experience with these fraudulent telemarketing schemes being marketed through television commercials, infomercials, magazine and newspaper advertisements, and other forms of mass media advertising, the Commission has excluded these activities from the general media advertising exemption.

The revised proposed Kule no longer excludes "prize promotions" from the general media exemption because the Commission believes that the majority of fraudulent prize promotions do not employ mass media or general advertising. In addition, the revised proposed Rule has dropped 'employment services" as one of the exceptions to the general media exemption. Although the Commission and other law enforcement agencies have brought actions against advance fee employment services that use mass media advertising, many legitimate employment services use the same type of mass media advertising and also require advance fees. The Commission believes that neither the legislative history of the Telemarketing Act nor the rulemaking record for the Rule provide a sufficient basis for singling out the employment service industry for an exception to the general media advertising exemption. Deceptive employment opportunity advertising will, however, still be subject to enforcement actions under the FTC Act.

Section 310.6(e) exempts telephone calls initiated by a customer in response to "a direct mail solicitation that clearly and conspicuously discloses all material information listed in Section 310.3(a)(1) of this Rule for any item offered in the direct mail solicitation; provided, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to investment opportunities, goods or services described in Sections 310.4(a)(2)-(3), or direct mail solicitations 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." Some commenters suggested that the Commission include under the general media exemption all direct mail solicitations—which, in effect, would have excluded all inbound calls from coverage under the Rule. However, the Commission's enforcement experience demonstrates that deceptive telemarketers frequently use direct mail solicitations as an integral part of their fraudulent schemes. Inbound calls prompted by such solicitations frequently result in the caller being subjected to the deceptive practices the Telemarketing Act is designed to

address. Therefore, the Commission has determined that including all direct mail solicitations within the general media exemption is unworkable. The Commission acknowledges, however, that most direct mail solicitations are not deceptive. In particular, the likelihood of deception is greatly diminished when direct mail solicitations contain all material information about the offered goods or services. Revised Section 310.6(e) therefore exempts only those direct mail solicitations that disclose, clearly and conspicuously, all the information specified in Section 310.3(a)(1) as material to a person's purchase decision. As in the general media exemption, revised Section 310.6(e) excludes from this exemption direct mail solicitations relating to investment opportunities, specific credit-related programs, and recovery rooms because of the Commission's enforcement experience in these areas.

The Commission decided to delete the "de minimis" exemption for incidental telemarketing activity contained in former Section 310.6(a). Comments indicate that neither the law enforcement nor the business communities found such an exemption helpful or workable. Law enforcement agencies believed that the exemption would hamper quick law enforcement, while providing a loophole for fraudulent telemarketers who specialize in high-price scams directed at only a few victims. 186 The business community found the exemption to be so restrictive that it would be of little significance. 187 The Commission agrees with those observations and believes that revisions made elsewhere in the revised proposed Rule, including exemptions in Section 310.6, eliminate the need for this specific exemption.

Comments about the initially proposed "business-to-business" exemption ¹⁸⁸ fell to opposite extremes. Several industry commenters asked that the exemption be expanded to include entities other than businesses. ¹⁸⁹ Other commenters asked that the Commission clarify the type of office supplies excluded from the exemption. ¹⁹⁰ Still other industry commenters suggested that a "business-to-business" exemption was only defensible if provided on an across-the-board basis, without exceptions. ¹⁹¹ On the other hand, law

Because the Commission has extensive enforcement experience pertaining to deceptive telemarketing directed to businesses, it does not believe that an across-the-board exemption for business-to-business contacts is appropriate. The Commission does agree, however, that clarification of the goods or services that are *excluded* from this exemption is necessary. Revised Section 310.6(f) states that only the retail sale of *nondurable* office or cleaning supplies are excluded from the exemption.¹⁹³

Many commenters suggested an exemption for transactions where the customer is able to examine the goods or services before paying for them but does not involve a face-to-face sales presentation. 194 The Commission does not believe such an exemption is necessary, given the changes elsewhere in the revised proposed Rule, as noted above.

Many commenters suggested an exemption based on a prior business relationship with the customer. 195 The Commission does not believe that such an exemption would be workable in the context of telemarketing fraud. A fraudulent telemarketer need only obtain an initial purchase from an unsuspecting victim to claim a "prior business relationship" exemption.

In addition, many commenters suggested an exemption for "established businesses," including businesses that offer basic customer protection policies such as a moneyback guarantee. 196 The Commission agrees with the comments of other law enforcement agencies that such broad-based "safe harbor" provisions are not appropriate. 197

Such a "safe harbor" or "established business" exemption might have an anticompetitive effect on new businesses entering the market. In addition, the experience of law enforcement agencies indicates that much telemarketing fraud is perpetrated by so-called "established businesses." Furthermore, the existence of policies such as a moneyback guarantee is no assurance that the company is not fraudulent. Law enforcement agencies are well aware that fraudulent

enforcement and consumer agencies urged the Commission to exclude additional goods or services from the business-to-business exemption.¹⁹²

¹⁸⁶ See, e.g., NYSCPB at 13; NACAA at 6; NAAG at 38–40; IA DOJ at 21.

¹⁸⁷ See, e.g., DMA at 36; Olan at 27; ICTA at 57; AAAA at 6.

¹⁸⁸ Initially proposed Rule Section 310.6(b).

¹⁸⁹ See, e.g., Viacom at 9.

¹⁹⁰ See, e.g., IBM at 28; BPIA at 4.

¹⁹¹ See DMA at 36-37.

 $^{^{192}\,} See$ NAAG at 41; ID AG at 2; USPS at 25.

¹⁹³ See, e.g., IBM at 28; BPIA at 4.

¹⁹⁴ See, e.g., CHC at 8, 12.

¹⁹⁵ See, e.g., ARDA at 39; ACRA at 9–10; MSSC at 27; Time Warner at 44; ADC at 2; DMA at 38.

¹⁹⁶ See, e.g., Time Warner at 23–26; DMA at 38; AmEx at 2; APAC at 1–2,6; Viacom at 6; Olan at 28; ACRA at 10; ARDA at 40; NRF at 17–18.

¹⁹⁷ See, e.g., Tr. at 705-26.