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The revised proposed Rule incorporates the suggestions of numerous commenters and exempts transactions that are subject to extensive requirements under other Commission rules.¹⁷² Section 310.6(a) exempts payper-call services subject to the FTC's 900 Number Rule.¹⁷³ Additionally, the Commission has clarified the definition of "investment opportunity" in Section 310.2(j) of the revised proposed Rule to expressly state that the term does not include sales of franchises subject to the FTC's Franchise Rule.174

Many commenters suggested exemptions based on other FTC rules, statutes, and regulations, for example, the Negative Option Rule, 16 CFR Part 425, FDCPA, 15 U.S.C. 1692, and the TILA, 15 U.S.C. 1601 et seq.).175 The Commission believes that changing the phrase "induce payment" to "induce purchase" in the definition of 'telemarketing'' clarifies that debt collection practices are not covered by this Rule. With regard to credit statutes such as the TILA and the Consumer Leasing Act ["CLA"], 15 U.S.C. 1667, the Commission believes that the revised proposed Rule's disclosure requirements do not conflict or overlap with those statutes. It is therefore unnecessary to specifically exempt transactions subject to the TILA and CLA from the provisions of this Rule. Similarly, the Commission believes that the disclosure provisions of the Negative Option Rule do not conflict or overlap with the provisions of this Rule and therefore there is no need to exempt those transactions.

Other commenters asked that the Commission exempt those entities that are not subject to the FTC Act.¹⁷⁶ The revised proposed Rule has added language to Section 310.1 that clarifies the scope of the Rule in accordance with those comments. Many of these commenters, however, also asked that agents of exempt entities or of entities engaging in exempt activities similarly be exempted from the Rule's provisions.¹⁷⁷ The Commission rejects such an extension. Exemptions under the FTC Act are either based on

"status," or a specific activity.¹⁷⁸ Exempting agents is contrary to the Commission's assertion of its jurisdiction under established case law. This Rule will cover sellers and telemarketers who do not fall within those status or activity-based exemptions of the FTC Act. Moreover, the Commission's decision is consistent with Congressional intent that the Telemarketing Act neither expand nor contract the Commission's authority.179

Section 310.6(b) of the revised proposed Rule exempts "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 during which the customer has the opportunity to examine the goods or services offered." In addition to Congress' clear intent not to cover such transactions,180 numerous commenters explained how face-to-face sales are not the type of telemarketing transactions that Congress was concerned about in passing the Telemarketing Act.¹⁸¹ The Commission agrees that such face-to-face contacts where consumers have the opportunity to examine the goods or services should be exempt under the Rule. This exemption also applies to telephone contacts made subsequent to a face-toface sales presentation to the extent such contacts are for the sole purpose of consummating the sale of goods or services that the customer had the opportunity to examine.

Section 310.6(c) of the revised proposed Rule exempts telephone calls initiated by a customer that are not the result of any solicitation by the seller or telemarketer. The Commission added this exemption to address many commenters' concerns that the definition of telemarketing might include an inbound call from a customer to make hotel, airline, car rental or similar reservations, to place carry-out or restaurant delivery orders, obtain information or customer technical support, or other incidental uses of the telephone that were not in response to a direct solicitation.¹⁸² This exemption is consistent with Congress' intent not to cover transactions involving incidental use of the telephone.183

The Commission has replaced former Section 310.6(c) with revised Sections 310.6(d) and (e). Section 310.6(c) of the initially proposed Rule had exempted telephone contacts made by a person "when there has been no initial sales contact directed to that particular person, by telephone or otherwise, from the seller or telemarketer." Many commenters expressed confusion over what was meant by "initial sales contact" or "directed to that particular person," and requested that the Commission clarify the scope of this exemption.¹⁸⁴ The Commission agrees that clarification is needed as to the scope of this exemption. Revised proposed Sections 310.6(d) and (e) now treat separately calls prompted by advertisements in any media, other than direct mail solicitations, and calls prompted by direct mail solicitations. Revised Section 310.6(d) exempts "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 Sections 310.4(a)(2)-(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." The revised language of Section 310.5(d) addresses some commenters' concerns that calls in response to television commercials, infomercials, magazine and newspaper advertisements, and other forms of mass media advertising would be covered by the Rule.¹⁸⁵ The Commission does not intend that telephone contacts in response to general media advertising be covered under the Rule. Rather, 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 fraudulent sellers and 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

- 184 See, e.g., ANA at 10-11; Viacom at 6-7; Olan
- at 27; AFSA at 3-4; QVC at 13-14; DMA at 37; MPA at 9; Time Warner at 26-27.

¹⁷² See, e.g., IFA at 4; Time Warner at 44–45; CHC at 7; ISA at 20-27; PMAA at 34-38.

¹⁷³ "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992," 16 CFR Part 308.

¹⁷⁴ "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures." 16 CFR Part 436.

¹⁷⁵ See, e.g., BOB at 2; ANA at 14; ABA at 3; ACA at 1; Advanta at 2; MBNA at 1.

¹⁷⁶ See, e.g., GHAA at 3; AT&T at 6–13; AmEx at 3; ABA at 1; BOB at 1; ASAE at 2; SCIC at 7.

¹⁷⁷ See, e.g., ABA at 1; Advanta at 1; Chase at 2; Citicorp at 3; NFN at 2.

¹⁷⁸ See 15 U.S.C. 44 and 45(a)(2). For examples of status exemptions, see FTC v. Green Tree Acceptance Corp., No. CA-4-86-469-K, slip op. (N.D. Tx. Sep. 30, 1987); Official Airlines Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980); FTC v. Miller, 549 F.2d 452 (7th Cir. 1977); Breen Air Freight, Ltd. v. Air Cargo, Inc., 470 F.2d 767 (2d Cir. 1972). For an example of an activity exemption, see Community Blood Bank of Kansas City, Inc. v. FTC, 405 F.2d 1011 (8th Cir. 1969).

¹⁷⁹ See Senate Report at 14.

¹⁸⁰ House Report at 7; Senate Report at 7-8. 181 See, e.g., DSA.

¹⁸² See, e.g., ACRA at 6; DSA at 5; Olan at 19-20; Viacom at 6-7; MCI at 5-6.

¹⁸³ Senate Report at 8.

¹⁸⁵ See, e.g., INTV at 4; QVC at 2–3; NAA at 10–12; ANA at 10–11.