

proposed rule, to include any written or oral business arrangement, however named, including but not limited to franchises,¹⁴ which consists of the payment of consideration for (1) the right or means to offer, sell, or distribute goods or services, and (2) the promise of more than nominal assistance in establishing, maintaining or operating a new business, or an existing business that is entering into a new line or type of business. The term "investment opportunity" is defined, in § 310.2(k), to include anything, tangible or intangible, except a business venture, that is offered, offered for sale, sold, or traded either for purposes of profit or income or based on express or implied representations about income, profit, or appreciation.¹⁵ In addition, these two definitions state that any business arrangement in which persons acquire, or purportedly acquire, government-issued licenses, or interests in one or more businesses derived from the possession of such licenses, are considered to be an "investment opportunity," and not a "business venture."

The term "goods or services" is defined expansively, in § 310.2(j), to cover virtually any item for which payment can be induced over the telephone. A list of specific items is included in the definition for illustrative purposes only.¹⁶

The proposed definition for "material," in § 310.2(l), is taken from the Commission's deception

statement.¹⁷ It states that material means likely to affect a consumer's choice of, or conduct regarding, goods or services.

The proposed rule defines "prize" and "premium" in a relatively parallel fashion. Section 310.2(q) states that a "prize" means anything offered, or purportedly offered, to a person at no cost and with no obligation to purchase goods or services and given, or purportedly given, by chance. A "premium," on the other hand, is defined in § 310.2(p) as anything offered or given, independent of chance, to customers as an incentive to purchase goods or services offered through telemarketing.

The proposed definition of "prize promotion," set forth in § 310.2(r), includes the traditional sweepstakes or other game of chance as well as any oral or written representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize. Thus, the definition of "prize promotion" covers not only legitimate contests or sweepstakes, but also fraudulent representations that a consumer has won a prize, when no such prize is to be distributed.

A "seller" is defined, in § 310.2(s) of the proposed rule, as any person who, in conjunction with telemarketing, provides or offers to provide goods or services in exchange for consideration or a donation. A "telemarketer," on the other hand, is defined in § 310.2(u) as any person who, in connection with telemarketing, initiates or receives a telephonic communication from a customer. Since many of the provisions in the proposed rule apply to both the seller and the telemarketer, these two definitions make clear that the proposed rule's obligations run not only to the person making or answering a telephone call or telephonic communication from a consumer, but also to the business providing the goods or services to be sold during that call.¹⁸

The definition of "telephone solicitation," in § 310.2(w) of the proposed rule, is intended to include only out-bound sales calls, i.e., telephone calls that are initiated by a telemarketer to a customer to induce payment for goods or services.

¹⁷The Commission's Deception Statement, first set out in a letter dated October 14, 1983, to the Honorable John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, is attached as an appendix to Cliffdale Associates, 103 F.T.C. 110 (1984). See also Thompson Medical Co., 104 F.T.C. 648, 816 (1984).

¹⁸It is possible for a person to be both a seller and a telemarketer in the same transaction, if that person both provides the goods or services in exchange for consideration or a donation and engages in the telephone calls with consumers.

Finally, the definition of "verifiable retail sales price," in § 310.2(x), is based on the Commission's Guides Against Deceptive Pricing.¹⁹ The term means the actual, bona fide price at which one or more retailers, in the area of the seller's principal place of business, has made a substantial number of sales. The seller must be able to document such a retail sales price.

Section 310.3 Deceptive Telemarketing Acts or Practices

Section 310.3 of the proposed rule includes lists of specific, deceptive telemarketing acts or practices prohibited under the rule. It also sets forth prohibited acts or practices that assist and facilitate deceptive telemarketing. This Section ends with prohibitions on the practice of credit card laundering.

1. Prohibited Deceptive Telemarketing Acts or Practices

Section 310.3(a) of the proposed rule states that certain acts or practices, when conducted by any seller or telemarketer, are considered deceptive telemarketing acts or practices and violations of the rule. The first subsection prohibits the failure to disclose certain information before payment is requested for goods or services. The second subsection lists a series of prohibited misrepresentations covering all telemarketing transactions, while the third subsection lists prohibited misrepresentations in connection with the offer, offer for sale, or sale of any business venture. The final two subsections prohibit obtaining funds without proper authorization.

Section 310.3(a)(1) of the proposed rule states that it is a prohibited deceptive telemarketing practice for any seller or telemarketer to fail to disclose certain material information before payment is requested for goods or services offered.²⁰ These disclosures must be made in the same manner and form as the payment request. The information required to be disclosed is as follows: First, the total costs, terms and material restrictions, limitations, or conditions of receiving any goods or services; second, the quantity of any goods or services sold; and third, all material terms and conditions of the seller's refund, cancellation, exchange, or repurchase policies, including a

¹⁹16 CFR Part 233.

²⁰The proposed rule permits sellers or telemarketers to discuss the price of goods or services with potential customers before disclosing the required information, but they may not ask that payment be made until after the disclosures are made.

¹⁴The term "franchise" is defined in the FTC Franchise Rule, formally entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," at 16 CFR 436.2(a).

¹⁵The application of the proposed rule to investment opportunities is limited, to some extent, by sections 3(d) and (e) of the Telemarketing Act, 15 U.S.C. 6102(d) and (e), which exclude from rule coverage any of the following persons: A broker, dealer, transfer agent, municipal securities dealer, municipal securities broker, government securities broker, government securities dealer (as those terms are defined in section 3(a) of the Securities and Exchange Act of 1934, 15 U.S.C. 78c(a)), an investment adviser (as that term is defined in Section 202(a)(11) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-2(a)(11)), an investment company (as that term is defined in section 3(a) of the Investment Company Act of 1940, 15 U.S.C. 80a-3(a)), any individual associated with those persons, or any persons described in section 6(f)(1) of the Commodity Exchange Act, 7 U.S.C. 8, 9, 15, 13b, 9a.

¹⁶The term "goods or services" specifically includes any charitable service that is promoted in conjunction with any offer of a prize, chance to win a prize, or opportunity to purchase any other goods or services. Thus, plans, programs, or campaigns conducted to induce payment for such charitable services are the only charitable solicitations covered by the proposed rule. In addition, only charitable solicitations conducted by an entity "organized to carry on business for its own profit or that of its members" are within the jurisdiction of the Commission. See 15 U.S.C. 44.