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14 FUNDING, INC.

11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

13
14 UNITED STATES OF AMERICA,
15 Plaintiff,

15 v.

16 GLOBAL MORTGAGE FUNDING, INC.,
17 a California corporation, also
18 f/d/b/a Global Realty, Inforte
19 Financial, and U.S. Escrow;

19 and

20 DAMIAN ROBERT KUTZNER,
21 individually and as an officer
22 or director of Global Mortgage
23 Funding, Inc.,
24 Defendants.

Civil No. SACV07-1275 DOC
(PJWx)

**STIPULATED JUDGMENT AND
ORDER FOR PERMANENT
INJUNCTION**

23 Plaintiff, the United States of America, acting upon
24 notification and authorization to the Attorney General by the
25 Federal Trade Commission ("FTC" or the "Commission"), commenced
26 this action by filing the complaint herein, and Individual
27 Defendant Damian Robert Kutzner and Corporate Defendant Global
28

1 4. The allegations of the complaint state a claim upon
2 which relief may be granted against Defendants, under Sections
3 5(a), 5(m)(1)(A), 13(b) and 19 of the Federal Trade Commission
4 Act ("FTC Act"), 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), and 57b.

5 5. The Commission previously sued present Defendants for
6 alleged violations of the Federal Trade Commission Act, 15 U.S.C.
7 § 53(b), and Sections 521(a) and 522(a) of the Gramm-Leach-Bliley
8 Act ("GLB Act"), 15 U.S.C. §§ 6821(a) and 6822(a). *FTC v. GM*
9 *Funding, et al.*, No. 8:02-cv-01026-DOC (C.D. Cal. filed Nov. 6,
10 2002). The parties resolved that litigation with a consent
11 decree signed and issued by this Court May 3, 2003.

12 6. On November 7, 2006, Corporate Defendant Global
13 Mortgage Funding, Inc. filed a voluntary petition for relief
14 under the liquidation provisions of Chapter 7 of the Bankruptcy
15 Code, 11 U.S.C. § 101 et seq., in the United States Bankruptcy
16 Court for this district, *In re Global Mortgage, Inc.*, No. 8:06-
17 12039-RK (Bankr. C.D. Cal. filed Nov. 7, 2006) (the "Global
18 Mortgage Bankruptcy Case"). Subsequently, James J. Joseph was
19 appointed Chapter 7 Trustee in the Global Mortgage Bankruptcy
20 Case.

21 7. On May 15, 2008, Individual Defendant Damian Robert
22 Kutzner filed a voluntary petition for relief under the
23 liquidation provisions of Chapter 7 of the Bankruptcy Code, 11
24 U.S.C. § 101 et seq., in the United States Bankruptcy Court for
25 this district, *In re Damian Robert Kutzner*, No. 8:08-bk-12656-ES
26 (Bankr. C.D. Cal. filed May 15, 2008) (the "Kutzner Personal
27 Bankruptcy Case") (together with the Global Mortgage Bankruptcy
28 Case, "the Bankruptcy Cases"). Subsequently, James J. Joseph was

1 appointed Chapter 7 Trustee for the Kutzner Personal Bankruptcy
2 Case.

3 8. This action, including the enforcement of a judgment
4 other than a money judgment, is not subject to the automatic
5 bankruptcy stay provisions of 11 U.S.C. § 362(a)(1), (2), (3) or
6 (6), because this action is brought by the United States pursuant
7 to referral by the Commission to enforce the Commission's police
8 or regulatory power as a governmental unit. Under 11 U.S.C.
9 § 362(b)(4), it is thus exempt from the automatic stay. See *FTC*
10 *v. First Alliance Mortgage Co. (In re First Alliance Mortgage*
11 *Co.)*, 264 B.R. 634, 645-51 (C.D. Cal. 2001) (Carter, J.).

12 9. The Trustee has filed motions in the Bankruptcy Cases
13 and obtained the Bankruptcy Court's approval to enter into this
14 Order and take any and all actions necessary and appropriate to
15 implement and effectuate the terms and conditions of this Order.

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

20 11. Plaintiff and Defendants hereby waive all rights to
21 appeal or otherwise challenge or contest the validity of this
22 Order.

23 12. Defendants agree that this Order does not entitle
24 Defendants to seek or obtain attorneys' fees as a prevailing
25 party under the Equal Access to Justice Act, 28 U.S.C. § 2412,
26 and Defendants further waive any rights to attorneys' fees that
27 may arise under said provision of law.

28 13. 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 and 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. "Assisting others," in the context of assisting others who are engaging or participating in telemarketing, means knowingly providing any of the following goods or services to another person or entity: (a) performing customer service functions, including, but not limited to, receiving or responding to customer complaints; (b) formulating or providing, or arranging for the formulation or provision of, any telephone sales script or any other marketing material; (c) providing names of, or assisting in the generation of, potential customers, or (d) performing marketing services of any kind.

3. "Commission" means Federal Trade Commission.

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

5. "Defendants" means the Individual Defendant and the Corporate Defendant, individually, collectively, or in any combination.

a. "Corporate Defendant" means Global Mortgage Funding, Inc., a California corporation, also

1 f/d/b/a Global Realty, Inforte Financial, and U.S.
2 Escrow;

3 b. "Individual Defendant" means Damian Robert
4 Kutzner, individually and as an officer and
5 director of Global Mortgage Funding, Inc.

6 6. "Donor" means any person solicited to make a charitable
7 contribution.

8 7. "Engaging or participating in telemarketing" includes
9 personally participating in telemarketing; managing others who
10 participate in telemarketing; and owning or operating an
11 enterprise conducting telemarketing.

12 8. "Established business relationship" means a
13 relationship between a seller and a person based on:

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

19 (b) the person's inquiry or application regarding a
20 product or service offered by the seller, within the three
21 (3) months immediately preceding the date of a telemarketing
22 call.

23 9. "FTC" means Federal Trade Commission.

24 10. "National Do Not Call Registry" means the National Do
25 Not Call Registry, which is the "do-not-call" registry maintained
26 by the Commission pursuant to 16 C.F.R. § 310.4(b)(1)(iii)(B).

27 11. "Representatives" means Defendants' agents, servants,
28 employees and those persons in active concert or participation

1 with them who receive actual notice of this Order by personal
2 service or otherwise.

3 12. "Seller" means any person who, in connection with a
4 telemarketing transaction, provides, offers to provide, or
5 arranges for others to provide goods or services to a customer in
6 exchange for consideration, whether or not such person is under
7 the jurisdiction of the Commission.

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

11 14. "Telemarketing Sales Rule" or "Rule" means the FTC Rule
12 entitled "Telemarketing Sales Rule," 16 C.F.R. Pt. 310 (2008),
13 attached hereto as Appendix A and as may be hereafter amended.

14 15. "Telemarketing" means a plan, program, or campaign
15 which is conducted to induce the purchase of goods or services or
16 a charitable contribution, by use of one or more telephones. The
17 term includes a plan, program, or campaign where callers purport
18 to take an informational survey, but also offer to sell goods or
19 services.

20 (a) The term does not include the solicitation of
21 sales through the mailing of a catalog that: Contains a
22 written description or illustration of the goods or services
23 offered for sale; includes the business address of the
24 seller; includes multiple pages of written material or
25 illustrations; and has been issued not less frequently than
26 once a year, when the person making the solicitation does
27 not solicit customers by telephone but only receives calls
28 initiated by customers in response to the catalog and during

1 those calls takes orders only without further solicitation.
2 For purposes of the previous sentence, the term "further
3 solicitation" does not include providing the customer with
4 information about, or attempting to sell, any other item
5 included in the same catalog which prompted the customer's
6 call or in a substantially similar catalog.

7 16. "Outbound telephone call" means a telephone call
8 initiated by a telemarketer to induce the purchase of goods or
9 services or to solicit a charitable contribution.

10 17. "Person" means any individual, group, unincorporated
11 association, limited or general partnership, corporation, or
12 other business entity.

13 **ORDER**

14 **I. PROHIBITION AGAINST TELEMARKETING BY INDIVIDUAL DEFENDANT**

15 **IT IS ORDERED** that for five (5) years from entry of this
16 Order, Individual Defendant Damian Robert Kutzner and his
17 Representatives are hereby prohibited from engaging or
18 participating in telemarketing, and from assisting others who are
19 engaging or participating in telemarketing, provided that for
20 purposes of this provision "telemarketing" does not include
21 telephone calls conducted to induce the purchase or goods or
22 services by a business, except calls to induce the retail sale of
23 non-durable office or cleaning supplies.

24 **II. PROHIBITION AGAINST VIOLATIONS OF THE TELEMARKETING**
25 **SALES RULE BY INDIVIDUAL DEFENDANT**

26 **IT IS FURTHER ORDERED** that, in connection with
27 telemarketing, Individual Defendant Damian Robert Kutzner and his
28 Representatives are hereby permanently restrained and enjoined

1 from engaging in, causing other persons to engage in, or
2 assisting other persons to engage in, violations of the
3 Telemarketing Sales Rule, including but not limited to:

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

14 B. Initiating any outbound telephone call to a person's
15 telephone number on the National Do Not Call Registry of persons
16 who do not wish to receive outbound telephone calls to induce the
17 purchase of goods or services unless the seller proves:

18 1. the seller has obtained the express agreement, in
19 writing, of such person to place calls to that person. Such
20 written agreement shall clearly evidence such person's
21 authorization that calls made by or on behalf of a specific party
22 may be placed to that person, and shall include the telephone
23 number to which the calls may be placed and the signature of that
24 person; or

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

1 C. Initiating any outbound telephone call to a person when
2 that person has previously stated that he or she does not wish to
3 receive an outbound telephone call made by or on behalf of the
4 seller whose goods or services are being offered or made by or on
5 behalf of the charitable organization for which a charitable
6 contribution is being solicited;

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

11 E. Abandoning any outbound telephone call to a person by
12 failing to connect the call to a representative within two
13 seconds of the person's completed greeting, unless the following
14 four conditions are met:

15 1. Individual Defendant and his Representatives
16 employ technology that ensures abandonment of no more than three
17 percent of all calls answered by a person, measured over the
18 duration of a single calling campaign, if less than 30 days, or
19 separately over each successive 30-day period or portion thereof
20 that the campaign continues; and

21 2. Individual Defendant and his Representatives, for
22 each telemarketing call placed, allow the telephone to ring for
23 at least fifteen seconds or four rings before disconnecting an
24 unanswered call; and

25 3. Whenever a Representative is not available to
26 speak with the person answering the call within two seconds after
27 the person's completed greeting, the seller or telemarketer
28 promptly plays a recorded message that states the name and

1 telephone number of the seller on whose behalf the call was
2 placed; and

3 4. Individual Defendant and his Representatives
4 retain records, in accordance with 16 C.F.R. § 310.5(b)-(d),
5 establishing compliance with the preceding three conditions;
6 *provided, however,* that Individual Defendant and his
7 Representatives may not allocate to others any record-keeping
8 responsibilities under 16 C.F.R. § 310.5(c);

9 *And further provided, however,* that if the Commission
10 promulgates rules that modify or supersede the Telemarketing
11 Sales Rule, in whole or part, Individual Defendant shall comply
12 fully and completely with all applicable requirements thereof, on
13 and after the effective date of any such rules.

14 **III. CIVIL PENALTY, MONETARY JUDGMENT, AND RIGHT TO REOPEN**

15 **IT IS FURTHER ORDERED** that:

16 A. Judgment in the amount of **six million dollars exactly**
17 (\$6,000,000.00) is hereby entered in favor of the United States
18 and against Individual Defendant Damian Robert Kutzner and
19 Corporate Defendant Global Mortgage Funding, Inc., jointly and
20 severally, as a civil penalty, pursuant to Section 5(m)(1)(A) of
21 the Federal Trade Commission Act, 15 U.S.C. § 45(m)(1)(A). Based
22 upon Individual Defendant's sworn representations in his first-
23 amended bankruptcy schedules and statement of financial affairs
24 in the Kutzner Personal Bankruptcy Case, full payment for the
25 foregoing civil penalty is suspended, contingent upon the
26 accuracy and completeness of those representations, as set forth
27 in Subparagraphs B and C of this Paragraph.

1 B. The civil penalty judgment against Individual Defendant
2 shall be suspended subject to the conditions set forth in this
3 subparagraph. Plaintiff's agreement to this Order is expressly
4 premised upon the truthfulness, accuracy and completeness of
5 Individual Defendant's initial bankruptcy schedules A, C, D, E,
6 G, I, and J; initial statement of intention; first-amended
7 bankruptcy schedules B, F, and H, and first-amended statement of
8 financial affairs ("Individual Defendant's Bankruptcy Filings").
9 Individual Defendant signed the initial bankruptcy documents
10 under penalties of perjury on June 30, 2008, and filed them the
11 same date in the Kutzner Personal Bankruptcy Case; and he signed
12 the first-amended documents August 25, 2008, and filed them the
13 same date in the Kutzner Personal Bankruptcy Case. Individual
14 Defendant voluntarily signed these documents with assistance of
15 counsel and under penalties of perjury. They include material
16 information upon which Plaintiff has relied in negotiating and
17 agreeing to this Order.

18 C. If, upon motion by Plaintiff, this Court finds that
19 Individual Defendant's Bankruptcy Filings failed to disclose any
20 material asset or materially misstated the value of any asset, or
21 made any other material misstatement or omission, then:

22 1. This Order shall be reopened and suspension of the
23 judgment shall be terminated for the purpose of requiring payment
24 of civil penalty in the full amount of the monetary judgment (\$6
25 million);

26 2. Plaintiff shall be allowed general unsecured claims
27 in the amount of **six million dollars exactly** (\$6,000,000.00) (the
28 "Bankruptcy Claims") in the Bankruptcy Cases, if not closed or

1 dismissed, and in any subsequent bankruptcy cases that Defendants
2 file;

3 3. Plaintiff's Bankruptcy Claims shall be classified
4 and entitled to receive the treatment afforded to holders of
5 allowed unsecured claims under the terms and conditions of any
6 plan or plans of reorganization or liquidation confirmed by the
7 Bankruptcy Court or any distribution by a Chapter 7 Trustee; and

8 4. Plaintiff shall participate in any payments in such
9 bankruptcy cases paid on account of such allowed unsecured claims
10 in accordance with the priorities of Section 726 of the
11 Bankruptcy Code, 11 U.S.C. § 726.

12 *Provided, however,* that in all other respects this Order
13 shall remain in full force and effect, unless otherwise ordered
14 by the Court.

15 D. In accordance with 31 U.S.C. § 7701(c)(2)(D) and
16 (c)(3), Defendants are hereby required, unless they have done so
17 already, to furnish to Plaintiff and the FTC their taxpayer
18 identifying numbers (social security numbers or employer
19 identification numbers), which Plaintiff and the FTC shall use
20 for purposes of collecting and reporting on any delinquent
21 amounts arising out of Defendants' relationships with the
22 government.

23 E. This judgment is a civil penalty owed to the United
24 States Government and is not compensation for actual pecuniary
25 loss. Defendants hereby waive any right to contest the facts as
26 alleged in the Complaint in any bankruptcy case or subsequent
27 civil litigation pursued by Plaintiff or the Commission to
28 enforce rights to any payment or money judgment pursuant to this

1 Order, including but not limited to a nondischargeability
2 complaint in any bankruptcy case. Defendants further waive any
3 right to contest that the facts found in the "Findings" section
4 of this Order establish all elements necessary to sustain an
5 action pursuant to, and that this Order shall have collateral
6 estoppel effect for purposes of Section 523(a)(7) of the
7 Bankruptcy Code, 11 U.S. C. § 523(a)(7) (relating to
8 nondischargeability of any debt that "is for a fine, penalty, or
9 forfeiture payable to and for the benefit of a governmental unit,
10 and is not compensation for actual pecuniary loss . . .").

11 F. Proceedings instituted under this Paragraph are in
12 addition to, and not in lieu of, any other civil or criminal
13 remedies that may be provided by law, including any other
14 proceedings Plaintiff or the Commission may initiate to enforce
15 this Order.

16 **IV. COMPLIANCE MONITORING OF INDIVIDUAL DEFENDANT**

17 **IT IS FURTHER ORDERED** that, for the purpose of
18 (i) monitoring and investigating compliance with any provision of
19 this Order, and (ii) investigating any discrepancies in the
20 accuracy of Individual Defendant's bankruptcy petition, first-
21 amended schedules, and statement of financial affairs, upon which
22 Plaintiff's agreement to this Order is expressly premised:

23 A. Within ten (10) days of service of written notice from
24 a representative of the Plaintiff or the Commission, Individual
25 Defendant shall:

26 1. Submit additional written reports, which are true
27 and accurate and sworn to under penalty of perjury;

28 2. produce documents for inspection and copying;

1 3. appear for deposition; and/or

2 4. provide entry during normal business hours to any
3 business location in Defendant's possession or direct or indirect
4 control to inspect the business operation.

5 B. Plaintiff and the Commission are authorized to use all
6 other lawful means, including but not limited to:

7 1. obtaining discovery from any person, without
8 further leave of court, using the procedures prescribed by Fed.
9 R. Civ. P. 30, 31, 33, 34, 36, 45 and 69; and

10 2. posing as consumers and suppliers to Defendant,
11 his employees, or any other entity managed or controlled in whole
12 or in part by Defendant, without identification or prior notice.

13 C. Individual Defendant shall permit representatives of
14 the Plaintiff and the Commission to interview any employer,
15 consultant, independent contractor, Representative, agent, or
16 employee who has agreed to such an interview, relating in any way
17 to any conduct subject to this Order. The person interviewed may
18 have counsel present.

19 **Provided, however,** that nothing in this Order shall limit
20 the Commission's lawful use of compulsory process, pursuant to
21 Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to
22 obtain any documentary material, tangible things, testimony, or
23 information relevant to unfair or deceptive acts or practices in
24 or affecting commerce (within the meaning of 15 U.S.C.
25 § 45(a)(1)).

1 **V. COMPLIANCE REPORTING BY INDIVIDUAL DEFENDANT**

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

4 A. For seven (7) years from the entry of this Order,

5 1. Individual Defendant shall notify the Commission
6 of the following:

7 a. Any changes in his residence, mailing
8 addresses, and/or telephone numbers, within ten (10)
9 days of such change;

10 b. Any changes in his employment status
11 (including self-employment), and any changes in his
12 ownership or control of any business entity, within ten
13 (10) days of such change. Such changes shall include:

14 (1) change in business name or address;

15 (2) incorporation, formation, or other
16 organization;

17 (3) dissolution, assignment, sale, merger,
18 or other action; and

19 (4) creation or dissolution of any
20 subsidiary, parent, or affiliate.

21 c. Any changes in his name, and any uses of any
22 aliases, fictitious names, or "doing business as"
23 names, within ten (10) days of such change or usage.

24 d. Notices under this Paragraph V(A)(1) shall
25 include:

26 (1) the name and address of each business
27 Individual Defendant is affiliated with, employed
28 by, creates or forms, or performs services for;

1 (2) a detailed description of the nature of
2 each such business;

3 (3) a detailed description of Individual
4 Defendant's duties and responsibilities in
5 relation to each such business or employment; and

6 (4) any aliases, fictitious names, or "doing
7 business as" names Individual Defendant is using.

8 2. Individual Defendant shall notify the Commission
9 at least thirty (30) days **prior to** any changes in structure of
10 any business entities (i) that he controls, directly or
11 indirectly, or in which he has an ownership interest, and
12 (ii) that may affect compliance obligations arising under this
13 Order, including but not limited to:

14 a. Any change in business name or address,

15 b. Any incorporation, formation, or other
16 organization;

17 c. Any dissolution, assignment, sale, merger, or
18 other action; and

19 d. Any creation or dissolution of any
20 subsidiary, parent, or affiliate that engages in any
21 acts or practices subject to this Order;

22 *Provided that*, with respect to any proposed change
23 about which Individual Defendant learns less than
24 thirty (30) days prior to the date such action is to
25 take place, Individual Defendant shall notify the
26 Commission as soon as is practicable after obtaining
27 such knowledge.
28

1 B. Individual Defendant shall prepare and submit written
2 reports that are true and accurate and signed under penalty of
3 perjury, setting forth in detail the manner and form in which he
4 has complied and is complying with this Order. The first such
5 report shall be submitted to Plaintiff and to the Commission
6 thirty (30) days after the entry of this Order, and subsequent
7 reports shall be submitted to the Commission annually thereafter
8 for seven (7) years. Each such report shall include, but not be
9 limited to:

10 1. Individual Defendant's then-current residence
11 address, mailing addresses, and telephone numbers;

12 2. Individual Defendant's then-current employment
13 status (including self-employment), including:

14 a. the name, addresses, and telephone numbers of
15 each business he is affiliated with, employed by, or
16 performs services for;

17 b. a detailed description of the nature of each
18 such business; and

19 c. a detailed description of Individual
20 Defendant's duties and responsibilities in relation to
21 each such business or employment;

22 3. Any other changes required to be reported under
23 Paragraph V(A); and

24 4. A copy of each acknowledgment Individual Defendant
25 has obtained since submitting his previous report, acknowledging
26 receipt of this Order, pursuant to Paragraph VII(C) of this
27 Order.

1 C. Individual Defendant shall notify the Commission of the
2 filing of any bankruptcy petition within fifteen (15) days of
3 filing;

4 D. For the purposes of this Order, Individual Defendant
5 shall, unless otherwise directed by the Commission's authorized
6 representatives, send by overnight courier all reports and
7 notifications required by this Order to the Commission, to the
8 following address:

9 Associate Director for Enforcement
10 Federal Trade Commission
600 Pennsylvania Ave. NW, Room NJ2122
11 Washington, DC 20580

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DOC (PJWx) (C.D. Cal.)

13 *Provided*, that, in lieu of overnight delivery, Individual
14 Defendant may send such reports or notifications by first-class
15 mail, but only if he contemporaneously sends an electronic
16 version of such report or notification to the Commission at:
17 DEBrief@ftc.gov.

18 E. For purposes of the compliance reporting and monitoring
19 required by this Order, the Commission and its representatives
20 are authorized to communicate directly with Individual Defendant.

21 **VI. RECORD-KEEPING PROVISIONS AS TO INDIVIDUAL DEFENDANT**

22 **IT IS FURTHER ORDERED** that, for ten (10) years from the
23 entry of this Order, the following records must be created and
24 retained by Individual Defendant Damian Robert Kutzner; by his
25 agents, employees, officers, and those persons in active concert
26 or participation with them who receive actual notice of this
27 Order by personal service or otherwise; and by every business
28 that Individual Defendant Damian Robert Kutzner controls,

1 directly or indirectly, and/or in which he has a majority
2 ownership interest. The records that must be created and
3 retained are:

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

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

13 C. Customer files containing the names, addresses, phone
14 numbers, dollar amounts paid, quantity of items or services
15 purchased, and description of items or services purchased, to the
16 extent such information is obtained in the ordinary course of
17 business;

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

21 E. Copies of all sales scripts, training materials,
22 advertisements, or other marketing materials; and

23 F. All records and documents necessary to demonstrate full
24 compliance with each provision of this Order, including but not
25 limited to, copies of acknowledgments of receipt of this Order,
26 required by Paragraph VII(C), and all reports and notices
27 submitted to the FTC pursuant to Paragraph V(A)(1) (relating to
28 notices of changes submitted within 10 days of the event),

1 V(A)(2) (relating to notices of changes of business relating to
2 the subject matter of this Order, required to be submitted 30
3 days **prior to** the change); V(B) (periodic reports of employment
4 and business activity); and V(C) (relating to bankruptcy
5 filings).

6 **VII. DISTRIBUTION OF ORDER BY INDIVIDUAL DEFENDANT**

7 **IT IS FURTHER ORDERED** that, for a period of seven (7) years
8 from the entry of this Order, Individual Defendant shall deliver
9 copies of the Order as directed below:

10 A. Individual Defendant as Control Person: For any
11 business that Individual Defendant Damian Robert Kutzner
12 controls, directly or indirectly, or in which he has a majority
13 ownership interest, Individual Defendant shall deliver a copy of
14 this Order to (1) all principals, officers, directors, and
15 managers of that business, (2) all employees, agents, and
16 representatives of that business who engage in conduct related to
17 the subject matter of the Order, and (3) any business entity
18 resulting from any change in structure set forth in Paragraph
19 V(A)(2). For current personnel, delivery shall be within five
20 (5) days of service of this Order upon Individual Defendant. For
21 new personnel, delivery shall occur prior to their assuming their
22 responsibilities. For any business entity resulting from any
23 change in structure set forth in Paragraph V(A)(2), delivery
24 shall be at least ten (10) days prior to the change in structure.

25 B. Individual Defendant as employee or non-control person:
26 For any business where Individual Defendant is not a controlling
27 person of the business but he otherwise engages in, or assists
28 others in, telemarketing, he shall deliver a copy of this Order

1 to all principals and managers of such business before engaging
2 in such conduct. For any current businesses, delivery shall be
3 within five (5) days of service of this Order upon Individual
4 Defendant.

5 C. Individual Defendant shall secure a signed and dated
6 statement acknowledging receipt of this Order within ten (10)
7 days of delivery, from all persons receiving a copy of the Order
8 pursuant to this Paragraph; and shall provide a copy of each such
9 acknowledgment to the Commission as specified in Paragraph
10 V(B)(4).

11 **VIII. CESSATION OF BUSINESS ACTIVITIES OF CORPORATE DEFENDANT**

12 **IT IS FURTHER ORDERED** that Corporate Defendant Global
13 Mortgage Funding, Inc., shall not engage in any business and the
14 Trustee shall not seek authority to operate the business of
15 Defendant Global Mortgage Funding, Inc., pursuant to Section 721
16 of the Bankruptcy Code, 11 U.S.C. § 721, or otherwise.

17 **IX. PROHIBITION OF SELLING OF CORPORATE DEFENDANT'S**
18 **CUSTOMER LISTS**

19 **IT IS FURTHER ORDERED** that Corporate Defendant Global
20 Mortgage Funding, Inc., is permanently restrained and enjoined
21 from selling, renting, leasing, transferring, or otherwise
22 disclosing the name, address, telephone number, credit or debit
23 card number, bank account number, e-mail address, social security
24 number, credit report, credit score, or other identifying
25 information of any person who submitted such identifying
26 information to Corporate Defendant Global Mortgage Funding, Inc.,
27 at any time prior to entry of this Order in connection with
28 Corporate Defendant Global Mortgage Funding, Inc.'s advertising,

1 marketing, promoting, offering for sale and sale of mortgage and
2 related financing services.

3 *Provided, however,* that Corporate Defendant Global Mortgage
4 Funding, Inc., may disclose such identifying information to a law
5 enforcement agency or as required by any law, regulation, or
6 court order.

7 *Provided further that,* if the Trustee is in possession of
8 any customer lists or other such identifying information, he
9 shall transfer such lists or information, including all copies,
10 to the FTC.

11 **X. CORPORATE BOOKS AND RECORDS OF CORPORATE DEFENDANT**

12 **IT IS FURTHER ORDERED** that the Trustee shall provide notice
13 to the FTC of the proposed abandonment or disposition of any
14 corporate books and records of Corporate Defendant Global
15 Mortgage Funding, Inc., in his possession. Upon the FTC's
16 request, the Trustee shall transfer such books and records to the
17 FTC.

18 **XI. OTHER CORPORATE DEFENDANT ASSETS**

19 **IT IS FURTHER ORDERED** that the Trustee shall provide notice
20 to the FTC of the proposed abandonment or disposition of any
21 other assets of Corporate Defendant Global Mortgage Funding, Inc.
22 Corporate Defendant Global Mortgage Funding, Inc., waives any
23 interest in all assets that the Trustee abandons, pursuant to 11
24 U.S.C. § 554, and directs that upon any abandonment its interest
25 in same be transferred to the FTC.

26 **XII. ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANTS**

27 **IT IS FURTHER ORDERED** that each Defendant, within five (5)
28 business days of receipt of this Order as entered by the Court,

1 must submit to the Plaintiff and to the Commission a truthful
2 sworn statement acknowledging receipt of this Order.

3 **XIII. FEES AND COSTS**

4 **IT IS FURTHER ORDERED** that each party to this Order shall
5 bear its own costs and attorneys' fees incurred in connection
6 with this action.

7 **XIV. SEVERABILITY**

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

12 **XV. RETENTION OF JURISDICTION**

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

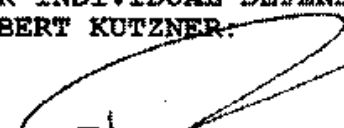
16 The Bankruptcy Trustee is entering into this Order only in
17 his fiduciary capacity as Chapter 7 Trustee for Damian Robert
18 Kutzner and for Global Mortgage Funding, Inc., and not
19 individually. The Trustee's obligations under this Order are
20 limited to those obligations specified in this Order and include
21 the duty not to seek to operate Global Mortgage Funding, Inc.'s
22 business under Section 721 of the Bankruptcy Code, to transfer to
23 the FTC any customer list or identifying information he may have
24 in his possession, and to notify the FTC of any proposed
25 abandonment or disposition of any corporate books and records in
26 his possession, and at the FTC's request, transfer these
27 corporate books and records to the FTC.

28


1
2 WE CONSENT TO ENTRY of the above Stipulated Judgment and
3 Order for Permanent Injunction:
4

5
6 **FOR INDIVIDUAL DEFENDANT DAMIAN
7 ROBERT KUTZNER:**

8 Dated: December 30th, 2008

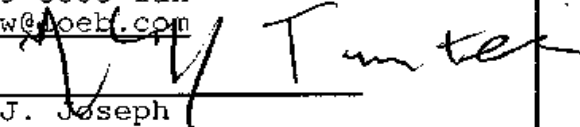

9 Damian Robert Kutzner,
10 individually and as an
11 officer and director of
12 Global Mortgage Funding,
13 Inc.

14 Dated: December 30th, 2008


15 Michael L. Mallow
16 Attorney for Individual
17 Defendant Damian Robert
18 Kutzner

19
20 Loeb & Loeb LLP
21 10100 Santa Monica Boulevard,
22 Suite 2200
23 Los Angeles, CA 90067-4120
24 310-282-2000 phone
25 310-919-3883 fax
26 mmallow@loeb.com

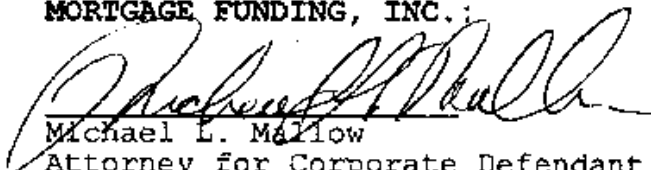
27 Dated: 5/21, 2009


28 James J. Joseph
Chapter 7 Trustee for Individual
Defendant Damian Robert
Kutzner
Danning, Gill, Diamond &
Kollitz, LLP
2029 Century Park East
Los Angeles, CA 90067-2094
310-277-0077 phone
310-277-5735 fax

FOR CORPORATE DEFENDANT GLOBAL MORTGAGE FUNDING, INC.;

March 12, 2009

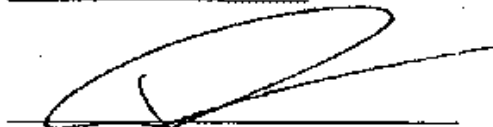
Dated: ~~December~~, 2008


Michael L. Mallow

Attorney for Corporate Defendant
Global Mortgage Funding,
Inc.

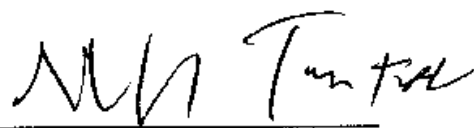
Loeb & Loeb LLP
10100 Santa Monica Boulevard,
Suite 2200
Los Angeles, CA 90067-4120
310-282-2000 phone
310-919-3883 fax
mmallow@loeb.com

Dated: December 30, 2008



Damian Robert Kutzner
President of Corporate Defendant
Global Mortgage Funding,
Inc.

Dated: 5/21, 2009



James J. Joseph
Chapter 7 Trustee for Corporate
Defendant Global Mortgage
Funding, Inc.
Danning, Gill, Diamond &
Kollitz, LLP
2029 Century Park East
Los Angeles, CA 90067-2094
310-277-0077 phone
310-277-5735 fax

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FOR PLAINTIFF THE UNITED STATES OF AMERICA:

Dated: July 14, 2009
Washington, DC

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

OF COUNSEL:

JEFFREY A. KLURFELD
Regional Director
Western Region
FEDERAL TRADE COMMISSION

EUGENE M. THIROLF, Director
KENNETH L. JOST, Deputy Director
Office of Consumer Litigation
U.S. Department of Justice



/s Thomas N. Dahdouh
THOMAS N. DAHDOUH
Attorney
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103
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Fax: 202-514-8742
E-mail: Daniel.Crane-Hirsch@usdoj.gov

SO ORDERED this 17 day of July, 2009.



DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

ALTERNATIVE FUELED VEHICLE BUYERS GUIDE

Before Selecting An Alternative Fueled Vehicle Consider:

- FUEL TYPE AND AVAILABILITY:** Know which fuel(s) power this vehicle. Determine whether refueling and/or recharging facilities that meet your driving needs are readily available.
- OPERATING COSTS:** Fuel and maintenance costs for AFVs differ from gasoline or diesel-fueled vehicles and can vary considerably. Visit www.fueleconomy.gov.
- PERFORMANCE/CONVENIENCE:** Vehicles powered by different fuels differ in their ability to start a cold engine, how long it takes to refill the vehicle's tank to full capacity, acceleration rates, and refueling methods.
- ENERGY SECURITY/RENEWABILITY:** Consider where and how the fuel powering this vehicle is typically produced.
- EMISSIONS:** Emissions are an important factor. For more information about how the vehicle you are considering compares to others, visit www.epa.gov/greenvehicle.

Additional Information

DEPARTMENT OF ENERGY (DOE)
For more information about AFVs, contact DOE's National Alternative Fuels Hotline, 1-800-423-1DOE, or visit DOE's Alternative Fuels Data Center website, www.afdc.doe.gov.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION (NHTSA)
For more information about vehicle safety, contact NHTSA's Auto Safety Hotline, 1-800-424-9393.

The information on this label is required by the Federal Trade Commission, 16 CFR Part 309.
For more information call toll-free (877) FTC-HELP or visit www.ftc.gov.

← 7.5 inches →

← 7 inches →

Figure 6

[60 FR 26955, May 19, 1995, as amended at 69 FR 55339, Sept. 14, 2004]

**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 the National 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.

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§ 310.2 Definitions.

(a) *Acquirer* means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.

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

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

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

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

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

(g) *Commission* means the Federal Trade Commission.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(y) *Prize promotion* means:

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

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

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

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

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

(cc) *Telemarketing* means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog

which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

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

§ 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

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

Continued

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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 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).

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.

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(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:

(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;

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.

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.

(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)(i)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate; *provided*, however, that this means of authorization shall not be deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and preacquired account information.

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

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

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

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

(2) Any person to employ, solicit, or otherwise cause a merchant, or an employee, representative, or agent of the merchant, to present to or deposit into

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the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

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

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

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

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

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

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

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

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

§310.4 Abusive telemarketing acts or practices.

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

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

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a

person's credit history, credit record, or credit rating until:

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

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

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

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

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

(6) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the

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goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements in paragraphs (a)(6)(i) through (ii) of this section must be met to evidence express informed consent.

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

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

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

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

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

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

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

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

(b) *Pattern of calls.* (1) It is an abusive telemarketing act or practice and a

violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

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

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

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

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

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

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

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.

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does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

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

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

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

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

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

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

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

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

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

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

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

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

(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

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.

entry method for the prize promotion; *provided*, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

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

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

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

[68 FR 4669, Jan. 29, 2003, as amended at 69 FR 16373, Mar. 29, 2004]

§ 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

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.

directly involved in telephone sales or solicitations; *provided*, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

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

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

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

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

§ 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

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to the Telephone Disclosure and Dispute Resolution Act of 1992,” 16 CFR Part 308, *provided*, however, that this exemption does not apply to the requirements of §§310.4(a)(1), (a)(7), (b), and (c);

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

(3) Telephone calls in which the sale of goods or services or charitable solicitation is not completed, and payment or authorization of payment is not required, until after a face-to-face sales or donation presentation by the seller or charitable organization, *provided*, however, that this exemption does not apply to the requirements of §§310.4(a)(1), (a)(7), (b), and (c);

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

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

(6) Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully discloses all material information listed in §310.3(a)(1) of this Rule, for any

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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

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

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

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

divide the costs to access the registry among various clients of that telemarketer or service provider.

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

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

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this Rule or otherwise to prevent telephone calls to telephone numbers on the registry.

[68 FR 45144, July 31, 2003, as amended at 69 FR 45585, July 30, 2004; 70 FR 43280, July 27, 2005; 71 FR 43054, July 31, 2006]

§310.9 Severability.

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

PART 311—TEST PROCEDURES AND LABELING STANDARDS FOR RECYCLED OIL

Sec.

311.1 Definitions.

311.2 Stayed or invalid parts.

311.3 Preemption.

311.4 Testing.

311.5 Labeling.

311.6 Prohibited acts.

AUTHORITY: 42 U.S.C. 6363(d).

SOURCE: 60 FR 55421, Oct. 31, 1995, unless otherwise noted.

§311.1 Definitions.

As used in this part:

(a) *Manufacturer* means any person who re-refines or otherwise processes used oil to remove physical or chemical impurities acquired through use or who blends such re-refined or otherwise processed used oil with new oil or additives.

(b) *New oil* means any synthetic oil or oil that has been refined from crude oil and which has not been used and may or may not contain additives. Such term does not include used oil or recycled oil.

(c) *Processed used* oil means re-refined or otherwise processed used oil or blend of oil, consisting of such re-refined or otherwise processed used oil and new oil or additives.

(d) *Recycled oil* means processed used oil that the manufacturer has determined, pursuant to section 311.4 of this part, is substantially equivalent to new oil for use as engine oil.

(e) *Used oil* means any synthetic oil or oil that has been refined from crude oil, which has been used and, as a result of such use, has been contami-

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nated by physical or chemical impurities.

(f) *Re-refined oil* means used oil from which physical and chemical contaminants acquired through use have been removed.

§311.2 Stayed or invalid parts.

If any part of this rule is stayed or held invalid, the rest of it will remain in force.

§311.3 Preemption.

No law, regulation, or order of any State or political subdivision thereof may apply, or remain applicable, to any container of recycled oil, if such law, regulation, or order requires any container of recycled oil, which container bears a label in accordance with the terms of §311.5 of this part, to bear any label with respect to the comparative characteristics of such recycled oil with new oil that is not identical to that permitted by §311.5 of this part.

§311.4 Testing.

To determine the substantial equivalency of processed used oil with new oil for use as engine oil, manufacturers or their designees must use the test procedures that were reported to the Commission by the National Institutes of Standards and Technology ("NIST") on July 27, 1995, entitled "Engine Oil Licensing and Certification System," American Petroleum Institute ("API"), Publication 1509, Thirteenth Edition, January 1995. API Publication 1509, Thirteenth Edition has been updated to API Publication 1509, Fifteenth Edition, April 2002. API Publication 1509, Fifteenth Edition, April 2002, is incorporated by reference. This incorporation by reference is approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the materials incorporated by reference may be obtained from: API, 1220 L Street, NW., Washington, DC 20005. Copies may be inspected at the Federal Trade Commission, Consumer Response Center, Room 130, 600 Pennsylvania Avenue, NW., Washington, DC 20580, or at the National Archives and Records Administration ("NARA"). For information on the availability of this material at NARA, call (202) 741-6030, or go to: