

November 24, 2014

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Donald S. Clark, Secretary of the Commission
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex B)
Washington, DC 20580

Transmitted via Email

Re: Telemarketing Sales Rule Regulatory Review
16 C.F.R. Part 310, Project No. R411001

Dear Secretary Clark:

The Attorneys General of Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Northern Mariana Islands, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, and Washington (“State Attorneys General”) submit the following comments in connection with the Telemarketing Sales Rule Regulatory Review, 16 C.F.R. Part 310, Project No. R411001.

I. INTRODUCTION

The State Attorneys General are the officials charged with enforcing the laws of the States that protect consumers from unfair and/or deceptive trade practices. The undersigned State Attorneys General submit the following comments in response to the notice of regulatory review of the Telemarketing Sales Rule (“TSR”) and request for public comments (“Notice”) issued by the Federal Trade Commission (“Commission”), and published in the Federal Register, 79 Fed. Reg. 46732 (August 11, 2014).

The Commission’s Notice invites comments on any relevant issue, including, but not limited to, a list of specified questions. The State Attorneys General offer their comments in response to four topics raised in the Notice, specifically: (1) whether the TSR should be amended to prohibit the use of preacquired account information as is the case with statutory prohibitions

covering internet transactions as well as the rules of the three major credit card associations; (2) whether the TSR's disclosure requirements with respect to negative option marketing in outbound telemarketing calls should be extended to cover calls initiated by consumers to vendors in response to general media advertising as well as direct mail marketing; (3) whether the TSR should be amended to require sellers and telemarketers to create and maintain call records; and (4) a variety of money transfer issues.

Telemarketing and its abuses, which occur when consumers are engaged in phone calls with businesses in the privacy of their homes, as well as on their personal cellular telephones, have long been areas of keen interest to our offices. Moreover, negative option marketing schemes are areas that the State Attorneys General have focused on for many years as part of their role in protecting consumers within their states. Indeed, the consumer protection offices of the State Attorneys General are often at the “front line” in fielding consumer complaints, taking up investigations, and pursuing legal actions against those who prey on victims through telemarketing and negative option scams. As recent statistics from the Commission bear out, telemarketing remains high on complaint lists, both State and Federal. In fiscal year 2013, over 3.7-million telemarketing complaints were filed with the Commission.¹

The Commission's Consumer Sentinel Network Data Book for January – December 2013 reports an increase in the number of fraud complaints from consumers who were contacted by telephone. The numbers increased from 184,965 in calendar year 2011 to 208,271 in calendar year 2012, and to 226,428 in calendar year 2013. In 2011, 30% of all fraud complaints originated from a telephone contact; in 2012, 34% of all fraud complaints originated from a telephone contact; and, in 2013, 40% of all fraud complaints originated from a telephone contact.² In many States, telemarketing complaints rank among the top five complaint categories received from their citizens.

Similarly, negative option marketing has long been a focus of the State Attorneys General. Some of them submitted comment letters to the Commission in 2009, suggesting ways in which the existing negative option rule could be improved to better protect consumers. (*See* letters attached hereto as Exhibit “A”). While the Commission ultimately decided to keep the rule in its current form, the Commission expressly noted in a July 25, 2014 statement that many of the concerns about negative options may be addressable in the context of changes to the TSR.

¹ *See* National Do Not Call Registry – Data Book FY 2013, Federal Trade Commission, December 2013, p. 4.

² *See* Consumer Sentinel Network Data Book for January – December 2013, Federal Trade Commission, February 2014, p. 9.

As the Commission noted at that time, negative option sellers interpret a consumer's silence or failure to take affirmative action as acceptance of an offer; in the view of the State Attorneys General, it is this very framework that often leads to confusion, misunderstanding, and outright deception in plans of this type.

At the same time, the use of novel payment mechanisms, such as remotely created checks or payment orders, wire transfers, and cash reload mechanisms, is also of concern to the State Attorneys General. Some such concerns were raised in an August 8, 2013 comment letter from several states to the Commission. (*See* letter attached hereto as Exhibit "B"). Many unscrupulous telemarketers have eluded the protections afforded consumers through conventional payment methods, such as credit and debit cards and electronic fund transfers that are processed through networks that are monitored for fraud and subject to the Truth-in-Lending Act and Regulation Z, as well as the Electronic Fund Transfer Act and Regulation E. These scammers have utilized novel payment methods to victimize unwitting consumers. The so-called novel payment mechanisms amount to fraud-induced money transfers that have caused significant harm to consumers and have effectively thwarted the ability of law enforcement to identify and successfully locate and stop the perpetrators.

Compounding the above issues are the TSR's inadequate record keeping provisions. Currently the TSR does not require sellers and telemarketers to retain records of the telemarketing calls they place to consumers. The lack of such a record keeping requirement results in time-consuming and frequently unsuccessful efforts on the part of law enforcement to locate and obtain records that telemarketers could easily maintain in their normal course of business.

II. THE TELEMARKETING SALES RULE SHOULD BE AMENDED TO SPECIFICALLY PROHIBIT THE USE OF PREACQUIRED ACCOUNT INFORMATION IN TELEMARKETING

In 2003, the Commission amended the TSR to require a telemarketer to acquire express informed consent before a consumer's credit or debit account could be charged for goods or services. The rules set up separate requirements for transactions which include a "free-to-pay" conversion feature, where there is a free trial period after which the consumer automatically incurs charges, and those that do not include such a feature.³

³ 16 C.F.R. § 310.4(a)(7)(i-ii).

However, the final 2003 amendments stopped short of the complete ban on preacquired account telemarketing contained in the proposed rules, despite strong support from consumer groups and law enforcement agencies.⁴ The Commission also declined to adopt the recommendation of the National Association of Attorneys General (“NAAG”) urging a total prohibition on the use of preacquired account information in transactions involving “free-to-pay” conversions. The Commission stated its belief that the solution set forth in the 2003 amendments “will provide consumers the information and command over these transactions that they need to protect themselves from unauthorized charges.”⁵

Since the 2003 amendments went into effect, the experience of the State Attorneys General has shown that preacquired account marketing in the telemarketing context remains a problem – one which may particularly affect non-English speaking consumers, the elderly, and other vulnerable groups.⁶ It is clear that any supposed benefit in allowing preacquired account data transfers in telemarketing (albeit with restrictions) is far outweighed by the harm such marketing schemes cause to consumers. For example, in the past four years, the Colorado Attorney General has sued well over two dozen magazine telemarketers, many of whom traded in credit card and bank account information and used the information to trick consumers into duplicative (and exorbitantly expensive) magazine “contracts.”

In the area of online transactions, “data pass” (an online marketing practice involving preacquired account information) is already prohibited. In 2010, following an investigation into data pass by the Senate Committee on Commerce, Science and Transportation, Congress passed the Restore Online Shoppers’ Confidence Act, 15 U.S.C. § 8401 (“ROSCA”). The findings incorporated into ROSCA note that “hundreds of reputable online retailers and websites” shared their customers’ billing information with third party sellers who in turn used “aggressive, misleading sales tactics to charge millions of American consumers” for membership clubs the consumers did not want.⁷

At the time of ROSCA’s passage, the expectation was that internet sales had largely supplanted telemarketing and direct mail marketing. However, over the past five years, that has not proven to be the case as telemarketing continued to be an area of frequent consumer

⁴ See 67 Fed. Reg. 4492 (Jan. 30, 2002) (to be codified at 16 C.F.R. pt. 310); 68 Fed. Reg. 4580, 4617 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310).

⁵ 68 Fed. Reg. 4580, 4621 n.473. (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310),

⁶ See Prentiss Cox, *The Invisible Hand of Preacquired Account Marketing*, 42 Harv. J. on Legis. 425 (2010).

⁷ See 15 U.S.C. § 8401.

complaints to the offices of the State Attorneys General, and many of those complaints concerned unauthorized charges to the consumer's account. The complaints show that the same consumer confusion which spurred ROSCA's passage also exists in the telemarketing arena, and they reinforce the need for similar restrictions through the TSR.

The very nature of telemarketing makes the use of preacquired account information difficult to identify. Consumers making a purchase via telephone may be transferred to a third party seller without ever realizing that a transfer has occurred, while fulfillment materials or confirmation emails that identify the third party are not delivered until well after charges appear on the consumers' accounts. Additionally, telemarketers have managed to circumvent many of the requirements of the TSR, particularly the heightened requirements for "free-to-pay" transactions. By offering their products and services for an initial term at a nominal upfront price (e.g. \$1.99) – a price which later rises dramatically – telemarketers relying on preacquired account information circumvent the TSR's requirement of obtaining the last four (4) digits of the consumer's account number and the equally important requirement of maintaining an audio recording of the entire transaction, as opposed to piecemeal recordings of only authorization or consent.⁸ Perhaps most importantly, the use of preacquired account information in telemarketing transactions defies consumer expectations about how they can be charged for goods or services, resulting in charges to consumers' accounts for which the consumers have not given their express informed consent.

Aside from bringing the TSR into line with online rules incorporated in ROSCA, this change would also be consistent with the operating rules of the three major credit card associations, Visa, MasterCard, and American Express, which restrict merchants from passing consumer account information to third parties.⁹ Consumers who use alternate payment methods (e.g. electronic checks or money orders) are, therefore, disproportionately vulnerable to unscrupulous telemarketers. The Commission appears poised to address this issue as set forth in

⁸ 16 C.F.R. § 310.4(a)(7)(i)(A).

⁹ See 79 Fed. Reg. 46732, 46734 (Aug. 11, 2014) (to be codified at 16 C.F.R. pt. 310); Visa International Operating Regulations, Chapter 8: Risk Management—Account and Transaction Information Security, *Confidential Consumer Cardholder Information—Visa Use and Disclosure of Confidential Consumer Cardholder Information – U.S. Region*, p. 622 (October 15, 2013), available at <http://usa.visa.com/download/merchants/visa-international-operating-regulations-main.pdf>; MasterCard Rules, *Rule 5.13 Sale or Exchange of Information*, p. 5-20 (May 15, 2014) available at http://www.mastercard.com/us/merchant/pdf/BM-Entire_Manual_public.pdf; American Express Merchant Reference Guide—U.S., *Rule 3.4—Treatment of American Express Cardmember Information*, p. 18 (October 2013), available at https://www209.americanexpress.com/merchant/singlevoice/singlevoiceflash/USEng/pdf/files/MerchantPolicyPDFs/US_%20RefGuide.pdf.

its July 2013 Notice of Proposed Rulemaking, 78 Fed. Reg. 41200 (“TSR Anti-Fraud NPRM”), and the State Attorneys General support the Commission’s additional consideration of this important issue.

Ultimately, the safest balance that can be struck on the use of preacquired account information in telemarketing is to place control over charges to the consumer’s account in the hands of the consumer, not the seller. The State Attorneys General therefore urge the Commission to amend the TSR to completely prohibit the use of preacquired account information, regardless of whether the transaction involves a free-to-pay conversion, in both inbound and outbound telemarketing.¹⁰ The rationale for this can be found in the “Findings; declaration of policy” to ROSCA which states: “The use of a ‘data pass’ process defied consumers’ expectations that they could only be charged for a good or service if they submitted their billing information, including their *complete* credit or debit card numbers.” (Emphasis added).¹¹ Therefore, the best way to ensure that a consumer has consented to a transaction is to prohibit the use of preacquired account information, and to require that the entire transaction be recorded so that law enforcement will be able to analyze telemarketers’ disclosures in their full context.

III. THE TELEMARKETING SALES RULE SHOULD BE EXPANDED TO BETTER ADDRESS THE USE OF NEGATIVE OPTION FEATURES IN TELEMARKETING

Negative option marketing refers to an offer or agreement to sell goods or services “under which the consumer’s silence or failure to take an affirmative action to reject the goods or services or to cancel the agreement within a specified period of time is interpreted by the seller as acceptance of the offer.”^{12,13} Oral negative option contracts are subject to abuse because disclosure of the terms is dependent in part upon which salesperson is making the disclosure. Under the current TSR, negative option terms may be placed in the middle of the oral offer and can be confused with other terms. A consumer who says “o.k.” at the conclusion of a sales pitch

¹⁰ In 2012, Vermont enacted the Discount Membership Program Act, 9 Vt. Stat. Ann. §§ 2470aa-2470hh, which prohibits data pass regardless of the initial method of contact. See 9 Vt. Stat. Ann. § 2470gg.

¹¹ 15 U.S.C. § 8401(7).

¹² 16 C.F.R. § 310.2(u).

¹³ For purposes of this letter, the term will also be deemed to include other offers such as “risk free” or free trials, where consumers are given a limited time to avail themselves of a service or product, after which they will automatically be billed unless the consumer takes some sort of timely affirmative action to cancel.

may not realize that in agreeing to make a purchase, he has also agreed to automatic charges to his credit card. Therefore, a negative option transaction may be automatic and the consumer will not even know about it.

Not surprisingly, negative option marketing has been abused as it has become more prevalent. As a result, the Federal Trade Commission amended the TSR in 2003 to require telemarketers and sellers to disclose the specific terms and conditions of negative option offers and to make truthful disclosures of all aspects of a negative option feature.¹⁴ However, the Rule should also require that negative option terms in a telemarketing transaction be stated separately from the other terms of the offer, and that there be a separate audible acceptance to the negative option terms.

Furthermore, existing consumer protections under the TSR largely do not apply to inbound telemarketing calls as a result of the “general media” exemption. The “general media” exemption, which stems from the original TSR issued in 1995, excludes from the Rule’s scope “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 16 C.F.R. Section 310.3(a)(1), for any goods or services offered in the direct mail solicitation, and that contains no material misrepresentation regarding any item contained in 16 C.F.R. Section 310.3(d) for any requested charitable contribution.”¹⁵ Exceptions to the general media exemption were added in 2003 as a result of the Commission’s law enforcement experience with deceptive telemarketers’ use of mass media to advertise “certain goods or services that have routinely been touted by fraudulent sellers using general media advertising to generate inbound calls.”¹⁶ Consequently, inbound calls in response to general media advertisements for investment or business opportunities, advance fee loans, credit card protection services, credit repair services, recovery services and (since 2010) debt relief services are subject to the Rule.

The shift to more protections through the 2003 amendments to the TSR regarding negative-option telemarketing and exceptions to the “general media” exemption resulted, not only from the identification of weakness in the original Rule, but also from the Commission’s recognition of changes in the marketplace and the telemarketing industry itself. Now, eleven

¹⁴ 16 C.F.R. § 310.3(a)(1)(vii) and 310.3(a)(2)(ix).

¹⁵ 16 C.F.R. § 310.6(b)(6).

¹⁶ 68 Fed. Reg. 4580, 4658 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310).

years after those 2003 amendments, it is again necessary to update the TSR with protections that correspond to the identified risks of our times.

Data from the Commission's Third Consumer Fraud Survey issued in 2013 suggest that more than half of all frauds are now mass-marketed through radio, television, newspapers, magazines, and additional types of general media advertising other than direct mail, including internet web pages and email.¹⁷ The Third Consumer Fraud Survey showed that in 59.3 percent of fraud incidents, victims initially learned about the fraudulent offer through such general media advertising.¹⁸ Such a high percentage of fraud originating from general media advertisements shows the contrast in protections afforded to consumers participating in outbound versus inbound telemarketing and, as such, highlights the clear need for updates to the TSR.

Fraud and abuse arising from inbound telemarketing can be seen in recent consumer complaints throughout the country. The following are examples of consumer complaints that involve inbound telemarketing:

- In a 2014 Indiana consumer complaint, the consumer called a telemarketer in response to a television advertisement for makeup products. The consumer purchased the product for \$29.95, the same price that was stated in the television advertisement. However, several months after the purchase, the consumer was shocked to learn that the true price of the item was the initial payment of \$29.95 followed by six (6) monthly payments of \$59.99, as well as an automatic charge of \$29.95 for additional product every other month in perpetuity. In this case it is clear that the consumer had not been made aware of the material terms of the transaction that she was entering into during the call, as neither the installment plan nor the negative option feature were adequately disclosed.
- In 2013, a Vermont consumer reported that he had called a telemarketer in response to a TV offer for clothing and during the call purchased items using his debit card. However, the next month, charges from another business also started appearing on the consumer's bank statement. The consumer reported that he was unable to stop the charges for 13 months.

¹⁷ See Keith B. Anderson, *Consumer Fraud in the United States: The Third FTC Survey* (April 2013), available at <http://ftc.gov/reports/consumer-fraud-united-states-2011-third-ftc-survey>.

¹⁸ *Id.* at 37-39.

- In Illinois, a recent complaint involved a consumer who called a telemarketer in response to an advertisement that promised a monetary reward for answering a survey. After the survey was conducted the consumer was asked to pay a fee with a debit card in order to redeem his reward. Several days after the inbound telemarketing call, the consumer received a letter indicating that he had joined a “savings club” for a monthly fee of \$49.95. The consumer did not knowingly consent to purchasing this membership and later learned that there were several other charges of this nature pending on his account.
- In a 2013 Illinois consumer complaint, the consumer stated that his credit card was being billed monthly for an auto club membership that he had never signed up for. Through mediation with the company responsible for the charges, it was revealed that the consumer’s enrollment in the membership club took place via a mail insert. This mail insert required the recipient to phone in to enroll. The company stated that it was not its policy, nor its intention to enroll a customer without the customer’s knowledge or approval. Nevertheless, during the phone call the consumer likely did not receive adequate information as to what he was purchasing, or even if he was purchasing something.
- In a 2014 Vermont consumer complaint, the consumer reported that she had placed a call to order skin cream which was marketed as “free for 3 months”. She described that, when she called to order, she asked three times whether the product was really free, and was “told each time that it was”. The consumer states that she did not ask for any additional orders, but that the company began charging her after the first month and continued to send her products.

Telemarketers who rely on the inherent confusion that often accompanies negative option marketing will argue that requiring the disclosure of the material terms and conditions of a negative option feature to outbound as well as inbound telemarketing will be unduly burdensome and negatively affect business. However, the veracity of such an inference is unfounded. The State Attorneys General are confident that expanding the TSR to protect consumers making inbound calls will not result in a chilling effect on business.

Sellers are already subject to similar, mandatory disclosure requirements in other, existing laws and regulations. A number of States’ existing consumer protection statutes, for example, either deem a seller’s failure to disclose a material fact to be a deceptive trade practice or affirmatively require the disclosure of material facts during all consumer transactions – not

just telemarketing transactions.¹⁹ In the online marketplace, negative option marketing is also regulated through ROSCA, which makes it unlawful for a seller to charge or attempt to charge any consumer for goods or services sold through a negative option feature unless that seller first discloses all material terms of the transaction.²⁰ Despite the regulations placed on internet marketing through ROSCA, and the states' preexisting consumer protection statutes, internet sales have *not* been chilled and, in fact, continue to soar.

It only makes sense that consumers responding to solicitations who place inbound calls to purchase goods or services should be afforded the same level of protection as those who participate in outbound telemarketing and internet transactions. The increased prevalence of inbound telemarketing in response to general media advertisements and the concurrent rise of fraud accompanying such telemarketing clearly show the necessity to regulate inbound telemarketing in the same fashion as outbound telemarketing. Further regulation of inbound telemarketing will apprise more consumers of the basic terms of the transactions into which they are solicited to enter and help prevent the harms that the TSR was originally intended to address.

Also, the provisions of the TSR relating to negative options, such as 16 C.F.R. Section 310.3(a)(2)(ix) requiring the disclosure of material terms and 16 C.F.R. Section 310.3(2)(ix) forbidding misrepresentations of any aspect of a negative option plan, should not be limited to sales that result in a charge or debit to the consumer's account. Many telemarketers include negative options in offers that do not result in a charge to a bank account or credit card at the time of the sale. Instead, the seller sends a product in a trial offer with a bill that must be paid if the consumer does not return the product. Or, the seller will place the consumer in a negative option at the time of sale, but bills the consumer later, e.g., for products under a continuity plan or automatic renewal of subscriptions. If the consumers do not pay, the seller sends dunning communications and then sends the account to collections. Sometimes sellers threaten to report consumers to credit reporting agencies if they fail to pay. Therefore, the TSR should be amended so as to clarify that these sections apply even if the customer is billed or invoiced at a later date.

The TSR already includes a similar limitation in Section 310.4(a)(7) that requires the customer's "express informed consent" before billing information is submitted for payment. This provision pertains to telemarketing transactions that involve preacquired account information and a free-to-pay conversion (a negative option), and calls for the telemarketer to obtain the last 4 digits of the account number, express agreement for the goods and services to be charged using the account number, and to make and retain a recording of the entire transaction. The section

¹⁹ See, e.g., K.S.A. 50-626(b)(2)-(3).

²⁰ 15 U.S.C.A. § 8403(1)-(3).

goes on to set forth requirements for preacquired account information not involving a free-to-pay conversion. However, a new section should be added with the goal of including free-to-pay conversion offers that do not include preacquired account information. The changes necessary to ensure that a telemarketer has express informed consent before billing or sending an invoice to a consumer for a free-to-pay conversion feature would be to expand Section 310.4(a)(7) to require express informed consent when a seller or telemarketer is in the act of collecting or attempting to collect payment, and when the seller or telemarketer is billing or invoicing the customer at a later time.

Finally, the TSR should be amended to require a telemarketer to send a confirmation to the consumer, whether by mail or otherwise, whenever, and at the time, the consumer is enrolled in a negative option feature through a telemarketing call. Such a confirmation would clearly and conspicuously set forth the terms of the negative option plan.

The State Attorneys General urge the Commission to amend the TSR to apply the restrictions on negative option features to inbound telemarketing, to require that negative option terms in a telemarketing transaction be stated separately from the other terms of the offer, to require that there be a separate audible acceptance for negative option terms, that restrictions on negative option features be applied to telemarketing calls that do not include a transaction but where the consumer is billed or invoiced at a later time, and to require that a confirmation be sent to the consumer following the telemarketing call, setting forth the terms of the negative option feature.

IV. THE TELEMARKETING SALES RULE SHOULD BE AMENDED TO REQUIRE SELLERS AND TELEMARKETERS TO CREATE AND MAINTAIN CALL RECORDS

As the Commission observes, the recordkeeping provisions of the TSR do not require sellers and telemarketers to retain records of the telemarketing calls they place to consumers. Instead, State Attorneys General must issue subpoena after subpoena to one telephone service provider after another, to not only determine the telemarketer responsible for the calls, but also to obtain records of when, and to whom, those calls were made. In the experience of the State Attorneys General, however, these efforts are time-consuming and frequently fruitless. Subpoenas and warning letters served on international service providers go unanswered, while service providers located in the United States are increasingly wary of divulging their subscribers' records. A small service provider, for example, will misconstrue the Electronic Communications Privacy Act, 18 U.S.C. § 2701, *et seq.* ("ECPA"), as prohibiting disclosure of any subscriber information, while a larger provider either outright refuses to provide toll (*i.e.*,

calling) records, requests an exorbitant fee for doing so, or cites to its inability to disclose such records as “customer proprietary network information” (CPNI) under the Telecommunications Act, 47 U.S.C. § 222. The patchwork of regulations governing subscriber records and the inevitable confusion that results mean law enforcement loses valuable time locating, and sometimes fighting for, records the telemarketer could easily maintain in its normal course of business.

Requiring sellers and telemarketers to retain records is not without precedent. In *FTC v. Green Millionaire, LLC*, the Court ordered that for all oral offers with a negative option feature, express informed consent to the offer must be recorded, including the sales representations, evidencing the consumer's agreement to the negative option feature. “The recording must demonstrate the consumer has provided billing information...specifically for the purpose of participating in the negative option feature and that the Defendants have disclosed to the consumer all costs associated with the negative option feature, that the consumer is agreeing to pay such cost, the length of any trial period, and that consumers must cancel to avoid being charged.”²¹ The Order in *Green Millionaire* is a starting point, but the TSR should require sellers and telemarketers to maintain call records to help ensure that the requirements of the TSR, whether current or future, are adhered to.

The State Attorneys General recognize a recordkeeping requirement may impose additional costs on telemarketers, but in today’s marketplace, telemarketers are making more calls than ever before with decreasing expense. The increasing availability of automated dialing technologies, “caller-ID management” services, and other Internet-based services, both within the United States and in other countries, means the costs of such services and technologies continue to plummet while consumer complaints about illegal telemarketing are rising at unprecedented rates. The cost-savings realized by telemarketers using these technologies should not be realized at the expense of law enforcement’s resources and consumer protection. The State Attorneys General urge the Commission to adopt a recordkeeping requirement for sellers and telemarketers.

V. THE TELEMARKETING SALES RULE SHOULD BE AMENDED TO BAN OR RESTRICT CERTAIN NOVEL PAYMENT METHODS

The State Attorneys General strongly support the Commission’s efforts to strengthen consumer protections against bogus charges and services by banning or, at a minimum,

²¹ *FTC v. Green Millionaire, LLC*, Case No. 1:12-cv-01102 (D. Md., Order Entering Stipulated Permanent Injunction, April 27, 2012).

restricting certain payment methods frequently used in fraudulent telemarketing transactions. The Commission proposed: (1) banning sellers and telemarketers from accepting remotely created checks, remotely created payment orders, cash-to-cash money transfers and cash reload mechanism as payment in *inbound* or outbound telemarketing transactions; (2) expanding the scope of the advance fee ban on “recovery” services to include recovery of losses in *any* previous transaction (at present, they are limited to recovery of losses in prior telemarketing transactions); as well as (3) clarifying other provisions of the TSR. The State Attorneys General strongly support the Commission’s proposed amendments and urge the agency to focus upon the problem of fraud-induced money transfers, whether they are induced by telephone solicitation or electronic solicitation.

Scammers located around the world perpetrate mass-marketing fraud through the use of fraudulent identities, thereby thwarting law enforcement’s efforts to locate them and intercept fraudulent money transfers. The use of calling cards, cellular phones, pre-paid SIM cards, free web-based email accounts and the manipulation of internet-based technology to mask caller identification, make it difficult to trace the origins of these communications, whether via telemarketing or electronic communication.

Wire transfers can easily be used to retrieve funds from locations around the world, with virtually no meaningful scrutiny of the recipient’s identity. And, unlike with conventional payment methods, such as credit or debit card transactions, there is no legal recourse for the consumer to seek a refund once the funds are transferred, regardless of how fraudulent the transaction.

The most common scams that utilize novel payment methods are as easily effectuated by electronic communication as by telemarketing. They include the “grandparent scam”, lottery scams, hundreds of variations on the Nigerian scam, romance scams, and counterfeit check scams (frequently used in secret shopper scams). Studies of Western Union and MoneyGram wire transfers over a certain base amount from the United States to Canada suggest that 58% to 79% of transferred dollars were induced by fraud. The ease with which scammers can contact huge numbers of potential victims quickly and at minimal cost, whether by telephone or *via* electronic media, highlight the need for stronger safeguards, such as those proposed by the Commission and supported by the State Attorneys General.

Because the perpetrators of such scams are unlikely to be deterred by the law, the Attorneys General support the FTC’s efforts to hold money transfer companies, whose payment systems are being utilized to accomplish such fraud, responsible for making reasonable inquiry into whether the transfer results from a prohibited telemarketing solicitation. The Telemarketing

Sales Rule, 16 C.F.R. Part 10 (“TSR” or “Rule”), considers it a deceptive telemarketing act or practice 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 . . . [Section] 310.4 of the Rule.” 16 C.F.R. § 301.4. Because money transfer companies provide “substantial assistance or support”, the Attorneys General urge the FTC, as it has done in the past²², to subject such companies to liability under Section 310.3(b) of the TSR.

VI. CONCLUSION

We thank the Federal Trade Commission for the opportunity to provide Comments on its periodic review of the TSR and how to make its continued application to telemarketing robust and effective, reflecting the practices at work in today’s marketplace and addressing the potential for consumer harm caused by them. The Commission’s consideration of our Comments is appreciated.

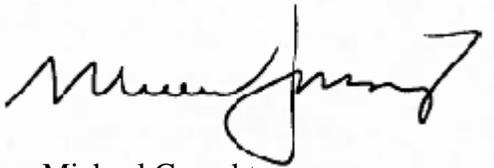
Respectfully submitted,



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Michael Geraghty
Alaska Attorney General

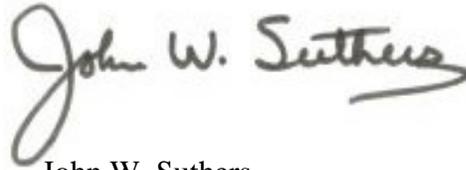


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²² *FTC v. MoneyGram International, Inc.*, No. 09-6576 (N.D. Ill., Stipulated Order for Permanent Injunction and Final Judgment, October 21, 2009).



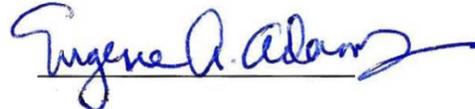
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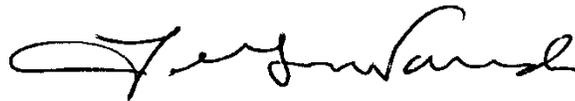
Joseph R. "Beau" Biden III
Delaware Attorney General



Eugene Adams
Interim Washington D. C. Attorney General



David Louie
Hawaii Attorney General



Lawrence Wasden
Idaho Attorney General



Lisa Madigan
Illinois Attorney General



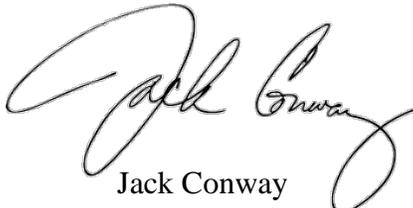
Greg Zoeller
Indiana Attorney General



Tom Miller
Iowa Attorney General



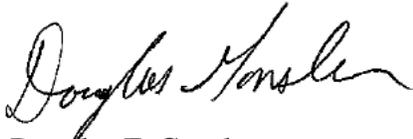
Derek Schmidt
Kansas Attorney General



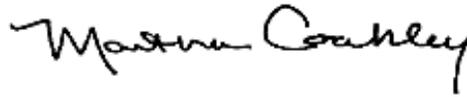
Jack Conway
Kentucky Attorney General



Janet Mills
Maine Attorney General



Douglas F. Gansler
Maryland Attorney General



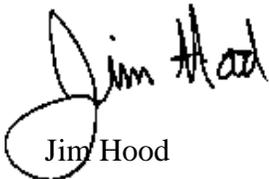
Martha Coakley
Massachusetts Attorney General



Bill Schuette
Michigan Attorney General



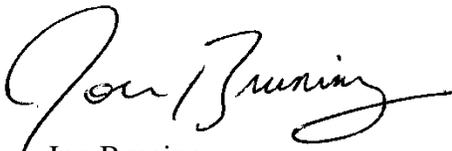
Lori Swanson
Minnesota Attorney General



Jim Hood
Mississippi Attorney General



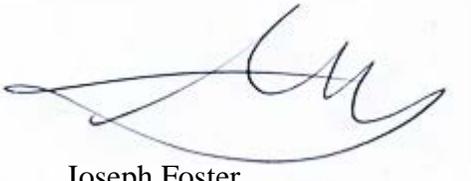
Tim Fox
Montana Attorney General



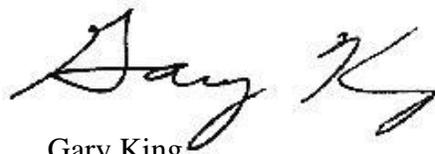
Jon Bruning
Nebraska Attorney General



Catherine Cortez Masto
Nevada Attorney General



Joseph Foster
New Hampshire Attorney General



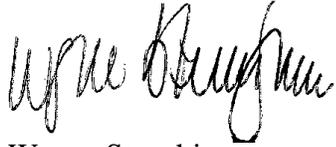
Gary King
New Mexico Attorney General



Eric Schneiderman
New York Attorney General



Roy Cooper
North Carolina Attorney General



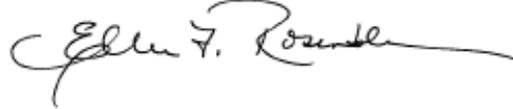
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Gilbert J. Birnbrich
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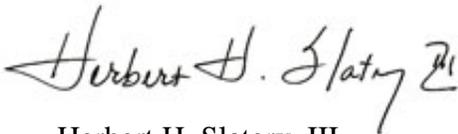
Ellen F. Rosenblum
Oregon Attorney General



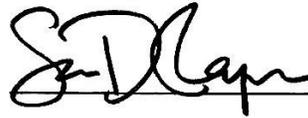
Peter Kilmartin
Rhode Island Attorney General



Marty J. Jackley
South Dakota Attorney General



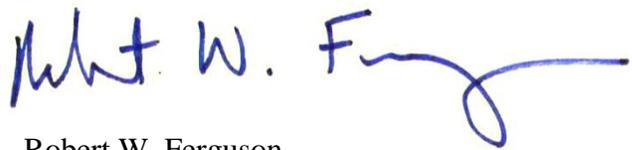
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EXHIBIT A

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STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT
05609-1001

October 13, 2009

BY FEDERAL EXPRESS AND EMAIL

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

Re: Prenotification Negative Option Rule Review
Matter No. PO64202

Dear Secretary Clark:

On behalf of the Attorneys General of the States of Arkansas, Illinois, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Mexico, Ohio, Oregon, Tennessee, Vermont, and West Virginia ("the States"), and in response to an Advance Notice of Proposed Rulemaking published in the Federal Register, 74 Fed. Reg. 22720 (May 14, 2009), we are writing to comment on the Federal Trade Commission ("FTC") rule on Use of Prenotification Negative Option Plans, 16 C.F.R. Part 425 (hereinafter referred to as "the PNOR"). The Attorneys General are the officials charged with enforcing the laws of the States designed to protect consumers from unfair and deceptive business practices.

The existing PNOR was originally promulgated in 1973, with technical amendments being made in 1998. The rule currently regulates only one type of negative option marketing—the so-called "prenotification negative option plan"—which involves an arrangement whereby consumers receive periodic announcements that merchandise will be delivered to them unless they decline to accept it within a set time frame. Importantly, the Commission seeks input on whether to extend the scope of the rule to regulate other forms of negative option marketing, most notably "trial conversions." See 74 Fed. Reg. at 22721.

For the reasons stated below, we strongly encourage the FTC to expand the rule, but only if the revisions are adequate to ensure that consumer protections are put into place with respect to consent to be charged after the trial period, periodic notification of charges, maximum duration of charges, method of cancellation, and applicability of the rule to services.

Much of the public discussion of the PNOR has focused on improving *disclosure* as a way of protecting consumers from being harmed by trial conversion negative option marketing. *See, e.g.*, FTC, NEGATIVE OPTIONS, A REPORT BY THE STAFF OF THE FTC'S DIVISION OF ENFORCEMENT (Jan. 2009) (hereinafter "NEGATIVE OPTIONS"). However, in the context of free to pay conversions, it is our firm view that improved disclosure of terms will *not* adequately protect consumers. Rather, there is a need for *substantive* regulatory provisions to ameliorate the harmful aspects of this form of negative option plan.

Therefore, we strongly encourage the FTC to add new provisions to the PNOR to regulate trial conversions, and, with respect to that form of negative option, to (1) prohibit charges following a "free" trial without receiving the affirmative consent of the consumer at the end of the trial; (2) mandate periodic notification to consumers of charges to their accounts in trial conversions; (3) set a cap on the number of months that a consumer may be charged and require an affirmative opt-in by the consumer to exceed that time limit; (4) require companies to permit consumers to cancel in the same method of communication as the solicitation to the consumer; and (5) include "services" under the PNOR.

I. BACKGROUND

The FTC uses the term "negative option marketing" broadly, to refer to those commercial transactions in which sellers interpret a consumer's failure to take affirmative action—either to reject an offer or to cancel an agreement—as affirmative assent to be charged. As the FTC has recognized, these kinds of transactions "change the typical relationship between the buyer and seller," in which the buyer is bound only if she responds affirmatively to an offer made by the seller. *See* NEGATIVE OPTIONS at 2.

The common law of the States reflects this basic proposition, that in order for a binding contract to exist, the offeree must affirmatively accept the terms of the offer. *See* 2 Samuel Williston & Richard Lord, A TREATISE ON THE LAW OF CONTRACTS 6:50 (4th ed. 2007); *see also* *Adams v. State Capital Life Ins. Co.*, 182 S.E.2d 250, 252 (N.C. App. 1971) ("Silence and inaction do not amount to an acceptance of an offer."); *Gov't Employees Ins. Co. v. Group Hospitalization Med. Services, Inc.*, 589 A.2d 464, 468-69 (Md. App. 1991) (silence and inaction can operate as acceptance of offer in only a few, limited circumstances). Ordinarily, consumers govern their behavior based on the idea that they must in effect say "yes" before a deal is made. Negative option marketing ignores this commonly-understood principle by deeming silence to be acceptance. *See In re Baum's Estate*, 117 A. 684, 685 (Pa. 1922) (offeree has a right to make no reply to offers and his silence and inaction cannot be construed as assent to offer).

Accordingly, consumers customarily do business based on the premise that they will not be bound, or incur any monetary obligations, unless and until there is a full "meeting of the minds" and genuine assent between the parties. Rooted in the concepts of offer and acceptance, consumers base their behavior on the notion that they are not "on the hook" until a "deal" is done, be it in the form of a handshake or a fully executed written contract. Free to pay conversion marketing turns those rules on their head, contrary to reasonably understood consumer expectations and assumptions. Lured by catch phrases such as "risk free" or "trial offer," consumers ultimately find themselves bound in some fashion to take affirmative steps, all because their silence was deemed to be acquiescence.

Consequently, consumers are stuck with terms and monetary obligations to which they did not knowingly assent. By their comments, the States do not mean to suggest that consumers do not have an obligation to read and understand all material terms and conditions; the reality, though, is that free to pay conversion marketing uses a form of trickery, and sleight of hand as it were, to reap millions from consumers in a manner flatly contrary to the ordinary rules of consumer transactions. There is an inherent deception built into these plans by the marketers such that the rule of "caveat emptor" cannot control this marketplace.

As evidenced by consumer data gathered by the States, negative option marketing of the trial conversion type is an area ripe for deception and abuse, consistent with the FTC staff's observation that "some negative option practices generate significant consumer dissatisfaction." NEGATIVE OPTIONS at ii. The States have taken steps to combat these abuses through a number of enforcement actions, both at the multistate and individual state level. *See, e.g., Minnesota ex rel. Hatch v. US Bank, NA, et al.*, No. 99-872 (D. Minn. 2000) (Amended Final Judgment and Order for Injunctive and Consumer Relief); *Minnesota ex rel. Hatch v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001); *Minnesota ex rel. Hatch v. Fleet Mortgage Corp.* 181 F. Supp. 2d 995 (D. Minn. 2001); *In re Citibank* (N.Y.S. Dept. of Law filed Feb. 22, 2002) (Assurance of Discontinuance); *People v. Chase Bank*, No. GIC850483 (Cal. Super. Ct. for San Diego County filed July 12, 2005) (Complaint); *AT&T Mobility*, No. 09-2-00463-1 (Wash. Dist. Ct. for Thurston County filed Feb. 26, 2009) (Assurance of Discontinuance); *Iowa ex rel. Miller v. Vertrue, Inc.*, No. EQ53486 (Iowa Dist. Ct. for Polk County filed May 15, 2006) (Petition in Equity).

II. STATES' OBSERVATIONS

The States have identified a number of significant problems in negative option trial conversions, the most troublesome of which involve the sale of services like discount membership programs. These include:

- The misleading character of negative options advertised as involving “free” or “trial” offers. The long-term impression created by this type of terminology is that consumers have *no obligation* to do anything, not that their silence after acceptance of the offer will open them to recurrent charges of unlimited duration.¹
- Consumers’ lack of awareness as to the existence of ongoing periodic charges to their credit card or bank account, in connection with trial conversions. The reality is that many consumers do not scrutinize their account statements and thus can go for long periods of time without realizing that they are being charged. Modest charges, like \$19.95 per month, can “fly under the radar.” This is particularly true with respect to bank account charges, the details of which, on an account statement, can be inscrutable to even well-educated consumers.
- The piling up of trial conversion charges over long periods of time, amounting to substantial amounts of money, even where consumers make little or no use of the goods or services offered. With no time cap on charges, consumers can incur hundreds of dollars worth of charges, or more.
- The difficulty faced by consumers in contacting the seller of the goods or services in order to cancel a trial conversion. There is no reason why a consumer who is bound by consent communicated in a particular way—electronically, for example—should not be able to cancel in the same manner.

Examples of consumer complaints. Reflective of the kind of frustration experienced by consumers are the following examples of consumer complaints received by the States:

- A professional couple in Vermont paid over \$750.00 through a joint credit card payment, and \$49.95 monthly increments, for a discount plan that neither of them authorized, wanted, or knew they had purchased. The periodic charge was small enough that the couple did not question the bill.
- An Oregon woman ordered what was advertised on the internet as a “Free Trial Offer” of a teeth whitening product for only \$4.87 shipping and handling and ended up getting charged \$78.41 and enrolled in an auto-ship program.

¹ Under the FTC’s Guide Concerning Use of the Word “Free” and Similar Representations, 16 C.F.R. § 251.1(a)(2), in using the word “free,” an offeror must exert “extreme care so as to avoid any possibility that consumers will be misled or deceived.”

- A Maryland consumer reported ordering a “free” bottle of Resveratrol by internet and agreeing to pay shipping charges of \$3.95. After the consumer received the shipment, his account was charged \$87.13. The company reported to the consumer that because he did not cancel he was charged full price.
- A Hawaii man reported that he signed up on the internet for “free trial” samples of an acai berry supplement and authorized a nominal shipping charge. The company sent him a two-month supply and enrolled him in an auto-ship program. His credit card was charged \$79.90 once a month for three months until he noticed the charges.
- In 2003, an Iowa couple discovered what they believed to be an unauthorized charge on their MasterCard in the amount of \$89.95 for Simple Escapes. Indeed, they ultimately discovered that such charges stretched back to 1998, and totaled \$489.70.
- In 2003, another Iowa couple discovered a \$96.00 charge for “MWI Connections” on their AT&T MasterCard, and complained that the charge was unauthorized. They stated they had no idea what the charge was for until they contacted the company and were told it had to do with entertainment coupons.
- In 2005, an Iowa couple reviewed their bank statement and discovered that \$199.95 had been withdrawn on their debit card the previous month for something called “Essentials.” As it turns out, the wife had placed a call to order an unrelated product in 2002, had agreed to join the Essentials program, and had subsequently been charged hundreds of dollars over the course of four years.

These consumer complaints offer a snapshot of the substantial numbers of complaints that our offices receive about trial conversions each year. The complaints we receive underscore the fact that the inherently deceptive nature of trial conversions render retailers’ disclosures meaningless and confuse and dupe even the most sophisticated consumer.

Trial conversions in telemarketing and on the internet. As outlined above, negative option plans, especially trial conversions, present particular problems and obstacles to consumers. While some such offers are currently the subject of regulation by the FTC (that is, those that are telemarketed and involve preacquired account information, *see* Telemarketing Sales Rule (“TSR”), 16 C.F.R. § 310.4(a)(6)(i)), other trial conversions are not similarly regulated, whether presented on the telephone or over the internet. Under these plans, sellers seek to entice consumers with words like “free” and “trial period,” inherently implying that the trial comes with no obligation on the part of the consumer. The TSR, as it pertains to only that telemarketing involving preacquired account information, has focused on disclosures, and not attacked head-on the substantive problems in these kinds of sales, leaving room for continued abuse of consumers.

Whereas in continuity sales plans, consumers receive regular notification with every shipment of merchandise, prompting them to take affirmative steps to cancel the plan if that is their preference, with trial conversions the recurrent charges are the subject of no notification from the seller and continue on silently and without limit.

To further illustrate the use of trial conversions on the internet, we have attached Exhibit 1, which is a redacted screen shot of a retailer's home page and an order page.

Compounding the problems for consumers is their inability to cancel once they realize their accounts have been charged. Consumers who have accepted the offer through the internet or by email may learn that such mechanisms are not available as a means of cancellation. Consumers may be forced to call a telephone number instead, which is not always toll-free, and they complain of being put on hold for unreasonable lengths of time. They also often find it difficult to get confirmation of a cancellation in writing from the seller. Such difficulties in cancellation compound the frustration caused by this type of negative option plan.

Data from the States. Confirming the need for greater substantive regulation of trial conversions is consumer data gathered by the States.

For example, in May of 2006, the Office of the Iowa Attorney General announced the results of a survey and the commencement of its suit against Memberworks, Inc., now known as Vertrue, Inc., which markets discount membership plans through trial conversions. With a response rate of 88 surveys returned of 400 originally mailed, 67 percent of responding consumers were unaware of their membership in the negative option sales plan. Additionally, almost all of the remaining consumers had never used the plan, or believed they had previously cancelled their membership. No responding consumer expressed satisfaction with their membership.²

Similarly, in 2007, the Vermont Attorney General's Office surveyed state residents by mail who had been billed for one of several discount plan memberships involving a "trial conversion" negative option and sold by a major over-the-phone purveyor of such plans. There were 100 respondents. Of that number, 33 recalled having signed up for a membership, and 67 did not; 53 expressly answered that they had not agreed to be billed. In addition, only 6 responded that they had ever used the plan. When the Attorney General's Office asked the seller to substantiate that the 53 "non-agreeing" consumers had consented on the phone to be billed, the company produced documentation for some, but not all, consumers, including 19 tape recordings that reflected some degree of consumer consent (albeit in a number of cases after the consumers had initially indicated a reluctance to sign up).

² The Iowa Attorney General's news release announcing his action against Vertrue, Inc., can be found at www.state.ia.us/government/ag/latest_news/releases/may_2006/MemberWorks.html.

Data from Colorado also shows that a company can make a great deal of money from early billings under a trial conversion, even when consumers who later discover the recurrent charges cancel their participation. That is, the revenue generated from the early charges levied against consumers in such plans can be great enough to favor using this form of negative option marketing. Thus, an investigation by the Colorado Attorney General identified a company that grossed more than \$8 million in only six months, even with an attrition rate above 75 percent after the first charge, which consumers discovered when they received their credit card bills. (The discovery might not have been even that quick if the charge had been to the consumers' *bank* accounts.)

Even more telling is a comparison of this same company's total number of shipments of its product before and after implementing the trial conversion plan. In 2004, the business reported approximately 1,500 shipments; one year later, after implementing its trial conversion plan to market the same product, the company reported more than 19,500 shipments.

By way of summary, if, as in the Vermont survey, a large majority of trial conversion participants do not recall ever having consented to be charged, and a majority of them affirmatively deny having given such agreement, then there is a clear need for better regulation of these offers. The issue is less the lack of up-front disclosure and consent-giving. The problem is rather that it is unreasonable to expect consumers enticed by a free trial offer both to remember, over an unlimited period of time, a spur-of-the-moment assent to be billed periodically, and to scrutinize (and decipher) their account statements month after month in order to recognize the charges. In light of these realities, the best, and perhaps the only, way to ensure that consumers understand why and in what amount they are being billed, and agree to such billing, is to ensure that they affirmatively consent to the charges after the trial period, receive periodic notice of future charges, and as a "backstop" safeguard, are protected by an outer limit on the duration of the billing.

III. SPECIFIC SUGGESTIONS

Based on their experience with consumers in this area, and with an eye toward protecting the public, the States strongly recommend that the FTC amend the PNOR in the following ways:

A. **Require Affirmative Written Consent to Bind Consumers at the End of Free Trials.**

The PNOR should be revised so as to require consumers' affirmative written consent following the "free" trial period in a trial conversion. That is, before a company may charge a consumer for a product or service previously received during a trial period, the company should be required to obtain written consent from the consumer to be charged in the future. Consent given at the outset of the trial period is not sufficient, because the trial period is most often touted as being without obligation and because it can and does lull consumers into a state of forgetfulness; only at the end of the trial does the relationship

between consumer and business transform into one in which the consumer is actually being charged. This change would do much to reveal the true market for these services and substantially reduce the possibility that the services are being sold to consumers who do not want them or are unaware of their purchase of them.

B. Require Periodic Notices.

The States are of the view that while up-front disclosures in trial conversions offer limited protection to consumers, *periodic* disclosures accompanying recurrent charges would be of significant value. These should be provided at no less than quarterly intervals. Periodic notice would make consumers aware of, or remind them of, the recurring charges and help prevent the continuation of unknowing or unwanted enrollment in these plans.

C. Impose Contract Maximum Time Limits.

Because it is unreasonable to assume that most consumers intend to be charged in perpetuity in connection with trial conversions, the States recommend the setting of an outer time limit on such charges, as a "backup" safeguard. Our suggested time limit is 18 months. At the expiration of that time limit, the company offering the negative option plan would be required to seek new written consent from the consumer. If no new consent is obtained, the contract would be terminated.

D. Require Fair Cancellation Processes.

Cancellation of negative option plans is made difficult for consumers when they are required by the seller to cancel using a different method of communication than the method by which they agreed to the offer. To reduce this difficulty, the States propose requiring that consumers be allowed to cancel their memberships by the same method as their enrollment (as well as by other methods, at the business' option). For example, if a consumer enrolled through an internet website, the company should provide an internet cancellation option.

E. Include "Services" Under the Negative Option Rule.

Currently, the PNOR only regulates negative option marketing "in connection with the sale, offering for sale, or distribution of goods and merchandise." 16 C.F.R. § 425.1(a). However, many of the offerings promoted by negative option plan companies could be considered *services*, thus circumventing the rule's current provisions, if they were expanded to include trial conversions. To guard against the dangers of negative option marketing, the States recommend that this definition be broadened to include "services."

The limited scope and provisions of the PNOR are insufficient to protect consumers from the pitfalls of trial conversions. By instituting the States' recommendations, the dangers of this common form of negative option marketing can be mitigated.

The Honorable Donald S. Clark
Re: Prenotification Negative Option Rule Review
Page 9 of 9

We thank the Federal Trade Commission for its consideration of these comments.

Sincerely yours,



Elliot Burg
Assistant Attorney General

Enc.



STATE OF FLORIDA

BILL McCOLLUM
ATTORNEY GENERAL

October 13, 2009

VIA OVERNIGHT DELIVERY

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

RE: Prenotification Negative Option Rule Review
Matter No. P064202

Dear Secretary Clark:

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

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

Sincerely,

A handwritten signature in dark ink, appearing to read "Bill McCollum", written in a cursive style.

Bill McCollum

Enclosure

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

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

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

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

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

I. Florida's Experience with Negative Option Plans

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Specific Suggestions

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

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

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

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

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

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

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

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

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

C. Expand Disclosure And Notice Requirements

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

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

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

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

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

E. Ensure That Negative Options Are Not Marketed to Minors

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

III. Conclusion

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

Appendix A

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

Appendix A

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

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

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Count	Case No.	Case name	Product or Service	Negative Option Types	Negative Option	Allegations Investigated	Sales Channels	Status	AVC Signed
28	L2006-3-1065	Integretel, Inc., d/b/a new name "The Billing Resource"	Aggregator is intermediary and facilitates marketing and billing for voicemail and similar services	Continuity	Unauthorized charges for negative option plans of telephone bills	Billing aggregator providing a service to telemarketers, internet companies and telecom businesses to invoice their charges on consumers' telephone bills.	Internet, Telemarketing	Closed; pending enforcement action by other agencies	
29	L2005-32-1138	America Online, LLC	Internet services	Free to pay, Continuity	Trial offer of Internet services converted to continuity	Terms and Conditions not clearly and conspicuously disclosed	Internet	Closed	ACV signed 12/11/2006
30	L2005-3-1143	Allied Telephone Directories a/k/a Global Directories, Inc. a/k/a Global Directories, LLC	National Business-to-Business Directory	Automatic renewals	Automatic renewal	Mailing invoices bearing the familiar "walking fingers" and the name "Yellow Pages" on the mailer for enrollment in a national business-to-business directory. The subscription is automatically renewed.	Print	Closed	AVC signed 5/6/2009
31	L2005-3-1140	Buongiorno USA, Inc.	Mobile content	Free-to-pay conversion, Continuity	Negative option subscriptions for cell phone "ring tones" and similar services	Unordered services billed for free ring tones	Television, Print, Internet	Pending	
32	L2005-3-1026	State of Florida, Office of the Attorney General, Department of Legal Affairs v. Berkeley Premium Nutraceuticals, Inc., Lifekey, Inc., Warner Health Care, Inc., Boland Naturals, Inc., Wagner Nutraceuticals, Inc., and Steve Warshak, individually and in his capacity as President and Owner of Berkeley Premium Nutraceuticals, Inc., Lifekey, Inc., Warner Health Care, Inc., Boland Naturals, Inc., Wagner Nutraceuticals, Inc.	Health Supplements	Continuity	Automatic shipment of products	Misleading advertising, auto ship delivery of product, refusal to honor cancellation requests, and refund policies.	Internet	Closed	Consent Order Obtained 3/7/2006

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

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

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

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

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

October 13, 2009

I. INTRODUCTION:

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

II. BACKGROUND:

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

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

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

² *Id.* at 7496, para. 5.

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

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

⁵ *Id.* at 6456, para. 16.

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

III. RULES SHOULD APPLY TO ALL PROVIDERS:

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

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

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

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

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

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

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

⁹ *Id.* at 6457, para. 18.

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

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

IV. DISCLOSURES:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. ADVERTISING:

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

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

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

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

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

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

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

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

VI. INITIAL GENERAL RECOMMENDATIONS:

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

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

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

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

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

VII. CRAMMING:

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

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

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

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

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

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

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

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

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

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

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

VIII. UNIFORM “Schumer Box”-TYPE DISCLOSURES:

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

²⁶ *NOI*, __ FCC Rcd __, para. 47.

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

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

EXHIBIT B

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August 8, 2013

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex B)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Filed by Mail and Online

Re: Telemarketing Sales Rule, 16 CFR Part 10, Project No. R411001

To Whom It May Concern:

The Offices of Attorney General ("AGOs") of the States of Arizona, Arkansas, Delaware, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, and Washington, and of the District of Columbia submit the following comments in response to proposed amendments to the federal Telemarketing Sales Rule ("TSR") set out in a Notice of Proposed Rulemaking ("NPRM") announced by the Federal Trade Commission ("FTC") on May 21, 2013.¹ The Attorneys General are the officials charged with enforcing the laws of the States that protect consumers from unfair and deceptive trade practices.

By way of summary, the AGOs focus their comments on the FTC's proposal to prohibit telemarketers from accepting money transfers and cash reload mechanisms as payment. Specifically, the AGOs recommend that the prohibition extend to transactions proposed by email, which transactions cause as much harm to consumers, if not more, than transactions over the telephone. Indeed, the FTC has an opportunity through this rulemaking to protect thousands of American consumers who otherwise would fall victim to cross-border fraud² that uses a combination of emailed offers and money transfers³ and similar methods of payment.

¹ See "FTC Seeks Public Comment on Proposal to Ban Payment Methods Favored in Fraudulent Telemarketing Transactions," <http://www.ftc.gov/opa/2013/05/tsr.shtm>.

² The term "cross-border fraud" commonly refers to fraud perpetrated across a national border, but here includes similar types of fraud across state boundaries within the United States.

³ For the purpose of this discussion, the term "money [or wire] transfer" has the same meaning as "cash-to-cash money transfer" in the NPRM.

I. THE FTC SHOULD PROHIBIT COMMERCIAL EMAIL TRANSACTIONS THAT USE A MONEY TRANSFER AS THE MODE OF PAYMENT

A. The problem of fraud-induced money transfers

For years, the problem of consumer fraud utilizing money transfers as the method of payment—what are sometime called fraud-induced transfers—has caused enormous harm to consumers and evaded a systematic and effective law enforcement solution. This situation has resulted from a perfect storm of factors: the existence of a multitude of scammers in many countries; the use by scammers of difficult-to-trace methods of communication, such as disposable cell phones and emails; a means of payment—money transfers—that can be picked up by a person with a forged ID in many different locations; and the lack of any chargeback or similar rights for consumers. To elaborate on each of these factors:

A multitude of scammers in many countries. Although no precise figures exist, it is clear that there are large numbers of people engaged in defrauding others, including Americans, from locations around the world using money transfers as the mode of payment. Modern methods of communication make it possible to scam consumers from an Internet café in Lagos or a boiler room in Toronto. Among the destinations to which consumers are commonly lured into sending money are Cameroon, Canada, Costa Rica, Ghana, Jamaica, Nigeria, Panama, Peru, Spain, the United Kingdom, and many others.⁴ As the FBI has noted, “Large-scale criminal mass-marketing fraud operations are present

⁴ See, e.g., U.S. Embassy, Yaounde, Cameroon, “Scams Warning, How to Avoid Cameroonian Scams, Frauds Originating From Cameroon,” http://yaounde.usembassy.gov/scams_warning.html; IC3, Internet Crime Complaint Center, “2012 Internet Crime Report, 2012 Frequent Reported Internet Crimes, The Grandparent Scam,” at 10, http://www.ic3.gov/media/annualreport/2012_IC3Report.pdf; AP and *Inside Costa Rica*, “Costa Rica Based Lottery Scammers at it Again,” (Sept. 18, 2012), <http://insidecostarica.com/2012/09/18/costa-rica-based-lottery-scammers-at-it-again/>; Thomas Morton, “Inside the criminal world of Ghana’s e-mail scam gangs,” *CNN Tech* (Apr. 6, 2011), <http://www.cnn.com/2011/TECH/web/04/05/motherboard.ghana.sakawa/index.html>; Pia Malbran and Jeff Glor, “Inside the Jamaican Lottery Scam: How U.S. seniors become targets,” *CBS News*, (Mar. 12, 2013), http://www.cbsnews.com/8301-505263_162-57573750/inside-the-jamaican-lottery-scam-how-u.s-seniors-become-targets/; *infra* note 24 (Nigeria); Reid Collins, “Guess What Grandpa?! The Story of a Worldwide Criminal Enterprise,” *The American Spectator*, (Jan 16, 2012), <http://spectator.org/archives/2012/01/16/guess-what-grandpa> (Panama); Laura Gunderson, “Scam alert: Revenue department warns of fraudulent phone calls and emails,” *The Oregonian, Oregon Live* (Oct. 31, 2012), http://blog.oregonlive.com/complaintdesk/2012/10/scam_alert_revenue_department.html (Peru); Ellen Roseman, “Woman victimized by Spanish email scam: Don’t wire money to someone you know who’s in trouble and asks for help unless you verify the person’s identity first,” *The Star* (Jan. 22, 2012), http://www.thestar.com/business/personal_finance/2012/01/22/woman_victimized_by_spanish_email_scam.html; Bob Greene, “The ‘With tears in my eyes’ e-mail,” *CNN* (Mar. 28, 2010), <http://www.cnn.com/2010/OPINION/03/28/greene.email.scam/index.html> (United Kingdom).

in multiple countries in most regions of the world.”⁵ Making matters worse, “[l]aw enforcement intelligence has revealed that a single perpetrator may use hundreds of fraudulent identities and multiple perpetrators may use one common identity, undermining law enforcement efforts to locate perpetrators and intercept fraudulent wire transfers.”⁶

Hard-to-trace methods of communication. Mass-fraud, and particularly cross-border, scammers are very hard to find, much less bring to justice. According to the FBI,

Law enforcement investigations have revealed perpetrators’ use of calling cards, cellular phones, and pre-paid SIM cards, the disposable nature of which hinders law enforcement efforts to determine users’ identities. West African fraud groups employ free web-based e-mail accounts, frequent multiple Internet cafes, and use Internet phones and other devices that supply instantaneous Internet connections to undermine investigative efforts to trace Internet Protocol addresses. Large scale boiler rooms are investing in sophisticated computer systems and storing servers in other countries, trusting that the complexity of cross-border cases deters law enforcement investigation. Recent investigations indicate that fraudsters manipulate the caller identification features of Internet-based technology, including VoIP and platform numbers, to create the appearance of operating within victims’ cities or countries rather than from overseas locations.⁷

Flexible pickup of funds. Money transfers in particular offer advantages to scammers on the receiving end of the payment conduit. For instance, “West African fraud groups commonly request payment via wire transfers, which produce minimal documentation, can often be collected with forged identification, and may be rapidly retrieved from nearly any location.”⁸ Indeed, wire transfers can be picked up almost

⁵ Federal Bureau of Investigation, *Mass-Marketing Fraud: A Threat Assessment, International Mass-Marketing Fraud Working Group* (June 2010), <http://www.fbi.gov/stats-services/publications/mass-marketing-fraud-threat-assessment> (hereinafter “*FBI*”).

⁶ *FBI*. With respect to the protean yet shadowy nature of West African cross-border fraud, the FBI report states, “West African criminal enterprises are highly adaptive and opportunistic, perpetrating nearly every type of mass-marketing fraud, including the ubiquitous 419 schemes as well as lottery, loan, investment, and work-at-home schemes. The groups often share successful fraud techniques with and provide assistance to other cells, a practice that may result in the commission of nearly identical schemes by multiple groups acting in relative independence of one another. They frequently employ individuals with specialized skills to impersonate attorneys, government officials, and bankers; design websites; forge checks; translate documents into foreign languages; collect wire transfers; and process incoming and outgoing mail.”

⁷ *Id.*

⁸ *Id.*

immediately in any of hundreds or thousands of locations with minimal scrutiny, and thus afford scammers an ideal conduit for the flow of consumer monies.⁹

Absence of chargeback rights. Compounding the difficulty for consumers is the fact that unlike with fraudulent credit card payments or unauthorized bank debits, senders of money transfers have no established right to a refund once their transfer has been picked up, regardless of how fraudulent the conduct of the receiver was in inducing the transaction.¹⁰ The FTC makes this point in its NPRM, noting that federal and state laws “fail to provide consumers with the means to recoup their money once they discover the fraud.”¹¹

Scams involving money transfers come in a number of forms, the details of which can vary over time. However, some of the predominant types of scams include the following:

“The grandparent scam.” An older consumer receives a telephone call from a person who sounds like her grandson; he says he is in trouble and needs money wired to him immediately. Often the story is that the grandson has been in a car accident, or has been arrested, in Canada or Mexico, and needs funds for medical care, bail, or car repairs; the caller will often ask that “his parents” not be contacted. However, the call is not from the consumer’s grandson; it is from a scammer; and once the grandparent sends money, the scammer may call back and ask for more.

Lottery scams. A consumer receives a call stating that he has won a lottery or sweepstakes or qualified for a government grant, but must send money, usually by money transfer, to cover “fees,” “taxes,” or other charges. In fact, the lottery/sweepstakes/grant does not exist, the consumer has not won anything, and the money is being sent to a scammer.

⁹ Western Union has over 489,000 agent locations. <http://www.westernunion.com/send-money-in-person>. Money can also be sent online “24/7” and picked up in cash, or, in some countries, deposited into a bank account or mobile wallet. http://www.westernunion.com/us/send-money/send-money-online.page?prop14=us_hmp_sendmoney_smon_learnmore&evr23=us_hmp_sendmoney_smonlearnmore. MoneyGram has over 244,000 agents. <http://www.moneygram.com/MGICorp/campaigns/moneytransfer/index.htm>.

¹⁰ Western Union states, “You can cancel or stop a regular money transfer as long as it the receiver [sic] hasn’t yet picked up the money. This may not be possible on a money order, bill payment or prepaid money transfer.” https://thewesternunion.custhelp.com/app/answers/detail/a_id/118/session/L3RpbWUvMTM3MDM3MzE1My9zaWQvUG9tOVpWcmw%3D. Similarly, according to MoneyGram, “You cannot cancel a Transfer or request a refund after the Receive Amount has been disbursed. Except as required by law, MoneyGram will not be responsible or liable to you or any other person for its failure for any reason to cancel a Transfer.” <https://www.moneygram.com/wps/mgo/jsps/sendmoney/includes/terms.jsp?standalone=1>.

¹¹ See NPRM at 47.

"Nigerian scams." A consumer receives an email stating that a wealthy person has died—often in Africa—and that someone in the U.S. is needed to safeguard the deceased's money in a bank account. However, there is no such wealthy person; it is just a lie to lure the consumer to wire money to the scammer, for "fees," "taxes," or other charges.

"Romance scams." An individual is contacted by a stranger, often claiming to be a young person of the opposite sex. The stranger expresses an interest in being a "pen pal" and perhaps talks about wanting to come to America. Then there is a heartfelt request for money to be wired—to replace a lost airplane ticket, to pay medical bills after a sudden accident, or for some other reason. It is all a scam.

"Counterfeit check scams." A consumer who is selling an item online or through the newspaper receives a check for *more* than the asking price. Even if the funds, once deposited, are treated by the bank as "available" for withdrawal, the check is still counterfeit—a fact that is not known for some days or weeks. By then, the consumer has wired a refund to the scammer for the excess payment. (The use of the counterfeit checks overlaps with other scams, including lotteries and "secret shopper" scams. In all of these cases, the consumer receives an overpayment and then is asked to send money back.)¹²

As for the overall extent of the problem for American consumers, that cannot be known with precision, but it is clearly very substantial. There are "strong indications" that losses to global mass-marketing fraud is in the tens of billions of dollars per year.¹³ The scope of this type of fraud is also reflected in surveys conducted of money transferors selected at random (not complainants). A multistate survey conducted in 2003 showed, strikingly, that over 29 percent of transfers and 58 percent of transferred dollars from the United States to Canada through Western Union in 2002 were the result of fraud (a number that is believed to have been "artificially" low because the sampled transfers included dollar amounts down to \$300).¹⁴ The comparable figure for transfers to Canada of \$1,000 or more through MoneyGram over a four-month period in 2007 was an astonishing 79 percent, according to the FTC.¹⁵

¹² All of these scams are described on the FTC's website. See <http://www.consumer.ftc.gov/articles/0204-family-emergency-scams>; <http://www.consumer.ftc.gov/articles/0086-international-lottery-scams>; <http://www.consumer.ftc.gov/articles/00021-nigerian-email-scam>; <http://www.consumer.ftc.gov/articles/0004-online-dating-scams>; and <http://www.consumer.ftc.gov/articles/0159-fake-checks>. See also David N. Kirkman, "Fraud, Vulnerability and Aging: When Criminals Gang Up on Mom and Dad," 17th Annual Elder Law Symposium, N.C. Bar Association (Feb. 22, 2013) (describing current scams targeting the elderly, including cross-border telemarketing and Internet scams using money transfers).

¹³ FBI.

¹⁴ "Western Union Enters into Settlement with Attorneys General" (Nov. 14, 2005), <http://www.atg.state.vt.us/news/western-union-enters-into-settlement-with-attorneys-general.php>.

¹⁵ See *FTC v. MoneyGram International, Inc.*, No. 1:09-cv-06576 (N.D. Ill., Oct. 19, 2009) (Complaint for Injunctive and Other Equitable Relief), ¶ 27, <http://www.ftc.gov/os/caselist/0623187/091020/moneygramcmpt.pdf>.

B. The use of email in connection with fraud-induced money transfers.

The AGOs strongly support the FTC's proposal to prohibit telemarketing that calls for payment by money transfer. Certain categories of scam do utilize this telemarketing-plus-money-transfer model. For example, grandparent scams typically begin with a telephone call to an older consumer from someone claiming to be the consumer's grandchild, who asks for money—often thousands of dollars—to bail him out of jail, repair a damaged car, or deal with some other supposed emergency. Some lottery scams also use an initial telephone contact.¹⁶

However, other types of scam employ *email* communications to target consumers. These include “Nigerian” or “419” scams,¹⁷ romance scams,¹⁸ and counterfeit-check scams.¹⁹ These communications involve relatively sophisticated techniques and high numbers of contacts. As the FBI describes the situation,

Law enforcement intelligence reveals perpetrators' increasing use of e-mail spiders, which crawl through websites, message boards, and other online forums to harvest e-mail addresses for subsequent solicitation via spam e-mail. Once the e-mail addresses have been collected, fraudsters often employ botnets—networks of computers infected with malicious code and programmed to follow the directions of a common command-and-control server—to facilitate the simultaneous distribution of thousands of spam e-mails. Perpetrators also pose as buyers and sellers on online auction websites, upload fake jobs to employment websites, and create bogus user accounts on social networking and dating websites to target new victims and initiate fraud schemes under the guise of legitimacy. While the majority of recipients delete or ignore Internet-based solicitations, their widespread distribution ensures that some recipients will believe the messages to be credible and respond accordingly. In addition, some recipients may perceive the e-mail solicitations to be fraudulent but respond anyway, thereby validating their e-mail addresses to the fraudsters and increasing the likelihood of future fraudulent solicitations.²⁰

¹⁶ See, e.g., AARP, “Scammers Lurk Behind Area Code 876: Older residents should beware of threatening con artists using Jamaican numbers” (Sept. 2012), <http://www.aarp.org/money/scams-fraud/info-09-2012/beware-area-code-876-nh1788.html>.

¹⁷ See, e.g., FBI, “Common Fraud Schemes, Nigerian Letter or “419” Fraud,” <http://www.fbi.gov/scams-safety/fraud>.

¹⁸ IC3, Internet Crime Complaint Center, “2012 Internet Crime Report, Romance Scams,” http://www.ic3.gov/media/annualreport/2012_IC3Report.pdf, at 16.

¹⁹ IC3, Internet Crime Complaint Center, “Intelligence Note: U.S. Law Firms Continue to be the Target of a Counterfeit Check Scheme” (Mar. 12, 2012), <http://www.ic3.gov/media/2012/120312.aspx>.

²⁰ FBI.

Significantly, there is reason to believe that money transfers induced by fraudulent email exceed money transfers induced by fraudulent telemarketing by a wide margin. According to data in the FTC's Consumer Sentinel national complaint database, for the period January 1, 2011, through June 3, 2013, the number of complaints involving "wire transfers" where the method of contact was "telephone" was 26,379; monetary losses reported in those complaints totaled \$188,963,368. The comparable figures for complaints involving money transfers where the method of contact was "email" were 67,217 and \$596,315,020—respectively *over two and one-half and three times as high* as the telephone-related figures.²¹

This is not to deny the magnitude of the problem of fraudulent telemarketing that utilizes money transfers, but rather to stress the equivalent or greater magnitude of the problem of fraudulent electronic communication that use the same payment method.²²

From the scammer's point of view, contacting potential victims by email has certain advantages. The technology allows a scammer to contact huge numbers of consumers rapidly and at minimal cost.²³ Emails also allow for a high level of anonymity, concealing the origin of the messages, masking cues (such as manner of speaking) as to the sender's identity and origin, and allowing scammers to convincingly pretend that they are someone they are not—such as an older man representing himself to be a younger woman as part of a romance scam.

²¹ In Consumer Sentinel, the payment method "Wire Transfer" includes Bank Transfer Other, Wire Transfer—MoneyGram, Wire Transfer—Western Union, and Wire Transfer—Other; initial contact "Telephone" includes Mobile—Text/Email/IM, Phone, Phone Call—Landline; Phone Call—Mobile/Cell, and Wireless; and initial contact "Email" includes Email and Internet/Mail. The data cited in the text and these definitions are based on information obtained from the FTC and the Consumer Sentinel Network on June 7, 2013.

²² For the period May 29, 2012 through May 29, 2013, 58.5 percent of all complaints to the National Consumers League ("NCL") involved money transfers as the payment method. Email from NCL to Vermont Attorney General's Office (June 11, 2013). Likewise, according to complaints filed with the FTC in the calendar years 2010 through 2012, the most common method of scammers' contacting consumers was email (43, 42 and 38 percent, respectively), followed by telephone (20, 29 and 34 percent, respectively), and additional contacts over the Internet (11, 13 and 12 percent, respectively). FTC, *Consumer Sentinel Network Data Book for January-December 2012*, at 9 (Feb. 2013), <http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2012.pdf>.

²³ See Robyn Dixon, "Nigerian Cyber Scammers: To the cyber scammers in Nigeria who trawl for victims on the Internet, Americans are easy targets. But one thief had second thoughts," *L.A. Times* (Oct. 20, 2005), <http://www.latimes.com/technology/la-fg-scammers20oct20.0.4094532.full.story> ("He sent 500 e-mails a day and usually received about seven replies."). Cf. "EFCC Bust Nigerian 419 Scammers," <http://video.onlinenigeria.com/Drama/adHG.asp?blurb=1345> (video showing a raid on an Internet café by a unit of Nigeria's Economic and Financial Crimes Commission and confiscation of computers and other evidence, including lists of email addresses used to send mass scam messages to Westerners).

The impact of email-initiated fraud-induced money transfers can be devastating on consumers. Among countless accounts of fraud, there are these:

- M.B., age 79, a resident of Vermont, met "Alex" through email contacts she received from an online religious dating website. During their online email and instant message conversations, Alex expressed to M.B. that his best friend's wife had cancer and that he was raising money to fund research of cancer-fighting herbs. For the next four months, Alex sent specific instructions to M.B. on how to discreetly send money to Ghana by splitting wire transfers into \$2,000 increments and to use various wire transfer locations. By the time anyone in M.B.'s family noticed what she was doing, almost \$44,000 had been wired to the scammer.
- G.R., a self-employed resident of Washington struggling to support herself, posted her resume on several websites. Scammers emailed her to offer a position as "operations manager" responsible for "processing customers' payments"; she was also instructed to complete an employment agreement and provide her bank account information for payroll purposes. She received checks totaling over \$16,000, a sum that, as instructed by the scammers, she deposited in her bank account and then withdrew and wired to four individuals in Russia. Her bank soon informed her that it had frozen her account because the deposited checks did not clear, and that she was solely responsible for repaying the full amount.
- G.H., a 57-year-old divorced and unemployed resident of Illinois, began an online relationship with Robert through a dating website. G.H. told Robert she needed a job, and Robert promised he had work for her in his business as an antique dealer. Soon after, Robert said he was traveling in Nigeria for work, and that his wallet had been stolen. He asked G.H. if she could send money to help him get home. She responded and wired a little over \$1,000 to Robert as instructed. This began a series of hard luck stories and requests for additional money from Robert. G.H. sent a total of \$23,800 to Robert in multiple wire transfers of approximately \$1,000 each before she realized she was being scammed.
- B.A., a resident of Ohio, was looking for employment online and received an email offer supposedly from a pharmaceutical company supplier. The email stated that the consumer would be sent a check, which he was to deposit and draw on to send money by wire transfer to pharmaceutical company representatives. The consumer would then receive packages of supplies and another check for shipping costs; and he would be paid \$500 a week. The consumer received and deposited a \$6,850 check, and wired three payments of \$1,950 each. A week later, the consumer's bank told him that the deposited checks were fraudulent and demanded that he pay back the money he withdrew.

C. Recommendation: The prohibition on telemarketing using money transfers should extend to commercial email communications using money transfers.

If the FTC is going to amend the TSR to prohibit telemarketing transactions in which the consumer's payment is sent by money transfer—and it should do so—then that prohibition should also extend to commercial *emails* sent to consumers that utilize a money transfer as the mode of payment. As noted above, if anything, the impact on U.S. consumers of money transfers induced by fraudulent emails is greater than the impact of money transfers induced by fraudulent telemarketing. Including emails used as the method of contact in these situations, alongside telemarketing, can be expected to deal a substantial blow to cross-border fraud that has up until now eluded an effective solution.

The AGOs understand that the FTC's authority to amend the TSR in this way may be constrained by the terms of the Telemarketing Consumer Fraud and Abuse Prevention Act, which required the Commission to prescribe rules focused on consumer fraud through telemarketing.²⁴ However, there are other avenues available to the Commission to avoid creating a major loophole in the fabric of protection afforded by the Rule, including promulgating a trade regulation rule under the Federal Trade Commission Act,²⁵ clarifying its position through litigation, or including a comment in its discussion of adopted amendments to the TSR—any of which could in turn empower States that have consumer protection statutes that look to federal precedent for guidance.²⁶

II. THE FTC SHOULD CLARIFY THAT A MONEY TRANSFER COMPANY'S FAILURE TO MAKE REASONABLE INQUIRY INTO WHETHER A PROHIBITED METHOD WAS USED TO INDUCE A CONSUMER TO SEND A MONEY TRANSFER IS UNLAWFUL.

The FTC's proposal to ban telemarketing that utilizes a money transfer as the method of payment is laudable, as would be extending that ban to email. Nonetheless, the reality is that any legal prohibition directed solely to the *scammers* is itself likely to have little impact on the incidence of fraud-induced transfers. The people who engage in this type of fraud are already violating the law by offering non-existent lottery winnings, false "grandchild" claims, illusory romances, and the like. In many cases, their conduct is criminal; they cannot be expected to care about complying with the civil TSR. Nor, as noted above, can they be easily found and brought to justice.

²⁴ See 15 U.S.C. § 6102(a)(1) (requiring the FTC to prescribe rules prohibiting "deceptive telemarketing acts or practices and other abusive telemarketing acts or practices").

²⁵ See 15 U.S.C. § 57a.

²⁶ See, e.g., 9 Vt. Stat. Ann. § 2453(b) ("It is the intent of the legislature that in construing subsection (a) of this section [prohibiting unfair and deceptive acts and practices in commerce], the courts of this state will be guided by the construction of similar terms contained in Section 5(a)(1) of the Federal Trade Commission Act as from time to time amended by the Federal Trade Commission and the courts of the United States.").

If the FTC is to reduce the incidence of cross-border and similar fraud, it needs to make clear the legal responsibility, and liability, of the entities that *control the method of payment*. These are the money transfer companies, without whose payment systems much of the fraud at issue would not be possible. As noted earlier, there is already precedent for taking legal action, at the state and/or federal level, against such businesses for failing to provide adequate protection from fraud for their customers. It is now appropriate, indeed critical, for the FTC to clarify those companies' responsibility for making reasonable inquiry into whether consumers who propose to wire money are doing so in response to a prohibited communication.

Under the TSR, it is a deceptive telemarketing act or practice and a violation of the 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 ... § 310.4 of [the] Rule."²⁷ There is no question that the money transfer companies provide "substantial assistance or support" to those who use deception to induce consumers to wire them money. If the FTC amends § 310.4 to prohibit telemarketers from accepting payment by money transfers, it is only reasonable to expect the money transfer companies to inquire of their customers as to whether this prohibition is being violated, and to consider failure to inquire a third-party violation of § 310.3(b). Indeed, the FTC has already taken a similar position in *FTC v. MoneyGram International, Inc.*²⁸ The FTC is also urged to extend this approach to encompass emails utilizing money transfers as the mode of payment.

²⁷ 16 C.F.R. § 310.3(b) (emphasis added).

²⁸ The FTC's Complaint in that case states, in pertinent part,

**VIOLATIONS OF THE TELEMARKETING SALES RULE
COUNT II**

Assisting and Facilitating Telemarketing Sales Rule Violations

91. In numerous instances, in the course of processing money transfers sent by U.S. consumers, Defendant or its agents have provided substantial assistance or support to sellers or telemarketers who Defendant or its agents knew or consciously avoided knowing:

- a. Induced consumers to pay for goods and services through the use of false or misleading statements, including, without limitation, the statement that the consumer has won and will receive a large cash award if the consumer pays a requested fee or fees, in violation of Section 310.3(a)(4) of the Telemarketing Sales Rule, 16 C.F.R. § 310.3(a)(4); and
- b. Requested or received payment of a fee or consideration in advance of consumers obtaining a loan when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan for a person in violation of Section 310.4(a)(4) of the Telemarketing Sales Rule.

92. Defendant's acts or practices alleged in Paragraph 91 constitute deceptive telemarketing acts or practices in violation of Section 310.3(b) of the Telemarketing Sales Rule and Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

III. UNDER THE TSR, CASH RELOAD MECHANISMS SHOULD BE TREATED THE SAME AS MONEY TRANSFERS.

In recent years, the States have seen increasing use of “cash reload” payment mechanisms to transfer funds as part of scams. Many work-at-home, advance-fee loan, and sweepstakes scam victims are now directed to make payments utilizing this system. As with money transfers, cash reloads are an especially risky means of payment; once the consumer (victim) provides the scammer with the account number of the cash reload “pack,” the scammer has instant access to the funds in that pack. Because of their increasing availability, ease of use, and minimal oversight by regulatory authorities, cash reload systems are an attractive payment vehicle for scammers. The AGOs support amendments to the TSR that would expressly prohibit telemarketers from accepting cash reloads as a means of payment, and further recommend, consistent with their comments on money transfers, that the ban be extended to include offers via email.

IV. THE AGOs SUPPORT THE PROPOSED BAN ON REMOTELY CREATED CHECKS.

By letter dated May 3, 2005, the Attorneys General of 34 States, the District of Columbia, and American Samoa took the position that remotely created checks (also called demand drafts) are “frequently used to perpetrate fraud on consumers,” and urged the Board of Governors of the Federal Reserve System to eliminate such checks in favor of electronic funds transfers that can serve the same payment function.²⁹ The letter noted several features of remotely created checks that make them “an ideal method of siphoning money from consumers”: lack of consumer awareness of how strangers can debit their bank accounts without authorization; the ease with which remotely created checks can be created, using freely-available software and ink; the fact that a scammer, or his processor, does not need special access to the banking system but can simply deposit the drafts to his own bank account; the difficulty, if not impossibility, of tracking remotely created checks; and the hurdles that consumers often encounter in trying to obtain a recredit to their bank account when—if at all—they discover an unauthorized debit (hurdles such as unclear or restrictive time frames for requesting a return, uninformed or hostile bank tellers, and the lack of incentives to the receiving bank’s initiating the return process).

Consistent with the views expressed in 2005, the AGOs support the proposed ban on the acceptance of remotely created checks by sellers and telemarketers.

FTC v. MoneyGram International, Inc., No. 1:09-cv-06576 (N.D. Ill., Oct. 19, 2009) (Complaint for Injunctive and Other Equitable Relief), http://www.ftc.gov/os/caselist/0623187/091020_moneygramcmpt.pdf.

²⁹ In the alternative, the signatories to the letter stated that “if demand drafts are to continue to be used, the proposed originating-bank warranty of authorization should augment, not supplant, the existing receiving bank warranty; and ... demand drafts should be mandatorily marked as such.”

V. THE AGOs SUPPORT THE OTHER PROPOSED AMENDMENTS TO THE TSR.

The AGOs also express their support for the other proposed amendments to the TSR, including broadening the ban on telemarketing recovery services to include losses incurred in any medium, and requiring that the recording of a consumer's express verifiable authorization include a description of the goods or services being purchased.

The AGOs thank the Federal Trade Commission for its consideration of these comments.

Sincerely,



Elliot Burg
Senior Assistant Attorney General