



withdraw its acceptance of this agreement and so notify proposed respondent, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not constitute an admission by proposed respondent that the law has been violated as alleged in the draft complaint, or that the facts as alleged in the draft complaint, other than the jurisdictional facts, are true.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondent, (1) issue its complaint corresponding in form and substance with the attached draft complaint and its decision containing the following order in disposition of the proceeding, and (2) make information about it public. When so entered, the order shall have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery of the complaint and the decision and order to proposed respondent's address as stated in this agreement by any means specified in Section 4.4(a) of the Commission's Rules shall constitute service. Proposed respondent waives any right it may have to any other means of service. The complaint may be used in construing the terms of the order. No agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

7. Proposed respondent has read the draft complaint and consent order. It understands that it may be liable for civil penalties in the amount provided by law and other appropriate relief for each violation of the order after it becomes final.

## **ORDER**

### **DEFINITIONS**

For purposes of this order, the following definitions shall apply:

1. "Affected Consumers" shall mean persons who, prior to the date of issuance of this order, downloaded and installed the TurboSaver Toolbar and had the Personalized Offers feature enabled.
2. "Clearly and prominently" shall mean as follows:
  - A. In textual communications (*e.g.*, printed publications or words displayed on the

screen of a computer or a mobile device), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts highly with the background on which they appear;

- B. In communications disseminated orally or through audible means (*e.g.*, radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;
  - C. In communications disseminated through video means (*e.g.*, television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (A) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them, and in the same language as the predominant language that is used in the communication;
  - D. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subparagraph (A) of this definition, in addition to any audio or video presentation of them; and
  - E. In all instances, the required disclosures are presented in an understandable language and syntax, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them.
3. “Collected Information” shall mean any information or data transmitted from a computer by the TurboSaver Toolbar as a result of the Personalized Offers feature being enabled prior to the date of issuance of this order to any computer server owned by, operated by, or operated for the benefit of respondent.
  4. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
  5. “Computer” shall mean any desktop or laptop computer, handheld device, telephone, or other electronic product or device that has a platform on which to download, install, or run any software program, code, script, or other content and to play any digital audio, visual, or audiovisual content.
  6. “Covered Online Service” shall mean any product or service using or incorporating a Targeting Tool. Covered Online Service includes, but is not limited to, the TurboSaver Toolbar with the Personalized Offers feature enabled.

7. “Personal information” shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a driver’s license number or other government-issued identification number; (g) prescription information, such as medication and dosage, and prescribing physician name, address, and telephone number, health insurer name, insurance account number, or insurance policy number; (h) a bank account, debit card, or credit card account number; (i) a persistent identifier, such as a customer number held in a “cookie” or processor serial number, that is combined with other available data that identifies an individual consumer; (j) a biometric record; or (k) any information that is combined with any of (a) through (j) above.
8. “Personalized Offers feature” shall mean the component of the TurboSaver Toolbar that Upromise has offered under the name of “Personalized Offers.”
9. “Respondent” shall mean Upromise, Inc., and its successors and assigns, and its officers, agents, representatives, and employees.
10. “Targeting Tool” shall mean any software program or application distributed by or on behalf of respondent that is installed on a consumer's computer, whether as a standalone product or as a feature of another product, and used by or on behalf of respondent to record or transmit information about any activity occurring on that computer involving the computer's interactions with websites, services, applications, or forms, unless (a) the activity involves transmission of information related to the configuration of the software program or application itself; (b) the activity involves a consumer's interactions with respondent's websites, services, applications, and/or forms; or (c) the activity involves a consumer's interactions with respondent's member merchants and that information is collected, retained, or used only as necessary for the purpose of providing the consumer's reward service benefits for transactions involving those merchants.

The TurboSaver Toolbar when configured to collect consumer data, for example, with the Personalized Offers feature enabled, is a Targeting Tool.

11. “Third party” shall mean any individual or entity other than respondent, except that a third party shall not include a service provider of respondent that:
  - A. only uses or receives personal information collected by or on behalf of respondent for and at the direction of the respondent and no other individual or entity,

- B. does not disclose the data, or any individually identifiable information derived from such data, to any individual or entity other than respondent, and
- C. does not use the data for any other purpose.

**I.**

**IT IS ORDERED** that respondent, directly or through any corporation, subsidiary, division, website, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any Targeting Tool, in or affecting commerce, shall,

- A. Prior to the consumer enabling (by downloading, installing, or otherwise activating) any Targeting Tool:
  - 1. Clearly and prominently, and prior to the display of and on a separate screen from, any “end user license agreement,” “privacy policy,” “terms of use” page, or similar document, disclose:
    - a) all the types of data that the Targeting Tool will collect, including but not limited to, if applicable, a statement that the data includes transactions or communications between the consumer and third parties in secure sessions, interactions with shopping baskets, application forms, online accounts, web-based email accounts, or search engine pages, and if the information includes personal, financial or health information.
    - b) how the data is used, including if the data is shared with a third party, other than as reasonably necessary: (i) to comply with applicable law, regulation, or legal process, (ii) to enforce respondent’s terms of use, or (iii) to detect, prevent, or mitigate fraud or security vulnerabilities.
  - 2. Obtain express affirmative consent from the consumer to the enabling (by downloading, installing, or otherwise activating) and to the collection of data.
- B. For those TurboSaver Toolbars installed by consumers before the date of issuance of this order, prior to (1) enabling data collection through any Targeting Tool or (2) otherwise making any material change from stated practices about collection or sharing of personal information through the TurboSaverToolbar, provide the notice and obtain the express consent described in subparts A(1) and (2) of this Part.

## II.

**IT IS FURTHER ORDERED** that respondent shall:

- A. Notify Affected Consumers: a) that they have or had the Personalized Offers feature enabled, and that from 2005 through January 2010 use of this feature resulted in collection and transmission of data to or on behalf of respondent, listing the categories of personal information that were, or could have been, transmitted; and b) how to permanently disable the Personalized Offers feature and uninstall the TurboSaver Toolbar. Notification shall be by each of the following means:
1. Beginning within thirty (30) days after the date of service of this order and for two (2) years after the date of service of this order, posting of a clear and prominent notice on its website.
  2. Beginning within thirty (30) days after the date of service of this order and for three (3) years after the date of service of this order, informing Affected Consumers who complain or inquire about the privacy or security of the TurboSaver Toolbar.
  3. Within sixty (60) days after the date of service of this order, providing direct, clear and prominent notice to Affected Consumers who have the Personalized Offers feature enabled.
- B. Provide prompt, toll-free, telephonic and electronic mail support to help Affected Consumers disable the Personalized Offers feature and, if requested, uninstall the TurboSaver Toolbar.

## III.

**IT IS FURTHER ORDERED** that respondent shall, within five (5) days after the date of service of this order, delete or destroy, or cause to be deleted or destroyed, all Collected Information in respondent's custody or control, unless otherwise directed by a representative of the Commission.

Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line FTC v. Upromise. Provided,

however, that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at DEbrief@ftc.gov.

#### IV.

**IT IS FURTHER ORDERED** that respondent, directly or through any corporation, subsidiary, division, website, or other device, in connection with its advertising, marketing, promotion, or offering of any service or product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the extent to which respondent maintains and protects the security, privacy, confidentiality, or integrity of any personal information collected from or about consumers, unless the representation is true, and non-misleading.

#### V.

**IT IS FURTHER ORDERED** that respondent, directly or through any corporation, subsidiary, division, website, or other device, in connection with its advertising, marketing, promotion, or offering of any product or service, in or affecting commerce, shall maintain a comprehensive information security program that is reasonably designed to protect the security, privacy, confidentiality, and integrity of personal information collected from or about consumers. This section may be satisfied through the review and maintenance of an existing program so long as that program fulfills the requirements set forth herein. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity and the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers, including:

- A. The designation of an employee or employees to coordinate and be accountable for the information security program;
- B. The identification of material internal and external risks that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of personal information and an assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management; (2) information systems, including network and software design, information processing, storage, transmission, and disposal; and (3) prevention, detection, and response to attacks, intrusions, account takeovers, or other systems failures;

- C. The design and implementation of reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures;
- D. The development and use of reasonable steps to select and retain service providers capable of appropriately safeguarding personal information such service providers receive from respondent or obtain on respondent's behalf, and the requirement, by contract, that such service providers implement and maintain appropriate safeguards; and
- E. The evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by subpart C, any material changes to respondent's operations or business arrangements, or any other circumstances that respondent knows or has reason to know may have a material impact on the effectiveness of its information security program.

## VI

**IT IS FURTHER ORDERED** that, in connection with its compliance with Part V of this order, for any Covered Online Service respondent shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. Professionals qualified to prepare such Assessments shall be: a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty (180) days after service of the order for the initial Assessment, and (2) each two (2) year period thereafter for twenty (20) years after service of the order for the biennial Assessments. Each Assessment shall:

- A. Set forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;
- B. Explain how such safeguards are appropriate to respondent's size and complexity, and the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers;
- C. Explain how the safeguards that have been implemented meet or exceed the

protections required by Part V of this order; and

- D. Certify that respondent's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and has so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Respondent shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biennial Assessments shall be retained by respondent until the order is terminated and provided to the Associate Director of Enforcement within ten (10) days of request.

## VII.

**IT IS FURTHER ORDERED** that respondent shall, for a period of five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Commission for inspection and copying:

- A. All advertisements, labeling, packaging and promotional material containing the representation;
- B. All materials relied upon in disseminating the representation;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and
- D. All acknowledgments of receipt of this order, obtained pursuant to Part IX.

Moreover, for a period of three (3) years after the date of preparation of each Assessment required under Part VI of this order, respondent shall maintain and upon request make available to the Commission for inspection and copying all materials relied upon to prepare the Assessment, whether prepared by or on behalf of the respondent, including but not limited to all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, for the compliance period covered by such Assessment.

### VIII.

**IT IS FURTHER ORDERED** that respondent shall, in connection with this action or any subsequent investigations related to or associated with the transactions or the occurrences that are the subject of the Commission's complaint, cooperate in good faith with the Commission and appear at such places and times as the Commission shall reasonably request, after written notice, for interviews, conferences, pretrial discovery, review of documents, and for such other matters as may be reasonably requested by the Commission. If requested in writing by the Commission, respondent shall appear and provide truthful testimony in any trial, deposition, or other proceeding related to or associated with the transactions or the occurrences that are the subject of the complaint, without the service of a subpoena.

### IX.

**IT IS FURTHER ORDERED** that respondent shall deliver a copy of this order to: (1) all current and future principals, officers, and directors; and (2) all current and future managers who have responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.* Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of the order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

### X.

**IT IS FURTHER ORDERED** that respondent shall notify the Commission at least thirty (30) days prior to any change in respondent that may affect compliance obligations arising under this order, including but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the creation or dissolution of a subsidiary (including an LLC), parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in respondent's name or address. *Provided, however,* that with respect to any proposed change about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line FTC v. Upromise. Provided, however, that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an

electronic version of such notices is contemporaneously sent to the Commission at DEbrief@ftc.gov.

## XI.

**IT IS FURTHER ORDERED** that respondent shall, within sixty (60) days after service of this order, and at such other times as the FTC may require, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

## XII.

This order will terminate on \_\_\_\_\_, 2031, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part of this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that this order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

UPROMISE, INC.

Dated: \_\_\_\_\_

By: \_\_\_\_\_

DAVID COPPINS  
President

Dated: \_\_\_\_\_

By: \_\_\_\_\_

J. BECKWITH BURR  
Wilmer Cutler Pickering Hale and Dorr  
Attorney for Respondent

FEDERAL TRADE COMMISSION

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
RUTH YODAIKEN  
KATRINA BLODGETT  
Counsel for the Federal Trade Commission

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