

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

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

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

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

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

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

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

Telemarketing means a plan, program, or campaign which is conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to

the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

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

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

⁴² 15 U.S.C. 6106(4).

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

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

⁴⁵ See, e.g., DSA at 6; NRF at 20-21.

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

⁴⁷ E.g., DMA at 17-18; MPA at 8-9.

³⁵ NAAG at 10.

³⁶ Initially proposed Rule Section 310.2(s).

³⁷ Tr. at 666.

³⁸ *Id.*

³⁹ Initially proposed Rule Section 310.2(u).

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

⁴¹ Initially proposed Rule Section 310.2(v).