.C. 6102(c), 6103, 6104. On the other hand, the TCPA "do not call" provisions may be enforced only in State court by a private person who receives more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the FCC's regulation. See 47 U.S.C. 227(c)(5).

¹³⁴ In the RNPRM discussion of the effective date of the Rule, the Commission stated that the "do not call procedures" adopted by telemarketers under the TCPA would comply with this section of the revised proposed Rule as well. 60 FR at 30424. The "procedures" mentioned in that section of the RNPRM consist of the compiling of the list of consumers who request not to be called by the seller or telemarketer.

¹³⁵ Rollins at 2.

¹³⁶ See *supra* text accompanying § 310.2(r) and (t) (discussing definitions of "seller" and "telemarketer").

Commission has made clear that it will consider distinct corporate divisions to be separate sellers. Thus, if a consumer tells one division of a company not to call again, a distinct corporate division of that company may make another telemarketing call to that consumer.

Another commenter asked the Commission to clarify what consumers must tell a seller to indicate they do not want additional calls, whether that request must be in writing, and how quickly the seller must act upon the caller's request.¹³⁷ Any form of request that the consumer does not wish to receive calls from a seller will suffice.¹³⁸ An oral statement as simple as "Do not call again" is effective notice. Finally, although the Rule is silent on the time frame within which the seller must act upon the consumer's request, such actions must be taken in a reasonably expeditious manner.

Section 310.4(b)(2) of the Final Rule provides a limited safe harbor against liability for violating the "do not call" prohibitions included in § 310.4(b)(1)(ii). The safe harbor states that a seller or telemarketer will not be liable for such violations 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 error.

One commenter maintained that this Section should mandate that a seller or telemarketer meet the requirements of the safe harbor in a reasonable manner in order to successfully assert the defense.¹³⁹ Another stated that a seller or telemarketer who makes repeated calls as the result of "error," despite its adoption of the requisite procedures outlined in this Section, should be on notice of its error and should not be allowed to repeatedly violate the "do not call" provision.¹⁴⁰ The Commission agrees that a rule of reasonableness should prevail in determining application of the safe harbor provision. If a company is complying in a reasonable manner with the requirements of the safe harbor, any true error should be excused. On the other hand, numerous purportedly "erroneous" calls to consumers who previously had asked not to be called

¹³⁷ Milligan at 1.

¹³⁸ This includes a statement by consumers that they are revoking their prior consent to receive calls by that seller. See GA OCA at 3.

¹³⁹ NYSCPB at 4-5.

¹⁴⁰ AARP at 23. See also Gardner at 1.

may be a sign that the seller's adopted procedures are ineffective, and that the safe harbor should no longer be available.

3. Section 310.4(c): Calling Time Restrictions

In the Final Rule, the Commission adopts the RNPRM's prohibition, in § 310.4(c), against any telemarketer engaging in outbound telephone calls to a person's residence, without the prior consent of the person, at any time other than between 8 a.m. and 9 p.m. local time at the called person's location. This provision is included 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."¹⁴¹

This provision of the Rule struck a responsive chord with individual consumers. A number of individuals maintained that telemarketers be prohibited from calling them at all.¹⁴² Others suggested multiple different time restrictions, for many different reasons.¹⁴³ On the other hand, the FCC has established calling time hours of 8 a.m. to 9 p.m. in its regulations implementing the TCPA.¹⁴⁴ By altering those permitted calling hours, the Commission would introduce a conflict in the federal regulations governing telemarketers. The record contains no compelling evidence to support a change that would produce such a result. Thus, this section of the Final Rule will be adopted as proposed.

4. Section 310.4(d): Required Oral Disclosures

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

¹⁴¹ 15 U.S.C. 6102(a)(3)(B).

¹⁴² See, e.g., Broadbent at 1; Tiegs at 1; Dander at 1; Beaver at 1; Lombard at 1; Shore at 1.

¹⁴³ See, e.g., GA OCA at 3 (to protect older victims who are home alone during the day, restrict calls to businesses between 8:00 a.m. to 5 p.m., and calls to residences between 5 p.m. and 9 p.m.); Dick at 1 (from 11 a.m. to 5 p.m. daily, with no calls on holidays and weekends); Rice at 1 (9 a.m. to 7 p.m., in respect for families with children); Stritchko at 1 (8 a.m. to 6 p.m., so a person can relax in the evening); Durkee at 1 (11 a.m. to 8 p.m., to respect those working nights or second shift); Kempf at 1 (10 a.m. to 2 p.m.); Joseph at 1; Tucker at 1; Magnuson at 1; Reymann at 1 (8 a.m. or 9 a.m. to 5 p.m.).

¹⁴⁴ See 47 CFR 64.1200(e)(1).

other such disclosures as the Commission deems appropriate.¹⁴⁵

The Final Rule requires all telemarketers, in outbound telephone calls, to disclose promptly and in a clear and conspicuous manner to the person receiving the call the following four items of 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 or payment is necessary to win if a prize promotion is offered.

The Final Rule adheres to the statutory requirement that the disclosures be prompt and clear. Industry representatives generally supported this requirement.¹⁴⁶ On the other hand, many law enforcement and consumer representative commenters maintained that the Commission should return to the language in the initially proposed Rule, requiring such disclosures to occur "at the beginning" of the telephone call.¹⁴⁷ One commenter noted that it is important that calls begin with a statement of the call's purpose to provide "an important protection against the usual strategy of prize promoters, which is to seduce consumers with visions of cars and cash before ever revealing that the caller's main purpose is to sell something."¹⁴⁸ Another stated that the Commission's failure to define the term "promptly" will "invite shady promoters to shoot for the grey area, and to provoke litigation over its meaning."¹⁴⁹

The Final Rule adopts the statutory language, requiring the disclosures to be "prompt." Intending to permit some flexibility in the seller's telemarketing presentation, the Commission has opted not to include in the Rule a definition of the term "prompt."¹⁵⁰ However, to respond to some of the concerns raised by commenters, the Commission intends that the Final Rule *not* permit the disclosure of the identity of the seller and the promotional purpose of the call at the end of the sales pitch.¹⁵¹ At a minimum, the Commission agrees with commenters that "prompt" disclosures should be made prior to the time any substantive information about

a prize, product, or service is conveyed to the consumer.¹⁵²

The comments also raised a number of questions about when the required oral disclosures must be made in "multiple purpose calls"—calls involving the sale of goods or services and some other activity, such as conducting a prize promotion or market research, or determining customer satisfaction. Law enforcement commenters noted the importance of requiring the mandated disclosures early in the call, to avoid consumer confusion about the call's purpose.¹⁵³ In addition, the legislative history of the Telemarketing Act noted the problem of deceptive telemarketers contacting potential victims under the guise of conducting a poll, survey, or other type of market research.¹⁵⁴ To address these problems, the Commission believes that in any multiple purpose call where the seller or telemarketer plans, in at least some of those calls, to sell goods or services, the disclosures required by this section of the Rule must be made "promptly," during the first part of the call, before the non-sales portion of the call takes place. Only in this manner will the Rule assure that a sales call is not being made under the guise of a survey research call, or a call for some other purpose.

To clarify this point, the following two examples, taken from the comments, are offered. On the one hand, a seller may call a customer to determine if that customer is satisfied with a previous purchase of goods or services. The seller plans, during the course of that call, to move into a sales presentation *if* the seller determines that the customer is satisfied. If the seller determines that the customer is not satisfied, however, the seller plans to terminate the call.¹⁵⁵ In this example, since the seller plans to make a sales presentation in at least some of its calls, the seller is required to disclose promptly the information required by this part of the Rule during the initial portion of the call, before the seller makes lengthy inquiries about customer satisfaction.

On the other hand, a seller may make calls to welcome new customers and to inquire whether everything about recently-purchased goods or services is satisfactory. The seller does not plan, during any of these calls, to sell anything to those customers. However, during such calls the customer may ask

about other purchase opportunities, to which the seller will respond by presenting those opportunities.¹⁵⁶ Since the seller initially has no plans to sell goods or services during these calls, no prompt disclosures are required.

As for the content of the required oral disclosures, the only significant comments concerned the "no purchase necessary" disclosure, in § 310.4(d)(4), required for calls offering a prize promotion. As stated in the RNPRM, 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. The USPS expressed concern in its comment that this disclosure may not cover scams where the marketer will not ask the consumer to purchase a prize, but instead will ask for payment of shipping charges, taxes, or other fees in order to enter or win a prize.¹⁵⁷ The Commission believes this is a valid concern, and therefore is amending this portion of the Final Rule to require the disclosure that "no purchase or payment is necessary to win" a prize. This disclosure is designed to counteract the false impression created by deceptive prize promotion telemarketers that a consumer must purchase some item, or make some other type of payment, in order to win the "fabulous" prize offered.¹⁵⁸ This disclosure carries the message to consumers that a true, legitimate prize promotion does not require any purchase or payment to participate or to win.¹⁵⁹

The revised proposed Rule required this disclosure to be made before the prize is described to the person called. A number of industry commenters requested some timing flexibility here, suggesting that this disclosure be required "before or in immediate conjunction with" the description of the prize.¹⁶⁰ The Commission agrees that such a change will ensure that this key disclosure is linked directly to the prize described. This modification is designed to prohibit deceptive telemarketers from separating the disclosure from the description of the prize, thereby

¹⁴⁵ 15 U.S.C. 6102(a)(3)(C).

¹⁴⁶ See RNPRM at 30418.

¹⁴⁷ See, e.g., NAAG at 13–14; NY DCA at 1; GA OCA at 1; AARP at 23–25; NAPA DA at 1.

¹⁴⁸ VT AG at 2–3.

¹⁴⁹ USPS at 6.

¹⁵⁰ The Commission believes that the usual meaning of the term should apply. "Prompt" is defined as "done, performed, delivered, etc., at once or without delay." *Webster's Encyclopedic Unabridged Dictionary of the English Language* at 1151 (Portland House 1989).

¹⁵¹ See MD AG at 2.

¹⁵² IA DOJ at 4.

¹⁵³ See, e.g., NAAG at 13–14; VT AG at 2–3; AARP at 23–25.

¹⁵⁴ See Senate Report at 9–10.

¹⁵⁵ See Rollins at 2.

¹⁵⁶ One commenter asked if an announcement, during a telemarketing call, that the consumer "has been entered free" into a sweepstakes would satisfy the disclosure requirement that no purchase or payment is necessary to win a prize. See ITI at 2–3. The Commission does not believe this disclosure would suffice, since the mere entry into a promotion may be different from actually having a chance of winning a prize.

¹⁵⁷ See 18 U.S.C. 1301.

¹⁵⁸ See, e.g., DMA at 5–6; ITI at 3; PCH at 2–3.

negating or diluting its salutary effect.¹⁶¹ In addition, in order to make the "no purchase or payment" disclosure meaningful, the Final Rule also requires telemarketers to disclose the no-purchase/no payment entry method for the prize promotion, if requested by the person called.

Many law enforcement and consumer representative commenters suggested that additional oral disclosures be required in every outbound telephone call involving a prize promotion.¹⁶² The USPS comment included the most concise statement on this issue, noting that "the fraud and deception caused by prize promotions are so great that any extra expense associated with making [such] oral disclosures * * * is a necessary cost of creating much-needed balance between telemarketers (who have all the information) and consumers (who will know only what the telemarketer tells them)."¹⁶³ While the Commission is aware of the extensive amount of telemarketing fraud that occurs with deceptive prize promotions, it also is mindful that required oral disclosures increase both the length and the cost of telemarketing calls. Moreover, as stated in the RNPBM, the Commission is doubtful of the consumer benefit to be derived from repeated disclosures of the same information. Under §§ 310.3(a)(1) (iv) and (v) of the Final Rule, all sellers and telemarketers must disclose, before a customer pays for goods and services, the odds of receiving a prize (or the factors used in calculating the odds, if the odds cannot be calculated in advance), that no purchase or payment is necessary to receive a prize or to participate in a prize promotion, and the no purchase/no payment method of entry with either instructions on how to enter or an address or local or toll-free telephone number the customers may contact for information. In addition, all sellers and telemarketers must disclose the material costs or conditions to receive or redeem a prize. The Commission believes that

¹⁶¹ The statement in the Final Rule that this disclosure must be made before or in conjunction with the description of the prize does not alter the requirement that this disclosure must also be made "promptly."

¹⁶² NAAG at 15 ("at a minimum, the Rule must require meaningful oral disclosures of the method of free entry, the odds of winning the prizes described, and the restrictions and conditions associated with the use of the prize"); VT AG at 3 (all of the above plus verifiable retail sales price should be disclosed); MD AG at 1 (require disclosure of the odds of winning, the nature and value of prizes, and the conditions on receiving the prizes); MA AG at 5 (value and odds); USPS at 7 (sales price and odds); AARP at 26-27 (free method of entry and prize value); IA DOJ at 14 (prize value); NAPA DA at 2 (prize value).

¹⁶³ USPS at 7.

mandating the repeated oral disclosure of this information in every outbound telephone call involving a prize promotion is unnecessary.

E. Section 310.5: Recordkeeping

Section 310.5 requires sellers or telemarketers to keep certain records relating to telemarketing activities for 24 months from the date the record is produced.¹⁶⁴ Failure to keep the records is a violation of the Rule.

A record retention requirement is necessary to enable law enforcement agencies to ascertain whether sellers and telemarketers are complying with the requirements of the Final Rule, to identify persons who are involved in any challenged practices, and to identify customers who may have been injured. A 24-month record retention period is necessary to provide adequate time for the Commission and State law enforcement agencies to complete investigations of noncompliance. Consumers who complain to a law enforcement agency about alleged deceptive or abusive telemarketing practices often fail to do so immediately. Thus, there may be substantial "lag time" between the occurrence of violations and the time law enforcement learns of the alleged violations. A two-year record retention period allows law enforcement agencies time to gather information needed to pursue law enforcement actions and identify victims.

The Commission is mindful, however, of the burden on legitimate business in maintaining these records. For example, commenters from the office supplies industry suggested that recordkeeping compliance costs would increase costs to dealers and, ultimately, consumers because of increased paperwork, computer usage and storage, and filing space.¹⁶⁵ The Final Rule, therefore, strikes a balance between minimizing the recordkeeping burden on industry and retaining the records necessary to pursue law enforcement actions and identify customers who have been injured. The Final Rule requires retaining records that most businesses already maintain during the ordinary course of business.

Section 310.5(a) sets out the records that must be maintained. Section 310.5(b) specifies that the records may be kept "in any form." Sellers and telemarketers may maintain the records in any manner, format, or place as they keep such records in the ordinary

¹⁶⁴ The Telemarketing Act authorizes the Commission to include recordkeeping requirements in the Rule. 15 U.S.C. 6102(a)(3).

¹⁶⁵ See, e.g., Decora, Hall, Knobe, Mansfield, Way.

course of business, including in electronic storage. Several law enforcement and consumer groups expressed concern that permitting electronic storage would increase the ease with which deceptive telemarketers could quickly destroy data.¹⁶⁶ Electronic storage and other non-paper recordkeeping pose the danger that deceptive telemarketers or sellers may quickly erase or otherwise destroy potential evidence. However, the Commission believes this risk is outweighed by the cost to legitimate businesses of maintaining hard copies of documents for two years. Electronic storage and other storage formats (other than paper) are increasingly used in both the public and private sectors to conserve space, paper, and personnel resources.

Moreover, if a deceptive telemarketer or seller were to destroy records, law enforcement agencies still would be able to charge them with violating § 310.5(b), which makes the failure to maintain all the required records a violation of the Rule.

Under § 310.5(a)(1), sellers and telemarketers must retain only *substantially different* advertising, brochures, telemarketing scripts, and promotional materials. Sellers and telemarketers need only retain a specimen copy of each advertising or promotional piece or script that is substantially different from other advertisements or scripts. They need not keep copies of documents that are virtually identical but for immaterial variations. If no scripts or other advertising or promotional materials are used in connection with the telemarketing activity, then no such materials would need to be retained. NAAG opined that telemarketers and sellers should not have sole discretion to determine what constitutes "substantially different," in view of the fact that what is "substantially different" in the consumer protection context can be problematic, and that changing a few words in a telemarketing script can have a tremendous impact.¹⁶⁷

The Commission agrees that reasonable people may differ as to whether a particular document is "substantially different" from another document. However, the Commission also recognizes that, in the legitimate telemarketing industry, scripts can change frequently, often with only minor alterations, and advertisements or promotional materials may differ only in minor respects from other versions.

¹⁶⁶ See, e.g., NAAG at 25; NACAA at 7; AARP at 27.

¹⁶⁷ NAAG at 25-26.

Retention of each and every script, advertisement, or other promotional piece would likely enhance efforts of law enforcers to build cases against deceptive telemarketers; but the Commission is unwilling to burden legitimate business with a requirement to maintain such a huge volume of records, much of which may be worthless or redundant from a law enforcement standpoint.

In the revised proposed Rule, § 310.5(a)(2) required sellers and telemarketers to maintain records of the name and last known address of each prize recipient and the prize awarded where the prizes have a value of \$25 or more. Several commenters stated that requiring records of prize recipients only with regard to prizes having a value of more than \$25 will not provide the type of documentation needed by law enforcement.¹⁶⁸ These commenters pointed out that many of the abuses found in prize promotions involve items valued under \$25, but represented to be valued much higher. Further, by its very nature, a deceptive prize promotion involves prizes sent to consumers that are virtually worthless. In order to address this valid concern, but not increase the burden on legitimate prize promoters, the Commission has revised § 310.5(a)(2) to require that records be maintained for all prizes *represented, directly or by implication*, to have a value of \$25 or more. Sellers and telemarketers do not have to maintain records on prize recipients and prizes awarded for prizes that are represented to have a value of less than \$25. The Commission believes that this change in wording should not increase the recordkeeping burden on legitimate business because such telemarketers and sellers would be expected to accurately represent prize values. Although in the Commission's experience, there is often at least an implied representation of value in deceptive prize promotions, there may be times when a prize promotion is silent as to value. Therefore, in those instances where no direct or implied representations have been made as to a prize's value, a seller or telemarketer must keep records for prizes that cost the seller or telemarketer more than \$25 to purchase.

Section 310.5(a)(3) requires that records be kept of customer transactions, including the name and last known address of the 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. Only

records relating to *actual sales* need be maintained; sellers and telemarketers are not required to keep records of all customer contacts, if those customers do not make a purchase.

Several commenters from the magazine sales industry noted that neither the seller nor telemarketer in the magazine sales industry has knowledge of, or control over, the dates of shipment, nor would they have records of such as required by § 310.5(a)(3);¹⁶⁹ records reflecting the date(s) of shipment would be kept by the contracted "fulfillment house." These commenters noted, however, that sellers and telemarketers would have the date the order was placed with the fulfillment house or the date that the service was to commence. In connection with magazine sales, either of these dates will be sufficient for purposes of compliance with § 310.5(a)(3).

Section 310.5(a)(4) requires sellers and telemarketers to keep certain records on current and former employees who are directly involved in telephone sales: name, any fictitious name used, the last known home address and telephone number, and job title. Any records relating to current and former employees are required only for those persons who are or became employees on or after the effective date of the Final Rule.

IA DOJ recommended that, if callers use fictitious "desk" names, sellers and telemarketers should not allow more than one person to use the same alias and should maintain *current* information on the name and address of any employee who has used an alias. If such requirements were included, IA DOJ opined, law enforcement would be able to request and obtain the information from a seller or telemarketer expeditiously. IA DOJ stated that these requirements are necessary to identify and locate individuals responsible for deceptive telemarketing sales.¹⁷⁰

The Commission agrees with the concerns raised by IA DOJ and has revised § 310.5(a)(4) to require that, if fictitious names are used by employees, the name must be traceable to a specific employee. This revision should eliminate the confusion that would result if more than one employee were using the same desk name.

The Commission believes, however, that it would be overly burdensome and inappropriate to require businesses to continue updating records on persons who no longer work for them. Businesses must maintain up-to-date

information on current employees, and last-known information on former employees, but the Final Rule does not place an affirmative duty on the seller or telemarketer to update information on former employees.

Section 310.5(a)(5) requires sellers and telemarketers to retain copies of any verifiable authorizations required under § 310.3(a)(3) of the Rule.¹⁷¹ Sellers and telemarketers should retain records of the verifiable authorization for each transaction. These records may be in any form, manner, or format consistent with the methods of authorization permitted under § 310.3(a)(3).

NASAA suggested that the Final Rule expressly provide law enforcement with access to records upon reasonable notice for the purpose of reviewing and copying.¹⁷² The Commission has decided not to include a provision requiring that the records be provided upon reasonable notice. The Commission does not believe that such a provision would appreciably enhance tools currently at the disposal of law enforcement authorities to obtain such information, if it is required to be maintained. Moreover, the Commission's own law enforcement experience indicates that such a provision could be construed to hamper its ability to obtain such information quickly, especially through *ex parte* temporary restraining orders against deceptive telemarketers.

Section 310.5(b) states that "[f]ailure to keep all records required by § 310.5(a) shall be a violation of this Rule." Sections 310.5(c) and (d) minimize the burden of maintaining duplicate records.

Under § 310.5(c), the seller and telemarketer need not keep duplicative records if they allocate between themselves, by written agreement, responsibility for complying with the recordkeeping requirements. Absent a written agreement between the parties, or if the written agreement is unclear as to who must maintain the required records, the seller is responsible for complying with §§ 310.5(a)(1)-(3) and (5), and the telemarketer is responsible for complying with § 310.5(a)(4) (the Section dealing with records about current and former employees). Several commenters on the initially proposed Rule supported § 310.5(c),¹⁷³ noting that it strikes a reasonable balance between maintaining necessary documentation and avoiding overly burdensome

¹⁶⁸ See, e.g., MPA at 3; MSSC at 3; DMT&H at 1; HEARSTCO at 2.

¹⁶⁹ IA DOJ at 6.

¹⁷¹ Section 310.3(a)(3) requires express verifiable authorization before submitting a demand draft for payment.

¹⁷² NASAA at 2.

¹⁷³ This provision was included in § 310.5(b) of the initially proposed Rule.

requirements, as well as noting that it is consistent with the contractual nature of the relationship between sellers and telemarketers.¹⁷⁴

On the other hand, NAAG feared that a seller could use contractual provisions to shift its recordkeeping responsibility to another "fly-by-night," and most likely "judgment proof," telemarketer. NAAG stated that the Rule's failure to provide joint and several responsibility for recordkeeping exacerbated the danger of deceptive telemarketers quickly destroying data.¹⁷⁵ NAAG asked that the Final Rule require that records be kept by an entity which will not benefit by their loss. The Commission has considered this suggestion, but since both sellers and telemarketers are liable for violations of the provisions of the Rule, it is unclear where such a "disinterested" recordkeeping entity might be found. Moreover, the Commission believes the risk that NAAG identified is outweighed by the cost to legitimate sellers and telemarketers of maintaining duplicate copies of documents for two years.

Finally, § 310.5(d) sets out the parties responsible for maintaining records at the end of, or after a change in ownership of, the seller's or telemarketer's business. In the event of dissolution or termination of such business, the principal of the seller or telemarketer is required to maintain these records. On the other hand, in the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business is required to maintain the records.¹⁷⁶

F. Section 310.6 Exemptions

Section 310.6 of the Rule exempts certain types of activities from the Rule's coverage. This section prompted considerable RNPRM comments, as it did in the initially proposed Rule. In their comments to the RNPRM, law enforcement and consumer groups once again cautioned against any exemptions because of the potential danger that deceptive telemarketers will seize upon any perceived loophole to avoid coverage under the Rule.¹⁷⁷ These groups argued that exemptions only

lead to confusion as to who is covered under the Rule and will cause law enforcement agencies to expend considerable resources to determine whether a telemarketer is subject to the Rule. They further maintained that, since only catalog sales are exempted from the Act, Congress intended for all telemarketers to be covered by the Rule and did not intend the Commission to include a broad list of specific exemptions.¹⁷⁸ The business community once again suggested that the Commission set out exemptions that will allow legitimate telemarketers to operate without the restraints of additional regulation.¹⁷⁹

The Commission has concluded that it is vested by the Telemarketing Act with discretion both in determining what constitutes "telemarketing" under the Act and in defining deceptive and abusive practices. In exercising that discretion, the Commission has decided that narrowly-tailored exemptions are necessary to prevent an undue burden on legitimate businesses and sales transactions. Section 310.6 enumerates these exemptions. The Commission determined the advisability of each exemption after examining the Act and considering the following factors: (1) Whether Congress intended that a certain type of sales activity be exempt under the Rule; (2) whether the conduct or business in question already is regulated extensively by Federal or State law; (3) whether, based on the Commission's enforcement experience, the conduct or business lends itself easily to the forms of deception or abuse that the Act is intended to address; and (4) whether requiring businesses to comply with the Rule would be unduly burdensome when weighed against the likelihood that sellers or telemarketers engaged in fraud would use an exemption to circumvent Rule coverage.

One commenter suggested an exemption for providers of funeral goods and services who are subject to the Commission's Funeral Rule, 16 CFR part 453.¹⁸⁰ The Commission believes that most telephone sales by funeral providers covered by the Funeral Rule will not be completed until after a face-to-face sales presentation. Such transactions would be exempt under § 310.6(c), discussed below. It is therefore unnecessary to specifically exempt those transactions from the provisions of this Rule.

Other commenters requested that the Commission reconsider its decision not

to exempt prior business relationships or established businesses.¹⁸¹ The Commission is not persuaded that exemptions defined in such a manner would be workable, nor does the Commission believe they are necessary, given the changes elsewhere in the Rule that focus it more narrowly. Indeed, one of the commenters on the initially proposed Rule that strongly advocated a "safe harbor" provision for established businesses has indicated that such an exemption is unnecessary because the revised proposed Rule was more narrowly and appropriately focused.¹⁸²

Section 310.6(a) exempts pay-per-call services subject to the Commission's 900-number Rule, 16 CFR part 308, since that Rule's extensive requirements and prohibitions governing these transactions already provide customers with substantial protections regarding the deceptive or abusive practices that are the subject of the Telemarketing Sales Rule.

Section 310.6(b) exempts the sales of franchises subject to the Commission's Franchise Rule, 16 CFR part 436. As discussed *supra*, the revised proposed Rule had defined the term "investment opportunity" in § 310.2(j) to exclude franchise sales. In order to make it clear that such transactions are not covered by the Telemarketing Sales Rule, the Commission has decided to add a separate exemption in § 310.6(b) for sales of franchises covered by the Franchise Rule, rather than to rely upon the definition of "investment opportunity" to accomplish this result. The Commission's Franchise Rule contains requirements and prohibitions that apply to the sale of franchises and business opportunities and that already provide customers with substantial protections. 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.¹⁸³ The Commission believes it is more appropriate to consider within the framework of that review process whether any further action is needed to address the sale of franchises, including those employing telemarketing. Following this approach, the Commission ensures that any new requirement or prohibition applicable to franchises will be codified in one regulation—the Franchise Rule—rather than spread out over two separate Rules.

One commenter (DSA) maintained that business ventures that are not

¹⁷⁴ See, e.g., initial comments: NRF at 41; ARDA at 37-38.

¹⁷⁵ NAAG at 25.

¹⁷⁶ One commenter suggested requiring that any agreement between the parties established under § 310.5(c) would also govern who is to maintain the records in the event of a dissolution. BSA at 7. The Commission believes that the division of responsibilities set forth in the Final Rule appears to be the most appropriate with regard to the types of records to be maintained.

¹⁷⁷ See, e.g., NCL at 16; NACAA at 8; NAAG at 23-25.

¹⁷⁸ See, e.g., NCL at 16.

¹⁷⁹ See, e.g., ACRA at 6-7; IBM at 19-23; FFF; BPIA at 10-12.

¹⁸⁰ See generally MFDA.

¹⁸¹ IBM at 19-23; ACRA at 6-7.

¹⁸² Time Warner at 2-3.

¹⁸³ 60 FR 17656 (April 7, 1995).

covered by the Franchise Rule should be exempted from the definition of investment opportunities as well.¹⁸⁴ The Commission disagrees. When a business venture is not covered by the Franchise Rule, then consumers do not receive the protection afforded by that Rule's pre-sale disclosure requirements. Therefore, it is appropriate that telephone sales of such ventures should be covered by this Rule, so that consumers may receive the benefit of its protections.¹⁸⁵

Section 310.6(c) exempts "telephone calls in which the sale of goods or services is not completed, and payment or authorization for payment is not required, until after a face-to-face sales presentation by the seller." This exemption reflects the Commission's enforcement experience that the occurrence of a face-to-face meeting limits the incidence of telemarketing deception and abuse. The paradigm of telemarketing fraud involves an interstate telephone call in which the customer has no other direct contact with the caller. The Commission has deleted the language in the revised proposed Rule which would have required the consumer to have an opportunity to examine the goods or services offered. Many commenters pointed out that consumers would not be able to examine an intangible service, nor would they be able to examine each item that was described in a catalog used by the seller in a sales presentation.¹⁸⁶ Furthermore, DSA pointed out that the requirement that a consumer be given the opportunity to examine the good or service was contrary to most State telemarketing laws and might preempt a large body of existing State law.¹⁸⁷

This exemption also covers those sales that begin with a face-to-face sales presentation and are later completed in a telephone call. The emphasis in this exemption is on the face-to-face contact between the buyer and seller, which distinguishes these transactions from those of telemarketing that are completed without face-to-face contact between buyer and seller.

Section 310.6(d) exempts calls initiated by a customer that are not the result of any solicitation by a seller or telemarketer. Such calls are not deemed

to be part of a telemarketing "plan, program, or campaign * * * to induce the purchase of goods or services" under the Act.¹⁸⁸ This exemption covers incidental uses of the telephone that are not in response to a direct solicitation, e.g., calls from a customer to make hotel, airline, car rental, or similar reservations, to place carry-out or restaurant delivery orders, or to obtain information or customer technical support.

Section 310.6(e) exempts calls initiated by a customer in response to general media advertisements, other than direct mail solicitations, unless the calls are in response to an advertisement relating to investment opportunities, credit repair, recovery rooms, or advance fee loans. This exemption applies to calls in response to television commercials, infomercials, home shopping programs, magazine and newspaper advertisements, and other forms of mass media advertising and solicitations. This exemption also covers calls from a customer in response to a business listing in the Yellow Pages or similar general directory listing. The Commission does not intend that telephone contacts in response to general media advertising be covered under the Rule. In the Commission's experience, calls responding to general media advertising do not typically involve the forms of deception and abuse the Act seeks to stem. 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 deceptive sellers or 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 experience with the marketing of these deceptive telemarketing schemes 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.

USPS recommended that the Commission designate prize promotions as one of the types of telemarketing that will not be entitled to claim a general media advertising exemption.¹⁸⁹ USPS pointed out that deceptive telemarketers have proven to be very adaptable and that the general media advertising exemption may be a major loophole for those with a "gift for developing 'new

and improved' frauds." USPS cautioned that deceptive telemarketers may take advantage of the exemption by fashioning false and deceptive print and broadcast media ads instead of using direct mail. The Commission agrees that deceptive telemarketers are adept at circumventing regulations. However, it is impossible to predict accurately the manner in which their resourcefulness will manifest itself. The Commission's law enforcement experience relating to deceptive telemarketing has not identified a problem with general media advertising of prize promotions, unlike the problems that have arisen with the enumerated telemarketing businesses that have been excluded from the exemption. In fact, it would likely be much more difficult to persuade consumers that they have been "specially selected" to receive a prize if the solicitation relating to the prize were to be publicized on the television, in a magazine, or through other mass media. Therefore, the Commission has decided to retain the exemption for mass media advertising of prize promotions. The Commission will reconsider that position if general advertising of prize promotions becomes a problem after the Final Rule has been in effect.

Section 310.6(f) of the Final Rule exempts calls from a customer in response to a direct mail solicitation that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this part for any item offered in the direct mail solicitation. In the Commission's experience, such solicitations are not uniformly related to the forms of deception and abuse the Act seeks to stem, nor are they uniformly unrelated to such misconduct. Rather, in certain discrete areas of telemarketing, such solicitations often provide the opening for subsequent deception and abuse. The Commission has drawn upon its enforcement experience, identified those problem areas, and excluded them from this exemption. The exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to any of several categories of goods or services: investment opportunities, credit repair, recovery rooms, advance fee loans, or prize promotions.

Many commenters from law enforcement and consumer groups strongly recommended that the Commission also exclude direct mail solicitations involving prize promotions from this exemption.¹⁹⁰ They pointed out that direct mail solicitations of prize promotions are a major source of

¹⁸⁴ DSA at 2.

¹⁸⁵ DSA at 3-4. DSA was prompted to raise this suggestion by its concern that the recruitment of persons to engage in the direct sale of goods or services might be considered a "business opportunity" which may be covered by this Rule. However, this concern is unfounded given the exemption of face-to-face sales from coverage of this Rule, included in § 310.6(c).

¹⁸⁶ DSA at 5-7; ACA at 2; DMT&H at 1; HEARSTCO at 2-3; MSSC at 4.

¹⁸⁷ DSA at 5-7.

¹⁸⁸ See Senate Report at 8.

¹⁸⁹ USPS at 10.

¹⁹⁰ Mass AG at 5-6; IA DOJ at 7; USPS at 10-11.

consumer complaints and consumer injury, and should remain within the Rule's coverage. The Commission is persuaded that abuse in direct mail prize promotions has been such a major source of consumer injury that an exemption no matter how carefully crafted, might provide loopholes which deceptive promoters might exploit to evade the Rule. Therefore, the Commission has added prize promotions to the list of telemarketing areas that are excluded from the direct mail solicitation exemption.

In excluding prize promotions from the direct mail solicitation exemption, the Commission has been mindful of the burdens this action might place on legitimate prize promoters. However, the Commission believes that the changes elsewhere in the Rule have reduced substantially the burden on legitimate industry by providing maximum flexibility to business as long as customers receive the necessary information and protections. Furthermore, the Commission believes that any increased burden will be minimal. Based on information provided during the comment periods and the public workshop, the legitimate prize promotion industry already complies substantially with most of the Rule's provisions. For example, legitimate prize promoters do not misrepresent the prize promotion or the goods and services offered; they do not debit customer's accounts without express verifiable authorization; and they maintain the required records.

Several commenters also pointed out that the wording of the exemption in the revised proposed Rule would allow direct mail solicitors to claim an exemption even if a direct mail solicitation were totally deceptive, since the exemption was predicated solely on making the disclosures required under § 310.3(a)(1).¹⁹¹ The exemption did not require that the disclosures be truthful, only that disclosures be made. It was not the Commission's intent to allow an exemption predicated upon untruthful § 310.3(a)(1) disclosures. Therefore, § 310.6(f) of the Final Rule specifies that the disclosures be made truthfully, in addition to being made clearly and conspicuously.

IBM noted that the Rule's exemptions for general media advertising in § 310.6(e) and direct mail solicitations in § 310.6(f) are broader and do not contain the prohibitions against further solicitation during calls from consumers that the Telemarketing Act places on

catalog sales.¹⁹² The commenter stated that "this produces the potentially perverse result of regulating most intensely the marketing medium that provides the greatest indicia of legitimacy and the most information for the consumer." This is an illusory problem since catalogs, being "direct mail solicitations," are exempt from the Rule, through § 310.6(f), if they clearly, conspicuously, and truthfully disclose all material information required in § 310.3(a)(1).

Section 310.6(g) exempts "telephone calls between a telemarketer and any business, except calls involving the retail sale of nondurable office or cleaning supplies." Several industry commenters suggested that a "business-to-business" exemption was defensible only if provided on an across-the-board basis, without exceptions.¹⁹³ Industry also asked that any exemption be expanded to include entities other than businesses, e.g., government agencies and educational institutions.¹⁹⁴ Numerous office and cleaning supplies businesses also expressed strong dissatisfaction with being covered by the Rule, arguing that the burden of complying with the Rule will fall on legitimate sellers and telemarketers, while the deceptive operators will simply ignore the requirements.¹⁹⁵

Enforcement and consumer agencies, on the other hand, cautioned against providing any business-to-business exemption because of the potential loophole such an exemption would provide.¹⁹⁶ They predicted the revival of "advertising specialty" scams that victimize small businesses with promises of fabulous prizes in exchange for the purchase of promotional items engraved with the business's name. These commenters also predicted the rise of other scams targeting small businesses. Law enforcement agencies suggested that, if a business-to-business exemption were to be included in the Final Rule, the Commission should expand the list of goods or services that would be excluded from the exemption. They suggested that advertising and promotional specialties and the sale of listings in classified directories and

other publications be excluded from the exemption.¹⁹⁷ Similarly, commenters from the office supplies industry argued that they should not be singled out for inclusion under the Rule because other industries selling to businesses also have a history of abuses, e.g., specialty or business promotional products, investment opportunities, and premium and prize promotions.¹⁹⁸

The Commission believes that Congress did not intend that every business use of the telephone be covered by this Rule. Nevertheless, the Commission's extensive enforcement experience pertaining to deceptive telemarketing directed to businesses, particularly office and cleaning supply scams, amply demonstrate that an across-the-board exemption for business-to-business contacts is inappropriate. The Commission recognizes that there may have been past problems with telemarketing sales of products other than office or cleaning supplies to businesses. However, the Commission's enforcement experience against deceptive telemarketers indicates that office and cleaning supplies have been by far the most significant business-to-business problem area; such telemarketing falls within the Commission's definition of deceptive telemarketing acts or practices. Therefore, the Commission has decided not to expand the list of business-to-business telemarketing activities excluded from the exemption. The Commission will reconsider that position if additional business-to-business telemarketing activities become problems after the Final Rule has been in effect.

BPIA suggested that, if the Commission does not believe a total exemption for business-to-business contacts is appropriate, there may be other modifications to the language of the Rule that would provide relief to the legitimate office supplies dealers who would otherwise be subject to the Rule's provisions.¹⁹⁹ The Commission believes that each of the suggested modifications would provide substantial loopholes for deceptive telemarketers. For example, one suggestion was that, in the context of office and cleaning supplies, "telemarketer" be defined as only those operations that sell their products exclusively through telemarketing. This definition would open the door to deceptive telemarketers who would need to set up only a *de minimis* number of non-telemarketing sales, e.g., by sales representative or by catalog, in

¹⁹¹ IA DOJ at 7; Mass AG at 5-6; USPS at 10-11.

¹⁹² IBM at 15-17. The Telemarketing Act exempts solicitation of sales through the mailing of a catalog as long as the seller or telemarketer "does not solicit customers by phone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation." § 6106(4).

¹⁹³ See, e.g., DMA at 6-7; AAP at 3; BPIA at 4-7.

¹⁹⁴ E.g., AAP at 3.

¹⁹⁵ See, e.g., Allard, Allied, B&D, BESCO, Cook, Cornerstone, Daisy, Decora, Guernsey, Jud, MBR, Midesha, Pelican, Sablatura, Total, Way.

¹⁹⁶ See, e.g., USPS at 11-12; IA DOJ at 8.

¹⁹⁷ See, e.g., USPS at 11-12; IA DOJ at 8.

¹⁹⁸ BPIA at 4-7.

¹⁹⁹ BPIA at 10-12.

order to claim the exemption. The same problem would arise from BPIA's alternative suggestion that the Rule exempt telemarketing of office supplies where the initial sale was made by a sales representative in person, in writing, electronically, or as a result of receipt of a catalog. Again, this exemption would open the door to deceptive telemarketers who would need to set up only an initial sale through a deceptive catalog or other means in order to claim the exemption. BPIA's third alternative was to define "telemarketer" as a person employed or under contract with an office or cleaning supply dealer that sells or distributes fewer than 100 different products. This alternative presents evidentiary obstacles to law enforcement. Law enforcement agencies would have to expend scarce resources to prove that the number of products sold is less than the threshold of 100 and argue over whether each brand or size or color of toner or paper or other product constitutes a separate product. The Commission therefore rejects these suggestions as unworkable.

On the other hand, telephone calls to sell nondurable office and cleaning supplies are the only business-to-business contacts that are not exempt from this Rule. The Commission believes that the conduct prohibitions and affirmative disclosures mandated by the Final Rule are crucial to protect businesses—particularly small businesses and nonprofit organizations—from the harsh practices of some unscrupulous sellers of those products. Nevertheless, it recognizes that the Rule may result in a disparate impact on the legitimate sellers of office and cleaning supplies as opposed to other businesses exempted from the Rule. Therefore, the Commission wishes to balance the benefits derived from compliance with the Rule's prohibitions and disclosure requirements against the burdens imposed upon the office and cleaning supply industry—minimizing such burdens where possible.²⁰⁰

After considering all areas of the Rule for possible minimization of compliance burdens to the legitimate office and cleaning supply industry, the Commission has decided to exempt sellers or telemarketers engaged in the sale of nondurable office and cleaning supplies from the recordkeeping requirements in § 310.5 of the Rule. The Commission realizes that exempting sellers and telemarketers of office and

cleaning supplies from the recordkeeping requirements may make law enforcement's job more difficult in some situations. However, the Commission has determined that the costs imposed on legitimate industry from the recordkeeping requirements under § 310.5 of the Rule outweigh the benefits compliance with that Section would afford. Based on its own law enforcement actions against deceptive sellers and telemarketers, the Commission does not believe that such an exemption will significantly obstruct law enforcement's efforts to stop unlawful activities by sellers and telemarketers of nondurable office and cleaning supplies.

G. 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.²⁰¹ Section 310.7(a) sets forth the notice that such parties must provide to the Commission regarding those actions. Such parties must serve written notice of their action on the Commission, if feasible, prior to initiating an action under this Rule. The notice must include a copy of the complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the State official or private person must serve the Commission with the required notice immediately upon instituting its action.

One commenter suggested that the street address and telephone number be added to the mailing address given in the Rule in order to clarify that overnight express delivery or facsimile would also be appropriate for providing written notice of State action to the Commission.²⁰² The Commission believes that such an agreement on service can be arranged informally between the Commission and the States. Such an informal agreement also provides the flexibility needed as addresses and telephone numbers may change in the future.

Section 310.7(b) of the revised proposed Rule stated that the Rule "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 FTC Act."²⁰³ This provision prompted

considerable comment from State law enforcement agencies, who noted that the States are able to sue third parties (including many parties who are exempt from FTC jurisdiction) in State court for assisting and facilitating telemarketing fraud.²⁰⁴ The States had anticipated that, in filing federal suits under the Act, State pendent claims could and would be joined to the federal causes of action. The States expressed concern that the language in § 310.7(b) could be construed to strip States of the right to bring pendent claims against entities that are exempt from FTC jurisdiction.²⁰⁵

The Commission does not believe that the language of § 310.7(b) in the revised proposed Rule would have compelled the construction that prompted NAAG's concern; but to clarify that the Commission intends to provide no support to such a construction, it has decided to delete § 310.7(b).

Congress clearly intended that the Act and the Rule serve to enhance, and not detract from, State law enforcement efforts to address telemarketing fraud. As NAAG pointed out,²⁰⁶ section 6103(f) of the Act contains language which makes it clear that the limitation in section 6105(b) of the Act does *not* restrict a State's authority to pursue any claim or action under its own laws in State court. Therefore, the Final Rule adds a new § 310.7(b), with language tracking § 6103(f)(1) of the Telemarketing Act to clarify, in the Rule, that notwithstanding jurisdictional limitations of the FTC Act, an authorized State official is not inhibited from proceeding in State court on the basis of an alleged violation of any civil or criminal statute of such State.

III. Preemption

Section 310.8 of the revised proposed Rule stated that "(n)othing in (the Rule) shall be construed to preempt any State law that is not in direct conflict with any provision of (the Rule)." This was intended to provide that State statutes, rules, or regulations concerning telemarketing that contain prohibitions or requirements that are not imposed by this Rule would remain in effect, to the extent that these statutes do not conflict with this Rule. This provision was intended to make clear that State laws can exceed the threshold-level requirements established by the Rule as

²⁰⁰ See 15 U.S.C. 6103 and 6104.

²⁰¹ See generally DMA.

²⁰² The Act states: "(N)o activity which is outside the jurisdiction of (the FTC) Act shall be affected by this Act." 15 U.S.C. 6105(a). In addition, the legislative history includes the statement that: "(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." Senate Report at 14.

²⁰⁴ See, e.g., NAAG at 21; VT AG at 2; NACAA at 8.

²⁰⁵ *Id.*

²⁰⁶ NAAG at 8.

²⁰⁰ BPIA estimates that, based on Dunn and Bradstreet data for 1995, there are over 6,000 office supply dealers in the United States, and the vast majority of these firms have annual revenues of less than \$2 million. BPIA at 8.

long as they do not directly conflict with the Rule's requirements.

This provision prompted considerable comment from industry and from law enforcement and consumer groups.²⁰⁷ Industry generally recommended that the Rule adopt a preemption standard based on "inconsistency," which has been used by the FTC in its Mail or Telephone Order Rule, 16 CFR part 435. They argued that such a standard would preempt State and local laws and regulations that are inconsistent with the federal rules to the extent that consumers are not provided with equal or greater protections, and would preempt those provisions of State law which provide the same requirements as the federal rules, but which demand that the requirements be undertaken in a fashion different from the federal law.

Law enforcement asked that the Commission clarify that the Rule does not preempt State law and recommended that a presumption against preemption be included in the text of the Rule.²⁰⁸ They noted that the Act did *not* authorize the FTC to preempt State laws and that, by including a preemption section, States with stronger regulations than the Rule could find themselves facing preemptive challenges since the stricter State regulations could be seen to conflict with federal law. GA OCA suggested that, if the FTC intends to include a preemption section, the Rule should use the traditional standard of preemption used in other FTC rules, *i.e.*, that State law is preempted only to the extent that it provides less consumer protection than does the Rule.²⁰⁹ NASAA recommended that only State regulations requiring conduct that would directly conflict with the federal rule should be exempted.²¹⁰

NAAG commented most extensively on this issue, urging deletion of any preemption provision from the Rule.²¹¹ NAAG stated that the language of the revised proposed Rule deviated sufficiently from the language of the statute that it could be used by defendants to argue that the FTC, by adoption of its Rule, has preempted enforcement of some State laws which are stronger than the FTC Rule. NAAG

²⁰⁷ See, e.g., Spiegel at 1; DMA at 9-11; Olan at 4-6; ATA at 2; NASAA at 2; NJ DCA at 5; MD AG at 1-2; VT AG at 3; GA OCA at 3-4; MA AG at 6-7; NCL at 4; IA DOJ at 8; NAAG at 6-12.

²⁰⁸ Several commenters requested clarification that county, municipal or other local laws would not be preempted by the Rule. See generally Napa; Hillsborough; NACAA; NYC; San Diego.

²⁰⁹ GA OCA at 3-4.

²¹⁰ NASAA at 2.

²¹¹ NAAG at 6-12. NAAG's position was supported by AARP, CFA, NACAA, IA DOJ, and USPS.

further stated that although it "disagree[s] that the Rule has this preemptive effect, or in fact can have this effect when Congress clearly spoke (in section 4(f)(1) of the Act, 15 U.S.C. 6103(f)(1)) in favor of no preemption, history tells us that such arguments will be made and, as such will make enforcement of our more consumer-friendly State laws more time-consuming and difficult." NAAG further predicted that deceptive telemarketers defending against a State enforcement action may point to the Commission's deletion of certain provisions included in the initial version of the Rule published with the NPR as evidence that in rejecting those provisions, the Commission effectively preempted similar provisions in State law.

The Commission does not intend any such preemptive effect and is persuaded by NAAG's arguments that the quoted preemption provision in the revised proposed Rule should be dropped. By including § 310.7(b) that tracks section 4(f)(1) of the Act, 15 U.S.C. 6103(f)(1), the Commission intends to underscore that the Rule does not "prohibit any attorney general or other authorized State official from proceeding in State court on the basis of an alleged violation of any civil or criminal statute of such State."

IV. Effective Date

The revised proposed Rule set an effective date of 30 days from the date the Rule was prescribed. Most industry commenters stated that 30 days was inadequate to permit systems to be refined, review and rewrite materials, review and renegotiate contracts between sellers and telemarketers, and train workers.²¹² The Commission agrees that there should be a longer period of time between the date this Rule is prescribed and the effective date in order to provide sufficient time for industry members to familiarize themselves with the requirements of the Final Rule and to ensure that their operations are in compliance. The Commission believes four months is an adequate amount of time to address the industry's needs in this regard. Accordingly, the effective date for this Rule is December 31, 1995.

V. Regulatory Flexibility Act

In publishing the initially proposed Rule, the Commission certified, subject to subsequent public comment, that the proposed Rule, if promulgated, would not have a significant economic impact

²¹² See, e.g., AAF at 1; CHC at 7; DMA at 11-14; NIMA at 4; IBM at 23-26; Olan at 6; Spiegel at 2; HII at 2.

on a substantial number of small entities and, therefore, that the provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), requiring an initial regulatory analysis, did not apply.²¹³ The Commission noted that any economic costs imposed on small entities by the proposed Rule were, in many instances, specifically imposed by statute. Where they were not, efforts had been made to minimize any unforeseen burden on small entities. The Commission determined, on the basis of the information available to the staff at that time, that the proposed Rule would result in few, if any, independent additional costs. The Commission nonetheless requested comment on the effects of the proposed Rule on costs, profitability, competitiveness, and employment in small entities, in order not to overlook any substantial economic impact that would warrant a final regulatory flexibility analysis.²¹⁴

The information and comments received by the Commission did not provide sufficient reliable statistical or analytical data to quantify precisely the effect, differential or otherwise, of the proposed Rule on small entities versus its effect on all entities that may be subject to this Rule. Accordingly, the Commission has determined that public comments and information before the Commission do not alter the conclusion that the Final Rule would not have a sufficiently significant economic impact on a substantial number of small entities to warrant a final regulatory flexibility analysis under the Regulatory Flexibility Act. This notice serves as certification to that effect to the Small Business Administration.

VI. Paperwork Reduction Act

The Paperwork Reduction Act ("PRA"),²¹⁵ and implementing regulations of the Office of Management and Budget ("OMB")²¹⁶ require agencies to obtain clearance for regulations that involve the "collection of information," which includes both reporting and recordkeeping requirements. In the RNPRM, the Commission proposed requiring sellers or telemarketers to maintain certain records relating to telemarketing transactions. The proposed recordkeeping requirements were "collections of information" as defined by the OMB regulations implementing the PRA. The proposed requirements, therefore, were submitted to OMB for review under the PRA and were

²¹³ 60 FR 8313, 8322 (Feb. 14, 1995).

²¹⁴ *Id.*

²¹⁵ 44 U.S.C. 3501-3520.

²¹⁶ 5 CFR 1320.7(c).

published in the **Federal Register** for separate comment.²¹⁷

The Commission estimated that approximately 40,000 industry members could be affected by the revised proposed Rule's recordkeeping requirements. It further estimated that no more than 100 companies would find it necessary to develop, modify, construct, or assemble materials or equipment in order to comply with the revised proposed Rule. The Commission further estimated that it would take these 100 entities approximately 100 hours each during the first year of compliance to assemble the necessary equipment, for a total of 10,000 burden hours. It also estimated that the companies that already have recordkeeping systems would require only one hour to comply with the proposed recordkeeping requirements, for a total burden estimate of 49,900 hours. The Commission requested that this figure be rounded up to a burden estimate of 50,000 hours. The additional burden hours, which was a yearly estimate, allowed for approximately 100 new companies to enter the industry during each succeeding year without requiring the Commission to modify the burden estimate.

The revised proposed Rule required sellers and telemarketers to provide certain disclosures in telemarketing transactions. Specifically, the revised proposed Rule required sellers or telemarketers to disclose in an outbound telephone call, the identity of the seller; the purpose of the call; the nature of the goods or services; and that no purchase was necessary to win if a prize promotion was offered in conjunction with a sales offer of goods or services. If requested, the telemarketer was required to disclose the no-purchase entry method for the prize promotion.

The Commission estimated that 40,000 industry members make approximately 9 billion calls per year, or 225,000 calls per year per company. However, under §§ 310.6(d) and (e) of the revised proposed Rule, if an industry member chose to solicit consumers by using advertising media other than direct mail or by using direct mail solicitations that make certain required disclosures, it would be exempted from complying with other disclosures required by the Rule. Because the burden of complying with written disclosures would be much lower than the burden of complying with all the Rule's provisions, the Commission estimated that at least 9,000 firms would choose to adopt telemarketing methods that exempt

them from the revised proposed Rule's oral disclosure requirements. The Commission estimated that it would take 7 seconds for callers to disclose the required information. It also estimated that at least 60% of calls resulted in "hang-ups" before the seller or telemarketer could make all the required oral disclosures and therefore lasted only 2 seconds. Accordingly, the Commission estimated that the total disclosure burden of the revised proposed Rule's requirements was approximately 250 hours per firm or 7.75 million hours.

The revised proposed Rule also required additional disclosures before the customer paid for goods or services. Specifically, the sellers or telemarketers were required to disclose the total costs to purchase, receive, or use the offered goods or services; all material restrictions; all material terms and conditions of the seller's refund, cancellation, exchange, or repurchase policies if a representation about the policy was part of the sales offer; and that no purchase was necessary to win if a prize promotion was offered in conjunction with a sales offer of goods or services. The telemarketer also had to disclose the non-purchase entry method for the prize promotion. The Commission estimated that approximately 10 seconds were necessary to make these required disclosures orally. However, these disclosures were only required to be made where a call resulted in an actual sale. The Commission estimated that sales occur in approximately 6 percent of telemarketing calls. Accordingly, the estimated burden for the disclosures was 37.5 hours per firm or 1.163 million hours.

Alternately, the disclosures required before the customer paid for goods or services could be made *in writing*. The Commission estimated that approximately 9,000 firms would choose to comply with the optional written disclosure requirement. Although this burden estimate was difficult to quantify, mailing campaigns appeared to be much less burdensome for firms than were individual oral disclosures. The Commission also found that these disclosure requirements were closely consistent with the ordinary business practices of most members of the industry. Absent the recordkeeping requirements, the Commission believed that this was the type of information that would be retained by these entities in any event during the normal course of business because it would be useful in resolving private, non-governmental inquiries and disputes. Nonetheless, the Commission had no reliable data from

which to conclude that there was *no* separately identifiable burden associated with this provision. Therefore, it estimated that a typical firm would spend approximately 10 hours per year engaged in activities ensuring compliance with this provision of the Rule, for an estimated burden estimate of 90,000 hours.

No comments were received addressing the Commission's paperwork burden projections. Therefore the Commission sees no reason to revise its projections of burden per year per covered industry member, or to modify the recordkeeping or disclosure requirements in the revised proposed Rule.

Because the aforementioned requirements would involve the "collection of information" as defined by the regulations of OMB, the Commission was required to submit the proposed requirements to OMB for clearance, 5 CFR 1320.13, and did so as part of this proceeding. OMB approved the request and assigned control number 3084-0097 to the information collection requirements. This approval will expire on July 31, 1998, unless it has been extended before that date.

List of Subjects in 16 CFR Part 310

Telemarketing, Trade practices.

Accordingly, the Commission amends chapter I, subchapter C of 16 CFR 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 Severability.

Authority: 15 U.S.C. 6101–6108.

§ 310.1 Scope of regulations in this part.

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

§ 310.2 Definitions.

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

²¹⁷ 60 FR 32682 (June 23, 1995).

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 express or implied, about past, present, or future income, profit, or appreciation.

(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 accept credit cards, or to transmit 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, offers to provide, or arranges for others 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 Rule for any seller or telemarketer to engage in the following conduct:

(1) Before a customer pays¹ 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;²

(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) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the customer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion; and the no purchase/no payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate; and

(v) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(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 being able to receive a prize, the nature or value of a prize, or that a purchase or payment is required to win

directing a customer to have a courier pick up payment or authorization for payment.

¹ When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or

a prize or to participate in a prize promotion;

(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;

(3) Obtaining or submitting for payment a check, draft, or other form of negotiable paper drawn on a person's checking, savings, share, or similar account, without that person's express verifiable authorization. Such authorization shall be deemed verifiable if any of the following means are employed:

(i) Express written authorization by the customer, which may include the customer's signature on the negotiable instrument; or

(ii) Express oral authorization which is tape recorded and made available upon request to the customer's bank and which evidences clearly both the customer's authorization of payment for the goods and services that are the subject of the sales offer and the customer's receipt of all of the following information:

(A) The date of the draft(s);

(B) The amount of the draft(s);

(C) The payor's name;

(D) The number of draft payments (if more than one);

(E) A telephone number for customer inquiry that is answered during normal business hours; and

(F) The date of the customer's oral authorization; or

(iii) Written confirmation of the transaction, sent to the customer prior to submission for payment of the customer's check, draft, or other form of negotiable paper, that includes:

(A) All of the information contained in §§ 310.3(a)(3)(ii)(A)-(F); and

(B) The procedures by which the customer can obtain a refund from the seller or telemarketer in the event the confirmation is inaccurate; and

(4) 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 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.

(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 Rule for:

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

(2) Any person to employ, solicit, or otherwise cause a merchant or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

(3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement 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 Rule 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 Rule 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 Rule 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 Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8 a.m. and 9 p.m. local time at the called person's location.

(d) *Required oral disclosures.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer 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 or payment is necessary to be able to win a prize or participate in a prize promotion if a

prize promotion is offered. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion.

§ 310.5 Recordkeeping requirements.

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

(1) All 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 are represented, directly or by implication, to 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;³

(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; provided, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

(5) All verifiable authorizations required to be provided or received under this Rule.

(b) A seller or telemarketer may keep the records required by § 310.5(a) in any form, and in the manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by § 310.5(a) shall be a violation of this Rule.

(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), or if no such agreement exists, the seller shall be

responsible for complying with §§ 310.5(a)(1)–(3) and (5); the telemarketer shall be responsible for complying with § 310.5(a)(4).

(d) 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, or other change in ownership of the seller's or telemarketer's business, the successor business shall maintain all records required under this section.

§ 310.6 Exemptions.

The following acts or practices are exempt from this Rule:

(a) The sale of 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) The sale of franchises subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 16 CFR part 436;

(c) 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;

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

(e) 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;

(f) Telephone calls initiated by a customer in response to a direct mail solicitation that clearly, conspicuously, and truthfully discloses all material information listed in § 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 prize promotions, 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; and

(g) Telephone calls between a telemarketer and any business, except calls involving the retail sale of nondurable office or cleaning supplies; provided, however, that § 310.5 of this Rule shall not apply to sellers or telemarketers 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 Rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 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) Nothing contained in this section shall prohibit any attorney general or other authorized State official from proceeding in State court on the basis of an alleged violation of any civil or criminal statute of such State.

§ 310.8 Severability.

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

By direction of the Commission.

Benjamin I. Berman,
Acting Secretary.

Concurring Statement of Commissioner Mary L. Azcuenaga in Telemarketing Sales Rule, Matter No. R411001

As required by the Telemarketing and Consumer Fraud and Abuse Prevention Act, the Commission today promulgates a Telemarketing Sales Rule. I join my colleagues in promulgating the Rule, which generally should be beneficial in combatting telemarketing fraud. I remain concerned, however, about the legal basis for the exemptions (and exceptions to the exemptions) for certain categories of business activities

³For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR part 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with § 310.5(a)(3) of this Rule.

under § 310.6 of the Rule. The Commission has adopted an intricate scheme of exemptions, relying primarily on its law enforcement experience to justify its selective application of the requirements of the Rule. The Telemarketing and Consumer Fraud and

Abuse Prevention Act does not provide the Commission with the express authority to grant exemptions from the Rule, and the better reading of the statute is that the Commission does not have the authority to exempt some of the categories of business activities in

§ 310.6. Although the exemptions may be reasonable as a matter of policy, the Commission does not have the authority to second-guess the Congress. *See Public Citizen v. FTC*, 869 F.2d 1541, 1553-57 (D.C. Cir. 1989).

APPENDIX—LIST OF COMMENTERS AND ACRONYMS, TELEMARKETING SALES RULE PROPOSALS

Acronym	Commenter
2M	2M Office Supply & Furniture**
3D	3D Office Supply and Printing**
AAAA	American Association of Advertising Agencies***
AAF	American Advertising Federation***
AAP	Association of American Publishers***
AARP	American Association of Retired Persons***
ABA	American Bankers Association***
ABI	Archbold Buckeye, Inc.*
ACA	American Cemetery Association***
ACB	Associated Credit Bureaus, Inc.*
ACRA	American Car Rental Association***
ADC	American Distributing Company***
ADS	ADS Teleservices*
ADVANTA	Advanta Corporation*
AFSA	American Financial Services Association*
A&H	Arter & Hadden*
AIG	American Impact Group*
AITS	Ass'n of Independent Television Stations, Inc.*
ALIC	Allstate Life Insurance Company*
ALLARD	Allard's**
ALLIED	Allied Strauss Office Products**
A-MARK	A-Mark Precious Metals, Inc.*
AMCI	Allstate Motor Club, Inc.*
AMERINET	AmeriNet, Inc.*
AMEX	American Express Company*
AMOC	Arizona Mail Order Company, Inc.*
ANA	Association of National Advertisers***
ANDREWS	Andrews Satellite & Home Theater*
ANN ARBOR	Ann Arbor News***
Anonymous	4 comments**
APAC	APAC TeleServices*
APN	American Publishers Network, Inc.*
ARA	Arizona Retailers Association*
ARAPAHOE	Arapahoe Heating Service, Inc.**
ARDA	American Resort Development Association***
ARMIN	Armin, Larry**
ASAE	American Society of Association Executives*
ASH	Ash, Paul T.**
ASTA	American Society of Travel Agents, Inc.***
AT&T	AT&T Corp.***
ATA	American Telemarketing Association***
ATAA	Air Transport Association of America**
ATFA	American Telephone Fundraisers Association***
ATLANTA	Atlanta Journal & Atlanta Constitution*
AUTOSCRIBE	AutoScribe Corporation*
AVALON	Avalon Communications**
AWMI	American West Marketing, Inc. (comments filed by two company representatives)*
BAGGS	Baggs, Andrew*
BAGWELL	Bagwell, Linda L.*
BAKER	Baker, Alden & Blanche**
BALLARD	Ballard, Barbara**
BAUER	Eddie Bauer, Inc.*
BAY CITY	Bay City Times*
B&D	B&D Office City**
BEAR	Bear Creek Corporation (comments forwarded by The Honorable Mark Hatfield and The Honorable Bob Packwood)*
BEAVER	Beaver, Laurence E.**
BELLEVILLE	Belleville News-Democrat*
BENNETT	Bennett's Office Supply & Equipment (comments forwarded by The Honorable Phil Gramm and The Honorable Kay Bailey Hutchison)**
BESCO	BESCO Business Equipment & Supply Co.**
BFC	Brown Forman Corporation*
BILLER	Biller, Mr. & Mrs. Albert C.**
BIRKHOLZ	Birkholtz, Ted**

APPENDIX—LIST OF COMMENTERS AND ACRONYMS, TELEMARKETING SALES RULE PROPOSALS—Continued

Acronym	Commenter
BMCA	Beneficial Management Corporation of America*
BNC	Birmingham News Company***
BOA	Bank of America**
BOB	Bank of Boston*
BPIA	Business Products Industry Association***
BRADLEY	Bradley, MJP*
BRANNEN	Brannen, Mary**
BRANTLEY	Brantley, Lamar*
BREWSTER	Brewster, The Honorable Bill K.*
BROADBENT	Broadbent, Alan R.**
BROGDON	Brogdon, Doris R.**
BROSKI	Broski, Jo Ann**
BROWNELL	Brownell, Catherine A.**
BS MGMT	BS Management Group**
BSA	Business Software Alliance**
BUBRICK	Bubrick's Office Supply Inc.**
BURKLAND	Burkland, George B.**
BUTHER	Buther, Peggy**
CA	Commercial Appeal*
CAPITAL	Capital Press*
CAPUTO	Caputo, Harriet Q. *
CARDOZA	Cardoza, James E.**
CARMODY	Carmody, John**
CBA	Consumer Bankers Association***
CC	Circuit City Stores, Inc.**
CCA	Career College Association*
CDI	Circulation Development, Inc.*
CFA	Consumer Federation of America***
CHAMPLIN	Champlin, Josephine A.**
CHASE	Chase Manhattan Bank (USA)***
CHAVKA	Chavka, Marian**
CHC	Columbia House Company***
CHEMICAL	Chemical Bank*
CHERNIKOFF	Chernikoff, J.D.*
CHRISTENSON	Christenson, Carl E.**
CHRISTIAN	Christian Book Store & Office Supply**
CITICORP	Citicorp/Citibank***
CME	Center for Media Education*
CMOR	Council for Marketing and Opinion Research***
COALITION	Coalition of various companies*
COFFEY	Coffey, Laurie E.**
COMCAST	Comcast Corporation/Jones Intercable*
COMMINS	Commins, Kevin J.**
CONSORTIUM	Consortium of nonprofit organizations**
CONWAY	Conway National Bank*
COOK	Cook Office Machine & Supply Company**
COPYTEK	Copytek Office Products**
CORNELL	Cornell Group*
CORNERSTONE	Cornerstone Office Systems, Inc.**
COX	Cox Newspapers, Inc.*
CPA	Colorado Press Association*
CRAPO	Crapo, The Honorable Michael D.**
CRILLY	Crilly, Thomas W.***
CROAK	Croak, E. Patrick**
CROWLEY	Crowley, Claude**
CROWDER	Crowder, Mrs. Lillian A.**
CUCI	CUC International*
CUNA	Credit Union National Assn, Inc.**
CUNNINGHAM	Cunningham, Georgia**
CURRAN	Curran, Jeanne**
DAILY NEWS	Daily News*
DAILY OKLA	Daily Oklahoman*
DAISY	Daisy Wheel Ribbon Co., Inc.**
DANDER	Dander, David A.**
DAVENPORT	Davenport, Frances L. and Jay E.**
DAWSON	Dawson, Burton**
DCR	Daily Court Review*
DECORA	Decora Office Furniture/Supplies**
DEFAZIO	DeFazio, Dominick**
DENTON	Denton Publishing Company (comments forwarded by The Honorable Kay Bailey Hutchison, The Honorable Mac Thornberry and The Honorable Phil Gramm)*
DIAMOND	Diamond, Peter & Karen**

APPENDIX—LIST OF COMMENTERS AND ACRONYMS, TELEMARKETING SALES RULE PROPOSALS—Continued

Acronym	Commenter
DICK	Dick, Joseph A.**
DICKS	Dicks, Della**
DILLON	Dillon, William R.**
DIVERSIFIED	Diversified Marketing Service, Inc.*
DMA	Direct Marketing Association***
DMBE	Department of Marketing and Business Environment, Florida International University*
DMI	DialAmerica Marketing, Inc.***
DMSI	Direct Marketing Services, Inc.*
DMT&H	Dickerson, Mackaman, Tyler & Hagen, P.C.***
DONREY	Donrey Media Group*
DOUBLEDAY	Doubleday Book & Music*
DOUGLAS	Douglas Center Stock Farm**
DOW JONES	Dow Jones & Company, Inc.***
DSA	Direct Selling Association***
DSA-NEV	Direct Sales Association of Nevada*
DSI	Direct Sales International*
DURKEE	Durkee, Dixie**
DUSTIN	Dustin, Doris**
DW&Z	Dierman, Wortley & Zola, Inc.*
EAGLE	Eagle Newspapers (forwarded by The Honorable John M. McHughes)*
EAKES	Eakes Office Products Center, Inc.**
EDMUND	Edmund Scientific Company*
EDWARDS	Edwards, Susan E.**
EHRLICH	Ehrlich, The Honorable Robert L., Jr.*
ELLIOTT	Elliott Office Equipment Co., Inc.**
EMA	Electronic Messaging Association***
EMMONS	Emmons, Ethel B.*
EPSTEIN, A	Epstein, Ann C.**
EPSTEIN, R	Epstein, Rosalie**
EQUIFAX	Equifax Credit Information Services, Inc.*
ERIE	Erie Construction (2 copies: one original; one forwarded by The Honorable Marcy Kaptur)*
ERNST	Ernst, Michael*
EXPRESS	Express Office Products**
FAIRFAX	Fairfax County Dept of Consumer Affairs**
FAYETTE	Fayetteville Publishing Co.*
FEDEX	Federal Express*
FFF	Feature Films for Families**
FINGERHUT	Fingerhut Companies***
FLINN	Flinn, Richard M.**
FLINT	Flint Journal***
FLUCH	Fluch, Mrs. Louise R.**
FORD	Ford Office Supply**
FORD, W	Ford, Wendell**
FORMS-NC	Forms & Supplies, Inc. (NC)**
FORMS-TN	Forms and Supplies, Inc. (TN)**
FORNEY	Forney Messenger Inc.*
FORREST	Forrest Stationers**
FOSTER	Foster, Alice Wilks**
FOURNIER	Fournier, Stephanie**
FPC	Fayetteville Publishing Company (forwarded by The Honorable Bill Hefner)*
FRANKLIN	Franklin Mint***
FRB	Federal Reserve Banks*
FRB-SF	Federal Reserve Bank of San Francisco***
FREECOM	FreeCom Communications, Inc.*
FRIENDS	Friends Office Products**
F&W	F&W Publications*
GA OCA	Georgia Office of Consumer Affairs***
GABRIEL	Gabriel, Mrs. Harry J. Jr.*
GAIL	Gail's Office Supply Company**
GANNETT	Gannett Co., Inc.*
GARAVALIA	Garavalia, Barbara A.**
GARDNER	Gardner, Darien**
GCM	Good Cents Marketing*
GE	GE Appliances*
GEROVICAP	Gerovicap Pharmaceutical**
GGP	Gift Gallery Promotions*
GHA	Group Health Association of America*
GIBSON CO	C.J. Gibson Co., Inc.**
GIBSON, D	Gibson, Derek**
GIBSON, S	Gibson, Stewart & Jean*
GLAMOUR	Glamour Shots (forwarded by The Honorable Don Nickles)**
GLOBE	Old Globe*

APPENDIX—LIST OF COMMENTERS AND ACRONYMS, TELEMARKETING SALES RULE PROPOSALS—Continued

Acronym	Commenter
GODDARD	Goddard, Ed**
GODFREY	Godfrey, Florence**
GOODMAN	Goodman, Marcia L.**
GORDON	Gordon, Philip J. (forwarded by The Honorable John M. McHugh**)
GOS	GOS Office Supply**
GOSLOW	Goslow, Alice**
GRA	Georgia Retail Association*
GREEN	Green, Jean**
GREENE	Greene Russ*
GRIDER	Grider, Felicia*
GRIFIN	Griffin, Dennis O.**
GROLIER	Grolier TeleMarketing, Inc.*
GUERNSEY	Guernsey Office Products**
GUTHY	Guthy-Renker*
HALL	Henry Hall Office Products**
HAND	Hand, Robert & Lisbeth**
HARKAWAY	Harkaway, Mrs. Patricia**
HAWES	Hawes Center, Inc.*
HEAD	Head, W.L.***
HEARST	Hearst Magazines*
HEARSTCO	Hearst Corporation**
HEATON	Heaton, Peggy**
HERRERA	Herrera, Barbara*
HERTZ	Hertz Corporation*
HFC	Household Finance Corporation*
H&H-1	Howe & Hutton, Ltd.—March 14 comment*
H&H-2	Howe & Hutton, Ltd.—March 30 comment*
HHDM	Harte-Hanks Direct Marketing*
HHMS	Harte-Hanks Marketing Services*
HII	Household International***
HILLSBOROUGH	Hillsborough County Consumer Protection Div.**
HISER	Hiser, James & Sherrill**
HNM&T	Hearst New Media & Technology*
HOFMANIS	Hofmanis, Alfred**
HOLSTEIN	Holstein, Everett & Irma**
HOUSEHOLD	Household Bank*
HSN	Home Shopping Network*
HUDSON	Hudson City Savings Bank*
HUNTINGTON	Huntington National Bank*
HUNTSVILLE	Huntsville Times/Huntsville News*
IA DOJ	Iowa Department of Justice***
IBAA	Independent Bankers Association of America**
IBM	International Business Machines Corporation***
ICTA	Industry Council for Tangible Assets***
ID AG	Idaho Attorney General*
IFA	International Franchise Association*
IFI	International Fabricare Institute*
IH	Investment Hotlines*
IMC	InfoCision Management Corporation*
IMS	International Magazine Service of Northern California (comment forwarded by the Honorable Lynn Woolsey)*
IMS-TX	International Magazine Service (Texas) (comment forwarded by the Honorable Kay Bailey Hutchison)*
IMSI	Infomercial Monitoring Service, Inc.*
IMSP	IMS Promotions*
INFOMALL	Infomall TV Network*
INSP	Inspirational Network*
IRC	Indiana Retail Council, Inc.*
IRL	International Readers League of Indianapolis*
ISA	Interactive Services Association***
ISENBERG	Isenberg, Angeline C.**
ITI	ITI Marketing Services, Inc.***
ITT HARTFORD	ITT Hartford**
IVAN	Ivan Allen Company**
JACKSON	Jackson Office Equipment, Inc.**
JACKSON, B	Jackson, Bogle**
JACOBSON	Jacobson, Frances S.**
JCP	Jackson Citizen Patriot*
JENSON	Jenson, Ines V.**
JERSEY	Jersey Business Supply Co., Inc.**
JOCKS	Jocks, Donald B.**
JOHNSON, D	Johnson, Darlene**
JOHNSON	Johnson Stationers**
JOHNSTON	Johnston, Gloria*

APPENDIX—LIST OF COMMENTERS AND ACRONYMS, TELEMARKETING SALES RULE PROPOSALS—Continued

Acronym	Commenter
JOINER	Joiner, Alex & Debbie**
JOSEPH	Joseph, Laura**
JUD	Jud's Office Supply, Inc.**
KALAMAZOO	Kalamazoo Gazette***
KAPLAN	Kaplan, Jules*
KIKENDALL	Kikendall, Thomas J.*
KARLE	Karle Publications & Communications, Inc.**
KELLY	Kelly, Marion R.**
KEMPF	Kempf, L.W.**
KING	King, Donna E.**
KLAVON	Klavon, Karl F.**
KLEID	Kleid Company*
KNIGHT	Knight Ridder***
KNOBE	Knobe's Office Supply & Equipment**
KNOXVILLE	Knoxville News Sentinel Co. (comments from two company representatives)*
KRELL	Krell, Sadie**
LANDMARK	Landmark Community Newspapers, Inc.*
LARK	Lark In The Morning*
LA TIMES	The Los Angeles Times*
LAURENZA	Laurenza, Joseph*
LCS	LCS Direct Marketing Service*
LEFORT	LeFort, Peter F.**
LEIBACHER	Leibacher, Philip J.*
LENOX	Lenox, Inc.*
LEVINSON	Levinson, Mrs. Rosalie**
LIGHTFOOT	Lightfoot, The Honorable Jim*
LINDSAY	Lindsay, Mrs. Sandra**
LM	LM Office Supply & Furniture**
LOMBARD	Lombard, Barbara C.**
LOWE'S	Lowe's Studio*
LS	Landmark Stationers**
MACHCINSKI	Machcinski, Lynnae**
MAGADITSCH	Magaditsch, Gwyn**
MAGNUSON	Magnuson, Donna**
MALACINSKI	Malacinski, George M.**
MANSFIELD	Mansfield Typewriter Co.**
MARKETLINK	Marketlink*
MARTIN	Martin Direct*
MARWYCK	Marwyck, Inc.**
MARX	Marx, June D.**
MASON	Mason, William Raymond**
MASS AG	Massachusetts Attorney General**
MASTERCARD	Mastercard Intl, Inc. and VISA USA, Inc.***
MBAA	Mortgage Bankers Association of America***
MBNA	MBNA America Bank, N.A.*
MBR	Macaulay's Business Resources, Inc.**
MCI	MCI Telecommunications Corp***
McKNIGHT	McKnight Management Company*
MCUL	Michigan Credit Union League**
MD AG	Maryland Attorney General**
MELLON	Mellon Bank Corporation*
MELTON	Melton, Carol A.*
MERCURY	Mercury Media*
MESSENGER	Messenger (forwarded by The Honorable Ed Whitfield)*
MEYER	Meyer, Alice W. (forwarded by The Honorable Lynn C. Woolsey)**
MEYERS	Meyers, Patricia**
MFDA	Missouri Funeral Directors' Association**
MGC	Merchants Golden Checks*
MGCB	Merchants Gift Check Book*
M-I	Messenger-Inquirer*
MIDESHA	Midesha Enterprises, Inc. (3 copies: one original; one forwarded by The Honorable Trent Lott; one forwarded by The Honorable Thad Cochran)**
MILLIGAN	Milligan, A.M.**
MILLS, S	Mills, Susan*
MILLS, M	Mills, Maria**
MINDHEIM	Mindheim, Mrs. Arthur D.**
MM	Merchant Masters*
MMC	Moore Medical Corporation*
MMS	Metropolitan Marketing Services*
MOBILE	Mobile Media*
MOERSCHELL	Moerschell, Mrs. G.E.**
MONEX	Monex Deposit Company***

APPENDIX—LIST OF COMMENTERS AND ACRONYMS, TELEMARKETING SALES RULE PROPOSALS—Continued

Acronym	Commenter
MOORE	Moore Medical (2 copies: one original; one forwarded by The Honorable Nancy L. Johnson)*
MOPA	Missouri Press Association*
MORA	Missouri Retailers Association*
MORSE	Morse, Larry E.*
MOUNTAIN	Mountain, Raymond**
MP	Merchants Promotions*
MPA	Magazine Publishers of America***
MPG	MPG Newspapers*
MPR	Mobile Press Register***
MRA	Michigan Retailers Association*
MRG	Marketing Response Group & Laser Co., Inc.*
MS PRESS	Mississippi Press***
MS	Merchant Sampler*
MSSC	Magazine Subscription Sales Coalition***
MTD	MTD Services*
MULLINS	Mullins, Zelma**
MUNSCH	Munsch, William C.**
MURRAY	Murray Ledger & Times*
MUSKEGON	Muskegon Chronicle*
MUTUAL	Mutual of Omaha Companies*
NAA	Newspaper Association of America***
NAAG	National Association of Attorneys General ***
NACAA	National Association of Consumer Agency Administrators ***
NAM	National Association of Manufacturers **
NAMA	National Automatic Merchandising Association *
NAPA	National Automated Payment Association ***
NAPA DA	Napa County District Attorney **
NAR	National Association of Realtors ***
NARASIMHAN	Narasimban, N. **
NARDA	North American Retail Dealers Association *
NASAA	North American Securities Administrators Association ***
NB	NationsBank ***
NBR	National Bank of the Redwoods *
NBS	NBS Office Supply **
NCL	National Consumers League ***
NCMC	National Credit Management Corporation *
NCTA	National Cable Television Association ***
NE	New England Office Supply, Inc. **
NETWORK	Network Direct *
NEVELING	Neveling, Dale *
NEWS	New Publishing Company *
NFA	National Futures Association *
NFIB	National Federation of Independent Business *
NFN	National Federation of Nonprofits *
NHI	New Hampton, Inc. *
NIE	Nationwide Insurance Enterprise *
NIMA	NIMA International ***
NJ DCA	New Jersey Division of Consumer Affairs **
NM AG	New Mexico Attorney General **
NNA	National Newspaper Association *
NORDSTROM	Nordstrom *
NORTHLAND	Northland Lutheran Retirement Community **
NPC	Neighborhood Periodical Club *
NPS	National Promotional Services *
NRF	National Retail Federation ***
NSF	National Science Foundation *
NYC DCA	New York City Dept of Consumer Affairs **
YNEX	YNEX *
NYSCPB	New York State Consumer Protection Board ***
NYSCUL	New York State Credit Union League **
NYTC	New York Times Company *
OCHOA	Ochoa, Anna & James Becker **
OCITY	Office City **
OCONNECT	Office Connection **
ODEPOT	Office Depot **
OENVIRON	Office Environments **
OEQUIP	Office Equipment Co., Inc **
OHIO	Ohio Health Care Products, Inc. *
OLAN	Olan Mills, Inc ***
OLIVER	Oliver, Louise **
OMF	Office Machines & Furniture Inc.**
OMSCO	Office Machine Service Co.**

APPENDIX—LIST OF COMMENTERS AND ACRONYMS, TELEMARKETING SALES RULE PROPOSALS—Continued

Acronym	Commenter
ONYX	House of Onyx (comments forwarded by The Honorable Wendell H. Ford and The Honorable Ed Whitfield)*
OPC	Oregonian Publishing Company*
OPCO	Office Products Inc.**
OREGONIAN	East Oregonian*
ORESOURCE	Office Resources**
ORKIN—1	Orkin Pest Control (comments filed by two company representatives)***
ORKIN-L	Orkin Lawn Care*
ORKIN-M	Orkin Maid*
ORKIN-P1	Orkin Pest Control—March 23 comment*
ORKIN-P2	Orkin Pest Control—March 30 comment*
ORKIN-PL	Orkin Plantscaping*
OSS	Office Supply Services Inc.**
PACESETTER	Pacesetter Corporation*
PALACE	Palace Office Supply**
PALMER	Palmer, Peter W.**
PANNITTO	Pannitto, Joseph P.**
PARKER	Parker, Stella**
PATRIOT	The Patriot-News***
PAUL	Paul, Byron S., Jr.**
PAYNE	Payne, Mrs. Helen R.**
P&C	Pullman & Comley (comment on originally proposed Rule)
P&C-1	Pullman & Comley (June 23 comment on revised proposed Rule)
P&C-2	Pullman & Comley (June 27 comment on revised proposed Rule)
PCH	Publishers Clearing House***
PCI	Private Citizen, Inc.*
PDW	Publishers Discount Warehouse (comments filed by five different company representatives)*
PELICAN	Pelican Office Supply, Inc.**
PENCIL	The Pencil Box Office Supplies**
PENNEY	J.C. Penney Company, Inc.*
PEPPERTREE	Peppertree Resorts (2 copies: one original; one forwarded by The Honorable Jesse Helms)*
PERSHING	Pershing, Robert S.**
PETERSON, P	Peterson, Phyllis G.*
PETERSON, R	Peterson, Rosie Marie*
PETERSON, S	Peterson, Selma**
P&G	Procter & Gamble**
PIERCE	Pierce, James & Sally**
PINCKNEY	Pinckney, Betty**
PLAIN	Plain Dealer***
PLP	Personal Legal Plans*
PMAA	Promotional Marketing Association of America and Incentive Federation**
POE	Professional Office Enterprises**
POLK	Polk, Arlisha Jerome**
PORTER	Porter, The Honorable John Edward*
PPI	Phone Programs Inc.*
PRESTIGE	Prestige Office Products**
PRINTING	Printing, Campanella & Rome (forwarded by The Honorable Lynn Woolsey)**
PROCH	Programmers Clearing House*
PRO-PRINT	Pro-Print Business Center**
PRUDENTIAL	Prudential Home Mortgage*
PTG	Pacific Telesis Group*
QUALITY	Quality Ribbons & Supplies Company**
QUICKCARD	Quickcard Systems***
QUILL	Quill Corporation**
QVC	QVC, Inc.***
RANKIN	Rankin, J.**
RDA	Reader's Digest Association, Inc.*
REGAL GROUP	Regal Group*
REGAL COMM	Regal Communications Corporation*
REICHWEIN	Reichwein, Kay*
RELIABLE	Reliable Office Products**
REYmann	Reymann, Clete**
RICE, D	Rice, David**
RICE, R	Rice, Rodger D. and Barbara L.*
RICH	Rich, David G.*
RIGSBY	Rigsby, Janice**
RITCHIE	Ritchie Swimwear*
RIVERS	Joan Rivers Products, Inc.*
RMH	RMH Telemarketing*
ROBERTS, D	Roberts, Denise A.**
ROBERTS, E	Roberts, E.**
RODRIGUEZ	Rodriguez, Ann*
ROLLINS	Rollins, Inc.***

APPENDIX—LIST OF COMMENTERS AND ACRONYMS, TELEMARKETING SALES RULE PROPOSALS—Continued

Acronym	Commenter
ROTBURG	Rotberg, Marion*
RPI	Resource Publications, Inc.*
RPOA	Resort Property Owners Association*
RPS	Rollins Protective Services*
RYBKA	Rybka, Edward C.**
SABLATURA	Sablatura's Office Supply & Furniture**
SAGINAW	Saginaw News***
SAMPLER	Business Sampler Advertising, Inc.*
SAN DIEGO	San Diego Department of Agriculture, Weights & Measures**
SANTROCK	Santrock, Billie**
SAUNDERS	W.J. Saunders**
SBTC	Southwestern Bell Telephone Company*
SC DCA	South Carolina Department of Consumer Affairs**
SCARBOROUGH	Scarborough, Peggy S. & Mary A. Bloodworth**
SCHENKEL	Schenkel, Walter H. Jr.**
SCHMIDT	Schmidt, Ann **
SCHULENBURG	Schulenburg Printing Office Supplies, Inc. (comments filed by six different company representatives) **
SCIC	Service Contract Industry Council ***
SCOTT	Scott, Nancy A. **
SDRA	South Dakota Retailers Association *
SEARCHLIGHT	Record Searchlight (comments filed by two different company representatives) *
SEARS	Sears Merchandise Group *
SFNA	San Francisco Newspaper Agency*
SHANDLING	Shandling, Adrian H. **
SHI	Shop at Home *
SHUBERT	Shuberts Inc. **
SHULMAN	Shulman, Betty *
SIA	Staten Island Advance *
SIASSR	Securities Industry Association *
SIGNAL	Signal Office Supply **
SIGNATURE	The Signature Group*
SIMON, G	Simon, Gus & Naomi **
SIMON, H	Simon, Hank **
SIMPSON	Simpson, Donald S. **
SINGTON	Sington, Homer & Coral **
SINOPOLI, A	Sinopoli, Albert B. **
SINOPOLI, M	Sinopoli, Michael T. **
SINOPOLI, N	Sinopoli, Natalie A. **
SINOPOLI, P	Sinopoli, Peter **
SMART	Smart, Bob **
SMITH-1	Smith, Mrs. Margaret A. **
SMITH-2	Smith, Margie **
SMITH-3	Smith, Madelyn **
SMITH, R	Smith, R. *
SMSI	Strategic Marketing Specialists, Inc. *
SPIEGEL	Spiegel, Inc. ***
SPRINT	Sprint Corporation *
S&S	Simpson & Simpson, P.C. *
SSE	Superstar Satellite Entertainment *
SSI	SafeCard Services, Inc. *
SSS	"Strictly" Subaru Service **
STANDARD	Standard Office Supply **
STAPLES	Staples, Inc. **
STAR	Star-Ledger *
STOKOE, G	Stokoe, Grant **
STOKOE, K	Stokoe, Kim Neuhoff **
STPETE	St. Petersburg Times *
STRITCHKO	Stritchko, Jim **
STUART	Stuart News *
SUBURBAN	Suburban Stationers, Inc **
SUFFOLK	Suffolk Life Newspapers **
SUN	Sun Newspapers *
SUPERIOR	Superior Office Products & Furniture Systems **
SUTTON	Sutton Marketing *
S&W	Sullivan & Worcester*
SYRACUSE	Syracuse Newspapers*
TALK800	Talk800*
TAYLOR	Taylor's Stationers**
TCI	Thomas Cook, Inc.*
TCPS	Telephone Check Payment Systems*
TELENATIONAL	Telenational Marketing*
TELESULTANTS	TeleSultants**

APPENDIX—LIST OF COMMENTERS AND ACRONYMS, TELEMARKETING SALES RULE PROPOSALS—Continued

Acronym	Commenter
TEZANOS	Tezanos, Maritza*
THOMPSON	Thompson's of Morgantown, Inc.**
THOMSON	Thomson, Ruth M.**
THORNTON	Thornton, Kevin A.**
THUMB	Thumb Office Supply, Inc.**
T-I	Times-Independent*
TIEDT	Tiedt, Thomas N.***
TIEGS	Tiegs, Curtis D.**
TIME WARNER	Time Warner***
TIMES TRENTON	Times of Trenton*
TITUS	Titus, The Honorable Dina (2 letters)*
TM	Telemarketing Magazine**
TMG	Television Marketing Group*
TMO	Total Marketing Outbound, Inc.*
TMW	TMW Marketing*
TOTAL	Total Office Products & Service**
TOWNE	Towne Office Supply**
TP	Times Picayune***
TPA	Tennessee Press Association, Inc.*
TRIBUNE	Tribune Products Company**
TUCKER	Tucker, H.J.**
TULANDER	Tulander, Jerry and Alan**
TUPPERWARE	Tupperware Worldwide*
TVMARKET	TV Marketplace, Inc.*
UACU	United Airlines Employees Credit Union**
UCI	United Color, Inc.*
UHL	Uhl, J.M.**
UMI	Universal Media, Inc.*
UNION	Union-News*
UPS	United Parcel Service, Inc.*
USCE	U.S. Coin Exchange*
USD	University of San Diego, Center for Public Interest Law*
USPS	U.S. Postal Service***
USTA	United States Telephone Association*
USWI	US West, Inc.*
VBA	Virginia Bankers Association**
VENTURA	Ventura County Star*
VIACOM	Viacom International***
VINCENT	Vincent, Chorey, Taylor & Feil*
VINSON	M.A. Vinson Construction Co.**
VIRGINIA	Virginia State Corporation Commission*
VT AG	Vermont Attorney General's Office**
WACHOVIA	Wachovia Corporation*
WADDLE	Waddle, Mr. Shannon**
WALDOON	Waldoon, James B.**
WALNUT	Walnut Telephone Company**
WARD	Ward, Doris L.**
WARD	Montgomery Ward*
WASHINGTON	The Washington Post***
WAUGH	Waugh, John C.*
WAY	Way Office Products Inc.**
WEBB	Webb, Mrs. Alice**
WEBER, G	Weber, G.E.**
WEBER	Ron Weber and Associates*
WESTVACO	Westvaco, Corp.*
WFNNB	World Financial Network National Bank*
WHITLEY	Whitley, Claude & Evelyn**
WILLIAMS	Williams Television Time*
WILSON, A	Wilson, A.M.**
WILSON, C	Wilson, Charles R.**
WILSON	Wilson Daily Times*
WINCHESTER	Winchester Sun*
WINDSOR	Windsor Vineyards*
WINONA	Winona Post*
WISE	Wise, Dorothy**
WOODARD	Woodard, James P.**
WOODBOURNE	Woodbourne International (comments forwarded by The Honorable Sam Nunn and The Honorable Kay Bailey Hutchison)*
WRIGHT, A	Wright, Albert R.**
WRIGHT, J	Wright, Joseph**
WRINKLE	Wrinkle, Glenn E.**
WTC	Wilmington Trust Company*

APPENDIX—LIST OF COMMENTERS AND ACRONYMS, TELEMARKETING SALES RULE PROPOSALS—Continued

Acronym	Commenter
WTO	West Telemarketing Outbound*
WU	Western Union*
YINGLING	Yingling, Thomas**
YOUNGBERG	Youngberg, Arthur D.*
ZIRGER	Zirger, Louise**

Notes:

* Filed comment to the originally proposed Rule.

** Filed comment to the revised proposed Rule.

*** Filed comments to both proposed Rules.

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