

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

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

4. *Investment opportunity.* The initially proposed Rule defined the term "investment opportunity"²⁷ to include "anything, tangible or intangible, excluding a business venture, that is offered, offered for sale, sold, or traded (1) to be held, wholly or in part, for purposes of profit or income; or (2) based wholly or in part on representations, either express or implied, about past, present or future income, profit, or appreciation."²⁸ A number of commenters suggested that this definition should be based solely on

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

The initially proposed definition also expressly stated that the term "investment opportunity" includes, but is not limited to, "any business arrangement where persons acquire, or purportedly acquire, government-issued licenses or interests in one or more businesses derived from the possession of such licenses." Upon further consideration, the Commission believes this clause is unnecessary because government-issued licenses or interests derived from such licenses are indisputably within the jurisdiction of the Commission. The Commission therefore has deleted the foregoing extraneous clause from the revised proposed Rule, but has added clarification that the definition of the term, "investment opportunity" *does not* include "sales of franchises subject to the Commission's [Franchise Rule] (cite omitted)."

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

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

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

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

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

The initially proposed Rule defined "prize promotion"³⁴ to include

³¹ The initially proposed Rule defined "prize" as "anything offered, or purportedly offered, to a person at no cost and with no obligation to purchase goods or services and given, or purportedly given, by chance." Initially proposed Rule Section 310.2(q).

³² NAAG at 9. See also IA DOJ at 20.

³³ USPS at 3.

³⁴ Initially proposed Rule Section 310.2(r).

²⁴ See MasterCard at 6.

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

²⁶ Initially proposed Rule Section 310.2(j).

²⁷ Initially proposed Rule Section 310.2(k).

²⁸ As noted in the NPR, Sections 3(d) and (e) of the Telemarketing Act, 15 U.S.C. 6102(d) and (e), exclude from Rule coverage any of the following persons: a broker, dealer, transfer agent, municipal securities dealer, municipal securities broker, government securities broker, government securities dealer [as those terms are defined in Section 3(a) of the Securities and Exchange Act of 1934, 15 U.S.C. 78c(a)], an investment adviser [as that term is defined in Section 202(a)(11) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-2(a)(11)], an investment company [as that term is defined in Section 3(a) of the Investment Company Act of 1940, 15 U.S.C. 80a-3(a)], any individual associated with those persons, or any persons described in Section 6(f)(1) of the Commodity Exchange Act, 7 U.S.C. 8, 9, 15, 13b, 9a.

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

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