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FILED
CLERK, U.S. DISTRICT COURT
FEB 26 2007
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

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RECEIVED
BUT NOT FILED
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CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION
DEPUTY

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

12 FEDERAL TRADE COMMISSION,

Case no. CV06-0849 SJO (OPx)

13 Plaintiff,

v.

~~PROPOSED~~ FINAL ORDER FOR
PERMANENT INJUNCTION AND
OTHER EQUITABLE RELIEF
AGAINST DEFENDANT
MEMBERSHIP SERVICES
DIRECT, INC. (A/K/A
CONTINUITY PARTNERS, INC.)

14 UNIVERSAL PREMIUM SERVICES,
15 INC., a California corporation (also known
16 as Premier Benefits, Inc.); CONSUMER
17 REWARD NETWORK, INC., a California
18 corporation; STAR COMMUNICATIONS
19 LLC, a California limited liability
20 company; MEMBERSHIP SERVICES
21 DIRECT, INC., a Nevada corporation (also
22 known as Continuity Partners, Inc.);
23 CONNECT2USA, INC., a Nevada
24 corporation; MERCHANT RISK
25 MANAGEMENT, INC., a Nevada
26 corporation; PANTEL ONE
27 CORPORATION, a Nevada Corporation;
28 ALL STAR ACCESS, INC., a Colorado
Corporation; PRIME TIME VENTURES,
INC., a Nevada Corporation; BRIAN K.
MACGREGOR; HARIJINDER SIDHU;
JOSEPH F. LAROSA, JR.; PRANOT
SANGPRASIT; WILLIAM THOMAS
HEICHERT; MICHAEL HOWARD
CUSHING; PAUL P. TOSI; MANH D.
CAO; MIDWEST PROPERTIES, INC.;
and CHRISTINE MACGREGOR,

Defendants.

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1 5. There is no genuine issue as to any material fact concerning the liability
2 of Defendant for deceptive and abusive acts and practices in violation of Section 5 of
3 the FTC Act, 15 U.S.C. § 45(a), and the Telemarketing Sales Rule, 16 C.F.R. Part
4 310, or the amount of consumer losses caused by Defendant's deceptive acts and
5 practices.

6 6. At all times relevant to the FTC's Amended Complaint, Defendant was
7 a "seller" or "telemarketer" engaged in "telemarketing" to "customers," as those
8 terms are defined in the TSR.

9 7. Defendant, directly or through its telemarketers, has made false or
10 misleading statements, or assisted others in making false or misleading statements, to
11 induce the purchase of program memberships, in violation of the Section 5 of the
12 FTC Act and the TSR. These false or misleading statements include but are not
13 limited to the following:

14 a. that Defendant will send consumers a valuable free item upon
15 payment of a nominal shipping and handling fee;

16 b. that Defendant already possesses consumers' bank account
17 information;

18 c. that consumers may cancel their memberships in Defendant's
19 programs by following certain procedures;

20 d. that consumers may obtain refunds for amounts paid to Defendant
21 by following certain procedures;

22 e. that Defendant will not make debits from consumers' bank
23 accounts;

24 8. Defendant, directly or through its telemarketers, has engaged in abusive
25 telemarketing practices, or assisted others in engaging in abusive telemarketing
26 practices, to induce the purchase of program memberships. These abusive
27 telemarketing practices include but are not limited to the following:
28

- 1 a. harassing and threatening consumers to obtain their bank account
2 information;
- 3 b. harassing and threatening consumers that the Defendant would
4 misuse consumers' bank account information if they did not consent to debit their
5 accounts for Defendant's membership program fees;
- 6 c. calling consumers repeatedly even after being requested to stop;
- 7 d. debiting the accounts of consumers who have hung up on
8 Defendant's telemarketers; and
- 9 e. debiting the accounts of consumers who have been specifically
10 told by Defendant's telemarketers that the consumer would not be charged.

11 9. Defendant is liable for both injunctive and monetary relief for its
12 violations of the FTC Act and the Telemarketing Sales Rule.

13
14 **DEFINITIONS**

15 For purposes of this Order, the following definitions shall apply:

16 1. **"Assets"** means any legal or equitable interest in, right to, or claim to,
17 any real or personal property, including, without limitation, chattels, goods,
18 instruments, equipment, fixtures, general intangibles, leaseholds, mail or other
19 deliveries, inventory, checks, notes, accounts, credits, contracts, receivables, shares
20 of stock, and all cash, wherever located.

21 2. **"Billing information"** means any data that enables any person to access
22 a customer's or donor's account, such as a credit card, checking, savings, share or
23 similar account, utility bill, mortgage loan account, or debit card.

24 3. **"Customer"** means any person who is or may be required to pay for
25 goods or services offered through telemarketing.

26 4. Unless otherwise specified, **"Defendant"** means Membership Services
27 Direct, Inc. (also known as Continuity Partners, Inc.).

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1 5. **“Document”** is synonymous in meaning and equal in scope to the usage
2 of the term in Federal Rule of Civil Procedure 34(a), and includes writings,
3 drawings, graphs, charts, photographs, audio and video recordings, computer
4 records, and any other data compilations from which information can be obtained. A
5 draft or non-identical copy is a separate document within the meaning of the term.

6 6. **“Donor”** means any person solicited to make a charitable contribution.

7 7. **“Material”** means likely to affect a person's choice of, or conduct
8 regarding, goods or services or a charitable contribution.

9 8. **“Negative option feature”** means, in an offer or agreement to sell or
10 provide any goods or services, a provision under which the customer's silence or
11 failure to take an affirmative action to reject goods or services or to cancel the
12 agreement is interpreted by the seller as acceptance of the offer.

13 9. **“Person”** means any individual, group, unincorporated association,
14 limited or general partnership, corporation, or other business entity.

15 10. **“Plaintiff”** means the Federal Trade Commission.

16 11. **“Preliminary Injunction Order”** means the “Preliminary Injunction
17 with Asset Freeze, Appointment of Permanent Receiver, and Other Equitable Relief”
18 entered in this case on March 22, 2006.

19 12. **“Receiver”** means Robb Evans & Associates LLC, the permanent
20 receiver appointed over the Receivership Defendants in the Preliminary Injunction
21 Order entered on March 22, 2006 in this case. The term “Receiver” also includes
22 any deputy receivers as may be named by the permanent receiver.

23 13. **“Seller”** means any person who provides, offers to provide, or arranges
24 for others to provide goods or services to the customer in exchange for consideration.

25 14. **“Telemarketer”** means any person who, in connection with
26 telemarketing, initiates or receives telephone calls to or from a customer or donor.

27 15. **“Telemarketing”** means a plan, program, or campaign which is
28 conducted to induce the purchase of goods or services or a charitable contribution, by

1 use of one or more telephones and which involves more than one interstate telephone
2 call.

3
4 **I.**
Prohibited Misrepresentations

5 IT IS THEREFORE ORDERED that in connection with the advertising,
6 promotion, offering, or sale of goods or services, Defendant, as well as its officers,
7 agents, servants, employees, and attorneys, and all other persons or entities in active
8 concert or participation with any of them who receive actual notice of this Order by
9 personal service or otherwise, whether acting directly or through any corporation or
10 other entity, subsidiary, division, or other device, including but not limited to
11 fictitious business names, and each such person, are hereby permanently restrained
12 and enjoined from misrepresenting, expressly or by implication, orally or in writing,
13 to any consumer or entity, any material fact, including, but not limited to, any
14 misrepresentations that:

15 A. Defendant or any business under its ownership or control will send the
16 consumers a free item if the consumers pay a shipping and handling fee;

17 B. Defendant or any business under its ownership or control provides a free
18 trial period during which time the consumers will not be charged fees;

19 C. Defendant or any business under its ownership or control provides a
20 cancellation period during which time the consumers may obtain a refund for fees
21 already paid;

22 D. Consumers may cancel their memberships at any time in programs
23 offered by Defendant or any business under its ownership or control; and

24 E. Defendant or any business under its ownership or control is affiliated
25 with or endorsed or sponsored by a person or government entity.

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1 **II.**
2 **Prohibition Against Unauthorized Billing**

3 IT IS FURTHER ORDERED that in connection with the telemarketing of
4 goods or services, Defendant, as well as its officers, agents, servants, employees, and
5 attorneys, and all other persons or entities in active concert or participation with any
6 of them who receive actual notice of this Order by personal service or otherwise,
7 whether acting directly or through any corporation or other entity, subsidiary,
8 division, or other device, including but not limited to fictitious business names, and
9 each such person, are hereby permanently restrained and enjoined from causing
10 billing information to be submitted for payment, directly or indirectly, unless
11 Defendant:

12 A. obtains from the customer, at a minimum, the last four (4) digits of the
13 account number to be charged;

14 B. obtains from the customer his or her express agreement to be charged
15 for the goods or services and to be charged using the account number pursuant to
16 subsection II.A of this Order; and

17 C. makes and maintains an audio recording of the entire telemarketing
18 transaction.

19 **III.**
20 **Prohibition Against Violating Telemarketing Sales Rule**

21 IT IS FURTHER ORDERED that in connection with the advertising,
22 promotion, offering, or sale of goods or services, Defendant, as well as its officers,
23 agents, servants, employees, and attorneys, and all other persons or entities in active
24 concert or participation with any of them who receive actual notice of this Order by
25 personal service or otherwise, whether acting directly or through any corporation or
26 other entity, subsidiary, division, or other device, including but not limited to
27 fictitious business names, and each such person, are hereby permanently restrained
28 and enjoined from violating any provision of the Telemarketing Sales Rule, 16

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1 C.F.R. Part 310, as currently promulgated (attached to this Order as *Appendix A*) or
2 as hereinafter may be amended, including but not limited to:

3 A. misrepresenting, directly or by implication, any material aspect of the
4 nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

5 B. misrepresenting, directly or by implication, a seller's or telemarketer's
6 affiliation with, or endorsement or sponsorship by, any person or government entity;

7 C. misrepresenting, directly or by implication, any material aspect of a
8 negative option feature including, but not limited to, the fact that the customer's
9 account will be charged unless the customer takes an affirmative action to avoid the
10 charge(s), the date(s) the charge(s) will be submitted for payment, and the specific
11 steps the customer must take to avoid the charge(s);

12 D. using threats, intimidation, or profane or obscene language in a
13 telemarketing call;

14 E. initiating, or causing a telemarketer to initiate, any outbound telephone
15 call to a person when that person previously has stated that he or she does not wish
16 to receive an outbound telephone call made by or on behalf of the seller whose goods
17 or services are being offered;

18 F. causing any telephone to ring, or engaging any person in telephone
19 conversation, repeatedly or continuously with intent to annoy, abuse, or harass any
20 person at the called number; and

21 G. providing substantial assistance or support to any seller or telemarketer
22 when that person knows or consciously avoids knowing that the seller or
23 telemarketer is engaged in any act or practice that violates Telemarketing Sales Rule
24 Sections 310.3(a), (c), or (d) or 310.4.

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**IV.
Monetary Judgment**

IT IS FURTHER ORDERED that:

A. Defendant is ordered to pay to the FTC a monetary judgment in the total amount of **\$30,576,809 (thirty million, five hundred seventy-six thousand, eight hundred nine dollars)**, which the FTC contends is the net consumer injury attributable to Defendant for the years 2003 to 2006.

B. Any right or claim that the Defendant may have to assets which are under Permanent Receivership and to all other assets of the entities placed into permanent receivership by the Court in the Preliminary Injunction Order are hereby assigned to the FTC.

C. Within ten (10) business days of the date of entry of this Order:

1. To the extent not already transferred to the Receiver, Irwin Union Bank shall transfer to the FTC or its designated agent, by wire pursuant to instructions provided by the FTC, all frozen assets held in the name of Blitz Media, Continuity Partners, or Membership Services Direct;

2. To the extent not already transferred to the Receiver, Summit State Bank shall transfer to the FTC or its designated agent, by wire pursuant to instructions provided by the FTC, all frozen assets held in the name of Blitz Media, Continuity Partners, or Membership Services Direct;

3. To the extent not already transferred to the Receiver, Bank of America shall transfer to the FTC or its designated agent, by wire pursuant to instructions provided by the FTC, all frozen assets held in the name of Blitz Media, Continuity Partners, or Membership Services Direct; and

4. To the extent not already transferred to the Receiver, Defendant, Brian MacGregor, and all other persons holding frozen assets on Defendant's behalf, shall transfer to the FTC or its designated agent all frozen assets held in the name of Blitz Media, Continuity Partners, or Membership Services Direct.

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1 D. In accordance with 31 U.S.C. § 7701, Defendant is hereby required,
2 unless it has done so already, to furnish to the Commission its employer
3 identification number, which shall be used for purposes of collecting and reporting
4 on any amount that may be owing by Defendant.

5 E. Proceedings instituted under this Section are in addition to, and not in
6 lieu of, any other civil or criminal remedies that may be provided by law, including
7 any other proceedings the Commission may initiate to enforce this Order.

8 F. The judgment set forth herein may be used by the FTC and the Receiver
9 for the purpose of taking all necessary or appropriate post-judgment collection steps,
10 including but not limited to obtaining and levying writs of execution and creating,
11 perfecting, and enforcing judgment liens on any real or personal property of
12 Defendant. The Clerk of the Court is hereby directed to accept this Order and
13 judgment set forth herein for the purpose of issuing writs of execution, abstracts of
14 judgment and any other post-judgment process at the request of the FTC or the
15 Receiver.

16
17 **V.
Commission's Use of Monetary Judgment**

18 IT IS FURTHER ORDERED that all funds paid to the Commission or its
19 agent pursuant to Section IV of this Order may be deposited into a fund administered
20 by the Commission or its agent to be used for equitable relief, including but not
21 limited to consumer redress and any attendant expenses for the administration of any
22 redress fund. In the event that direct redress to consumers is wholly or partially
23 impracticable or that funds remain after redress is completed, the Commission may
24 apply any remaining funds for such other equitable relief (including consumer
25 information remedies) as it determines to be reasonably related to the practices
26 alleged in the First Amended Complaint. Any funds not used for such equitable
27 relief shall be deposited to the United States Treasury as disgorgement. Defendant
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1 shall have no right to challenge the Commission's choice of remedies under this
2 Section.

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4 **VI.
Lifting of the Asset Freeze**

5 IT IS FURTHER ORDERED that the freeze of Defendant's assets pursuant to
6 Sections IV (Asset Freeze) and V (Retention of Assets and Documents by Financial
7 Institutions and Other Third Parties) of the Preliminary Injunction Order shall be
8 lifted permanently upon entry of this Order.

9
10 **VII.
Cooperation with FTC Counsel and the Receiver**

11 IT IS FURTHER ORDERED that Defendant shall, in connection with this
12 action or any subsequent investigations related to or associated with the transactions
13 or the occurrences that are the subject of the FTC's First Amended Complaint,
14 cooperate in good faith with the FTC and shall direct its stockholders, officers, and
15 employees to appear at such places and times as the FTC shall reasonably request,
16 after written notice, for interviews, conferences, pretrial discovery, review of
17 documents, and for such other matters as may be reasonably requested by the FTC.
18 If requested in writing by the FTC, Defendant shall appear and provide truthful
19 testimony in any trial, deposition, or other proceeding related to
20 or associated with the transactions or the occurrences that are the subject of the First
21 Amended Complaint, without the service of a subpoena. This Section does not
22 preclude anyone subject to this Section from invoking his Fifth Amendment privilege
23 against self-incrimination.

24 IT IS FURTHER ORDERED that Defendant shall cooperate fully with the
25 Receiver in: (A) pursuing any and all claims by the Receiver against other persons or
26 entities; (B) assisting the Receiver in defending any and all actions or claims brought
27 against the Receiver, the Receivership estate, or the Receivership Defendants by
28 other persons or entities; (C) executing any documents that it has the power to

1 execute necessary to transfer assets or ownership interests to the Receiver pursuant
2 to the terms of this Order; and (D) refraining from any act that would interfere or
3 impede the Receiver in execution of the performance of its duties.

4
5 **VIII.**
Customer Lists

6 IT IS FURTHER ORDERED that Defendant, in connection with the
7 advertising, promotion, offering, or sale of goods or services, or where Defendant is
8 a majority owner of the business or directly or indirectly manages or controls such a
9 business, as well as the business's officers, agents, servants, employees, and
10 attorneys, and all other persons or entities in active concert or participation with any
11 of them who receive actual notice of this Order by personal service or otherwise,
12 whether acting directly or through any corporation or other entity, subsidiary,
13 division, or other device, including but not limited to fictitious business names, and
14 each such person, are hereby restrained and enjoined from selling, renting, leasing,
15 transferring, or otherwise disclosing the name, address, telephone number, electronic
16 mail address, credit card number, bank account number, or other identifying
17 information of any person who paid any money to any of the defendants named in
18 the First Amended Complaint filed in this case, at any time prior to entry of this
19 Order, in connection with the advertising, promotion, offering for sale, sale, or
20 distribution of any goods or services. *Provided*, however, that such identifying
21 information may be disclosed to a law enforcement agency or as required by law,
22 regulation, or court order.

23
24 **IX.**
Acknowledgment and Receipt of Order

25 IT IS FURTHER ORDERED that Defendant, within five (5) business days of
26 receipt of this Order as entered by the Court, shall execute and submit to the
27 Commission a truthful sworn statement acknowledging receipt of this Order.
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**X.
Distribution of Order by Defendant**

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order, Defendant shall deliver copies of the Order as directed below:

A. Defendant must deliver a copy of this Order to all of its principals, officers, directors, and managers. Defendant also must deliver copies of this Order to all of its employees, agents, and representatives who engage in conduct related to the subject matter of the Order. For current personnel, delivery shall be within (5) days of service of this Order upon Defendant. For new personnel, delivery shall occur prior to them assuming their responsibilities.

B. Defendant must secure a signed and dated statement acknowledging receipt of the Order, within thirty (30) days of delivery, from all persons receiving a copy of the Order pursuant to this Section. Should any person(s) receiving a copy of this Order pursuant to this Section fail or refuse to sign, date and return to Defendant a statement acknowledging receipt of the Order, Defendant shall provide the name, address, telephone number, e-mail address and such other contact information as may enable the FTC to contact such person(s) and verify his or her receipt of this Order.

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**XI.
Compliance Reporting**

IT IS FURTHER ORDERED that, in order that compliance with the provisions of this Order may be monitored:

A. For a period of five (5) years from the date of entry of this Order, Defendant shall notify the Commission of any changes in corporate structure that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the filing of a

1 bankruptcy petition; or a change in the corporate name or address, at least thirty (30)
2 days prior to such change, *provided that*, with respect to any proposed change in the
3 corporation about which Defendant learns less than thirty (30) days prior to the date
4 such action is to take place, Defendant shall notify the Commission as soon as is
5 practicable after obtaining such knowledge.

6 B. One hundred eighty (180) days after the date of entry of this Order,
7 Defendant shall provide a written report to the Commission, sworn to under penalty
8 of perjury, setting forth in detail the manner and form in which it has complied and is
9 complying with this Order. This report shall include, but not be limited to:

10 1. A copy of each acknowledgment of receipt of this Order, or
11 contact information of those given a copy of this Order, pursuant to Section X.C of
12 this Order; and

13 2. Any other changes required to be reported under subsection XI.A
14 above.

15 C. For the purposes of this Order, Defendant shall, unless otherwise
16 directed by the Commission's authorized representatives, mail all written
17 notifications to the Commission to:

18 Associate Director for Enforcement
19 Federal Trade Commission
20 600 Pennsylvania Ave., NW
21 Washington, DC 20580

22 All such written notifications to the Commission shall include the following
23 reference information:

24 Re: **FTC v. Universal Premium Services**

25 C.D. Cal. Case No. CV06-0849 SJO (OPx)

26 D. For the purposes of compliance reporting and monitoring required by
27 this Order, the Commission is authorized to communicate directly with Defendant.

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XII.
Compliance Monitoring

IT IS FURTHER ORDERED that, for the purposes of monitoring and investigating compliance with any provision of this Order:

A. Within ten (10) business days of receipt of written notice from a representative of the Commission, Defendant shall submit additional written reports, sworn to under penalty of perjury; produce documents for inspection and copying; appear for deposition; and/or provide entry during normal business hours to any business location in Defendant's possession or direct or indirect control to inspect the business operation;

B. In addition, the Commission is authorized to monitor compliance with this Order by all other lawful means, including but not limited to the following:

1. Obtaining discovery from any person, without further leave of court, using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, and 45; and

2. Posing as consumers and suppliers to Defendant, its employees, or any other entity that it manages or controls in whole or in part, without the necessity of identification or prior notice; and

C. Defendant shall permit representatives of the Commission to interview any employer, consultant, affiliate, independent contractor, representative, agent, or employee who has agreed to such an interview, relating in any way to any conduct subject to this Order. The person interviewed may have counsel present.

Provided however, that nothing in this Order shall limit the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to obtain any documentary material, tangible things, testimony, or information relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C. § 45(a)(1)).

XIII.

1 **Record Keeping Provisions**

2 IT IS FURTHER ORDERED that, for a period of eight (8) years from the date
3 of entry of this Order, Defendant, in connection with the telemarketing, advertising,
4 promotion, offering, or sale of goods or services, and its agents, employees, officers,
5 corporations, attorneys, successors, and assigns, and those persons or entities in
6 active concert or participation with any of them who receive actual notice of this
7 Order by personal service or otherwise, whether acting directly or through any
8 corporation or other entity, subsidiary, division, or other device, including but not
9 limited to fictitious business names, and each such person, are hereby restrained and
10 enjoined from failing to create and retain the following records:

11 A. Accounting records that reflect the cost of goods or services sold,
12 revenues generated, and the disbursement of such revenues;

13 B. Personnel records accurately reflecting: the name, address, and
14 telephone number of each person employed in any capacity by such business,
15 including as an independent contractor; that person's job title or position; the date
16 upon which the person commenced work; and the date and reason for the person's
17 termination, if applicable;

18 C. Customer files containing the names, addresses, phone numbers, dollar
19 amounts paid, quantity of items or services purchased, and description of items or
20 services purchased, to the extent such information is obtained in the ordinary course
21 of business;

22 D. Complaints and refund requests (whether received directly, indirectly or
23 through any third party), and any responses to those complaints or requests;

24 E. Copies of all promotional materials, sales scripts, training materials,
25 websites, or other marketing materials;

26 F. Copies of all contracts entered into with third-party service providers;
27 and

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1 G. All records and documents necessary to demonstrate full compliance
2 with each provision of this Order, including but not limited to the information
3 required by Section X.C of this Order and all reports submitted to the FTC pursuant
4 to this Order.

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6 **XIV.
Permanent Receivership Duties**

7 IT IS FURTHER ORDERED that except as expressly stated in this Order, this
8 Order does not abridge or terminate the Receiver's authority and duties as set forth in
9 the Preliminary Injunction Order.

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11 **XV.
Fees and Costs**

12 IT IS FURTHER ORDERED that each party to this Order hereby agrees to
13 bear its own costs and attorneys' fees incurred in connection with this action.

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15 **XVI.
Retention of Jurisdiction**


16 IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this
17 matter for purposes of construction, modification and enforcement of this Order.

18
19 **XVII.
Severability**

20 IT IS FURTHER ORDERED that the provisions of this Order are separate and
21 severable from one another. If any provision is stayed or determined to be invalid,
22 the remaining provisions shall remain in full force and effect.

23
24 **IT IS SO ORDERED.**

25
26 Dated: 2/26/07

27 
28 _____
The Honorable S. James Otero
United States District Court Judge

*** THIS SECTION IS CURRENT THROUGH THE OCTOBER 12, 2006 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 16 -- COMMERCIAL PRACTICES
CHAPTER I -- FEDERAL TRADE COMMISSION
SUBCHAPTER C -- REGULATIONS UNDER SPECIFIC ACTS OF CONGRESS
PART 310 -- TELEMARKETING SALES RULE

SCALED

§ 310.1 Scope of regulations in this part.

This part implements the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-6108, as amended.

HISTORY: [60 FR 43842, 43864, Aug. 23, 1995; 68 FR 4580, 4669, Jan. 29, 2003]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART: 15 U.S.C. 6101-6108.

NOTES: [EFFECTIVE DATE NOTE: 68 FR 4580, 4669, Jan. 29, 2003, revised Part 310, effective Mar. 31, 2003.]

§ 310.2 Definitions.

(a) Acquirer means a business organization, financial institution, or an agent of a business organization or financial 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 money, goods or services, or anything else of value.

(b) Attorney General means the chief legal officer of a state.

(c) Billing information means any data that enables any person to access a customer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card

(d) Caller identification service means a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone

(e) Cardholder means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.

(f) Charitable contribution means any donation or gift of money or any other thing of value.

(g) Commission means the Federal Trade Commission.

(h) Credit means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(i) Credit card means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(j) Credit card sales draft means any record or evidence of a credit card transaction.

(k) Credit card system means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.

(l) Customer means any person who is or may be required to pay for goods or services offered through telemarketing.

(m) Donor means any person solicited to make a charitable contribution.

(n) Established business relationship means a relationship between a seller and a consumer based on:

(1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or

(2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

(o) Free-to-pay conversion means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.

(p) Investment opportunity means anything, tangible or intangible, that is offered, offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation.

(q) Material means likely to affect a person's choice of, or conduct regarding, goods or services or a charitable contribution.

(r) Merchant means a person who is authorized under a written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(s) Merchant agreement means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(t) Negative option feature means, in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.

(u) Outbound telephone call means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.

(v) Person means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(w) Preacquired account information means any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged.

(x) Prize means anything offered, or purportedly offered, and given, or purportedly given, to a person by chance. For purposes of this definition, chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.

(y) Prize promotion means:

(1) A sweepstakes or other game of chance; or

(2) An oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.

(z) Seller means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.

(aa) State means any state of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(bb) Telemarketer means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

(cc) Telemarketing means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

(dd) Upselling means soliciting the purchase of goods or services following an initial transaction during a single telephone call. The upsell is a separate telemarketing transaction, not a continuation of the initial transaction. An "external upsell" is a solicitation made by or on behalf of a seller different from the seller in the initial transaction, regardless of whether the initial transaction and the subsequent solicitation are made by the same telemarketer. An "internal upsell" is a solicitation made by or on behalf of the same seller as in the initial transaction, regardless of whether the initial transaction and subsequent solicitation are made by the same telemarketer.

SCANNED

§ 310.3 Deceptive telemarketing acts or practices.

(a) Prohibited deceptive telemarketing acts or practices. It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Before a customer pays n1 for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:

n1 When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment.

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer; n2

n2 For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR 226, compliance with the disclosure requirements under the Truth in Lending Act and Regulation Z shall constitute compliance with § 310.3(a)(1)(i) of this Rule.

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

(iii) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the customer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and, if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning; and the no-purchase or payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate;

(v) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(vi) In the sale of any goods or services represented to protect, insure, or otherwise limit a customer's liability in the event of unauthorized use of the customer's credit card, the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. 1643; and

(vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s)

(2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

(ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;

(iii) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;

(iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

(v) Any material aspect of a prize promotion including, but not limited to, the odds of being able to receive a prize, the nature or value of a prize, or that a purchase or payment is required to win a prize or to participate in a prize promotion;

(vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability;

(vii) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity;

(viii) That any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. 1643, or

(ix) Any material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(3) Causing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z, n3 or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E. n4 Such authorization shall be deemed verifiable if any of the following means is employed:

n3 Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR part 226

n4 Electronic Fund Transfer Act, 15 U.S.C. 1693 et seq., and Regulation E, 12 CFR part 205.

(i) Express written authorization by the customer or donor, which includes the customer's or donor's signature; n5

n5 For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(ii) Express oral authorization which is audio-recorded and made available upon request to the customer or donor, and the customer's or donor's bank or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer's or donor's receipt of all of the following information:

(A) The number of debits, charges, or payments (if more than one);

(B) The date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;

(C) The amount(s) of the debit(s), charge(s), or payment(s);

(D) The customer's or donor's name;

(E) The customer's or donor's billing information, identified with sufficient specificity such that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction;

(F) A telephone number for customer or donor inquiry that is answered during normal business hours; and

(G) The date of the customer's or donor's oral authorization; or

(iii) Written confirmation of the transaction, identified in a clear and conspicuous manner as such on the outside of the envelope, sent to the customer or donor via first class mail prior to the submission for payment of the customer's or donor's billing information, and that includes all of the information contained in § 310.3(a)(3)(ii)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate; provided, however, that this means of authorization shall not be deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and preacquired account information.

(4) Making a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution.

(b) Assisting and facilitating. It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates § 310.3(a), (c) or (d), or § 310.4 of this Rule

(c) Credit card laundering. Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for:

(1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;

(2) Any person to employ, solicit, or otherwise cause a merchant, or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

(3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.

(d) Prohibited deceptive acts or practices in the solicitation of charitable contributions. It is a fraudulent charitable solicitation, a deceptive telemarketing act or practice, and a violation of this Rule for any telemarketer soliciting charitable contributions to misrepresent, directly or by implication, any of the following material information:

(1) The nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested;

(2) That any charitable contribution is tax deductible in whole or in part;

(3) The purpose for which any charitable contribution will be used;

(4) The percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program;

(5) Any material aspect of a prize promotion including, but not limited to: the odds of being able to receive a prize; the nature or value of a prize; or that a charitable contribution is required to win a prize or to participate in a prize promotion; or

(6) A charitable organization's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.

HISTORY: [60 FR 43842, 43865, Aug. 23, 1995; 68 FR 4580, 4670, Jan. 29, 2003]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART: 15 U.S.C. 6101-6108.

NOTES: [EFFECTIVE DATE NOTE: 68 FR 4580, 4670, Jan. 29, 2003, revised Part 310, effective Mar. 31, 2003.]

§ 310.4 Abusive telemarketing acts or practices.

(a) Abusive conduct generally. It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Threats, intimidation, or the use of profane or obscene language;

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:

(i) The time frame in which the seller has represented all of the goods or services will be provided to that person has expired; and

(ii) The seller has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Nothing in this Rule should be construed to affect the requirement in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose;

(3) Requesting or receiving payment of any fee or consideration from a person for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney;

(4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person;

(5) Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; provided, however, that this paragraph shall not apply to the disclosure or receipt of a customer's or donor's billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction;

(6) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements in paragraphs (a)(6)(i) through (ii) of this section must be met to evidence express informed consent.

(i) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the seller or telemarketer must:

(A) obtain from the customer, at a minimum, the last four (4) digits of the account number to be charged;

(B) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account number pursuant to paragraph (a)(6)(i)(A) of this section; and,

(C) make and maintain an audio recording of the entire telemarketing transaction.

(ii) In any other telemarketing transaction involving preacquired account information not described in paragraph (a)(6)(i) of this section, the seller or telemarketer must:

(A) at a minimum, identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged; and

(B) obtain from the customer or donor his or her express agreement to be charged for the goods or services and to be charged using the account number identified pursuant to paragraph (a)(6)(ii)(A) of this section; or

(7) Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call; provided that it shall not be a violation to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours.

(b) Pattern of calls. (1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

(i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls established to comply with § 310.4(b)(1)(iii);

(iii) Initiating any outbound telephone call to a person when:

(A) that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited; or

(B) that person's telephone number is on the "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller

(i) has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature of that person; or

n6 For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(ii) has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

(iv) Abandoning any outbound telephone call. An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

(2) It is an abusive telemarketing act or practice and a violation of this Rule for any person to sell, rent, lease, purchase, or use any list established to comply with § 310.4(b)(1)(iii)(A), or maintained by the Commission pursuant to § 310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists.

(3) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(ii) and (iii) if it can demonstrate that, as part of the seller's or telemarketer's routine business practice:

(i) It has established and implemented written procedures to comply with § 310.4(b)(1)(ii) and (iii);

(ii) It has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to § 310.4(b)(3)(i);

(iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact, in compliance with § 310.4(b)(1)(iii)(A),

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to § 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process;

(v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to § 310.4(b)(3)(i), and

(vi) Any subsequent call otherwise violating § 310.4(b)(1)(ii) or (iii) is the result of error.

(4) A seller or telemarketer will not be liable for violating 310.4(b)(1)(iv) if:

(i) the seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign;

(ii) the seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed; and

n7 This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.

(iv) the seller or telemarketer, in accordance with § 310.5(b)-(d), retains records establishing compliance with § 310.4(b)(4)(i)-(iii).

(c) Calling time restrictions. Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8.00 a.m. and 9:00 p.m. local time at the called person's location.

(d) Required oral disclosures in the sale of goods or services. It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase o-payment entry method for the prize promotion; provided, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

(e) Required oral disclosures in charitable solicitations. It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution, to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the charitable organization on behalf of which the request is being made; and

(2) That the purpose of the call is to solicit a charitable contribution.

HISTORY: [60 FR 43842, 43866, Aug. 23, 1995; 68 FR 4580, 4671, Jan. 29, 2003; 68 FR 16414, Apr. 4, 2003; 69 FR 16368, 16373, Mar. 29, 2004]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART: 15 U.S.C. 6101-6108.

NOTES: [EFFECTIVE DATE NOTE: 68 FR 4580, 4671, Jan. 29, 2003, revised Part 310, effective Mar. 31, 2003. "Full compliance with § 310.4(a)(7), the caller identification transmission provision, is required by January 29, 2004. The Commission will announce at a future time the date by which full compliance with § 310.4(b)(1)(iii)(B), the "do-not-call" registry provision, will be required. The Commission anticipates that full compliance with the "do-not-call" provision will be required approximately seven months from the date a contract is awarded to create the national registry." 68 FR 16414, Apr

4, 2003, provides "The Commission will require full compliance with §§ 310.4(b)(1)(iv) and § 310.4(b)(4) on October 1, 2003." 69 FR 16368, 16373, Mar. 29, 2004, revised paragraph (b)(3)(iv), effective Jan. 1, 2005.]

§ 310.5 Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

(1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of \$ 25.00 or more;

(3) The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services; n8

n8 For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with § 310.5(a)(3) of this Rule.

(4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales or solicitations; provided, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

(5) All verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.

(b) A seller or telemarketer may keep the records required by § 310.5(a) in any form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by § 310.5(a) shall be a violation of this Rule.

(c) The seller and the telemarketer calling on behalf of the seller may, by written agreement, allocate responsibility between themselves for the recordkeeping required by this Section. When a seller and telemarketer have entered into such an agreement, the terms of that agreement shall govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, the seller shall be responsible for complying with §§ 310.5(a)(1)-(3) and (5); the telemarketer shall be responsible for complying with § 310.5(a)(4).

(d) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer shall maintain all records as required under this Section. In the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business shall maintain all records required under this Section.

HISTORY: [60 FR 43842, 43867, Aug. 23, 1995; 68 FR 4580, 4673, Jan. 29, 2003]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART: 15 U.S.C. 6101-6108.

NOTES: [EFFECTIVE DATE NOTE: 68 FR 4580, 4673, Jan. 29, 2003, revised Part 310, effective Mar. 31, 2003.]

§ 310.6 Exemptions.

(a) Solicitations to induce charitable contributions via outbound telephone calls are not covered by § 310.4(b)(1)(iii)(B) of this Rule.

(b) The following acts or practices are exempt from this Rule:

(1) The sale of pay-per-call services subject to the Commission's Rule entitled "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992," 16 CFR Part 308, provided, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(2) The sale of franchises subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," ("Franchise Rule") 16 CFR Part 436, provided, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(3) Telephone calls in which the sale of goods or services or charitable solicitation is not completed, and payment or authorization of payment is not required, until after a face-to-face sales or donation presentation by the seller or charitable

organization, provided, however, that this exemption does not apply to the requirements of § 310.4(a)(1), (a)(7), (b), and (c);

(4) Telephone calls initiated by a customer or donor that are not the result of any solicitation by a seller, charitable organization, or telemarketer, provided, however, that this exemption does not apply to any instances of upselling included in such telephone calls;

(5) Telephone calls initiated by a customer or donor in response to an advertisement through any medium, other than direct mail solicitation, provided, however, that this exemption does not apply to calls initiated by a customer or donor in response to an advertisement relating to investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or advertisements involving goods or services described in § 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls;

(6) Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this Rule, for any goods or services offered in the direct mail solicitation, and that contains no material misrepresentation regarding any item contained in § 310.3(d) of this Rule for any requested charitable contribution; provided, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or goods or services described in § 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls; and

(7) Telephone calls between a telemarketer and any business, except calls to induce the retail sale of nondurable office or cleaning supplies; provided, however, that § 310.4(b)(1)(iii)(B) and § 310.5 of this Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

HISTORY: [60 FR 43842, 43867, Aug. 23, 1995; 68 FR 4580, 4673, Jan. 29, 2003]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART: 15 U.S.C. 6101-6108.

NOTES: [EFFECTIVE DATE NOTE: 68 FR 4580, 4673, Jan. 29, 2003, revised Part 310, effective Mar. 31, 2003.]

§ 310.7 Actions by states and private persons.

(a) Any attorney general or other officer of a state authorized by the state to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, shall serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this Rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, and shall include a copy of the state's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the state or private person shall serve the Commission with the required notice immediately upon instituting its action.

(b) Nothing contained in this Section shall prohibit any attorney general or other authorized state official from proceeding in state court on the basis of an alleged violation of any civil or criminal statute of such state.

HISTORY: [60 FR 43842, 43867, Aug. 23, 1995; 68 FR 4580, 4674, Jan. 29, 2003]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART: 15 U.S.C. 6101-6108.

NOTES: [EFFECTIVE DATE NOTE: 68 FR 4580, 4674, Jan. 29, 2003, revised Part 310, effective Mar. 31, 2003.]

§ 310.8 Fee for access to the National Do Not Call Registry.

(a) It is a violation of this Rule for any seller to initiate, or cause any telemarketer to initiate, an outbound telephone call to any person whose telephone number is within a given area code unless such seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to telephone numbers within that area code that are included in the National Do Not Call Registry maintained by the Commission under § 310.4(b)(1)(iii)(B); provided, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to § 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

(b) It is a violation of this Rule for any telemarketer, on behalf of any seller, to initiate an outbound telephone call to any person whose telephone number is within a given area code unless that seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to the telephone numbers within that area code that are included in the National Do Not Call Registry; provided, however, that such payment is not necessary if the seller initiates, or causes a

telemarketer to initiate, calls solely to persons pursuant to § 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

(c) The annual fee, which must be paid by any person prior to obtaining access to the National Do Not Call Registry, is \$ 62 per area code of data accessed, up to a maximum of \$ 17,050; provided, however, that there shall be no charge for the first five area codes of data accessed by any person, and provided further, that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the National Do Not Call Registry, without being required under this Rule, 47 CFR 64.1200, or any other Federal law. Any person accessing the National Do Not Call Registry may not participate in any arrangement to share the cost of accessing the registry, including any arrangement with any telemarketer or service provider to divide the costs to access the registry among various clients of that telemarketer or service provider.

(d) After a person, either directly or through another person, pays the fees set forth in § 310.8(c), the person will be provided a unique account number which will allow that person to access the registry data for the selected area codes at any time for twelve months following the first day of the month in which the person paid the fee ("the annual period"). To obtain access to additional area codes of data during the first six months of the annual period, the person must first pay \$ 62 for each additional area code of data not initially selected. To obtain access to additional area codes of data during the second six months of the annual period, the person must first pay \$ 31 for each additional area code of data not initially selected. The payment of the additional fee will permit the person to access the additional area codes of data for the remainder of the annual period.

(e) Access to the National Do Not Call Registry is limited to telemarketers, sellers, others engaged in or causing others to engage in telephone calls to consumers, service providers acting on behalf of such persons, and any government agency that has law enforcement authority. Prior to accessing the National Do Not Call Registry, a person must provide the identifying information required by the operator of the registry to collect the fee, and must certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent telephone calls to telephone numbers on the registry. If the person is accessing the registry on behalf of sellers, that person also must identify each of the sellers on whose behalf it is accessing the registry, must provide each seller's unique account number for access to the national registry, and must certify, under penalty of law, that the sellers will be using the information gathered from the registry solely to comply with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on the registry

HISTORY: [68 FR 45134, 45144, July 31, 2003; 69 FR 45580, 45585, July 30, 2004; 70 FR 43273, 43280, July 27, 2005; 71 FR 43053, 43054, July 31, 2006]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART: 15 U.S.C. 6101-6108.

NOTES: [EFFECTIVE DATE NOTE: 70 FR 43273, 43280, July 27, 2005, revised paragraphs (c) and (d), effective Sept. 1, 2005; 71 FR 43053, 43054, July 31, 2006, revised paragraphs (c) and (d), effective July 31, 2006.]

§ 310.9 Severability.

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

HISTORY: [68 FR 4580, 4675, Jan. 29, 2003]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART: 15 U.S.C. 6101-6108.

NOTES: [EFFECTIVE DATE NOTE: 68 FR 4580, 4675, Jan. 29, 2003, added this section as part of the revision of Part 310, effective Mar. 31, 2003.]