



STATE OF FLORIDA

BILL McCOLLUM
ATTORNEY GENERAL

October 13, 2009

VIA OVERNIGHT DELIVERY

The Honorable Donald S. Clark
Secretary, Federal Trade Commission
Room H-135 (Annex Q)
600 Pennsylvania Ave, NW
Washington, DC 20580

RE: Prenotification Negative Option Rule Review
Matter No. P064202

Dear Secretary Clark:

I would like to submit comments in response to the Advance Notice of Proposed Rulemaking, 74 Fed. Reg. 2270 (May 14, 2009), on the Federal Trade Commission ("FTC") rule concerning the Use of Prenotification Negative Option Plans, 16 C.F.R. Part 425 ("PNOR"). As the chief law enforcement officer in this state, I have the primary responsibility to enforce the laws of Florida designed to protect consumers from unfair or deceptive business practices. *See* Chapter 501, Part II, Florida Statutes (2009). Our office has substantial experience in investigating and litigating matters involving several types of negative option plans and would like to share that experience with the FTC as it considers expanding the scope of the PNOR.

I greatly appreciate the Commission's consideration of this matter. Please feel free to contact me if you need any further information.

Sincerely,

A white rectangular box redacting the signature of Bill McCollum.

Bill McCollum

Enclosure

The Florida Attorney General (“Attorney General”) submits these comments in response to the Advance Notice of Proposed Rulemaking, 74 Fed. Reg. 2270 (May 14, 2009), on the Federal Trade Commission (“FTC”) rule concerning the Use of Prenotification Negative Option Plans, 16 C.F.R. Part 425 (“PNOR”). The Attorney General has the primary responsibility to enforce the laws of Florida designed to protect consumers from unfair or deceptive business practices. *See* Chapter 501, Part II, Florida Statutes (2009). The Attorney General has substantial experience in investigating and litigating matters involving several types of negative option plans and would like to share that experience with the FTC as it considers expanding the scope of the PNOR.¹

The existing PNOR was originally promulgated in 1973, with technical amendments in 1998. The PNOR currently regulates only one type of negative option marketing—the so-called “prenotification negative option plan” – where consumers receive periodic announcements that merchandise will be delivered to them unless they decline to accept it within a set time frame. The FTC has sought input on whether to extend the scope of the PNOR to regulate other forms of negative option marketing, most notably “trial conversions.” *See* 74 Fed. Reg. at 22721.

The Attorney General supports the retention of the existing PNOR but with some important changes to: (1) expand coverage of the rule to other variations of negative options, notably free-to-pay conversions and automatic renewals; (2) require express, informed consent of the offer; (3) require clear and conspicuous disclosure of the material terms at the point of sale and in confirmation notices following the sale; (4) tighten the requirements for cancellation

¹ The Attorney General also acknowledges the comments provided by other states concerning the PNOR.

rights and expand the right to cancel; (5) tighten regulation of third-party billing mechanisms;² and, (6) ensure that negative option contracts are not marketed to minors.

I. Florida's Experience with Negative Option Plans

The Attorney General has investigated dozens of companies for marketing and billing of negative option plans since 1998. *See* Appendix A.³ Only two investigations involved prenotification negative option plans that would be subject to the existing PNOR. The overwhelming majority of the investigations to date have instead involved “free-to-pay” offers with automatic renewal or continuity features. The negative option plans were advertised on the Internet in a majority of the cases, but these plans were also offered to consumers through print advertising, telemarketing, television commercials, and at the point of sale.⁴

Although negative option plans have created problems for Florida consumers in a wide variety of contexts, one area of particular concern to our office involves the use of negative option marketing for mobile phone content such as ringtones and games. The Attorney General was the first in the nation to investigate and resolve cases in which mobile content offered by third parties was charged by wireless carriers to cell phone bills. The offers for “free” ringtones and other content were prevalent on the Internet and television and were also placed in magazines targeted to teens and “tweens.” A substantial percentage of those responding to the

² The Attorney General has recently discussed the third-party billing issue in response to the Federal Communication Commission's Consumer Information and Disclosure and Truth-in-Billing and Billing Format Notice of Inquiry. A copy of the response to the NOI is attached.

³ Appendix A is not an exhaustive list of all negative option cases investigated by our office since 1998. For example, Appendix A does not include any negative option investigations that are currently non-public.

⁴ Accurate data on the number of consumer complaints relating to option plans is not available. Florida has two agencies that receive consumer complaints, the Attorney General and the Department of Agriculture and Consumer Affairs. Neither office tracks complaints by negative option plan categories. However, in four of the pending negative option cases alone, the Attorney General has received over two thousand (2000) consumer complaints.

offers were minors who provided the phone number of the mobile device that would receive the content.

Acceptance of the offer of free content was considered by the seller as an acceptance of the terms and conditions of a negative option contract, the terms of which were typically contained in several pages of text that were available through a link contained in the offer, a link located on a separate web page, in scroll down boxes or in small print text below the “fold.” The negative option contracts provided that charges for content subscriptions would be made to the consumer’s cell phone account until the subscription was cancelled. The cell phone account holders, many of them parents of the minors who accepted the “free” content, received vaguely worded charges that did not disclose the terms of the negative option agreement. To compound the problem, cancellation of the mobile content plan was extremely difficult and time-consuming.

The Attorney General discovered that many players were involved in marketing and profiting from negative option plans for mobile content, including: (1) the company that produces the service and product to be billed under a negative option plan; (2) the wireless carrier that bills and collects the recurring charges; (3) the affiliate network marketers that create advertising for the negative option plans and distribute advertising through e-mail, on search engines, in banner ads, pop-ups, on web pages, and elsewhere on the Internet; (4) the aggregators that act as intermediaries between the billing companies and other participants in the arrangement for billing purposes and for review and approval of Internet offers; and, (5) the website hosts who may also facilitate the enrollment in the negative option with other free offers and pop-up ads. Our Cyberfraud Section has been successful in obtaining agreements with mobile phone companies, product and service providers, affiliate marketing networks, and

hosting sites to reform the industry conduct and provide consumer restitution, but the existing PNOR provided no relief in this context.

Affiliate network marketing and hosting sites are being used to offer many products and services through negative option plans and the Attorney General believes that the use of these marketing methods will only increase, especially in the absence of FTC regulation. Moreover, mobile phone and landline bills will continue to be tempting targets for subscriptions or other goods or services offered as negative options. For example, the Attorney General opened an investigation in 2007 after receiving consumer complaints of unauthorized, recurring third-party charges to landline telephone bills. Many of these charges were based on negative option plans for voice-dial services, grocery store coupons, and other goods or services advertised on the Internet. It soon became evident that the players involved in marketing content for mobile phones also participated in the marketing of services that resulted in recurring charges to the landline accounts.

Another area of specific concern to our office is negative option marketing of magazine and membership subscriptions through the Internet, telemarketing, and direct mail. In marketing these products, the terms of the offer are often explained so quickly or blurred with other terms that any “consent” from the consumer cannot be attributed to a knowing and informed understanding of the offer. Also, the “trial” period is often so abbreviated that the consumer has little or no time to review the product before the cancellation or return period expires and the automatic charges begin. In some instances, the automatic charges are initiated before the trial period expires.

For example, one multi-state investigation involved the offer of “free” magazines on a trial basis by Time, Inc. If the consumer accepted the “free trial” offer, the consumer would

receive the magazines and be charged automatically for a magazine subscription which would also automatically renew indefinitely (and possibly at a higher price) until the consumer cancelled the subscription. The terms of the automatic renewal were disclosed separately from the trial offer and the consumer's consent to the automatic renewal was not obtained separately from the consumer's enrollment in the free magazine offer. Our office received thousands of complaints from consumers nationwide stating that they only accepted the free magazines, but did not agree to a subscription and/or that they agreed to a subscription, but did not agree to renew the subscription. Our investigation revealed numerous issues related to the negative option marketing, including whether the terms of the negative option were clearly and adequately disclosed, whether the consumer was given an opportunity to expressly consent to the negative option term, whether the consumer was likely to believe the purchase was for a limited term subscription rather than an automatically renewed subscription, how consumers were subsequently informed of the activation of an automatic renewal or enrollment in a negative option membership, how consumers were billed or charged, and how Time sought to collect payments for charges resulting from an automatic renewal. None of these issues was controlled by the existing PNOR.

The Attorney General shares the concerns expressed by other states that free-to-pay and trial offers are subject to deceptive and/or unfair marketing tactics across a wide variety of contexts. Based upon the investigations conducted by the Attorney General as well as a review of the consumer complaints and other data, the following are significant problems that our office has encountered in the marketing and implementation of negative option plans:

- Failure to obtain express informed acceptance of a negative option offer such that consumers know they are consenting to a negative option plan and understand the

terms of the plan, including how the plan is to be billed and, if applicable, to what account the product or service will be billed;

- Failure to clearly and conspicuously disclose in a meaningful manner the terms and conditions of negative option offers, including but not limited to “free-to-pay” conversion offers and automatic renewals;
- Use of unregulated billing mechanisms that do not provide consumers with procedures to challenge charges for negative option plans;
- Marketing of negative option plans to minors and absence of safeguards that would prevent minors from entering into negative option plans;
- Use of pre-acquired account information in billing for negative option plans without disclosing that the account information will later be used to bill for products or services;
- Failure to provide appropriate channels for consumers to cancel and/or failure to provide adequate systems and personnel to respond to consumers’ requests for cancellation;
- Failure of businesses to take responsibility for all advertising distributed at their direction and with their approval or through which they profit;
- Failure to clearly and conspicuously disclose and describe negative option charges in bills; and,
- Failing to disclose when trial periods begin and end as well as setting trial periods that are too brief to allow consumers to try a product or service and cancel before being charged.

Therefore, in light of the changing marketplace and the increasingly sophisticated use of billing devices and marketing channels, the Attorney General supports the retention of the existing PNOR but with some important changes to expand the coverage of the rule and to provide additional protections that reflect the risks inherent in today's transactions.

II. Specific Suggestions

A. Expand The Definition of Negative Options And Apply The Rule To All Entities Participating In The Negative Option Transaction

Of the nearly fifty (50) investigations the Attorney General has handled since 1998 that involve negative options, only two investigations directly involved the application of PNOR to the type of negative option offer made. More commonly, deceptive and unfair business practices are occurring in negative option plans that employ free-to-pay conversions, often combined with recurring charges based on automatic renewal or continuity features. These plans are being marketed in all available mediums--Internet, telephone, print, retail, television, emails, mail, cell phone advertisements, and other electronic devices-- and involve numerous entities that promote, assist, and facilitate the transaction. Rarely is there a direct one-to-one transaction between the ultimate merchant and the buyer.

For example, in retail sales a variety of products not offered at retail may be offered to a consumer at checkout. The consumer buying a book from a retail outlet may be offered, for example, a "free" trial of a magazine subscription. The consumer may rely on the retail sales associate's assurance that the offer is "free" with no obligation to purchase, but the terms of the offer may be determined by the publisher or by a third-party marketing agent. The consumer may receive the negative option terms of the offer on the retail receipt or from a separate insert or may be directed on the receipt to visit a website. Thus the consumer may accept a purportedly

“free” offer that leads to an unwanted charge on the same account used in the retail transaction. When the consumer is enrolled in the offer, a variety of entities may benefit, including the retail sales associate, the retail store, a third-party marketing entity, an Internet marketing affiliate, a third-party payment processor, and others. The PNOR offers no regulation in these instances and the consumer often has difficulty identifying which entity, if any, will provide relief from the unwanted transaction. Therefore, the Attorney General encourages the FTC to consider expanding the scope of the rule to reach the current marketplace practices and to include assisters, facilitators, and other agents involved in marketing and implementing the negative option plan.

B. Require Express Informed Consent To Bind Consumers At The End Of Free Trials.

As the FTC has recognized, negative option transactions “change the typical relationship between the buyer and seller,” in which the buyer is bound only if she responds affirmatively to an offer made by the seller. Consumers customarily do business based on the premise that they will not be bound and incur any monetary obligations, unless and until there is a full “meeting of the minds” and genuine assent between the parties. Negative option marketing ignores this commonly-understood principle by deeming silence to be acceptance. Therefore, the risks inherent in a negative option plan are great. To ensure that negative option transactions are fair, the Attorney General suggests that businesses should be required to clearly and conspicuously disclose the negative option terms and to obtain express informed consent of the consumer to each material obligation.

The Attorney General recognizes that consumers may benefit from an automatic renewal or continuous service contract in some instances and he does not seek to interfere with an

appropriate negative option transaction. The lynchpin to establishing a fair negative option transaction is ensuring that the consumer understands the obligations attendant with the transaction and expressly consents to those obligations. Therefore, our office encourages the FTC to revise the rule to require consumers' express affirmative consent to the negative option obligation in the initial offer as well as following the "free" trial period in a trial conversion or before any renewal charges can be made on a recurring term subscription (if the term extends longer than six months, we would suggest that a notice of continuing service also be provided—see discussion in paragraph C below).

That is, before a company may charge a consumer for a product or service previously received during a trial period or automatically renew a membership or other recurring charge after the initial period, the company would have to obtain express consent from the consumer to be charged in the future. Consent purportedly given at the outset of the trial period is not sufficient, because the trial period is most often touted as being without obligation and because it can and does lull consumers into a state of forgetfulness; only at the end of the trial period does the relationship between the consumer and business transform into one in which the consumer is actually being charged. The consent must be express and include all material terms. The merchant must retain evidence of this express consent; otherwise the transaction is void and the consumer is under no obligation to pay. The express consent would then be followed up with a written acknowledgement by the company that clearly and conspicuously discloses all material terms of the negative option obligation and the procedures for cancellation. These changes to the PNOR would substantially reduce the risk that the products and services are being sold to consumers who do not want them or are unaware of their purchase of them.

C. Expand Disclosure And Notice Requirements

The majority of deceptive practices that our office encounters arise from the lack of adequate disclosure of the material terms of the negative option obligation. For example, an Internet merchant of consumer credit-related services captured the consumer's credit card billing information by misrepresenting to the consumer that the credit card information would be used to confirm his or her credit card accounts. In fact, the information was used to charge the consumer's card for the service once the trial period elapsed. Therefore, it is essential that the PNOR be expanded to require that all material terms of the negative option be disclosed at the point of sale or when consent is expressed. Whenever billing information is captured, there should be a clear and conspicuous disclosure of how and when a payment will be processed and the amount and interval of each payment, including any preauthorization charges. Likewise, all billing methods should clearly disclose the identity of the merchant and contact information for disputing the charges.

Because the initial disclosures generally offer limited protection and likely are not retained by the consumer, particularly in "free-to-pay" conversion offers, our office supports a *periodic* disclosure requirement at no less than six-month intervals. The periodic notice would be provided in written form and would include all material terms of the negative option obligation, including any recurring charges. The notice must confirm the consumer's acceptance of an obligation to pay the recurring charges and set forth the terms for cancellation.

D. Expand Right to Cancel And Require Adherence to Cancellation Policies

Cancellation of negative option plans is difficult for consumers when they are required by the seller to cancel using a different method of communication than the method by which they agree to the offer. To reduce this difficulty, the Attorney General proposes requiring that

consumers be allowed to cancel their memberships by the same method as their enrollment (as well as by other methods, at the option of the seller). For example, if a consumer enrolled through an Internet website, the company should provide an Internet cancellation option. The Attorney General also recommends the PNOR require that any cancellation be acknowledged with a cancellation number. The requirements for cancellation should be clearly and conspicuously set out not only in the original offer, but also in the written confirmation of the offer and any periodic disclosures. In addition, in free-to-pay conversion offers, the cancellation period should be sufficient to allow the consumer to receive acknowledgment of the offer and to accept the charges.

E. Ensure That Negative Options Are Not Marketed to Minors

Contracts for negative option plans are often detailed and confusing. They are not agreements that should be decided upon by minors. Accordingly, the requirements for enrollment in negative option offers that are likely to be received and responded to by minors must be enhanced. Before a “free trial” offer can be processed, the Attorney General suggests that business should be required to take reasonable steps to ensure that the express consent of an adult is obtained.

III. Conclusion

Our office would be happy to provide further information on its experience with negative option plans. I thank the FTC for its consideration of these comments.

Appendix A

Count	Case No.	Case name	Product or Service	Negative Option Types	Negative Option	Allegations Investigated	Sales Channels	Status	AVC Signed
1	L2009-3-1056	Advanced Wellness Research, Inc., Nicolas Molina, Michael Trimarco	Dietary supplements, e.g., acai berry, teeth whitening, other supplies	Free to pay conversion; Continuity	15 day free trial/ \$80 month continuity plan	Unable to cancel during trial period; terms and conditions not clear and conspicuous; customer service poor/non-existent;	Internet	Pending	
2	L2009-3-1042	ATT Mobility, LLC	Voice dial feature, media packages/bundles	Free to pay conversion; Continuity	Free trial converted to monthly recurring charges	Terms and conditions not clearly and conspicuously disclosed; represented as "free;" added to account without authorization	Print, Internal Telemarketing, Retail Point of Sale	Pending	
3	L2009-3-1041	FMW	Dietary supplements, e.g., acai berry	Free to pay conversion; Continuity	15 day free trial/ \$80 month continuity plan	Unable to cancel during trial period; terms and conditions not clear and conspicuous; customer service poor/non-existent;	Internet	Pending	
4	L2009-3-1015	Mobile Messenger Americas, Inc.	Marketing of mobile content	Continuity	Negative option subscriptions for cell phone "ring tones" and similar services	Terms and conditions not clear and conspicuous, unaware they were being charged and in the plan	Internet	Closed	AVC signed 01/21/2009
5	L2008-3-1245	SFL/GIC	Dietary supplements, e.g., acai berry	Free to pay conversion; Continuity	15 day free trial/ \$80 month continuity plan	Unable to cancel during trial period; terms and conditions not clear and conspicuous; customer service poor/non-existent;	Internet	Closed	AVC signed 6/22/2009
6	L2008-3-1166	Mobilefunster d/b/a Funmobile	Marketing of mobile content	Free to pay conversion, Continuity	Negative option subscriptions for cell phone "ring tones" and similar services	Terms and conditions not clear and conspicuous, unaware they were being charged and in the plan	Internet	Closed	AVC signed 08/08/2008
7	L2008-3-1165	Rodale, Inc.	Books and magazines	Prenotification, continuity, Free to pay conversion, Automatic renewal	Automatic renewals of subscriptions, continuity	Shipment of unordered books and magazines; renewal of subscriptions without authorization	Internet, Telemarketing, Print	Pending	
8	L2008-3-1159	Magic Jack	Device for long distance calling over Internet	Free to pay conversion	30 day free trial	Unable to cancel; charged within 30 day free trial period	Internet, Radio, Television, Print	Pending	
9	L2008-3-1128	Matthew Bender & Company, Inc. d/b/a LexisNexis Matthew Bender; Reed Elsevier, Inc	Legal publications	Continuity, Automatic renewals	Automatic shipments of new editions, automatic renewals of subscriptions	Shipment of unordered publications	Internet, Print, Telephone, Personal Sales Contact	Closed	AVC signed 4/14/2009
10	L2008-3-1060	Central Coast Nutraceuticals, Inc.	"Health" products	Free to pay conversions, Continuity	Risk-free trial of product converts to monthly shipments of product and enrollment in a separate program	Consumers signing up for free trial are enrolled in monthly pay program	Internet	Pending	
11	L2008-3-1036	Sprint Nextel Corporation	Billing for mobile content	Free to pay conversion, Continuity	Acceptance of offer of content results in recurring monthly charges to mobile phone bills	Billing for mobile content advertised as free; unauthorized charges	Print, Internal Telemarketing, Retail Point of Sale	Pending	
12	L2008-3-1035	Verizon Wireless Services, LLC	Billing for mobile content	Free to pay conversion, Continuity	Monthly recurring subscriptions for cell phone "ring tones" and similar services	Billing for mobile content advertised as free; unauthorized charges	Television, Print, Internet	Closed	AVC signed 6/22/2009

Appendix A

Count	Case No.	Case name	Product or Service	Negative Option Types	Negative Option	Allegations Investigated	Sales Channels	Status	AVC Signed
13	L2008-3-1033	T-Mobile, USA, Inc.	Mobile content	Free to pay conversion, Continuity	Acceptance of offer of content results in recurring monthly charges to mobile phone bills	Billing for mobile content advertised as free; unauthorized charges	Print, Internal Telemarketing, Retail Point of Sale	Pending	
14	L2008-3-1014	Dept. of Leg. Affairs v. All Florida Firm, Inc. and Jamison M. Jessup, Sr.	Workers comp officer exemption and registered agent	Automatic renewal	Automatic renewal of services	Failure to clearly and conspicuously disclose terms and conditions	Print, Internet	Pending	
15	L2008-3-1010	Cingular Wireless/ATT Mobility LLC	Roadside assistance	Free to pay conversion, Continuity	Free trial for 30/60 days, then \$2.99/month billed to mobile phone if not cancelled	Failure to disclose offer conditions; added to bills without authorization	Telemarketing, Internet, Print and Point of Sale Retail	Pending	
16	L2007-3-1174	New Motion, Inc.	Mobile content provider	Free to pay conversion, Continuity	Negative option subscriptions for cell phone "ring tones" and similar services.	Enrollment of consumers into negative option plans billed to their cell phone without authorization.	Television, Print, Internet	Closed	AVC signed 2/19/2009
17	L2007-3-1159	Thompson Publishing Group, Inc.	Legal publications	Free to pay conversion, Continuity, Automatic renewal	Automatic shipments of new editions, automatic renewals of subscriptions	Unordered merchandise	Print, Internet	Closed	AVC signed 5/7/2008
18	L2007-3-1113	M-Qube, Inc.	Aggregator is intermediary and facilitates marketing and billing of mobile content	Free to pay conversion, Continuity	"Free" ringtones and other offers of free content converted to subscriptions for cell phone "ring tones" and similar services.	Aggregator assisting and facilitating mobile content offers.	Internet	Closed	AVC signed 08/25/2008
19	L2007-3-1098	Nationwide Voice Messaging, Inc.	Voice mail box services	Free to pay conversion, Continuity	30 day free trial converts to monthly charge to land line phone bill	Unauthorized charges; offer is for free coupons or other free goods or services and consumer is unaware that acceptance results in voicemail charges; 30 day free trial, converts to monthly fee in addition to one-time set up charge	Internet	Pending	
20	L2007-3-1097	United Voice Messaging, Inc.	Voice mail box services	Free to pay conversion, Continuity	30 day free trial converts to monthly charge to land line phone bill	Unauthorized charges; offer is for free coupons or other free goods or services and consumer is unaware that acceptance results in voicemail charges; 30 day free trial, converts to monthly fee in addition to one-time set up charge	Internet	Pending	

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Count	Case No.	Case name	Product or Service	Negative Option Types	Negative Option	Allegations Investigated	Sales Channels	Status	AVC Signed
21	L2007-3-1096	Optimum Voicemail, Inc.	Voice mail box services	Free to pay conversion, Continuity	30 day free trial converts to monthly charge to land line phone bill	Unauthorized charges; offer is for free coupons or other free goods or services and consumer is unaware that acceptance results in voicemail charges; 30 day free trial, converts to monthly fee in addition to one-time set up charge	Internet	Pending	
22	L2007-3-1095	Telephone Services, Inc.	Customer service for voice mail box businesses	Free to pay conversion, Continuity	30 day free trial converts to monthly charge to land line phone bill	Unauthorized charges; offer is for free coupons or other free goods or services and consumer is unaware that acceptance results in voicemail charges; 30 day free trial, converts to monthly fee in addition to one-time set up charge	Internet	Pending	
23	L2007-3-1065	CyberSpace to Paradise, Inc., d/b/a Harris Publishing Group a/k/a HD Publishing and Net Detective	Web based person search database (public records search) sold on subscription basis	Continuity	3 year basic subscription for \$29.99, optional 3 day trial of advanced service for \$9.99 with recurring monthly billing for \$29.95	Refuses to give refunds or stop billing.	Internet	Pending	
24	L2007-3-1044	Azoogleads US, Inc.	Affiliate marketing network distributes advertising for mobile content	Free to pay conversion, Continuity	"Free" ringtones and other offers of free converted to subscriptions for cell phone "ring tones" and similar services.	Distributed ads for free ringtones and other offers on Internet that resulted in monthly recurring subscriptions	Internet	Closed	AVC signed 11/6/2007
25	L2006-3-1149	Consumerinfo.com, Inc. d/b/a Experian Consumer Direct, Qspace, Inc., iplace, Inc. freecreditreport.com; consumerinfo.com; creditexpert.com; creditmatters.com	Purported "FREE" Experian credit report and credit score with 7-day trial enrollment in Triple Advantage, a credit monitoring product	Free to pay conversion, continuity	Purported "Free" trial of credit monitoring, then free-to-pay conversion at until cancelled	Failure to adequately disclose negative option enrollment in credit monitoring with "Free" credit report, deceptive advertising, misleading domain, failure to honor cancellation	Internet	Pending	
26	L2006-3-1089	World Avenue, USA, LLC, successor by merger to Nutech, LLC, & Nunti Ji, an individual	Affiliate marketing network distributes advertising for mobile content by offering "free" Dell laptop or other incentive rewards for completion of an online survey.	Free to pay conversion, Continuity, Automatic renewals	Consumers driven to site by offers of "free merchandise" must accept negative option offers to qualify.	Terms and conditions are not clearly and conspicuously disclosed. Unauthorized charges to	Internet	Closed	AVC signed 01/16/2008
27	L2006-3-1084	Email Discount Network	Shopping coupons and discounts	Continuity	Activation free of \$12.95, and then \$14.95/month	Unauthorized charges to telephone bills	Internet	Closed	AVC signed 2/23/2007

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Count	Case No.	Case name	Product or Service	Negative Option Types	Negative Option	Allegations Investigated	Sales Channels	Status	AVC Signed
28	L2006-3-1065	Integretel, Inc., d/b/a new name "The Billing Resource"	Aggregator is intermediary and facilitates marketing and billing for voicemail and similar services	Continuity	Unauthorized charges for negative option plans of telephone bills	Billing aggregator providing a service to telemarketers, internet companies and telecom businesses to invoice their charges on consumers' telephone bills.	Internet, Telemarketing	Closed; pending enforcement action by other agencies	
29	L2005-32-1136	America Online, LLC	Internet services	Free to pay, Continuity	Trial offer of Internet services converted to continuity	Terms and Conditions not clearly and conspicuously disclosed	Internet	Closed	ACV signed 12/11/2006
30	L2005-3-1143	Allied Telephone Directories a/k/a Global Directories, Inc. a/k/a Global Directories, LLC	National Business-to-Business Directory	Automatic renewals	Automatic renewal	Mailing invoices bearing the familiar "walking fingers" and the name "Yellow Pages" on the mailer for enrollment in a national business-to-business directory. The subscription is automatically renewed.	Print	Closed	AVC signed 5/6/2009
31	L2005-3-1140	Buongiorno USA, Inc.	Mobile content	Free-to-pay conversion, Continuity	Negative option subscriptions for cell phone "ring tones" and similar services	Unordered services billed for free ring tones	Television, Print, Internet	Pending	
32	L2005-3-1026	State of Florida, Office of the Attorney General, Department of Legal Affairs v. Berkeley Premium Nutraceuticals, Inc., Lifekey, Inc., Warner Health Care, Inc., Boland Naturals, Inc., Wagner Nutraceuticals, Inc., and Steve Warshak, individually and in his capacity as President and Owner of Berkeley Premium Nutraceuticals, Inc., Lifekey, Inc., Warner Health Care, Inc., Boland Naturals, Inc., Wagner Nutraceuticals, Inc.	Health Supplements	Continuity	Automatic shipment of products	Misleading advertising, auto ship delivery of product, refusal to honor cancellation requests, and refund policies.	Internet	Closed	Consent Order Obtained 3/7/2006

Appendix A

Count	Case No.	Case name	Product or Service	Negative Option Types	Negative Option	Allegations Investigated	Sales Channels	Status	AVC Signed
33	L2004-3-1149	Eli Research, Inc. d/b/a The Coding Institute, National Subscription Bureau, National Litigation Bureau, New Hill Services and others	Deceptive printed advertisement. Complaints allege that the company is disseminating direct mail solicitations that resemble past due invoices for payments due to doctor's offices, clinics, and law offices. Possible violations of Chapter 501, Part II, and Section 817.061, Florida Statutes.	Automatic renewal, Continuity	Simulated invoices for magazines not ordered by consumer	Opportunity to purchase magazine comes in what appears to be an invoice and/or bill.	Print	Closed	AVC signed 9/12/2007
34	L2003-3-1219	Cingular Wireless LLC	Mobile content	Free to pay conversion, Continuity	"Free" ring tones results in recurring monthly charges to mobile phone bills	Billing for mobile content advertised as free; unauthorized charges	Print, Internal Telemarketing, Retail Point of Sale	Closed	AVC signed 2/28/2008
35	L2003-3-1130	Alltel Communications, Inc.	Roadside Assistance Service	Free to pay conversion, Continuity	Free trial for 30/60 days, then billed monthly to mobile phone if not cancelled	Terms and conditions not clear and conspicuous, unaware they were being charged and in the plan	Internal Telemarketing, Point of Sale	Pending, trial scheduled	
36	L2002-3-1241	Dynamic Resource Group, Inc.	Books and Magazines, Assorted Arts and Crafts	Free to pay conversion, Continuity	Trial offer for book, if not cancelled, placed in continuity plan for books in same and related series	Mail unsolicited bills for unordered magazine subscriptions and terms and conditions not clear and conspicuously disclosed, receipt of unordered merchandise	Print	Closed	AVC signed 9/20/2004
37	L2001-3-1484	Trilegiant Corporation	Buyers Club	Free to pay conversion, Automatic renewal	Trial offer of Buyers Club converts to automatic renewals	The use of a negative option in the sale of buyer club memberships.	Telemarketing, Print	Closed	AVC signed 3/27/2005
38	L2000-3-2279	Brand Direct Marketing, Inc.	Buyers Club	Free to pay conversion, Automatic renewal	Free trial	Terms and conditions not clear and conspicuous, unaware they were being charged and in the plan	Telemarketing	Closed	AVC signed 7/3/2002
39	L2000-3-2115	ICR Security Services, Inc. d/b/a ADT Security Services	Home security system	Automatic renewal	Security agreement automatically renews if not cancelled	Terms and conditions not clearly and conspicuously disclosed, including the requirement that consumers must enter into a multi-year monitoring agreement	Personal sales contact	Closed	AVC signed 7/9/2001

Appendix A

Count	Case No.	Case name	Product or Service	Negative Option Types	Negative Option	Allegations Investigated	Sales Channels	Status	AVC Signed
40	L2000-3-2068	Time Inc.; Time Customer Service; Time Consumer Marketing; Time Inc. Home Entertainment	Magazine sales	Free to pay Conversion, Automatic renewal	Simulated invoices for magazines; aggressive collection efforts for magazine subscriptions that were automatically renewed without the consumer's authorization or knowing consent; consumers charged for monthly subscriptions to books/clubs that they were unaware of joining	Free to pay conversion of magazine subscriptions; automatic renewal of magazine subscriptions without consumer consent; solicitations for magazine subscriptions that simulate invoices, billing/ collection/credit card charges for unordered merchandise and magazine subscriptions including renewal subscriptions that were not ordered.	Internet, Print, Telemarketing	Multi-state settlement ; case closed	AVC signed 3/3/2006
41	L2000-3-2066	House Beautiful	Magazine sales	Automatic renewal	Simulated invoices for magazines not ordered by consumer	Opportunity to purchase magazine comes in what appears to be an invoice and/or bill.	Print	C&D Letter sent; closed	
42	L2000-3-1920	Dept. of Legal Affairs v. Memberworks, Inc. and others	Discount savings program	Free to pay conversion, Automatic renewal	Purported "Free" 30 day trial, then conversion into an annual membership (\$49.95- \$100+/yr); later billed monthly	Unauthorized charges, telemarketing sales law violations, including failures to disclose and misrepresentation of negative option, program membership terms, use of "free," cancellation mechanisms, and deceptive retention.	Telemarketing Outbound & Inbound (up sells)	Closed	Settlement signed 6/9/2004
43	L2000-3-1813	Enhancement Services Inc., fka : First Lenders Insurance Services, Inc.	Household protection services	Free to pay conversion, Automatic renewal	30 day "risk free" trial converted to \$99/year auto renewal	Charging fees of \$99.95 without consent to consumer credit cards for "Household Protection Plus"	Print, Telemarketing	Closed	AVC signed 9/27/2001
44	L2000-3-1223	Burdines v. Department of Legal Affairs	Buyers Club	Free to pay conversion, Continuity	Free trial	Terms and conditions not clear and conspicuous, unaware they were being charged and in the plan	Telemarketing	Closed	AVC signed 9/25/2001
45	L1999-3-1416	Credit Card Sentinel, Inc.	Credit Card Protection	Free to pay conversion, Continuity	Trial offer of credit card protection, if not cancelled placed in continuity plan	Terms and conditions not clearly and conspicuously disclosed	Telemarketing	Closed	AVC signed 11/4/2002
46	L1998-3-1257	Oxmoor House, Inc.; Southern Progress Corporation	Books	Free to pay conversion, Prenotification, Continuity	Trial offer for book, if not cancelled, placed in continuity plan for books in same and related series	Terms and conditions not clearly and conspicuously disclosed; receipt of unordered merchandise	Print	Closed	AVC signed 7/9/2001
47	L1997-3-1256	Dept. of Legal Affairs v. Triad Discount Buying Service, Inc.; Member Service of America, LLC, and others	Buyers Club	Free to pay conversion; Automatic renewal	Trial offer of buyers Club converts to automatic renewals	Solicitation of buying service membership/imposing charges on credit cards without consumers' authorization	Telemarketing	Closed	Final Judgment 12/10/2001

**Before the
Federal Communications Commission
Washington, D.C. 205544**

In the Matter of)	
)	
Consumer Information and Disclosure)	CG Docket No. 09-158
)	
Truth-in-Billing and Billing Format)	CC Docket No.98-170
)	
IP-Enabled Services)	WC Docket No. 04-36

**COMMENTS OF
ATTORNEYS GENERAL
OF THE UNDERSIGNED STATES
TO NOTICE OF INQUIRY**

October 13, 2009

I. INTRODUCTION:

The undersigned Attorneys General submit these comments in response to the Federal Communications Commission's ("FCC" or "Commission") *Consumer Information and Disclosure and Truth-in-Billing and Billing Format NOTICE OF INQUIRY*, regarding the protection and empowerment of consumers by "ensuring sufficient access to relevant information about communications services." We appreciate the Commission's interest in these areas of great concern to the Attorneys General, who serve as chief law enforcement officers of their respective states. We recognize that this is an initial stage in an extensive proceeding, and therefore submit these brief, general preliminary concerns and recommendations for the Commission's consideration, regarding some of the issues raised by the Commission in this *NOTICE OF INQUIRY*.

II. BACKGROUND:

As the Commission acknowledged in its Notice of Inquiry, the Commission addressed growing consumer and marketplace confusion related to carrier abuses in billing for telecommunications services by releasing its *First Truth in Billing Order* in 1999.¹ There, the general principles the Commission espoused were: (1) that consumer telephone bills be clearly organized, clearly identify the service provider, and highlight any new provisions; (2) that bills contain full and non-misleading descriptions of all charges; and (3) that bills contain clear and conspicuous disclosure of any information that the consumer may need to make inquiries about, or contest charges on the bill.² The Commission left the details of compliance with these requirements to the carriers; also, Commercial Mobile Radio Service carriers ("CMRS carriers" or "wireless providers") were exempt from that Order.

In 2005, the Commission revisited those truth-in-billing requirements. The Commission abolished the exemption for brief, clear, non-misleading, and plain-language bills for CMRS carriers.³ The Commission also tentatively ruled that "government mandated charges must be placed in a section of the bill separate from all other charges," and that "carriers must disclose the full rate * * * to the consumer at the point of sale * * * before the customer signs any contract for the carrier's services."⁴ The Commission changed these rules largely because the increase in consumer complaints in the wireless industry was "demonstrative of consumer confusion and dissatisfaction with current billing practices."⁵

¹ *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492 (1999) (*First Truth-in-Billing Order*).

² *Id.* at 7496, para. 5.

³ *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 6456, para. 16 (2005) (*Second Truth-in-Billing Order*).

⁴ *Id.* at 6468, para. 39; 6477, *Id.* at para. 55-56, emphasis in original.

⁵ *Id.* at 6456, para. 16.

Several Attorneys General participated in these proceedings through prior comments to the Commission, including extensive comments in response to the Commission's 2005 Order and Further Notice of Proposed Rulemaking. Many of those previous comments remain pertinent and informative today and we encourage the Commission to revisit those prior responses.

III. RULES SHOULD APPLY TO ALL PROVIDERS:

As the Commission noted in this Notice of Inquiry, the number of consumer complaints in the telecommunications area has continued to rise.⁶ Telecommunications-related complaints were again in the top ten most common complaints for 2008, according to the National Association of Attorneys General.⁷

The Commission's truth-in-billing rules and consumer-information-related rules that might develop from this proceeding should be applied to other telecommunications and communications-related services, such as broadband internet, subscription video services/cable and satellite television, and Voice over Internet Protocol ("VoIP") services. Given the current trend of offering some of these "other services" alongside traditional landline or wireless telephone services in a single "bundled" package, now more than ever the rules that apply to some should apply to all, to the extent applicable.

The Commission has already found that, with respect to truth-in-billing requirements for CMRS carriers, "one of the fundamental goals of the truth-in-billing principles is to provide consumers with clear, well-organized, and non-misleading information so that they will be able to reap the advantages of competitive markets."⁸ Additionally, "[i]t is critical for consumers to receive accurate billing information from their carriers to take full advantage of the benefits of a competitive marketplace."⁹ The same is true for all communications services, including broadband internet, subscription video/cable and satellite television, and VoIP.

This is particularly true with VoIP. When it comes to the fundamental goals of truth-in-billing principles, there exists no inherent reason to treat VoIP differently than traditional landline or wireless telephone services, since many VoIP consumers merely substitute VoIP for those traditional telephony services they utilized in the past. As such, consumers deserve the same standards for and clarity of information when choosing and paying for the services of VoIP providers.

⁶ *Consumer Information and Disclosure*, CG Docket No. 09-158, *Truth-in-Billing and Billing Format*, CC Docket 98-170, *IP-Enabled Services*, WC Docket No. 04-36, Notice of Inquiry, __ FCC Rcd at __, para. 15 (2009) (*NOI*).

⁷ <http://www.naag.org/top-10-list-of-consumer-complaints-for-2008-aug.-31-2009.php>

⁸ *Second Truth-in-Billing Order*, 20 FCC Rcd 6457, para. 17.

⁹ *Id.* at 6457, para. 18.

The Commission has a firm legal basis to extend these rules to the various “other services” without violating any freedom of speech protections. Inaccurate commercial speech — such as misrepresentations, non-truths, and misleading implications — can often result from mere omissions of pertinent, material information. As the Commission noted, it is well-settled that “[t]he State and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading[.]”¹⁰ Additionally, under the standard *Central Hudson* test for regulating non-misleading commercial speech, the Commission has previously determined that it has a substantial interest in “ensuring that consumers are able to make intelligent and well informed decisions in the increasingly competitive telecommunications market that the 1996 Telecommunications Act is intended to foster.”¹¹ Thus, the Commission may mandate clear, accurate, true, and full disclosures without running afoul of freedom-of-speech principles.

Consumers need information displayed in a consistent format that allows them to compare their current services with the new and increasing number of offerings regarding similar services from other providers. Basic marketplace principles have always dictated that consumers cannot formulate informed decisions by comparing what they perceive as the same or similar services, if — in reality — the services are distinctly different. For example, wireless telephone plans advertised by competing providers at the same low monthly rate, where only one of the providers’ plans drastically limits monthly text messages and monthly minutes, are distinctly different. Such differing plans are unlikely to result in the same or similar monthly charges to consumers. This problem may arise when comparing traditional landline telephone services to VoIP services as well. Information displayed in consistent formats would allow consumers to effectively compare one provider’s offerings with another’s, and determine reasonably estimated costs.

IV. DISCLOSURES:

The Commission’s tentative conclusion in 2005 that disclosures should occur before any contract is signed remains valid.¹² In 2004, 32 states obtained agreements with three major CMRS carriers requiring rate disclosures at the point-of-sale. In addition, the CTIA Consumer Code for Wireless Service provides that signatories to the Code will provide rate information at the point-of-sale, but only to the extent of making the information available to consumers in collateral or other disclosures at point-of-sale

¹⁰ *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985); accord, *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) (“there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it.”).

¹¹ *First Truth-in-Billing Order*, 14 FCC Rcd 7531, para. 61.

¹² *Second Truth-in-Billing Order*, 20 FCC Rcd 6477, para 56.

and on web sites.¹³ Requiring adequate disclosures before entering into a contract remains a very important necessity in the marketplace. As the Commission noted, “a disclosure after contract signing, when most CMRS carriers lock customers into long-term contracts subject to significant early termination fees, may thwart our pro-competition goal of enabling consumers to make informed comparisons of different carriers’ plans before subscribing.”¹⁴ To be fair, today most CMRS carriers now provide consumers with reasonable trial periods to cancel services without early termination fees or other penalties. However, other communications services also use long-term contracts with early termination fees today, and many do not provide reasonable trial periods or clear disclosures of early-termination fees.¹⁵ Given the increasing rate of “bundling” services, proper advertising and point-of-sale disclosures for all communications-related services are necessary for a competitive marketplace. Furthermore, even reasonable trial periods do not always extend past receipt of the consumers’ first bills, and thus may serve little actual notice of overall costs and fees.

The same is true where long-term contracts are renewed with consumers’ current providers. Many consumer complaints and investigations indicate that consumers often feel “trapped” into contract extensions, where a contract renewal has occurred without their knowledge or express approval.¹⁶ Whether due to an automatic-contract-renewal trigger, or due to actions by consumers, providers must make adequate disclosures in order to ensure that renewals of long-term contracts are the result of the consumers’ own choices. The effect of “trapping” a consumer in a long-term contract for another term serves only to weaken competition in the marketplace and to weaken consumers’ abilities to “shop around” for the best provider to serve their needs.

Information necessary for consumers to formulate purchasing decisions changes from stage-to-stage of the process. Necessary disclosures in an advertisement are obviously different from what is needed at the point-of-sale. In turn, information that is required at the point-of-sale may be different from what is necessary at or after the consummation of a long-term contract. Nonetheless, certain general, basic information must always be disclosed prior to consummation of a long-term contract in order to ensure consumers can properly weigh the benefits and drawbacks of that contract. This general, basic information includes overall costs or a reasonable estimate of overall costs, recurring monthly charges, usage-based charges, contract lengths, initiation or startup or

¹³ See http://files.ctia.org/pdf/The_Code.pdf

¹⁴ *Second Truth-in-Billing Order*, 20 FCC Rcd 6477, para 56.

¹⁵ For example, one satellite television provider offers, or has offered in the past, 24 hours for consumers to fully rescind contracts. When the satellite television provider’s services are sold as part of a bundle by landline telephone providers, it is not clear that all landline telephone providers disclose the 24-hour window to consumers purchasing the bundled services.

¹⁶ Two types of renewal provisions are common. In the first, so-called “evergreen” clauses ensure that the contract automatically renews, unless the consumer notifies the provider (often by mail) a specific number of days in advance of termination. In the second, long-term contracts are automatically renewed when the consumer alters the telecommunications “plan” or orders new equipment. Many complaints and investigations suggest that these provisions are not meaningfully disclosed to consumers.

installation costs (including equipment costs and requirements), applicability and amount of early termination or other fees or penalties, and overage limits and charges on plan features. Particularly with the increasing popularity of satellite television, digital cable, and broadband internet, items such as installation costs and equipment requirements are becoming more important to disclose and make clear to consumers upfront.

When this information and other material terms are not provided in some static form to consumers before they contemplate execution of a long-term contract, consumer complaints and investigations often indicate that there exists an inherent gap between what the consumers believe they are agreeing to and what the providers plan to hold the consumers responsible for. This simple truism is the cause of much consumer confusion and frustration. Too often we hear from consumers that they do not understand the commitments they are making, or the costs they will incur, when choosing providers because clear and full disclosures of contractual provisions — including total costs for initiating services, total costs for equipment required in order to receive services, and early termination fees in the event they cancel services — are not made prior to consummation of long-term contracts.

Two specific problem areas regarding appropriate disclosures are wireless service coverage maps and broadband internet service speeds. We encourage the Commission to evaluate technologies available to wireless providers for more accurate determinations and disclosures in respective coverage maps of “weak spots” and “dropped call zones” to better apprise consumers of potential problem areas. As consumers become more reliant upon their “smart phones” for a myriad of communications services, this coverage information becomes more critical. Such weak spots and dropped call zones known widely to existing customers often show up on current coverage maps as “full” or “best” coverage, when that is not what consumers are experiencing. Within covered areas on maps it would not be difficult — perhaps through the use of hash marks, varying shades of the same color, or other symbols — to show intermittent service, strength of service, or other potential service issues. We also encourage the Commission to evaluate broadband internet speeds, particularly in regard to providers’ advertising. Speeds advertised as “up to” a certain amount are often not regularly realized by consumers. It would appear that a better hallmark to both empower consumers and simplify comparisons of various providers’ plans, as well as more accurately describing the services provided, would be a requirement to list average speeds during peak hours of use in any advertisement referencing maximum speeds.

V. ADVERTISING:

Regarding advertisement disclosures, consumer complaints and investigations often indicate there continues to be a disconnect between advertised prices and clear, conspicuous disclosures of all costs and fees. This discrepancy in wireless providers’ advertising was part of the motivation behind the 2004, 32-state agreements with three major CMRS carriers mentioned above, requiring rate disclosures at the point-of-sale. However, when advertising specific prices, and particularly when advertising promotional monthly prices, all services referenced in this proceeding should be required

to disclose additional costs and fees in order to avoid running afoul of many generally-applicable consumer protection laws.¹⁷ Disclosure of these costs and fees at the point-of-sale, while necessary does not rectify potentially misleading advertised prices.¹⁸ The need for clear and conspicuous disclosure of costs and fees in advertising is particularly important today, given the trend towards “bundled services” advertising. Where a low-monthly-bundled-package price relies on additional after-sale rebates or other discounts consumers are required to procure, the failure of the provider to clearly and conspicuously disclose this information likely makes the advertised low monthly price misleading. Further, it may result in consumers paying providers more each month than they would have paid to those providers’ competitors. Similar problems may arise when short-term promotional prices are offered by providers. If appropriate costs and fees associated with the advertised promotional price are not adequately disclosed in a clear and conspicuous manner, the advertised promotional price is likely misleading. The misleading nature of those promotional prices may be exacerbated when associated with long-term contractual obligations mandating higher subsequent payments.

Some problems created for consumers by misleading advertisements may be partially resolved with clear and conspicuous disclosures at the point-of-sale.¹⁹ Nonetheless, consumer complaints and investigations often indicate point-of-sale disclosures are also sometimes lacking sufficient information for consumers.²⁰ This is particularly a problem where one provider is essentially performing the point-of-sale duties for another provider in a “bundled services” package. One example would be a traditional landline telephone provider that bundled its services together with an independent satellite television provider’s services for the convenience of the landline telephone provider’s customers. All costs and fees, and other material information mentioned throughout this comment, are not always disclosed in an adequate or clear and conspicuous manner in these circumstances — no doubt in part because the landline telephone provider’s staff are, for all intents and purposes, selling another provider’s services as opposed to the services they’re most familiar with. These bundling problems are becoming more frequent with regards to certain early termination fees. When buying

¹⁷ See, e.g.: Oregon Unlawful Trade Practices Act ORS 646.605 *et seq.*; Texas Deceptive Trade Practices and Consumer Protection Act, Tex. Bus. and Com. Code 17.41, *et seq.*; Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101, *et seq.*

¹⁸ For example, a “shortfall charge” has appeared on some consumers’ telephone bills for long-distance telephone plans advertised for a low monthly fee. However, that low monthly fee cannot be realized by consumers due to a higher minimum spend level. Consumers are assessed the “shortfall charge” if their long-distance usage does not result in the higher minimum spend level.

¹⁹ We stress that where this is the case, it does not change the unlawful nature of the misleading advertisement or potential legal ramifications for the unlawful conduct. Subsequent point-of-sale disclosures cannot “cure” unlawful advertising.

²⁰ For example, one internet provider advertises a “30-day trial period,” and consumers have complained that they thought they would not have to pay for the service, when in actuality the “trial period” only means that the consumer can cancel during that time without incurring the early-termination fee.

bundled services, determining which of the bundled services may have early termination fees, and which may not, is resulting in noticeable consumer confusion and frustration.²¹

VI. INITIAL GENERAL RECOMMENDATIONS:

We encourage the Commission to evaluate the benefits of general requirements for clear and conspicuous disclosures, both in advertising and at the point-of-sale, of the above-mentioned material terms, conditions, costs, and fees. We request that the Commission also consider more specific rules for disclosures pertaining to bundled communications services.

One additional area of concern and confusion for consumers involves the purchase or lease of equipment from communications providers. Recent information has indicated consumers often don't even know whether they are purchasing or leasing equipment. In given transactions, consumers may believe they have purchased equipment required to receive certain services, when in reality they are leasing the equipment, or vice versa. Just as with installation costs and fees mentioned previously, with the increasing popularity of satellite television, digital cable, and broadband internet, it is becoming increasingly important to disclose aspects regarding ownership of necessary equipment. We submit that the Commission could help resolve these concerns through the use of specific advertising and point-of-sale disclosure requirements regarding the purchase or lease of equipment.

We also encourage the Commission to take into consideration the long history of effective consumer protection by the states and their respective Attorneys General. As set forth in past comments to the Commission, we reiterate the unique position Attorneys General and state regulatory entities play in keeping the marketplace lawful, through the enforcement of state laws and regulations which compliment, as opposed to contradict, federal law and regulations. In September of 2006 a letter was sent to Congress, signed by 41 Attorneys General, regarding the potential harm of preemption in the regulation and oversight of wireless carriers. The Attorneys General stressed that the Commission could not protect consumers alone, that "[s]tate oversight is needed to monitor practices...[,]" and that "states need to be free to discern and deal with unfair business practices that may be unique to an industry by passing specific laws designed to protect their consumers."²² These arguments ring true regarding many telecommunications and communications-related services, not just wireless services. Further, the Commission should evaluate the success of certain state and federal regulatory cooperative authority, such as the success of state-federal authority exercised for many years to help combat cramming and slamming.

²¹ Complaints have indicated that some consumers are confused about which provider they are using, and often feel that neither provider is accountable for the consumer's issues with the bundled services.

²² September 14, 2006, letter to Members of Congress from the National Association of Attorneys General regarding opposition to Sections 1006 and 1008 of H.R. 5252, the "*Advanced Telecommunications and Opportunity Reform Act*."

VII. CRAMMING:

Unfortunately, despite both the success of state-federal regulatory cooperation in fighting cramming and Attorneys General lawsuits against crammers for violations of consumer protection laws, cramming remains a problem.²³ The profitability of cramming and the ease with which crammers can submit unauthorized charges continues to make it an attractive business model, and complaints are once again on the rise.²⁴

Cramming is profitable in part because, even with regulations and state-federal regulatory cooperative authority to help consumers identify and reverse unauthorized charges on their telephone bills, unauthorized charges often still go overlooked by consumers for a variety of reasons. A reason often given by consumers, when asked why they did not detect an unauthorized charge, is that they did not know that third parties could even put charges on their telephone bills. Complaints and investigations indicate consumers regularly miss these charges simply because they do not know to look for them.²⁵ While most consumers know to closely guard their credit card number and closely monitor their credit card bills, consumers may be less wary of giving out their telephone numbers, because they are unaware that unscrupulous individuals may use telephone numbers to extract money through their telephone bills. Since consumers may not know that entities which are not their provider can put charges on their telephone bills, consumers may have no reason to be suspicious when they see those types of charges, and may assume that the charges are properly authorized by their provider.

Another reason often given by consumers for not detecting unauthorized charges is the low dollar amount of the charges. Complaints and investigations indicate crammers often charge nominal monthly fees on consumers' phone bills, in an attempt to avoid drawing attention to the charges. Consumers may not question the relatively small increase in their bill the first month it occurs, which then becomes a reoccurring and therefore "normal" fee from month-to-month. This minimal discrepancy is especially problematic for non-profit entities, government agencies, and businesses that usually pay for several lines, where bills can often range in the hundreds, if not thousands of dollars. In addition, consumers sometimes encounter difficulty in removing unauthorized charges, either because telephone providers refer them to the third parties responsible for the charge or because consumers encounter resistance in getting either the providers or the third parties to accept responsibility for determining whether the charge is proper.

We encourage the Commission to evaluate the benefits of giving consumers more authority over which, if any, third-party entities may place charges on consumers'

²³ See e.g.: *People of the State of Illinois v. LiveDeal, Inc.*, and *People of the State of Illinois v. Minilec ISP Warranty, LLC*. Illinois alone has filed 30 cramming related lawsuits since 1996.

²⁴ For example, in Illinois consumers filed 27 complaints in 2005, 45 in 2006, 82 in 2007, 277 in 2008, and there have been 203 complaints in 2009 through September.

²⁵ *State of Oregon ex rel John R Kroger, Attorney General v. Simple.net Inc., f/k/a Dial-Up Services, Inc., d/b/a Simple.Net, an Arizona Corporation*; In the Circuit Court for the State of Oregon, County of Lincoln, 082810.

telephone bills. Requiring providers to obtain “opt-in” consent from consumers before third-party charges can be placed on their bills, or requiring providers to allow consumers to “opt-in” for blocking third parties from placing charges on their bills, should be considered.

Although we acknowledge that prohibiting third parties from placing charges on telephone bills may be a difficult step, we believe that the harm to consumers caused by this practice heavily outweighs any benefits derived from remaining with the status quo. We believe this is especially true when analyzing the current trend of non-telecommunication-related entities, such as credit-repair services, warranty services, or online services submitting charges on consumers’ telephone bills. A telephone bill is simply not the proper billing method for such charges.

An “opt-in” model would enable consumers to control access to their telephone bills and prevent unlawful and unauthorized charges. Consumers who wish to be billed for third-party services on their telephone bills could have an option to lift the block, to “opt-in” — although we encourage the Commission to evaluate the benefits of requiring providers to allow consumers to “opt-in” for specified third-party charges, as opposed to an “all or nothing” requirement. Even if opt-in consent is not realistic as the default option for consumers upon signing up for telephone services, we encourage the Commission to evaluate the benefits of at least requiring providers to make available to consumers the option of blocking such third-party charges.

As stated above, the vast majority of consumers may simply not understand how vulnerable their telephone bills are to unlawful and unauthorized charges. In addition to the above recommendations, we encourage the Commission to evaluate the benefits of potential educational efforts to better apprise consumers of the nature of telephone bills. If consumers were educated to protect their telephone numbers like they do their credit card numbers, it is likely that unlawful and unauthorized charges would be identified and reversed at a higher rate.

VIII. UNIFORM “Schumer Box”-TYPE DISCLOSURES:

Finally, we believe that the Commission’s suggestion of a “Schumer Box”-type disclosure requirement would be of great benefit to consumers. As the Commission is already aware, all credit card companies are required to provide the same basic information on rates and charges, in the same format, to all potential customers.²⁶ Requiring standardized disclosures for each communications market would increase every consumer’s ability to compare services and therefore enhance competition and efficiency in the overall marketplace. Though consumers may require different information for the various communications services, there are certain “basics” that should be required across-the-board. As set forth previously in this comment, every service provider should be required to disclose: an accurate monthly fee (including estimated fees and taxes where applicable); all usage fees that may apply, including usage

²⁶ *NOI*, __ FCC Rcd __, para. 47.

limits for particular features and associated overage charges; the contract length, if any; the amount of any early termination fee and the circumstances under which it will apply; any up-front equipment or installation costs or requirements; if a promotional price is being offered, the length of the promotion, the monthly promotional fee, and the monthly fee and usage charges after the promotion period ends; and, the minimum total costs or estimated minimum total costs to consumers of the contract in its entirety.²⁷ Given the confusion created by the increasingly popular bundling of services, it is important to also evaluate the benefits of mandating this basic information to consumers in similar formats across the various types of communications services being offered in bundles, to the extent practicable. Requiring additional information particular to the type of service should also be considered (*e.g.*, wireless companies should disclose the amount of minutes plans provide, etc), and we encourage the Commission to evaluate the benefits of mandating similar formats for other such specified disclosures.

²⁷ Requiring the disclosure of these basic terms is akin to the requirements under the Truth-in-Lending Act that every credit and charge card issuer must disclose: 1, the annual percentage rate; 2, any fees for issuance or availability; 3, the minimum finance charge; 4, any transaction charges; 5, the grace period; 6, the balance computation method; 7, a statement on charge card payments; 8, any cash advance fee; 9, any late payment fee; 10, any over-the-limit fee; and 11, any balance transfer fee. 12 C.F.R. § 226.5a(b).