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U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FEDERAL TRADE COMMISSION,
Plaintiff,

v.

HANSON PUBLICATIONS, INC.,
a corporation,

9069-5057 QUEBEC, INC.,
a corporation, also d/b/a Hanson Publications, Inc.,

ASSOCIATED MERCHANT PAPER
SUPPLIES, INC.,
a corporation, also d/b/a AMPS and Fourniture
de Papier Associated Merchant, Inc.,

ALBERT MOUYAL,
individually and as an owner and/or officer or
director of the corporate defendants,

ADRIAN P. TOWNING,
individually and as an owner and/or officer or
director of the corporate defendants, and

CHARLES HAMOUTH,
individually and as an owner and/or officer or
director of the corporate defendants,
Defendants.

Case No. 1:02 CV 2205

Judge Nugent

Mag. Judge Streepy

STIPULATED FINAL ORDER
AND PERMANENT
INJUNCTION AS TO ALBERT
MOUYAL

Plaintiff Federal Trade Commission ("Commission") filed its Complaint on November 8, 2002, seeking a permanent injunction and other relief, including consumer redress, pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b) and 57b, and the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101 *et seq.*

On November 12, 2002, the Court entered an *ex parte* temporary restraining order and an order to show cause why a preliminary injunction should not be granted. Plaintiff and Defendant Albert Mouyal ultimately stipulated to a preliminary injunction, which this Court entered on December 13, 2002. Plaintiff and Defendant Mouyal now enter into this Stipulated Final Order and Permanent Injunction.

FINDINGS

By the stipulation of the parties, and without Defendant Mouyal admitting liability for any of the violations alleged in the Complaint, the Court makes the following findings:

1. Plaintiff alleges that Defendant Mouyal has violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), the Federal Trade Commission's Trade Regulation Rule entitled "Telemarketing Sales Rule," 16 C.F.R. Part 310, and the Telemarketing Act, 15 U.S.C. § 6101 *et seq.*

2. This Court has jurisdiction over the subject matter of this case and over Defendant Mouyal pursuant to 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c) and 6105(b), and 28 U.S.C. §§ 1331, 1337(a) and 1345. Venue in the Northern District of Ohio is proper under 15 U.S.C. § 53(b), and 28 U.S.C. §§ 1391 (b), (c), and (d).

3. Plaintiff has the authority to seek the relief it has requested.
4. The Complaint states a claim upon which injunctive relief may be granted against Defendant Mouyal under Sections 5(a), 13(b), and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 53(b), and 57b, and the Telemarketing Act, 15 U.S.C. § 6105.
5. The activities of Defendant Mouyal alleged in the Complaint are in or affecting commerce, as commerce is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
6. By agreeing to this Stipulated Final Order and Permanent Injunction, Defendant Mouyal does not admit any of the allegations in the Complaint except those contained in Paragraphs 1 through 4. Likewise, Plaintiff does not admit that any defense to the Complaint is valid. This Final Order and the rights, responsibilities, and remedies included in it is entered into for settlement purposes only.
7. The Court entered a Temporary Restraining Order in this matter on November 12, 2002, and entered Stipulated Orders extending and modifying the Temporary Restraining Order on November 19 and 21, 2002.
8. On December 13, 2002, the Court entered a Stipulated Preliminary Injunction against Defendant Mouyal.
9. In the months following entry of the Temporary Restraining Order and the Preliminary Injunction, Defendant Mouyal violated the Orders by dissipating assets.
10. This action and the relief ordered herein are in addition to, and not in lieu of, other remedies as may be provided by law, including both civil and criminal remedies. This Order resolves all matters arising from the allegations in this Complaint and the contempt violations identified in Finding of Fact 9.

11. The parties waive all rights to seek judicial review of, or otherwise challenge or contest the validity of, this Order or the temporary or preliminary orders entered in this proceeding. Defendant Mouyal also waives any claim that he may have under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action to the date of the entry of this Stipulated Final Order and Permanent Injunction. Defendant Mouyal further waives and releases any claim he may have against the Plaintiff or its employees, agents, or representatives.

12. Defendant Mouyal consents freely and without coercion to entry of this Stipulated Final Order and Permanent Injunction in the interest of settling this litigation, and acknowledges that he understands this Order and is prepared to abide by it. At all times, Defendant Mouyal has been represented by counsel, including during the negotiations that led to this Order.

13. Any voluntary bankruptcy petition filed by Defendant Mouyal does not automatically stay this action, which the Court finds is the “commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit’s police or regulatory power,” as set forth in 11 U.S.C. § 362(b)(4).

14. Any voluntary bankruptcy petition filed by Defendant Mouyal does not divest this Court of jurisdiction to enter this Stipulated Final Order and Permanent Injunction against Defendant Mouyal.

15. Entry of this Order is in the public interest.

ORDER

I. DEFINITIONS

IT IS THEREFORE ORDERED that the following Definitions shall apply:

1. "Defendant Mouyal" means Albert Mouyal and his successors, assigns, officers, agents, servants, employees, and those persons or entities in active concert or participation with him who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any corporation, limited liability company, subsidiary, division, partnership, consulting agreement, or other device; "corporate Defendants" means Hanson Publications, Inc., 9069-5057 Quebec, Inc., and Associated Merchant Paper Supplies, Inc., which also do business as Hanson, Hanson-Toronto, Hanson-Quebec, AMPS, and possibly other fictitious names, and each of them, and their successors, assigns, officers, agents, servants, employees, and those persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any corporation, limited liability company, subsidiary, division, partnership, consulting agreement, or other device.
2. "Plaintiff" means the Federal Trade Commission.
3. The terms "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the applicable phrase or sentence inclusive rather than exclusive.
4. "Assets" means all real and personal property owned or controlled by any Defendant, or held for the benefit of any Defendant, including — but not limited to — "goods,"

“instruments,” “equipment,” “fixtures,” “general intangibles,” “inventory,” “checks” or “notes” (as these terms are defined in the Uniform Commercial Code), and all cash, wherever located.

5. “Assisting others” means knowingly providing any of the following goods or services to another entity: (1) performing customer service functions, including, but not limited to, receiving or responding to customer complaints; (2) formulating or providing, or arranging for the formulation or provision of, any telephone sales script or any other marketing material; (3) providing names of, or assisting in the generation of, potential customers; or (4) performing marketing services of any kind.

6. “Consumer” includes any individual, group, unincorporated association, limited or general partnership, corporation or other business entity.

7. “Document” is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure 34(a). A draft or non-identical copy is a separate document within the meaning of the term.

8. “Person” means a natural person, organization, or other legal entity, including a corporation, partnership, proprietorship, association, cooperative, government or governmental subdivision or agency, or any other group or combination acting as an entity.

9. “Telephone solicitation” is synonymous with the term “telemarketing,” as defined in the Telemarketing Sales Rule, 16 C.F.R. Part 310, except that the term “telephone solicitation” shall also include calls originating and terminating within the same State of the United States if the calls would have otherwise satisfied the Telemarketing Sales Rule definition of “telemarketing” had they originated outside the consumer’s State.

II.
PROHIBITED BUSINESS ACTIVITIES

A. **IT IS FURTHER ORDERED** that Defendant Mouyal is hereby permanently restrained and enjoined from receiving any remuneration of any kind whatsoever from, engaging or participating in, or assisting others who are engaging or participating in, any business activity involving the telephone solicitation to consumers in the United States of (1) business telephone, internet, or e-mail directories, or (2) nondurable office supplies. This prohibition shall include, but not be limited to, (i) initiating or receiving such telephone solicitations; (ii) managing others who initiate or receive such telephone solicitations; (iii) operating an enterprise that initiates or receives such telephone solicitations; (iv) owning or serving as an officer or director of an enterprise that initiates or receives such telephone solicitations; (v) otherwise working as an employee or independent contractor with a unit or division of an enterprise that initiates or receives such telephone solicitations; or (vi) serving as a paid or compensated consultant to any person, partnership, or business entity engaged in such telephone solicitation activity.

B. **IT IS FURTHER ORDERED** that, notwithstanding the provisions of Subpart A, above, Defendant Mouyal is hereby permanently restrained and enjoined from receiving any remuneration of any kind whatsoever from, engaging or participating in, or assisting others who are engaging or participating in, any business activity involving either telephone solicitations to consumers in the United States not covered by Subpart A, above, or the offer or sale to consumers in the United States of business telephone, internet, or e-mail directories, or nondurable office supplies via means other than by telephone solicitation, unless he first obtains

a performance bond in the principal sum of five hundred thousand dollars in United States currency (\$500,000).

1. Any such bond shall be conditioned upon compliance with Section 5 of the FTC Act, 15 U.S.C. § 45(a), with the Telemarketing Sales Rule, 16 C.F.R. Part 310, and with the provisions of this Order. The bond shall be deemed continuous and remain in full force and effect as long as Defendant Mouyal continues to engage in conduct that requires the posting of the bond, and for at least three years after Defendant Mouyal has ceased to engage in such conduct. The bond shall cite this Order as the subject matter of the bond, and shall provide surety thereunder against financial loss resulting from whole or partial failure of performance due, in whole or in part, to any violation of Section 5 of the FTC Act, the Telemarketing Sales Rule, the provisions of this Order, or to any other violation of law.
2. The performance bond required pursuant to this Subpart B shall be an insurance agreement providing surety for financial loss issued by a surety company that is admitted to do business in each of the states in which Defendant Mouyal does business and that holds a Federal Certificate of Authority As Acceptable Surety On Federal Bond and Reinsuring. Such performance bond shall be in favor of: (1) Plaintiff, for the benefit of any consumer injured as a result of any violation of Section 5 of the FTC Act, the Telemarketing Sales Rule, or the provisions of this Order committed by Defendant Mouyal, his agents, or any persons acting in concert with him; and (2) any consumer so injured.
3. The bond required pursuant to this Subpart B is in addition to, and not in lieu of, any bond required by any other federal, state, or local law, or by any court order not entered in this action, except that, to the extent allowed by law, the bond required pursuant to this Subpart B may satisfy any performance bond required by any other federal, state or local law where such law requires a performance bond for the amount of five hundred thousand dollars (\$500,000) or less.
4. At least ten business days before Defendant Mouyal commences receiving any remuneration of any kind whatsoever from, engaging or participating in, or assisting others who are engaging or participating in, any business activity involving either telephone solicitations not covered by Subpart A, above, or the offer or sale

of business telephone, internet, or e-mail directories, or nondurable office supplies via means other than by telephone solicitation, Defendant Mouyal shall provide the bond required by this Subpart D to the Plaintiff at the addresses specified in **Section XIII.C** of this Order.

5. Defendant Mouyal shall not disclose the existence of the performance bond required by this Subpart B to any consumer without also disclosing clearly and prominently, at the same time, the following phrase: "This bond is required by order of the U.S. District Court, in the case FTC v. Hanson Publications, Inc., et al., Case No. 2:02 CV 2205 (N.D. Ohio), in settlement of allegations of false and misleading representations in the promotion and sale of goods and services." The disclosure shall be set forth in a clear and conspicuous manner, separated from all other text, in 100% black ink against a light background, in print at least as large as the main text of the sales material or document, and enclosed in a box containing only the required disclosure.
6. If, upon motion by Plaintiff, the Court finds that Defendant Mouyal, or any business in which he engages or participates, has violated Section 5 of the FTC Act, the Telemarketing Sales Rule, or this Order, the Plaintiff may execute against the performance bond required by this Subpart B. Proceedings instituted under this sub-paragraph 6 are in addition to, and not in lieu of, any other civil or criminal remedies as may be provided by law, including any other proceedings Plaintiff may initiate to enforce this Order.

PROVIDED, however, that this **Section II** shall not prohibit Defendant Mouyal from working for any person that engages or participates in telephone solicitations under the following conditions:

1. Defendant Mouyal performs work unrelated to the telephone solicitation activity of the person and is not, directly or indirectly, receiving remuneration for, engaging or participating in, or supervising, advising, training, or consulting for those engaging or participating in, telephone solicitations;
2. Defendant Mouyal performs his work for the person at a different facility from that in which the telephone solicitation activity of the person is conducted; for purposes of this provision, work at a

“different facility” means Defendant Mouyal must work in a different building from the telephone solicitation activity or, if the person has only one building, Defendant Mouyal must work on a different floor from the telephone solicitation activity, or, if the person has only one floor, Defendant Mouyal must work in a different room from the telephone solicitation activity;

3. Defendant Mouyal is not an officer or director of the person;
4. Defendant Mouyal is not, and has no option or other interest to become, directly or indirectly, a shareholder, partner, or other owner of more than five percent (5%) of the person;
5. Defendant Mouyal has notified Plaintiff of his association with the person, including his job title and the name, business address, and business telephone number of the person; and
6. The person does not make telephone solicitations on behalf of other persons.

If Defendant Mouyal is uncertain about how this Section and its proviso apply in a specific situation, he may apply to the Court for clarification or guidance.

III. COMPLIANCE WITH THE FEDERAL TRADE COMMISSION ACT AND THE TELEMARKETING SALES RULE

A. **IT IS FURTHER ORDERED** that in connection with the offering for sale or sale of any good or service, Defendant Mouyal is hereby permanently restrained and enjoined from making, or assisting others in making, any express or implied representation of material fact that is false or misleading, including, but not limited to:

1. Misrepresenting, in connection with the sale, offering for sale, or distribution of business directories and nondurable office supplies, that consumers ordered the goods that were shipped and/or billed to them; and

2. Misrepresenting, in connection with the sale, offering for sale, or distribution of nondurable office supplies, that the entity on whose behalf the misrepresentation is being made is connected with the consumer's automated credit card machine supplier or that it is the consumer's regular supplier.

B. **IT IS FURTHER ORDERED** that in connection with the offering for sale or sale of any good or service, Defendant Mouyal is hereby permanently restrained and enjoined from violating, or assisting others in violating, any provision of the Telemarketing Sales Rule, 16 C.F.R. Part 310, including, but not limited to, the following violations:

1. Making false or misleading statements to induce the consumer to pay for goods, including, but not limited to, misrepresenting, directly or by implication, that (a) the entity on whose behalf the representation is being made is connected with the consumer's regular supplier and (b) the consumer ordered the goods that were shipped and/or billed to the consumer, thereby violating 16 C.F.R. § 310.3(a)(4);
2. Failing to disclose, in "outbound telephone calls," promptly and in a clear and conspicuous manner, the seller's identity to the person receiving the call, thereby violating 16 C.F.R. § 310.4(d)(1); and
3. Failing to disclose, in "outbound telephone calls," promptly and in a clear and conspicuous manner to the person receiving the call, that the purpose of the call is to sell goods, thereby violating 16 C.F.R. § 310.4(d)(2).

A copy of the Telemarketing Sales Rule is appended to this Order as **Appendix A** and is incorporated herein as if fully rewritten. In the event that the Telemarketing Sales Rule is amended by the Commission in a manner which would create a new or different standard applicable to Defendant Mouyal's obligations under this Order, Defendant Mouyal's compliance with the Telemarketing Sales Rule as so amended shall not constitute a violation of this Order.

IV.
MANDATORY COMPLIANCE

IT IS FURTHER ORDERED that Defendant Mouyal, in connection with any and every business entity of which he is a majority owner, or which he otherwise manages or controls and where the business is engaged in the sale or marketing of any good or service, is hereby permanently restrained and enjoined from:

1. Failing to take reasonable steps sufficient to monitor and ensure that all employees and independent contractors engaged in sales or other consumer service functions comply with **Sections II and III** of this Order. Such steps shall include adequate monitoring of sales presentations or other calls with consumers, and shall also include, at a minimum, the following: (1) listening to the oral representations made by persons engaged in sales or other consumer service functions; (2) establishing a procedure for receiving and responding to consumer complaints; and (3) ascertaining the number and nature of consumer complaints regarding transactions in which each employee or independent contractor is involved;
2. Failing promptly to investigate fully any consumer complaint received by any business to which this Section applies; and
3. Failing to take corrective action with respect to any salesperson whom Defendant Mouyal determines is not complying with this Order, which may include training, disciplining, and/or terminating such salesperson.

PROVIDED, however, that nothing in this Section shall be construed to nullify the prohibitions set forth in **Section II**, above.

V.
PROHIBITIONS AGAINST DISTRIBUTION OF CONSUMER LISTS

IT IS FURTHER ORDERED that Defendant Mouyal is permanently restrained and enjoined from selling, renting, leasing, transferring or otherwise disclosing the name, address, telephone number, credit card number, bank account number, e-mail address, or other identifying information of any person who paid any money to the corporate Defendants at any time, in connection with the offering for sale or sale of any good or service; **PROVIDED, however,** that Defendant Mouyal may disclose such identifying information to a law enforcement agency or as required by any law, regulation or court order, and shall disclose such identifying information to the Plaintiff pursuant to this Order.

VI.
PROHIBITION ON TRANSFERRING BUSINESS INFORMATION

IT IS FURTHER ORDERED that Defendant Mouyal is hereby permanently restrained and enjoined from transferring or in any other way providing to any person (other than a United States or Canadian, federal, state, or local law enforcement agency, or pursuant to a court order), directly or indirectly, any trade secrets or knowledge, whether recorded or otherwise, or any books, records, tapes, disks, accounting data, manuals, electronically stored data, banking records, invoices, telephone records, ledgers, payroll records, or other documents of any kind, including information stored in computer-maintained form, in the possession, custody, or control of Defendant Mouyal that are in any way related to a corporate Defendant.

**VII.
SUSPENDED JUDGMENT**

A. **IT IS FURTHER ORDERED** that judgment is hereby entered against Defendant Mouyal, for equitable monetary relief, in the amount of seventy million dollars (\$70,000,000) in United States currency. Plaintiff and Defendant Mouyal agree that this judgment shall not be construed as the payment of any fine, penalty, punitive assessment, or forfeiture. **PROVIDED, however,** that this monetary judgment shall immediately be suspended subject to the conditions set forth below and in **Section IX** of this Order.

B. **IT IS FURTHER ORDERED** that, unless already done, Defendant Mouyal shall provide the Commission with clear, legible and full-size photocopies of all valid driver's licenses in his possession, which will be used for collection, reporting and compliance purposes.

**VIII.
ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANT**

IT IS FURTHER ORDERED that Defendant Mouyal, within five (5) business days of receipt of this Order as entered by the Court, must submit to the Commission a truthful sworn statement acknowledging receipt of this Order.

**IX.
RIGHT TO REOPEN WITH SUM CERTAIN**

IT IS FURTHER ORDERED that,

A. Plaintiff's agreement to, and the Court's approval of, this Final Order is expressly premised upon the truthfulness, accuracy, and completeness of the financial information provided

by Defendant Mouyal during depositions held on May 7 and 12, 2003, and October 29, 2003, and in a financial disclosure provided on 3/1/04^{AM} in these disclosures, Defendant Mouyal provided material information upon which Plaintiff relied in negotiating and agreeing to this Final Order. If the Court finds, upon motion by the Federal Trade Commission, that Defendant Mouyal failed to disclose any material asset, materially misrepresented the value of any asset, or made any other material misrepresentation or omission, the Court shall reinstate the judgment against Defendant Mouyal, in favor of the Commission, in the amount of seventy million dollars (\$70,000,000), which shall become immediately due and payable. Should this judgment be modified as to the monetary liability of Defendant Mouyal, this Final Order, in all other respects, shall remain in full force.

B. Defendant Mouyal authorizes Plaintiff to verify all information provided by Defendant Mouyal with all appropriate third parties, including, but not limited to, financial institutions and credit reporting bureaus; and

C. Proceedings instituted under this Section are in addition to, and not in lieu of, any and all other proceedings and remedies as may be provided by law, including any other proceedings Plaintiff may initiate to enforce this Final Order. In any proceeding instituted under this Section, Defendant Mouyal shall not challenge for any reason the appropriateness, fairness, or validity of the amount of the seventy million dollar (\$70,000,000.00) judgment.

**X.
LIFT OF ASSET FREEZE**

IT IS FURTHER ORDERED that the freeze of Defendant Mouyal's assets, imposed in the Preliminary Injunction entered in this proceeding, shall immediately be lifted. A financial institution shall be entitled to rely upon a letter from Plaintiff stating that the freeze has been lifted, which letter shall be provided promptly by Plaintiff upon Defendant Mouyal's request.

**XI.
USE OF CONSUMER REDRESS AND DISGORGEMENT FUNDS**

IT IS FURTHER ORDERED that:

A. The Plaintiff shall deposit all funds received from Defendant Mouyal pursuant to this Order in an interest-bearing account administered by Plaintiff or its agent.

B. All funds paid by Defendant Mouyal shall be used for equitable relief, including but not limited to consumer redress and any attendant expenses for the administration of any redress fund. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after redress is completed, Plaintiff may apply any remaining funds to such other equitable relief (including consumer education remedies) as it determines to be reasonably related to Defendant Mouyal's practices alleged in the complaint. Any funds not used for such equitable relief shall be deposited as disgorgement to the United States Treasury. Defendant Mouyal shall have no right to challenge Plaintiff's choice of remedies under this Section.

XII.
RECORD KEEPING PROVISIONS

IT IS FURTHER ORDERED that, for a period of eight (8) years from the date of entry of this Order, as to any entity of which Defendant Mouyal is a majority owner or in which he exercises control, Defendant Mouyal and his agents, employees, officers, corporations, successors, and assigns, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby restrained and enjoined from failing to create and retain the following records:

- (A) Accounting records that reflect the cost of goods or services sold, revenues generated, and the disbursement of such revenues;
- (B) Personnel records accurately reflecting: the name, address, and telephone number of each person employed in any capacity by such business, including as an independent contractor; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable;
- (C) Consumer files containing the names, addresses, phone numbers, dollar amounts paid, quantity of items or services purchased, and description of items or services purchased, to the extent such information is obtained in the ordinary course of business;
- (D) Complaints and refund requests (whether received directly, indirectly or through any third party) and any responses to those complaints or requests; and

- (E) Copies of all sales scripts, training materials, advertisements, or other marketing materials.

XIII.
COMPLIANCE REPORTING BY DEFENDANT MOUYAL

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

- (A) For a period of three (3) years from the date of entry of this Order,
 - (1) Defendant Mouyal shall notify the Commission of the following:
 - (a) Any changes in his residence, mailing addresses, and telephone numbers, within ten (10) days of the date of such change;
 - (b) Any changes in his employment status (including self-employment) within ten (10) days of the date of such change. Such notice shall include the name and address of each business that Defendant Mouyal is affiliated with, employed by, or performs services for; a statement of the nature of the business; and a statement of his duties and responsibilities in connection with the business;
 - (c) Any changes in his name or use of any aliases or fictitious names;
 - and
 - (2) Defendant Mouyal shall notify the Commission of any changes in corporate structure 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 filing of a bankruptcy petition; or a change in the corporate name or address, at least thirty (30) days prior to such change, *provided* that, with respect to any proposed change in the corporation about which Defendant Mouyal learns less than thirty (30) days prior to the date such action is to take place, Defendant Mouyal shall notify the Commission as soon as is practicable after obtaining such knowledge.

(B) One hundred eighty (180) days after the date of entry of this Order, Defendant Mouyal shall provide a written report to the FTC, sworn to under penalty of perjury, setting forth in detail the manner and form in which he has complied and is complying with this Order. This report shall include, but not be limited to:

- (1) Any changes required to be reported pursuant to subparagraph (A) above;
- (2) A copy of each acknowledgment of receipt of this Order obtained by Defendant Mouyal pursuant to **Section XV**;
- (3) A copy of any performance bond obtained by Defendant Mouyal pursuant to **Section II**;

(C) For the purposes of this Order, Defendant Mouyal shall, unless otherwise directed by the Commission's authorized representatives, mail all written notifications to the Commission to:

Director, East Central Region
Federal Trade Commission
Eaton Center, Suite 200
1111 Superior Ave., East
Cleveland, Ohio 44114

Re: FTC v. Hanson Publications, Inc., et al., Civil Action No. 02-CV-2205.

(D) For purposes of the compliance reporting required by this Order, the Commission shall, unless otherwise directed by Mouyal, communicate with Mouyal through or in the presence of his counsel. Mouyal is responsible for notifying the Commission in writing in the event of any change in his legal representation. For any period of time during which Mouyal does not have legal counsel, he agrees that the Commission is authorized to communicate with him directly.

**XIV.
COMPLIANCE MONITORING**

IT IS FURTHER ORDERED that, for the purpose of monitoring and investigating compliance with any provision of this Order,

(A) Within ten (10) days of receipt of written notice from a representative of the Commission, Defendant Mouyal shall submit additional written reports, sworn to under penalty of perjury; produce documents for inspection and copying; appear for deposition; and/or provide entry during normal business hours to any business location in his possession or direct or indirect control to inspect the business operation; provided, however, that this provision does not waive any rights Mouyal may have under the Federal Rules of Civil Procedure relating to the location of any such deposition, which rights are expressly reserved;

(B) In addition, the Commission is authorized to monitor compliance with this Order by all other lawful means, including but not limited to the following:

- (1) obtaining discovery from any person, without further leave of court, using the procedures proscribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, and 45;

- (2) posing as consumers and suppliers to: Defendant Mouyal, his employees, or any other entity managed or controlled in whole or in part by Defendant Mouyal, without the necessity of identification or prior notice;

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

(C) Defendant Mouyal agrees not to prohibit or obstruct representatives of the Commission from interviewing any employer, consultant, independent contractor, representative, agent, or employee who has agreed to such an interview, relating in any way to any conduct subject to this Order. The person interviewed may have his or her own counsel present.

**XV.
DISTRIBUTION OF ORDER BY DEFENDANT**

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order, Defendant Mouyal shall deliver a copy of this Order to the principals, officers, directors, managers and employees under his control for any business that (a) employs or contracts for personal services from Defendant Mouyal and (b) has responsibilities with respect to the subject matter of this Order. Defendant Mouyal shall secure from each such person a signed and dated statement acknowledging receipt of the Order within thirty (30) days after the date of service of the Order or the commencement of the employment relationship.

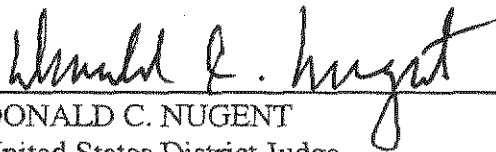
XVI.
INDEPENDENCE OF OBLIGATIONS

IT IS FURTHER ORDERED that the expiration of any requirements imposed by this Stipulated Final Order shall not affect any other obligation arising under this Order.

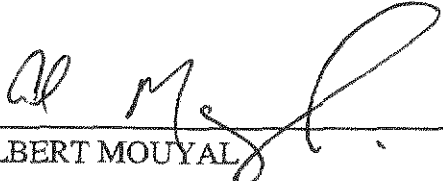
XVII.
RETENTION OF JURISDICTION

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


SO ORDERED, this 24th day of MAY, 2004



DONALD C. NUGENT
United States District Judge

Stipulated and agreed to this 21st day of May, 2004


ALBERT MOUYAL

WILLIAM E. KOVACIC
Federal Trade Commission General Counsel


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JON MILLER STEIGER
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Counsel for Defendants

APPENDIX A
TELEMARKETING SALES RULE

proposition that local retail shopping has, to date, been reduced as a result of inbound or outbound telemarketing. And, the fact remains that, other than DeHart, none of the commenters, including major sellers, telemarketers, and industry groups, provides any evidence relating to the potential for a national "do-not-call" registry to result in a reduction in service or an increase in cost for inbound telemarketing, nor in a concomitant increase in retail shopping done in local malls.

Moreover, the Commission believes there can be no hard evidence on which to base a prediction of consumers' actions following the implementation of the "do-not-call" registry provision. It seems likely, based on the experience of states that have implemented statewide "do-not-call" lists, and the overwhelmingly high response of consumers to the Commission's proposal, that many consumers will avail themselves of the opportunity to place their telephone numbers on the national "do-not-call" registry. However, as noted above, this may or may not have any impact on consumers' decision to shop at local malls, or on their choice of transportation. Thus, while consumer behavior may change as a result of the promulgation of amendments to the Rule, such changes cannot be quantified or even reasonably estimated because consumer decisions are influenced by many variables other than existence of the "do-not-call" registry. Any indirect impact of the amended Rule on the environment would therefore be highly speculative and impossible to accurately predict or measure.

The Commission does not believe that any alternative to creating a national "do-not-call" registry would both provide the benefits of the registry and ameliorate all potential concerns regarding environmental impact. For example, the Commission does not believe that given its justification for the necessity of the registry, eliminating the provision from the amended Rule would be appropriate based solely on the unsupported allegations of indirect environmental effect raised in the DeHart comment. Furthermore, the Commission can think of no alternative other than eliminating the national "do-not-call" registry that would address DeHart's unsupported and highly speculative concern.

In sum, although any evaluation of the environmental impact of the amendments to the TSR is uncertain and highly speculative, the Commission finds no evidence of avoidable adverse impacts stemming from the amended Rule. Therefore, the Commission has

determined, in accordance with § 1.83 of the FTC's Rules of Practice, that no environmental assessment or EIS is required.¹⁰⁷⁵

List of Subjects in 16 CFR Part 310.

Telemarketing, Trade practices.

Accordingly, title 16, part 310 of the Code of Federal Regulations, is revised to read as follows:

PART 310—TELEMARKETING SALES RULE

Sec.

- 310.1 Scope of regulations in this part.
- 310.2 Definitions.
- 310.3 Deceptive telemarketing acts or practices.
- 310.4 Abusive telemarketing acts or practices.
- 310.5 Recordkeeping requirements.
- 310.6 Exemptions.
- 310.7 Actions by states and private persons.
- 310.8 Reserved: Fee for access to "do-not-call" registry.
- 310.9 Severability.

Authority: 15 U.S.C. 6101-6108.

§ 310.1 Scope of regulations in this part.

This part implements the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-6108, as amended.

§ 310.2 Definitions.

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

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

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

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

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

of or in addition to the person to whom the credit card is issued.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰⁷⁵ 16 CFR 1.83. See also *National Citizens Comm. for Broad. v. FCC*, 567 F.2d 1095, 1098 n.3 (D.C. Cir. 1977).

purchase of goods or services or a charitable contribution.

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

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

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

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

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

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

(y) *Prize promotion* means:

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

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

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

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

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

(cc) *Telemarketing* means a plan, program, or campaign which is

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

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

§ 310.3 Deceptive telemarketing acts or practices.

(a) *Prohibited deceptive telemarketing acts or practices.* It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Before a customer pays¹ for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods

¹ When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment.

or services that are the subject of the sales offer;²

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

(iii) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the customer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and, if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning; and the no-purchase/no-payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate;

(v) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(vi) In the sale of any goods or services represented to protect, insure, or otherwise limit a customer's liability in the event of unauthorized use of the customer's credit card, the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. 1643; and

(vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

² For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226, compliance with the disclosure requirements under the Truth in Lending Act and Regulation Z shall constitute compliance with § 310.3(a)(1)(i) of this Rule.

(ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;

(iii) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;

(iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

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

(vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability;

(vii) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity;

(viii) That any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. 1643; or

(ix) Any material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(3) Causing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z,³ or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E.⁴ Such authorization shall be deemed verifiable if any of the following means is employed:

(i) Express written authorization by the customer or donor, which includes the customer's or donor's signature;⁵

(ii) Express oral authorization which is audio-recorded and made available

upon request to the customer or donor, and the customer's or donor's bank or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer's or donor's receipt of all of the following information:

(A) The number of debits, charges, or payments (if more than one);

(B) The date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;

(C) The amount(s) of the debit(s), charge(s), or payment(s);

(D) The customer's or donor's name;

(E) The customer's or donor's billing information, identified with sufficient specificity such that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction;

(F) A telephone number for customer or donor inquiry that is answered during normal business hours; and

(G) The date of the customer's or donor's oral authorization; or

(iii) Written confirmation of the transaction, identified in a clear and conspicuous manner as such on the outside of the envelope, sent to the customer or donor via first class mail prior to the submission for payment of the customer's or donor's billing information, and that includes all of the information contained in §§ 310.3(a)(3)(ii)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate; *provided*, however, that this means of authorization shall not be deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and preacquired account information.

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

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

(c) *Credit card laundering.* Except as expressly permitted by the applicable

credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for:

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

(2) Any person to employ, solicit, or otherwise cause a merchant, or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

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

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

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

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

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

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

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

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

§ 310.4 Abusive telemarketing acts or practices.

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

³ Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR part 226.

⁴ Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.*, and Regulation E, 12 CFR part 205.

⁵ For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such forms of signature is recognized as a valid signature under applicable federal law or state contract law.

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

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:

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

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

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

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

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

(6) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements

in paragraphs (a)(6)(i) through (ii) of this section must be met to evidence express informed consent.

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

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

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

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

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

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

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

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

(b) *Pattern of calls.*

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

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

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive

outbound telephone calls established to comply with § 310.4(b)(1)(iii);

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

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

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

(i) has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature⁶ of that person; or

(ii) has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

(iv) Abandoning any outbound telephone call. An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

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

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

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

(ii) It has trained its personnel, and any entity assisting in its compliance, in

⁶For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

the procedures established pursuant to § 310.4(b)(3)(i);

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

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

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

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

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

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

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

(iii) whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed⁷; and

(iv) the seller or telemarketer, in accordance with § 310.5(b)-(d), retains records establishing compliance with § 310.4(b)(4)(i)-(iii).

(c) *Calling time restrictions.* Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location.

(d) *Required oral disclosures in the sale of goods or services.* It is an abusive

telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion; *provided*, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

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

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

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

§ 310.5 Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

(1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of \$25.00 or more;

(3) The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and

the amount paid by the customer for the goods or services;⁸

(4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales or solicitations; *provided*, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

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

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

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

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

§ 310.6 Exemptions.

(a) Solicitations to induce charitable contributions via outbound telephone calls are not covered by § 310.4(b)(1)(iii)(B) of this Rule.

(b) The following acts or practices are exempt from this Rule:

(1) The sale of pay-per-call services subject to the Commission's Rule

⁷ This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.

⁸ For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with § 310.5(a)(3) of this Rule.

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

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

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

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

(5) Telephone calls initiated by a customer or donor in response to an advertisement through any medium, other than direct mail solicitation, *provided*, however, that this exemption does not apply to calls initiated by a

customer or donor in response to an advertisement relating to investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or advertisements involving goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls;

(6) Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this Rule, for any goods or services offered in the direct mail solicitation, and that contains no material misrepresentation regarding any item contained in § 310.3(d) of this Rule for any requested charitable contribution; *provided*, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls; and

(7) Telephone calls between a telemarketer and any business, except calls to induce the retail sale of nondurable office or cleaning supplies; *provided*, however, that § 310.4(b)(1)(iii)(B) and § 310.5 of this Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

§ 310.7 Actions by states and private persons.

(a) Any attorney general or other officer of a state authorized by the state to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, shall serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this Rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, and shall include a copy of the state's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the state or private person shall serve the Commission with the required notice immediately upon instituting its action.

(b) Nothing contained in this Section shall prohibit any attorney general or other authorized state official from proceeding in state court on the basis of an alleged violation of any civil or criminal statute of such state.

§ 310.8 [Reserved: Fee for access to "do-not-call" registry.]

§ 310.9 Severability.

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

By direction of the Commission.

Donald S. Clark,
Secretary.

Note: Appendices A and B are published for informational purposes only and will not be codified in Title 16 of the Code of Federal Regulations.

Appendix A

List of Acronyms for Rule Review Commenters

February 28, 2000 Request for Comment

Acronym — Commenter

AARP—AARP
Alan—Alan, Alicia
ARDA—American Resort Development Association
ATA—American Teleservices Association
Anderson—Anderson, Wayne
Baressi—Baressi, Sandy
Bell Atlantic—Bell Atlantic
Bennett—Bennett, Douglas H.
Biagiotti—Biagiotti, Mary
Bishop—Bishop, Lew & Lois
Blake—Blake, Ted
Bowman-Kruhm—Bowman-Kruhm, Mary
Braddick—Braddick, Jane Ann
Brass—Brass, Eric
Brosnahan—Brosnahan, Kevin
Budro—Budro, Edgar
Card—Card, Giles S.
Collison—Collison, Doug
Conn—Conn, David
Conway—Conway, Candace
Croushore—Croushore, Amanda
Curtis—Curtis, Joel
Dawson—Dawson, Darcy
DMA—Direct Marketing Association
DSA—Direct Selling Association
Doe—Doe, Jane
ERA—Electronic Retailing Association
FAMSA—FAMSA-Funeral Consumers Alliance, Inc.
Gannett—Gannett Co., Inc.
Garbin—Garbin, David and Linda
A. Gardner—Gardner, Anne
S. Gardner—Gardner, Stephen
Gibb—Gibb, Ronald E.
Gilchrist—Gilchrist, Dr. K. James
Gindin—Gindin, Jim
Haines—Haines, Charlotte
Harper—Harper, Greg
Heagy—Heagy, Annette M.
Hecht—Hecht, Jeff
Hickman—Bill and Donna
Hollingsworth—Hollingsworth, Bob and Pat
Holloway—Holloway, Lynn S.
Holmay—Holmay, Kathleen
ICFA—International Cemetery and Funeral Association

Johnson—Johnson, Sharon Coleman
Jordan—Jordan, April
Kelly—Kelly, Lawrence M.
KTW—KTW Consulting Techniques, Inc.
Lamet—Lamet, Jerome S.
Lee—Lee, Rockie
LSAP—Legal Services Advocacy Project
LeQuang—LeQuang, Albert
Leshner—Leshner, David
Mack—Mack, Mr. and Mrs. Alfred
MPA—Magazine Publishers of America, Inc.
Manz—Manz, Matthias
McCurdy—McCurdy, Bridget E.
Menefee—Menefee, Marcie
Merritt—Merritt, Everett W.
Mey—Mey, Diana
Mitchelp—Mitchelp
TeleSource—Morgan-Francis/Tele-Source Industries
NACHA—NACHA-The Electronic Payments Association
NAAG—National Association of Attorneys General
NACAA—National Association of Consumer Agency Administrators
NCL—National Consumers League
NFN—National Federation of Nonprofits
NAA—Newspaper Association of America
NASAA—North American Securities Administrators Association
Nova53—Nova53
Nurik—Nurik, Margy and Irv
PLP—Personal Legal Plans, Inc.
Peters—Peters, John and Frederickson, Constance
Reese—Reese Brothers, Inc.
Reynolds—Reynolds, Charles
Rothman—Rothman, Iris
Runnels—Runnels, Mike
Sanford—Sanford, Kanija
Schiber—Schiber, Bill
Schmied—Schmied, R. L.
Strang—Strang, Wayne G.
TeleSource—Morgan-Francis/Tele-Source Industries
Texas—Texas Attorney General
Thai—Thai, Linh Vien
Vanderburg—Vanderburg, Mary Lou
Ver Steegt—Ver Steegt, Karen
Verizon—Verizon Wireless
Warren—Warren, Joshua
Weltha—Weltha, Nick
Worsham—Worsham, Michael C., Esq.

Appendix B

List of Acronyms for NPRM Commenters

Acronym — Commenter

1-800-DoNotCall—1-800-DoNotCall, Inc.
AARP—AARP
ACA—ACA International
ACUTA—ACUTA
Advanta—Advanta Corp.
Aegis—Aegis Communications Group
Alabama Police—Alabama State Police Association, Inc.
AAST—American Association of State Troopers
ABA—American Bankers Association
ABIA—American Bankers Insurance Association
American Blind—American Blind Products, Inc.
ACE—American Council on Education
ADA—American Diabetes Association
AmEx—American Express

AFSA—American Financial Services Association
Red Cross—American Red Cross
ARDA—American Resort Development Association
ARDA-2—American Resort Development Association-Do Not Call Registry
American Rivers—American Rivers
ASTA—American Society of Travel Agents
ATA—American Teleservices Association
Blood Centers—America's Blood Centers
Community Bankers—America's Community Bankers
Ameriquest—Ameriquest Mortgage Company
Armey—Armey, The Honorable Dick (U.S. House of Representatives)
AFP—Association of Fundraising Professionals
APTS—Association of Public Television Stations
ANA—Association of National Advertisers
Associations—joint comment of: American Teleservices Association, Direct Marketing Association, Electronic Retailing Association, Magazine Publishers Association, and Promotion Marketing Association
Assurant—Assurant Group
Avinta—Avinta Communications, Inc.
Ayres—Ayres, Ian
Baldacci—Baldacci, The Honorable John Elias (U.S. House of Representatives)
BofA—Bank of America
Bank One—Bank One Corporation
Beautyrock—Beautyrock, Inc.
BellSouth—BellSouth Corporation
Best Buy—Best Buy Company, Inc.
BRI—Business Response Inc.
CCAA—California Consumer Affairs Association
CATS—Californians Against Telephone Solicitation
Capital One—Capital One Financial Corporation
Car Wash Guys—WashGuy Systems
Carper—Carper, The Honorable Thomas R. (U.S. Senate)
Celebrity Prime Foods—Celebrity Prime Foods
Cendant—Cendant Corporation
Chamber of Commerce—Chamber of Commerce of the United States of America
CRF—Charitable Resource Foundation, Inc.
Chicago ADM—Chicago Association of Direct Marketing
Childhood Leukemia—Childhood Leukemia Foundation
CDI—Circulation Development, Inc.
CURE—Citizens United for Rehabilitation of Errants
Citigroup—Citigroup Inc.
Civil Service Leader—Civil Service Leader
Collier Shannon—Collier Shannon Scott
Comcast—Comcast
CNHI—Community Newspaper Holdings, Inc.
Community Safety—Community Safety, LLC
Connecticut—Connecticut Commissioner of Consumer Protection
CBA—Consumer Bankers Association
CCC—joint comment of: Consumer Choice Coalition, ACI Telecentrics, Coverdell & Company, Discount Development Services, HSN LP d/b/a HSN and Home Shopping Network, Household Credit Services, MBNA America Bank, MemberWorks

- Incorporated, Mortgage Investors Corporation, Optima Direct, TCIM Inc., Trilegiant Corporation and West Corporation
- CMC—Consumer Mortgage Coalition
- Consumer Privacy—Consumer Privacy Guide
- Convergys—Convergys Corporation
- CCA—Corrections Corporation of America
- CASE—Council for Advancement and Support of Education
- Cox—Cox Enterprises
- Craftmatic—Craftmatic Organization, Inc.
- Davis—Davis, The Honorable Tom (U.S. House of Representatives)
- DBA—Debt Buyers Association
- DeHart—DeHart & Darr Associates
- Deutsch—Deutsch, The Honorable Peter (U.S. House of Representatives)
- DialAmerica—DialAmerica Marketing, Inc.
- DMA—Direct Marketing Association/U.S. Chamber of Commerce
- DMA-NonProfit—Direct Marketing Association NonProfit Federation
- DSA—Direct Selling Association
- Discover—Discover Bank
- DC—District of Columbia, Office of the People's Counsel
- Eagle—Eagle Bank
- EFSC—Electronic Financial Services Council
- EPIC—Joint comment: Electronic Privacy Information Center, Center for Digital Democracy, Junkbusters Corp., International Union UAW, Privacy Rights Clearinghouse, Consumers Union, Evan Hendricks of Privacy Times, Privacyactivism, Consumer Action, Consumer Project on Technology, Robert Ellis Smith of Privacy Journal, Consumer Federation of America, Computer Scientists for Social Responsibility, and Private Citizen, Inc.
- ERA—Electronic Retailing Association
- EPI—Enterprise Prison Institute
- Experian—Experian Marketing Information Solutions, Inc.
- Fiber Clean—Fiber Clean
- Roundtable—Financial Services Roundtable
- Fire Fighters Associations:
- Asheville FFA—Asheville (NC) Fire Fighters Association
- Bethlehem FFA—Bethlehem (PA), IAFF Local 735
- Boone FFA—Boone (IA)
- California FFA—California Professional Firefighters
- Cedar Rapids FFA—Cedar Rapids (IA), IAFF Local 11
- Cedar Rapids Airport FFA—Cedar Rapids Airport (IA)
- Chattanooga FFA—Chattanooga (TN) Fire Fighters Association, Local 820
- Edwardsville FFA—Edwardsville (IL) Fire Fighters Local 1700
- Greensboro FFA—Greensboro (NC)
- Hickory FFA—Hickory (NC) Firefighters Association, IAFF Local 2653
- Indiana FFA—Indiana, Professional Fire Fighters Union of
- Iowa FFA—Iowa Professional Firefighters
- Missouri FFA—Missouri State Council of Fire Fighters
- North Carolina FFA—North Carolina, Professional Fire Fighters & Paramedics of
- North Maine FFA—North Maine (Des Plaines, IL) Firefighters, IAFF Local 224
- Ottumwa FFA—Ottumwa (IA)
- Roanoke FFA—Roanoke (VA) Fire Fighters Association
- Springfield FFA—Springfield (MO) Firefighters Association, Local 52
- Sycamore FFA—Sycamore, IAFF Local 3046
- Utah FFA—Utah, Professional Firefighters of
- Vermont FFA—Vermont, Professional Firefighters of
- Wisconsin FFA—Wisconsin, Professional Fire Fighters of
- FireCo—FireCo, L.L.C.
- Fleet—FleetBoston Financial Corporation
- FOP—Fraternal Order of Police, Grand Lodge
- FPIR—Fund for Public Interest Research, Inc.
- FCA—Funeral Consumers Alliance, Inc.
- Gannett—Gannett Co., Inc.
- Gottschalks—Gottschalks, Inc.
- Greater Niagara—Greater Niagara Newspapers
- Green Mountain—Green Mountain Energy Company
- Gryphon—Gryphon Networks
- Hagel, Johnson & Carper—Joint letter from: The Honorable Chuck Hagel, Tim Johnson, and Thomas R. Carper (U.S. Senate)
- Hastings—Hastings, The Honorable Doc (U.S. House of Representatives)
- Herald Bulletin—Herald Bulletin
- Horick—Horick, Bob
- Household International:
- Household Auto—Joint comment: Household Finance Corp, OFLA Receivables Corp., and Household Automotive
- Household Credit—Household Bank, Credit Card Services
- Household Finance—Household Finance Corporation
- Household-Montalvo—Montalvo, David
- HSBC—HSBC Bank USA
- Hudson Bay-Anderson—Hudson Bay Company of Illinois-owner
- Hudson Bay-Goodman—Hudson Bay Company-Goodman
- HRC—Human Rights Campaign
- IBM—IBM
- ICT—ICT Group, Inc.
- Illinois Police—Illinois Council of Police & Sheriffs
- Infocision—Infocision Management Corporation
- Inhofe—Inhofe, The Honorable James (U.S. Senate)
- Insight—Insight Realty, Inc.
- ITC—Interactive Teleservices Corp.
- ICFA—International Cemetery & Funeral Association
- IFA—International Franchise Association
- IUPA—International Union of Police Associations
- ICC—Internet Commerce Coalition
- Intuit—Intuit Inc.
- Italian American Police—Italian American Police Society of New Jersey
- Johnson—Johnson, The Honorable Tim (U.S. Senate)
- Kansas—Kansas, House of Representatives
- KeyCorp—KeyCorp.
- Lautman—Lautman & Associates
- LSAP—Legal Services Advocacy Project
- Leggett & Platt—Leggett & Platt
- Lenox—Lenox Inc.
- Leukemia Society—Leukemia & Lymphoma Society
- Life Share—Life Share
- Lucas—Lucas, The Honorable Ken (U.S. House of Representatives)
- MPA—Magazine Publishers Association
- Make-A-Wish—Make-A-Wish Foundation of America
- Manzullo—Manzullo, The Honorable Donald A. (U.S. House of Representatives)
- March of Dimes—March of Dimes Birth Defects Foundation
- Marketlink—Marketlink, Inc.
- MBA—Massachusetts Bankers Association
- MasterCard—MasterCard International
- MBNA—MBNA America Bank, N.A.
- McClure—McClure, Scott
- McConnell—McConnell, The Honorable Mitch (U.S. Senate)
- Metris—Metris Companies, Inc.
- Michigan Nonprofit—Michigan Nonprofit Association
- MidFirst—MidFirst Bank
- MBAA—Mortgage Bankers Association of America
- Myrick—Myrick, The Honorable Sue (U.S. House of Representatives)
- NACHA—NACHA-The Electronic Payments Association
- Nadel—Nadel, Mark S. (law review article: "Rings of Privacy: Unsolicited Telephone Calls and the Right to Privacy," 4 *Yale Journal on Regulation* 99 (Fall 1986))
- NAAG—National Association of Attorneys General
- NACAA—National Association of Consumer Agency Administrators
- NAIFA—National Association of Insurance & Financial Advisors
- NAR—National Association of Realtors
- NARUC—National Association of Regulatory Utility Commissioners
- ARVC—National Association of RV Parks & Campgrounds
- NASCO—National Association of State Charity Officials
- NASUCA—National Association of State Utility Consumer Advocates
- E-Commerce Coalition—National Business Coalition on E-Commerce & Privacy
- NCTA—National Cable & Telecommunications Association
- National Children's Cancer—National Children's Cancer Society, Inc.
- NCLC—Joint comment: National Consumer Law Center, National Association of Consumer Advocates, Consumer Federation of America, Consumers Union, and US Public Interest Research Group
- NCLF—National Children's Leukemia Foundation
- NCL—National Consumers League
- NEMA—National Energy Marketers Association
- NFPPA—National Family Privacy Protection Association
- NFIB—National Federation of Independent Business
- NFC—National Franchise Council
- NFDA—National Funeral Directors Association
- NNA—National Newspaper Association of America
- NPMA—National Pest Management Association
- NPR—National Public Radio
- NRF—National Retail Federation
- NTC—National Troopers Coalition
- Nelson—Nelson, The Honorable E. Benjamin (U.S. Senate)
- NetCoalition—NetCoalition

- Nethercutt—Nethercutt, The Honorable George R., Jr. (U.S. House of Representatives)
- NeuStar—NeuStar, Inc.
- New Orleans—New Orleans, City Council of (CNO)—Utility, Cable & Telecommunications Committee
- NJ Police—New Jersey Police Officers Foundation, Inc.
- NYSCPB—New York State Consumer Protection Board
- NAA—Newspaper Association of America
- Nextel—Nextel Communications, Inc.
- Ney, Sandlin, Jones, Shows and Cantor—Joint letter from: The Honorable Bob Ney, Max Sandlin, Walter Jones, Ronnie Shows, and Eric Cantor (U.S. House of Representatives)
- Noble—Noble Systems
- NATN—North American Telephone Network LLC
- NC Zoo—North Carolina Zoological Society
- Not-For-Profit Coalition—Not-For-Profit and Charitable Coalition
- NSDI—NSDI Teleperformance
- OSU—Ohio State University
- OTC—Ohio Troopers Coalition
- Pacesetter—Pacesetter Corporation
- PVA—Paralyzed Veterans of America
- Paramount—Paramount Lists, Inc.
- Pascrell—Pascrell, The Honorable Bill, Jr. (U.S. House of Representatives)
- Patrick—Patrick, George W.
- Paul—Paul, The Honorable Ron (U.S. House of Representatives)
- Pelland—Pelland, Paul
- PLP—Personal Legal Plans, Inc.
- Michigan Police—Police Officers Association of Michigan
- possibleNOW—possibleNOW.com, Inc.
- PRC—Privacy Rights Clearinghouse
- Private Citizen—Private Citizen, Inc.
- Proctor—Proctor, Alan
- PBP—Progressive Business Publications
- PCIC—Progressive Casualty Insurance Company
- Angel Food—Project Angel Food
- PMA—Promotion Marketing Association
- Purple Heart—Purple Heart Service Foundation, Military Order of
- Ramstad—Ramstad, The Honorable Jim (U.S. House of Representatives)
- Redish—Redish, Martin H., Esq.
- Reed Elsevier—Reed Elsevier Inc.
- Reese—Reese Brothers, Inc.
- SBC—SBC Communications Inc.
- Schrock—Schrock, The Honorable Edward L. (U.S. House of Representatives)
- Sensenbrenner—Sensenbrenner, The Honorable F. James, Jr. (U.S. House of Representatives)
- SHARE—SHARE
- SIA—Software & Information Industry Association
- Southerland—Southerland, Inc.
- Southern Poverty—Southern Poverty Law Center
- Special Olympics—Special Olympics, Inc.
- SO-AZ—Special Olympics Arizona
- SO-CA—Special Olympics Southern California
- SO-CO—Special Olympics Colorado
- SO-CN—Special Olympics Connecticut
- SO-IA—Special Olympics Iowa
- SO-KY—Special Olympics Kentucky
- SO-MD—Special Olympics Maryland
- SO-MO—Special Olympics Missouri
- SO-MT—Special Olympics Montana
- SO-NH—Special Olympics New Hampshire
- SO-NJ—Special Olympics New Jersey
- SO-NM—Special Olympics New Mexico
- SO-NY—Special Olympics New York
- SO-VT—Special Olympics Vermont
- SO-VA—Special Olympics Virginia
- SO-WA—Special Olympics Washington
- SO-WI—Special Olympics Wisconsin
- SO-WY—Special Olympics Wyoming
- Spiegel—Spiegel, Marilyn
- Stage Door—Stage Door Music Productions, Inc.
- Statewide Appeal—Statewide Appeal Inc.
- Success Marketing—Success Marketing, Inc.
- Synergy Global—Synergy Global Networks, The
- Synergy Solutions—Synergy Solutions, Inc.
- Sytel—Sytel Limited
- Tate—Tate & Associates
- Technion—Technion Communications Corp
- TDI—Telecommunications for the Deaf, Inc.
- TeleDirect—TeleDirect International, Inc.
- Telefund—Telefund, Inc.
- Teleperformance—Teleperformance USA
- TRC—Tele-Response Center
- TeleStar—TeleStar Marketing, L.P.
- TRA—Tennessee Regulatory Authority
- Terry—Terry, The Honorable Lee (U.S. House of Representatives)
- Texas Environment—Texas Campaign for the Environment
- Texas PUC—Texas Office of Public Utility Counsel
- Thayer—Thayer, Richard E., Esq.
- Time—Time, Inc.
- Tribune—Tribune Publishing Company
- UNICOR—UNICOR: (Federal Prison Industries, Inc, DOJ), Federal Bureau of Prisons)
- DOJ—U.S. Department of Justice
- Uniway—Uniway of Coastal Georgia
- Verizon—Verizon Companies
- Virginia—Virginia Attorney General
- VISA—VISA U.S.A., Inc.
- Watts—Watts, The Honorable J.C., Jr. (U.S. House of Representatives)
- Weber—Weber, Ron & Associates, Inc.
- Wells Fargo—Wells Fargo & Company
- White—White, David T.
- WTA—Wisconsin Troopers' Association Inc.
- Worsham—Worsham, Michael C., Esq.
- YPIMA—Yellow Pages Integrated Media Association (YPIMA)

Supplemental Comments

- AARP-Supp.—AARP
- AOP-Supp.—Aircraft Owners and Pilots Association (Marsha Mason-Thies)
- Allstate-Supp.—Allstate Life Insurance Company
- Community Bankers-Supp.—America's Community Bankers
- AICR-Supp.—The American Institute for Cancer Research (Kathryn L. Ward)
- Red Cross-Supp.—American Red Cross
- ARDA-Supp.—The American Resort Development Association (Yartin DePoy and Stratis Pridgeon)
- ATA-Supp.—American Teleservices Association
- Associations-Supp.—Associations Letter
- Avinta-Supp.—Avinta (Abe Chen)
- Bond-Supp.—Bond, The Honorable Christopher S. (U.S. Senate)

- Celebrity Prime Foods-Supp.—Celebrity Prime Foods
- Chesapeake-Supp.—The Chesapeake Bay Foundation (Amelia Koch and Melissa Livingston)
- Christian Appalachian-Supp.—The Christian Appalachian Project
- Comic Relief-Supp.—Comic Relief, Inc. (Dennis Albaigh)
- Covington & Burling-Supp.—Covington and Burling
- DialAmerica-Supp.—DialAmerica Marketing, Inc.
- DMA Letter-Supp.—Direct Marketing Association-Transmittal Letter
- DMA Study-Supp.—Direct Marketing Association-Study
- ERA and PMA-Supp.—Electronic Retailing Association and Promotion Marketing Association
- EPI-Supp.—Enterprise Prison Institute
- Domenici-Supp.—Domenici, The Honorable Pete V. (U.S. Senate)
- FDS-Supp.—Federation Department Stores
- Hoar-Supp.—Hoar, Wesley C.
- Illinois-Supp.—Illinois Attorney General's Office
- ICTA-Supp.—Industry Council for Tangible Assets
- Luntz-Supp.—Luntz Research Companies (Chrys Lemon)
- MPA-Supp.—Magazine Publishers of America
- Maryland-Supp.—Maryland Attorney General's Office (Carol Beyers)
- McIntyre-Supp.—McIntyre Law Firm, PLLC (Chrys Lemon)
- McKenna-Supp.—McKenna, Douglas M.
- Memberworks-Supp.—Memberworks National Survey Topline (Chrys Lemon)
- Minnesota-Supp.—Minnesota Attorney General's Office
- Missouri-Supp.—Missouri Attorney General's Office
- NACDS-Supp.—National Association of Chain Drug Stores
- Ney, Sandlin, Jones, Shows and Cantor-Supp.—Joint letter from: The Honorable Bob Ney, Max Sandlin, Walter Jones, Ronnie Shows, and Eric Cantor (U.S. House of Representatives)
- NAR-Supp.—National Association of Realtors
- NWF-Supp.—National Wildlife Federation
- NAA June 28-Supp.—Newspaper Association of America (John F. Sturm)
- NAA July 31-Supp.—Newspaper Association of America
- Not-For-Profit Coalition-Supp.—Not-For-Profit and Charitable Coalition
- PMA-Supp.—Promotion Marketing Association
- Putnam-Supp.—Putnam, The Honorable Adam H. (U.S. House of Representatives)
- Riley-Supp.—Riley, The Honorable Bob (U.S. House of Representatives)
- SBC-Supp.—SBC Communications Inc.
- Time-Supp.—Time, Inc.
- Vermont-Supp.—Vermont Attorney General's Office
- WWF-Supp.—World Wildlife Fund (Deborah Hechinger)
- Worsham-Supp.—Worsham, Michael C.

User Fee Comments

- AARP-User Fee—AARP

ABA-User Fee—American Bankers Association
 Red Cross-User Fee—American Red Cross
 ARDA-User Fee—American Resort Development Association
 ATA-User Fee—American Teleservices Association
 Community Bankers-User Fee—America's Community Bankers
 Ameriquest-User Fee—Ameriquest Mortgage Company
 Celebrity Prime Foods-User Fee—Celebrity Prime Foods
 CBA-User Fee—Consumer Bankers Association
 DialAmerica-User Fee—DialAmerica Marketing, Inc.
 DMA Letter-User Fee—Direct Marketing Association
 DMA Comments-User Fee—Direct Marketing Association
 Discover-User Fee—Discover Bank
 ERA/PMA-User Fee—Electronic Retailing Association and Promotion Marketing Association (joint comment)
 Household-User Fee—Household Bank (SB), N.A. and Household Bank (Nevada), N.A. (joint comment)
 Hudson Bay-User Fee—Hudson Bay Company of Illinois, Inc.
 ICTA-User Fee—Industry Council for Tangible Assets
 InfoCision-User Fee—InfoCision Management Corporation
 ITC-User Fee—Interactive Teleservices Corporation
 MPA-User Fee—Magazine Publishers of America
 MasterCard-User Fee—MasterCard International, Inc.
 NACDS-User Fee—National Association of Chain Drug Stores
 NAR-User Fee—National Association of Realtors
 NASUCA-User Fee—National Association of State Utility Consumer Advocates
 NEMA-User Fee—National Energy Marketers Association
 Not-For-Profit Coalition-User Fee—Not-For-Profit and Charitable Coalition
 SBC-User Fee—SBC Communications, Inc.
 Tennessee-User Fee—Tennessee Regulatory Authority
 SBA-User Fee—United States Small Business Administration, Office of Advocacy
 Visa-User Fee—Visa U.S.A., Inc.
 Wells Fargo-User Fee—Wells Fargo & Company

Concurring Statement of Commissioner Orson Swindle in *Telemarketing Sales Rule*, File No. R411001

I wholeheartedly support the amendments to the Telemarketing Sales Rule ("TSR"), because I believe that they will help protect consumers from deceptive and abusive telemarketing practices. In particular, these amendments will give consumers the ability to avoid the sheer volume of unwanted telemarketing calls that many consider to be a nuisance. I write separately to explain my views on two issues — how the Commission determines whether an act or practice is

"abusive" for purposes of the TSR, and the national do-not-call registry.

Abusive Telemarketing Acts or Practices

The Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act") directs the Commission to promulgate rules that prohibit "deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." 15 U.S.C. 6102 (a)(1). To determine what constitutes an abusive telemarketing practice, the Commission for the most part has used the examples of abusive practices that Congress provided in the Telemarketing Act and principles drawn from these examples. I agree that this is an appropriate analysis, and in light of the rulemaking record as a whole, I fully support the TSR amendments that fall within these parameters. These amendments include, among other things, the provisions involving the national do-not-call registry, transmission of caller identification information, and abandoned calls and predictive dialers.

When the Commission seeks to identify practices as abusive that are less distinctly within the parameters of the Act's examples and their emphasis on privacy protection, the Commission employs its traditional unfairness analysis.¹ I understand the Commission's intention to narrow the potentially expansive scope of the term "abusive" by using its unfairness analysis. However, given the broad ordinary meaning of the term "abusive," I believe that the standard for determining what constitutes an abusive telemarketing practice likely is broader than the stringent definition of the term "unfair." Therefore, I would have preferred it had the Commission looked to the plain meaning of the term "abusive" and then formulated a separate standard to identify abusive

¹ Given that nothing in the language of the Telemarketing Act or its legislative history indicates that Congress intended the Commission to use its unfairness standard to determine which practices are abusive, I previously raised concerns about this analysis and requested comment on this issue. *Concurring Statement of Commissioner Orson Swindle in Telemarketing Sales Rule Review*, File No. R411001, available at (www.ftc.gov/os/2002/01/swindletsrstatement.htm). Although some comments agreed with this concern, they did not offer an alternative analysis of abusive practices beyond suggesting that the Commission's authority is limited to the examples of abusive practices included in the Telemarketing Act and its legislative history. See *Statement of Basis and Purpose* at 100, n. 428. However, because the Act does not limit the Commission's authority to identify abusive practices to the examples in the Act, the Commission may prohibit other practices that it identifies as abusive.

telemarketing practices for purposes of the Telemarketing Act and the TSR.

Nevertheless, I agree with the Commission's conclusion that a telemarketing practice that meets the strict unfairness standard will constitute an abusive practice for purposes of the Act and the TSR. In light of the rulemaking record, I therefore support the TSR amendments that are analyzed under this standard. This includes the requirement that telemarketers obtain consumers' or donors' express informed consent before causing their information to be submitted for payment. The rulemaking record evidences the harm that results from unauthorized billing, the need for the consent requirement, and the need to mandate specific steps that telemarketers must take to obtain consumers' consent in transactions involving preacquired account information.

In addition, the record supports the prohibition on the disclosure or receipt, for consideration, of unencrypted account numbers for use in telemarketing (except to process a payment for goods or services or a charitable contribution pursuant to a transaction). I do not believe that the mere disclosure of personal financial information, without more, causes or is likely to cause substantial consumer injury. In this situation, however, the rulemaking record provides a basis for concluding that trafficking in unencrypted account numbers is likely to cause substantial consumer injury in the form of unauthorized billing. Industry comments state that there is no legitimate reason to purchase unencrypted lists of credit card numbers. Therefore, there is a strong likelihood that telemarketers who do engage in this practice will misuse the information in a manner that results in unauthorized charges to consumers' accounts. The Commission's law enforcement experience corroborates this conclusion.² As a result, I conclude that this practice is abusive for purposes of the Telemarketing Act.

The National Do-Not-Call Registry

The Telemarketing Act and the TSR recognize consumers' "right to be let alone." See, e.g., *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (stating that the "right to be let alone" is the "most comprehensive of rights and the right most valued by

² See *Statement of Basis and Purpose* at 97-98. In addition, given the evidence that the use of encrypted account information in telemarketing can result in unauthorized charges, there is an even greater likelihood that injury will occur when a telemarketer has obtained, for consideration, consumers' actual credit card numbers.

civilized men"). In the context of telemarketing, there is an inherent tension between this right and the First Amendment's right to free speech. With this in mind, and in light of the rulemaking record as a whole, the Commission has determined to establish a national do-not-call registry. This will enable consumers to stop certain telemarketing calls — calls to induce the purchase of goods and services from companies within the FTC's jurisdiction (except where the consumer has an "established business relationship" with the seller).

Although the USA PATRIOT Act of 2001 gave the Commission authority to regulate for-profit companies that make telephone calls seeking charitable donations on behalf of charities, the Commission has determined to exempt these entities from the national do-not-call registry requirements. Instead, the Commission requires these telemarketers to comply with the "entity-specific" do-not-call provision, which prohibits them from calling

consumers who have said they do not want to be called by or on behalf of a particular entity. This more narrowly tailored approach seeks to protect consumers from unwanted telemarketing calls seeking charitable donations, while minimizing the impact of the TSR on charities' First Amendment rights. I do not object to taking this approach at the outset; but if there is evidence that suggests that this approach is not effective in protecting consumers from unsolicited telemarketing calls, the Commission should revisit this decision and require for-profit telemarketers seeking charitable donations to comply with the national do-not-call registry.

While I believe that the amended TSR and the national do-not-call registry will go a long way to help consumers prevent unwanted intrusions into their homes, a number of entities are not subject to the TSR's requirements. Under the Telemarketing Act and the TSR, the Commission does not have jurisdiction in whole or in part over the

calls of entities such as banks, telephone companies, airlines, insurance companies, credit unions, charities, political campaigns, and political fund-raisers. From the perspective of consumers, the right to be let alone is invaded just as much by unwanted calls from exempt entities (e.g., banks, telephone companies, or political fund-raisers) as it is by such calls from covered entities.³ Therefore, I believe that the entire spectrum of entities that make telemarketing calls to consumers should be subject to do-not-call requirements.

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³ The Federal Communications Commission, however, has requested comment on whether to establish a national do-not-call registry that would address telemarketing calls by at least some of the entities that are exempt from the FTC's jurisdiction. *Notice of Proposed Rulemaking, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 67 FR 62667 (Oct. 8, 2002).