

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of)
) FILE NO. 952-3331
)
AMERICA ONLINE, INC.,) AGREEMENT CONTAINING
a corporation.) CONSENT ORDER
)

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

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

1. Proposed Respondent America Online, Inc. is a Delaware corporation, with its principal office or place of business at 22000 AOL Way, Dulles, VA 20166.
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 into pursuant to this agreement.
4. This agreement and any related complaint 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 sixty (60) 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, for the purpose of this agreement or for any other purpose, any admission by proposed

Respondent that any law has been violated as alleged in the draft complaint, or that any 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 This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 2.34 of the Commission's Rules, the Commission may, without further notice to proposed Respondent, (1)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 to 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 by any means specified in Section 4.4 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. No agreement, understanding, representation, or interpretation not contained in the order or in the agreement may be used to vary or contradict the terms of the order or the agreement.

7. Proposed Respondent has read the draft complaint and consent order. Proposed Respondent 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 terms shall have the meanings set forth below, unless specifically stated otherwise:

1. "Account" means a demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit plan) held either directly or indirectly by a Financial Institution, as defined below, and established primarily for personal, family, or household purposes.
2. "Financial Institution" means a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person who, directly or indirectly, holds an Account belonging to a consumer.
3. "Consumer" means a natural person or other entity which may be billed for online services; provided that, for purposes of Paragraphs V, VI, and VIII(A) of this

order, "Consumer" shall only mean a natural person.

4. "Electronic Fund Transfer," as defined by the Electronic Fund Transfer Act, 15 U.S.C. § 1693a(6), means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephone, or computer or magnetic tape so as to order, instruct, or authorize a Financial Institution to debit or credit an Account, except that it does not mean a transaction made using a debit card or debit card account which a consumer has identified as a credit card or credit card account.

5. "Online Service" shall mean a Respondent-Controlled access, information, communication, or transaction service which is made available to Consumers as a paid service via connection by computers, modems, or other means, to a proprietary or non-proprietary network of telecommunication or computer facilities.

6. Unless otherwise specified, "Respondent" shall mean America Online, Inc., its successors and assigns, and its officers, agents, servants, divisions, and employees.

7. "Respondent-Controlled" shall mean Respondent makes the management decisions affecting compliance with the provisions of this order.

8. "In or affecting commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that Respondent, directly or through any Respondent-Controlled corporation, subsidiary or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any Online Service in or affecting commerce, shall not misrepresent, expressly or by implication, the terms or conditions of any trial offer of any Online Service.

II.

IT IS FURTHER ORDERED that Respondent, directly or through any Respondent-Controlled corporation, subsidiary, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any Online Service in or affecting commerce, shall not represent, expressly or by implication, that the Online Service is offered "free," "without risk," "without charge," "without further obligation," or words of similar import denoting or implying the absence of any obligation on the part of the recipient of such offer to pay for the Online Service unless Respondent discloses clearly and prominently any obligation of the recipient to cancel or take other affirmative action to avoid charges for use of the Online Service.

Provided, that for purposes of this Paragraph II, "clearly and prominently" shall mean with respect to any representation, described in the foregoing paragraph and made in Respondent's detailed instructional materials (*e.g.*, starter kits, guidebooks)

distributed to Consumers, a disclosure in a type size and in a location that are sufficiently noticeable so that an ordinary Consumer could notice, read, and comprehend it.

Provided, further, that for purposes of this Paragraph II, "clearly and prominently" shall mean, as to any representation described above in this Paragraph, apart from any representation covered by the preceding proviso, and made in the context of any advertisement or promotion of the Online Service through any media, including radio, television or other broadcast media, direct mail, interactive network (except as provided in Paragraph IV below), or print media (including promotion packages attached thereto), a statement directing Consumers to a location where the disclosure required herein will be available (*e.g.*, "For conditions and membership details," followed by: "load up trial software" or "see registration process" or words of similar effect.) In the case of an audio statement, the statement shall be delivered in a volume and cadence sufficient for an ordinary Consumer to notice, hear, and comprehend it. In the case of a video statement, the statement shall be of a size and shade and shall appear for a duration sufficient for an ordinary Consumer to notice, read, and comprehend it. In the case of print media, the statement shall be in a type size and in a location sufficient for an ordinary Consumer to notice, read, and comprehend it.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be permitted.

III.

IT IS FURTHER ORDERED that Respondent, directly or through any Respondent-Controlled corporation, subsidiary, or other device, in connection with the advertising, promotion, offering for sale, sale, distribution of, or billing for any Online Service in or affecting commerce, shall not misrepresent, expressly or by implication, the fees or charges assessed for such Online Service.

IV.

IT IS FURTHER ORDERED that Respondent, directly or through any Respondent-Controlled corporation, subsidiary, or other device, in connection with the advertising, promotion, offering for sale, sale, distribution of, or billing for any Online Service in or affecting commerce, shall disclose, clearly and prominently, during the final registration process, and prior to the Consumer incurring any financial obligation or liability to Respondent, the terms of all mandatory financial obligations to Respondent which will be incurred by the Consumer as a result of using such Online Service, including but not limited to the following:

- A. The financial terms and conditions of any plan or practice (*e.g.*, trial offer) by which Consumers enroll in or renew enrollment in such Online Service and by which, accordingly, Respondent

charges the Consumer; provided, that if such plan or practice exists, Respondent must also disclose clearly and prominently any obligation of the recipient to cancel or take other affirmative action to avoid charges for use of the Online Service and provide at least one reasonable means by which the Consumer may effectively cancel his or her enrollment by a date certain and thereby avoid further charges;

- B. Any mandatory membership, enrollment, or usage fees (*e.g.*, monthly or hourly usage charges); and
- C. The manner in which such fees or charges are assessed and calculated, provided, that Respondent may satisfy this provision by disclosing that: (i) additional charges might apply; (ii) information about assessing and calculating the Consumer's fees or charges can be found online; and (iii) the exact location, such as the particular area online (*e.g.*, Keyword: Billing), where Consumers can find detailed information about assessing and calculating the Consumer's fees or charges.

Provided, however, that for purposes of this paragraph IV, a disclosure is "clearly and prominently" made if it is of a size and shade, and appears for a duration sufficient for an ordinary Consumer to notice, read, and comprehend it. In addition to the foregoing, such disclosure shall not be avoidable by Consumers. Provided, further, that such disclosure shall not be deemed avoidable for purposes of this Order based solely on an ordinary Consumer's failure to read it.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be permitted.

V.

IT IS FURTHER ORDERED that Respondent, directly or through any Respondent-Controlled corporation, subsidiary, or other device, in connection with any Electronic Fund Transfer from any Consumer Account, shall not misrepresent the terms or conditions of such Electronic Fund Transfer.

VI.

IT IS FURTHER ORDERED that Respondent, directly or through any Respondent-Controlled corporation, subsidiary, or other device, in connection with any Electronic Fund Transfer from any Consumer Account, shall not:

- A. Fail to obtain Consumer authorization before initiating any Electronic Fund Transfer from any Consumer Account as required by Section 907(a) of the Electronic Fund Transfer Act, 15 U.S.C. § 1693e(a), and Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b), as more fully set out in Section 205.10 of the Federal Reserve Board's Official Staff Commentary to Regulation E, 12 C.F.R. § 205, Supp. I.
- B. Fail to provide any Consumer with advance notice of Electronic Fund Transfers from the Consumer's Account varying in amount from previous

transfers as required by Section 907(b) of the Electronic Fund Transfer Act, 15 U.S.C. § 1693e(b), and Section 205.10(d) of Regulation E, 12 C.F.R. § 205.10(d), as more fully set out in Section 205.10 of the Federal Reserve Board's Official Staff Commentary to Regulation E, 12 C.F.R. § 205, Supp. I.

VII.

IT IS FURTHER ORDERED that Respondent, directly or through any Respondent-Controlled corporation, subsidiary, or other device, shall, for five (5) years after the last date of dissemination of any representation covered by Paragraphs I - V of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying business records demonstrating compliance with the terms and provisions of this order, except as provided for in Paragraph VIII of this order, including, but not limited to:

- A. All advertisements, promotional materials, and instructional materials distributed or accessible to Consumers containing the representation;
- B. For five (5) years after the date of receipt or generation, all written complaints from Consumers, governmental or consumer protection organizations and responses thereto; provided, however, that in lieu of maintaining all electronic mail communications, Respondent may comply with this provision by maintaining a representative sample of such communications.

VIII.

IT IS FURTHER ORDERED that Respondent, directly or through any Respondent-Controlled corporation, subsidiary, or other device, shall, for two (2) years after the date of issuance of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All documents pertaining to Respondent's use of Electronic Fund Transfers from Consumer Accounts, including written complaints from Consumers, governmental or consumer protection organizations and responses thereto; provided, however, in lieu of maintaining all electronic mail communications, Respondent may comply with this provision by maintaining a representative sample of such communications; and

- B. All business records which demonstrate Respondent's compliance with Paragraph VI of this order; provided, however, in lieu of maintaining all electronic mail communications, Respondent may comply with this provision by maintaining a representative sample of such communications.

IX.

IT IS FURTHER ORDERED that Respondent, and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, senior managers (*e.g.*, vice-presidents or above), and agents (including, without limitation, advertising agencies) having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent and its successors and assigns, shall prepare a summary of this order, and shall distribute a copy of that summary to all current and future managers with responsibilities or duties affecting compliance with the terms of this order.

X.

IT IS FURTHER ORDERED that Respondent, directly or through any Respondent-Controlled corporation, subsidiary, or other device, 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 dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a parent or Respondent-Controlled subsidiary or Respondent-Controlled 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, Washington, D.C. 20580.

XI.

IT IS FURTHER ORDERED that Respondent, directly or through any Respondent-Controlled corporation, subsidiary, or other device, shall, within sixty (60) days after the date of 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 it has complied with this order.

XII.

IT IS FURTHER ORDERED that, no later than six (6) months from the effective date of this order, Respondent shall establish and implement a program to educate Consumers about Consumer use of electronic payment systems. Such program:

- A. May be established jointly with, or under the auspices of, an appropriate trade association or other consumer education program (*e.g.*, Project Open);
- B. Shall have a duration of not less than one (1) year from the date of implementation;
- C. Shall be of a scope and employ media reasonably necessary to reach a wide audience of Consumers, including but not limited to:
 - 1. At least 50,000 color brochures designed, produced, printed, and disseminated by Respondent directly to Consumers and organizations with direct access to Consumers likely to use electronic payments systems;
 - 2. The Internet;
 - 3. Reference on Respondent's Online Service; and
 - 4. A direct link to the Internet from Respondent's Online Service; and
- D. Shall include, but not be limited to, information about: various types of electronic payment systems available to Consumers; obligations of Consumers, merchants, and Financial Institutions in using such systems; how such payment systems are used, including the means by which Consumers may attempt to prevent the fraudulent use of those systems; various legal protections available to Consumers under each system; and organizations, including law enforcement agencies, from which Consumers may obtain further information or assistance.

No later than ninety (90) days from the date of issuance of this order, Respondent shall submit for review and approval to the Associate Director, Division of Credit Practices, a draft plan for the program and drafts of any materials to be disseminated pursuant to Paragraph XII(C) above. Such approval shall not be unreasonably withheld. Such description and materials should be sent by overnight delivery to the Associate Director, Division of Credit Practices, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

XIII.

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 _____, 1996.

AMERICA ONLINE, INC.:

By: _____
LENNERT LEADER
Senior Vice President and
Chief Financial Officer
America Online, Inc.

DAVID W. PHILLIPS, ESQ.
Associate General Counsel
America Online, Inc.

FEDERAL TRADE COMMISSION:

STEVEN D. SILVERMAN

NINA CHANG

Counsel for the Federal Trade
Commission

APPROVED:

LUCY MORRIS
Assistant Director
Division of Credit Practices

DAVID MEDINE
Associate Director
Division of Credit Practices

JOAN Z. BERNSTEIN
Director
Bureau of Consumer Protection

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

_____))
In the Matter of)
)
AMERICA ONLINE, INC.,) DOCKET NO.
a corporation.)
_____))

COMPLAINT

The Federal Trade Commission, having reason to believe that America Online, Inc. (“America Online” or “respondent”) has violated the provisions of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45-58, as amended, as well as the Electronic Fund Transfer Act (“EFTA”), 15 U.S.C. §§ 1693-1693r, as amended, and its implementing Regulation E, 12 C.F.R. § 205, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. America Online is a Delaware corporation with its principal office or place of business at 22000 AOL Way, Dulles, Virginia 20166.
2. America Online has developed, advertised, offered for sale, sold, and distributed to the public its online service for personal computer users. Through its online service, America Online provides consumers with a range of options including electronic mail, interactive magazines and newspapers, transactional services, and access to the Internet.
3. America Online has been and is now engaged in the regular practice of making “electronic fund transfer[s]” from “consumer” “account[s]” as those terms are defined in the EFTA and its implementing Regulation E.
4. The acts and practices of America Online alleged in this complaint have been in or affecting commerce as “commerce” is defined in Section 4 of the FTC Act.

AMERICA ONLINE’S COURSE OF BUSINESS

5. America Online has disseminated or has caused to be disseminated advertisements for its online service through various media including, but not limited to, print, television, direct mail, promotional materials, and instructional materials. These advertisements include, but are not limited to, the attached Exhibits A and B, which contain the following statements:

Exhibit A

OPEN HERE TO BEGIN YOUR FREE TRIAL
It Just Takes 3 Easy Steps . . . To explore America Online®
for TEN Hours on us. So, go for it and we'll see you online
soon!

* * *

You NEED America Online . . . To **access** the Internet with
graphical ease . . . to **download** over 120,000 software files
and get computing support . . . To **investigate** your special
interests or discover new ones **AND MUCH MORE!** All
For Ten Hours, FREE!

The advertisement contains a statement at the bottom of an inside panel, in fine print, that provides:

Use of America Online requires a major credit card or checking
account. Users outside the United States pay an additional per-minute
surcharge at all times, including trial time. . . . Additional phone
charges may apply. Your free trial time must be used within 30 days
of your initial sign-on. Limit one free trial per household.

Exhibit B

OPEN HERE FOR FREE SOFTWARE.
TRY AMERICA ONLINE FREE FOR 10 HOURS! TRY THE
NATION'S MOST EXCITING ONLINE SERVICE -- FREE.

* * *

JUST USE THIS SOFTWARE TO TRY AMERICA ONLINE
FREE. . . . Start using your 10 FREE hours today.

* * *

SPECIAL TRIAL OFFER 10 FREE HOURS TO EXPLORE
AMERICA
ONLINE. . . .

The advertisement contains a statement at the bottom of an inside panel, in fine print, that provides:

Communication surcharges may apply. See online registration information for details on your free trial offer. Use of America Online requires a major credit card or checking account. Limit one free trial per household. Your free trial time must be used within 30 days of your initial sign-on. Members outside the 48 contiguous United States may pay a surcharge at all times, including trial time. . . .

6. Consumers choosing to participate in the free trial offer do so by connecting to the America Online service through a telecommunication modem attached to their personal computers. Upon their initial connection to the service, consumers view a series of registration screens including, but not limited to, the attached Exhibits C and D. The registration screens obtain identification and billing information from consumers, prompt consumers to select screen names and passwords for future access to the online service, and provide basic information about the online service, including the following details about the terms of the free trial offer:

Exhibit C

HERE'S HOW YOUR FREE TRIAL WORKS:

So you can explore America Online at no risk:

*Your first TEN hours of connect time are free.

*The monthly membership fee of \$9.95 has been waived for your first month.

*Your free trial time must be used within 30 days of your first sign-on. You will not be charged unless you use more than your 10 free hours.

In addition, the registration screens display basic membership terms including the monthly charges incurred by America Online members:

Exhibit D

YOUR AMERICA ONLINE MEMBERSHIP

*Your monthly membership fee of \$9.95 (charged at the end of your first month) INCLUDES FIVE free hours of connect time EACH month.

*After your five free hours, you may use additional time at the rate of \$2.95 per hour. . . .

7. Upon completion of the registration process, consumers are provided an opportunity to review America Online's Terms of Service Agreement and Rules of the Road. To do so, consumers must access the Members' Service area, available online. These documents, along with the Membership Conditions viewed during the registration process, are collectively

referred to by America Online as the Terms of Service and comprise the contract between America Online and its members.

8. While the hourly charge for use of the America Online service is disclosed during the registration process, neither the registration screens nor the Terms of Service disclose the manner in which America Online calculates the time that consumers spend online. Consumers may, however, obtain information on this subject by accessing online resource areas, including an online explanation of America Online's billing practices. This explanation, attached hereto as Exhibit E, provides in relevant part:

Exhibit E

CONNECT RATE[:] If you use MORE time online this month than the number of free hours noted at the top of this screen [5 hours/month], you will be charged a connect rate. You will be charged for your extra [connect] time on America Online in one-minute increments. . . .

AMERICA ONLINE'S VIOLATIONS OF SECTION 5(a) OF THE FTC ACT

9. Through the means described in Paragraphs 5 through 8, America Online has represented, expressly or by implication, that consumers who participate in its free trial offer will not be charged, provided only that they use the trial time within thirty days of their initial sign-on and do not exceed ten hours of online use.

10. In truth and in fact, consumers who participate in America Online's free trial offer and use less than ten hours of online time during the thirty days following their initial sign-on, but who fail to cancel their memberships during the trial period, incur charges. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

11. In the advertising and sale of its online service, America Online has represented, expressly or by implication, that consumers who participate in its free trial offer will not be charged, provided only that they use the trial time within thirty days of their initial sign-on and do not exceed ten hours of online use. America Online has failed to disclose adequately to consumers that, upon completion of ten hours of online use or thirty days from the date of initial sign-on, whichever is earlier, consumers who fail to contact America Online and cancel their trial memberships are automatically enrolled as members of America Online and are charged a monthly membership fee plus applicable hourly fees. These fees continue to accrue until the consumers affirmatively cancel their memberships. Such facts would be material to consumers in their purchase or use of the America Online service. The failure to disclose these facts in light of the representation made was, and is, a deceptive practice.

12. Through the means described in Paragraphs 5 through 8, America Online has

represented, expressly or by implication, that it calculates online connect time at the rate of \$2.95 per hour, prorated by one-minute increments, for time spent online beyond the five free hours of monthly connect time. In addition, America Online rounds up portions of a minute to the next highest whole minute. Thus, America Online has represented, for example, that an online session lasting 2 minutes and 46 seconds would be billed as 3 minutes.

13. In truth and in fact, America Online does not merely calculate online connect time at the rate of \$2.95 per hour, prorated by one-minute increments, with portions of a minute rounded up to the next whole minute. Rather, America Online adds 15 seconds of connect time to each online session, allegedly representing the time required for a user's modem to connect to America Online at the start of an online session and the time required to disconnect from America Online at the close of a session. When online usage consists of a whole minute plus 46-59 seconds, the additional 15 seconds causes the total connect time to exceed the next whole minute. Thus, for example, an online session of 2 minutes and 46 seconds, with the 15 second supplement, totals 3 minutes and 1 second and is billed as 4 minutes. Likewise, when an online session consists of a whole minute exactly, the additional 15 seconds causes the session to be rounded to the next whole minute. Therefore, the representation set forth in Paragraph 12 was, and is, false or misleading.

14. In the advertising and sale of its online service, America Online has represented, expressly or by implication, that it calculates online connect time at the rate of \$2.95 per hour, prorated by one-minute increments, for time spent online beyond the five free hours of monthly connect time. America Online has failed to disclose adequately to consumers its practice of adding 15 seconds of connect time to each online session, as described in Paragraph 13. Such facts would be material to consumers in their purchase or use of the America Online service. The failure to disclose these facts in light of the representation made was, and is, a deceptive practice.

15. In the course of the online registration process, consumers view a screen titled "Billing Options," attached as Exhibit F, that states:

Exhibit F

Choose a billing method

To ensure that we have the correct billing information on file for charges incurred beyond your trial time, please select one of the following payment options:

VISA
MasterCard
American Express
DiscoverCard
Checking

Consumers choosing the Checking option are first informed that America Online will deduct automatically from their checking accounts each month any charges that they incur in using the online service. Until at least September 1995, such consumers also viewed a screen, attached as Exhibit G, that states:

Exhibit G

Processing your Checking Authorization

Thank you for trying America Online. In the next few days you will receive a checking authorization form in the mail. This form gives America Online authorization to deduct the charges you incur from your checking account automatically every month. We request that this form be returned at your earliest convenience. Until it is received, your account will be limited to \$50.00.

16. Through the means described in Paragraph 15, America Online has represented, expressly or by implication, that it would not debit consumers' checking accounts before it received the authorization forms permitting it to do so.

17. In truth and in fact, America Online in many instances debited the checking accounts of consumers before receiving their authorization forms or without ever receiving such forms. Therefore, the representation set forth in Paragraph 16 was, and is, false or misleading.

AMERICA ONLINE'S VIOLATIONS OF SECTION 907 OF THE EFTA

18. As described in Paragraph 17, in the course and conduct of its business, America Online in many instances has debited consumers' checking accounts before receiving their authorization forms or without ever receiving such forms. In addition, in the course and conduct of its business, America Online in many instances has failed to provide consumers with advance written notice of transfers from their accounts varying in amount from previous transfers.

19. America Online's aforesaid practices violate Sections 907(a) and (b) of the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693e(a) and (b), and Sections 205.10(b) and (d) of Regulation E, 12 C.F.R. §§ 205.10(b) and (d), as more fully set out in Section 205.10 of the Federal Reserve Board's Official Staff Commentary to Regulation E, 12 C.F.R. § 205, Supp. I.

20. The acts and practices of America Online as alleged in this complaint constitute deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act. Such acts and practices additionally violate Sections 907(a) and (b) of

the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693e(a) and (b), and Sections 205.10(b) and (d) of Regulation E, 12 C.F.R. §§ 205.10(b) and (d).

Therefore, the Federal Trade Commission this _____ day of _____, 1997 has issued this complaint against respondent.

By the Commission.

Donald S. Clark
Secretary

SEAL:

[Exhibits A-G attached to paper copies of complaint, but not available in electronic form.]

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement to a proposed consent order from America Online, Inc. (“America Online”).

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

The complaint alleges that America Online’s advertisements and statements online to consumers violated the Federal Trade Commission Act (“FTC Act”). Section 5 of the FTC Act prohibits false, misleading, or deceptive representations or omissions of material information. See 15 U.S.C. §§ 45-58, as amended. The complaint also alleges that America Online’s billing practices violated the Electronic Fund Transfer Act (“EFTA”) and its implementing Regulation E. Sections 907(a) of the EFTA and 205.10(b) of Regulation E permit preauthorized electronic transfers from consumer accounts only if such transfers are authorized by consumers in writings that are signed or similarly authenticated. See 15 U.S.C. § 1693e(a); 12 C.F.R. § 205.10(b). Sections 907(b) of the EFTA and 205.10(d) of Regulation E require advance written notice to consumers of preauthorized transfers varying in amount from previous preauthorized transfers. See 15 U.S.C. § 1693e(b); 12 C.F.R. § 205.10(d).

The complaint alleges that America Online represented that consumers who participate in its free trial offer will not be charged, provided only that they use the ten hours of allotted trial time within thirty days of their initial sign-on and do not exceed ten hours of online use. This representation is false, according to the complaint, because consumers who participate in America Online’s free trial offer and use less than ten hours of online time during the thirty days following their initial sign-on, but who fail to cancel their memberships during the trial period, incur charges. The complaint also alleges that America Online failed to disclose adequately to consumers that, upon completion of ten hours of online use or thirty days from the date of initial sign-on, whichever is earlier, consumers who fail to cancel their trial memberships are automatically enrolled as members of America Online and are charged a monthly membership fee plus applicable hourly fees. These fees continue until the consumers affirmatively cancel their memberships. These practices, according to the complaint, constitute deceptive practices in violation of Section 5 of the FTC Act.

The complaint also alleges that America Online represented that it calculates online connect time at the rate of \$2.95 per hour, prorated by one-minute increments, for time spent online beyond the five hours of monthly connect time that it provides to its members (America Online rounds up portions of a minute to the next highest whole minute; thus, an online session lasting 2 minutes and 46 seconds, for example, would be billed as 3 minutes). This representation is false, according to the complaint, because America Online adds 15 seconds of

connect time to each online session for connection charges incurred at the beginning and end of the session. When online usage consists of a whole minute plus 46-59 seconds, the additional 15 seconds causes the total connect time to exceed the next whole minute (for example, an online session of 2 minutes and 46 seconds, with the 15 second supplement, totals 3 minutes and 1 second and is billed as 4 minutes). In addition, the complaint alleges that America Online failed to disclose adequately to consumers its practice of adding 15 seconds of connect time to each online session. These practices, according to the complaint, are deceptive in violation of Section 5 of the FTC Act.

The America Online complaint further alleges that the company represented online that it would not debit consumers' checking accounts before it received from them authorization forms permitting it to do so. This representation is false, according to the complaint, because America Online regularly debited consumers' checking accounts before receiving their authorization forms or without ever receiving such forms. The complaint alleges that this practice is false or misleading in violation of Section 5 of the FTC Act.

The complaint also alleges that, because America Online in many instances debited consumers' checking accounts before receiving their authorization forms or without ever receiving such forms, it violated Sections 907(a) of the EFTA and 205.10(b) of Regulation E. In addition, the complaint alleges that America Online often failed to provide consumers with advance written notice of transfers from their accounts varying in amount from previous transfers, thereby violating Sections 907(b) of the EFTA and 205.10(d) of Regulation E.

The proposed consent order contains provisions designed to remedy the violations charged and to prevent America Online from engaging in similar acts and practices in the future. Specifically, Paragraph I of the proposed order prohibits America Online, in connection with advertising, promoting, selling, or distributing any online service, from misrepresenting the terms or conditions of any trial offer of such online service.

Paragraph II of the proposed consent order prohibits America Online, in connection with advertising, promoting, selling, or distributing any online service, from representing that the online service is "free," "without risk," "without charge," "without further obligation," or words of similar effect unless America Online discloses, "clearly and prominently," any obligation to cancel or take other affirmative action to avoid charges for use of the online service.

Paragraph II also contains two provisos that set out the requirements of a "clear and prominent" disclosure. First, with respect to a covered representation made by America Online in detailed instructional materials distributed to consumers (*e.g.*, starter kits and guidebooks), the disclosure must be in a type size and in a location that are sufficiently noticeable so that an ordinary consumer could notice, read, and comprehend it. Second, as to representations made through other media, America Online must provide a statement directing consumers to a location where the required disclosure will be available (*e.g.*, "For conditions

and membership details," followed by: "load up trial software" or "see registration process" or words of similar effect). Audio statements shall be delivered in a volume and cadence sufficient for an ordinary consumer to notice, hear, and comprehend them. Video statements shall be of a size and shade and shall appear for a duration sufficient for an ordinary consumer to notice, read, and comprehend them. In the case of print media, the statement shall be in a type size and in a location sufficient for an ordinary consumer to notice, read, and comprehend it.

Paragraph III prohibits America Online, in connection with advertising, promoting, selling, or distributing any online service, from misrepresenting the fees or charges assessed for such online service.

Paragraph IV complements Paragraph III and supplements Paragraph II. It provides that America Online, in connection with advertising, promoting, selling, or distributing any online service, shall disclose, "clearly and prominently," during the final registration process, and prior to consumers incurring any financial obligation or liability, the terms of all mandatory financial obligations that will be incurred by consumers as a result of using such online service. Specifically, subparagraph IV.A. requires America Online to disclose the financial terms and conditions of any plan (*e.g.*, trial offer) by which consumers enroll in or renew enrollment in the online service. Moreover, if such plan exists, America Online must disclose, "clearly and prominently," any obligation to cancel or take other affirmative action to avoid charges and provide at least one reasonable means by which consumers may effectively cancel their enrollment. Subparagraph IV.B. requires America Online to disclose any mandatory membership, enrollment, or usage fees (*e.g.*, monthly or hourly usage charges) and, pursuant to subparagraph IV.C., the manner in which such fees or charges are assessed and calculated. America Online may satisfy subparagraph IV.C. by disclosing: (1) that additional charges might apply; (2) that information about assessing and calculating fees or charges can be found online; and (3) the exact location where consumers can find detailed information about assessing and calculating fees or charges.

For purposes of Paragraph IV, a disclosure is "clearly and prominently" made if it is of a size and shade, and appears for a duration sufficient for an ordinary consumer to notice, read, and comprehend it. The disclosure shall not be avoidable by consumers.

Paragraph V prohibits America Online, in connection with advertising, promoting, selling, or distributing any online service, from misrepresenting the terms or conditions of any electronic fund transfer from a consumer's account.

Paragraph VI requires America Online, in connection with an electronic fund transfer from a consumer account, to obtain authorization for the transfer, as required by Section 907(a) of the EFTA and Section 205.10(b) of Regulation E. In addition, America Online must provide advance notice of electronic fund transfers from consumer accounts that vary in

amount from previous transfers, as required by Section 907(b) of the EFTA and Section 205.10(d) of Regulation E.

Paragraphs VII through XI contain provisions generally found in Commission consent orders, including record-keeping requirements, distribution requirements, notice requirements, and a requirement that America Online submit a report setting forth the manner in which it has complied with the consent order.

Paragraph XII requires America Online to implement a consumer education program concerning the use of electronic payment systems. Specifically, subparagraph XII.A. provides that the program may be established jointly with, or under the control of, an appropriate trade association or other consumer education program. Subparagraph XII.B. requires that the program last at least one year from the date of implementation and, pursuant to subparagraph XII.C., the program must be of a scope and employ the means necessary to reach a wide group of consumers. Such means must include: (1) providing at least 50,000 color brochures directly to consumers and organizations with direct access to consumers likely to use electronic payments systems; (2) providing content on the Internet; (3) referencing such content on America Online's service; and (4) providing a direct link to the Internet from America Online's service. Subparagraph XII.D. requires that the content of the education program includes information about: (1) the various types of electronic payment systems available to consumers; (2) the obligations of consumers, merchants, and financial institutions in using such systems; (3) the methods by which such payment systems are used, including how consumers may attempt to prevent the fraudulent use of those systems; (4) the legal protections available to consumers; and (5) the organizations, including law enforcement agencies, from which consumers may obtain further information or assistance. The consumer education program must be approved by the Commission's Associate Director for Credit Practices.

Finally, Paragraph XIII contains a provision terminating the order, under ordinary circumstances, twenty years from the date of its issuance.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Statement of Commissioner Roscoe B. Starek, III
Concurring in Part and Dissenting in Part
in
America Online, Inc.
File No. 952-3331

Although I have voted to accept for public comment the consent agreement with America Online, Inc. ("AOL"), the extensive consumer education remedy contained in paragraph XII of the proposed order is far too broad. Once again, a majority of the Commission is willing to use a negotiated settlement to compel speech that it would have virtually no chance of persuading a court to require.

The proposed consumer education program is an extremely comprehensive endeavor that no doubt will provide valuable information to consumers of online services about the use of electronic payment systems. Further, it is more closely related to the violations alleged in the complaint than the sunscreen advertising "consumer education" remedy in the proposed consent agreement with Schering-Plough Healthcare Products, Inc. accepted for comment two months ago.¹ Nonetheless, as a fencing-in remedy it is too broad to be reasonably related to AOL's alleged law violations.

The complaint alleges that AOL misrepresented and deceptively failed to disclose material information about its billing practices, misrepresented the terms of its checking account debiting program, and violated provisions

¹ See *Schering-Plough Healthcare Products, Inc.*, File No. 942-3341 (separate statements of Commissioner Azcuenaga and Commissioner Starek concurring in part and dissenting in part).

of the Electronic Fund Transfer Act and its implementing Regulation E pertaining to consumer authorization of electronic payments. As fencing-in relief, the order requires AOL to establish and implement a program lasting at least one year to educate consumers about the use of electronic payment systems.² The program must "be of a scope and employ media reasonably necessary to reach a wide audience of Consumers [of online services], including **but not limited to**" 50,000 color brochures, the Internet, and AOL's online service. Proposed order, ¶ XII(C) (emphasis added).

The order also requires that the program include, **but not be limited to**, information about: various types of electronic payment systems available to Consumers; obligations of Consumers, merchants, and Financial Institutions in using such systems; how such payment systems are used, including the means by which Consumers may attempt to prevent the fraudulent use of those systems; various legal protections available to Consumers under each system; and organizations, including law enforcement agencies, from which Consumers may obtain further information or assistance.

Proposed order, ¶ XII(D) (emphasis added).

Although some form of consumer education program may well be warranted as fencing-in relief, this program goes too far. AOL is not so likely to engage in a whole host of future law violations that it should be required to educate consumers about how to use "various types of electronic payment systems" and how

² Within 90 days of the order's issuance, AOL must submit, for review and approval by the Associate Director of the Bureau of Consumer Protection's Division of Credit Practices, a draft plan for the program and drafts of any materials to be disseminated. Proposed order, ¶ XII.

to attempt to prevent fraudulent use of those systems. Nor do I think that it is reasonable in scope to require AOL to inform consumers about their own obligations and the obligations of merchants and financial institutions generally in using electronic payment systems. Similarly, requiring AOL to educate consumers about "various legal protections" for consumers using electronic payment systems is too broad to be reasonably related to the prevention of future deception like or related to that alleged in the complaint. That the alleged deception here involves the use of electronic payment systems is not enough of a nexus to justify a consumer education program covering all risks, obligations, and law violations involving electronic payment systems. Following that logic, information about driving a car and traffic laws would be reasonably related to a violation of the Commission's Used Car Rule. ³

Finally, the consumer education provision would require content and dissemination "not limited to" what is stated in the order. Although it is not clear how the Commission could enforce content and dissemination requirements not described in the order, it makes little sense to accept language indicating that even the extensive dissemination measures and speech described in the proposed order may not be enough to comply with the basic requirement to establish a program to educate consumers about the use of electronic payment systems.

³ See Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. Part 455.

If this relief were sought in litigation, rather than obtained through a consent agreement, it would not withstand scrutiny under the First Amendment. The information that the order specifically requires AOL to disseminate is far more extensive than necessary to prevent future violations by AOL, and the boundaries of the "not limited to" language are unclear. Even if a respondent waives its First Amendment rights in a consent agreement, the Commission -- as a government agency acting in the public interest -- should not compel speech through negotiation that it has no colorable chance of obtaining in litigation.