

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

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

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

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

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

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

Section 310.3 Deceptive Telemarketing Acts or Practices

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

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

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

⁵¹ 60 FR at 8315.

⁵² See, e.g., MPA at 19; NRF at 35.

⁵³ Initially proposed Rule Section 310.2(x).

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

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

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

⁴⁹ E.g., NRF at 24.

⁵⁰ See, e.g., WFNNB at 1.