

can be adopted.”<sup>223</sup> NACAA suggested that the Commission require disclosure of the total cost of the contract, noting that consumers do not always have the time or ability to “do the math” during a telemarketing call.<sup>224</sup> NCL concurred with LSAP and NACAA, and noted that since the seller or telemarketer would know the total contract price in an installment offer, it would impose no undue burden on industry members to mandate disclosure of the total contract price.<sup>225</sup>

The Commission declines to adopt the recommendations to modify the total cost disclosure provision. The Commission believes that its interpretation, set forth in the NPRM, allows sellers and telemarketers the flexibility necessary to make a truthful and meaningful disclosure when goods or services are offered in conjunction with an open-ended installment agreement. The Commission’s interpretation makes clear, however, that, at a minimum, the total number of payments and the amount of each must be clearly and conspicuously disclosed in order to satisfy the requirements of § 310.3(a)(1)(i). Although the Commission continues to believe that the best practice is for the telemarketer or seller to disclose the full amount of payments under of the contract whenever possible, it declines to impose such a requirement, which would be unworkable in the context of open-ended contracts, such as negative option plans.<sup>226</sup>

The Commission also declines to adopt the recommendation that the Commission explicitly state that for electricity sales, it is permissible to disclose the price per kilowatt hour.<sup>227</sup> The Commission recognizes that a vast number of goods and services can be sold through telemarketing, and believes it unnecessary to specify, for each, the specific terms that must be disclosed. Rather, the Commission believes that the language of § 310.3(a)(1)(i), which requires that the disclosure of total costs (among others) be made “truthfully, and in a clear and conspicuous manner,” provides sufficient guidance for sellers who must make these disclosures, without necessitating explicit approval from the Commission for each of the

myriad variations of “total cost” disclosures for the many kinds of goods and services sold through telemarketing. Therefore, § 310.3(a)(1)(i) is retained unchanged in the amended Rule.

*§ 310.3(a)(1)(ii) — Disclosure of material restrictions*

Section 310.3(a)(1)(ii) requires the disclosure of “[a]ll material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer.” In response to the Rule Review, NAAG recommended that this provision explicitly state that the illegality of the goods or services offered is a material term. NAAG’s concern arose out of the numerous cross-border foreign lottery scams in which U.S. citizens are offered the sale of foreign lottery chances.<sup>228</sup> The Commission declined to modify the Rule, stating its position that the term “material” is “sufficiently clear and broad enough to encompass the illegality of goods or services offered.”<sup>229</sup>

In response to the NPRM, DOJ supported NAAG’s reasoning, and recommended that the Commission add to § 310.3(a)(1)(ii) “a specific and unambiguous reference to the illegality of goods and services that the seller or telemarketer is offering,” noting that such an amendment would enhance law enforcement and consumer education efforts regarding foreign lottery scams.<sup>230</sup> The Commission remains confident that the breadth of the term “material,” as used in the Rule, would necessarily encompass the underlying illegality of goods or services offered in telemarketing.<sup>231</sup> Therefore, the Commission declines to modify the language in this provision and the amended Rule retains unchanged the original text of § 310.3(a)(1)(ii).

*§ 310.3(a)(1)(iv) — Disclosures regarding prize promotions*

Section 310.3(a)(1)(iv) requires that, in any prize promotion, a telemarketer must disclose, before a customer pays, the odds of being able to receive the prize, that no purchase or payment is required to win a prize or participate in a prize promotion, and the no-purchase/no-payment method of participating in the prize promotion. In the NPRM, the Commission proposed adding a disclosure that making a purchase will

not improve a customer’s chances of winning,<sup>232</sup> which would make the TSR’s disclosure provision consistent with the requirements for direct mail solicitations under the Deceptive Mail Prevention and Enforcement Act of 1999 (“DMPEA”).<sup>233</sup> After reviewing the record in this matter, the Commission has determined to amend the Rule by adding this disclosure requirement to two provisions: in § 310.3(a)(1) (governing all telemarketing calls), and in § 310.4(d) (governing outbound telemarketing).<sup>234</sup>

As noted in the NPRM, the Commission believes that this disclosure will prevent consumer deception. The legislative history of the DMPEA suggests that without such a disclosure, many consumers reasonably interpret the overall presentation of many prize promotions to convey the message that making a purchase will enhance their chances of winning the touted prize.<sup>235</sup> Such a message is likely

<sup>222</sup> 67 FR at 4503. Although NCL originally made this suggestion with respect to § 310.4(d), which governs oral disclosures required in outbound telemarketing calls, the rationale and purpose of the proposed disclosure applies with equal force to all telemarketing, as covered by § 310.3(a). See NCL-RR at 9. See also the discussion below in the section on sweepstakes disclosures within the analysis of § 310.4(d).

<sup>223</sup> 67 FR at 4503. The DMPEA is codified at 39 U.S.C. 3001(k)(3)(A)(II). See also “The DMA Guidelines for Ethical Business Practice,” revised Aug. 1999, at <http://www.the-dma.org/library/guidelines/dotherightthing.shtml#23> (Article #23, Chances of Winning). In this regard, it is noteworthy that the DMA’s Code of Ethics advises that “[n]o sweepstakes promotion, or any of its parts, should represent . . . that any entry stands a greater chance of winning a prize than any other entry when this is not the case.”

<sup>224</sup> See discussion below regarding the disclosure in § 310.4(d).

<sup>225</sup> See SEN. REP. NO. 106-102 (1999); and H. REP. NO. 106-431 (1999). Law enforcement actions since enactment of DMPEA further support this conclusion. For example, Publishers Clearing House (“PCH”) agreed to settle an action brought by 24 states and the District of Columbia alleging, among other things, that the PCH sweepstakes mailings deceived consumers into believing that their chances of winning the sweepstakes would be improved by buying magazines from PCH. As part of the settlement, PCH agreed to include disclaimers in its mailings stating that buying does not increase the consumer’s chances of winning, and pay \$18.4 million in redress. In 2001, PCH agreed to pay \$34 million in a settlement with the remaining 26 states. See, e.g., *Missouri ex rel. Nixon v. Publishers Clearing House*, Boone County Circuit Ct., No. 99 CC 084409 (2002); *Ohio ex rel. Montgomery v. Publishers Clearing House*, Franklin County Ct. of Common Pleas, No. 00CVH-01-635 (2001). Similarly, in 1999, American Family Publishers (“AFP”) settled several multi-state class actions that alleged the AFP sweepstakes mailings induced consumers to buy magazines to better their chances of winning a sweepstakes. The original suit, filed by 27 states, was settled in March 1998 for \$1.5 million, but was reopened and expanded to 48 states and the District of Columbia after claims that AFP had violated its agreement. The state action was finally settled in August 2000 with AFP agreeing to pay an additional \$8.1 million in

<sup>223</sup> LSAP-NPRM at 7.

<sup>224</sup> NACAA-NPRM at 7-8 (citing, as an example of the harm that would persist absent such a provision, the sale of purportedly “free” magazines, for which consumers are billed exorbitant “shipping and handling” fees).

<sup>225</sup> NCL-NPRM at 3-4.

<sup>226</sup> See 60 FR at 43846 (noting that the total cost of a contract cannot be ascertained in negative option or continuity plans).

<sup>227</sup> See Green Mountain-NPRM at 7.

<sup>228</sup> 67 FR at 4502-03.

<sup>229</sup> *Id.* at 4503.

<sup>230</sup> DOJ-NPRM at 3.

<sup>231</sup> As the Commission noted in the NPRM, the definition of “material” under the Rule comports with the Commission’s Deception Statement and established Commission precedent. See 67 FR at 4503.