

GREGORY A. BROWER
United States Attorney
ROBERT R. EDELMAN
Assistant United States Attorney
333 Las Vegas Blvd. South, Suite 5000
Las Vegas, Nevada 89101
Phone: (702)388-6336 / Facsimile: (702)388-6787

ALAN PHELPS (Appearing under LR IA 10-3)
Trial Attorney
U.S. Department of Justice
Office of Consumer Litigation
P.O. Box 386
Washington, DC 20044
Phone: (202) 307-6154 / Facsimile: (202) 514-8742

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
STAR SATELLITE, LLC, also)
doing business as TENAYA MARKETING;)
)
WALTER ERIC MYERS, individually and as)
an officer of STAR SATELLITE LLC;)
)
Defendants, and)
)
THE MYERS IRREVOCABLE TRUST,)
CINDY MYERS and ZACHARY T. BALL in)
their capacities as Trustees,)
KATIE MYERS and M [REDACTED] M [REDACTED],)
)
Relief Defendants.)
)

**STIPULATED JUDGMENT AND ORDER FOR PERMANENT INJUNCTION AGAINST
STAR SATELLITE, LLC, WALTER ERIC MYERS, THE MYERS IRREVOCABLE
TRUST, CINDY MYERS AS TRUSTEE, ZACHARY T. BALL AS TRUSTEE, KATIE
MYERS AND M [REDACTED] M [REDACTED] AS BENEFICIARIES**

Plaintiff, the United States of America, acting upon
notification and authorization to the Attorney General by the

Federal Trade Commission ("FTC" or the "Commission"), has commenced this action by filing the complaint herein, and defendants Star Satellite, LLC, Walter Eric Myers, and relief defendants The Myers Irrevocable Trust, Cindy Myers, Zachary T. Ball, Katie Myers, and M [REDACTED] M [REDACTED] have waived service of the summons and complaint. Plaintiff, the above-named Defendants, represented by the attorney whose name appears hereafter, and Relief Defendants have agreed to settlement of this action.

THEREFORE, on the joint motion of the parties, it is hereby **ORDERED, ADJUDGED AND DECREED** as follows:

FINDINGS

1. This Court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355, and 15 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a), and 57b.

2. Plaintiff, Defendants, and Relief Defendants consent to jurisdiction and venue in this District.

3. The activities of Defendants and Relief Defendants are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

4. Defendants and Relief Defendants do not admit any allegations of the complaint and entry into this Stipulated Judgment and Order for Permanent Injunction shall not be deemed an admission of any of the allegations of the Complaint in this or any other matter, except as otherwise specifically provided

herein.

5. The complaint states a claim upon which relief may be granted against Defendants and Relief Defendants, under Sections 5(a), 5(m)(1)(A), 13(b), and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), and 57b.

6. Defendants and Relief Defendants have entered into this Stipulated Judgment and Order for Permanent Injunction ("Order") freely and without coercion. Defendants and Relief Defendants further acknowledge that they have read the provisions of this Order and are prepared to abide by them.

7. Defendants and Relief Defendants hereby waive all rights to appeal or otherwise challenge or contest the validity of this Order.

8. Defendants and Relief Defendants have agreed that this Order does not entitle Defendants and Relief Defendants to seek or to obtain attorneys' fees as a prevailing party under the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, and Defendants further waive any rights to attorneys' fees that may arise under said provision of law.

9. Relief Defendants The Myers Irrevocable Trust and its Beneficiaries stipulate that \$56,665 is the full amount they received from the telemarketing of EchoStar Satellite programming

10. Entry of this Order is in the public interest.

DEFINITIONS

For the purpose of this Order, the following definitions

shall apply:

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

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

3. "Defendants" means Star Satellite, and Walter Eric Meyers.

4. "Established business relationship" means a relationship between the seller and a person based on: (a) the person's purchase, rental, or lease of the seller's goods or services or a financial transaction between the person and seller, within the eighteen (18) months immediately preceding the date of the telemarketing call; or (b) the person's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding date of a telemarketing call.

5. "National Do Not Call Registry" means the National Do Not Call Registry maintained by the Federal Trade Commission pursuant to 16 C.F.R. § 310.4(b)(1)(iii)(B).

6. "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.

7. "Person" means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

8. "Relief Defendants" means The Myers Irrevocable Trust, Cindy Myers and Zachary T. Ball in their roles as Trustees, and Beneficiaries Katie Myers and M [REDACTED] M [REDACTED].

9. "Representatives" means Defendants' successors, assigns, officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise.

10. "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, whether or not such person is under the jurisdiction of the Federal Trade Commission.

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

12. "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.

13. The "Telemarketing Sales Rule" or "Rule" means the FTC Rule entitled "Telemarketing Sales Rule," 16 C.F.R. § 310, attached hereto as Appendix A, or as it may be amended.

ORDER

I. PROHIBITION AGAINST ABUSIVE TELEMARKETING PRACTICES

IT IS ORDERED that, in connection with telemarketing, Defendants and their Representatives are hereby permanently restrained and enjoined from engaging in, causing other persons to engage in, or assisting other persons to engage in, violations of the Telemarketing Sales Rule, including but not limited to:

A. Initiating any outbound telephone call to any person at a telephone number on the National Do Not Call Registry unless the seller proves that:

(1) the seller 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

(2) the seller has an established business relationship with such person and that person has not previously stated that he or she does not wish to receive outbound telephone calls made by or on behalf of the seller; or

B. Initiating any outbound telephone call to a person when that person has previously 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 by or on behalf of the charitable organization for which a charitable contribution is being solicited; or

C. Initiating any outbound telephone call to a telephone number within a given area code without first paying the required annual fee for access to the telephone numbers within that area code that are on the National Do Not Call Registry; and

D. Abandoning any outbound telephone call to a person by failing to connect the call to a live operator within two seconds of the person's completed greeting, unless the following four conditions are met:

1. Defendants or their Representatives employ technology that ensures abandonment of no more than three percent of all calls answered by a person, measured per day per calling campaign;

2. Defendants or their Representatives, for each telemarketing call placed, allow the telephone to ring for at least fifteen seconds or four rings before disconnecting an unanswered call;

3. Whenever a live operator is not available to speak with the person answering the call within two 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

4. Defendants retain records, in accordance with 16 C.F.R. § 310.5 (b)-(d), establishing compliance with the preceding three conditions.

Provided, however, that if the Commission promulgates any rule that modifies or supersedes the Telemarketing Sales Rule, in whole or part, Defendants shall comply fully and completely with all applicable requirements thereof, on and after the effective date of any such rule.

II. CIVIL PENALTY

IT IS FURTHER ORDERED that:

A. Judgment in the amount of Four Million, Three Hundred Seventy Four Thousand, Seven Hundred Sixty Eight Dollars (\$4,374,768) is hereby entered against Defendants Star Satellite and Walter Eric Myers as a civil penalty, pursuant to Section 5(m) (1) (A) of the Federal Trade Commission Act, 15 U.S.C. § 45(m) (1) (A). The Myers Irrevocable Trust and its Beneficiaries are hereby required to turn over Fifty Six Thousand, Six Hundred Sixty Five Dollars (\$56,665) to the Plaintiff. Based upon Defendants Star Satellite's and Walter Eric Myers' sworn representations in financial statements provided to the Commission on behalf of themselves and the Relief Defendants, and the Relief Defendants' stipulation of the amount of money they received from the telemarketing of EchoStar Satellite programming, full payment for the foregoing is suspended except for Seventy-Five Thousand Dollars (\$75,000), contingent upon the accuracy and completeness of the financial statements as set forth in subparagraph E of this Paragraph, and Relief Defendants' stipulation.

B. Prior to or concurrently with the execution of this Order, Defendants and Relief Defendants shall transfer a total of \$75,000 to attorney Jeffrey L. Shields, who shall hold the entire sum for no purpose other than payment to the Treasurer of the United States after entry of this Order by the Court. Within

five (5) days of receipt of notice of the entry of this Order, Jeffrey L. Shields shall transfer such payment in the form of a wire transfer or certified or cashier's check made payable to the Treasurer of the United States. The check or written confirmation of the wire transfer shall be delivered to: Director, Office of Consumer Litigation, U.S. Department of Justice Civil Division, P.O. Box 386, Washington, DC 20044. The cover letter accompanying the check shall include the title of this litigation and a reference to DJ# 102-3432. Such transfer by Defendants' attorney shall constitute partial satisfaction of the judgment against the Defendants and partial satisfaction of the amount to be turned over to the Plaintiff by the Relief Defendants.

C. Defendants and Relief Defendants shall cooperate fully with Plaintiff and the Commission and its agents in all attempts to collect the amount due pursuant to this Paragraph if Defendants or Relief Defendants fail to pay fully the amount due at the time specified herein. In such an event, Defendants and Relief Defendants The Myers Irrevocable Trust, Katie Myers and M [REDACTED] M [REDACTED] agree to provide Plaintiff and the Commission with their federal and state tax returns for the preceding two years, and to complete new standard-form financial disclosure forms fully and accurately within ten (10) business days of receiving a request from Plaintiff or the Commission to do so. Defendants and Relief Defendants further authorize Plaintiff and the

Commission to verify all information provided on the financial disclosure forms provided by Defendants and Relief Defendants with all appropriate third parties, including but not limited to financial institutions.

D. Upon payment by Defendants Star Satellite, Walter Eric Myers and/or the Relief Defendants as provided in subparagraph B of this Paragraph, the remainder of the judgment against the Defendants shall be suspended subject to the conditions set forth in subparagraph E of this Paragraph.

E. Plaintiff's agreement to this Order is expressly premised upon the truthfulness, accuracy, and completeness of Defendants Star Satellite's and Walter Eric Myers' sworn financial statements and supporting documents submitted to the Commission and dated February 12, 2007, August 1, 2007, August 15, 2007, and Relief Defendant The Myers Irrevocable Trust's and its Beneficiaries' stipulation that \$56,665 is the full amount they received from the telemarketing of EchoStar Satellite programming, all of which include material information upon which Plaintiff relied in negotiating and agreeing to this Order.

F. If, upon motion by Plaintiff, this Court finds that Defendant Star Satellite, Defendant Walter Eric Myers, or the Relief Defendants failed to disclose any material asset, materially misrepresented the value of any asset, made any other material misrepresentation or omission in the sworn financial statements described above, or failed to disclose any material

asset received by the Relief Defendants from the telemarketing of EchoStar Satellite programming, then the Order shall be reopened and (1) suspension of the judgment shall be lifted for the purpose of requiring payment of a civil penalty in the full amount of the judgment (\$4,374,768) from the Defendants, and (2) the Court shall require The Myers Irrevocable Trust and its Beneficiaries to turn over to the Plaintiff the full amount of assets The Myers Irrevocable Trust and its Beneficiaries received from the telemarketing of EchoStar Satellite programming. All Defendants and Relief Defendants agree to waive any statute of limitations defense they may have. The respective judgment and amount to be turned over to Plaintiff, less any amounts paid to the Commission, shall become immediately due and payable by respective Defendants and Relief Defendants The Myers Irrevocable Trust and its Beneficiaries, with interest computed at the rate prescribed under 28 U.S.C. § 1961, as amended, which shall immediately begin to accrue on the unpaid balance. Provided, however, that in all other respects this Order shall remain in full force and effect, unless otherwise ordered by the Court.

F. In accordance with 31 U.S.C. § 7701, Defendants are hereby required, unless they have done so already, to furnish to Plaintiff and the FTC their taxpayer identifying number(s) (social security numbers or employer identification numbers) which shall be used for purposes of collecting and reporting on

any delinquent amount arising out of Defendants' relationship with the government.

G. Defendants and Relief Defendants agree that the facts as alleged in the complaint filed in this action shall be taken as true in any subsequent litigation filed by Plaintiff or the Commission to enforce their rights pursuant to this Order, including but not limited to a nondischargeability complaint in any subsequent bankruptcy proceeding.

H. Proceedings instituted under this Paragraph are in addition to, and not in lieu of, any other civil or criminal remedies as may be provided by law, including any other proceedings that the Plaintiff may initiate to enforce this Order.

III. RECORD KEEPING PROVISIONS

IT IS FURTHER ORDERED that for a period of five (5) years from the date of entry of this Order, Defendants, and their successors and assigns, shall maintain and make available to the Plaintiff or Commission, within seven (7) days of the receipt of a written request, business records demonstrating compliance with the terms and provisions of this Order.

IV. DISTRIBUTION OF ORDER BY DEFENDANTS AND ACKNOWLEDGMENTS OF RECEIPT

IT IS FURTHER ORDERED that Defendants, and their successors and assigns, shall within thirty (30) days of the entry of this Order, provide a copy of this Order with Appendix A to all of

their owners, principals, members, officers, and directors, as well as managers, agents, servants, employees, and attorneys having decision-making authority with respect to the subject matter of this Order; secure from each such person a signed statement acknowledging receipt of a copy of this Order; and shall, within ten (10) days of complying with this Paragraph, file an affidavit with the Court and serve the Commission, by mailing a copy thereof, to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580, setting forth the fact and manner of its compliance, including the name and title of each person to whom a copy of the Order has been provided.

V. NOTIFICATION OF BUSINESS CHANGES

IT IS FURTHER ORDERED that each Defendant, and its successors and assigns, shall notify the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580, at least thirty (30) days prior to any change in such Defendant's business, including, but not limited to, merger, incorporation, dissolution, assignment, and sale, which results in the emergence of a successor corporation, the creation or dissolution of a subsidiary or parent, or any other change, which may affect such Defendant's obligations under this Order.

VI. NOTIFICATION OF INDIVIDUAL'S AFFILIATION

IT IS FURTHER ORDERED that Defendant Walter Eric Myers shall, for a period of five (5) years from the date of entry of this Order, notify Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580, within thirty (30) days of his affiliation with a new business or employment whose activities include telemarketing or his affiliation with a new business or employment in which his duties involve the sale or offering for sale of satellite programming.

VII. COMMUNICATION WITH DEFENDANTS

IT IS FURTHER ORDERED that for the purposes of compliance reporting, Plaintiff and the Commission are authorized to communicate directly with Defendants.

VIII. FEES AND COSTS

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

IX. SEVERABILITY

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

X. RETENTION OF JURISDICTION

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

XI. COMPLETE SETTLEMENT

The parties hereby consent to entry of the foregoing Order which shall constitute a final judgment and order in this matter. The parties further stipulate and agree that the entry of the foregoing Order shall constitute a full, complete and final settlement of this action.

JUDGMENT IS THEREFORE ENTERED in favor of Plaintiff and against Defendants and Relief Defendants, pursuant to all the terms and conditions recited above.

//

//

FOR THE DEFENDANTS:

Walter Eric Myers
Walter Eric Meyers,
Individually,

Walter Eric Myers
Star Satellite, by Walter Eric
Myers, President

Jeffrey L. Shields
Jeffrey L. Shields, Esq.
Attorney for Defendants

Lee S. McCullough III
Lee S. McCullough III
Trust Protector

Cindy Myers
The Myers Irrevocable Trust by
Cindy Myers Trustee

Zachary T. Ball
The Myers Irrevocable Trust by
Zachary T. Ball, Trustee

Katie S. Myers
Katie Myers, Beneficiary

Katie S. Myers
Katie Myers, Parent and
Guardian for M [redacted] M [redacted],
Beneficiary

FOR THE PLAINTIFF:

GREGORY G. KATSAS
Acting Assistant Attorney General
Civil Division
U.S. DEPARTMENT OF JUSTICE

GREGORY A. BROWER
United States Attorney
District of Nevada

Robert R. Edelman
ROBERT R. EDELMAN
Assistant U.S. Attorney

EUGENE M. THIROLF
Director
Office of Consumer Litigation

Alan Pheles
ALAN PHELES
Trial Attorney
Office of Consumer Litigation
Civil Division
U.S. Department of Justice
Washington, DC 20530

Lois C. Greisman
LOIS C. GREISMAN
Associate Director for
Marketing Practices

Russell Deitch
RUSSELL DEITCH
GARY IVENS
Attorneys, Federal Trade
Commission
600 Pennsylvania Ave, N.W.,
Washington, DC 20580

IT IS SO ORDERED.

DATED: _____

UNITED STATES DISTRICT JUDGE

REASONS FOR SETTLEMENT

This statement accompanies the final order executed by defendants Star Satellite, Walter Myers, and various relief defendants. The final order enjoins defendants from violating the Telemarketing Sales Rule ("Rule"), 16 C.F.R. Part 310, including abandoning calls. It also requires the payment of civil penalties and disgorgement.

Pursuant to Section 5(m)(3) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45(m)(3), the Commission hereby sets forth its reasons for settlement by entry of Stipulated Judgment and Order for Permanent Injunction ("final order"):

On the basis of the allegations contained in the complaint, the Commission believes that a civil penalty of \$4,374,768 constitutes the appropriate amount on which to base the settlement against the defendants. Additionally, the Commission believes that the relief defendants received a maximum of \$56,665 derived from the defendants' alleged law violations, and that that amount is therefore the appropriate amount for the relief defendants to pay. However, due to the defendants' inability to pay, the total combined payments by defendants and relief defendants is \$75,000 - including the \$56,665 in disgorgement - unless the defendants or relief defendants made misrepresentations to the Commission about their finances. In addition, the injunctive provisions of the final order should assure the defendants' future compliance with the law. Finally, with the entry of the final order, the time and expense of litigation will be avoided.

For the foregoing reasons, the Commission believes that the settlement by the entry of the attached final order is justified and well within the public interest.

Appendix A



Code of Federal Regulations

16

Parts 0 to 999

Revised as of January 1, 2004

Commercial Practices

Containing a codification of documents
of general applicability and future effect

As of January 1, 2004

With Ancillaries

Published by
Office of the Federal Register
National Archives and Records
Administration

A Special Edition of the Federal Register

Pt. 310

16 CFR Ch. I (1-1-04 Edition)

**PART 310—TELEMARKETING SALES
RULE**

Sec.

310.1 Scope of regulations in this part.

310.2 Definitions.

310.3 Deceptive telemarketing acts or practices.

310.4 Abusive telemarketing acts or practices.

310.5 Recordkeeping requirements.

310.6 Exemptions.

310.7 Actions by states and private persons.

310.8 Fee for access to “do-not-call” registry.

310.9 Severability.

AUTHORITY: 15 U.S.C. 6101-6108.

SOURCE: 68 FR 4669, Jan. 29, 2003, unless otherwise noted.

§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.

§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.

Federal Trade Commission**§ 310.2**

(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.

§310.3

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.

16 CFR Ch. I (1-1-04 Edition)

(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.

§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 pays¹ for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, 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 the sales offer;²

(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

¹When 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.

²For 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.

Federal Trade Commission**§ 310.3**

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/no-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,³ or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E.⁴ Such authorization shall be deemed verifiable if any of the following means is employed:

³Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR part 226.

⁴Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.*, and Regulation E, 12 CFR part 205.

§ 310.3

(i) Express written authorization by the customer or donor, which includes the customer's or donor's signature;⁵

(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

⁵For 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.

16 CFR Ch. I (1-1-04 Edition)

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:

Federal Trade Commission**§ 310.4**

(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.

§ 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 re-

turn 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.

§ 310.4

16 CFR Ch. I (1-1-04 Edition)

(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 signature⁶ of that person; or

(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,

⁶For 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.

Federal Trade Commission**§ 310.4**

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 three (3) months 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 placed⁷; and

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

⁷This 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.

(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/no-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

§ 310.5

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

§ 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;⁸

(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

⁸For 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.

16 CFR Ch. I (1-1-04 Edition)

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.

§ 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);

Federal Trade Commission**§ 310.8**

(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 non-durable 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 non-durable office or cleaning supplies.

§ 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.

§ 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

§ 310.9

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 \$25 per area code of data accessed, up to a maximum of \$7,375; *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 \$25 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 \$15 for each additional area code of data not initially selected. The payment of the additional fee will permit the person to

16 CFR Ch. I (1–1–04 Edition)

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.

[68 FR 45144, July 31, 2003]

§ 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.



Federal Register

**Monday,
March 29, 2004**

Part III

Federal Trade Commission

**16 CFR Part 310
Telemarketing Sales Rule; Final Rule**

Nevertheless, the Commission believes that, to the extent that this amendment has an economic effect on small business, the Commission has adopted an approach that minimizes the impact to ensure that it is not substantial, while fulfilling the mandate of the Appropriations Act that all businesses obtain data from the National Do Not Call Registry on a monthly basis.

As discussed above in detail, based on the record, the Commission has extended the interval at which businesses must access Registry data and purge their calling lists of numbers contained on the Registry to thirty-one (31) days, the maximum allowable pursuant to the Appropriations Act mandate. And, in recognition of the need for businesses, particularly small businesses, to modify their procedures and systems to accommodate this amendment, the Commission has set the effective date for this amended Rule provision as January 1, 2005, allowing more than nine months time for necessary preparations.

4. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement of Obtaining Data From the National Do Not Call Registry Every Thirty (30) Days and the Type of Professional Skills That Will Be Necessary To Comply.

As discussed in the NPRM, this amendment does not impose any new, or affect any existing, reporting, disclosure, or specific recordkeeping requirements within the meaning of the Paperwork Reduction Act. The Commission further posited in the NPRM that it did not “believe that the modification requiring sellers and telemarketers to obtain data from the National Registry at a more frequent interval will create a significant burden on sellers or telemarketers that have already established systems to comply with the requirement in the existing TSR that requires accessing the Registry database on a quarterly basis.” But, the Commission recognized that “[t]here will likely be additional costs * * * incurred to access the Registry every thirty days (effectively twelve (12) times per year) versus the current requirement

telemarketing does not distinguish between those entities that conduct exempt calling, such as survey calling, those that receive inbound calls, and those that conduct outbound calling campaigns. Moreover, sellers who act as their own telemarketers are not accounted for in the Census data).

of every three months (effectively four (4) times per year).⁴¹

Many commenters argued that the amended Rule provision will be burdensome on businesses, particularly small businesses. NADA noted that “dealers and other small businesses can expect a corresponding increase in the personnel costs necessary to download the data and perform the scrub. Because small businesses may lack available personnel to perform this additional function, they may find it necessary to outsource the function to a vendor,” which would further increase costs associated with the more frequent scrub requirement.⁴² However, as described below, in response to Question 5, the Commission has taken steps to minimize the impact of the amended Rule provision on small businesses, to the extent possible while still effectuating the mandate of the Appropriations Act.

5. Steps the Agency Has Taken To Minimize Any Significant Economic Impact on Small Entities, Consistent With the Stated Objectives of the Appropriations Act, Including the Factual, Policy, and Legal Reasons For Selecting the Alternative Finally Adopted, and Why Each of the Significant Alternatives Was Rejected.

As noted in the NPRM, the Appropriations Act of 2004 provides the Commission no discretion in the matter of whether to amend the TSR.” The Commission, however, included in the NPRM a request for factual information about the amount of time it will take for “sellers and telemarketers, including small businesses, to modify their business procedures and systems to be able to comply with the amended provision.” Based on the record, the Commission has determined to set the effective date for this amendment as January 1, 2005. This time frame will, as noted above, provide businesses,

⁴¹ Based on data obtained during the TSR amendment finalized in 2003, the Commission estimated that “the cost of accessing the National Do Not Call Registry to purge the numbers it contains from a company’s calling list (separate from the fee paid to obtain the list) is around \$100. Given this estimate, sellers and telemarketers seeking to comply with the proposed rule modification would pay \$1200 per year (\$100 per scrub x 12 scrubs per year) rather than \$400 per year (\$100 per scrub x 4 scrubs per year).”

⁴² NADA at 2 (recommending a January 1, 2005 effective date). See also Ziskind at 1 (noting that the more frequent scrub interval will “add an additional burden to REALTORS,” and cost “cost us time and money”); NRF at 2 (“for smaller businesses, in particular, the extra hours they may be forced to spend each month in order to prepare to contact their customers is subtracted from the time they could spend serving those customers”).

especially small businesses,⁴³ adequate time to modify their systems and procedures to comply with the amended provision. In addition, the Commission has extended the interval at which businesses must access Registry data and purge their calling lists of numbers contained on the Registry to thirty-one (31) days, the maximum allowable pursuant to the Appropriations Act mandate.

Thus, while the Commission considered more burdensome alternatives (*i.e.*, choosing an interval of thirty (30), rather than thirty-one (31) days, the Commission rejected those alternatives, as discussed above, in favor of a regulatory approach that was the least burdensome to all regulated entities, including small entities, if any.

IX. Amended Rule

■ Accordingly, the Commission amends title 16, Code of Federal Regulations, as follows:

PART 310—TELEMARKETING SALES RULE

■ 1. The authority citation for part 310 continues to read as follows:

Authority: 15 U.S.C. 6101–6108.

■ 2. Amend § 310.4 by revising paragraph (b)(3)(iv) to read as follows:

§ 310.4 Abusive telemarketing acts or practices.

* * *

(b) * * *

(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;

* * * * *

By direction of the Commission.

Donald S. Clark,

Secretary.

Note: This appendix will not appear in the Code of Federal Regulations.

⁴³ The Commission notes that the TSR applies only to interstate telemarketing campaigns, and thus, is likely to exempt numerous small business entities that only conduct their telemarketing within a single state. The FCC, which regulates intrastate calling, while not mandated by the Appropriations Act to modify its telemarketing rules, is considering a change to bring them in line with the TSR. See “FCC Seeks Comment on Rules to Eliminate Spam From Mobile Phones; Commission Also Asks for Comments on Possible ‘Safe Harbor’ for Telemarketing Calls to Mobile Phones,” Mar. 11, 2004 (containing reference to the FCC’s impending NPRM on a thirty (30) day scrub interval).