

(5) Consequently, Congress should enact legislation that will offer consumers necessary protection from telemarketing deception and abuse.

Based on the above findings, Congress directed the Commission to issue a rule, within 365 days from the date of enactment of the Act, prohibiting deceptive and abusive telemarketing acts and practices.² The Act specifies that the rule shall contain a definition of deceptive telemarketing acts or practices.³ According to the statute, this definition may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering.⁴ The Act further specifies that, in order to prohibit other abusive acts or practices, the rule shall include:

(1) A requirement prohibiting a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy;

(2) Restrictions on the hours when unsolicited telephone calls can be made to consumers; and

(3) A requirement that telemarketers promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services, and make any other disclosures the Commission deems appropriate, including the nature and price of the goods or services being sold.⁵ The Act also directs the Commission to consider recordkeeping requirements.⁶

Enforcement actions for violations of the final rule will be brought by the Commission in the same manner as for other rules with respect to unfair or deceptive acts or practices under section 5 of the FTC Act.⁷ In addition, Section 4 of the Telemarketing Act⁸ authorizes the attorneys general of the States to enforce compliance with the final rule by instituting Federal court enforcement actions, after serving prior written notice upon the Commission when feasible. Moreover, Section 5 of the Telemarketing Act⁹ authorizes actions, in Federal district court, by private persons adversely affected by any pattern or practice of telemarketing which violates the final rule, where the amount in controversy exceeds \$50,000

in actual damages for each such person. As with State actions, such private persons must give prior written notice to the Commission, when feasible.

Section B of this notice discusses the proposed rule that the Commission has drafted pursuant to the Telemarketing Act.

Section B. Discussion of the Proposed Rule

Section 310.1 Scope of the Regulations

Section 310.1 states that this part implements the Telemarketing Act, and shall be referred to as the "Telemarketing Sales Rule."

Section 310.2 Definitions

Section 310.2 of the proposed rule defines the following terms: Acquirer; attorney general; business venture; cardholder; Commission; credit card; credit card sales draft; credit card system; customer; goods or services; investment opportunity; material; merchant; merchant agreement; person; premium; prize; prize promotion; seller; State; telemarketer; telemarketing; telephone solicitation; and verifiable retail sales price.

The definition of "telemarketing" sets the parameters of the proposed rule's coverage. It tracks the definition of "telemarketing" included in the Telemarketing Act, with certain additions noted below.¹⁰ As set forth in the Act, telemarketing is defined as any plan, program, or campaign which is conducted to induce payment for goods or services by use of one or more telephones and which involves more than one interstate telephone call.¹¹ One addition to the definition in the proposed rule clarifies that telemarketing includes the use of a facsimile machine, computer modem, or any other telephonic medium.¹² Another addition to the definition explicitly states that telemarketing includes not just calls initiated by telemarketers, but also calls initiated by persons in response to any form of promotional messages used by or on

behalf of the seller, including postcards, brochures and advertisements.

The Telemarketing Act and the proposed rule exempt from the definition of telemarketing all solicitations of sales through the mailing of a catalog,¹³ when the person making the solicitation does not call customers but only receives calls from customers in response to the catalog and only takes orders during those calls, without further solicitation. The proposed rule states that during such calls from customers, the person taking the order may provide further information to the customer about, or may try to sell, any other item included in the same catalog which prompted the customer's calls without losing the exemption from the definition of "telemarketing."

A number of terms are used in the proposed rule's prohibitions on credit card laundering. The term "acquirer" is defined, in § 310.2(a) of the proposed rule, to include any business organization, financial institution, or agent of such organization or institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for anything of value. The term "credit card" is defined expansively, in § 310.2(f), to include any instrument or device, however named, used by a cardholder to obtain money, goods, services, or anything else of value. § 310.2(g) defines a "credit card sales draft" as any record or evidence, including a writing or an electronic or magnetic transmission or record, of a credit card transaction. The term "credit card system" is defined, in § 310.2(h), as any method or procedure used to generate, transmit, or process for payment a credit card sales draft. For purposes of this rule, the term "merchant" is narrowly defined, in § 310.2(m), to include only those persons authorized under a written contract with an acquirer to honor or accept, transmit, or process credit cards in payment for goods or services. Finally, § 310.2(n) defines the term "merchant agreement" as the written contract between a merchant and an acquirer.

The proposed rule includes certain requirements for the telemarketing sale of business ventures and investment opportunities. The term "business venture" is defined, in § 310.2(c) of the

¹⁰ See 15 U.S.C. 6106(4).

¹¹ The Act's definition of the term "telemarketing" states that the plan, program, or campaign must be conducted to induce the purchase of goods or services. The proposed rule states that the plan, program, or campaign must be conducted to induce payment for goods or services. This change is intended to make clear that the definition of telemarketing includes plans, programs, or campaigns conducted to induce rentals or leases, as well as certain donations.

¹² Since telemarketing includes the use of computer modems and other telephonic media, the proposed definition states that telemarketing involves not just telephone calls, but also telephone connections.

¹³ The Telemarketing Act and the proposed rule require catalogs to include multiple pages of written descriptions or illustrations of the goods or services being offered for sale, to include a business address of the seller, and to be issued not less frequently than once a year.

² 15 U.S.C. 6102(b).

³ 15 U.S.C. 6102(a)(2).

⁴ *Id.*

⁵ 15 U.S.C. 6102(a)(3).

⁶ *Id.*

⁷ 15 U.S.C. 45. The Telemarketing Act provides that the FTC rule shall be treated as a rule issued under section 18(a)(1)(B) of the FTC Act, 15 U.S.C. 57a(a)(1)(B).

⁸ 15 U.S.C. 6103.

⁹ 15 U.S.C. 6104.