

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of)	FILE NO. 992-3206
)	
VALUE AMERICA, INC.,)	AGREEMENT CONTAINING
a corporation.)	CONSENT ORDER
)	
)	

The Federal Trade Commission has conducted an investigation of certain acts and practices of Value America, Inc., a corporation ("proposed respondent"). Proposed respondent, having been represented by counsel, is willing to enter into an agreement containing a consent order resolving the allegations contained in the attached draft complaint. Therefore,

IT IS HEREBY AGREED by and between Value America, Inc., by its duly authorized officer, and counsel for the Federal Trade Commission that:

1. Proposed respondent Value America, Inc., is a Virginia corporation with its principal office or place of business at 2300 Commonwealth Drive, Charlottesville, Virginia 22901.
2. Proposed respondent admits all the jurisdictional facts set forth in the draft complaint.
3. Proposed respondent waives:
 - a. Any further procedural steps;
 - b. The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and
 - c. All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.
4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft complaint, will be placed on the public record for a period of thirty (30) days and information about it publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify proposed respondent, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision in disposition of the proceeding.
5. This agreement is for settlement purposes only and does not constitute an admission by proposed respondent that the law has been violated as alleged in the draft complaint, or that the

facts as alleged in the draft complaint, other than the jurisdictional facts, are true.

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 This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondent, (1)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

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

ORDER

DEFINITIONS

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

1. "Rebate" shall mean cash, instant savings, instant credit, credit towards future purchases, merchandise, services, or any other consideration offered to consumers who purchase products or services from respondent, which is provided at the time of purchase, or subsequent to the purchase.
2. Unless otherwise specified, "respondent" shall mean Value America, Inc., a corporation, its successors and assigns and its officers, agents, representatives, and employees.
3. "Clearly and conspicuously" shall mean as follows:
 - A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services, and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement. Provided, however, that in any advertisement presented predominantly through audio or visual means, the

disclosure may be made through the same means in which the ad is predominantly presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

- B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

4. In the case of advertisements disseminated by means of an interactive electronic medium, such as software, the Internet, or online services:

- (i) “in close proximity” shall mean on the same Web page, online service page, or other electronic page, and proximate to the triggering representation, and shall not include disclosures accessed or displayed through hyperlinks, pop-ups, interstitials or other means;

- (ii) a disclosure made “through the use of a hyperlink” shall mean a hyperlink that is itself clear and conspicuous, is clearly identified as a hyperlink, is labeled to convey the nature and relevance of the information it leads to, is on the same Web page, online service page, or other electronic page and proximate to the triggering representation, and takes the consumer directly to the disclosure on the click-through electronic page or other display window or panel.

5. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

6. The term “Mail or Telephone Order Merchandise Rule” means the Federal Trade Commission’s Trade Regulation Rule entitled “Mail or Telephone Order Merchandise,” 16 C.F.R. Part 435, and as it may hereafter be amended.

7. “Eligible purchaser” shall mean any person, firm or other entity that ordered and paid for any product from respondent prior to the date of service of this order, whose product has not been shipped by respondent, and who has not previously received a refund and who has not previously consented to a delay in shipping; and more than ten (10) days have passed after the date stated by respondent in the solicitation for shipment or the delay notice (or if no time was stated, thirty (30) days after receipt of the properly competed order or issuance of the delay notice).

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any computer, computer-related product or Internet access service, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the price or cost to consumers of such product or service or what is included in the price of any such product or service.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any computer, computer-related product or Internet access service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the price or cost to consumers of any such computer, computer-related product or Internet access service when that price, cost, or any rebate is conditioned upon the purchase of any other product or service, unless it discloses clearly and conspicuously, and in close proximity to the representation, that consumers must purchase the other product or service in order to obtain the represented price or rebate and the cost of the other product or service, including if a service, the length of time that consumers are required to purchase the service.

Provided, that for purposes of this Part, use of the term “rebate” or “discount,” without any description or characterization of either term, shall not, in and of itself, be deemed a representation about the price or cost to consumers of a product or service.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any computer, computer-related product or Internet access service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the after-rebate cost of such product or service, unless it discloses, clearly and conspicuously, and in close proximity to the representation, the amounts of any and all rebates offered and the total price or cost to consumers of the product or service, excluding any and all rebate amounts (*i.e.*, the before-rebate price).

Provided, however, if (1) the offer involves only one rebate and no other reductions in the total price of such product or service, and (2) respondent discloses the amount of that rebate as prescribed above, then respondent need not disclose the before-rebate price or cost of such

product or service.

IV.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any Internet access service, or any computer or computer-related product for which the price, cost or any rebate is conditioned upon the purchase of Internet access service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the price or cost to consumers of such Internet access service, unless it discloses, clearly and conspicuously:

- A. the dollar amounts of any and all fees, charges, rebate repayments, and other costs consumers are required to pay to cancel the Internet access service;
- B. (1) that consumers may have to pay long distance telephone charges, hourly surcharges, or other costs in excess of local telephone service charges to access the Internet service, if that is the case; and (2) a means for each consumer to ascertain whether he or she would incur such costs or charges to access the Internet service and the amount of any such costs or charges. Provided that respondent may comply with Part IV.B (2), above, by disclosing a means by which consumers may obtain information from the Internet service provider about available access phone numbers and the amount of any hourly surcharges or other costs to access the Internet service, and by advising consumers to contact their local telephone company to determine whether using the access telephone number closest to them will incur charges in excess of local service charges; and
- C. the amount of time required for purchasers to receive any rebate.

Provided that in the case of advertisements disseminated through an interactive electronic medium, such as software, the Internet or other online services, respondent may make the disclosures required by this Part through the use of a hyperlink. In addition,

- 1. for Part IV.A, above, any such hyperlink must be labeled: “Early Cancellation of the Internet Service May Result in Substantial Penalties. Click Here.”;
- 2. for Part IV.B, above, any such hyperlink must be labeled: “You May Have to Pay Significant Telephone Charges to Use the Internet Service. Click Here.”;
- 3. for Part IV.C , above, any such hyperlink must be labeled: “Time to Receive Rebate. Click Here.”

V.

IT IS FURTHER ORDERED that respondent Value America, Inc., directly or through any corporation, subsidiary, division or other device shall not violate any provision of the Mail or Telephone Order Merchandise Rule, including but not limited to:

- A. Soliciting orders for the sale of telephone order merchandise unless it has a reasonable basis to expect that it will be able to ship some or all of such merchandise within the time stated in the solicitation or, if no time is stated clearly and conspicuously in the solicitation, within thirty (30) days after receipt of a properly completed order, as required by 16 C.F.R. § 435.1(a)(1);
- B. Where respondent is unable to ship within the applicable time set forth in 16 C.F.R. § 435.1(a)(1), failing to offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel the order and receive a prompt refund, as required by 16 C.F.R. § 435.1(b)(1); and
- C. Having failed to offer the option to consent to a delay or to cancel the order and receive a prompt refund, as required by 16 C.F.R. § 435.1(b)(1), and also having failed to ship the merchandise within the applicable time, failing to deem the order canceled and to make a prompt refund, as required by 16 C.F.R. § 435.1(c)(5).

Provided that, in the event the Mail or Telephone Order Merchandise Rule is hereafter amended or modified, respondent's compliance with the Mail or Telephone Order Merchandise Rule as so amended or modified shall not be deemed a violation of this order.

VI.

IT IS FURTHER ORDERED that respondent Value America, Inc., and its successors and assigns, shall, for a period of five (5) years from the date of issue of this Order, maintain and make available to the Federal Trade Commission, within thirty days (30) days of the date of receipt of a written request, business records demonstrating compliance with the terms and provisions of Part V.

VII.

IT IS FURTHER ORDERED that respondent shall provide refunds to eligible purchasers in accordance with the provisions of this Part.

- A. Within twenty (20) days from the date of service of this order, respondent shall compile a list containing: (1) the name, last known mailing address, phone number and electronic mail address of each eligible purchaser; and (2) the total price paid by each such eligible purchaser for all products ordered but not received, including all charges for applicable taxes and for shipping and handling, if any. Respondent shall retain a National Change of Address System (“NCOA”) licensee to update the mailing addresses on this list by processing the name and mailing address portion of this list through the NCOA database, provided that respondent’s obligation to retain such an NCOA licensee shall expire at such time as respondent completes its compilation of the above-referenced list.

- B. Within thirty (30) days after the date of service of this order, respondent shall cancel the order of each eligible purchaser contained on the list required by Part VII.A, and shall send to each such person, via first-class mail, a Refund Notice in the form set forth in Appendix A, accompanied by a check for the amount stated on the list. The phrase: “NOTICE: REFUND CHECK ENCLOSED” shall appear on the front of the envelope transmitting the Refund Notice in typeface equal or larger in size to 14 point. The words “Forward and Address Correction Requested” shall appear in the upper, left-hand corner one-quarter of an inch beneath the return address.

Provided that, in lieu of mailing a refund check to any eligible purchaser, respondent may credit each such eligible purchaser’s credit card or debit card account for the amount stated on the list required by Part VII.A, and shall send the Refund Notice via electronic mail. The subject line of the electronic mail shall state “Refund Credit.” The Refund Notice shall include the amount of the refund credit and the date such action was taken.

The Refund Notice shall not include any information other than that contained in Appendix A, nor shall any other material be transmitted with the notice, except for a refund check, if applicable.

- C. Within sixty (60) days after the date of service of this order, respondent shall furnish to Federal Trade Commission staff:
 - A. a copy of the list required by Part VII.A,
 - B. for each eligible purchaser, (a) the amount, check number and mailing date of the refund check mailed to such purchaser, or (b) the amount credited to such person’s credit card or debit card account, and the date on which it was credited.

VIII.

IT IS FURTHER ORDERED that respondent Value America, Inc., and its successors and assigns, shall for five (5) years after the last date of dissemination of any representation covered by this order maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;

Provided however, that in the case of advertisements and promotional materials disseminated by means of an interactive electronic medium, respondent and its successors and assigns may comply with this provision by maintaining and making available all advertisements and promotional materials for computer or computer-related products or services for which the price, cost or any rebate is conditioned upon the purchase of Internet access service; but, multiple versions of advertisements and promotional materials need not be maintained or submitted, if they differ only in terms of the prices of the products or services being offered;

- B. All materials that were relied upon in complying with this order; and

- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IX.

IT IS FURTHER ORDERED that respondent Value America, Inc., and its successors and assigns, shall deliver a copy of this order and the Mail or Telephone Order Merchandise Rule to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

X.

IT IS FURTHER ORDERED that respondent Value America, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

XI.

IT IS FURTHER ORDERED that respondent Value America, Inc., and its successors and assigns shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XII.

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

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

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or

upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Signed this _____ day of _____ 2000.

VALUE AMERICA, INC.,

By: _____

An officer of the corporation

Alfred J. T. Byrne
LeClair Ryan, PC
Attorney for Respondent

APPROVED:

Beverly J. Thomas
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C. LEE PEELER
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REFUND NOTICE

[To be printed on Value America, Inc. letterhead]

[Date]

[Name and address of recipient]

Dear [recipient's name]:

Our records show that you have an outstanding order of merchandise from Value America. Pursuant to the terms of an agreement with the Federal Trade Commission concerning our merchandise delivery practices, we have agreed to provide full refunds to any customer whose shipment has not been made within ten days of the date we promised. Because your merchandise has not been shipped, you are entitled to a refund.

We have [enclosed a refund check] [credited your charge or debit card on [date]] for [amount of redress]. This amount includes the purchase price(s) for the merchandise you ordered, plus any taxes and shipping and handling charges. If you still wish to purchase the merchandise, you may reorder it from Value America.

Please call toll-free 1-800-XXX-XXXX or see our website at www.va.com if you have any questions.

Sincerely,

[Name and title of Value America, Inc. official]