

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: August 17, 2004
TO: Blanca S. Bayó, Commission Clerk and Administrative Services Director
FROM: Dale R. Buys, Regulatory Analyst III, Division of Competitive Markets & Enforcement
RE: Docket No. 040062-TI; Compliance investigation of New Century Telecom, Inc. for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, or Local Provider Selection.

RECEIVED FPSC
AUG 17 2004 3:05
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT

Please file the attached correspondence between Commission staff and The Helein Law Group, LLP, in the above referenced docket file. The documents are as follows:

- Florida Public Service Commission letter dated July 14, 2004, from Rick Moses addressed to Ms. Loubna W. Haddad (2 pages).
- Print out of Email sent July 15, 2004 4:57 PM from Loubna W. Haddad addressed to Rick Moses (2 pages).
- The Helein Law Group, LLP letter dated July 20, 2004, signed by Charles H. Helein, addressed to Rick Moses (43 pages). The letter includes a revised settlement proposal and attachments explaining the company's proposed compliance program.
- Florida Public Service Commission letter dated July 27, 2004, from Rick Moses to Ms. Loubna Haddad (2 pages).
- The Helein Law Group, LLP letter dated August 5, 2004, signed by Loubna W. Haddad addressed to Rick Moses (3 pages).

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DOCUMENT NUMBER-DATE

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Telecommunications
E Commerce
Technology
Corporate & Finance
Trademarks
Proprietary Rights
Complex Litigation
General Business Law

The Helein Law Group, LLP

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McLean, VA 22102

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2004 AUG -6 PM 3:02

DIVISION OF
COMPETITIVE SERVICES

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August 5, 2004

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DISTRIBUTION CENTER
04 AUG -6 AM 10:35

Via Overnight Mail

Rick Moses
Chief, Bureau of Service Quality
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: New Century Telecom – Docket # 040062-T1

Dear Mr. Moses:

On behalf of New Century Telecom, Inc. (“NCT”), this is in response to your July 27, 2004 letter relating to the settlement negotiations in the above-referenced docket.

Since the docketing of this proceeding, NCT believes that substantial progress has been made in clarifying and correcting the facts and circumstances that contributed to its initiation. Most importantly, NCT has shown that the company does not intend and never has intended to abandon its operations and customers in Florida to avoid addressing questions about its compliance with regulatory requirements.

On the contrary, NCT seeks to settle this case on terms that will permit it to continue operations in Florida. Its ability to do so is, however, directly linked to the economic resources it has to devote to this goal.

NCT’s economic circumstances, coupled with its tenuous position in the hyper-competitive long distance market make it impossible for it accede to three of the Staff requests – the use of live attendants for verification, the recording of all telephone solicitations, and the undertaking of providing financial surety for its performance in some form other than a performance bond.

The validity of NCT’s concerns should come as no surprise. In two back-to-back articles in the Wall Street Journal it was first reported that “Onetime telecom titans AT&T Corp. and MCI Inc.... face a profit-sapping technology shift and a hostile

regulatory environment ... that [have] forced AT&T ... to make a humbling retreat from the consumer long-distance business [and that] ... people who have worked the numbers on AT&T and MCI essentially value the consumer business at zero.”¹

In the second article, it is reported that -

Taking advantage of their continuing control over phone lines into homes, the three top Bell telephone companies are ramping up discounts to attract customers while seeking to ratchet up the rates they charge rivals using their networks.

The upshot: Eight years after Congress mandated more open competition in the local phone business, rivals new and old say they are being financially squeezed ... Already, the Bells’ chief rival, AT&T Corp., has decided to stop competing for residential customers, saying it can’t make any money doing so. At the same time, dozens of smaller phone companies, which flooded into the market after the Telecommunications Act of 1996, are scaling back marketing plans and consulting bankruptcy attorneys.”

Fueling the turmoil is a regulatory environment that has shifted in the Bells’ favor. ...

In the meantime, the bigger Bells – SBC Communications Inc., BellSouth Corp., and Verizon Communications Inc. – are trying to win consumers by slashing prices, to levels even they admit don’t cover their costs. In Michigan, Florida, California, and elsewhere, the big Bells are offering a variety of incentives, including introductory rates of \$7.95 a month for unlimited local phone service or \$100 checks to switch phone companies.²

The added costs and administrative burdens that the three Staff requests would impose make NCT’s tenuous hold on its ability to compete financially and competitively impossible. The micro-management that these requests exhibit is in stark contrast to the apparent freedom the Bell companies enjoy to practice market-clearing tactics such as predatory pricing, price squeezes and consumer bribery.

NCT will not accede to the Staff’s unwarranted rejection of NCT’s selection of InfoCorp, Inc. as the company’s Third Party Verification company (“TPV”). Staff’s rejection is based on a patent negative prejudgment about this company’s assumed association with NCT’s regulatory counsel. InfoCorp is an independent corporation that offers a variety of corporate services to other companies and is seeking to expand its service. Its reputation is inviolate. The company is 100% independent from and

¹ “Bride or Bridesmaid? AT&T and MCI May Compete for Suitors,” Wall Street Journal, August 2, 2004, p. C1, Dennis K. Berman.

² “Bells Mount Two-Way Assault on Local Market,” Wall Street Journal, August 3, 2004, p. A1, Anne Marie Squeo.

unaffiliated with NCT. This is all that is required under the Commission's rules. Absent some compelling evidence of danger to the public interest, the Commission should not be involved in deciding whom NCT may associate with in doing business.

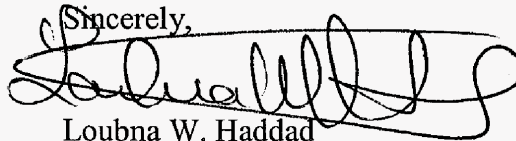
InfoCorp's working relationship with NCT's regulatory counsel does not violate any Commission rule or policy. In fact, that working relationship will assist NCT's compliance with its regulatory obligations and is one of the principal reasons InfoCorp was chosen as NCT's TPV.

It appears that Staff's position on InfoCorp results from similarly erroneous assumptions about the circumstances surrounding NCT's operations and that NCT was engaged with other companies in a concerted effort to reduce or avoid its regulatory obligations or to avoid the consequences of its alleged infraction of some of those obligations. NCT has demonstrated that its mode of operations – namely, the outsourcing of certain back office administrative functions – is based solely on the legitimate principles of economies of scale and the reduction of its operating costs.

Assumptions based on unfounded fears have no place in settlement negotiations. Like any contractual negotiations, there must be an acceptance that both parties are dealing in good faith and with the intent to perform in good faith. NCT's selection of InfoCorp is based on sound business judgments and reflects an increased commitment to improve NCT's regulatory compliance. The Staff has no logical, factual or legal basis to conclude otherwise.

Lastly, your letter indicates that Staff would like to review how many complaints NCT has received and that, to date, Staff has not received this information nor has it been able to review any of NCT's internal complaints. On the contrary, when NCT responded to the Commission's Subpoena Duces Tecum Without Deposition on July 16, 2004, it produced all responsive documents within its possession to the Commission's attorney, Lee Fordham, as instructed. NCT is also in the process of responding to the Public Counsel's discovery requests, which are due on or before August 11th. NCT is not aware of any other related discovery requests, from Staff or otherwise, that are pending.

We look forward to building on the progress realized to date and to achieving final resolution of this matter.

Sincerely,

Loubna W. Haddad
The Helein Law Group, LLP

cc: E.C. Deeno Kitchen, Dobson, Kitchen & Smith
Gary M. Ketchum, Dobson, Kitchen & Smith
Charles Beck, Office of Public Counsel

STATE OF FLORIDA

COMMISSIONERS:
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DIVISION OF COMPETITIVE MARKETS &
ENFORCEMENT
BETH W. SALAK
DIRECTOR
(850) 413-6600

Public Service Commission

July 27, 2004

Ms. Loubna W. Haddad
The Helein Law Group, LLP
8180 Greensboro Drive
Suite 700
McLean, VA 22102

Dear Ms. Haddad:

We have received your proposed settlement agreement signed by Mr. Charles Helein. In the cover letter with the proposed settlement New Century Telecom, Inc. (NCT) listed three exceptions to the items staff suggested New Century should include in its proposed settlement offer.

The first exception is NCT's refusal to discontinue using prerecorded questions for the Third Party Verification (TPV) process. Staff is still concerned that using prerecorded messages and then recording the person's answer "Yes" or "No" is not sufficient to safeguard against fraud. Therefore, staff cannot support NCT's proposal to continue using prerecorded questions on the TPV recording. Also, Rule 25-4.118, (2)(c), Florida Administrative Code, requires that the TPV company be independent and not affiliated with the company in which it is verifying provider changes. According to your July 15, 2004, letter, New Century is transferring its TPV business to InfoCorp, Inc. The State Corporation Commission in the Commonwealth of Virginia, lists Jane M. Scott as an officer of InfoCorp. Jane M. Scott also signed her name as Jane M. Helein-Scott on an application for certification in Florida for World Communications Satellite Systems, Inc. If Ms. Scott is an officer of InfoCorp it appears to staff that NCT's use of InfoCorp as a TPV company would not be in compliance with the rule requirement that the TPV company be "unaffiliated and independent" of NCT. The commonality of Jane M. Scott signing an Annual Report that was submitted on behalf of NCT in 2002 and Ms. Scott currently being listed as an officer of InfoCorp, in staff's opinion, is an affiliation. Whether Ms. Scott's name appearing on these two documents legally proves an affiliation, or not, in staff's opinion, if NCT is serious about settling this docket, NCT should select a TPV company that is totally independent and unaffiliated with NCT or the Helein Law Firm.

Your second exception is in regard to staff's suggestion of recording the sales solicitations to ensure that potential customers are not misled. Instead of recording the conversations, NCT proposes its Company Compliance Program. However, the program only requires random monitoring, with no specificity of how often the monitoring will be done, and it has very weak enforcement when a marketer is found deviating from the company scripts. Much more stringent enforcement and monitoring would have to be proposed before staff could support not requiring recording of the sales solicitations.

Ms. Loubna W. Haddad
Page 2
July 27, 2004

The third exception is NCT's refusal to obtain a Surety Bond in the amount of \$1,000,000. Without the Surety Bond, staff has reason to believe that NCT may not honor its settlement if it were accepted by the Commission. If NCT can propose an alternative to the Surety Bond that has the same effect, staff is willing to review the alternative.

In addition, staff cannot support paragraph three of the proposed settlement that restricts the Commission from pursuing further action against NCT if the Commission obtains information not already in the Commission's possession. As we have stated previously, we would like to review how many complaints NCT has received. To-date, we do not have that information, nor have we been able to review any of NCT's internal complaints. We believe this information is critical.

For the above reasons, staff will not support NCT's proposed settlement as submitted on July 20, 2004. In order to move forward, please reply to staff's concerns by August 6, 2004. If you have questions, please contact me at 850/413-6582.

Sincerely,



Rick Moses
Chief, Bureau of Service Quality

cc: E.C. Deeno Kitchen, Dobson, Kitchen & Smith
Gary M. Ketchum, Dobson, Kitchen & Smith
Charles Beck, Office of Public Counsel
Lee Fordham, Office of the General Counsel
Adam Teitzman, Office of the General Counsel

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July 20, 2004

Via Overnight Mail

Rick Moses
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Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: New Century Telecom – Docket Number 040062-TI

Dear Mr. Moses:

On behalf of New Century Telecom, Inc. ("NCT") this is in response to the items requested be included in the settlement of the above-referenced docket as set forth in your letter dated July 14, 2004.

With three exceptions, NCT is able to agree to the revisions requested. The exceptions are based solely on the cost required to meet the requested commitments. NCT simply does not have the funds to cover the costs associated with these items.

(1) NCT agrees to discontinue using its existing third party verification (TPV) company and to use another unaffiliated TPV company. This transition is already in progress. However, because of the costs involved and the fact that in the dealings NCT has had with independent TPV companies has never disclosed the availability of live attendant verifications, NCT cannot cease using prerecorded questions on the TPVs. NCT is further concerned that by ceasing use of prerecorded questions, it opens itself up to possible allegations of manipulating the verification process, either directly or indirectly. Prerecorded questions, with auto-attendant operation, is in NCT's experience the most reliable method to insure the independence of the verification process. NCT does agree that the prerecorded questions will conform to the verification script that the Staff agrees is compliant with regulatory requirements.

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DIVISION OF
COMPETITIVE SERVICES

(2) Costs also prohibit NCT from being able to record each telemarketing solicitation. The cost of equipment and its maintenance, and the cost of storage and retrieval of each solicitation are both financially and logistically prohibitive. NCT knows of no other carrier that records its sales solicitations and by adding such costs to NCT's operations, NCT's ability as a small carrier to compete will be impaired. NCT's monitoring program with attendant disciplinary consequences as set forth in the attached Compliance Program will provide effective control of NCT's telemarketing operations and at a cost NCT can afford and stay competitive.

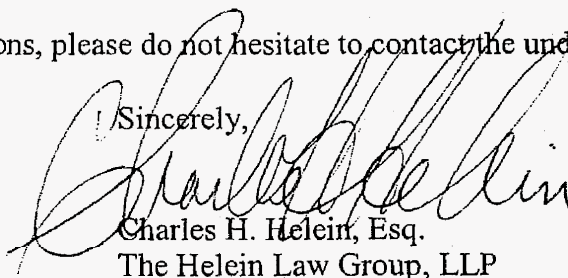
(3) NCT cannot afford the \$1,000,000 Surety Bond. Earlier this year it was forced to abandon an embryonic amount of operations in another state because it could not financially qualify with any bonding company for a post-certification bond in an amount that was but a fraction of the surety requested in this instance.

NCT submits that the terms upon which agreement has been reached establish a working arrangement that will serve the public interest, permit a small carrier to compete in the Florida market and avoid any barriers to its participation in that market.

Attached is the revised Settlement Agreement that incorporates Staff's requests subject to the above exceptions. The revised document also replaces the references to Staff's "Proposed Agency Action" with the word "Recommendation," as this is the more accurate description. Also attached is a copy of NCT's Compliance Program, per Staff's request.

Should you have any questions, please do not hesitate to contact the undersigned.

Sincerely,



Charles H. Helein, Esq.
The Helein Law Group, LLP

cc: E.C. Deeno Kitchen, Dobson, Kitchen & Smith
Gary M. Ketchum, Dobson, Kitchen & Smith
Charles Beck, Office of Public Counsel

NEW CENTURY TELECOM, INC.
TELEMARKETING COMPLIANCE PROGRAM

The following sets forth New century Telecom, Inc.'s (hereinafter "Company) policy of mandatory compliance with applicable federal and state rules and regulations governing the telemarketing and switching of telephone service. The Company's policy consists of the following rules, monitoring procedures and disciplinary actions governing the telemarketing of prospective customers.

1. Each telemarketer is given and required to maintain a copy of this Compliance Program.
2. Each telemarketer is examined on his/her knowledge and understanding of this Compliance Program.
3. Each telemarketer is given a copy and required to read, understand and adhere to the marketing script attached hereto describing the Company's services and charges, which may be amended by the Company from time to time.
4. Each telemarketer is given and required to maintain a copy of the Federal Communications Commission ("FCC") rules governing the switching of telephone services as attached hereto.
5. Each telemarketer is given and required to maintain a copy of the federal Telemarketing Sales Rule as attached hereto.
6. Each telemarketer is given and required to maintain a copy of the rules governing the switching of telephone services of the State of Florida as attached hereto.
7. Each telemarketer is given and required to maintain a copy of the federal do-not-call laws, as well as the do-not-call laws of the State of Florida as attached hereto.
8. Each telemarketer is informed that the Company monitors and evaluates compliance with the Company's Compliance Program using individuals to listen in on calls, who patrol the telemarketing area for purposes of overhearing the telemarketers' portions of calls and to pose questions about the Compliance Program.
9. Each telemarketer is instructed to disclose any information he/she obtains that implicates the Company's Compliance Program.
10. All monitoring of calls and patrols of work area is conducted at random and without notification.
11. Company has established a program to cross check by BTN the telemarketer associated with any complaint based on any aspect of the telemarketing.

12. Should a telemarketer be found to have (i) substantially deviated from Company-provided scripts, (ii) misled or deceived any prospective customer, (iii) acted other than in substantial compliance with any applicable FCC or state rule, or (iv) been responsible for a complaint based on the marketing/sales event, a written report shall be provided detailing the error, specifying the applicable requirement and issuing a warning that a repetition may lead to further disciplinary action.
13. Any telemarketer found to have again engaged in the conduct listed in paragraph 12 shall receive a written report as outlined and shall be suspended for a period of 3 days.
14. Any telemarketer found to have engaged in the conduct listed in paragraph 12 for a third time shall be terminated and subject to forfeiture of any outstanding commissions related to such conduct.*
15. Each telemarketer must sign his/her copy of Company's Compliance Program as provided below.
16. Company shall review and update its Compliance Program as necessary to maintain compliance with federal and state telemarketing and verification rules and regulations.

SEEN AND AGREED:

I, _____, hereby acknowledge and agree that I have received, reviewed and understand the New Century Telecom, Inc. Compliance Program; that I am obligated to adhere to and comply with its terms; and that any failure to comply with the Compliance Program will result in disciplinary action, including termination of my services.

Printed Name

Date

Signature

* This "3 and out" rule is necessitated to protect New Century Telecom, Inc. against allegations of wrongful termination based on a variety of legal theories such as age or gender discrimination, defamation, and so forth.

**SAMPLE SALES SCRIPT
NEW CENTURY SCRIPT**

HELLO MR./MRS. _____, THIS IS _____ CALLING FROM NEW CENTURY TELECOM.

WE ARE CALLING TO OFFER YOU OUR LOW RATES FOR LONG DISTANCE TELEPHONE SERVICE INCLUDING INTERSTATE RATES AND INTRASTATE RATES.

ARE YOU DULY AUTHORIZED BY THE TELEPHONE ACCOUNT OWNER TO MAKE CHANGES TO AND/OR INCUR CHARGES ON THE TELEPHONE ACCOUNT?
(CUSTOMER MUST SAY "YES")

AND YOU ARE OVER THE AGE OF 18? **(CUSTOMER MUST SAY "YES")**
(CONTINUE ONLY IF ANSWER IS YES TO BOTH QUESTIONS, IF NO, EXPLAIN THAT WE WILL CALL AT A LATER DATE)

WE ARE CURRENTLY OFFERING A LOW RATE OF _____ PER MINUTE FOR STATE-TO-STATE AND IN-STATE CALLS BETWEEN THE HOURS OF 8:00 AM TO 6:00 PM AND _____ PER MINUTE STATE-TO-STATE AND IN-STATE BETWEEN THE HOURS OF 6:01 PM AND 7:59 AM SEVEN (7) DAYS A WEEK. THESE RATES CARRY A RECURRING **MONTHLY FEE OF _____**. WE ALSO OFFER VERY COMPETITIVE INTERNATIONAL RATES THAT CAN BE VIEWED ON OUR WEB PAGE AT WWW.NEWCENTURYTELECOM.COM. YOUR LOCAL PHONE COMPANY MAY ALSO CHARGE A SMALL FEE TO CHANGE YOUR LONG DISTANCE CARRIER TO NEW CENTURY.

PLEASE UNDERSTAND THAT NEW CENTURY IS NOT AFFILIATED WITH YOUR LOCAL TELEPHONE COMPANY ALTHOUGH YOUR NEW RATES WILL BE BILLED ON YOUR LOCAL TELEPHONE BILL, AS BILLED ON BEHALF OF ILD FOR NEW CENTURY.

MR./MRS. _____, IF THIS SOUNDS GOOD TO YOU, I WILL PUT YOU THRU A VERIFICATION PROCESS THAT WILL VERIFY AND RECORD SOME BASIC INFORMATION TO COMPLETE THE ORDER, THIS WILL ONLY TAKE A FEW SECONDS.

MR./MRS. _____, THANK YOU VERY MUCH FOR YOUR ORDER. THERE IS NO CONTRACT AND THE SERVICE CAN BE CANCELLED AT ANY TIME WITHOUT PENALTY. SHOULD YOU WANT TO CANCEL OR IF YOU HAVE ANY QUESTIONS OR CONCERNS, PLEASE FEEL FREE TO CONTACT OUR CUSTOMER SERVICE DEPARTMENT AT 1-800-711-1322, YOU CAN ALSO CONTACT US ON OUR WEB PAGE AT WWW.NEWCENTURYTELECOM.COM.

THANK YOU VERY MUCH AND HAVE A GREAT DAY.

VENTAS
NEW CENTURY SCRIPT

BUENOS DIAS, TARDES SR. SRA. _____, ESTE/A ES _____ Y LLAMO DE LA COMPANIA NEW CENTURY TELECOM.

LE ESTAMOS LLAMANDO PARA OFRECERLE NUESTRAS BAJAS TARIFAS DE LARGA DISTANCIA PARA LLAMADAS DENTRO Y FUERA DEL ESTADO.

ES USTED UNA PERSONA AUTORIZADA POR LA PERSONA DUENA DEL TELEFONO PARA REALIZAR CAMBIOS O AUTORIZAR CARGOS EN LA CUENTA TELEFONICA?
(CLIENTE DEBE DECIR "SI" PARA CONTINUAR)

Y ES USTED MAYOR DE 18 ANOS **(CLIENTE DEBE DECIR "SI" PARA CONTINUAR)**
(CONTINUE UNICAMENTE SI LA RESPUESTA A LAS DOS PREGUNTAS ANTERIORES FUERON SI, SI NO INDIQUE QUE VOLVERA A LLAMAR EN OTRO MOMENTO)

ACTUALMENTE ESTAMOS OFRECIENDO NUESTRO NUEVO PLAN DE _____ EL MINUTO POR LLAMADAS DE ESTADO A ESTADO Y DENTRO DE SU ESTADO EN HORARIO DE 8:00AM A 6:00PM Y _____ **EL MINUTO POR LLAMADAS DE ESTADO A ESTADO Y DENTRO DE SU ESTADO EN EL HORARIO DE 6:01PM A 7:59AM, LOS SIETE (7) DIAS DE LA SEMANA. ESTA TARIFA INLCUYE UN CARGO MENSUAL DE _____ ASI MISMO OFRECEMOS TARIFAS INTERNACIONALES ALTAMENTE COMPETITIVAS LAS MISMAS QUE PUEDEN SER REVISADAS EN NUESTRA PAGINA WEB WWW.NEWCENTURYTELECOM.COM SU CAMPAÑA LOCAL PUEDE ADICIONAR UN PEQUEÑO CARGO POR CAMBIAR SU SERVICIO DE LARGADISTANCIA CON NEW CENTURY.**

POR FAVOR ENTIENDA QUE NEW CENTURY NO ESTA AFILIADA CON SU COMPANIA LOCAL A PESAR DE QUE SU NUEVO TARIFARIO SERA REGISTRADO EN SU RECIBO DE LA COMPANIA LOCAL. SU RECIBO SE REGISTRARA A NOMBRE DE ILD EN REPRESENTACION DE NEW CENTURY.

SR/SRA _____, SI ESTO LE PARECE BIEN LE COMUNICARE A MI OPERADORA PARA INICIAR EL PROCESO DE VERIFICACION PARA VERIFICAR Y GRABAR ALGUNA INFORMACION BASICA PARA PODER COMPLETAR SU ORDEN, SOLO LE TOMARA ALGUNOS SEGUNDOS.

SR/SRA _____, MUCHAS GRACIAS POR SU ORDEN. NO EXISTE NINGUN CONTRATO Y EL SERVICIO PUEDE SER CANCELADO EN CUALQUIER MOMENTO SIN NINGUNA PENALIDAD. SI UD. DESEARA CANCELARO SI TUVIERA ALGUNA CLASE DE PREGUNTAS POR FAVOR SIENTASE LIBRE DE CONTRACTAR NUESTRO DEPARTAMENTO DE ATENCION AL CLIENTE AL 1-800-711-1322, O SI LO PREFIERE-- LO PUDED HACER POR INTERNET EN NUESTRA PAGINA WEB WWW.NEWCENTURYTELECOM.COM.

MUCHAS GRACIAS Y QUE TENGA UN BUEN DIA.

FCC Rules Governing Switching of Telephone Services

§ 64.1110

47 CFR Ch. I (10-1-03 Edition)

§ 64.1110 State notification of election to administer FCC rules.

(a) *Initial Notification.* State notification of an intention to administer the Federal Communication Commission's unauthorized carrier change rules and remedies, as enumerated in §§ 64.1100 through 64.1190, shall be filed with the Commission Secretary in CC Docket No. 94-129 with a copy of such notification provided to the Consumer Information Bureau Chief. Such notification shall contain, at a minimum, information on where consumers should file complaints, the type of documentation, if any, that must accompany a complaint, and the procedures the state will use to adjudicate complaints.

(b) *Withdrawal of Notification.* State notification of an intention to discontinue administering the Federal Communication Commission's unauthorized carrier change rules and remedies, as enumerated in §§ 64.1100 through 64.1190, shall be filed with the Commission Secretary in CC Docket No. 94-129 with a copy of such amended notification provided to the Consumer Information Bureau Chief. Such discontinuance shall become effective 60 days after the Commission's receipt of the state's letter.

[65 FR 47691, Aug. 3, 2000]

§ 64.1120 Verification of orders for telecommunications service.

(a) No telecommunications carrier shall submit or execute a change on the behalf of a subscriber in the subscriber's selection of a provider of telecommunications service except in accordance with the procedures prescribed in this subpart. Nothing in this section shall preclude any State commission from enforcing these procedures with respect to intrastate services.

(1) No submitting carrier shall submit a change on the behalf of a subscriber in the subscriber's selection of a provider of telecommunications service prior to obtaining:

(i) Authorization from the subscriber, and

(ii) Verification of that authorization in accordance with the procedures prescribed in this section. The submitting carrier shall maintain and preserve

records of verification of subscriber authorization for a minimum period of two years after obtaining such verification.

(2) An executing carrier shall not verify the submission of a change in a subscriber's selection of a provider of telecommunications service received from a submitting carrier. For an executing carrier, compliance with the procedures described in this part shall be defined as prompt execution, without any unreasonable delay, of changes that have been verified by a submitting carrier.

(3) Commercial mobile radio services (CMRS) providers shall be excluded from the verification requirements of this part as long as they are not required to provide equal access to common carriers for the provision of telephone toll services, in accordance with 47 U.S.C. 332(c)(8).

(b) Where a telecommunications carrier is selling more than one type of telecommunications service (e.g., local exchange, intraLATA/intrastate toll, interLATA/interstate toll, and international toll) that carrier must obtain separate authorization from the subscriber for each service sold, although the authorizations may be made within the same solicitation. Each authorization must be verified separately from any other authorizations obtained in the same solicitation. Each authorization must be verified in accordance with the verification procedures prescribed in this part.

(c) No telecommunications carrier shall submit a preferred carrier change order unless and until the order has been confirmed in accordance with one of the following procedures:

(1) The telecommunications carrier has obtained the subscriber's written or electronically signed authorization in a form that meets the requirements of § 64.1130; or

(2) The telecommunications carrier has obtained the subscriber's electronic authorization to submit the preferred carrier change order. Such authorization must be placed from the telephone number(s) on which the preferred carrier is to be changed and must confirm the information in paragraph (a)(1) of

this section. Telecommunications carriers electing to confirm sales electronically shall establish one or more toll-free telephone numbers exclusively for that purpose. Calls to the number(s) will connect a subscriber to a voice response unit, or similar mechanism, that records the required information regarding the preferred carrier change, including automatically recording the originating automatic number identification; or

(3) An appropriately qualified independent third party has obtained, in accordance with the procedures set forth in paragraphs (c)(3)(i) through (c)(3)(iv) of this section, the subscriber's oral authorization to submit the preferred carrier change order that confirms and includes appropriate verification data (e.g., the subscriber's date of birth or social security number). The independent third party must not be owned, managed, controlled, or directed by the carrier or the carrier's marketing agent; must not have any financial incentive to confirm preferred carrier change orders for the carrier or the carrier's marketing agent; and must operate in a location physically separate from the carrier or the carrier's marketing agent.

(i) *Methods of third party verification.* Automated third party verification systems and three-way conference calls may be used for verification purposes so long as the requirements of paragraphs (c)(3)(ii) through (c)(3)(iv) of this section are satisfied.

(ii) *Carrier initiation of third party verification.* A carrier or a carrier's sales representative initiating a three-way conference call or a call through an automated verification system must drop off the call once the three-way connection has been established.

(iii) *Requirements for content and format of third party verification.* All third party verification methods shall elicit, at a minimum, the identity of the subscriber; confirmation that the person on the call is authorized to make the carrier change; confirmation that the person on the call wants to make the carrier change; the names of the carriers affected by the change (not including the name of the displaced carrier); the telephone numbers to be switched; and the types of service in-

involved. Third party verifiers may not market the carrier's services by providing additional information, including information regarding preferred carrier freeze procedures.

(iv) *Other requirements for third party verification.* All third party verifications shall be conducted in the same language that was used in the underlying sales transaction and shall be recorded in their entirety. In accordance with the procedures set forth in 64.1120(a)(1)(ii), submitting carriers shall maintain and preserve audio records of verification of subscriber authorization for a minimum period of two years after obtaining such verification. Automated systems must provide consumers with an option to speak with a live person at any time during the call.

(4) Any State-enacted verification procedures applicable to intrastate preferred carrier change orders only.

(d) Telecommunications carriers must provide subscribers the option of using one of the authorization and verification procedures specified in §64.1120(c) in addition to an electronically signed authorization and verification procedure under 64.1120(c)(1).

(e) A telecommunications carrier may acquire, through a sale or transfer, either part or all of another telecommunications carrier's subscriber base without obtaining each subscriber's authorization and verification in accordance with §64.1120(c), provided that the acquiring carrier complies with the following streamlined procedures. A telecommunications carrier may not use these streamlined procedures for any fraudulent purpose, including any attempt to avoid liability for violations under part 64, subpart K of the Commission rules.

(1) No later than 30 days before the planned transfer of the affected subscribers from the selling or transferring carrier to the acquiring carrier, the acquiring carrier shall file with the Commission's Office of the Secretary a letter notification in CC Docket No. 00-257 providing the names of the parties to the transaction, the types of telecommunications services to be provided to the affected subscribers, and

the date of the transfer of the subscriber base to the acquiring carrier. In the letter notification, the acquiring carrier also shall certify compliance with the requirement to provide advance subscriber notice in accordance with § 64.1120(e)(3), with the obligations specified in that notice, and with other statutory and Commission requirements that apply to this streamlined process. In addition, the acquiring carrier shall attach a copy of the notice sent to the affected subscribers.

(2) If, subsequent to the filing of the letter notification with the Commission required by § 64.1120(e)(1), any material changes to the required information should develop, the acquiring carrier shall file written notification of these changes with the Commission no more than 10 days after the transfer date announced in the prior notification. The Commission reserves the right to require the acquiring carrier to send an additional notice to the affected subscribers regarding such material changes.

(3) Not later than 30 days before the transfer of the affected subscribers from the selling or transferring carrier to the acquiring carrier, the acquiring carrier shall provide written notice to each affected subscriber of the information specified. The acquiring carrier is required to fulfill the obligations set forth in the advance subscriber notice. The advance subscriber notice shall be provided in a manner consistent with 47 U.S.C. 255 and the Commission's rules regarding accessibility to blind and visually-impaired consumers, 47 CFR 6.3, 6.5 of this chapter. The following information must be included in the advance subscriber notice:

(i) The date on which the acquiring carrier will become the subscriber's new provider of telecommunications service,

(ii) The rates, terms, and conditions of the service(s) to be provided by the acquiring carrier upon the subscriber's transfer to the acquiring carrier, and the means by which the acquiring carrier will notify the subscriber of any change(s) to these rates, terms, and conditions.

(iii) The acquiring carrier will be responsible for any carrier change charges associated with the transfer,

(iv) The subscriber's right to select a different preferred carrier for the telecommunications service(s) at issue, if an alternative carrier is available,

(v) All subscribers receiving the notice, even those who have arranged preferred carrier freezes through their local service providers on the service(s) involved in the transfer, will be transferred to the acquiring carrier, unless they have selected a different carrier before the transfer date; existing preferred carrier freezes on the service(s) involved in the transfer will be lifted; and the subscribers must contact their local service providers to arrange a new freeze.

(vi) Whether the acquiring carrier will be responsible for handling any complaints filed, or otherwise raised, prior to or during the transfer against the selling or transferring carrier, and

(vii) The toll-free customer service telephone number of the acquiring carrier.

[65 FR 47691, Aug. 3, 2000, as amended at 66 FR 12892, Mar. 1, 2001; 66 FR 28124, May 22, 2001; 68 FR 19159, Apr. 18, 2003]

§ 64.1130 Letter of agency form and content.

(a) A telecommunications carrier may use a written or electronically signed letter of agency to obtain authorization and/or verification of a subscriber's request to change his or her preferred carrier selection. A letter of agency that does not conform with this section is invalid for purposes of this part.

(b) The letter of agency shall be a separate document (or an easily separable document) or located on a separate screen or webpage containing only the authorizing language described in paragraph (e) of this section having the sole purpose of authorizing a telecommunications carrier to initiate a preferred carrier change. The letter of agency must be signed and dated by the subscriber to the telephone line(s) requesting the preferred carrier change.

(c) The letter of agency shall not be combined on the same document, screen, or webpage with inducements of any kind.

(d) Notwithstanding paragraphs (b) and (c) of this section, the letter of

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 solicitation 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)(i)(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 form 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

⁶ For 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
 NFL—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
 ABLA—American Bankers Insurance Association
 American Blind—American Blind Products, Inc.
 ACE—American Council on Education
 ADA—American Diabetes Association
 AmEx—American Express

AFFSA—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
 Army—Army, 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, OFL-A 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

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, Inc.
 Synergy Solutions—Synergy Solutions, Inc.
 The Sytel—Sytel Limited
 Tale—Tate & Associates
 Telephone Communications Corp
 TTD—Telecommunications for the Deaf, Inc.
 TlediDirect—TlediDirect International, Inc.
 Telfund—Telfund, Inc.
 Telformance—Telformance USA
 TRC—Tale-Response Center
 Telsar—Telsar 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
 Unway—Unway of Coastal Georgia
 Verizon—Verizon Companies
 Virginia—Virginia Attorney General
 VISA—VISA U.S.A., Inc.
 VISA—VATIS, 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.
 WPIMA—Yellow Pages, Integrated Media Association (YPIMA)
 AARP-Supp.—AARP
 AOP-Supp.—Aircraft Owners and Pilots Association (Marsha Mason-Thies)
 Allstate-Supp.—Allstate Life Insurance Company
 Community Bankers-Supp.—America's Association
 AICR-Supp.—The American Institute for Cancer Research (Kadryn L. Ward)
 Red Cross-Supp.—American Red Cross
 ARDA-Supp.—The American Resort Development Association (Yarlin DePoy and Stratis Pridgeon)
 A7A-Supp.—American Teleservices Association
 Associations-Supp.—Associations Letter Avina (Abe Chen)
 Bond-Supp.—Bond, The Honorable Christopher S. (U.S. Senate)

Supplemental Comments

SO-MD—Special Olympics Maryland
 SO-KY—Special Olympics Kentucky
 SO-IA—Special Olympics Iowa
 SO-CN—Special Olympics Connecticut
 SO-CO—Special Olympics Colorado
 California
 SO-CA—Special Olympics Southern
 SO-AZ—Special Olympics Arizona
 Special Olympics—Special Olympics, Inc. Center
 Southern Poverty—Southern Poverty Law Center
 Southernland—Southernland, Inc.
 Association
 SIIA—Software & Information Industry Representatives)
 SHARE—SHARE
 Honorable F. James, Jr. (U.S. House of Representatives)
 Sensenbrenner—Sensenbrenner, The (U.S. House of Representatives)
 Schrock—Schrock, The Honorable Edward L. SBC—SBC Communications Inc.
 Reese—Reese Brothers, Inc.
 Reed Elsevier—Reed Elsevier Inc.
 Redish—Redish, Martin H., Esq.
 House of Representatives)
 Ramsad—Ramsad, The Honorable Jim (U.S. Foundation, Military Order of Purple Heart—Purple Heart Service
 PMA—Promotion Marketing Association
 Angel Food—Project Angel Food Company
 PCIC—Progressive Casualty Insurance
 BFP—Progressive Business Publications
 Proctor—Proctor, Alan
 Private Citizen—Private Citizen, Inc.
 PRC—Privacy Rights Clearinghouse
 possibleNOW—possibleNOW.com, Inc. of Michigan
 Michigan Police—Police Officers Association
 PLP—Personal Legal Plans, Inc.
 Pelland—Pelland, Paul
 of Representatives)
 Paul—Paul, The Honorable Ron (U.S. House of Representatives)
 Patrick—Patrick, George W.
 (U.S. House of Representatives)
 Pascrell—Pascrell, The Honorable Bill, Jr.
 Paramount—Paramount Lists, Inc.
 PVA—Paralyzed Veterans of America
 Pacesetter—Pacesetter Corporation
 OTC—Ohio Troopers Coalition
 OSU—Ohio State University
 NSDI—NSDI Teleperformance
 Charitable Coalition
 Not-For-Profit Coalition—Not-For-Profit and NC Zoo—North Carolina Zoological Society LLC
 NATN—North American Telephone Network
 Noble—Noble Systems
 Noble Systems
 Representatives)
 and Eric Cantor (U.S. House of Representatives)
 Max Sandlin, Walter Jones, Ronnie Shows, joint letter from: The Honorable Bob Ney, Ney, Sandlin, Jones, Shows and Cantor—Nexel—Nexel Communications, Inc.
 NAA—Newspaper Association of America Protection Board
 NYSCPB—New York State Consumer Foundation, Inc.
 NJ Police—New Jersey Police Officers Telecommunications Committee
 (CNO) Utility, Cable &
 New Orleans—New Orleans, City Council of Neutral—Neutral, Inc.
 Representatives)
 George R., Jr. (U.S. House of Representatives)
 Nethercutt—Nethercutt, The Honorable
 SO-MT—Special Olympics Missouri
 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 Albig)
 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.—Federalation 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
 MFA-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. Memberships-Supp.—Memberships 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
 WFF-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 fundraisers. 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 fundraisers) 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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³The 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).

Florida Rules Governing Switching of Telephone Service
25-4.118 Local, Local Toll, or Toll Provider Selection.

(1) The provider of a customer shall not be changed without the customer's authorization. The customer or other authorized person may change the residential service. For the purposes of this section, the term "other authorized person" shall mean a person 18 years of age or older within the same household. The person designated as the contact for the local telecommunications company, an officer of the company, or the owner of the company is the person authorized to change business service. A LEC shall accept a provider change request by telephone call or letter directly from its customers; or

(2) A LEC shall accept a change request from a certificated LP or IXC acting on behalf of the customer. A certificated LP or IXC shall submit a change request only if it has first certified to the LEC that at least one of the following actions has occurred:

(a) The provider has a letter of agency (LOA), as described in (3), from the customer requesting the change;

(b) The provider has received a customer-initiated call, and beginning six months after the effective date of this rule has obtained the following:

1. The information set forth in (3)(a)1. through 5.; and
2. Verification data including at least one of the following:
 - a. The customer's date of birth;
 - b. The last four digits of the customer's social security number; or
 - c. The customer's mother's maiden name.

(c) A firm that is independent and unaffiliated with the provider claiming the subscriber has verified the customer's requested change by obtaining the following:

1. The customer's consent to record the requested change or the customer has been notified that the call will be recorded; and
2. Beginning six months after the effective date of this rule an audio recording of the information stated in subsection (3)(a)1. through 5.; or

(d) 1. The provider has received a customer's change request, and has responded by mailing an informational package that shall include the following:

- a. A notice that the information is being sent to confirm that a customer's request to change the customer's telecommunications provider was obtained;
- b. A description of any terms, conditions, or charges that will be incurred;

c. The name, address, and telephone number of both the customer and the soliciting company;

d. A postcard which the customer can use to confirm a change request;

e. A clear statement that the customer's local, local toll, or toll provider will be changed to the soliciting company only if the customer signs and returns the postcard confirming the change; and

f. A notice that the customer may contact by writing the Commission's Division of Consumer Affairs, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, or by calling, toll-free (TDD & Voice) 1-800-342-3552, for consumer complaints.

2. The soliciting company shall submit the change request to the LP only if it has first received the postcard that must be signed by the customer.

(3)(a) The LOA submitted to the company requesting a provider change shall include the following information (each shall be separately stated):

1. Customer's billing name, address, and each telephone number to be changed;

2. Statement clearly identifying the certificated name of the provider and the service to which the customer wishes to subscribe, whether or not it uses the facilities of another company;

3. Statement that the person requesting the change is authorized to request the change;

4. Statement that the customer's change request will apply only to the number on the request and there must only be one presubscribed local, one presubscribed local toll, and one presubscribed toll provider for each number;

5. Statement that the LEC may charge a fee for each provider change;

6. Customer's signature and a statement that the customer's signature or endorsement on the document will result in a change of the customer's provider.

(b) The soliciting company's provider change fee statement, as described in (a)5. above, shall be legible, printed in boldface at least as large as any other text on the page, and located directly above the signature line.

(c) The soliciting company's provider change statement, as described in (a)6. above, shall be legible, printed in boldface at least as large as any other text on the page, and located directly below the signature line.

(4) The LOA shall not be combined with inducements of any kind on the same document. The document as a whole must not be misleading or deceptive. For purposes of this rule,

the terms "misleading or deceptive" mean that, because of the style, format or content of the document or oral statements, it would not be readily apparent to the person signing the document or providing oral authorization that the purpose of the signature or the oral authorization was to authorize a provider change, or it would be unclear to the customer who the new provider would be; that the customer's selection would apply only to the number listed and there could only be one provider for that number; or that the customer's LP might charge a fee to switch service providers. If any part of the LOA is written in a language other than English, then it must contain all relevant information in each language. Notwithstanding the above, the LOA may be combined with checks that contain only the required LOA language as prescribed in subsection (3) of this section and the information necessary to make the check a negotiable instrument. The LOA check shall not contain any promotional language or material. The LOA check shall contain in easily readable, bold-face type on the front of the check, a notice that the consumer is authorizing a primary carrier change by signing the check. The LOA language shall be placed near the signature line on the back of the check.

(5) A prospective provider must have received the signed LOA before initiating the change.

(6) Information obtained under (2)(a) through (d) shall be maintained by the provider for a period of one year.

(7) Customer requests for other services, such as travel card service, do not constitute a provider change.

(8) Charges for unauthorized provider changes and all 1+ charges billed on behalf of the unauthorized provider for the first 30 days or first billing cycle, whichever is longer, shall be credited to the customer by the company responsible for the error within 45 days of notification to the company by the customer, unless the claim is false. After the first 30 days up to 12 months, all 1+ charges over the rates of the preferred company will be credited to the customer by the company responsible for the error within 45 days of notification to the company by the customer, unless the claim is false. Upon notice from the customer of an unauthorized provider change, the LEC shall change the customer back, or to another company of the customer's choice. The change must be made within 24 hours excepting Saturday, Sunday, and holidays, in which case the change shall be made by the end of the next business day. The provisions of this subsection apply whether or not the change is deemed to be an unauthorized carrier change infraction under subsection (13).

(9) The company shall provide the following disclosures when soliciting a change in service from a customer:

(a) Identification of the company;

(b) That the purpose of the visit or call is to solicit a change of the provider of the customer:

(c) That the provider shall not be changed unless the customer authorizes the change; and

(d) All information as referenced in Rule 25-24.490(3).

(10) During telemarketing and verification, no misleading or deceptive references shall be made while soliciting for subscribers.

(11) A provider must provide the customer a copy of the authorization it relies upon in submitting the change request within 15 calendar days of request.

(12) Each provider shall maintain a toll-free number for accepting complaints regarding unauthorized provider changes, which may be separate from its other customer service numbers, and must be answered 24 hours a day, seven days a week. If the number is a separate toll-free number, beginning six months after the effective date of this rule new customers must be notified of the number in the information package provided to new customers or on their first bill. The number shall provide a live operator or shall record end user complaints made to the customer service number to answer incoming calls. A combination of live operators and recorders may be used. If a recorder is used, the company shall attempt to contact each complainant no later than the next business day following the date of recording and for three subsequent days unless the customer is reached. If the customer is not reached, the company shall send a letter to the customer's billing address informing the customer as to the best time the customer should call or provide an address to which correspondence should be sent to the company. Beginning six months after the effective date of this rule, a minimum of 95 percent of all call attempts shall be transferred by the system to a live attendant or recording device prepared to give immediate assistance within 60 seconds after the last digit of the telephone number listed as the customer service number for unauthorized provider change complaints was dialed; provided that if the call is completed within 15 seconds to an interactive, menu-driven, voice response unit, the 60-second answer time shall be measured from the point at which the customer selects a menu option to be connected to a live attendant. Station busies will not be counted as completed calls. The term "answer" as used in this subsection means more than an acknowledgment that the customer is waiting on the line. It shall mean the provider is ready to render assistance or accept the information necessary to process the call.

(13)(a) A company shall not be deemed to have committed an unauthorized carrier change infraction if the company, including its agents and contractors, did the following:

1. Followed the procedures required under subsection (2) with respect to the person requesting the change;
2. Followed these procedures in good faith; and
3. Complied with the credit procedures of subsection (8).

(b) In determining whether fines or other remedies are appropriate for an unauthorized carrier change infraction, the Commission shall consider the actions taken by the company to mitigate or undo the effects of the unauthorized change. These actions include but are not limited to whether the company, including its agents and contractors:

1. Followed the procedures required under subsection (2) with respect to the person requesting the change in good faith;
2. Complied with the credit procedures of subsection (8);
3. Took prompt action in response to the unauthorized change;
4. Reported to the Commission any unusual circumstances that might have adversely affected customers such as system errors or inappropriate marketing practices that resulted in unauthorized changes and the remedial action taken;
5. Reported any unauthorized provider changes concurrently affecting a large number of customers; or
6. Took other corrective action to remedy the unauthorized change appropriate under the circumstances.

Specific Authority 350.127(2) F.S.

Law Implemented 364.01, 364.03, 364.19, 364.285 F.S.

History: New 3-4-92, Amended 5-31-95, 7-20-98, 12/28/98.

Federal Do-Not-Call Law

Federal Communications Commission

§ 64.1200

the carrier provides materially false or incomplete information in its FCC Form 499-A or otherwise fails to comply with paragraphs (a), (b), and (c) of this section.

(f) *Imposition of fine.* After notice and opportunity to respond, the Commission may impose a fine on a carrier that is subject to the registration requirement pursuant to paragraph (a) of this section if that carrier fails to submit an FCC Form 499-A in accordance with paragraphs (a), (b), and (c) of this section.

(g) *Changes in information.* A carrier must notify the Commission of any changes to the information provided pursuant to paragraph (b) of this section within no more than one week of the change. Carriers may satisfy this requirement by filing the relevant portion of FCC Form 499-A in accordance with the Instructions to such form.

(h) *Duty to confirm registration of other carriers.* The Commission shall make available to the public a comprehensive listing of registrants and the information that they have provided pursuant to paragraph (b) of this section. A telecommunications carrier providing telecommunications service for resale shall have an affirmative duty to ascertain whether a potential carrier-customer (*i.e.*, reseller) that is subject to the registration requirement pursuant to paragraph (a) of this section has filed an FCC Form 499-A with the Commission prior to offering service to that carrier-customer. After notice and opportunity to respond, the Commission may impose a fine on a carrier for failure to confirm the registration status of a potential carrier-customer before providing that carrier-customer with service.

[66 FR 12894, Mar. 1, 2001]

Subpart L—Restrictions on Telemarketing and Telephone Solicitation

§ 64.1200 Delivery restrictions.

(a) No person or entity may:

(1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an

automatic telephone dialing system or an artificial or prerecorded voice,

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

(2) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call,

(i) Is made for emergency purposes,

(ii) Is not made for a commercial purpose,

(iii) Is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation,

(iv) Is made to any person with whom the caller has an established business relationship at the time the call is made, or

(v) Is made by or on behalf of a tax-exempt nonprofit organization.

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine,

(i) For purposes of paragraph (a)(3) of this section, a facsimile advertisement is not "unsolicited" if the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that includes the facsimile number to which any advertisements may be sent and clearly indicates the recipient's consent to receive such facsimile advertisements from the sender.

(ii) A facsimile broadcaster will be liable for violations of paragraph (a)(3) of this section if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails

to take steps to prevent such facsimile transmissions.

(4) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(5) Disconnect an unanswered telemarketing call prior to at least 15 seconds or four (4) rings.

(6) Abandon more than three percent of all telemarketing calls that are answered live by a person, measured over a 30-day period. A call is "abandoned" if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting. Whenever a sales representative is not available to speak with the person answering the call, that person must receive, within two (2) seconds after the called person's completed greeting, a prerecorded identification message that states only the name and telephone number of the business, entity, or individual on whose behalf the call was placed, and that the call was for "telemarketing purposes." The telephone number so provided must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign. The telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. The seller or telemarketer must maintain records establishing compliance with paragraph (a)(6) of this section.

(i) A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line that is assigned to a person who either has granted prior express consent for the call to be made or has an established business relationship with the caller shall not be considered an abandoned call if the message begins within two (2) seconds of the called person's completed greeting.

(ii) Calls made by or on behalf of tax-exempt nonprofit organizations are not covered by paragraph (a)(6) of this section.

(7) Use any technology to dial any telephone number for the purpose of determining whether the line is a facsimile or voice line.

(b) All artificial or prerecorded telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated, and

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign.

(c) No person or entity shall initiate any telephone solicitation, as defined in paragraph (f)(9) of this section, to:

(1) Any residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), or

(2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government. Such do-not-call registrations must be honored for a period of 5 years. Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if:

(i) It can demonstrate that the violation is the result of error and that as part of its routine business practice, it meets the following standards:

(A) *Written procedures.* It has established and implemented written procedures to comply with the national do-not-call rules;

(B) *Training of personnel.* It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(C) *Recording.* It has maintained and recorded a list of telephone numbers that the seller may not contact;

(D) *Accessing the national do-not-call database.* It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than three months prior to the date any call is made, and maintains records documenting this process; and

(E) *Purchasing the national do-not-call database.* It uses a process to ensure that it does not sell, rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose except compliance with this section and any such state or federal law to prevent telephone solicitations to telephone numbers registered on the national database. It purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers; or

(ii) It has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed; or

(iii) The telemarketer making the call has a personal relationship with the recipient of the call.

(d) No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(1) *Written policy.* Persons or entities making calls for telemarketing purposes must have a written policy,

available upon demand, for maintaining a do-not-call list.

(2) *Training of personnel engaged in telemarketing.* Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list.

(3) *Recording, disclosure of do-not-call requests.* If a person or entity making a call for telemarketing purposes (or on whose behalf such a call is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on the do-not-call list at the time the request is made. Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the telemarketing call is made, the person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request. A person or entity making a call for telemarketing purposes must obtain a consumer's prior express permission to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a telemarketing call is made or an affiliated entity.

(4) *Identification of sellers and telemarketers.* A person or entity making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. The telephone number provided may not be a 900 number or any other local or long distance transmission charges.

(5) *Affiliated persons or entities.* In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business

entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(6) *Maintenance of do-not-call lists.* A person or entity making calls for telemarketing purposes must maintain a record of a caller's request not to receive further telemarketing calls. A do-not-call request must be honored for 5 years from the time the request is made.

(7) Tax-exempt nonprofit organizations are not required to comply with 64.1200(d).

(e) The rules set forth in paragraph (c) and (d) of this section are applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers to the extent described in the Commission's Report and Order, CG Docket No. 02-278, FCC 03-153, "Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991."

(f) As used in this section:

(1) The terms *automatic telephone dialing system* and *autodialer* mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(2) The term *emergency purposes* means calls made necessary in any situation affecting the health and safety of consumers.

(3) The term *established business relationship* means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

(i) The subscriber's seller-specific do-not-call request, as set forth in para-

graph (d)(3) of this section, terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.

(ii) The subscriber's established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

(4) The term *facsimile broadcaster* means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

(5) The term *seller* means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(6) The term *telemarketer* means the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(7) The term *telemarketing* means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(8) The term *telephone facsimile machine* means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(9) The term *telephone solicitation* means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

(10) The term *unsolicited advertisement* means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

(11) The term *personal relationship* means any family member, friend, or acquaintance of the telemarketer making the call.

(g) Beginning January 1, 2004, common carriers shall:

(1) When providing local exchange service, provide an annual notice, via an insert in the subscriber's bill, of the right to give or revoke a notification of an objection to receiving telephone solicitations pursuant to the national do-not-call database maintained by the federal government and the methods by which such rights may be exercised by the subscriber. The notice must be clear and conspicuous and include, at a minimum, the Internet address and toll-free number that residential telephone subscribers may use to register on the national database.

(2) When providing service to any person or entity for the purpose of making telephone solicitations, make a one-time notification to such person or entity of the national do-not-call requirements, including, at a minimum, citation to 47 CFR 64.1200 and 16 CFR 310. Failure to receive such notification will not serve as a defense to any person or entity making telephone solicitations from violations of this section.

(h) The administrator of the national do-not-call registry that is maintained by the federal government shall make the telephone numbers in the database available to the States so that a State may use the telephone numbers that relate to such State as part of any database, list or listing system maintained by such State for the regulation of telephone solicitations.

[68 FR 44177, July 25, 2003]

EFFECTIVE DATE NOTE: At 68 FR 44177, July 25, 2003, §64.1200 was revised. Paragraph (a)(3)(i) will become effective Jan. 1, 2005.

§ 64.1201 Restrictions on billing name and address disclosure.

(a) As used in this section:

(1) The term *billing name and address* means the name and address provided to a local exchange company by each of its local exchange customers to which the local exchange company directs bills for its services.

(2) The term "telecommunications service provider" means interexchange carriers, operator service providers, enhanced service providers, and any other provider of interstate telecommunications services.

(3) The term *authorized billing agent* means a third party hired by a telecommunications service provider to perform billing and collection services for the telecommunications service provider.

(4) The term *bulk basis* means billing name and address information for all the local exchange service subscribers of a local exchange carrier.

(5) The term *LEC joint use card* means a calling card bearing an account number assigned by a local exchange carrier, used for the services of the local exchange carrier and a designated interexchange carrier, and validated by access to data maintained by the local exchange carrier.

(b) No local exchange carrier providing billing name and address shall disclose billing name and address information to any party other than a telecommunications service provider or an authorized billing and collection agent of a telecommunications service provider.

(c)(1) No telecommunications service provider or authorized billing and collection agent of a telecommunications service provider shall use billing name and address information for any purpose other than the following:

(i) Billing customers for using telecommunications services of that service provider and collecting amounts due;

(ii) Any purpose associated with the "equal access" requirement of *United States v. AT&T* 552 F.Supp. 131 (D.D.C. 1982); and

Florida Do-Not-Call Law

Select Year: 2003 ▼

Go :

The 2003 Florida Statutes

Title XXXIII
REGULATION OF TRADE, COMMERCE,
INVESTMENTS, AND SOLICITATIONS

Chapter 501
CONSUMER
PROTECTION

View Entire
Chapter

501.059 **Telephone solicitation.--**

(1) As used in this section:

(a) "Telephonic sales call" means a call made by a telephone solicitor to a consumer, for the purpose of soliciting a sale of any consumer goods or services, or for the purpose of soliciting an extension of credit for consumer goods or services, or for the purpose of obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes.

(b) "Consumer goods or services" means any real property or any tangible or intangible personal property which is normally used for personal, family, or household purposes, including, without limitation, any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed, as well as cemetery lots and timeshare estates, and any services related to such property.

(c) "Unsolicited telephonic sales call" means a telephonic sales call other than a call made:

1. In response to an express request of the person called;
2. Primarily in connection with an existing debt or contract, payment or performance of which has not been completed at the time of such call;
3. To any person with whom the telephone solicitor has a prior or existing business relationship; or
4. By a newspaper publisher or his or her agent or employee in connection with his or her business.

(d) "Commission" means the Florida Public Service Commission.

(e) "Telephone solicitor" means any natural person, firm, organization, partnership, association, or corporation, or a subsidiary or affiliate thereof, doing business in this state, who makes or causes to be made a telephonic sales call, including, but not limited to, calls made by use of automated dialing or recorded message devices.

(f) "Consumer" means an actual or prospective purchaser, lessee, or recipient of consumer goods or services.

(g) "Merchant" means a person who, directly or indirectly, offers or makes available to consumers any consumer goods or services.

(h) "Doing business in this state" refers to businesses who conduct telephonic sales calls from a location in Florida or from other states or nations to consumers located in Florida.

(i) "Department" means the Department of Agriculture and Consumer Services.

(2) Any telephone solicitor who makes an unsolicited telephonic sales call to a residential, mobile, or telephonic paging device telephone number shall identify himself or herself by his or her true first and last names and the business on whose behalf he or she is soliciting immediately upon making contact by telephone with the person who is the object of the telephone solicitation.

(3)(a) Any residential, mobile, or telephonic paging device telephone subscriber desiring to be placed on a "no sales solicitation calls" listing indicating that the subscriber does not wish to receive unsolicited telephonic sales calls may notify the department and be placed on that listing upon receipt by the department of a \$10 initial listing charge. This listing shall be renewed by the department annually for each consumer upon receipt of a renewal notice and a \$5 assessment.

(b) The department shall update its "no sales solicitation calls" listing upon receipt of initial consumer subscriptions or renewals and provide this listing for a fee to telephone solicitors upon request.

(c) All fees imposed pursuant to this section shall be deposited in the General Inspection Trust Fund for the administration of this section.

(4) No telephone solicitor shall make or cause to be made any unsolicited telephonic sales call to any residential, mobile, or telephonic paging device telephone number if the number for that telephone appears in the then-current quarterly listing published by the department. Any telephone solicitor or person who offers for sale any consumer information which includes residential, mobile, or telephonic paging device telephone numbers, except directory assistance and telephone directories sold by telephone companies and organizations exempt under s. 501(c)(3) or (6) of the Internal Revenue Code, shall screen and exclude those numbers which appear on the division's then-current "no sales solicitation calls" list. This subsection does not apply to any person licensed pursuant to chapter 475 who calls an actual or prospective seller or lessor of real property when such call is made in response to a yard sign or other form of advertisement placed by the seller or lessor.

(5)(a) A contract made pursuant to a telephonic sales call is not valid and enforceable against a consumer unless made in compliance with this subsection.

(b) A contract made pursuant to a telephonic sales call:

1. Shall be reduced to writing and signed by the consumer.
2. Shall comply with all other applicable laws and rules.
3. Shall match the description of goods or services as principally used in the telephone solicitations.
4. Shall contain the name, address, and telephone number of the seller, the total price of the contract, and a detailed description of the goods or services being sold.
5. Shall contain, in bold, conspicuous type, immediately preceding the signature, the following statement:

"You are not obligated to pay any money unless you sign this contract and return it to the seller."

6. May not exclude from its terms any oral or written representations made by the telephone solicitor to the consumer in connection with the transaction.

(c) The provisions of this subsection do not apply to contractual sales regulated under other sections of the Florida Statutes, or to the sale of financial services, security sales, or sales transacted by companies or their wholly owned subsidiaries or agents, which companies are regulated by chapter 364, or to the sale of cable television services to the duly franchised cable television operator's existing subscribers within that cable television operator's franchise area, or to any sales where no prior payment is made to the merchant and an invoice accompanies the goods or services allowing the consumer 7 days to cancel or return without obligation for any payment.

(6)(a) A merchant who engages a telephone solicitor to make or cause to be made a telephonic sales call shall not make or submit any charge to the consumer's credit card account or make or cause to be made any electronic transfer of funds until after the merchant receives from the consumer a copy of the contract, signed by the purchaser, which complies with this section.

(b) A merchant who conducts a credit card account transaction pursuant to this section shall be subject to the provisions of s. 817.62.

(c) The provisions of this subsection do not apply to a transaction:

1. Made in accordance with prior negotiations in the course of a visit by the consumer to a merchant operating a retail business establishment which has a fixed permanent location and where consumer goods are displayed or offered for sale on a continuing basis;

2. In which the consumer may obtain a full refund for the return of undamaged

and unused goods or a cancellation of services notice to the seller within 7 days after receipt by the consumer, and the seller will process the refund within 30 days after receipt of the returned merchandise by the consumer;

3. In which the consumer purchases goods or services pursuant to an examination of a television, radio, or print advertisement or a sample, brochure, or catalog of the merchant that contains:

a. The name, address, and telephone number of the merchant;

b. A description of the goods or services being sold; and

c. Any limitations or restrictions that apply to the offer; or

4. In which the merchant is a bona fide charitable organization or a newspaper as defined in chapter 50.

(7)(a) No person shall make or knowingly allow a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called.

(b) Nothing herein prohibits the use of an automated telephone dialing system with live messages if the calls are made or messages given solely in response to calls initiated by the persons to whom the automatic calls or live messages are directed or if the telephone numbers selected for automatic dialing have been screened to exclude any telephone subscriber who is included on the department's then-current "no sales solicitation calls" listing or any unlisted telephone number, or if the calls made concern goods or services that have been previously ordered or purchased.

(8) The department shall investigate any complaints received concerning violations of this section. If, after investigating any complaint, the department finds that there has been a violation of this section, the department or the Department of Legal Affairs may bring an action to impose a civil penalty and to seek other relief, including injunctive relief, as the court deems appropriate against the telephone solicitor. The civil penalty shall not exceed \$10,000 per violation and shall be deposited in the General Inspection Trust Fund if the action or proceeding was brought by the department, or the Legal Affairs Revolving Trust Fund if the action or proceeding was brought by the Department of Legal Affairs. This civil penalty may be recovered in any action brought under this part by the department, or the department may terminate any investigation or action upon agreement by the person to pay a stipulated civil penalty. The department or the court may waive any civil penalty if the person has previously made full restitution or reimbursement or has paid actual damages to the consumers who have been injured by the violation.

(9)(a) In any civil litigation resulting from a transaction involving a violation of this section, the prevailing party, after judgment in the trial court and exhaustion of all

appeals, if any, shall receive his or her reasonable attorney's fees and costs from the nonprevailing party.

(b) The attorney for the prevailing party shall submit a sworn affidavit of his or her time spent on the case and his or her costs incurred for all the motions, hearings, and appeals to the trial judge who presided over the civil case.

(c) The trial judge shall award the prevailing party the sum of reasonable costs incurred in the action plus a reasonable legal fee for the hours actually spent on the case as sworn to in an affidavit.

(d) Any award of attorney's fees or costs shall become a part of the judgment and subject to execution as the law allows.

(e) In any civil litigation initiated by the department or the Department of Legal Affairs, the court may award to the prevailing party reasonable attorney's fees and costs if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or if the court finds bad faith on the part of the losing party.

(10) The commission shall by rule ensure that telecommunications companies inform their customers of the provisions of this section. The notification may be made by:

(a) Annual inserts in the billing statements mailed to customers; and

(b) Conspicuous publication of the notice in the consumer information pages of the local telephone directories.

History.--s. 1, ch. 87-253; s. 1, ch. 90-143; ss. 3, 5, ch. 91-237; s. 1, ch. 92-186; s. 59, ch. 92-291; s. 3, ch. 94-298; s. 616, ch. 97-103; s. 4, ch. 2003-179.

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Terms of Settlement
In Docket No. 040062-TI
Compliance Investigation of
New Century Telecom, Inc.
Rule 25-4.118, F.A.C.

This Settlement is made and entered this ____ day of _____, 2004 by and between New Century Telecom, Inc., (the "Company") and the Florida Public Service Commission (the "Commission") (collectively referred to as the "Parties").

WHEREAS, on April 21, 2004 a Memorandum containing a recommendation in this docket ("Recommendation") was issued to the Commission's Director, Division of the Commission Clerk & Administrative Services by the Division of Competitive Markets & Enforcement, Office of Standards Control & Reporting and Office of General Counsel (collectively, the "Divisions") to be presented at a Regular Agenda meeting of the Commission;

WHEREAS, the Recommendation proposed that the Company be penalized for 42 apparent violations of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection;

WHEREAS, thereafter, the Company's representatives and the Commission Staff engaged in discussions and exchanged certain information relevant to the Recommendation;

WHEREAS, as a result of those discussions and information, the Company sought to resolve the issues raised by the Recommendation through settlement and the Commission indicated its willingness to consider the Company's settlement offer provided that the terms of the settlement the material issues of the Recommendation;
and

WHEREAS, this Settlement contains the terms to satisfy the material issues of the Recommendation;

NOW THEREFORE, the Company and the Commission do hereby agree as follows:

1. The Parties agree and acknowledge that this Settlement is in consideration for the termination of Docket No. 040062-TI and shall constitute final action taken by the Parties concerning the Staff Recommendation in Docket No. 040062-TI.

2. The Parties agree that this Settlement is for settlement purposes only and that signing does not constitute an admission by the Company, or its principals, of any violation of law, rules or policy associated with or arising from its actions or omissions as described in the Recommendation.

3. The Commission agrees that, in the absence of material new evidence relating to issues described in the Recommendation that the Commission did not obtain through its investigation for the Recommendation or is not otherwise currently in the Commission's possession, the Commission will not use the facts developed for the Recommendation, or the existence of this Settlement, to institute, on its own motion, any new proceedings, formal or informal, or to make any actions on its own motion against the Company, or its principals, concerning the matters that were the subject of the Recommendation. Consistent with the foregoing, nothing in this Settlement limits, *inter alia*, the Commission's authority to consider and adjudicate any formal complaints that may be filed by third parties pursuant to the F.A.C., as amended, and to take any action in response to such complaints.

4. For purposes of settling the matters set forth herein, the Company agrees to take the actions described below.

- (i) Copies of Consent Decree to Prospective Successors or Assigns: Prior to any sale, dissolution, reorganization, assignment, merger, acquisition or other action that would result in a successor or assign for provision of the Company's intrastate communications services, the Company will furnish a copy of this Settlement to such prospective successors or assigns and advise same of their duties and obligations under this Settlement.
- (ii) Notice of Consent Decree Requirements to Officers, Directors, Managers, and Employees: The Company will be responsible for making the substantive requirements and procedures set forth in this Settlement known to its directors and officers, and to managers, employees, agents, and persons associated with the Company who are responsible for implementing the obligations set forth in this Settlement.
- (iii) Provisioning and Verification Code of Conduct: The Company will establish a Compliance Program that will conform to this Settlement and be reviewed by all current provisioning personnel and verification agents. All such persons will reaffirm annually, in writing that they have recently reviewed, and fully understand, the Compliance Program. The Compliance Program will establish a strict quality standard, to which all persons will be required to adhere.
- (iv) Compliance Infractions: The Company shall keep records listing material infractions, if any and all personnel and agents shall be informed that a material violation of the Compliance Program may result in termination of employment.
- (v) Complaints: As of the Effective Date, and going forward, the Company will promptly and in good faith address and resolve all complaints regarding its services in a reasonable manner consistent with this Settlement and the Compliance Program. In all cases where the Company concludes that a decision to switch to the Company was not properly verified, the Company will take appropriate disciplinary action against the employee or agent in question, consistent with the standards set forth in the Compliance Program. In all cases where the Company concludes that proper verification was not obtained the Company will contact the Customer and provide appropriate remedies. For a period of two years from the Effective Date, Company will provide the Commission with quarterly reports

identifying customer complaints. The reports shall contain a brief description of the nature of each complaint, the customer name and telephone number, the date and amount of any refund or credits issued for each complaint and the action Company took in final resolution of each complaint.

- (vi) Reporting: Within 60 days from the Effective Date, the Company will provide a formal report to the Commission. The Company will provide additional reports every twelve (12) months, continuing for twenty-six (26) months from the Effective Date. Each report will include the following: (a) a status report on the Company's progress in implementing this Settlement, (b) a list of all infractions assigned to personnel related to this Settlement during that period, and (c) copies of all Customer complaints related to the Company's compliance with this Settlement for the period since the previous report, including copies of the resolution of any such complaint.
- (vii) Verification Script: Company will use the script attached hereto for third party verification based on the fact that to the best of Company's knowledge it complies with the Commission's requirements and sets forth a clear and conspicuous verification. Within 60 days from the Effective Date, Company's representatives and the Commission Staff shall work together to modify the attached script if need be.
- (viii) Third Party Verification Company: Within 30 days from the Effective Date, Company will discontinue using Teco Verification, Inc. as its third party verification company and will use, in its stead, another unaffiliated third party verification company. Company shall require the new third party verification company to use the verification script attached hereto, as may be modified by the Parties, and to record on the verification tape the date the verification was performed.
- (ix) Transfers of Customer Base: Company will not acquire or transfer any customer base in Florida except as provided in an Rule 25-4.118, Florida Administrative Code.
- (x) Warm Line Transfer: Company will work with the Commission to establish a warm line transfer between the Commission and Company's customer service department. The warm line transfer will be finalized and ready for operation within 120 days after the Effective Date.

5. The Company will make a voluntary contribution (not a fine or penalty) to the Florida Public Service Commission in the amount of \$151,500.00 as

follows: \$9,000 for 9 cases in which no TPV was available (\$81,000); \$2,500 for 27 cases in which the verification lacked the notification required by the Rule (\$67,500); and \$500 for the 6 cases in which the TPV was for Miko Telephone Corporation (\$3,000), a total of \$151,500.

6. Company shall pay \$15,150 within ten days of the Effective Date of this Settlement. Fourteen days thereafter, Company shall pay each week \$5,000 until the balance \$136,350 is retired in full, a period of 27 weeks, with a final payment of \$1,350 in the 28th week. The Commission acknowledges that this payment plan is based on the financial position of the Company at the time of Settlement. Company acknowledges that should its financial position improve at any time during the payment period it will increase or accelerate its weekly payments accordingly.

7. In addition, Company shall refund or credit the full amount of any charges incurred by each of the 42 customers to the extent not already credited or refunded.

8. The Company must make its payments by check, wire transfer or money order drawn to the order of the Florida Public Service Commission, and the check, wire transfer or money order should refer to Acct. No. _____. If the Company makes payments by check or money order, it must mail the check or money order to: _____

If the Company makes payments by wire transfer, it must wire such payment in accordance with Commission procedures for wire transfers.

9. The Company admits that it operates as a reseller of intrastate telecommunications services and that the FPSC has jurisdiction over it and the

subject matter for the purposes of this Settlement. The Company represents and warrants that it is the properly named party to this Settlement and has sufficient funds available to meet fully all financial and other obligations set forth herein. The Company further represents and warrants that it has caused this Settlement to be executed by its authorized representative's signature. Said representative and the Company respectively affirm and warrant that said representative is acting in her capacity and within her authority as a corporate officer of the Company, and on behalf of the Company and that by her signature said representative is binding the Company to the terms and conditions of this Settlement. The Company and its principal also represent that they have been represented by counsel of their choice in connection with this Settlement and are fully satisfied with the representation of counsel.

10. The Company represents that it has reviewed and understands the Florida Public Service Commission rule requirements and agrees to comply with those requirements.

11. The Company represents and warrants that it shall not effect any change in its form of doing business or its organizational identity or participate directly or indirectly in any activity to form a separate entity or corporation which engages in acts prohibited in this Settlement or for any other purpose which would otherwise circumvent any part of this Settlement or the obligation of this Settlement.

12. The Parties' the decision to enter into this Settlement is expressly contingent upon this Settlement being signed without revision, change, addition, or modification.

13. The Parties agree that either the Commission or the Company may withdraw from this Settlement if any revision, change, addition, or modification is made to its terms.

14. If the Commission brings a judicial action to enforce the terms of this Settlement, the parties will not contest the validity of the Settlement, and the Company will waive any statutory right to a trial *de novo*. The Company does not waive any statutory right to a trial *de novo* to determine whether it violated this Settlement.

15. In the event that this Settlement is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

16. Any material violation of the Settlement will entitle the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order. The Commission agrees that before it takes any formal action in connection with any alleged or suspected violation of this Settlement, the Company will be notified of the alleged or suspected violation and be given a reasonable opportunity to respond.

17. The Parties agree that if any provision of the Settlement conflicts with any subsequent rule or order adopted by the Commission, where compliance with the provision would result in a violation, (except an order specifically intended to revise the terms of this Settlement to which the Company and its principals do not consent) that provision will be superseded by such Commission rule or order.

18. By this Settlement, the Company does not waive or alter its right to assert and seek protection from disclosure of any privileged or otherwise confidential and protected documents and information, or to seek appropriate safeguards of confidentiality for any competitively sensitive or proprietary information. The status of materials prepared for, reviews made and discussions held in the preparation for and implementation of the Company's compliance efforts under the Settlement, which would otherwise be privileged or confidential, are not altered by the execution or implementation of its terms and no waiver of such privileges is made by this Settlement.

19. The Parties agree that they will take such other actions as may be necessary to effectuate the objectives of this Settlement.

20. This Settlement may be signed in counterparts.

Florida Public Service Commission

New Century Telecom, Inc.

By:

By: Karyn Bartel
President

Date

Date

Dale Buys

From: Loubna W. Haddad [lwh@thlglaw.com]
Sent: Thursday, July 15, 2004 4:57 PM
To: Rick Moses
Cc: Charles Beck; DKitchen@dkslaw.org; GKetchum@dkslaw.org; Ray Kennedy; Dale Buys; Adam Teitzman; Jason Rojas; Beth Salak
Subject: RE: Settlement Negotiation Topics

Rick:

Under its previous management, New Century was operating out of a suite of offices located in the same building as our law office. After transfer of control, the new management elected to maintain the same headquarters. New Century has only one shareholder/director/officer - Karyn Bartel. She carries out her duties from the Roswell, Georgia offices.

Loubna

Loubna W. Haddad
The Helein Law Group LLP
8180 Greensboro Dr., Suite 700
McLean, VA 22102
Tel: (703) 714-1321
Fax: (703) 714-1330

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From: Rick Moses [mailto:RMoses@PSC.STATE.FL.US]
Sent: Thursday, July 15, 2004 4:07 PM
To: lwh@thlglaw.com
Cc: Charles Beck; DKitchen@dkslaw.org; GKetchum@dkslaw.org; Ray Kennedy; Dale Buys; Adam Teitzman; Jason Rojas; Beth Salak
Subject: RE: Settlement Negotiation Topics

Thank you for the quick response. I have one clarifying question. You responded that New Century continues to be headquartered at the same address as listed for your law firm. Is your law office the headquarters of New Century? Would you also tell me what the name of the President and CEO and the address or addresses where these two individuals work?

-----Original Message-----

From: Loubna W. Haddad [mailto:lwh@thlglaw.com]
Sent: Thursday, July 15, 2004 3:58 PM
To: Rick Moses
Cc: Charles Beck; DKitchen@dkslaw.org; GKetchum@dkslaw.org; Ray Kennedy; Dale Buys; Adam Teitzman; Jason Rojas; Beth Salak
Subject: RE: Settlement Negotiation Topics

Please see attached letter.

7/22/2004

Loubna W. Haddad
The Helein Law Group LLP
8180 Greensboro Dr., Suite 700
McLean, VA 22102
Tel: (703) 714-1321
Fax: (703) 714-1330

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From: Rick Moses [<mailto:RMoses@PSC.STATE.FL.US>]
Sent: Wednesday, July 14, 2004 3:40 PM
To: lwh@thlglaw.com
Cc: Charles Beck; DKitchen@dkslaw.org; GKetchum@dkslaw.org; Ray Kennedy; Dale Buys; Adam Teitzman; Jason Rojas; Beth Salak
Subject: Settlement Negotiation Topics

Attached is a letter to be followed-up with a hard copy of the negotiation topics we discussed on July 13, 2004, regarding Docket Number 040062.

We look forward to hearing your response after discussing the topics with your client. Thanks.

<<newcentury.doc>>

STATE OF FLORIDA

COMMISSIONERS:
BRAULIO L. BAEZ, CHAIRMAN
J. TERRY DEASON
LILA A. JABER
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON



DIVISION OF COMPETITIVE MARKETS &
ENFORCEMENT
BETH W. SALAK
DIRECTOR
(850) 413-6600

Public Service Commission

July 14, 2004

Ms. Loubna W. Haddad
The Helein Law Group LLP
8180 Greensboro Drive, Suite 700
McLean, Virginia 22102

Dear Ms. Haddad:

Thank you for joining us via telephone to discuss a possible settlement that staff can support before the Commission regarding Docket Number 040062-TI.

During the meeting you were requested to provide additional information on several topics. The following is a list of those items.

1. Were customers transferred from Miko to New Century notified that they could choose a carrier of their choice prior to them being switched to New Century?
2. Please explain New Century's relationship with, and the responsibilities of, a person named Geri Duty.
3. Please identify the name and address of the third party verification company New Century currently uses and the name and address of the company New Century intends to use in the future.
4. Provide the number of Florida customers currently served by New Century.
5. Provide the telephone number and physical location of the business office of New Century.

The following lists subjects discussed that staff believes should be part of any settlement brought before the Commission.

1. New Century will discontinue using its existing third party verification (TPV) company and use an unaffiliated TPV company that does not use prerecorded questions. Staff has agreed to review the script that is to be used by the TPV Company prior to its implementation.
2. New Century shall require the TPV Company to record on the verification tape the date the verification was performed.
3. New Century will not acquire or transfer any customer base, except as provided in Rule 25-4.118, Florida Administrative Code.

Ms. Loubna W. Haddad
Page 3
July 14, 2004

The above items are in addition to the existing information provided in your proposed settlement. Staff also desires to review the information requested in the subpoena regarding the complaints that New Century has received before proceeding with further settlement discussions. As additional information comes to our attention, renegotiation of some terms or conditions may be necessary.

Sincerely,



Rick Moses
Chief, Bureau of Service Quality

cc: E.C. Deeno Kitchen, Dobson, Kitchen & Smith
Gary M. Ketchum, Dobson, Kitchen & Smith
Charles Beck, Office of Public Counsel