

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

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

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

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

Section 310.5 Recordkeeping Requirements

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

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

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

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

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

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

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

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

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

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

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

Some commenters requested clarification of certain recordkeeping

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

¹⁴⁷ See, e.g., Monex at 16–17.

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

¹⁴⁹ Initially proposed Rule Section 310.4(f).

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

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

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

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

¹⁵⁴ See, e.g., RPI at 1; BSA at 14.

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

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

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

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

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

¹⁶⁰ See ARDA at 36–37.