FTC Policy Statement on Deception

DATE: October 14, 1983
Appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984).

The Honorable John D. Dingell
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to the Committee's inquiry regarding the Commission's enforcement policy against deceptive acts or practices.[1] We also hope this letter will provide guidance to the public.

Section 5 of the FTC Act declares unfair or deceptive acts or practices unlawful. Section 12 specifically prohibits false ads likely to induce the purchase of food, drugs, devices or cosmetics. Section 15 defines a false ad for purposes of Section 12 as one which is "misleading in a material respect."[2] Numerous Commission and judicial decisions have defined and elaborated on the phrase "deceptive acts or practices" under both Sections 5 and 12. Nowhere, however, is there a single definitive statement of the Commission's view of its authority. The Commission believes that such a statement would be useful to the public, as well as the Committee in its continuing review of our jurisdiction.

We have therefore reviewed the decided cases to synthesize the most important principles of general applicability. We have attempted to provide a concrete indication of the manner in which the Commission will enforce its deception mandate. In so doing, we intend to address the concerns that have been raised about the meaning of deception, and thereby attempt to provide a greater sense of certainty as to how the concept will be applied.[3]

I. SUMMARY

Certain elements undergird all deception cases. *First*, there must be a representation, omission or practice that is likely to mislead the consumer.[4] Practices that have been found misleading or deceptive in specific cases include false oral or written representations, misleading price claims, sales of hazardous or systematically defective products or services without adequate disclosures, failure to disclose information regarding pyramid sales, use of bait and switch techniques, failure to perform promised services, and failure to meet warranty obligations.[5]

Second, we examine the practice from the perspective of a consumer acting reasonably in the circumstances. If the representation or practice affects or is directed primarily to a particular group, the Commission examines reasonableness from the perspective of that group.

Third, the representation, omission, or practice must be a "material" one. The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception. In many instances,

materiality, and hence injury, can be presumed from the nature of the practice. In other instances, evidence of materiality may be necessary.

Thus, the Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment. We discuss each of these elements below.

II. THERE MUST BE A REPRESENTATION, OMISSION, OR PRACTICE THAT IS LIKELY TO MISLEAD THE CONSUMER.

Most deception involves written or oral misrepresentations, or omissions of material information. Deception may also occur in other forms of conduct associated with a sales transaction. The entire advertisement, transaction or course of dealing will be considered. The issue is whether the act or practice is likely to mislead, rather than whether it causes actual deception.[6]

Of course, the Commission must find that a representation, omission, or practice occurred. In cases of express claims, the representation itself establishes the meaning. In cases of implied claims, the Commission will often be able to determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transaction.[7] In other situations, the Commission will require extrinsic evidence that reasonable consumers reach the implied claims.[8] In all instances, the Commission will carefully consider any extrinsic evidence that is introduced.

Some cases involve omission of material information, the disclosure of which is necessary to prevent the claim, practice, or sale from being misleading.[9] Information may be omitted from written[10] or oral[11] representations or from the commercial transaction.[12]

In some circumstances, the Commission can presume that consumers are likely to reach false beliefs about the product or service because of an omission. At other times, however, the Commission may require evidence on consumers' expectations.[13]

Marketing and point-of-sales practices that are likely to mislead consumers are also deceptive. For instance, in bait and switch cases, a violation occurs when the offer to sell the product is not a bona fide offer.[14] The Commission has also found deception where a sales representative misrepresented the purpose of the initial contact with customers.[15] When a product is sold, there is an implied representation that the product is fit for the purposes for which it is sold. When it is not, deception occurs.[16] There may be a concern about the way a product or service is marketed, such as where inaccurate or incomplete information is provided.[17] A failure to perform services promised under a warranty or by contract can also be deceptive.[18]

III. THE ACT OR PRACTICE MUST BE CONSIDERED FROM THE PERSPECTIVE OF THE REASONABLE CONSUMER

The Commission believes that to be deceptive the representation, omission or practice must be likely to mislead reasonable consumers under the circumstances.[19] The test is whether the consumer's interpretation or reaction is reasonable.[20] When representations or sales practices are targeted to a specific audience, the Commission determines the effect of the practice on a

reasonable member of that group. In evaluating a particular practice, the Commission considers the totality of the practice in determining how reasonable consumers are likely to respond.

A company is not liable for every interpretation or action by a consumer. In an advertising context, this principle has been well-stated:

> An advertiser cannot be charged with liability with respect to every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim. Perhaps a few misguided souls believe, for example, that all "Danish pastry" is made in Denmark. Is it therefore an actionable deception to advertise "Danish pastry" when it is made in this country.? Of course not, A representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed. Heinz W. Kirchner, 63 F.T.C. 1282, 1290 (1963).

To be considered reasonable, the interpretation or reaction does not have to be the only one.[21] When a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation.[22] An interpretation will be presumed reasonable if it is the one the respondent intended to convey.

The Commission has used this standard in its past decisions. "…The test applied by the Commission is whether the interpretation is reasonable in light of the claim."[23] In the Listerine case, the Commission evaluated the claim from the perspective of the "average listener."[24] In a case involving the sale of encyclopedias, the Commission observed "[i]n determining the meaning of an advertisement, a piece of promotional material or a sales presentation, the important criterion is the net impression that it is likely to make on the general populace."[25] The decisions in *American Home Products*, *Bristol Myers*, and *Sterling Drug* are replete with references to reasonable consumer interpretations.[26] In a land sales case, the Commission evaluated the oral statements and written representations "in light of the sophistication and understanding of the persons to whom they were directed."[27] Omission cases are no different: the Commission examines the failure to disclose in light of expectations and understandings of the typical buyer[28] regarding the claims made.

When representations or sales practices are targeted to a specific audience, such as children, the elderly, or the terminally ill, the Commission determines the effect of the practice on a reasonable member of that group.[29] For instance, if a company markets a cure to the terminally ill, the practice will be evaluated from the perspective of how it affects the ordinary member of that group. Thus, terminally ill consumers might be particularly susceptible to exaggerated cure claims. By the same token, a practice or representation directed to a well-educated group, such as a prescription drug advertisement to doctors, would be judged in light of the knowledge and sophistication of that group.[30]

As it has in the past, the Commission will evaluate the entire advertisement, transaction, or course of dealing in determining how reasonable consumers are likely to respond. Thus, in

advertising the Commission will examine "the entire mosaic, rather than each tile separately."[31] As explained by a court of appeals in a recent case:

> The Commission's right to scrutinize the visual and aural imagery of advertisements follows from the principle that the Commission looks to the impression made by the advertisements as a whole. Without this mode of examination, the Commission would have limited recourse against crafty advertisers whose deceptive messages were conveyed by means other than, or in addition to, spoken words. American Home Products, 695 F.2d 681, 688 (3d Cir. Dec. 3, 1982).[32]

Commission cases reveal specific guidelines. Depending on the circumstances, accurate information in the text may not remedy a false headline because reasonable consumers may glance only at the headline.[33] Written disclosures or fine print may be insufficient to correct a misleading representation.[34] Other practices of the company may direct consumers' attention away from the qualifying disclosures.[35] Oral statements, label disclosures or point-of-sale material will not necessarily correct a deceptive representation or omission.[36] Thus, when the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser.[37] Pro forma statements or disclaimers may not cure otherwise deceptive messages or practices.[38]

Qualifying disclosures must be legible and understandable. In evaluating such disclosures, the Commission recognizes that in many circumstances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller. Disclosures that conform to the Commission's Statement of Enforcement Policy regarding clear and conspicuous disclosures, which applies to television advertising, are generally adequate, CCH Trade Regulation Reporter, ¶ 7569.09 (Oct. 21, 1970). Less elaborate disclosures may also suffice.[39]

Certain practices, however, are unlikely to deceive consumers acting reasonably. Thus, the Commission generally will not bring advertising cases based on subjective claims (taste, feel, appearance, smell) or on correctly stated opinion claims if consumers understand the source and limitations of the opinion.[40] Claims phrased as opinions are actionable, however, if they are not honestly held, if they misrepresent the qualifications of the holder or the basis of his opinion or if the recipient reasonably interprets them as implied statements of fact.[41]

The Commission generally will not pursue cases involving obviously exaggerated or puffing representations, *i.e.*, those that the ordinary consumers do not take seriously.[42] Some exaggerated claims, however, may be taken seriously by consumers and are actionable. For instance, in rejecting a respondent's argument that use of the words "electronic miracle" to describe a television antenna was puffery, the Commission stated:

> Although not insensitive to respondent's concern that the term miracle is commonly used in situations short of changing water into wine, we must conclude that the use of "electronic miracle" in the context of respondent's grossly exaggerated claims would lead consumers to give added credence to the overall suggestion that this device is superior to other types of antennae. *Jay Norris*, 91 F.T.C. 751, 847 n.20 (1978), *aff'd*, 598 F.2d 1244 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979).

Finally, as a matter of policy, when consumers can easily evaluate the product or service, it is inexpensive, and it is frequently purchased, the Commission will examine the practice closely before issuing a complaint based on deception. There is little incentive for sellers to misrepresent (either by an explicit false statement or a deliberate false implied statement) in these circumstances since they normally would seek to encourage repeat purchases. Where, as here, market incentives place strong constraints on the likelihood of deception, the Commission will examine a practice closely before proceeding.

In sum, the Commission will consider many factors in determining the reaction of the ordinary consumer to a claim or practice. As would any trier of fact, the Commission will evaluate the totality of the ad or the practice and ask questions such as: how clear is the representation? how conspicuous is any qualifying information? how important is the omitted information? do other sources for the omitted information exist? how familiar is the public with the product or service?[43]

IV. THE REPRESENTATION, OMISSION OR PRACTICE MUST BE MATERIAL

The third element of deception is materiality. That is, a representation, omission or practice must be a material one for deception to occur.[44] A "material" misrepresentation or practice is one which is likely to affect a consumer's choice of or conduct regarding a product.[45] In other words, it is information that is important to consumers. If inaccurate or omitted information is material, injury is likely.[46]

The Commission considers certain categories of information presumptively material.[47] First, the Commission presumes that express claims are material.[48] As the Supreme Court stated recently, "[i]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising."[49] Where the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false, materiality will be presumed because the manufacturer intended the information or omission to have an effect.[50] Similarly, when evidence exists that a seller intended to make an implied claim, the Commission will infer materiality.[51]

The Commission also considers claims or omissions material if they significantly involve health, safety, or other areas with which the reasonable consumer would be concerned. Depending on the facts, information pertaining to the central characteristics of the product or service will be presumed material. Information has been found material where it concerns the purpose,[52] safety,[53] efficacy,[54] or cost,[55] of the product or service. Information is also likely to be material if it concerns durability, performance, warranties or quality. Information pertaining to a finding by another agency regarding the product may also be material.[56]

Where the Commission cannot find materiality based on the above analysis, the Commission may require evidence that the claim or omission is likely to be considered important by consumers. This evidence can be the fact that the product or service with the feature represented costs more than an otherwise comparable product without the feature, a reliable survey of consumers, or credible testimony.[57]

A finding of materiality is also a finding that injury is likely to exist because of the representation, omission, sales practice, or marketing technique. Injury to consumers can take many forms.[58] Injury exists if consumers would have chosen differently but for the deception. If different choices are likely, the claim is material, and injury is likely as well. Thus, injury and materiality are different names for the same concept.

V. CONCLUSION

The Commission will find an act or practice deceptive if there is a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer's detriment. The Commission will not generally require extrinsic evidence concerning the representations understood by reasonable consumers or the materiality of a challenged claim, but in some instances extrinsic evidence will be necessary.

The Commission intends to enforce the FTC Act vigorously. We will investigate, and prosecute where appropriate, acts or practices that are deceptive. We hope this letter will help provide you and the public with a greater sense of certainty concerning how the Commission will exercise its jurisdiction over deception. Please do not hesitate to call if we can be of any further assistance.

By direction of the Commission, Commissioners Pertschuk and Bailey dissenting, with separate statements attached and with separate response to the Committee's request for a legal analysis to follow.

/s/James C. Miller III
Chairman

cc: Honorable James T. Broyhill
Honorable James J. Florio
Honorable Norman F. Lent

ENDNOTES:

[1]S. Rep. No. 97-451, 97th Cong., 2d Sess. 16; H.R. Rep. No. 98-156, Part I, 98th Cong., 1st Sess. 6 (1983). The Commission's enforcement policy against unfair acts or practices is set forth in a letter to Senators Ford and Danforth, dated December 17, 1980.

[2]In determining whether an ad is misleading, Section 15 requires that the Commission take into account "representations made or suggested" as well as "the extent to which the advertisement fails to reveal facts material in light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual." 15 U.S.C. 55. If an act or practice violates Section 12, it also violates Section 5. *Simeon Management Corp*., 87 F.T.C. 1184, 1219 (1976), *aff'd*, 579 F.2d 1137 (9th Cir. 1978); *Porter & Dietsch*, 90 F.T.C. 770, 873-74 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980).

[3]Chairman Miller has proposed that Section 5 be amended to define deceptive acts. Hearing Before the Subcommittee for Consumers of the Committee on Commerce, Science, and Transportation, United States Senate, 97th Cong., 2d Sess. *FTCs Authority Over Deceptive*

Advertising, July 22,1982, Serial No. 97-134, p. 9. Three Commissioners believe a legislative definition is unnecessary. *Id*. at 45 (Commissioner Clanton), at 51 (Commissioner Bailey) and at 76 (Commissioner Pertschuk). Commissioner Douglas supports a statutory definition of deception. Prepared statement by Commissioner George W. Douglas, Hearing Before the Subcommittee for Consumers of the Committee on Commerce, Science and Transportation, United States Senate, 98th Cong. lst Sess. (March 16, 1983) p. 2.

[4]A misrepresentation is an express or implied statement contrary to fact. A misleading omission occurs when qualifying information necessary to prevent a practice, claim, representation, or reasonable expectation or belief from being misleading is not disclosed. Not all omissions are deceptive, even if providing the information would benefit consumers. As the Commission noted in rejecting a proposed requirement for nutrition disclosures, "In the final analysis, the question whether an advertisement requires affirmative disclosure would depend on the nature and extent of the nutritional claim made in the advertisement.". *ITT Continental Baking Co. Inc.*, 83 F.T.C. 865, 965 (1976). In determining whether an omission is deceptive, the Commission will examine the overall impression created by a practice, claim, or representation. For example, the practice of offering a product for sale creates an implied representation that it is fit for the purposes for which it is sold. Failure to disclose that the product is not fit constitutes a deceptive omission. [*See* discussion below at 5-6) Omissions may also be deceptive where the representations made are not literally misleading, if those representations create a reasonable expectation or belief among consumers which is misleading, absent the omitted disclosure.

Non-deceptive emissions may still violate Section 5 if they are unfair. For instance, the R-Value Rule, 16 C.F.R. 460.5 (1983), establishes a specific method for testing insulation ability, and requires disclosure of the figure in advertising. The Statement of Basis and Purpose, 44 FR 50,242 (1979), refers to a deception theory to support disclosure requirements when certain misleading claims are made, but the rule's general disclosure requirement is based on an unfairness theory. Consumers could not reasonably avoid injury in selecting insulation because no standard method of measurement existed.

[5]Advertising that lacks a reasonable basis is also deceptive. *Firestone*, 81 F.T.C. 398, 451-52 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). *National Dynamics*, 82 F.T.C. 488, 549-50 (1973); *aff'd and remanded on other grounds*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974), *reissued*, 85 F.T.C. 391 (1976). *National Comm'n on Egg Nutrition*, 88 F.T.C. 89, 191 (1976), *aff'd*, 570 F.2d 157 (7th Cir.), *cert. denied*, 439 U.S. 821, *reissued*, 92 F.T.C. 848 (1978). The deception theory is based on the fact that most ads making objective claims imply, and many expressly state, that an advertiser has certain specific grounds for the claims. If the advertiser does not, the consumer is acting under a false impression. The consumer might have perceived the advertising differently had he or she known the advertiser had no basis for the claim. This letter does not address the nuances of the reasonable basis doctrine, which the Commission is currently reviewing. 48 FR 10,471 (March 11, 1983).

[6]In *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976), the court noted "the likelihood or propensity of deception is the criterion by which advertising is measured."

[7]On evaluation of the entire document:

> The Commission finds that many of the challenged Anacin advertisements, when viewed in their entirety, did convey the message that the superiority of this product has been proven [footnote omitted]. It is immaterial that the word "established", which was used in the complaint, generally did not appear in the ads; the important consideration is the net impression conveyed to the public. *American Home Products*, 98 F.T.C. 136, 374 (1981), *aff'd*, 695 F.2d (3d Cir. 1982).

On the juxtaposition of phrases:

> On this label, the statement "Kills Germs By Millions On Contact" immediately precedes the assertion "For General Oral Hygiene Bad Breath, Colds and Resultant Sore Throats" [footnote omitted]. By placing these two statements in close proximity, respondent has conveyed the message that since Listerine can kill millions of germs, it can *cure*, prevent and ameliorate colds and sore throats [footnote omitted]. *Warner Lambert*, 86 F.T.C. 1398, 1489-90 (1975), *aff'd*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978) (emphasis in original).

On the nature of the claim, *Firestone* is relevant. There the Commission noted that the alleged misrepresentation concerned the safety of respondent's product, "an issue of great significance to consumers. On this issue, the Commission has required scrupulous accuracy in advertising claims, for obvious reasons." 81 F.T.C. 398, 456 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

In each of these cases, other factors, including in some instances surveys, were in evidence on the meaning of the ad.

[8]The evidence can consist of expert opinion, consumer testimony (particularly in cases involving oral representations), copy tests, surveys, or any other reliable evidence of consumer interpretation.

[9]As the Commission noted in the Cigarette rule, "The nature, appearance, or intended use of a product may create an impression on the mind of the consumer . . . and if the impression is false, and if the seller does not take adequate steps to correct it, he is responsible for an unlawful deception." Cigarette Rule Statement of Basis and Purpose, 29 FR 8324, 8352 (July 2, 1964).

[10]*Porter & Dietsch*, 90 F.T.C. 770, 873-74 (1977), *aff'd*. 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); *Simeon Management Corp*., 87 F.T.C. 1184, 1230 (1976), *aff'd*, 579 F.2d 1137 (9th Cir. 1978).

[11]*See, e.g., Grolier*, 91 F.T.C. 315,480 (1978), *remanded on other grounds*, 615 F.2d 1215 (9th Cir. 1980), *modified on other grounds*, 98 F.T.C. 882 (1981), *reissued*, 99 F.T.C. 379 (1982).

[12]In *Peacock Buick*, 86 F.T.C. 1532 (1975), *aff'd*, 553 F.2d 97 (4th Cir. 1977), the Commission held that

> absent a clear and early disclosure of the prior use of a late model car, deception can result from the setting in which a sale is made and the expectations of the buyer ... *Id.* at 1555.
>
> [E]ven in the absence of affirmative misrepresentations, it is misleading for the seller of late model used cars to fail to reveal the particularized uses to which they have been put... When a later model used car is sold at close to list price ... the assumption likely to be made by some purchasers is that, absent disclosure to the contrary, such car has not previously been used in a way that might substantially impair its value. In such circumstances, failure to disclose a disfavored prior use may tend to mislead. *Id* at 1557-58.

[13]In *Leonard Porter*, the Commission dismissed a complaint alleging that respondents' sale of unmarked products in Alaska led consumers to believe erroneously that they were handmade in Alaska by natives. Complaint counsel had failed to show that consumers of Alaskan craft assumed respondents' products were handmade by Alaskans in Alaska. The Commission was unwilling, absent evidence, to infer from a viewing of the items that the products would tend to mislead consumers.

> By requiring such evidence, we do not imply that elaborate proof of consumer beliefs or behavior is necessary, even in a case such as this, to establish the requisite capacity to deceive. However, where visual inspection is inadequate, some extrinsic testimony evidence must be added. 88 F.T.C. 546, 626, n.5 (1976).

[14]*Bait and Switch Policy Protocol*, December 10, 1975; Guides Against Bait Advertising, 16 C.F.R. 238.0 (1967). 32 FR 15,540.

[15]*Encyclopedia Britannica* 87 F.T.C. 421, 497 (1976), *aff'd*, 605 F.2d 964 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980), *modified*, 100 F.T.C. 500 (1982).

[16]*See* the complaints in *BayleySuit*, C-3117 (consent agreement) (September 30,1983) [102 F.T.C. 1285]; *Figgie International, Inc.*, D. 9166 (May 17, 1983).

[17]The Commission's complaints in *Chrysler Corporation*, 99 F.T.C. 347 (1982), and *Volkswagen of America*, 99 F.T.C. 446 (1982), alleged the failure to disclose accurate use and care instructions for replacing oil filters was deceptive. The complaint in *Ford Motor Co.*, D. 9154, 96 F.T.C. 362 (1980), charged Ford with failing to disclose a "piston scuffing" defect to purchasers and owners which was allegedly widespread and costly to repair. *See also General Motors*, D. 9145 (provisionally accepted consent agreement, April 26, 1983). [102 F.T.C. 1741]

[18]*See Jay Norris Corp.*, 91 F.T.C. 751 (1978), *aff'd with modified language in order*, 598 F.2d 1244 (2d Cir. 1979), *cert. denied*, 444 U.S. 980 (1979) (failure to consistently meet guarantee claims of “immediate and prompt" delivery as well as money back guarantees); *Southern States Distributing Co.*, 83 F.T.C. 1126 (1973) (failure to honor oral and written product maintenance guarantees, as represented); *Skylark Originals, Inc.*, 80 F.T.C. 337 (1972), *aff'd*, 475 F.2d 1396 (3d Cir. 1973) (failure to promptly honor moneyback guarantee as represented in advertisements and catalogs); *Capitol Manufacturing Corp.*, 73 F.T.C. 872 (1968) (failure to fully, satisfactorily and promptly meet all obligations and requirements under terms of service guarantee certificate).

[19]The evidence necessary to determine how reasonable consumers understand a representation is discussed in Section II of this letter.

[20]An interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is deceptive. *See Heinz W. Kirchner*, 63 F.T.C. 1282 (1963).

[21]A secondary message understood by reasonable consumers is actionable if deceptive even though the primary message is accurate. *Sears, Roebuck & Co*., 95 F.T.C. 406, 511 (1980), *aff'd* 676 F.2d 385 (9th Cir. 1982); *Chrysler*, 87 F.T.C. 749 (1976), *aff'd*, 561 F.2d 357 (D.C. Cir.), *reissued* 90 F.T.C. 606 (1977); *Rhodes Pharmacal Co*., 208 F.2d 382, 387 (7th Cir. 1953), *aff'd*, 348 U.S. 940 (1955).

[22]*National Comm'n on Egg Nutrition*, 88 F.T.C. 89, 185 (1976), *enforced in part*, 570 F.2d 157 (7th Cir. 1977); *Jay Norris Corp*., 91 F.T.C. 751, 836 (1978), *aff'd*, 598 F.2d 1244 (2d Cir. 1979).

[23]*National Dynamics*, 82 F.T.C. 488, 524, 548 (1973), *aff'd*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974), *reissued* 85 F.T.C. 391 (1976).

[24]*Warner-Lambert*, 86 F.T.C. 1398, 1415 n.4 (1975), *aff'd*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

[25]*Grolier*, 91 F.T.C. 315, 430 (1978), *remanded on other grounds*, 615 F.2d 1215 (9th Cir. 1980), *modified on other grounds*, 98 F.T.C. 882 (1981), *reissued*, 99 F.T.C. 379 (1982).

[26]*American Home Products*, 98 F.T.C. 136 (1981), *aff'd* 695 F.2d 681 (3d Cir. 1982). "… consumers may be led to expect, quite reasonably..." (at 386); "... consumers may reasonably believe..." (*Id*. n.52); "... would reasonably have been understood by consumers...." (at 371); "[t]he record shows that consumers could reasonably have understood this language . . ." (at 372). *See also*, pp. 373, 374, 375. *Bristol-Myers*, D. 8917 (July 5, 1983), appeal docketed, No. 83-4167 (2nd Cir. Sept. 12,1983)."…ads must be judged by the impression they make on reasonable members of the public . . . " (Slip Op. at 4); ". . . consumers could reasonably have understood . . ." (Slip Op. at 7); ". . . consumers could reasonably infer . . ." (Slip Op. at 11) [102 F.T.C. 21 (1983)]. *Sterling Drug, Inc*., D. 8919 (July 5,1983), appeal docketed, No. 83-7700 (9th Cir. Sept. 14,1983). "... consumers could reasonably assume . . ." (Slip Op. at 9); ". . . consumers could reasonably interpret the ads . . ." (Slip Op. at 33). [102 F.T.C. 395 (1983)]

[27]*Horizon Corp*., 97 F.T.C. 464, 810 n.13 (1981).

[28]*Simeon Management*, 87 F.T.C. 1184, 1230 (1976).

[29]The listed categories are merely examples. Whether children, terminally ill patients, or any other subgroup of the population will be considered a special audience depends on the specific factual context of the claim or the practice.

The Supreme Court has affirmed this approach. "The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience." *Bates v. Arizona*, 433 U.S. 350, 383 n.37 (1977).

[30]In one case, the Commission's complaint focused on seriously ill persons. The ALJ summarized:

> According to the complaint, the frustrations and hopes of the seriously ill and their families were exploited, and the representation had the tendency and capacity to induce the seriously ill to forego conventional medical treatment worsening their condition and in some cases hastening death, or to cause them to spend large amounts of money and to undergo the inconvenience of traveling for a non-existent "operation." *Travel King*, 86 F.T.C. 715, 719 (1975).

In a case involving a weight loss product, the Commission observed:

> It is obvious that dieting is the conventional method of losing weight. But it is equally obvious that many people who need or want to lose weight regard dieting as bitter medicine. To these corpulent consumers the promises of weight loss without dieting are the Siren's call, and advertising that heralds unrestrained consumption while muting the inevitable need for temperance, if not abstinence, simply does not pass muster. *Porter & Dietsch*, 90 F.T.C. 770, 864-865 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980).

Children have also been the specific target of ads or practices. In *Ideal Toy*, the Commission adopted the Hearing Examiner's conclusion that:

> False, misleading and deceptive advertising claims beamed at children tend to exploit unfairly a consumer group unqualified by age or experience to anticipate or appreciate the possibility that representations may be exaggerated or untrue. *Ideal Toy*, 64 F.T.C. 297, 310 (1964).

See also, *Avalon Industries Inc*., 83 F.T.C. 1728, 1750 (1974).

[31]*FTC v. Sterling Drug*, 317 F.2d 669, 674 (2d Cir. 1963).

[32]Numerous cases exemplify this point. For instance, in *Pfizer*, the Commission ruled that "the net impression of the advertisement, evaluated from the perspective of the audience to whom the advertisement is directed, is controlling." 81 F.T.C. 23, 58 (1972).

In a subsequent case, the Commission explained that "[i]n evaluating advertising representations, we are required to look at the complete advertisement and formulate our opinions on them on the basis of the net general impression conveyed by them and not on isolated excerpts." *Standard Oil of Calif*, 84 F.T.C. 1401, 1471 (1974), *aff'd as modified*, 577 F.2d 653 (9th Cir. 1978), *reissued*, 96 F.T.C. 380 (1980).

The Third Circuit stated succinctly the Commission's standard. "The tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or

phrases apart from their context." *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

[33]In *Litton Industries*, the Commission held that fine print disclosures that the surveys included only "Litton authorized" agencies were inadequate to remedy the deceptive characterization of the survey population in the headline. 97 F.T.C. 1, 71, n.6 (1981), *aff'd as modified*, 676 F.2d 364 (9th Cir. 1982). Compare the Commission's note in the same case that the fine print disclosure "Litton and one other brand" was reasonable to quote the claim that independent service technicians had been surveyed. "[F]ine print was a reasonable medium for disclosing a qualification of only limited relevance." 97 F.T.C. 1, 70, n.5 (1981).

In another case, the Commission held that the body of the ad corrected the possibly misleading headline because in order to enter the contest, the consumer had to read the text, and the text would eliminate any false impression stemming from the headline. *D.L. Blair*, 82 F.T.C. 234, 255-256 (1973).

In one case respondent's expert witness testified that the headline (and accompanying picture) of an ad would be the focal point of the first glance. He also told the administrative law judge that a consumer would spend [t]ypically a few seconds at most" on the ads at issue. *Crown Central*, 84 F.T.C. 1493, 1543 nn. 14-15 (1974).

[34]In *Giant Food*, the Commission agreed with the examiner that the fine-print disclaimer was inadequate to correct a deceptive impression. The Commission quoted from the examiner's finding that "very few if any of the persons who would read Giant's advertisements would take the trouble to, or did, read the fine print disclaimer." 61 F.T.C. 326, 348 (1962).

Cf. Beneficial Corp. v. FTC, 542 P.2d 611, 618 (3d Cir. 1976), where the court reversed the Commission's opinion that no qualifying language could eliminate the deception stemming from use of the slogan "Instant Tax Refund."

[35]"Respondents argue that the contracts which consumers signed indicated that credit life insurance was not required for financing, and that this disclosure obviated the possibility of deception. We disagree. It Is clear from consumer testimony that oral deception was employed in some instances to cause consumers to ignore the warning in their sales agreement. . ." *Peacock Buick*, 86 F.T.C. 1532, 1558-59 (1974).

[36]*Exposition Press*, 295 F.2d 869, 873 (2d Cir. 1961); *Gimbel Bros*., 61 F.T.C. 1051, 1066 (1962); *Carter Products*, 186 F.2d 821, 824 (1951).

By the same token, money-back guarantees do not eliminate deception. In *Sears*, the Commission observed:

> A money-back guarantee is no defense to a charge of deceptive advertising.... A money-back guarantee does not compensate the consumer for the often considerable time and expense incident to returning a major-ticket item and obtaining a replacement.

Sears, Roebuck and Co., 95 F.T.C. 406, 518 (1980), *aff'd*, 676 F.2d 385 (9th Cir. 1982). However, the existence of a guarantee, if honored, has a bearing on whether the Commission

should exercise its discretion to prosecute. *See* Deceptive and Unsubstantiated Claims Policy Protocol, 1975.

[37]*See American Home Products*, 98 F.T.C. 136, 370 (1981), *aff'd*, 695 F.2d 681, 688 (3d Cir. Dec. 3, 1982), Whether a disclosure on the label cures deception in advertising depends on the circumstances:

> ... it is well settled that dishonest advertising is not cured or excused by honest labeling [footnote omitted). Whether the ill-effects of deceptive nondisclosure can be cured by a disclosure requirement limited to labeling, or whether a further requirement of disclosure in advertising should be imposed, is essentially a question of remedy. As such it is a matter within the sound discretion of the Commission [footnote omitted]. The question of whether in a particular case to require disclosure in advertising cannot be answered by application of any hard-and-fast principle. The test is simple and pragmatic: Is it likely that, unless such disclosure is made, a substantial body of consumers will be misled to their detriment? *Statement of Basis and Purpose for the Cigarette Advertising and Labeling Trade Regulation Rule*, 1965, pp. 89-90. 29 FR 8325 (1964).

Misleading "door openers" have also been found deceptive (Encyclopedia Britannica, 87 F.T.C. 421 (1976), *aff'd*, 605 F.2d 964 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980), *as modified*, 100 F.T.C. 500 (1982)), as have offers to sell that are not bona fide offers (*Seekonk Freezer Meats, Inc*., 82 F.T.C. 1025 (1973)). In each of these instances, the truth is made known prior to purchase.

[38]In the Listerine case, the Commission held that *pro forma* statements of no absolute prevention followed by promises of fewer colds did not cure or correct the false message that Listerine will prevent colds. *Warner Lambert* 86 F.T.C. 1398, 1414 (1975), *aff'd*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

[39]*Chicago Metropolitan Pontiac Dealers' Ass'n*, C. 3110 (June 9,1983). [101 F.T.C. 854 (1983)]

[40]An opinion is a representation that expresses only the behalf of the maker, without certainty, as to the existence of a fact, or his judgement as to quality, value, authenticity, or other matters of judgement. American Law Institute, *Restatement on Torts, Second* ¶ 538 A.

[41]*Id*. ¶ 539. At common law, a consumer can generally rely on an expert opinion. *Id*., ¶ 542(a). For this reason, representations of expert opinion will generally be regarded as representations of fact.

[42]"[T]here is a category of advertising themes, in the nature of puffing or other hyperbole, which do not amount to the type of affirmative product claims for which either the Commission or the consumer would expect documentation." *Pfizer, Inc*, 81 F.T.C. 23, 64 (1972).

> The term "Puffing" refers generally to an expression of opinion not made as a representation of fact. A seller has some latitude in puffing his goods, but he is not authorized to misrepresent them or to assign to them benefits they do not possess [cite omitted]. Statements made for the purpose of deceiving prospective purchasers cannot

properly be characterized as mere puffing. *Wilmington Chemical*, 69 F.T.C. 828, 865 (1966).

[43]In *Avalon Industries*, the ALJ observed that the "'ordinary person with a common degree of familiarity with industrial civilization' would expect a reasonable relationship between the size of package and the size of quantity of the contents. He would have no reason to anticipate slack filling." 83 F.T.C. 1728, 1750 (1974) (I.D.).

[44]"A misleading claim or omission in advertising will violate Section 5 or Section 12, however, only if the omitted information would be a material factor in the consumer's decision to purchase the product." *American Home Products Corp*., 98 F.T.C. 136, 368 (1981), *aff'd*, 695 F.2d 681 (3d Cir. 1982). A claim is material if it is likely to affect consumer behavior. "Is it likely to affect the average consumer in deciding whether to purchase the advertised product-is there a material deception, in other words?" Statement of Basis and Purpose, *Cigarette Advertising and Labeling Rule*, 1965, pp. 86-87. 29 FR 8325 (1964).

[45]Material information may affect conduct other than the decision to purchase a product. The Commission's complaint in *Volkswagen of America*, 99 F.T.C. 446 (1982), for example, was based on provision of inaccurate instructions for oil filter installation. In its *Restatement on Torts, Second*, the American Law Institute defines a material misrepresentation or omission as one which the reasonable person would regard as important in deciding how to act, or one which the maker knows that the recipient, because of his or her own peculiarities, is likely to consider important. Section 538(2). The Restatement explains that a material fact does not necessarily have to affect the finances of a transaction. "There are many more-or-less sentimental considerations that the ordinary man regards as important." Comment on Clause 2(a)(d).

[46]In evaluating materiality, the Commission takes consumer preferences as given. Thus, if consumers prefer one product to another, the Commission need not determine whether that preference is objectively justified. *See Algoma Lumber*, 291 U.S. 54, 78 (1933). Similarly, objective differences among products are not material if the difference is not likely to affect consumer choices.

[47]The Commission will always consider relevant and competent evidence offered to rebut presumptions of materiality.

[48]Because this presumption is absent for some implied claims, the Commission will take special caution to ensure materiality exists in such cases.

[49]*Central Hudson Gas & Electric Co. v. PSC*, 447 U.S. 557, 567 (1980).

[50]*Cf. Restatement on Contracts, Second* ¶ 162(l).

[51]In *American Home Products*, the evidence was that the company intended to differentiate its products from aspirin. The very fact that AHP sought to distinguish its products from aspirin strongly implies that knowledge of the true ingredients of those products would be material to purchasers." *American Home Products*, 98 F.T.C. 136, 368 (1981), *aff'd*, 695 F.2d 681 (3d. Cir. 1982).

[52]In *Fedders*, the ads represented that only Fedders gave the assurance of cooling on extra hot, humid days. "Such a representation is the raison d'etre for an air conditioning unit-it is an extremely material representation." 85 F.T.C. 38, 61 (1975) (I.D.), *petition dismissed*, 529 F.2d 1398 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976).

[53]"We note at the outset that both alleged misrepresentations go to the issue of the safety of respondent's product, an issue of great significance to consumers." *Firestone*, 81 F.T.C. 398, 456 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

[54]The Commission found that information that a product was effective in only the small minority of cases where tiredness symptoms are due to an iron deficiency, and that it was of no benefit in all other cases, was material. *J.B. Williams Co*., 68 F.T.C. 481, 546 (1965), *aff'd*, 381 F.2d 884 (6th Cir. 1967).

[55]As the Commission noted in *MacMillan, Inc*.:

> In marketing their courses, respondents failed to adequately disclose the number of lesson assignments to be submitted in a course. These were material facts necessary for the student to calculate his tuition obligation, which was based on the number of lesson assignments he submitted for grading. The nondisclosure of these material facts combined with the confusion arising from LaSalle's inconsistent use of terminology had the capacity to mislead students about the nature and extent of their tuition obligation. *MacMillan, Inc*., 96 F.T.C. 208, 303-304 (1980).

See also, Peacock Buick, 86 F.T.C. 1532, 1562 (1975), *aff'd*, 553 F.2d 97 (4th Cir. 1977).

[56]*Simeon Management Corp*., 87 F.T.C. 1184 (1976), *aff'd*, 579 F.2d 1137, 1168, n.10 (9th Cir. 1978).

[57]In *American Home Products*, the Commission approved the ALJ's finding of materiality from an economic perspective:

> If the record contained evidence of a significant disparity between the prices of Anacin and plain aspirin, it would form a further basis for a finding of materiality. That is, there is a reason to believe consumers are willing to pay a premium for a product believed to contain a special analgesic ingredient but not for a product whose analgesic is ordinary aspirin. *American Home Products*, 98 F.T.C. 136, 369 (1981), *aff'd*, 695 F.2d 681 (3d Cir. 1982).

[58]The prohibitions of Section 5 are intended to prevent injury to competitors as well as to consumers. The Commission regards injury to competitors as identical to injury to consumers. Advertising and legitimate marketing techniques are intended to "lure" competitors by directing business to the advertiser. In fact, vigorous competitive advertising can actually benefit consumers by lowering prices, encouraging product innovation, and increasing the specificity and amount of information available to consumers. Deceptive practices injure both competitors and consumers because consumers who preferred the competitor's product are wrongly diverted.

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FTC Policy Statement on Unfairness

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DATE: December 17, 1980

Appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984). See 15 U.S.C. § 45(n).

The Honorable Wendell H. Ford
Chairman, Consumer Subcommittee
Committee on Commerce, Science, and Transportation
Room 130 Russell Office Building
Washington, D.C. 20510

The Honorable John C. Danforth
Ranking Minority Member, Consumer Subcommittee
Committee on Commerce, Science, and Transportation
Room 130 Russell Office Building
Washington, D.C. 20510

Dear Senators Ford and Danforth:

This is in response to your letter of June 13, 1980, concerning one aspect of this agency's jurisdiction over "unfair or deceptive acts or practices." You informed us that the Subcommittee was planning to hold oversight hearings on the concept of "unfairness" as it has been applied to consumer transactions. You further informed us that the views of other interested parties were solicited and compiled in a Committee Print earlier this year.[1] Your letter specifically requested the Commission's views on cases under Section 5 "not involving the content of advertising," and its views as to "whether the Commission's authority should be limited to regulating false or deceptive commercial advertising." Our response addresses these and other questions related to the concept of consumer unfairness.

We are pleased to have this opportunity to discuss the future work of the agency. The subject that you have selected appears to be particularly timely. We recognize that the concept of consumer unfairness is one whose precise meaning is not immediately obvious, and also recognize that this uncertainty has been honestly troublesome for some businesses and some members of the legal profession. This result is understandable in light of the general nature of the statutory standard. At the same time, though, we believe we can respond to legitimate concerns of business and the Bar by attempting to delineate in this letter a concrete framework for future application of the Commission's unfairness authority. We are aided in this process by the cumulative decisions of this agency and the federal courts, which, in our opinion, have brought added clarity to the law. Although the administrative and judicial evolution of the consumer unfairness concept has still left some necessary flexibility in the statute, it is possible to provide a reasonable working sense of the conduct that is covered.

In response to your inquiry we have therefore undertaken a review of the decided cases and rules and have synthesized from them the most important principles of general applicability. Rather than merely reciting the law, we have attempted to provide the Committee with a concrete indication of the manner in which the Commission has enforced, and will continue to enforce, its unfairness mandate. In so doing we intend to address the concerns that have been raised about the meaning of consumer unfairness, and thereby attempt to provide a greater sense of certainty about what the Commission would regard as an unfair act or practice under Section 5.

This letter thus delineates the Commission's views of the boundaries of its consumer unfairness jurisdiction and is subscribed to by each Commissioner. In addition, we are enclosing a companion Commission statement that discusses the ways in which this body of law differs from, and supplements, the prohibition against consumer deception, and then considers and evaluates some specific criticisms that have been made of our enforcement of the law.[2] Since you have indicated a particular interest in the possible application of First Amendment principles to commercial advertising, the companion statement will include discussions relevant to that question. The companion statement is designed to respond to the key questions raised about the unfairness doctrine. However, individual Commissioners may not necessarily endorse particular arguments or particular examples of the Commission's exercise of its unfairness authority contained in the companion statement.

Commission Statement of Policy on the Scope of the
Consumer Unfairness Jurisdiction

Section 5 of the FTC Act prohibits, in part, "unfair ... acts or practices in or affecting commerce."[3] This is commonly referred to as the Commission's consumer unfairness jurisdiction. The Commission's jurisdiction over "unfair methods of competition" is not discussed in this letter.[4] Although we cannot give an exhaustive treatment of the law of consumer unfairness in this short statement, some relatively concrete conclusions ran nonetheless be drawn.

The present understanding of the unfairness standard is the result of an evolutionary process. The statute was deliberately framed in general terms since Congress recognized the impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasion.[5] The task of identifying unfair trade practices was therefore assigned to the Commission, subject to judicial review,[6] in the expectation that the underlying criteria would evolve and develop over time. As the Supreme Court observed as early as 1931, the ban on unfairness "belongs to that class of phrases which do not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called 'the gradual process of judicial inclusion and exclusion.'"[7]

By 1964 enough cases had been decided to enable the Commission to identify three factors that it considered when applying the prohibition against consumer unfairness. These were: (1) whether the practice injures consumers; (2) whether it violates established public policy; (3) whether it is unethical or unscrupulous.[8] These factors were later quoted with apparent approval by the Supreme Court in the 1972 case of *Sperry & Hutchinson*.[9] Since then the Commission has continued to refine the standard of unfairness in its cases and rules, and it has now reached a more detailed sense of both the definition and the limits of these criteria.[10]

Consumer injury

Unjustified consumer injury is the primary focus of the FTC Act, and the most important of the three *S&H* criteria. By itself it can be sufficient to warrant a finding of unfairness. The Commission's ability to rely on an independent criterion of consumer injury is consistent with the intent of the statute, which was to "[make] the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant injured by the unfair methods of a dishonest competitor."[11]

The independent nature of the consumer injury criterion does not mean that every consumer injury is legally "unfair," however. To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.

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First of all, the injury must be substantial. The Commission is not concerned with trivial or merely speculative harms.[12] In most cases a substantial injury involves monetary harm, as when sellers coerce consumers into purchasing unwanted goods or services[l3] or when consumers buy defective goods or services on credit but are unable to assert against the creditor claims or defenses arising from the transaction. [14] Unwarranted health and safety risks may also support a finding of unfairness.[15] Emotional impact and other more subjective types of harm, on the other hand, will not ordinarily make a practice unfair. Thus, for example, the Commission will not seek to ban an advertisement merely because it offends the tastes or social beliefs of some viewers, as has been suggested in some of the comments.[16]

Second, the injury must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces. Most business practices entail a mixture of economic and other costs and benefits for purchasers. A seller's failure to present complex technical data on his product may lessen a consumer's ability to choose, for example, but may also reduce the initial price he must pay for the article. The Commission is aware of these tradeoffs and will not find that a practice unfairly injures consumers unless it is injurious in its net effects.[17] The Commission also takes account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the agency, but also the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters.[18] Finally, the injury must be one which consumers could not reasonably have avoided.[19] Normally we expect the marketplace to be self-correcting, and we rely on consumer choice-the ability of individual consumers to make their own private purchasing decisions without regulatory intervention--to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory. However, it has long been recognized that certain types of sales techniques may prevent consumers from effectively making their own decisions, and that corrective action may then become necessary. Most of the Commission's unfairness matters are brought under these circumstances. They are brought, not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking.[20]

Sellers may adopt a number of practices that unjustifiably hinder such free market decisions. Some may withhold or fail to generate critical price or performance data, for example, leaving buyers with insufficient information for informed comparisons.[21] Some may engage in overt coercion, as by dismantling a home appliance for "inspection" and refusing to reassemble it until a service contract is signed.[22] And some may exercise undue influence over highly susceptible classes of purchasers, as by promoting fraudulent "cures" to seriously ill cancer patients.[23] Each of these practices undermines an essential precondition to a free and informed consumer transaction, and, in turn, to a well-functioning market. Each of them is therefore properly banned as an unfair practice under the FTC Act.[24]

Violation of public policy

The second *S&H* standard asks whether the conduct violates public policy as it has been established by statute, common law, industry practice, or otherwise. This criterion may be applied in two different ways. It may be used to test the validity and strength of the evidence of consumer injury, or, less often, it may be cited for a dispositive legislative or judicial determination that such injury is present.

Although public policy was listed by the *S&H* Court as a separate consideration, it is used most frequently by the Commission as a means of providing additional evidence on the degree of consumer injury caused by specific practices. To be sure, most Commissi6n actions are brought to redress relatively clear-cut injuries, and those determinations are based, in large part, on objective economic analysis. As we have indicated before, the Commission believes that considerable attention should be devoted to the analysis of whether substantial net harm has occurred, not only because that is part of the unfairness test, but also because the focus on injury is the best way to ensure that the Commission acts responsibly and uses its resources wisely. Nonetheless, the Commission wishes to emphasize the importance of examining outside statutory policies and established judicial principles for assistance in helping the agency ascertain whether a particular form of conduct does in fact tend to harm consumers. Thus the agency has referred to First Amendment decisions upholding consumers' rights to receive

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information, for example, to confirm that restrictions on advertising tend unfairly to hinder the informed exercise of consumer choice.[25]

Conversely, statutes or other sources of public policy may affirmatively allow for a practice that the Commission tentatively views as unfair. The existence of such policies will then give the agency reason to reconsider its assessment of whether the practice is actually injurious in its net effects.[26] In other situations there may be no clearly established public policies, or the policies may even be in conflict. While that does not necessarily preclude the Commission from taking action if there is strong evidence of net consumer injury, it does underscore the desirability of carefully examining public policies in all instances.[27] In any event, whenever objective evidence of consumer injury is difficult to obtain, the need to identify and assess all relevant public policies assumes increased importance.

Sometimes public policy will independently support a Commission action. This occurs when the policy is so clear that it will entirely determine the question of consumer injury, so there is little need for separate analysis by the Commission. In these cases the legislature or court, in announcing the policy, has already determined that such injury does exist and thus it need not be expressly proved in each instance. An example of this approach arose in a case involving a mail-order firm.[28] There the Commission was persuaded by an analogy to the due-process clause that it was unfair for the firm to bring collection suits in a forum that was unreasonably difficult for the defendants to reach. In a similar case the Commission applied the statutory policies of the Uniform Commercial Code to require that various automobile manufacturers and their distributors refund to their customers any surplus money that was realized after they repossessed and resold their customer's cars.[29] The Commission acts on such a basis only where the public policy is suitable for administrative enforcement by this agency, however. Thus it turned down a petition for a rule to require fuller disclosure of aerosol propellants, reasoning that the subject of fluorocarbon safety was currently under study by other scientific and legislative bodies with more appropriate expertise or jurisdiction over the subject.[30]

To the extent that the Commission relies heavily on public policy to support a finding of unfairness, the policy should be clear and well-established. In other words, the policy should be declared or embodied in formal sources such as statutes, judicial decisions, or the Constitution as interpreted by the courts, rather than being ascertained from the general sense of the national values. The policy should likewise be one that is widely shared, and not the isolated decision of a single state or a single court. If these two tests are not met the policy cannot be considered as an "established" public policy for purposes of the S&H criterion. The Commission would then act only on the basis of convincing independent evidence that the practice was distorting the operation of the market and thereby causing unjustified consumer injury.

Unethical or unscrupulous conduct

Finally, the third *S&H* standard asks whether the conduct was immoral, unethical, oppressive, or unscrupulous. This test was presumably included in order to be sure of reaching all the purposes of the underlying statute, which forbids "unfair" acts or practices. It would therefore allow the Commission to reach conduct that violates generally recognized standards of business ethics. The test has proven, however, to be largely duplicative. Conduct that is truly unethical or unscrupulous will almost always injure consumers or violate public policy as well. The Commission has therefore never relied on the third element of *S&H* as an independent basis for a finding of unfairness, and it will act in the future only on the basis of the first two.

We hope this letter has given you the information that you require. Please do not hesitate to call if we can be of any further assistance. With best regards,

/s/Michael Pertschuk Chairman

/s/Paul Rand Dixon Commissioner

/s/David A. Clanton Commissioner

/s/Robert Pitofsky Commissioner

/s/Patricia P. Bailey Commissioner

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[1]Unfairness: Views on Unfair Acts and Practices in Violation of the Federal Trade Commission Act (1980) (hereinafter referred to as "Committee Print").

[2]Neither this letter nor the companion statement addresses ongoing proceedings, but the Commission is prepared to discuss those matters separately at an appropriate time.

[3]The operative sentence of Section 5 reads in full as follows: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. 45(a)(1).

[4]In fulfilling its competition or antitrust mission the Commission looks to the purposes, policies, and spirit of the other antitrust laws and the FTC Act to determine whether a practice affecting competition or competitors is unfair. *See, e.g., FTC v. Brown Shoe Co.,* 384 U.S. 316 (1966). In making this determination the Commission is guided by the extensive legislative histories of those statutes and a considerable body of antitrust case law. The agency's jurisdiction over "deceptive acts or practices" is likewise not discussed in this letter.

[5]*See* H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., at 19 (1914) (If Congress "were to adopt the method of definition, it would undertake an endless task"). In 1914 the statute was phrased only in terms of "unfair methods of competition," and the reference to "unfair acts or practices" was not added until the Wheeler-Lee Amendment in 1938. The initial language was still understood as reaching most of the conduct now characterized as consumer unfairness, however, and so the original legislative history remains relevant to the construction of that part of the statute.

[6]The Supreme Court has stated on many occasions that the definition of "unfairness" is ultimately one for judicial determination. *See, e.g., FTC v. Sperry & Hutchinson Co.,* 405 U.S. 233, 249 (1972); *FTC v. R..F. Keppel & Bro.,* 291 U.S. 304, 314 (1934).

[7]*FTC v. Raladam Co.,* 283 U.S. 643, 648 (1931). *See also FTC v. R.F. Keppel & Bro.,* 291 U.S. 304, 310 (1934) ("Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories").

[8]The Commission's actual statement of the criteria was as follows:

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-whether, in other words, it is within at least the penumbra of some common- law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964).

[9]*FTC v. Sperry & Hutchinson C..,* 405 U.S. 223, 244-45 n.5 (1972). The Circuit Courts have concluded that this quotation reflected the Supreme Court's own views. *See Spiegel, Inc. v. FTC,* 540 F.2d 287, 293 n.8 (7th Cir. 1976); *Heater v. FTC,* 503 F.2d 321, 323 (9th Cir. 1974). The application of these factors to antitrust matters is beyond the scope of this letter.

[10]These standards for unfairness are generally applicable to both advertising and non-advertising cases.

[11]83 Cong. Rec. 3255 (1938) (remarks of Senator Wheeler).

[12]An injury may be sufficiently substantial, however, if it does a small harm to a large number of people, or if it raises a significant risk of concrete harm.

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[13]*See, e.g., Holland Furnace Co. v. FTC*, 295 F.2d 302 (7th Cir. 1961) (seller's servicemen dismantled home furnaces and then refused to reassemble them until the consumers had agreed to buy services or replacement parts).

[14]Statement of Basis and Purpose, Preservation of Consumers' Claims and Defenses, 40 Fed. Reg. 53,506, 53522-23 (1975).

[15]For an example *see Philip Morris, Inc.*, 82 F.T.C. 16 (1973) (respondent had distributed free-sample razor blades in such a way that they could come into the hands of small children) (consent agreement). Of course, if matters involving health and safety are within the primary jurisdiction of some other agency, Commission action might not be appropriate.

[16]*See, e.g.,* comments of Association of National Advertisers, Committee Print at 120. In an extreme case, however, where tangible injury could be clearly demonstrated, emotional effects might possibly be considered as the basis for a finding of unfairness. *Cf.* 15 U.S.C. 1692 *et seq.* (Fair Debt Collection Practices Act) (banning, eg., harassing late-night telephone calls).

[17]*See Pftzer, Inc*., 81 F.T.C. 23, 62-63 n. 13 (1972); Statement of Basis and Purpose, Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 43 Fed. Reg. 59614, 59636 n.95 (1978).

When making this determination the Commission may refer to existing public policies for help in ascertaining the existence of consumer injury and the relative weights that should be assigned to various costs and benefits. The role of public policy in unfairness determinations will be discussed more generally below.

[18]For example, when the Commission promulgated the Holder Rule it anticipated an overall lowering of economic costs to society because the rule gave creditors the incentive to police sellers, thus increasing the likelihood that those selling defective goods or services would either improve their practices or leave the marketplace when they could not obtain financing. These benefits, in the Commission's judgment, outweighed any costs to creditors and sellers occasioned by the rule. See Statement of Basis and Purpose, Preservation of Consumers' Claims and Defenses, 40 Fed. Reg. 53506, 53522-23 (1975).

[19]In some senses any injury can be avoided--for example, by hiring independent experts to test all products in advance, or by private legal actions for damages-but these courses may be too expensive to be practicable for individual consumers to pursue.

[20]This emphasis on informed consumer choice has commonly been adopted in other statutes as well. *See, e.g.,* Declaration of Policy, Fair Packaging and Labeling Act, 15 U.S.C. 1451 ("Informed consumers are essential to the fair and efficient functioning of a free market economy".)

[21]*See, e.g.,* Statement of Basis and Purpose, Labeling and Advertising of Home Insulation, 44 Fed. Reg. 50218, 50222-23 (1979); Statement of Basis and Purpose, Posting of Minimum Octane Numbers on Gasoline Dispensing Pumps, 36 Fed. Reg. 23871,23882 (1971). *See also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* Inc., 425 U.S. 748 (1976).

[22]*See Holland Furnace Co. v. ETC,* 295 F.2d 302 (7th Cir. 1961); *cf Arthur Murray Studio, Inc. v.* EW, 458 F.2d 622 (5th Cir. 1972) (emotional high-pressure sales tactics, using teams of salesmen who refused to let the customer leave the room until a contract was signed). *See also* Statement of Basis and Purpose, Cooling-Off Period for Door-to-Door Sales, 37 Fed. Reg. 22934, 22937-38 (1972).

[23]*See, e.g., Travel King,* Inc., 86 F.T.C. 715, 774 (1975). The practices in this rase primarily involved deception, but the Commission noted the special susceptibilities of such patients as one reason for banning the ads entirely rather than relying on the remedy of fuller disclosure. The Commission recognizes that "undue influence" in advertising and promotion is difficult to define, and therefore exercises its authority here only with respect to substantial coercive-like practices and significant consumer injury.

[24]These few examples are not exhaustive, but the general direction they illustrate is clear. As the Commission stated in promulgating its Eyeglasses Rule, the inquiry should begin, at least, by asking "whether the acts or practices at issue inhibit

the functioning of the competitive market and whether consumers are harmed thereby." Statement of Basis and Purpose, Advertising of 0phthalmic Goods and Services, 43 Fed. Reg. 23992,24001 (1978).

[25]*See* Statement of Basis and Purpose, Advertising of ophthalmic Goods and Services, 43 Fed. Reg. 23992,24001 (1978), *citing Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976).

[26]*Cf*. Statement of Basis and Purpose, Advertising of ophthalmic Goods and Services, *supra; see also n.17 supra.*

[27]The analysis of external public policies is extremely valuable but not always definitive. The legislative history of Section 5 recognizes that new forms of unfair business practices may arise which, at the time of the Commission's involvement, have not yet been generally proscribed. See page 4, *supra.* Thus a review of public policies established independently of Commission action may not be conclusive in determining whether the challenged practices should be prohibited or otherwise restricted. At the same time, however, we emphasize the importance of examining public policies, since a thorough analysis can serve as an important check on the overall reasonableness of the Commission's actions.

[28]*Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir. 1976). In this case the Commission did inquire into the extent of the resulting consumer injury, but under the rationale involved it presumably need not have done so. *See also FTC v. R.F. Keppel & Bro.,* 291 U.S. 304 (1934) (firm had gained a marketing advantage by selling goods through a lottery technique that violated state gambling policies); *cf. Simeon Management Corp.,* 87 F.T.C. 1184, 1231 (1976), *aff'd*, 579 F.2d 1137 (9th Cir. 1978) (firm advertised weight-loss program that used a drug which could not itself be advertised under FDA regulations) (alternative ground). Since these public-policy cases are based on legislative determinations, rather than on a judgment within the Commission's area of special economic expertise, it is appropriate that they can reach a relatively wider range of consumer injuries than just those associated with impaired consumer choice.

[29]A surplus occurs when a repossessed car is resold for more than the amount owed by the debtor plus the expenses of repossession and resale. The law of 49 states requires that creditors refund surpluses when they occur, but if creditors systematically refuse to honor this obligation, consumers have no practical way to discover that they have been deprived of money to which they are entitled. *See Ford Motor Co.,* 94 F.T.C. 564, 618 (1979) *appeal pending,* Nos. 79-7649 and 79-7654 (9th Cir.); *Ford Motor Co.,93* F.T.C. 402 (1979) (consent decree); *General Motors Corp.,* D. 9074 (Feb., 1980) (consent decree). By these latter two consent agreements the Commission, because of its unfairness jurisdiction, has been able to secure more than $2 million for consumers allegedly deprived of surpluses to which they were entitled.

[30]See Letter from John F. Dugan, Acting Secretary, to Action on Smoking and Health (January 13, 1977). *See* also letter from Charles A. Tobin, Secretary, to Prof. Page and Mr. Young (September 17,1973) (denying petition to exercise § 6(b) subpoena powers to obtain consumer complaint information from cosmetic fu-ms and then to transmit the data to FDA for that agency's enforcement purposes).

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FTC Policy Statement Regarding Advertising Substantiation

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DATE: November 23, 1984

Appended to Thompson Medical Co., 104 F.T.C. 648, 839 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987).

Introduction

On March 11, 1983, the Commission published a notice requesting comments on its advertising substantiation program.[1] To facilitate analysis of the program, the notice posed a number of questions concerning the program's procedures, standards, benefits, and costs, and solicited suggestions for making the program more effective. Based on the public comments and the staff's review, the Commission has drawn certain conclusions about how the program is being implemented and how it might be refined to serve better the objective of maintaining a marketplace free of unfair and deceptive acts or practices. This statement articulates the Commission's policy with respect to advertising substantiation.

The Reasonable Basis Requirement

First, we reaffirm our commitment to the underlying legal requirement of advertising substantiation-that advertisers and ad agencies have a reasonable basis for advertising claims before they are disseminated.

The Commission intends to continue vigorous enforcement of this existing legal requirement that advertisers substantiate express and implied claims, however conveyed, that make objective assertions about the item or service advertised. Objective claims for products or services represent explicitly or by implication that the advertiser has a reasonable basis supporting these claims. These representations of substantiation are material to consumers. That is, consumers would be less likely to rely on claims for products and services if they knew the advertiser did not have a reasonable basis for believing them to be true.[2] Therefore, a firm's failure to possess and rely upon a reasonable basis for objective claims constitutes an unfair and deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act.

Standards for Prior Substantiation

Many ads contain express or implied statements regarding the amount of support the advertiser has for the product claim. When the substantiation claim is express (e.g.., "tests prove", "doctors recommend", and "studies show"), the Commission expects the firm to have at least the advertised level of substantiation. Of course, an ad may imply more substantiation than it

expressly claims or may imply to consumers that the firm has a certain type of support; in such cases, the advertiser must possess the amount and type of substantiation the ad actually communicates to consumers.

Absent an express or implied reference to a certain level of support, and absent other evidence indicating what consumer expectations would be, the Commission assumes that consumers expect a "reasonable basis" for claims. The Commission's determination of what constitutes a reasonable basis depends, as it does in an unfairness analysis, on a number of factors relevant to the benefits and costs of substantiating a particular claim. These factors include: the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable. Extrinsic evidence, such as expert testimony or consumer surveys, is useful to determine what level of substantiation consumers expect to support a particular product claim and the adequacy of evidence an advertiser possesses.

One issue the Commission examined was substantiation for implied claims. Although firms are unlikely to possess substantiation for implied claims they do not believe the ad makes, they should generally be aware of reasonable interpretations and will be expected to have prior substantiation for such claims. The Commission will take care to assure that it only challenges reasonable interpretations of advertising claims.[3]

Procedures for Obtaining Substantiation

In the past, the Commission has sought substantiation from firms in two different ways: through industry-wide "rounds" that involved publicized inquiries with identical or substantially similar demands to a number of firms within a targeted industry or to firms in different industries making the same type of claim; and on a case-by-case basis, by sending specific requests to individual companies under investigation. The Commission's review indicates that "rounds" have been costly to both the recipient and to the agency and have produced little or no law enforcement benefit over a case-by-case approach.

The Commission's traditional investigatory procedures allow the staff to investigate a number of firms within an industry at the same time, to develop necessary expertise within the area of investigation, and to announce our activities publicly in circumstances where public notice or comment is desirable. The Commission intends to continue undertaking such law enforcement efforts when appropriate. However, since substantiation is principally a law enforcement tool and the Commission's concern in such investigations is with the substantiation in the *advertiser's* possession, there is little, if any, information that the public could contribute in such investigations. Therefore, the Commission anticipates that substantiation investigations will rarely be made public before they are completed.

Accordingly, the Commission has determined that in the future it will rely on nonpublic requests for substantiation directed to individual companies via an informal access letter or, if necessary, a formal civil investigative demand. The Commission believes that tailored, firm-specific requests, whether directed to one firm or to several firms within the same industry, are a more efficient law enforcement technique. The Commission cannot presently foresee circumstances under which the past approach of industry-wide rounds would be appropriate in the ad substantiation area.

Relevance of Post-Claim Evidence in Substantiation Cases

The reasonable basis doctrine requires that firms have substantiation before disseminating a claim. The Commission has on occasion exercised its discretion, however, to consider supporting materials developed after disseminations The Commission has not previously identified in one document the circumstances in which it may, in its discretion, consider post-claim evidence in substantiation cases.[5] Such guidance can serve to clarify the program's actual operation as well as focus consideration of postclaim evidence on cases in which it is appropriate.

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The Commission emphasizes that as a matter of law, firms lacking a reasonable basis before an ad is disseminated violate Section 5 of the FTC Act and are subject to prosecution. The goal of the advertising substantiation requirement is to assure that advertising is truthful, however, and the truth or falsity of a claim is always relevant to the Commission's deliberations. Therefore, it is important that the agency retain the discretion and flexibility to consider additional substantiating evidence, not as a substitute for an advertiser's prior substantiation, but rather in the following circumstances:

> When deciding, before issuance of a complaint, whether there is a public interest in proceeding against a firm;
>
> When assessing the adequacy of the substantiation an advertiser possessed before a claim was made; and
>
> When deciding the need for or appropriate scope of an order to enter against a firm that lacked a reasonable basis prior to disseminating an advertisement.

First, using post-claim evidence to evaluate the truth of a claim, or otherwise using such evidence in deciding whether there is a public interest in continuing an investigation or issuing a complaint, is appropriate policy. This does not mean that the Commission will postpone action while firms create post-claim substantiation to prove the truthfulness of claims, nor does it mean that subsequent evidence of truthfulness absolves a firm of liability for failing to possess prior substantiation for a claim. The Commission focuses instead on whether existing evidence that claims are true should lead us in the exercise of our prosecutorial discretion to decline to initiate a law enforcement proceeding. If available post-claim evidence proves that the claim is true, issuing a complaint against a firm that may have violated the prior substantiation requirement is often inappropriate, particularly in light of competing demands on the Commission's resources.

Second, post-claim evidence may indicate that apparent deficiencies in the pre-claim substantiation materials have no practical significance. In evaluating the adequacy of prior substantiation, the Commission will consider only post-claim substantiation that sheds light on pre-existing substantiation. Thus, advertisers will not be allowed to create entirely new substantiation simply because their prior substantiation was inadequate.

Finally, the Commission may use post-claim evidence in determining the need for or appropriate scope of an order to be entered against a firm that lacked a reasonable basis. Thus, when additional evidence offered for the first time at trial suggests that the claim is true, the Commission may frame a narrower order than if there had been no post-claim evidence.

The Commission remains committed to the prior substantiation requirement and further believes that these discretionary factors will provide necessary flexibility. The Commission will consider post-claim evidence only in the circumstances listed above. But, whether it will do so in any particular case remains within its discretion.

Self Regulation Groups and Government Agencies

The Commission traditionally has enjoyed a close working relationship with self regulation groups and government agencies whose regulatory policies have some bearing on our law enforcement initiatives. The Commission will not necessarily defer, however, to a finding by a self-regulation group. An imprimatur from a self-regulation group will not automatically shield a firm from Commission prosecution, and an unfavorable determination will not mean the Commission will automatically take issue, or find liability if it does. Rather the Commission will make its judgment independently, evaluating each case on its merits. We intend to continue our useful relationships with self-regulation groups and to rely on the expertise and findings of other government agencies in our proceedings to the greatest extent possible.

By direction of the Commission.

' The distinction between pre-claim and post-claim evidence is only relevant when the charge is lack of substantiation. For other chases, such as falsity, when evidence was developed is irrelevant to its admissibility at trial.

[1] 48 FR 10471, March 11, 1983.

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[2] Nor presumably would an advertiser have made such claims unless the advertiser thought they would be material to consumers.

[3] Individual Commissioners have expressed differing views as to how claims should be interpreted so that advertisers are not held to outlandish or tenuous interpretations. Notwithstanding these variations in approach, the focus of all Commissioners on reasonable interpretations of claims is intended to ensure that advertisers are not required to substantiate claims that were not made.

[4] The Commission's evidentiary rule, 16 C.F.R. 3.40, has sometimes been interpreted as precluding introduction of post-claim substantiation. In fact, it does not. Section 3.40 only provides a sanction against the introduction of evidence that should have been produced in response to a subpoena, but was not.

[5] The distinction between pre-claim and post- claim evidence is only relevant when the charge is lack of substantiation. For other charges, such as falsity, when evidence was developed is irrelevant to its admissibility at triaL

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United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Enforcement Policy Statement on Deceptively Formatted Advertisements

The Federal Trade Commission issues this enforcement policy statement regarding advertising and promotional messages integrated into and presented as non-commercial content.[1] The statement summarizes the principles underlying the Commission's enforcement actions, advisory opinions, and other guidance over many decades addressing various forms of deceptively formatted advertising.

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." As the Commission set forth in its 1983 Policy Statement on Deception, a representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers – that is, it would likely affect the consumer's conduct or decisions with regard to a product or service.[2] In determining whether an advertisement, including its format, misleads consumers, the Commission considers the overall "net impression" it conveys.[3] Any qualifying information necessary to prevent deception must be disclosed prominently and unambiguously to overcome any misleading impression created.

The Commission has long held the view that advertising and promotional messages that are not identifiable as advertising to consumers are deceptive if they mislead consumers into believing they are independent, impartial, or not from the sponsoring advertiser itself. Knowing the source of an advertisement or promotional message typically affects the weight or credibility consumers give it. Such knowledge also may influence whether and to what extent consumers choose to interact with content containing a promotional message. Over the years, the Commission has challenged as deceptive a wide variety of advertising and other commercial message formats, including "advertorials" that appeared as news stories or feature articles, direct-mail ads disguised as book reviews, infomercials presented as regular television or radio programming, in-person sales practices that misled consumers as to their true nature and

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[1] The scope of this enforcement policy statement is restricted to commercial speech the Commission has authority to regulate. The Commission traditionally considers factors articulated in *R.J. Reynolds Tobacco Co.*, 111 F.T.C. 539, 544-46 (1988), in evaluating whether speech is commercial. *See, e.g.*, *POM Wonderful LLC*, 155 F.T.C. 1, 74-75 (2013), *aff'd,* 777 F.3d 478 (D.C. Cir. 2015).

[2] *FTC Statement on Deception*, 103 F.T.C. 174, 175 (1984) (*appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) ("*Deception Policy Statement*").

[3] *Id.* at 178.

purpose, mortgage relief ads designed to look like solicitations from a government agency, emails with deceptive headers that appeared to originate from a consumer's bank or mortgage company, and paid endorsements offered as the independent opinions of impartial consumers or experts.

With the emergence of digital media and changes in the way publishers monetize content, online advertising known as "native advertising" or "sponsored content," which is often indistinguishable from news, feature articles, product reviews, editorial, entertainment, and other regular content, has become more prevalent. In digital media, a publisher, or an authorized third party, can easily and inexpensively format an ad so it matches the style and layout of the content into which it is integrated in ways not previously available in traditional media. The effect is to mask the signals consumers customarily have relied upon to recognize an advertising or promotional message.

At the same time, the business models of many publishers also have undergone significant change, as, increasingly, consumers are able to skip or block digital ads while watching digitized programming or browsing publisher content. Consequently, many publishers have begun to offer advertisers formats and techniques that are closely integrated with and less distinguishable from regular content so that they can capture the attention and clicks of ad-avoiding consumers.

Regardless of the medium in which an advertising or promotional message is disseminated, deception occurs when consumers acting reasonably under the circumstances are misled about its nature or source, and such misleading impression is likely to affect their decisions or conduct regarding the advertised product or the advertising. This statement sets forth generally applicable standards on which the Commission relies in making such a determination.

I. Deceptive Advertising Formats

The principle that advertising and promotional messages should be identifiable as advertising is found in Commission and staff policy guidance,[4] specific cases challenging deceptive advertising in a wide range of media,[5] and Congressional policy with regard to telemarketing calls and commercial email.[6] As set forth below, over the years, the Commission

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[4] *See, e.g.*, *Advisory Opinion No. 191, Advertisements which appear in news format*, 73 F.T.C. 1307 (1968) (hereinafter "*Advisory Opinion on Ads in News Formats*").

[5] *See, e.g.*, *Georgetown Publ'g House Ltd. P'ship*, 122 F.T.C. 392 (1996) (consent); *JS&A Grp., Inc.*, 111 F.T.C. 522 (1989) (consent).

[6] *See* Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. §§ 7701-7713 (hereinafter the "CAN-SPAM Act"); Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108 (hereinafter the "Telemarketing Fraud Act").

and staff have addressed the potential for consumers to be deceived by various categories of advertising formats, such as ads appearing in a news or feature story format, deceptive endorsements, undisclosed sponsorship of advertising and promotional messages, and ads in search results.

A. Advertisements Appearing in a News Format or That Otherwise Misrepresent Their Source or Nature

The Commission first addressed the issue of print advertisements appearing in a news format in a 1967 press release and subsequent 1968 advisory opinion.[7] A newspaper column, advertising the cuisine of local restaurants, was written in narrative form, with each write-up discussing such details as how a meal was prepared, the name of the chef and/or head waiter, cocktail service offered, whether dancing was permitted, hours, and the price range of the meal.[8] The Commission found that the column "use[d] the format and ha[d] the general appearance of a news feature and/or article for public information which purport[ed] to give an independent, impartial and unbiased view of the cuisine facilities of a particular restaurant." The Commission also explained that the inclusion of the exact price of the meal advertised or listing a range of prices for other meals would not alter this impression. The Commission concluded that a clear and conspicuous disclosure that the column was an advertisement was necessary to prevent consumers from being deceived. Specifically, the Commission suggested placing "ADVERTISEMENT," in clear type, sufficiently large to be readily noticed, in close proximity to the ad. The Commission, however, noted that in some instances, "the format of [an] advertisement may so exactly duplicate a news or feature article as to render the caption 'ADVERTISEMENT' meaningless and incapable of curing the deception."[9]

Two decades later, in a case against a bookseller, the Commission applied this same analysis and concluded there was reason to believe that the bookseller violated the FTC Act through a deceptive direct-mail ad formatted to appear as if it were a book review torn out of a magazine, with a personalized note attached.[10] The Commission alleged that the ad's format communicated a misleading claim that it was "a book review written by an independent journalist or reviewer, containing the independent opinions of the journalist or reviewer, and was disseminated in a magazine or other independent publication." The Commission observed that the ad was printed on glossy stock and had a ripped, left edge, and included other elements, such as the header "REVIEW," a byline, a publication date, and page numbers, and part of an unrelated article on the reverse side, which, taken together, made it look like a published review of the book advertised. In evaluating what the ad communicated to consumers, the Commission

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[7] *Statement in Regard to Advertisements That Appear in Feature Article Format*, FTC Release, (Nov. 28, 1967) (hereinafter "*Statement on Ads in Feature Article Format*"); *Advisory Opinion on Ads in News Formats*.

[8] *Advisory Opinion on Ads in News Formats*, 73 F.T.C. at 1307.

[9] *Statement on Ads in Feature Article Format.*

[10] *Georgetown Publ'g House Ltd. P'ship*, 122 F.T.C. at 393-96.

also considered that affixed to each ad was a small, stick-on note containing what appeared to be a personalized, handwritten message, with the recipient's first name and saying, "Try this. It works! J."

During the 1980s, after the Federal Communications Commission removed its ban on program-length commercials, such advertisements, known as infomercials, began to air on television and radio.[11] Concerned about the increasingly blurred line between advertising and non-promotional content, the Commission brought cases alleging that deception occurs when infomercials are presented as regular television or radio programming, such as a news report or talk show. In the Commission's first such case in 1989, the Commission challenged a television infomercial that opened with the statement, "Welcome to 'Consumer Challenge,' hosted by Jonathan Goldsmith," and went on to describe the program as one that "examines popular new products for you," with the help of investigative reporters.[12] It then announced that the day's program would investigate a particular brand of sunglasses, posing the question to viewers: "[N]ew Product innovation or consumer rip-off?" In evaluating the sunglass infomercial, the Commission asserted that its format was likely to mislead consumers into believing that it was "an independent consumer program … that conducts independent and objective investigations of consumer products," including for the company's sunglasses. Since bringing that case, the FTC has charged that numerous other television and radio infomercials were deceptively formatted. In nearly every such case, the Commission has issued an order requiring a clear and prominent disclosure, at the beginning of an infomercial and again each time ordering instructions are given, informing consumers that the program is a "PAID ADVERTISEMENT" for the particular product or service advertised.[13]

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[11] *See Deregulation of Radio*, 84 F.C.C.2d 968, 1007 (1981) (rescinding the FCC's policy banning program-length radio commercials); *Revision of Programming and Commercialization, Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations,* 98 F.C.C.2d 1075 (1984) (rescinding the FCC's policy banning program-length television commercials).

[12] *JS&A Grp., Inc.*, 111 F.T.C. at 523-24.

[13] *See*, *e.g.*, *Vital Basics, Inc.*, 137 F.T.C. 254, 274, 340-41 (2004) (consent); *Nutrivida, Inc.*, 126 F.T.C. 339, 342-43, 351-52 (1998) (consent); *Bogdana Corp.*, 126 F.T.C. 37, 47, 100-01 (1998) (consent); *Mega Sys. Int'l, Inc.*, 125 F.T.C. 973, 986, 1218-19 (1998) (consent); *Olsen Labs., Inc.*, 119 F.T.C. 161, 167, 214 (1995) (consent); *Wyatt Mktg. Corp.,* 118 F.T.C. 86, 94, 113-14 (1994) (consent); *Del Dotto Enters., Inc.*, 117 F.T.C. 446, 452-53, 466 (1994) (consent); *Synchronal Corp.*, 116 F.T.C. 989, 1002-03, 1045 (1993) (consent); *Michael S. Levey*, 116 F.T.C. 885, 900-01, 950-51 (1993) (consent); *Nat'l Media Corp.*, 116 F.T.C. 549, 559, 582 (1993) (consent); *CC Pollen Co.*, 116 F.T.C. 206, 209, 239-40 (1993) (consent); *Nu-Day Enters., Inc.*, 115 F.T.C. 479, 483, 488-89 (1992) (consent); *Twin Star Prods., Inc.*, 113 F.T.C. 847, 852-53, 862 (1990) (consent); *TV Inc.*, 113 F.T.C. 677, 679, 693 (1990) (consent); *see also FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 209, 211 (D. Mass. 2009) (noting parties' stipulation to an injunctive provision addressing deceptive formats), *aff'd,* 624 F.3d 1 (1st Cir. 2010).

More recently, the Commission has brought a series of cases concerning ads disguised to look like news reports on weight-loss pills and other products, where a purported journalist tested the advertised product and authored the story.[14] The ads used devices such as news-related names and headlines suggestive of a local television station, trademarks of established news companies, reporter by-lines, and reader comment sections to create that false impression. In one case, the Commission alleged the format was deceptive despite the presence of a small-print disclaimer "Advertorial" in the top border of some websites.[15] Consumers reached all these fake news websites by clicking on ads presented as attention-getting news headlines, which frequently appeared on legitimate news websites.

In another recent case, the Commission challenged as deceptive a website purported to originate from an independent scientific organization. The Commission alleged that dietary supplement marketers misrepresented that their website promoting the health benefits of their children's supplements was an independent, objective resource for scientific and other information on treating a specific health condition, and that they failed to disclose their relationship to the website.[16]

The Commission also has challenged advertisements misrepresenting that a government agency endorsed or was affiliated with a product or service. For example, one such case against a seller of mortgage relief services concerned radio ads formatted to appear as public service announcements from the United States government, which began, "Please stay tuned for this important public announcement for those in danger of losing their home" and prominently featured the word "federal."[17] A federal district court found these radio ads deceived consumers,

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[14] *See, e.g.*, Complaint at 4-5, 8-9, *FTC v. Circa Direct LLC*, No. 11-cv-2172 (D.N.J. Apr. 18, 2011) (stipulated order); Complaint at 3-4, 6-7, *FTC v. DLXM LLC*, No. CV 11-1889 (E.D.N.Y. Apr. 18, 2011) (stipulated order); Complaint at 3-4, 6-7, *FTC v. Coulomb Media, Inc.*, No. 211-cv-11618 (E.D. Mich. Apr. 15, 2011) (stipulated order).

[15] *See* Complaint at 6, *FTC v. Circa Direct LLC*; *see also* Memorandum in Support of Plaintiff's Motion for a TRO at 14, *FTC v. Circa Direct LLC* (Apr. 18, 2011). Similarly, in a Securities and Exchange Commission case concerning paid promotions of stocks that appeared in a news format, a court held that, "[t]he 'advertorial' label … simply does not convey to the reader that the articles, which appear in a news-item format, were indeed purchased by the subject companies; this label does not provide investors with the material information regarding the publishers' bias." *SEC v. Corp. Relations Grp., Inc.*, No. 6:99-cv-1222, 2003 U.S. Dist. LEXIS 24925, at *26-27 (M.D. Fla. Mar. 28, 2003).

[16] Complaint at 3-4, 28-29, *FTC v. NourishLife, LLC*, No. 15-cv-00093 (N.D. Ill. Jan. 7, 2015) (stipulated order).

[17] Complaint at 6, 12, *Fed. Loan Modification Law Ctr., LLP*, No. SACV-09-401 (C.D. Cal. Apr. 3, 2009) (summary and default judgments). The Commission similarly has challenged sweepstakes prize promotion mailings misrepresenting a government affiliation. *See*, *e.g.*, Complaint at 11-12, 15, *FTC v. Nat'l Awards Serv. Advisory, LLC*, No. CV-10-5418 (N.D. Cal. Nov. 30, 2010) (stipulated judgment) (some of the challenged mailings claimed a government affiliation using words such as "State of Illinois Commissioners of Regulation" or the "OFFICE

observing that the defendants "intended to cause consumers to associate [those responsible for the ads] with the federal government so that consumers would be more likely to believe that [they] were credible and stable."[18] The Commission similarly has alleged that direct mail mortgage loan modification ads sent in official-looking brown envelopes with a window and a Washington, D.C. return address identifying the sender as the "NHMC Department of Financial Records" or "Nations Housing Modification Center" were deceptive.[19]

In 2002, when online search was a relatively new medium, FTC staff issued guidance concerning the potential for consumers to be deceived by paid ads formatted to appear as the regular search results that search engines return in response to consumers' queries.[20] The Commission concurs with the staff's conclusion, as articulated in the 2002 guidance and updated guidance issued in 2013,[21] that consumers ordinarily would expect a search engine to return results based on relevance to a search query, as determined by impartial criteria, not based on payment from a third party. Knowing when search results are included or ranked higher based on payment and not on impartial criteria likely would influence consumers' decisions with regard to a search engine and the results it delivers. Thus, failing to clearly and prominently disclose the paid nature of such advertising results is deceptive.

OF THE PRESIDENT OFFICIAL NOTIFICATION," and included language, symbols, and artwork evoking a government connection, such as "In God We Trust" or a bald eagle).

[18] Order Granting Plaintiff's Motion for Summary Judgment Against Boaz Minitzer at 7, *Fed. Loan Modification Law Ctr., LLP*, No. SACV-09-401 (C.D. Cal. Nov. 17, 2010).

[19] Complaint at 5, 13, *Fed. Hous. Modification Dep't, Inc.*, No. 09-CV-01753 (D.D.C. Sept. 15, 2009) (stipulated orders).

[20] Letter from Heather Hippsley, Acting Associate Director, Division of Advertising Practices, Federal Trade Commission to Gary Ruskin, Executive Director, Commercial Alert (June 27, 2002) ("Search Engine Guidance"), *available at* www.ftc.gov/sites/default/files/documents/closing_letters/commercial-alert-response-letter/commercialalertletter.pdf.

[21] Press Release, Federal Trade Commission, FTC Consumer Protection Staff Updates Agency's Guidance to Search Engine Industry on the Need to Distinguish Between Advertisements and Search Results (June 25, 2013), *available at* www.ftc.gov/news-events/press-releases/2013/06/ftc-consumer-protection-staff-updates-agencys-guidance-search; *see also* Exemplar letter from Mary K. Engle, Associate Director, Division of Advertising Practices, Federal Trade Commission to General Purpose Search Engines (June 24, 2013), *available at* www.ftc.gov/sites/default/files/attachments/press-releases/ftc-consumer-protection-staff-updates-agencys-guidance-search-engine-industryon-need-distinguish/130625searchenginegeneralletter.pdf ("Updated Search Engine Letter").

B. Misleading Door Openers

Other formats that mislead consumers about a commercial message's nature or purpose also have been alleged or found to be deceptive, such as misleading sales visits and calls and emails with falsified sender information. An early example of such a challenge was a 1976 case against an encyclopedia seller.[22] A salesperson would "disguise his role as a salesman and appear as a surveyor engaged in advertising research" or salespeople would "approach prospects' homes in the guise of delivering . . . gifts or prizes without identifying themselves as salesmen, or that the purpose of their visit is to sell encyclopedia."[23] The Commission order required the respondents' sales representatives to present a card that clearly disclosed the purpose of the visit before entering a prospect's home.[24] Subsequently, the Commission's Deception Policy Statement categorized this practice as a "misleading door opener," citing it for the general proposition that, "when the first contact between the seller and a buyer occurs through a deceptive practice, the law may be violated, even if the truth is subsequently made known to the purchaser."[25]

In 1994, concerned about deception and abuse occurring in the telemarketing of goods and services, Congress enacted the Telemarketing Fraud Act,[26] which prohibited the use of deceptive door-openers in telemarketing. That Act, among other things, outlawed as an abusive practice a telemarketer's failure to "promptly and clearly disclose … that the purpose of the call is to sell goods or services" when that is the case.[27] The Commission implemented Congress's

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[22] *Encyc. Britannica, Inc.*, 87 F.T.C. 421, 495-97, 531 (1976), *aff'd*, 605 F.2d 964 (7th Cir. 1979), as modified, 100 F.T.C. 500 (1982); *see also Grolier, Inc.*, 99 F.T.C. 379, 383 (1982), *aff'd*, 699 F.2d 983 (9th Cir. 1983), as modified, 104 F.T.C. 639 (1984).

[23] *Encyc. Britannica, Inc.*, 87 F.T.C. at 496.

[24] *Id.* at 524-26, 533-34.

[25] *Deception Policy Statement*, 103 F.T.C. at 180 & n.37. A number of courts have stated or held, both before and after issuance of the *Deception Policy Statement*, that the FTC Act is violated if a consumer's first contact is induced through deception, even if the truth is clarified prior to purchase. *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 632 (6th Cir. 2014); *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975); *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2d Cir. 1961); *Carter Prods., Inc. v. FTC*, 186 F.2d 821, 824 (7th Cir. 1951); *FTC v. LeanSpa, LLC*, No. 3:11-cv-1715, 2015 U.S. Dist. LEXIS 26906, at *33-34 (D. Conn. Mar. 5, 2015); *FTC v. Ivy Capital, Inc.*, No. 2:11-cv-00283, 2013 U.S. Dist. LEXIS 42369, at *23 (D. Nev. Mar. 26, 2013); *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1066 (C.D. Cal. 2012); *FTC v. City West Advantage, Inc.*, No. 2:08-CV-00609, 2008 U.S. Dist. LEXIS 71608, at *7-9 (D. Nev. July 22, 2008); *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 304 (S.D.N.Y. 2008); *FTC v. Connelly*, 2006 U.S. Dist. LEXIS 98263, at *49 (C.D. Cal. Dec. 20, 2006).

[26] 15 U.S.C. §§ 6101-6108.

[27] *Id*. at § 6102(a)(3)(C).

intent to prohibit this practice when it promulgated the Telemarketing Sales Rule.[28] In enforcing that Rule, the Commission has brought cases against telemarketers who misrepresented that calls were from, or made on behalf of, companies with which consumers had done business, such as banks and credit card companies.[29]

When Congress passed the CAN-SPAM Act,[30] among the practices the law was intended to address were emails that "mislead recipients as to the source or content of such mail."[31] Specifically, Congress concluded that "[m]any senders of unsolicited commercial electronic mail purposefully disguise the source of such mail" and "include misleading information in the messages' subject lines in order to induce the recipients to view the messages," and that the recipients of such mail "incur costs for the … time spent accessing, reviewing, and discarding such mail …."[32] The CAN-SPAM Act therefore effectively prohibited deceptive door-openers in commercial email. The Act outlawed the sending of emails containing falsified header information, including sender or subject information, and made doing so a violation of the FTC Act.[33] Even prior to the law's passage, in a case against an email marketer, the Commission alleged it was deceptive to forge an email's header information so as to make recipients believe a well-known bank or mortgage company sent it.[34]

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[28] 16 C.F.R § 310.4(d)(2).

[29] *See* Complaint at 26, 28, *FTC v. FTN Promotions, Inc.*, No. 807-cv-1279 (M.D. Fla. July 23, 2007) (stipulated orders); Complaint, *Millennium Indus., Inc.*, No. 01-1932 (D. Ariz. Oct. 18, 2001) (stipulated order); Complaint, *Creditmart Fin. Strategies Inc.*, No. C99-1461WD (W.D. Wash. Sept. 14, 1999) (stipulated order); Complaint, *Liberty Direct, Inc.*, No. 299-cv-01637 (D. Ariz. Sept. 14, 1999) (stipulated order).

[30] 15 U.S.C. §§ 7701-7713.

[31] *Id*. at § 7701(b)(2).

[32] *Id*. at § 7701(a)(3), (7), and (8).

[33] *Id*. at § 7704(a)(1) and (2). In certain circumstances, materially falsifying header information also can be a crime punishable by a fine, imprisonment, or both, and enforceable by the United States Department of Justice. *See* 18 U.S.C. § 1037.

[34] Complaint, *GM Funding, Inc.*, No. SACV 02-1026 (C.D. Cal. May 5, 2003) (stipulated order). The Commission has since brought a number of other cases challenging spam emails with deceptive sender and subject line information. *See, e.g.*, Complaint at 21, *FTC v. Sale Slash, LLC*, No. CV15-03107 (C.D. Cal. Apr. 27, 2015); Complaint at 10-11, *FTC v. Cleverlink Trading Ltd.*, No. 05C 2889 (N.D. Ill. May 16, 2005) (stipulated order); Complaint, *Phoenix Avatar, LLC*, No. 04C 2897 (N.D. Ill. Apr. 23, 2004).

C. Deceptive Endorsements That Do Not Disclose a Sponsoring Advertiser

Consumers may also be misled about an advertisement's nature or source as a result of an advertiser's use of consumer and other endorsements. As the Commission stated in the Endorsement Guides, "When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed. … clearly and conspicuously …."[35] In revising the Guides in 2009, the Commission specifically addressed paid endorsements in non-traditional forms of advertising, such as user-generated social media, personal blogs, online comment forums, or television talk show interviews.[36] The Commission's advice was based on the principle that when the content in which an endorsement is disseminated is not identifiable by consumers as advertising, consumers would not ordinarily expect an endorser to be speaking on behalf of a sponsoring advertiser and such connection must be disclosed to avoid deceiving consumers.

Since revising the Endorsement Guides, the Commission has brought a number of cases underscoring this principle.[37] For example, in a case against an app developer, employees of a public relations firm hired by the developer posted reviews about its games in the iTunes app store, without disclosing their relationship to the company.[38] The Commission asserted that the posted reviews were misrepresented as independent reviews reflecting the opinions of ordinary consumers, and that the failure to disclose the reviewers' material connection to the app company was deceptive. Another case concerned a home security firm's hiring of spokespersons who appeared on television and radio programs as impartial expert reviewers but failed to make known their connection to the company.[39]

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[35] Guides Concerning Use of Endorsements and Testimonials in Advertising (hereinafter "Endorsement Guides"), 16 C.F.R. § 255.5 (Disclosure of material connections).

[36] *Id.* Examples 3, 7, 8, 9.

[37] *See*, *e.g.*, Complaint at 4-5, *Machinima, Inc.*, FTC File No. 142-3090 (Sept. 2, 2015) (consent accepted pending public comment); *AmeriFreight, Inc.*, 159 F.T.C. 1627, 1629 (2015) (consent); *Deutsch LA, Inc.*, 159 F.T.C. 1164, 1169 (2015) (consent); Complaint at 5, *ADT LLC*, No. C-4460 (June 18, 2014) (consent); Complaint at 10, *United States v. Spokeo, Inc.*, No. CV12-05001 (C.D. Cal. June 19, 2012) (stipulated order for civil penalties); *Legacy Learning Sys.*, *Inc*., 151 F.T.C. 383, 386-87 (2011) (consent); *Reverb Commc'ns, Inc.*, 150 F.T.C. 782, 784 (2010) (consent).

[38] *Reverb Commc'ns, Inc.*, 150 F.T.C. 782, 783-84 (2010) (consent).

[39] Complaint at 1-5, *ADT LLC*.

II. Commission Policy on Deceptively Formatted Advertising

The recent proliferation of natively formatted advertising in digital media has raised questions about whether these advertising formats deceive consumers by blurring the distinction between advertising and non-commercial content. Natively formatted advertising encompasses a broad range of advertising and promotional messages that match the design, style, and behavior of the digital media in which it is disseminated. The ads can appear in a wide variety of forms, including written narratives, videos, infographics, images, animations, in-game modules, and playlists on streaming services. Often natively formatted ads are inserted into the stream of regular content a publisher offers,[40] generally referred to in this statement as a "publisher site," such as news and news aggregator sites and social media platforms.[41] In some instances, publishers place these ads on their sites and, in other instances, advertising networks operating ad content-recommendation engines do so. Advertising and promotional messages also can be embedded into entertainment programming, including professionally produced and user-generated videos on social media.

Regardless of an ad's format or medium of dissemination, certain principles undergird the Commission's deceptive format policy. Deception occurs when an advertisement misleads reasonable consumers as to its true nature or source, including that a party other than the sponsoring advertiser is the source of an advertising or promotional message, and such misleading representation is material. In this regard, a misleading representation is material if it is likely to affect consumers' choices or conduct regarding the advertised product or the advertisement, such as by leading consumers to give greater credence to advertising claims or to interact with advertising with which they otherwise would not have interacted.[42] Such misleadingly formatted advertisements are deceptive even if the product claims communicated are truthful and non-misleading.[43]

Although the particular facts will determine whether an advertisement formatted like the material in which it appears is deceptive, this statement sets forth the factors the Commission will consider in making that determination.

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[40] Commonly, when a natively formatted ad appears on a publisher site, it consists of headline text, a short description, and a thumbnail image, which, if clicked, lead to additional content.

[41] The term "publisher site" refers to any media platform on which consumers consume content and media creators and curators publish content. The content may be delivered by publishers through various means, including the web and mobile applications, and may be accessed by consumers on different devices, including computers, smartphones, tablets, and televisions.

[42] By product or advertising claims, the Commission generally means any representations about the benefits or attributes of a product, type of product, or category of products, including disparaging claims about a competitor's products.

[43] The Commission has challenged advertising formats as deceptive without challenging product claims made in advertisements. *See, e.g.*, Complaint, *ADT LLC*; *Georgetown Publ'g House Ltd. P'ship*, 121 F.T.C. 392; *JS&A Grp., Inc.*, 111 F.T.C. 522.

A. An Advertisement's Format Can Mislead Consumers as to Its Nature or Source

In evaluating whether an ad's format is misleading, the Commission considers the net impression the advertisement conveys to reasonable consumers, not statements in isolation.[44] Ads can convey claims by means other than, or in addition to, written or spoken words, such as visual or aural imagery and the interaction among all elements of the ad.

Applying the net impression standard in its *Advisory Opinion on Ads in a News Format*, the Commission commented that inclusion of exact price information would not change the overall impression conveyed that a series of newspaper ads were feature articles giving independent and impartial restaurant reviews.[45] In a case against a bookseller, the Commission's complaint noted a number of elements, including the challenged ad's printing on magazine-like paper, a ripped left edge, page numbering, inclusion of a publication date and byline, and an affixed personalized sticky note, in alleging that the overall impression created was that the ad was an independent book review.[46] Thus, in evaluating whether an ad's format is misleading, the Commission will scrutinize the entire ad, examining such factors as its overall appearance, the similarity of its written, spoken, or visual style to non-advertising content offered on a publisher's site, and the degree to which it is distinguishable from such other content.

Any determination of whether an advertisement's format misleads as to the ad's nature or source depends on how reasonable consumers would interpret the ad in a particular situation. To be reasonable, an interpretation or response of consumers to a particular ad need not be the only one nor be shared by a majority of consumers.[47] Interpretations that advertisers intend to convey about an advertisement's nature or source are presumed reasonable.[48]

In digital media, consumers can encounter natively formatted ads in a wide variety of situations, including in the news feed or main page of a publisher site, or through other means, such as posts in social media, in search results, and in email. In evaluating whether reasonable consumers would recognize ads as such, the Commission will consider the particular circumstances in which the ads are disseminated, including customary expectations based on consumers' prior experience with the media in which it appears and the impression

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[44] *FTC v. Am. Home Prods. Corp.*, 695 F.2d 681, 687 (3d Cir. 1982), *citing Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976).

[45] *Advisory Opinion on Ads in News Formats*, 73 F.T.C. at 1307-08.

[46] *Georgetown Publ'g House Ltd. P'ship*, 122 F.T.C. at 393-96.

[47] *Deception Policy Statement*, 103 F.T.C. at 177 n.20. "A material practice that misleads a significant minority of reasonable consumers is deceptive." *Id*.

[48] *Id*. at 178.

communicated by the ad's format.[49] For instance, if a natively formatted ad appearing as a news story is inserted into the content stream of a publisher site that customarily offers news and feature articles, reasonable consumers are unlikely to recognize it as an ad.

The target audience of an ad also may affect whether it is likely to mislead reasonable consumers about its nature or source. Increasingly, in digital media, advertisers can target natively formatted ads to individual consumers and even tailor the ads' messaging to appeal to the known preferences of those consumers.[50] The propensity of an ad to mislead as to its nature or source may be different when considered from the perspective of its target audience. To the extent that an advertisement is targeted to a specific audience, the Commission will consider the effect of the ad's format on reasonable or ordinary members of that targeted group.[51]

Certain ads that are formatted like the non-advertising content with which they are presented, however, may be unlikely to mislead consumers acting reasonably. Some ads by the

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[49] For example, consumers' customary use of and prior experience with search engines are relevant to the need to distinguish paid from regular search results. *See* Updated Search Engine Letter, at note 2 and accompanying text.

[50] There may be a host of data collection and use activities associated with natively formatted ads disseminated programmatically in digital media, some of which may not be transparent to consumers. This enforcement policy statement is not intended to address the legal and policy implications of such practices. Existing Commission and staff guidance address the privacy issues raised by digital advertising and consistently recommend that companies provide truthful and prominent information and choices to consumers about their data collection, use, and sharing practices. *See, e.g.*, FTC, Protecting Consumer Privacy in an Era of Rapid Change: Recommendations For Businesses and Policymakers (Mar. 2012), *available at* www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf (recommending a framework for addressing consumer privacy, including transparency and simplified choice regarding the online collection and use of consumer data for marketing purposes); FTC Staff Report: Self-Regulatory Principles For Online Behavioral Advertising: Tracking, Targeting, and Technology (Feb. 2009), *available at* www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/p085400behavadreport.pdf (setting forth proposed principles related to online behavioral advertising).

[51] *Deception Policy Statement*, 103 F.T.C. at 177-78. For example, special considerations may be relevant in determining whether a natively formatted ad directed to children would be misleading. *Id.* at 177; *cf. Commission Enforcement Policy Statement in Regard to Clear and Conspicuous Disclosure in Television Advertising*, CCH Trade Regulation Reporter, ¶ 7569.09 (Oct. 21, 1970) *available at* www.ftc.gov/system/files/documents/public_statements/288851/701021tvad-pr.pdf (disclosures in television ads that are intended to qualify misleading claims communicated to children "must be written and presented in a manner that would be understood by them and have the capacity to attract their attention").

very nature of their promotional message communicated may be inherently obvious as advertising to consumers. For instance, if a natively formatted ad with an image of a particular sports car and the headline "Come and Drive [X] today" were inserted into the news stream of a publisher site, that ad likely would be identifiable as an ad to consumers, even though it was presented in the same visual manner as news stories in the stream.

Finally, in determining the overall impression communicated by an ad, the Commission also will consider any qualifying information contained in the ad.[52] Advertisements may include disclosures to inform consumers of their commercial nature, including text labels, audio disclosures, or visual cues distinguishing the ad from other content into which it is integrated. Any disclosure used must be "sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression."[53] A disclosure's adequacy ultimately will be measured by whether reasonable consumers perceive the ad as advertising.[54]

A disclosure must be made in "simple, unequivocal" language, so that consumers comprehend what it means.[55] For example, in infomercial cases, the Commission has required the use of the words "Paid Advertisement."[56] In its Advisory Opinion on Ads in a News Format, the Commission suggested use of the term "Advertisement" to prevent consumers from being deceived by those particular advertising formats.[57] Disclosures also must be made in the same language as the predominant language in which ads are communicated.[58]

The conspicuousness of the disclosure will depend on the method of delivery and placement within the ad. Depending on the circumstances, a disclosure in the text may not remedy a misleading impression created by the headline because reasonable consumers might glance only at the headline.[59] In Commission cases and Rules addressing audio ads, the

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[52] *Deception Policy Statement*, 103 F.T.C. at 181.

[53] *Removatron Int'l Corp. v. FTC*, 884 F. 2d 1489, 1497 (1st Cir. 1989).

[54] *See supra* note 47 and accompanying text.

[55] *Thompson Medical Co.*, 104 F.T.C. 648, 783 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

[56] *See*, *e.g.*, *FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d at 209, 211; *Vital Basics, Inc.*, 137 F.T.C. at 340-41; *Nutrivida, Inc.*, 126 F.T.C. at 351-52; *Bogdana Corp.*, 126 F.T.C. at 100-01; *Mega Sys. Int'l, Inc.*, 125 F.T.C. at 1218-19.

[57] *Advisory Opinion on Ads in News Formats*, 73 F.T.C. at 1307-08; *Statement on Ads in Feature Article Format*.

[58] *See, e.g.*, Final Order and Judgment at 8, *Direct Mktg. Concepts, Inc.*, No. 04-11136-GAO (D. Mass. Aug. 13, 2009) (as to Direct Marketing Concepts, Inc. and others); Free Annual Credit Disclosures, 16 C.F.R. § 610.4(a)(3)(ii) (general requirements for disclosures).

[59] *Deception Policy Statement*, 103 F.T.C. at 180.

Commission has required audible disclosures to be delivered in a volume, cadence, and speed sufficient for ordinary consumers to hear and understand them.[60]

To be effective, a disclosure also generally must be made contemporaneously with the misleading claim it is intended to qualify. For example, disclosures that subsequently inform consumers of a natively formatted ad's commercial nature after they have clicked on and arrived at another page will not cure any misleading impression created when the ad is presented in the stream of a publisher site. This approach also reflects and is consistent with long-standing public policy, as codified in the CAN-SPAM Act[61] and Telemarketing Fraud Act[62] and found in Commission cases,[63] that material misrepresentations as to the nature or source of a commercial communication are deceptive, even if the truth is subsequently made known to consumers.

B. Misleading Claims about the Nature or Source of Advertising Are Likely Material

Deception occurs when an ad misleads consumers about a material fact.[64] Material facts are those that are important to consumers' choices or conduct regarding a product.[65] Misleading representations or omissions about an advertisement's true nature or source, including that a party other than the sponsoring advertiser is the source of the advertising, are likely to affect

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[60] *See*, *e.g.*, Final Order and Judgment at 8, *Direct Mktg. Concepts, Inc.* (radio disclosures must be "in a volume and cadence sufficient for an ordinary consumer to hear"); Agreement Containing Consent Order at 3, *Carrot Neurotechnology, Inc.*, FTC File No. 142-3132 (Sept. 17, 2015) (consent accepted pending public comment) (necessary disclosures under the order must be "in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand"); Free Annual Credit Disclosures, 16 C.F.R. § 610.4(a)(3)(iv) ("Audio disclosures shall be in a slow and deliberate manner and in a reasonably understandable volume and pitch.").

[61] 15 U.S.C. §§ 7701-7713 at 7704(a)(2).

[62] 15 U.S.C. §§ 6101-6108 at 6102(a)(3)(C).

[63] *See*, *e.g.*, *supra* notes 22, 25, 34 and accompanying text.

[64] *Deception Policy Statement*, 103 F.T.C. at 182.

[65] *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992) ("a claim is considered material if it 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product'") (quoting *Cliffdale Assocs., Inc.*, 103 F.T.C. at 165). Material information may influence consumer behavior apart from the purchase of a product. *Deception Policy Statement*, 103 F.T.C. at 182 n.45. A material misrepresentation is one "the reasonable person would regard as important in deciding how to act, or one which the maker knows that the recipient, because of his or her own peculiarities, is likely to consider important." *Id.* (citing Restatement (Second) of Torts, § 538(2) (1965)).

consumers' behavior with regard to the advertised product or the advertisement.[66] Consumers with such a misleading impression, for example, are likely to give added credence to advertising messages communicated and to interact with advertising content with which they otherwise would have decided not to interact.[67]

The Commission presumes that claims made expressly and claims the advertiser intended to make are material.[68] The Commission also considers certain misleading formats to be presumptively material. Depending on the facts, false claims that advertising and promotional messages reflect the independent, impartial views, opinions, or experiences of ordinary consumers or experts are presumed material.[69] Similarly, the Commission views as material any misrepresentations that advertising content is a news or feature article,[70] independent product

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[66] There are some exceptions, where consumers might not act differently if they were to identify certain forms of advertising as such. For example, if a branded product is included in entertainment programming in exchange for payment or other consideration from an advertiser, unless this paid product placement communicates an objective claim about a product, the fact that such advertising was included because of payment is unlikely to affect consumers' decision-making. When no objective claims are made for the product advertised, there is no claim to which greater credence can be given; thus, whether an advertiser had paid for the placement or the product appeared because of the program writer's creative judgment would not likely be material to consumers. *See generally* Letter from Mary K. Engle, Associate Director, Division of Advertising Practices, Federal Trade Commission to Gary Ruskin, Executive Director, Commercial Alert (Feb. 10, 2005), *available at* www.ftc.gov/system/files/documents/advisory_opinions/letter-commercial-alert-applying-commission-policy-determine-case-case-basis-whether-particular/050210productplacemen.pdf (response to a petition from a consumer group to issue guidelines requiring the on-screen disclosure "ADVERTISEMENT," whenever paid product placement occurred in television programming; FTC staff concluded that such a disclosure would not generally be necessary to prevent deception and that when particular instances of paid product placement or brand integration were deceptive, they could be adequately addressed on a case-by-case basis).

[67] In evaluating materiality, the Commission takes consumer preferences as given rather than considering whether they are objectively justified. *Deception Policy Statement*, 103 F.T.C. at 182 n.46.

[68] *Deception Policy Statement*, 103 F.T.C. at 182.

[69] *See*, *e.g., supra* notes 36, 37, 38, 39 and accompanying text. Regarding the specific issue of advertisers using spokespersons to promote products in programming without disclosing the spokesperson's financial ties to the advertiser, a connection between an advertiser and an endorser that is not reasonably expected by the audience must be fully disclosed. *See, e.g., ADT LLC*, No. C-4460, 2014 FTC LEXIS 142, at *3, 5-6 (June 18, 2014) (consent); Endorsement Guides, 16 C.F.R. § 255.5.

[70] *See*, *e.g.*, *supra* notes 7, 8, 13, 14 and accompanying text.

review,[71] investigative report,[72] or scientific research or other information from a scientific or other organization.[73] Commercial communications that mislead consumers that they are from the government,[74] a legitimate business, such as a well-known bank,[75] or a marketing surveyor[76] also are presumed to be material.

III. Conclusion

Although digital media has expanded and changed the way marketers reach consumers, all advertisers, including digital advertisers, must comply with the same legal principles regarding deceptive conduct the Commission has long enforced. This statement sets forth principles of general applicability on which the Commission will rely in determining whether any particular advertising format is deceptive, in violation of Section 5 of the FTC Act. The Commission will find an advertisement deceptive if the ad misleads reasonable consumers as to its nature or source, including that a party other than the sponsoring advertiser is its source. Misleading representations of this kind are likely to affect consumers' decisions or conduct regarding the advertised product or the advertisement, including by causing consumers to give greater credence to advertising claims or to interact with advertising content with which they otherwise would not have interacted.

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[71] *See*, *e.g., supra* note 10 and accompanying text.

[72] *See*, *e.g.*, *supra* notes 12, 13 and accompanying text.

[73] *See*, *e.g.*, *supra* note 16 and accompanying text.

[74] *See*, *e.g.*, *supra* notes 17, 18, 19 and accompanying text.

[75] *See*, *e.g.*, *supra* notes 29, 34 and accompanying text.

[76] *See*, *e.g.*, *supra* note 23 and accompanying text.

FEDERAL TRADE COMMISSION news

WASHINGTON, D. C. 20580

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COMMISSION ENFORCEMENT POLICY STATEMENT IN REGARD TO CLEAR AND CONSPICUOUS DISCLOSURE IN TELEVISION ADVERTISING

The Commission in recent years has issued various opinions, orders and trade regulation rules that are concerned with the need for affirmative disclosures in connection with certain kinds of representations. These disclosures have been required, in general terms, to be "clear and conspicuous". Because questions have been raised as to the specific meaning of the term "clear and conspicuous", the Commission deems it appropriate to set forth the standards it considers in determining whether, in fact, an affirmative disclosure in a television commercial is "clear and conspicuous".

I. In making this determination, the Commission will take into consideration all the technical factors (size of letters, duration of disclosure, etc.) used in presenting the disclosure to a television audience as well as the substance of the individual disclosure. Specifically, the Commission believes that each of the following specific standards should be met for a television disclosure to be deemed clear and conspicuous:

A. The disclosure should be presented simultaneously in both the audio and video portions of the television advertisement.

B. The video portion of the disclosure must contain letters of sufficient size so that it can be easily seen and read on all television sets, regardless of picture tube size, that are commercially available for the consuming public.

C. The video portion of the disclosure should contain letters of a color or shade that readily contrast with the background. The background should consist of only one color or shade.

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D. During the audio portion of the disclosure, no other sounds, including music, should be presented.

E. The video portion of the disclosure should appear on the screen for a sufficient duration to enable it to be completely read by the viewer.

F. The audio and video portions of the disclosure should immediately follow the specific sales representation to which they relate, and should be presented each time the representation is presented during the advertisement. In cases where a disclosure is required, but is not linked to a specific representation, it should appear in immediate conjunction with the major sales theme of the advertisement.

II. Television advertisers should consider the audience to whom the disclosure is directed in order to assure that such persons can understand the full meaning of the disclosure. For example, a disclosure appearing in a television advertisement directed at children must be written and presented in a manner that would be understood by them and have the capacity to attract their attention. The substance of the disclosure should be such that it can be understood by all those individuals that understand the sales representation of the advertisement. If securing this understanding is impractical, then the advertisements containing such representations should not be used on television.

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Enforcement Policy Statement Regarding Negative Option Marketing

I. Introduction and Background

The Federal Trade Commission ("FTC" or "Commission") issues this Policy Statement to provide guidance regarding its enforcement of various statutes and FTC regulations addressing negative option marketing and operating.[1] This Statement is intended to assist the business community and practitioners by providing specific guidance on the Commission's interpretation of existing law as it applies to negative option practices. This Statement may also assist the courts in developing an appropriate framework for interpreting and applying the various statutes and regulations addressing negative option marketing discussed herein.

Negative option offers come in a variety of forms, but all share a central feature: each contains a term or condition under which the seller may interpret a consumer's silence or failure to take affirmative action to reject a good or service or to cancel the agreement as acceptance or continuing acceptance of the offer.[2] Typically, negative option arrangements include, but are not limited to, automatic renewals, continuity plans, free-to-pay or fee-to-pay conversions, and prenotification plans. Automatic renewals allow sellers (*e.g.*, a magazine publisher) to

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[1] This Policy Statement elaborates on principles annunciated by the Commission in individual cases and rules issued over the course of many years. This Policy Statement does not confer any rights on any person and does not operate to bind the FTC or the public. In any enforcement action, the Commission must prove the challenged act or practice violates one or more existing statutory or regulatory requirements. In addition, this Policy Statement does not preempt federal, state, or local laws. Compliance with those laws, however, will not necessarily preclude Commission law enforcement action under the FTC Act or other statutes. Pursuant to the Congressional Review Act (5 U.S.C. § 801 *et seq.*), the Office of Information and Regulatory Affairs designated this Policy Statement as not a "major rule," as defined by 5 U.S.C. § 804(2).

[2] The Commission's Telemarking Sales Rule (16 C.F.R. Part 310) defines a negative option feature as a provision in an offer or agreement to sell or provide any goods or services "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." 16 C.F.R. § 310.2(w).

unilaterally renew consumers' subscriptions when they expire, unless consumers affirmatively cancel their subscriptions by a certain date. Continuity plans allow consumers to agree in advance to receive periodic shipments of goods or provision of services (*e.g.*, bottled water delivery), which they continue to receive until they cancel the agreement. Free trial marketing (*e.g.*, free-to-pay conversions) provides consumers the opportunity to receive goods or services for free (or at a nominal fee) for a trial period. After the trial period, sellers can automatically begin charging a fee (or higher fee) unless consumers affirmatively cancel or return the goods or services. Finally, under prenotification plans[3] (*e.g.*, book-of-the-month clubs), sellers provide periodic notices offering goods to participating consumers and then send—and charge for—those goods only if the consumers take no action to decline the offer. The periodic announcements and shipments can continue indefinitely.[4]

Negative option programs are widespread in the marketplace and can provide substantial benefits for sellers and consumers. At the same time, consumers suffer costs when marketers fail to make adequate disclosures, bill consumers without their consent, or make cancellation difficult or impossible. Over the years, unfair or deceptive negative option practices have remained a persistent source of consumer harm, often saddling shoppers with recurring payments for products and services they did not intend to purchase or did not want to continue to purchase.[5] To address this problem, the Commission and states regularly bring cases

[3] The Commission's Rule on the "Use of Prenotification Negative Option Plans" (16 C.F.R. Part 425) only covers this type of negative option marketing.
[4] In addition, some negative option offers include upsell or bundled offers, where sellers use consumers' billing data to sell additional products from the same seller or pass consumers' billing data to a third party for their sales. An upsell occurs when a consumer completes a first transaction and then receives a second solicitation for an additional product or service. A bundled offer occurs when a seller packages two or more products or services together so that they cannot be purchased separately.
[5] See, *e.g.*, n. 6 *infra*.

challenging a variety of harmful negative option practices. These matters involve a range of deceptive or unfair practices, including inadequate disclosures of hidden charges in ostensibly "free" offers and other products or services, enrollment without consumer consent, and inadequate or overly burdensome cancellation and refund procedures.[6] In addition, the Commission receives thousands of complaints each year related to negative option marketing. The number of ongoing cases and high volume of complaints demonstrate there is prevalent, unabated consumer harm in the marketplace.

The FTC's enforcement actions primarily rely on Section 5 of the FTC Act (15 U.S.C. § 45(a)), the Restore Online Shoppers' Confidence Act ("ROSCA") (15 U.S.C. §§ 8401-8405), and the Telemarketing Sales Rule (16 C.F.R. Part 310). However, the Rule on the Use of Prenotification Negative Option Plans (16 C.F.R. Part 425), the Electronic Fund Transfer Act ("EFTA") (15 U.S.C. §§ 1693-1693r), and the Postal Reorganization Act (*i.e.*, the Unordered Merchandise Statute) (39 U.S.C. § 3009) also address various aspects of negative option marketing.

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[6] Recent examples of these matters include: *FTC v. JDI Dating, Ltd.*, No. 1:14-cv-08400 (N.D. Ill. 2014); *FTC, State of Illinois, and State of Ohio v. One Technologies, LP*, No. 3:14-cv-05066 (N.D. Cal. 2014); *FTC v. Health Formulas, LLC*, No. 2:14-cv-01649-RFB-GWF (D. Nev. 2016); *FTC v. BunZai Media Group, Inc.*, No. 2:15-cv- 04527-GW-PLA (C.D. Cal. 2015); *FTC v. NutraClick LLC*, No. 2:16-cv-06819-DMG-JPR (C.D. Cal. 2016) (NutraClick I); *FTC v. DOTAuthority.com, Inc.*, No. 0:16-cv-62186-WJZ (S.D. Fla. 2016); *FTC v. XXL Impressions*, No. 1:17-cv-00067-NT (D. Me. 2017); *FTC v. AAFE Products Corp.*, No. 3:17-cv-00575 (S.D. Cal. 2017); *FTC v. RevMountain, LLC*, No. 2:17-cv-02000-APG-GWF (D. Nev. 2017); *FTC v. Pact, Inc.*, No. 2:17-cv-01429 (W.D. Wash. 2017); *FTC v. Tarr*, No. 3:17-cv-02024-LAB-KSC (S.D. Cal. 2017); *FTC v. Credit Bureau Center, LLC*, No. 17-cv-00194 (N.D. Ill. 2017); *FTC v. AdoreMe, Inc.*, No. 1:17-cv-09083 (S.D.N.Y. 2017); *FTC v. Triangle Media Corp.*, No. 3:18-cv-01388-LAB-LL (S.D. Cal. 2018); *In re: UrthBox, Inc.*, No. C-4676 (FTC 2019); *FTC v. Elite IT Partners, Inc.*, No. 2:19-cv-00125-RJS (D. Utah 2019); *FTC v. Apex Capital Group, LLC*, No. 2:18-cv-09573-JFW-JPR (C.D. Cal. 2018); *FTC v. AH Media*, No. 3:19-cv-04022-JD (N.D. Cal. 2019); *FTC v. Age of Learning, Inc.*, No. 2:20-cv-07996 (C.D. Cal. 2020); *FTC v. NutraClick, LLC*, No. 2:20-cv-08612 (C.D. Cal. 2020) (NutraClick II).

Section 5 of the FTC Act: Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices, is the core consumer protection statute enforced by the Commission, and therefore, has traditionally served as the primary mechanism for addressing deceptive negative option claims.[7] In its guidance and cases, the FTC has highlighted four basic Section 5 requirements that negative option marketing must follow to comply with Section 5.[8] First, marketers must clearly and conspicuously disclose the material terms of a negative option offer including, at a minimum, key terms such as the existence of the negative option offer, the offer's total cost, and how to cancel the offer.[9] Second, sellers must disclose these material terms before consumers agree to the purchase.[10] Third, marketers must obtain consumers' express informed

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[7] Section 5 specifically states that "unfair or deceptive acts or practices in or affecting commerce . . . are . . . declared unlawful." The FTC Act defines "unfair or deceptive acts or practices" to include such acts or practices involving foreign commerce that cause or are likely to cause reasonably foreseeable injury within the United States or involve material conduct occurring within the United States (15 U.S.C. § 45(a)(4)(A)). It also defines "unfair" practices as those that cause or are likely "to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition" (15 U.S.C. § 45(n)).

[8] *See Negative Options: A Report By the Staff of the FTC's Division of Enforcement*, 26-29 (Jan. 2009), *https://www.ftc.gov/sites/default/files/documents/reports/negative-options-federal-trade-commission-workshop-analyzing-negative-option-marketing-report-staff/p064202negativeoptionreport.pdf*. In discussing the principal Section 5 requirements related to negative options, the report cites to the following pre-ROSCA cases, *FTC v. JAB Ventures*, No. CV08-04648 (C.D. Cal. 2008); *FTC v. Complete Weightloss Center*, No. 1:08cv00053 (D.N.D. 2008); *FTC v. Berkeley Premium Nutraceuticals*, No. 1:06cv00051 (S.D. Ohio 2006); *FTC v. Think All Publ'g*, No. 4:07cv11 (E.D. Tex. 2006); *FTC v. Hispanexo*, No. 1:06cv424 (E.D. Va. 2006); *FTC v. Consumerinfo.com*, No. SACV05-801 (C.D. Cal. 2005); *FTC v. Conversion Mktg.*, No. SACV04-1264 (C.D. Cal. 2004); *FTC v. Mantra Films*, No. CV03-9184 (C.D. Cal. 2003); *FTC v. Preferred Alliance*, No. 103-CV0405 (N.D. Ga. 2003); *United States v. Prochnow*, No. 1:02-CV-0917 (N.D. Ga. 2002); *FTC v. Ultralife Fitness, Inc.*, No. 2:08-cv-07655-DSF-PJW (C.D. Cal. 2008); *In the Matter of American Isuzu Motors*, No. C-3712 (FTC 1997); *FTC v. Universal Premium Services*, No. CV06-0849 (C.D. Cal. 2006); *FTC v. Remote Response*, No. 06-20168 (S.D. Fla. 2006); and FTC's Dot Com Disclosures guidance.

[9] *See, e.g.*, *FTC v. JAB Ventures*; *FTC v. Complete Weightloss Center*; *FTC v. NutraClick, LLC I.*

[10] *See*, *e.g.*, *FTC v. JAB Ventures*; *Complete Weightloss Center*; *FTC v. Berkeley Premium Nutraceutical*; *FTC v. Think All Publ'g*. Disclosures earlier in the transaction may be necessary to avoid deception. *See e.g.*, FTC's Dot Com Disclosures guidance.

consent to such offers.[11] Finally, marketers must not erect unreasonable barriers to cancellation or impede the effective operation of promised cancellation procedures, and must honor cancellation requests that comply with such procedures.[12] Although these basic guidelines are useful, the legality of a particular negative option depends on an individualized assessment of the advertisement's net impression and the marketer's business practices.[13]

ROSCA: Enacted by Congress in 2010 to address ongoing problems with online negative option marketing, ROSCA prohibits charging or attempting to charge consumers for goods or services sold on the Internet through any negative option feature[14] unless the marketer: (1) clearly and conspicuously discloses all material terms of the transaction[15] before obtaining the consumer's billing information; (2) obtains a consumer's express informed consent before

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[11] *E.g.*, *FTC. v. Neovi, Inc.*, 604 F.3d 1150, 1157-59 (9th Cir. 2010), *amended by* 2010 WL 2365956 (9th Cir. June 15, 2010); *FTC v. Amazon.com, Inc.*, No. C14-1038-JCC, 2016 WL 10654030, at *8 (W.D. Wash. Apr. 26, 2016); *FTC v. Ideal Fin. Sols., Inc.*, No. 2:13-CV-00143-JAD, 2015 WL 4032103, at *8 (D. Nev. June 29, 2015); *FTC v. BunZai Media Group, Inc.*

[12] *See, e.g.*, *FTC v. Universal Premium Services*; *FTC v. Remote Response*; *FTC v. Berkeley Premium Nutraceuticals*; *FTC v. Hispanexo*; *FTC v. Age of Learning, Inc.*

[13] *See*, *e.g.*, *Negative Options: A Report By the Staff of the FTC's Division of Enforcement*, 28.

[14] 15 U.S.C. § 8403. ROSCA incorporates the definition of "negative option feature" from the Commission's Telemarketing Sales Rule, 16 C.F.R. § 310.2(w). ROSCA also contains a finding that "Third party sellers used a free trial period to enroll members, after which they periodically charged consumers until consumers affirmatively canceled the memberships. This use of "free-to-pay conversion" and "negative option" sales took advantage of consumers' expectations that they would have an opportunity to accept or reject the membership club offer at the end of the trial period." 15 U.S.C. § 8401(8). Finally, in addition to addressing negative option marketing, ROSCA contains provisions related to third party "post transaction" offers. *See, e.g.*, 15 U.S.C. § 8402.

[15] The Commission has brought several cases alleging a failure to disclose adequately the terms of the negative option feature. *See, e.g.*, *FTC v. NutraClick II*; *FTC v. Triangle Media Corporation*; *FTC v. AAFE Products Corp*. The Commission recently alleged that failure to disclose a material term of the underlying service that was necessary to prevent deception violated this provision of ROSCA. *In re: MoviePass, Inc.,* No. C-4751 (October 5, 2021).

charging the consumer's account; [16] and (3) provides simple mechanisms for the consumer to stop recurring charges.[17]

ROSCA also addresses offers made by, or on behalf of, third-party sellers during, or immediately following, a transaction with an initial merchant. Specifically, ROSCA prohibits post-transaction, third-party sellers[18] from charging or attempting to charge consumers unless the seller: (1) before obtaining billing information, clearly and conspicuously discloses the offer's material terms; and (2) receives the consumer's express informed consent by obtaining the consumer's name, address, contact information, as well as the full account number to be charged, and requiring the consumer to perform an additional affirmative action indicating consent.[19] ROSCA also prohibits initial merchants from disclosing billing information to any post-transaction third-party seller for use in any Internet-based sale of goods or services.[20]

Furthermore, ROSCA provides that a violation of that Act is a violation of a Commission trade regulation rule under Section 18 of the FTC Act.[21] Thus, the Commission may seek a variety of remedies for violations of ROSCA, including civil penalties under Section 5(m)(1)(A) of the FTC Act;[22] injunctive relief under Section 13(b) of the FTC Act;[23] and consumer redress,

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[16] *See, e.g.*, *FTC v. BunZai Media Group, Inc.*; *FTC v. Health Formulas, LLC*; and *FTC v. JDI Dating, Ltd*.

[17] *See, e.g.*, *FTC v. Age of Learning, Inc.*; *FTC v. AdoreMe, Inc.*; and *FTC, State of Illinois, and State of Ohio v. One Technologies*.

[18] ROSCA defines "post-transaction third-party seller" as a person other than the initial merchant who sells any good or service on the Internet and solicits the purchase on the Internet through an initial merchant after the consumer has initiated a transaction with the initial merchant. 15 U.S.C. § 8402(d)(2).

[19] 15 U.S.C. § 8402(a).

[20] 15 U.S.C. § 8402(b).

[21] 15 U.S.C. § 8404. Section 18 of the FTC Act is 15 U.S.C. § 57a.

[22] 15 U.S.C. § 45(m)(1)(A).

[23] 15 U.S.C. § 53(b).

such as damages, and other relief under Section 19 of the FTC Act.[24] Although Congress charged the Commission with enforcing ROSCA, it did not direct the FTC to promulgate implementing regulations.[25]

Telemarketing Sales Rule: The TSR prohibits deceptive telemarketing acts or practices, including those involving negative option offers, and certain types of payment methods common in deceptive negative option marketing. Specifically, the TSR requires telemarketers to disclose all material terms and conditions of the negative option feature, including the need for affirmative consumer action to avoid the charges, the date (or dates) the charges will be submitted for payment, and the specific steps the customer must take to avoid the charges. It also prohibits telemarketers from misrepresenting such information and contains specific requirements related to payment authorization.[26] Finally, the TSR prohibits the use of payment methods often used in deceptive marketing, including negative options, such as remotely created checks.[27] The Rule, however, only applies to negative option offers made over the telephone.

Prenotification Plan Rule: The Commission promulgated the "Use of Prenotification Negative Option Plans" Rule ("Prenotification Plan Rule") (16 C.F.R. Part 425).[28] The Prenotification Plan Rule requires sellers of such plans to clearly and conspicuously disclose

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[24] 15 U.S.C. § 57b(a)(1) and (b).
[25] ROSCA states that a violation "of this chapter or any regulation prescribed under this chapter shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices." 15 U.S.C. § 8404(a).
[26] 16 C.F.R. Part 310.3(a).
[27] 80 Fed. Reg. 77520 (Dec. 14, 2015). The TSR Notice of Proposed Rulemaking (78 Fed. Reg. 41200 (July 9, 2013)) noted negative option cases where the defendants used unauthorized remotely created checks. *E.g.*, *FTC v. FTN Promotions*, *Inc.*, Civ. No. 8:07-1279 (M.D. Fla. Dec. 30, 2008) (Stip. Perm. Inj.) (defendants allegedly caused more than $171 million in unauthorized charges to consumers' accounts for bogus travel and buyers' clubs in part by using unauthorized remotely created checks).
[28] The Commission issued the Rule after finding some negative option marketers committed unfair and deceptive practices that violated Section 5 of the Act, 15 U.S.C. § 45.

their plan's material terms before consumers subscribe. It enumerates seven material terms sellers must disclose: (1) how subscribers must notify the seller if they do not wish to purchase the selection; (2) any minimum purchase obligations; (3) the subscribers' right to cancel; (4) whether billing charges include postage and handling; (5) that subscribers have at least ten days to reject a selection; (6) that, if any subscriber is not given ten days to reject a selection, the seller will credit the return of the selection and postage to return the selection, along with shipping and handling; and (7) the frequency with which announcements and forms will be sent.[29] In addition, sellers must provide particular periods during which they will send introductory merchandise, give consumers a specified period to respond to announcements, provide instructions for rejecting merchandise in announcements, and promptly honor written cancellation requests.[30]

The Prenotification Plan Rule applies only to plans like book-of-the-month clubs in which sellers provide periodic notices offering goods to participating consumers and then send—and charge for—those goods only if the consumers take no action to decline the offer. These types of plans, however, account for only a small fraction of current negative option marketing. Therefore, the Rule does not reach most modern negative option marketing.[31]

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[29] 16 C.F.R. § 425.1(a)(1)(i)-(vii).
[30] 16 C.F.R. §§ 425.1(a)(2) and (3); § 425.1(b).
[31] The Prenotification Plan Rule defines "negative option plan" narrowly to apply only to prenotification plans. 16 C.F.R. § 425.1(c)(1). In 1998, the Commission clarified the Rule's application to such plans in all media, stating that it "covers all promotional materials that contain a means for consumers to subscribe to prenotification negative option plans, including those that are disseminated through newer technologies . . . ." 63 Fed. Reg. 44555, 44561 (Aug. 20, 1998). In 2017, the Commission estimated that fewer than 100 sellers ("clubs") were subject to the current Rule's requirements. 82 Fed. Reg. 38907, 38908 (Aug. 16, 2017).

Other Relevant Requirements: EFTA[32] and the Unordered Merchandise Statute[33] also contain provisions relevant to negative option marketing. EFTA prohibits sellers from imposing recurring charges on a consumer's debit cards or bank accounts without written authorization. The Unordered Merchandise Statute provides that mailing unordered merchandise, or a bill for such merchandise, constitutes an unfair method of competition and an unfair trade practice in violation of Section 5 of the FTC Act.

II. Principles For Negative Option Marketing

Given the number of applicable statutory and regulatory requirements and the ongoing problems in the marketplace, the Commission now issues the following enforcement guidance based on its enforcement history.[34] This guidance covers three areas commonly addressed by the Commission in its negative option cases: disclosures, consent, and cancellation. These principles convey the Commission's current views on the application of relevant statutes and regulations to negative option marketing and, as such, should help marketers in their compliance efforts and better understand how the Commission enforces the law.

Disclosures: ROSCA[35] requires marketers to clearly and conspicuously disclose the material terms of the transaction.[36] Pursuant to longstanding precedent, any express claim or

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[32] 15 U.S.C. §§ 1693-1693r.
[33] 39 U.S.C. § 3009.
[34] In an October 2, 2019 Notice (84 Fed. Reg. 52393), the Commission sought comment on the need for amendments to the "Rule Concerning the Use of Prenotification Negative Option Plans" (*i.e.*, "Negative Option Rule" (16 CFR Part 425)) to help consumers avoid recurring payments for products and services they did not intend to order and to allow them to cancel such payments without unwarranted obstacles. The Commission will continue to closely monitor compliance with the rules and laws applicable to negative option marketing, and is still considering various options in the rule review proceeding for the Negative Option Rule.
[35] Any reference to ROSCA in these principles applies only to Internet transactions, consistent with that statute's coverage.
[36] Of course, sellers fail to disclose adequately material terms if the disclosed terms are not truthful and substantiated.

deliberately implied claim is presumed to be material.[37] Moreover, the FTC's cases for failure to disclose under Section 5 of the FTC Act are generally consistent with ROSCA.[38] Those terms at minimum should include:

- Any material terms related to the underlying product or service that are necessary to prevent deception, regardless of whether that term directly relates to the terms of the negative option offer;[39]
- That consumers will be charged[40] for the good or service, or that those charges will increase after any applicable trial period ends, and, if applicable, that the charges will be on a recurring basis, unless the consumer timely takes steps to prevent or stop such charges;
- Each deadline (by date or frequency) by which the consumer must act in order to stop the charges;
- The amount (or range of costs) the consumer will be charged or billed and, if applicable, the frequency of such charges a consumer will incur unless the consumer takes timely steps to prevent or stop those charges;

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[37] *See, e.g.*, *FTC Statement on Deception*, 103 F.T.C. 174, 182 (1984) *(appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)); *Thompson Medical Co.*, 104 F.T.C. 648, 816 (1984).

[38] The Commission has consistently brought cases for deceptive and pure omissions of material fact. *See*, *e.g.*, *FTC v. Roca Labs, Inc.*, 345 F. Supp. 3d 1375, 1390 (M.D. Fla. 2018); *FTC v. NPB Advert., Inc.*, 218 F. Supp. 3d 1352, 1361 (M.D. Fla. 2016); *FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp. 1080, 1088 (C.D. Cal. 1994); *FTC v. BlueHippo Funding, LLC*, 762 F.3d 238, 241 (2d Cir. 2014). *But see*, *In re International Harvester*, 104 F.T.C. 949, 1059 (1984) (Not all omissions are deceptive or unfair. "The number of facts that may be material to consumers-and on which they may have prior misconceptions-is literally infinite.")

[39] The Commission recently alleged that a negative option seller's failure to disclose that it was impeding access to its movie subscription service violates ROSCA. *MoviePass, Inc*.

[40] "Charge," "Charged," or "Charging," for the purposes of this Policy Statement, means any attempt to collect money or other consideration from a consumer, including but not limited to causing Billing Information to be submitted for payment, including against the consumer's credit card, debit card, bank account, telephone bill, or other account.

- The date (or dates) each charge will be submitted for payment; and
- All information necessary to cancel the contract.

These disclosures must be clear and conspicuous.[41] To meet this standard, offers should be difficult to miss (*i.e.*, easily noticeable) or unavoidable and easily understandable by ordinary consumers, including:

- In any communication that is solely visual or solely audible, the disclosure should be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure should be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.
- A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, should stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.
- An audible disclosure, including by telephone or streaming video, should be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.
- In any communication using an interactive electronic medium, such as the Internet or software, the disclosure should be unavoidable. A disclosure is not clear and conspicuous if a consumer needs to take any action, such as clicking on a hyperlink or hovering over an icon, to see it.

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[41] *Supra* at nn. 9 and 15.

- The disclosure should use diction and syntax understandable to ordinary consumers and should appear in each language in which the representation that requires the disclosure appears.
- The disclosure should comply with these requirements in each medium through which it is received, including all electronic devices and face-to face communications.
- The disclosure should not be contradicted or mitigated by, or inconsistent with, anything else in the communication.[42]
- When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

Additionally, if the disclosures are in writing (including on the Internet), they should:

- if related to the negative option feature, appear immediately adjacent to the means of recording the consumer's consent for the negative option feature;
- if not related to the negative option feature, appear before consumers make a decision to buy (*e.g.*, before they "add to shopping cart"); and
- not contain any other information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to read and understand the

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[42] An example of an inadequate disclosure is one where the consumer sees an offer upfront, in an electronic or written advertisement or on the landing page of a website, which is materially different from the terms of the offer presented in later stages, such as later web pages, of the ordering process. *See*, *e.g.*, *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 633 (6th Cir. 2014); *FTC v. Fed. Loan Modification Law Ctr., LLP*, No. SA-CV-09-401-CJC (MLGx) (C.D. Cal. 2010); *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1214 (D. Nev. 2011).

disclosures, including any information not directly related to the material terms and conditions of any negative option feature.

For all telephone and other oral offers, the disclosures should not contain any other information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to understand the disclosures, including any information not directly related to the material terms and conditions of any negative option feature.

Consent:[43] ROSCA, judicial decisions applying Section 5, and cases brought by the Commission under those laws make clear marketers should obtain the consumer's express informed consent before charging the consumer.[44] To attain express informed consent, the negative option seller should:

- obtain the consumer's acceptance of the negative option feature offer separately from any other portion of the entire transaction;
- not include any information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to provide their express informed consent to the negative option feature;[45]
- obtain the consumer's unambiguously affirmative consent to the negative option feature;[46]

[43] Negative option sellers covered by the Telemarketing Sales Rule should also ensure that they are complying with the consent requirements in 16 C.F.R. § 310.4 specifically applicable to transactions involving a free-to-pay conversion and preacquired account information.
[44] *Supra* at nn. 11 and 16.
[45] Such information could appear on the product page itself (*e.g.*, extraneous language that interferes with the consumer's ability to provide consent) or in another location (*e.g.*, a separate webpage containing information materially contradicting the information on the consent page).
[46] A "pre-checked box" does not constitute affirmative consent. In addition, the seller should clearly disclose the name of the billing entity authorized by the consumer's consent.

- obtain the consumer's unambiguously affirmative consent to the entire transaction; and
- be able to verify the consumer's consent.

Cancellation: ROSCA requires negative option sellers to provide a simple, reasonable means for consumers to cancel their contracts.[47] To meet this standard, negative option sellers should provide cancellation mechanisms that are at least as easy to use as the method the consumer used to initiate the negative option feature. For example, to ensure compliance with this simple cancellation mechanism requirement, negative option sellers should not subject consumers to new offers or similar attempts to save the negative option arrangement that impose unreasonable delays on consumers' cancellation efforts.[48] In addition, negative option sellers should provide their cancellation mechanisms at least through the same medium (such as website or mobile application) the consumer used to consent to the negative option feature. The negative option seller should provide, at a minimum, the simple mechanism over the same website or web-based application the consumer used to purchase the negative option feature. If the seller also provides for telephone cancellation, it should provide, at a minimum, a telephone number, and answer all calls to this number during normal business hours, within a short time frame, and ensure the calls are not lengthier or otherwise more burdensome than the telephone call the consumer used to consent to the negative option feature.

Finally, to comply with Section 5, a seller's cancellation procedures for negative option features should be effective. Sellers should not impede the effective operation of promised

[47] *Supra* at 17.
[48] While a request to consider an offer or discount would not amount to an unreasonable delay, multiple requests for a consumer to listen to additional offers, lengthy pitches, or ignoring a consumer's request to decline further offers could amount to an unreasonable delay.

cancellation procedures, and should honor cancellation requests that comply with such procedures. In implementing effective cancellation procedures, marketers should not, among other things: hang up on consumers who call to cancel; place them on hold for an unreasonably long time; provide false information about how to cancel; or misrepresent the reasons for delays in processing consumers' cancellation requests.[49] If ROSCA applies, sellers must comply with both that statute and Section 5 of the FTC Act.

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[49] *See, e.g.*, *FTC v. Universal Premium Services*; *FTC v. Remote Response*; *FTC v. Hispanexo*; *FTC v. Berkeley Premium Nutraceuticals*.

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Introduction

The Federal Trade Commission (FTC) amended the Telemarketing Sales Rule (TSR) in 2003, 2008, 2010 and 2015. Like the original TSR issued in 1995, the amended Rule gives effect to the Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFPA). This legislation gives the FTC and state attorneys general law enforcement tools to combat telemarketing fraud, gives consumers added privacy protections and defenses against unscrupulous telemarketers, and helps consumers tell the difference between fraudulent and legitimate telemarketing. This guide describes the types of organizations and activities that are subject to the TSR and explains how to comply.

Certain key provisions:

- require disclosures of specific information
- prohibit misrepresentations
- limit when telemarketers may call consumers
- require transmission of Caller ID information
- prohibit abandoned outbound calls, subject to a safe harbor
- prohibit unauthorized billing
- apply to all upsells, even in unsolicited calls from a consumer
- set payment restrictions for the sale of certain goods and services
- require that specific business records be kept for two years

In addition:

- in August 2008, the Commission adopted additional amendments to the TSR that directly address the use of prerecorded messages in telemarketing calls.
- in August 2010, the Commission further amended the TSR to address deceptive and abusive practices associated with debt relief services.
- in December 2015, the Commission further amended the TSR to prohibit the use of remotely created payment orders and checks, cash-to-cash money transfers, and cash reload mechanisms in both outbound and inbound telemarketing. The amendments also expanded the TSR's prohibition of recovery services to apply to losses in any prior transaction, not just prior telemarketing transactions, and clarified a number of Do Not Call and other TSR provisions.

All of these amendments are explained in this guide.

If your telemarketing campaigns involve any calls across state lines — whether you make outbound calls or receive calls in response to advertising — you may be subject to the TSR's provisions.

The Federal Communications Commission (FCC) enforces the Telephone Consumer Protection Act (TCPA), which also regulates telemarketing. For more information about the TCPA, contact the FCC at fcc.gov. Many states also have laws regulating telemarketing. For information about a particular state's laws, contact the state attorney general's office or another state consumer protection agency.

Who Must Comply with the TSR?

The TSR regulates "telemarketing" — defined in the Rule as "a plan, program, or campaign . . . to induce the purchase of goods or services or a charitable contribution" involving more than one interstate telephone call. (The FCC regulates both

intrastate and interstate calling.) With some important exceptions, any businesses or individuals that take part in "telemarketing" must comply with the TSR. This is true whether, as "*telemarketers*," they initiate or receive phone calls to or from consumers, or as "*sellers*," they provide, offer to provide, or arrange to provide goods or services to consumers in exchange for payment. It makes no difference whether a company makes or receives calls using low-tech equipment or the newest technology. Similarly, it makes no difference whether the calls are made from outside the United States; so long as they are made to consumers in the United States. Those making the calls, unless otherwise exempt, must comply with the TSR's provisions. If the calls are made to induce the purchase of goods, services, or a charitable contribution, the company is engaging in "telemarketing."

Certain sections of the TSR apply to individuals or companies *other* than "sellers" or "telemarketers" if these individuals or companies provide substantial assistance or support to sellers or telemarketers. The Rule also applies to individuals or companies that help telemarketers gain unauthorized access to the credit card system by using another merchant's account to charge consumers, a practice known as credit card laundering.

Charities and For-Profit Telemarketers Calling on Their Behalf

Although tax exempt non-profit charities that conduct their own telemarketing are not covered by the TSR, the USA PATRIOT Act, passed in 2001, brought charitable solicitations by for-profit telemarketers within the scope of the TSR. As a result, most of the TSR's provisions now are applicable to "telefunders" — telemarketers who solicit charitable contributions on behalf of non-profit charities.

Telefunders must:

- make certain prompt disclosures in every outbound call.
- get express verifiable authorization if accepting payment by methods other than credit or debit card.
- maintain records for 24 months.
- comply with the entity-specific Do Not Call requirements, but are exempt from the National Do Not Call Registry provision.
- include a prompt keypress or voice-activated opt-out mechanism in any prerecorded message call on behalf of a non-profit organization to a member of, or previous donor to, the non-profit.

Telefunders may not:

- make a false or misleading statement to induce a charitable contribution.
- make any of several specific prohibited misrepresentations.
- engage in credit card laundering.
- place "cold" calls that deliver prerecorded messages.
- engage in acts defined as abusive under the TSR, such as calling before 8 a.m. or after 9 p.m., disclosing or receiving consumers' unencrypted account information, and denying or interfering with a consumer's right to be placed on a Do Not Call list.

Exemptions from the TSR

Some Types of Businesses and Individuals

Some types of businesses, individuals, and activities are outside the FTC's jurisdiction, and not covered by the TSR. Certain calls or callers also are completely or partially exempt from the Rule's provisions. The following sections explain the coverage of the Rule and the exemptions.

The FCC's jurisdiction extends to some entities and activities that are not subject to regulation by the FTC. For more information about the FCC's rules, visit fcc.gov.

Some types of businesses are not covered by the TSR even though they conduct telemarketing campaigns that may involve some interstate telephone calls to sell goods or services. These three types of entities are not subject to the FTC's jurisdiction, and are not covered by the TSR:

- banks, federal credit unions, and federal savings and loans.
- common carriers — such as long-distance telephone companies and airlines — when they are engaging in common carrier activity.
- non-profit organizations — those entities that are not organized to carry on business for their own, or their members', profit.

Nevertheless, any individual or company that contracts with one of these three types of entities to provide telemarketing services must comply with the TSR.

Examples:

- A non-bank company that contracts with a bank to provide telemarketing services on the bank's behalf is covered.
- A non-airline company that contracts with an airline to provide telemarketing services on behalf of the airline is covered.
- A company that is acting for profit is covered by the TSR if it solicits charitable contributions on behalf of a non-profit organization.

Sellers of Certain Investments

Under the Telemarketing Act, a number of entities and individuals associated with them that sell investments and are subject to the jurisdiction of the Securities and Exchange Commission or the Commodity Futures Trading Commission are not covered by the TSR — even if they engage in a plan, program, or campaign to sell through interstate telephone calls. However, these entities and individuals **are** covered by the FCC's telemarketing rules.

These entities are: brokers, dealers, transfer agents, municipal securities dealers, municipal securities brokers, government securities brokers, and government securities dealers (as those terms are defined in Section 202(a)(11) of the Investment Advisers Act of 1940); and futures commission merchants, including brokers, commodity trading advisers, commodity pool operators, leverage transaction merchants, floor brokers, or floor traders (as those terms are defined in Section 6(1) of the Commodity Exchange Act).

The Business of Insurance

The McCarran-Ferguson Act provides that the FTC Act, and by extension, the TSR, are applicable to the business of insurance to the extent that such business is not regulated by state law. Whether the McCarran-Ferguson exemption removes insurance-related telemarketing from coverage of the TSR depends on the extent to which state law regulates insurance telemarketing. If state law regulates the telemarketing at issue and enforcement of the TSR would conflict with and effectively

supersede those statelaws, then the TSR would not apply. Unlike the jurisdictional exemptions for banks and non-profit organizations, which do not extend to third-party telemarketers making calls on their behalf, in the case of the telemarketing of insurance products and services, the TSR does not necessarily apply simply because the campaign is conducted by a third-party telemarketer.

Some Types of Calls

Some types of calls also are not covered by the Rule, regardless of whether the entity making or receiving the call is covered. These include:

- unsolicited calls from consumers.
- calls placed by consumers in response to a catalog.
- business-to-business calls unless they involve retail sales of nondurable office or cleaning supplies, or solicit sales or charitable contributions from employees.
- calls made in response to general media advertising (with some important exceptions).
- calls made in response to direct mail advertising (with some important exceptions).

Exemptions Explained

Unsolicited Calls from Consumers

Any call from a consumer that is not placed in response to a solicitation by the seller, charitable organization, or telemarketer is exempt from coverage. Because the consumer initiates the call without any inducement from the seller or telemarketer, the call is not considered part of a telemarketing plan, program, or campaign conducted to sell goods or services or to induce a charitable contribution. Some examples include calls to:

- make hotel, airline, car rental, or similar reservations.
- contact a department store or charity without prompting from an advertisement or solicitation.

Calls are not considered “unsolicited” when placed by consumers in response to a prerecorded call. If a seller or telemarketer “upsells” a consumer during an unsolicited call initiated by the consumer, the upsell is covered by the TSR.

Calls Made in Response to a Catalog

Generally, the TSR does not apply to calls placed by consumers in response to a mailed catalog if the catalog:

- 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;
- has been issued at least once a year; and
- the catalog seller doesn’t solicit consumers by phone, but only receives calls initiated by consumers in response to the catalog, and during the calls, only accepts orders without additional solicitation. The catalog seller may give the consumer information about — or attempt to sell the consumer — other items in the same catalog that prompted the consumer’s call or in a similar catalog.

If a telemarketer offers goods or services that are not in the catalog that prompted the consumer’s call — or in a substantially similar catalog — the sales transaction is covered by the TSR. Regardless of the TSR’s application to a particular sale, catalog merchandise sales also are covered by the FTC’s Mail or Telephone Order Merchandise Rule (16 C.F.R. Part 435).

Business-to-Business Solicitation Calls, Unless They Involve the Sale of Nondurable Office or Cleaning Supplies, or Solicit Sales or Charitable Contributions from Employees

Most phone calls between a telemarketer and a business are exempt from the TSR. However, business-to-business calls to induce the retail sale of nondurable office or cleaning supplies are not exempt and must comply with the TSR. Examples of nondurable office or cleaning supplies include paper, pencils, solvents, copying machine toner, and ink — in short, anything that, when used, is depleted, and must be replaced. Goods like software, copiers, computers, mops, and buckets are considered durable because they can be used again.

Although sellers and telemarketers involved in telemarketing sales to businesses of nondurable office or cleaning supplies must comply with the TSR's requirements and prohibitions, the TSR specifically exempts them from the recordkeeping requirements and from the National Do Not Call Registry provisions. These sellers and telemarketers do not have to create or keep any particular records, or purge numbers on the National Do Not Call Registry from their call lists to comply with the TSR.

In addition, telemarketing calls that solicit consumers at their work — that is, calls to business lines that solicit individual employees to buy products or services for their own use or make personal charitable contributions — also are not business-to-business solicitations and are not exempt from the TSR.

Calls Made in Response to General Media Advertising

The TSR generally does not apply to calls consumers make in response to general media advertising, such as TV commercials; infomercials; home shopping programs; radio ads; print ads in magazines, newspapers, the Yellow Pages, or online directories; and banner ads and other forms of mass media advertising and solicitation. Telemarketers receiving these kinds of inbound calls from consumers nevertheless have to comply with **three important requirements:**

First, the prohibitions on certain payment methods, namely the use of remotely created payment orders and remotely created checks, cash-to-cash money transfers, and cash reload mechanisms, apply to inbound calls in response to general media advertising. If a seller or telemarketer uses remotely created payment orders or checks, or accepts cash-to-cash money transfers or cash reload mechanisms, it will violate the TSR.

> **Remotely created payment orders and checks** are electronic checks that merchants can create after obtaining a consumer's bank account number. These are different from paper checks that consumers write and sign.
>
> **Cash-to-cash money transfers** are made electronically from one person to another in a different location by money transfer providers like MoneyGram and Western Union.
>
> **A cash reload mechanism** is an authorization code PIN number or other security measure that allows consumers to convert cash into an electronic form.

Sellers and telemarketers that comply with these prohibitions in inbound telemarketing remain exempt from the TSR requirements if they otherwise qualify for the general media exemption. Therefore, they are covered by the TSR only if they violate the prohibition.

Second, if a seller or telemarketer "upsells" a consumer during a call initiated by the consumer, the upsell is covered by the TSR.

Third, the TSR **does** cover calls from consumers in response to general media advertisements relating to:

> franchises not covered by the FTC's Franchise Rule,
>
> business opportunities not covered by the FTC's Business Opportunity Rule,
>
> credit card loss protection,

- credit repair,
- recovery services,
- advance-fee loans,
- investment opportunities, or
- debt relief services

An investment opportunity is anything that is offered, offered for sale, sold, or traded based on representations about past, present, or future income, profit, or appreciation. Examples of investment opportunities include art, rare coins, oil and gas leases, precious or strategic metals, gemstones, or FCC license or spectrum lottery schemes. In addition, business ventures that are not covered by the FTC's Franchise Rule are investment opportunities.

Calls Made in Response to Direct Mail Advertising

Direct mail advertising includes, but is not limited to, postcards, flyers, door hangers, brochures, "certificates," letters, email, faxes, or similar methods of delivery sent to an identified person or family urging them to call a specified phone number about an offer of some sort. For purposes of the TSR, "direct mail" is not limited to messages sent by conventional mail delivery or private couriers. The exemption for calls responding to direct mail advertising is available both to telemarketers soliciting sales of goods or services and to telefunders soliciting charitable contributions.

Sales solicitations: Generally, consumer calls in response to a direct mail solicitation that clearly, conspicuously, and truthfully makes the disclosures required by the TSR are exempt from the TSR. These disclosures are:

- cost and quantity;
- material restrictions;
- limitations or conditions;
- any "no-refund" policy; and
- if the offer includes a prize promotion, credit card loss protection, or a negative option feature, the information about any of those elements of the offer required by the TSR.

If you are a seller or telemarketer who uses direct mail, you may use this exemption only if your direct mail solicitation messages make the disclosures required by Section 310.3(a)(1) of the TSR clearly, conspicuously, and truthfully.

Charitable solicitations: Consumer calls in response to direct mail messages that solicit charitable contributions are exempt, provided they contain no material misrepresentation about:

- the nature, purpose, or mission of the entity on whose behalf the contribution is requested;
- the tax deductibility of any contribution;
- the purpose for which the contribution will be used;
- the percentage or amount of the contribution that will go to a charitable organization or program;
- any material aspect of a prize promotion; or
- a charitable organization or telemarketer's affiliations, endorsements, or sponsorships.

There is no exemption for calls responding to any direct mail advertising that relates to credit card loss protection, credit repair, recovery services, advance-fee loans, investment opportunities, prize promotions, debt relief services, franchises not covered by the FTC's Franchise Rule, or business opportunities not covered by the FTC's Business Opportunity Rule. This is regardless of whether the advertisement makes the disclosures required by the TSR and contains no misrepresentations.

In addition, as with the general media exemption, it is a violation of the TSR for a seller or telemarketer engaged in direct mail solicitation to accept remotely created payment orders or checks, cash-to-cash money transfers, or cash reload mechanisms.

However, sellers and telemarketers that comply with these prohibitions in inbound telemarketing remain exempt from the TSR's requirements. Therefore, they are covered by the TSR only if they violate the prohibition.

Lastly, **"upselling" is not exempt.** Upselling occurs when a seller or telemarketer tries to sell additional goods or services during a single phone call, after an initial transaction. Any instances of upselling following an exempt transaction are covered by the TSR.

Even if the initial transaction is exempt because it's an unsolicited call from a consumer, a response to a general media advertisement or certain direct mail solicitations, or an outbound non-sales call (say, a customer service call), any upsell following the initial transaction is subject to all relevant provisions of the TSR.

Examples:

A consumer calls a department store to ask about the price of a microwave oven. Because the call is not the result of a solicitation by the seller, the initial inquiry is exempt from the Rule. If the seller tries to upsell a refrigerator during the same call, the upsell transaction is subject to the TSR.

A consumer calls in response to an infomercial advertising a home gym product for sale. If the home gym product is the only item offered during the call, the call is exempt. But if the telemarketer offers a free-trial offer to a cookbook series after the sales pitch for the home gym, the cookbook offer constitutes a separate transaction and is an upsell covered by the TSR. If both the home gym product and the cookbook series are prominently featured in the general media advertisement, transactions involving either or both products fall within the general media exemption. But if the cookbook is visible on the set of the infomercial, mentioned only in passing, or mentioned as an afterthought, pitching the cookbook during the a consumer's call about the home gym product is considered an upsell and is not exempt from the TSR.

Partial Exemptions

Some calls are exempt from most provisions of the TSR, but not all. These include:

- calls relating to the sale of 900-Number pay-per-call services.
- calls relating to the sale of franchises and business opportunities.
- calls that are part of a transaction that involves a face-to-face sales presentation.

Calls Relating to the Sale of 900-Number Services

The sale of 900-Number pay-per-call services, which is subject to the FTC's 900-Number Rule, is exempt from most provisions of the TSR. Still, to comply with the TSR, sellers of pay-per-call services must not:

- call any number on the National Do Not Call Registry or on that seller's Do Not Call list.
- deny or interfere with a person's right to be placed on any Do Not Call Registry.
- call outside permissible calling hours.
- place robocalls to consumers who have not agreed to accept them.
- abandon calls.
- fail to transmit Caller ID information.
- threaten or intimidate a consumer or use obscene language.

cause any telephone to ring or engage a person in conversation with the intent to annoy, abuse, or harass the person called.

Partial coverage under the TSR does not affect the obligation of sellers and providers of 900-Number Services to comply with the 900-Number Rule (16 C.F. R. Part 308).

Calls Relating to the Sale of Franchises and Business Opportunities

Calls relating to the sale of franchises that are covered by the FTC's Franchise Rule (16 C.F.R. Part 436) and business opportunities subject to the Business Opportunities Rule (16 C.F.R. Part 437) are exempt from most provisions of the TSR but not all. Sellers and telemarketers selling franchises subject to the Franchise Rule or business opportunities subject to the Business Opportunities Rule must not:

call numbers that are on the National Do Not Call Registry or on that seller's Do Not Call list.

deny or interfere with a person's right to be placed on any Do Not Call Registry.

call outside permissible calling hours.

place robocalls to consumers who have not agreed to accept them.

abandon calls.

fail to transmit Caller ID information.

threaten or intimidate a consumer or use obscene language.

cause any telephone to ring or engage a person in conversation with the intent to annoy, abuse, or harass the person called.

Partial coverage under the TSR does not affect the obligation of franchisors to comply with the Franchise Rule or the Business Opportunity Rule.

Calls that are Part of a Transaction Involving a Face-to-Face Sales Presentation

The TSR generally does not cover telephone transactions where the sale of goods or services or a charitable contribution is not completed until after a face-to-face presentation by the seller or charitable organization, and the consumer is not required to pay or authorize payment until then. This exemption is for transactions that begin with a face-to-face sales presentation and are completed in a phone call, as well as those that begin with a phone call and are completed in a face-to-face sales presentation.

The key to the face-to-face exemption is the direct, substantive and personal contact between the consumer and seller. The goal of the TSR is to protect consumers against deceptive or abusive practices that can arise when a consumer has no direct contact with an invisible and anonymous seller other than the telephone sales call. A face-to-face meeting provides the consumer with more information about — and direct contact with — the seller, and helps limit potential problems the TSR is designed to remedy.

Nevertheless, even in transactions where there is a face-to-face meeting, telemarketers must not:

call numbers on the National Do Not Call Registry or on that seller's Do Not Call list.

deny or interfere with a person's right to be placed on any Do Not Call Registry.

call outside permissible calling hours.

place robocalls to consumers who have not agreed to accept them.

abandon calls.

fail to transmit Caller ID information.

threaten or intimidate a consumer or use obscene language.

cause any telephone to ring or engage a person in conversation with the intent to annoy, abuse, or harass the person called.

If the transaction is completed in a face-to-face meeting at the consumer's home or away from the seller's place of business, the seller must comply with the FTC's Cooling Off Rule (16 C.F.R. Part 429).

Requirements for Sellers and Telemarketers

Sellers and Telemarketers Must Disclose Material Information

The TSR requires sellers and telemarketers, whether making outbound calls to consumers or receiving inbound calls from consumers, to provide certain material information before the consumer pays for the goods or services that are the subject of the sales offer. **Material** information is information that would likely affect a person's choice of goods or services or the person's decision to make a charitable contribution. More simply, it is information a consumer needs to make an informed decision about whether to buy goods or services or make a donation. Sellers and telemarketers may provide the material information either orally or in writing. Failure to provide any of the required information truthfully and in a **"clear and conspicuous"** manner, before the consumer pays for the goods or services offered, is a deceptive telemarketing act or practice that violates the TSR and subjects a seller or telemarketer to a civil penalty of $43,792 for each violation.

Clear and Conspicuous: Clear and conspicuous means that information is presented in a way that is difficult to miss and that ordinary consumers will easily notice and understand, so that required disclosures are communicated as effectively as the sales message.

When **written,** clear and conspicuous information must be printed in the same language(s) as the sales offer(s) in a type size that a consumer can readily see and understand; that has the same emphasis and degree of contrast with the background as the sales offer; and that is not buried on the back or bottom, or in unrelated information that an ordinary consumer wouldn't think important enough to read. When a seller or telemarketer makes required disclosures in a written document that is sent to a consumer and follows up with an outbound sales call to the consumer, the disclosures are considered clear and conspicuous only if they are sent close enough in time to the call so that the consumer associates the call with the written disclosures.

When disclosures are **oral**, clear and conspicuous means at an understandable speed and pace, and in the same language(s)and in the same tone and volume as the sales offer(s) so that ordinary consumers can easily hear and understand it. When making outbound calls, a telemarketer must promptly disclose certain types of information to consumers orally in the sales presentation. For purposes of the TSR, **"promptly"** means before any sales pitch is given and before any charitable solicitation is made. Required information about a prize promotion must be given before or when the prize offered is described.

Before a Consumer Consents to Pay: Sellers and telemarketers must give a consumer the information required by Section 310.3(a)(1) of the TSR before:

Getting a consumer's consent to buy — or persuading a consumer to send full or partial payment by check.

Asking for any credit card, bank account or other payment information.

Requesting, arranging for, or asking a consumer to request or arrange for a courier to pick up payment for the goods or services offered. Couriers include Federal Express, DHL, UPS, agents of the seller or telemarketer, or any other person who will go to a consumer's home or other location to pick up payment for the goods or services being offered.

When sellers and telemarketers have pre-acquired account information, they must provide the required disclosures before the customer provides express informed consent. Pre-acquired account information is any information that enables you to cause

a charge against a consumer's account without obtaining the account number directly from the consumer during the transaction for which the consumer will be charged.

What Information Must Sellers and Telemarketers Provide to Consumers?

When sellers and telemarketers offer to sell goods or services, they must provide the consumer with material information about the offered goods or services necessary to avoid misleading consumers. The term **material** means likely to affect someone's choice of goods or services or decision to make a charitable contribution, or someone's conduct with regard to a purchase or donation.

The TSR specifies seven broad categories of material information that sellers and telemarketers must give consumers:

1. Cost and Quantity

The TSR requires sellers and telemarketers to disclose the total cost to buy, receive, or use the offered goods or services. While disclosing the total number of installment payments and the amount of each payment satisfies this requirement, the number and amount of such payments must correlate to the billing schedule that will be implemented. For example, the TSR's requirements would not be met if you were to state the product's cost per week if the consumer has to pay installments on a monthly or quarterly basis. The TSR also requires you to tell a consumer the total quantity of goods the consumer must pay for and receive. You must provide both these items of material information to the consumer before the consumer pays for the goods or services that are the subject of the sales offer. You may provide this material information orally or in writing, as long as the information is clear and conspicuous.

Sometimes, the total cost and quantity are not fixed when the initial transaction takes place, but, instead, are determined over time. For example, in a **negative option plan**, like those offered by some book clubs, the consumer may agree to buy a certain number of items over a specified time period. The consumer gets periodic announcements of the selections; each announcement describes the selection, which will be sent automatically and billed to the consumer unless the consumer tells the company not to send it. Similarly, a **continuity plan** is a type of negative option plan that offers subscriptions to collections of goods. During the course of the plan, the consumer can choose to purchase some or all the items offered in the collection. Consumers who agree to buy an introductory selection also agree to receive additional selections on a regular schedule until they cancel their subscription to the plan.

Both negative option and continuity plans are structured to give consumers the opportunity to buy a series of products over time. The cost of the plan as a whole is determined by the number and type of items the consumer decides to accept in the series, and at the time of the initial sales offer, neither the seller nor the consumer necessarily knows how much product the consumer will purchase, or the total cost of the products.

To comply with the TSR, a seller or telemarketer offering a negative option or a continuity plan must disclose the total costs and quantity of goods or services that are part of the initial offer; the total quantity of additional goods or services that a consumer must purchase over the duration of the plan; and the cost, or range of costs, to purchase each additional good or service separately. You may provide this material information orally or in writing, as long as the information is clear and conspicuous. In addition, some negative option plans are subject to the FTC's Negative Option Rule (16 C.F.R. Part 426).

Cost and Quantity Disclosure in the Marketing of Credit Products: If sellers and telemarketers are offering credit products subject to the Truth in Lending Act (TILA) or Regulation Z, compliance with the credit disclosure requirements and the timing of the disclosures mandated by TILA or Regulation Z constitute compliance with the total cost and quantity disclosure requirements of the TSR with respect to the credit instrument. Nevertheless, the **cost and quantity** of any goods or services purchased with that credit also must be disclosed.

2. Material Restrictions, Limitations, or Conditions

The TSR requires sellers and telemarketers to disclose all material restrictions, limitations, or conditions to purchase, receive, or use goods or services that they are offering to the consumer. Material information is information that a consumer needs to make an informed purchasing decision. A material restriction, limitation, or condition is one that, if known to the consumer, would likely affect the decision to purchase the goods or services offered; to purchase them at the offered price; to purchase them from that particular seller; or to make a charitable contribution. Examples of material information that must be disclosed include:

- in the case of an offer of a credit card, a requirement that a consumer make a deposit in order to receive and use the card (that is, that the credit card is a secured card).
- in the case of a vacation certificate, a restriction, limitation, or condition that prevents a purchaser from using the certificate during the summer; or that requires a purchaser to make reservations a year in advance to travel using the certificate; or that requires the consumer to incur expenses beyond the price of the certificate to redeem the certificate for a vacation.
- the underlying illegality of goods or services, such as the illegality of foreign lottery chances.

Sellers and telemarketers may disclose orally or in writing information about material restrictions, limitations, or conditions to purchase, receive, or use the goods or services being offered, as long as the information is clear and conspicuous and disclosed before the consumer pays.

3. No-Refund Policy

If there’s a policy of honoring requests for refunds, cancellations of sales or orders, exchanges, or re-purchases, sellers and telemarketers must disclose information about the policy only if they make a statement about the policy during the sales presentation. If the sales presentation includes a statement about such a policy, it also must include a clear and conspicuous disclosure of all terms and conditions of the policy that are likely to affect a consumer’s decision on whether to buy the goods or services offered.

If the seller’s policy is that “all sales are final” — that is, no refunds, cancellations of sales or orders, or exchanges or re-purchases are allowed — the TSR requires you to let consumers know before they pay for the goods or services being offered. You may give this information to consumers orally or in writing, as long as the information is clear and conspicuous.

4. Prize Promotions

A *prize promotion* includes any sweepstakes or other game of chance, and any representation that someone has won, has been selected to receive, or may be eligible to receive a prize or purported prize. A *prize* is anything offered and given to a consumer by chance.

For the element of chance to be present, all that is necessary under the TSR is that if the consumer is guaranteed to receive an item, at the time of the offer the telemarketer does not identify the specific item that the person will receive. For example, say you send a solicitation promising recipients that they will receive one of four or five listed items but you do not tell recipients which of the listed items they will receive. In that case, any item the consumer receives is a prize, and the solicitation is a prize promotion.

A seller or telemarketer that offers a prize promotion must provide consumers with several items of information before the consumer pays for any goods or services being offered. This information may be given to consumers orally or in writing, as long as the information is clear and conspicuous. You must tell consumers:

- the odds of winning the prize(s). If the odds can’t be calculated in advance because they depend on the number of people who enter the promotion, for example, you must tell that to consumers, along with any other factors used to calculate the odds.
- that they can participate in the prize promotion or win a prize without buying anything or making any payment, and that any purchase or payment will not increase the chances of winning. When offering a prize promotion in outbound calls,

you must disclose this information orally and promptly. A legitimate prize promotion does not require any purchase or payment of money for a consumer to participate or win. If a purchase or payment of money is required for eligibility for a prize, it is not a prize promotion; it is a lottery, which is generally unlawful under federal and state lottery laws.

how they can enter the prize promotion without paying any money or purchasing any goods or services. This disclosure must include instructions on how to enter, or an address or local or toll-free telephone number where consumers can get the no-purchase/no-payment entry information.

any material costs or conditions to receive or redeem any prize. For example, if one of the offered prizes is a "vacation," but the recipient must pay for her own accommodations, that's a cost or condition that is likely to affect the consumer's response to the offer and therefore, must be disclosed.

5. Credit Card Loss Protection

A seller or telemarketer offering a credit card loss protection plan — one that claims to protect, insure, or otherwise limit a consumer's liability in the event of unauthorized use of a customer's credit card — must disclose the limits on a cardholder's liability under federal law for unauthorized use of a credit card (15 U.S.C. § 1643). Since the law limits cardholder liability for unauthorized use — for example, when a credit card is lost or stolen — to no more than $50, disclosure of this information to consumers will help ensure that they have the material information necessary to decide whether the protection plan offered is worth the cost.

6. Negative Option Features

The term "negative option feature" is used in the TSR. This occurs when the seller interprets the consumer's silence, or failure to take an affirmative action to reject goods or services or cancel an agreement, as acceptance of the offer. One type of negative option offer is a "free-to-pay conversion" offer (also known as a "free-trial offer"), where customers receive a product or service for free for an initial period and then have to pay for it if they don't take some affirmative action to cancel before the end of the period. Other types of negative option features include continuity plans and other arrangements where consumers automatically receive and incur charges for shipments in an ongoing series unless they take affirmative action to stop the shipment.

Under the TSR, any seller or telemarketer whose offer of a product or service involves a negative option feature must truthfully, clearly, and conspicuously disclose three pieces of information:

1. the fact that the customer's account will be charged unless he or she takes an affirmative action — such as canceling — to avoid the charge.

2. the date(s) on which the charge(s) will be submitted for payment.

3. the specific steps the customer must take to avoid the charges.

While the best practice is to provide an actual date on which payment will be submitted, it is acceptable to give an approximate date if you don't — or can't — know the actual date, provided the approximate date gives the consumer reasonable notice of when to expect the debit or charge. As for disclosing how the consumer can avoid charges, it is not sufficient under the TSR to say that a consumer would have to call a toll-free number to cancel without giving the number.

7. Debt Relief Services

The TSR defines a "debt relief service" as a program that claims directly, or implies, that it can renegotiate, settle, or in some way change the terms of a person's debt to an unsecured creditor or debt collector. That includes reducing the balance, interest rates or fees a person owes.

Under the TSR, any seller or telemarketer of a debt relief service must truthfully, clearly, and conspicuously disclose five pieces of information:

how much the service costs as well as any material restrictions, limitations or conditions on the debt relief service. If the sales presentation includes a statement about the refund policy, you must also include a clear and conspicuous disclosure of all terms and conditions of the policy;

how long it will take the consumer to achieve the represented results based on a good faith estimate;

how much money a customer must save before you'll make a settlement offer to creditors;

the possible consequences if the customer fails to make timely payments to creditors; and

the customer's rights regarding dedicated accounts if you ask or require your customers to set aside funds in a dedicated account.

Prompt Oral Disclosures in Outbound Sales Calls and Upselling Transactions

An **outbound call** is a call initiated by a telemarketer to a consumer. The TSR requires that a telemarketer making an outbound sales call **promptly** disclose, before any sales pitch is given, the following four items of information truthfully, clearly, and conspicuously:

1. **The identity of the seller.** The seller is the entity that provides goods or services to the consumer in exchange for payment. The identity of the telemarketer, or person making the call, need not be disclosed if it is different from the identity of the seller. If the seller commonly uses a fictitious name that is registered with appropriate state authorities, it is fine to use that name instead of the seller's legal name.
2. **That the purpose of the call is to sell goods or services.** The TSR requires that the purpose of the call be disclosed truthfully and promptly to consumers. How you describe or explain the purpose of the call is up to you, as long as your description is not likely to mislead consumers. For example, it would be untruthful to state that a call is a "courtesy call" if it's a sales call.
3. **The nature of the goods or services being offered.** This is a brief description of items you are offering for sale.
4. **In the case of a prize promotion, that no purchase or payment is necessary to participate or win, and that a purchase or payment does not increase the chances of winning.** If the consumer asks, you must disclose — without delay — instructions on how to enter the prize promotion without paying any money or purchasing any goods or services.

These same disclosures must be made in an **upselling** transaction if any of the information in these disclosures is different from the initial disclosures (if the initial transaction was an outbound call subject to the TSR) or if no disclosures were required in the initial transaction, like a non-sales customer service call. For example, in an **external upsell,** where the second transaction in a single telephone call involves a second seller, you must tell the consumer the identity of the second seller — the one on whose behalf the upsell offer is being made. On the other hand, in an **internal upsell,** where additional goods or services are offered by the same seller as the initial transaction, no new disclosure of the seller's identity is necessary because the information is the same as that provided in the initial transaction.

Prompt Oral Disclosures in Outbound Calls to Solicit Charitable Contributions

Telefunders must make two clear and conspicuous oral disclosures promptly before any charitable solicitation is made:

1. **The identity of the charitable organization on whose behalf the solicitation is being made.** The charitable organization is the entity on whose behalf a charitable contribution is sought. The identity of the telemarketer, or person making the call, need not be disclosed. If the charitable organization commonly uses a fictitious name that is registered with appropriate state authorities, that name may be disclosed instead of the charitable organization's legal name.

2. **That the purpose of the call is to solicit a charitable contribution.** The TSR requires that the purpose of the call be disclosed promptly to consumers. How the purpose of the call is described or explained is up to you, as long as your description or explanation is not likely to mislead consumers.

How does a for-profit company that telemarkets for a non-profit organization make the required oral disclosures? When a for-profit company makes interstate calls to solicit charitable contributions for a non-profit organization, the for-profit telemarketer must make the required prompt disclosures for charitable solicitation calls. The company must identify the entity on behalf of which the charitable solicitation is made, and state that the purpose of the call is to solicit a charitable contribution. However, if a for-profit company solicits charitable contributions on behalf of a charity and offers goods or services that are of more than nominal value — a book, magazine subscription, or perhaps a membership — to induce donations, the required oral disclosures for both sales **and** charitable contributions must be made. “Nominal” means a value less than the amount of any contribution being solicited. In a situation where the goods or services offered are of nominal value, stating the name of the non-profit organization on whose behalf the call is being made is sufficient.

Examples:

“I am calling on behalf of [name of non-profit organization] to offer you a subscription to the organization’s newsletter, which [description of newsletter], and to ask for a donation to help support the work of [name of non-profit organization].”

“I am calling for [name of non-profit organization] to seek your support. For a donation of $25 or more, [name of non-profit organization] will extend to you a one-year membership, which entitles you to [description of the membership]. Your donation will help us to continue the [non-profit organization’s] important work . . .”

Multiple Purpose Calls. Some calls have more than one purpose. They may involve the sale of goods or services and another objective, like conducting a prize promotion or determining customer satisfaction. They may involve a charitable solicitation combined with a prize promotion. In any multiple purpose call where the seller or telemarketer is planning to sell goods or services in at least some of the calls, the four sales disclosures above must be made promptly — that is, during the first part of the call before the non-sales portion of the call. Similarly, in any multiple purpose call where the telemarketer is planning to solicit charitable contributions in at least some of the calls, the two charitable solicitation disclosures must be made promptly — that is, during the first part of the call, before the noncharitable solicitation part of the call.

Example:

A seller calls a consumer to determine whether he or she is satisfied with a previous purchase and then plans to move into a sales presentation if the consumer is satisfied. Since the seller plans to make a sales presentation in at least some of the calls (the seller plans to end the call if the consumer is not satisfied), the four sales disclosures above must be made promptly during the initial portion of the call and before inquiring about customer satisfaction.

However, a seller may make calls to welcome new customers and ask whether they are satisfied with goods or services they recently purchased. If the seller doesn’t plan to sell anything to these customers during any of these calls, the four oral sales disclosures are not required. That’s the case even if customers ask about the sellers’ other goods or services, and the seller responds by describing the goods or services. Because the seller has no plans to sell goods or services during these calls, the disclosures are not required.

Misrepresentations are Prohibited

The TSR prohibits sellers and telemarketers from making false or misleading statements to induce anyone to pay for goods or services or make a charitable contribution. For example:

- you cannot falsely claim that you need a consumer's bank account number or credit card number only for identification purposes, when, in fact, you will use the number as payment for the goods or services offered.
- a seller of precious metals cannot induce anyone to invest by falsely claiming that the seller offers the metals at or near wholesale price.
- it would be illegal under the TSR to solicit a charitable contribution by claiming that 100 percent of the funds collected would benefit the stated charity, when only 30 percent of the money goes to the charity.

In addition, the TSR prohibits sellers and telemarketers from misrepresenting specific categories of information about a telemarketing transaction that are likely to affect a consumer's decision to purchase the goods or services offered. The TSR also prohibits both express and implied misrepresentations. Sellers and telemarketers cannot circumvent the TSR by creating a false impression in a consumer's mind through the artful use of half-truths or misleading or incomplete information.

In sales transactions, the TSR prohibits misrepresentations about the following:

1. Cost and Quantity

The TSR prohibits sellers and telemarketers from misrepresenting the total costs to purchase, receive, or use the goods or services offered, or the quantity of goods or services offered at the stated price. For example, you may not tell consumers that they may purchase a magazine subscription for three years at $1.50 a month, when that rate is an introductory rate that will expire after the first year.

2. Material Restrictions, Limitations, or Conditions

The TSR prohibits sellers and telemarketers from misrepresenting any material restriction, limitation, or condition to purchase, receive, or use goods or services offered to the consumer. For example, you may not falsely claim that a hotel certificate may be used any time at any major hotel chain in the country, when it can be used only at certain times or at a limited number of hotels.

3. Performance, Efficacy, or Central Characteristics

The TSR prohibits sellers and telemarketers from misrepresenting any material aspect of the performance, efficacy, nature, or central characteristics of the goods or services offered to the consumer. For example, it's a violation of the TSR to falsely claim that:

- a water processor offered for sale can eliminate all known contaminants from tap water.
- a service offered by the seller can improve a person's credit rating.
- a machine will operate properly without maintenance.
- precious metals outperform other types of investments.
- a seller can recover money lost by the consumer in a previous transaction.
- a purchaser of a business venture can earn "more money in a week than you now earn in a year" or achieve specific levels of income.

4. Refund, Repurchase, or Cancellation Policies

The TSR prohibits sellers and telemarketers from misrepresenting any material aspect — one that likely would have an effect on the consumer's purchasing decision — of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies. For example, the TSR prohibits you from claiming that "our policy is to make our customers happy — if at any time

you're not absolutely delighted, just send the merchandise back," if there are time limits, "restocking" charges, or other important restrictions on the return of the goods. It also prohibits sellers and telemarketers from claiming that tickets may be cancelled any time up to the date of an event when such cancellation requests would not be honored.

5. Material Aspects of Prize Promotions

The TSR prohibits sellers and telemarketers from misrepresenting any material aspect of a prize promotion: you may not lie about any aspect of a prize promotion that is likely to affect a consumer's decision to buy any goods or services offered in conjunction with a prize promotion, to buy them at the offered price, or to buy them from you. For example, you may not misrepresent:

- the odds of being able to receive a prize (for example, falsely saying that everyone who enters is guaranteed to win a prize, or falsely claiming that a particular person is "the top winner in the entire state").
- the nature or value of a prize (for example, falsely claiming a prize is an "expensive genuine diamond tennis bracelet," when the prize has only nominal value or doesn't contain any diamonds).
- that a purchase or payment is required to win a prize or participate in a prize promotion (for example, falsely claiming that a consumer must buy magazine subscriptions to enter a prize promotion).

6. Material Aspects of Investment Opportunities

The TSR prohibits sellers and telemarketers from misrepresenting any material aspect of an investment opportunity. You may not make any false or misleading statements about an investment opportunity that are likely to affect a prospective purchaser's decision to invest. You may not misrepresent any information needed to make an informed investment decision. Examples of material aspects of an investment opportunity include: the risk involved in the investment, the liquidity of the investment, or the earnings potential or profitability of the investment. Depending on the nature of the investment opportunity, other material aspects may include markup over acquisition costs; past performance, marketability, or value of an investment; or fees charged in credit-financed purchases of precious metals.

7. Affiliations, Endorsements, or Sponsorships

The TSR prohibits sellers and telemarketers from misrepresenting affiliations with — or endorsements or sponsorships by — any person, organization, or government entity. For example, you cannot falsely claim that you're a member of the Better Business Bureau or the local chamber of commerce, or that you're affiliated with the local police or some national charity. Neither can you create the impression in a consumer's mind that the postal permit number displayed on a mail solicitation is a sign that the U.S. Postal Service has approved a promotion. In addition, sellers and telemarketers cannot falsely claim or create the impression in a consumer's mind that they are related to or affiliated with a company with which the consumer usually does business.

8. Credit Card Loss Protection

The TSR prohibits sellers and telemarketers from misrepresenting that any customer needs offered goods or services to receive protection against unauthorized charges that he or she already has under federal law (15 U.S.C. § 1643). For example, you cannot falsely claim that a consumer who doesn't buy the credit card loss protection you're offering might be liable for thousands of dollars in unauthorized charges should a credit card be stolen. In fact, the law caps a customer's liability for unauthorized charges on her credit card at $50.

9. Negative Option Features

The TSR prohibits sellers and telemarketers from misrepresenting any material aspect of a negative option feature of an offer, including: the fact that the consumer's account will be charged unless the consumer takes an affirmative action to avoid the charges, the dates the charges will be submitted for payment, and the specific steps the customer must take to avoid the charges. For example, the TSR prohibits you from representing that to avoid being charged, the consumer need only call a toll-free number to cancel if, in fact, the number is never answered. In this case, you would be misrepresenting the specific steps the customer must take to avoid the charge, because the steps described wouldn't achieve that purpose.

10. Debt Relief Services

The TSR prohibits sellers and telemarketers from misrepresenting any material aspect of a debt relief service, either explicitly or by implication, including: the amount of money or the percentage of the debt someone may save by using your service; the amount of time necessary to get the results you represent; the amount of money or the percentage of each outstanding debt the customer must accumulate before you'll begin your attempts to negotiate, settle or modify the terms with creditors; the amount of money or the percentage of each outstanding debt the customer must accumulate before you'll make a bona fide offer to negotiate, settle or modify the terms with creditors; the effect of your service on the customer's creditworthiness; the effect of your service on the collection efforts of any creditors or debt collectors; the percentage or number of customers who have gotten the results you represent; and whether your business is a bona fide nonprofit entity.

In charitable solicitation calls, the TSR prohibits misrepresentations about:

1. The Nature, Purpose, or Mission of the Entity on Whose Behalf the Solicitation is Made

The TSR prohibits telefunders from misrepresenting the nature, purpose, or mission of any entity on whose behalf a charitable contribution is being solicited. It would violate the TSR for a telefunder to claim, expressly or by implication, that a charitable contribution is being requested on behalf of a charity that seeks to protect endangered species if the purpose of the charity is to support a local petting zoo of barnyard animals. And a telefunder may not represent that a charitable organization engages in cancer research if the organization simply educates the public about cancer through its fundraising calls.

2. Tax Deductibility

Whether a contribution is tax deductible — or an organization is tax exempt — may be an important consideration when potential donors are deciding whether or how much to contribute. The TSR therefore prohibits telefunders from misrepresenting, expressly or by implication, that any charitable contribution is partly or fully tax deductible, or falsely implying that an organization on whose behalf a contribution is solicited is "tax exempt."

3. Purpose of a Contribution

The TSR prohibits telefunders from misrepresenting how the requested contribution will be used. This includes not only how a donation will be spent, but also the locality where the direct effect of the donation will be felt. The purpose for which a contribution is sought usually is important to a donor, and any misrepresentations about that would be likely to mislead a consumer. It would violate the TSR for you to state or imply that a donation will benefit sick children in the local area if the money collected is not spent to benefit sick children or is not spent to benefit sick kids in the donor's local area. You also cannot claim that a donation will be used to pay for bullet-proof vests for local law enforcement officers if the money goes to some other purpose. The charitable purpose described to potential donors may not be peripheral or incidental to the primary purpose for which the donation will be used.

4. Percentage or Amount of Contribution that Goes to the Charitable Organization or Program

The TSR prohibits telefunders from misrepresenting the percentage or amount of the contribution that goes to a charitable organization or program. This prohibition covers statements made in response to the questions of potential donors, as well as unprompted standalone statements. Even though the TSR does not require you to affirmatively disclose the percentage or amount of the contribution that goes to a charitable organization or program, if a potential donor raises the question, you must answer truthfully and must not misrepresent this information in any way.

5. Material Aspects of Prize Promotions

The TSR prohibits telefunders from misrepresenting any material aspects of a prize promotion in conjunction with a charitable solicitation. You may not make a false statement about any aspect of a prize promotion that could affect a donor's decision to make a charitable contribution in conjunction with the prize promotion.

6. Affiliations, Endorsements, or Sponsorship

The TSR prohibits telefunders from misrepresenting their own or a charitable organization's affiliation with, or endorsement or sponsorship by, any person, organizations, or government entity. For example, you cannot falsely claim that the organization on whose behalf you are calling is affiliated with, sponsored by, endorsed by, or otherwise approved by any other entity or organization. Nor could you falsely claim to be endorsed or "approved by" the local police. In addition, you cannot falsely claim — or create the impression — that you are related to or affiliated with a charity that the donor has heard of or contributed to in the past.

Payment Methods Other than Debit and Credit Cards

The TSR requires "express verifiable authorization" when the payment is made by a method other than a credit card (subject to the Truth in Lending Act and Regulation Z), or a debit card (subject to the Electronic Fund Transfer Act (EFTA) and Regulation E). Because many novel payment methods lack protection against unauthorized charges and dispute resolution rights should the customer be unhappy with the goods or services, the TSR requires that when customers in telemarketing transactions pay by such methods, sellers and telemarketers must meet a higher standard for proving authorization. This provision, the prohibition on sharing unencrypted account numbers, and the requirement that a consumer's express informed consent be obtained in every telemarketing transaction, are in place to protect consumers from unauthorized charges.

What about remotely created payment orders, remotely created checks, cash-to-cash money transfers, and cash reload mechanisms? The use of these four payment methods in both inbound and outbound telemarketing is prohibited by the TSR. Remotely created payment orders and checks create an unreasonable risk of consumer loss by allowing fraudulent merchants to create unsigned checks that debit a consumer's bank account without authorization. Cash-to-cash money transfers and cash reload mechanisms likewise allow anonymous fraudsters to disappear with money paid by consumers for undelivered goods and services.

What about cash, checks, and money orders? The "express verifiable authorization" requirement does not apply to conventional checks that the consumer writes, signs, and mails, or to payments by postal money order, cash, gift certificates, or direct billing (where the customer or donor receives a written bill or statement before having to pay). These payment methods have been used for years, and consumers are familiar with the advantages and relative risks of each. But there are payment methods that consumers may be unfamiliar with and that lack fundamental protections. In the latter instance, the TSR requires more proof of authorization to protect consumers from unauthorized charges: If payment is made by mortgage or utility billing (where goods or services other than the mortgage or utility payment is billed on these accounts), or a similar unconventional method, a telemarketer must obtain the customer or donor's "express verifiable authorization."

Who is responsible for obtaining verifiable authorization? Under the TSR, sellers and telemarketers that receive payment by methods other than credit or debit cards are responsible for obtaining verifiable authorization in those transactions. Even if you use the services of a third party to process or submit billing information other than credit or debit card information, you are responsible for ensuring that the disclosure requirements of the TSR for verifying authorization are met. Under the TSR, a third party also can be held liable for violating the TSR if the third party substantially assists a seller or telemarketer and knows — or consciously avoids knowing — that the seller or telemarketer is violating the TSR by failing to obtain verifiable authorization.

Processing and submitting account information constitutes substantial assistance to a seller or telemarketer. Therefore, if a third party is processing account information for a seller or telemarketer, the third party should ensure that whoever is obtaining consumers' account information obtains verifiable authorization in accordance with the TSR's requirements. A third party who processes and submits bank account information cannot avoid liability by not asking questions about whether authorization procedures comply with the TSR. Indeed, a third party can be held liable under the TSR if it knows that the authorization procedures do not comply with the TSR and it processes or submits account information for payment anyway.

Does the TSR apply if I only supply the software to process or submit bank account information for payment? Maybe. Providing the means to submit a consumer's account information for payment constitutes substantial assistance to a seller or telemarketer. If the seller or telemarketer who is using the software is violating the TSR, a law enforcement agency may ask

about the extent to which the software provider ensured that authorization procedures were in place to comply with the TSR. A software provider cannot sell its product with its “eyes closed” to the business practices used by the software purchaser, consciously avoiding any knowledge of the wrongdoing. Deceptive telemarketers favor novel payment methods, like remotely created payment orders or checks. Therefore, third parties should know who they’re doing business with — and whether the people they do business with are complying with the TSR.

Under the TSR, authorization is considered verifiable if it is obtained in one of three ways:

- advance written authorization from the consumer;
- an audio recording of the consumer giving express oral authorization; or
- written confirmation of the transaction sent to the consumer before you submit the charge for payment.

Here are the requirements for each type of authorization.

Written Authorization

Any form of written authorization from a consumer is acceptable, as long as it has the consumer’s signature. For example, a consumer may transmit written authorization to the seller or telemarketer by facsimile or may send a “voided” signed check as written authorization. An electronic signature also is valid, provided it would be recognized as a valid signature under applicable federal or state contract law.

Oral Authorization

Any audio recording of an oral authorization payment must clearly demonstrate that the consumer has received each of eight specific pieces of information about the transaction and that the consumer has authorized that funds be taken from (or charged to) his or her account based on the required disclosures by the seller or telemarketer. A general question like, “Do you understand all the terms of the sale?” followed by a consumer’s “uh-huh” or “yeah” is not enough to demonstrate authorization. The tape recording must show that the consumer received each piece of information below and that, based on this information, the consumer understood and acknowledged each term of the transaction and authorized the transaction.

State laws vary on permitting the recording of telephone conversations and the requirements to obtain consent of the recorded party. Consult an attorney for guidance on these issues.

The seller or telemarketer must clearly and conspicuously state, and the consumer must acknowledge:

- the goods and services being purchased, or the charitable contribution for which payment authorization is sought.
- the number of debits, charges, or payments (if more than one).
- the date the debits, charges, or payments will be submitted for payment.
- the amount of the debits, charges, or payments.
- the customer or donor’s name.
- the customer or donor’s billing information, identified in specific enough terms that the consumer understands which account will be used to collect payment for the transaction.
- a telephone number that is answered during normal business hours by someone who can answer the consumer’s questions.
- the date of the consumer’s oral authorization.

The TSR also requires that the audio recording of the oral authorization must be made available upon request to the customer or donor, as well as to the customer or donor’s bank or other billing entity.

The Electronic Fund Transfer Act (EFTA)

Other laws, such as the EFTA (15 U.S.C. § 1693 *et seq.*), may impose different obligations about obtaining a consumer's authorization of a charge. It is the responsibility of each seller and telemarketer to determine how to comply with all applicable laws and rules. Compliance with the TSR requirements for obtaining authorization does not eliminate the obligation to comply with EFTA and other applicable laws.

Authorization by Written Confirmation

If sellers and telemarketers choose verifiable authorization through written confirmation, they must send the confirmation to the consumer via first class mail — and identify it clearly and conspicuously as confirmation of payment — **before** submitting the consumer's billing information for payment. That does not mean that you must wait to submit this information until a consumer **receives** the confirmation: The TSR requires only that you **send** it before you submit the billing information for payment.

The written confirmation must contain all the information required in an audio recording of an oral authorization. In addition, if you choose to use the written confirmation method of authorization, you must have a refund policy in place and must disclose in the written confirmation how to obtain a refund if the consumer disputes the written confirmation. The TSR's prohibition on misrepresenting a refund policy applies in the context of obtaining verifiable authorization by means of written confirmation.

The TSR leaves it to sellers and telemarketers to determine what procedures are necessary to ensure that confirmations are sent prior to submission, to put these procedures in place, and to ensure that records are generated and maintained to document that confirmations are sent at the appropriate time and required refunds are provided.

Note: In transactions involving pre-acquired account information combined with a free-to-pay conversion, sellers and telemarketers may not use the written confirmation method of obtaining authorization. In these transactions, written confirmation does not constitute "express verifiable authorization."

Date the debit, charge, or payment will be submitted for payment

This disclosure ensures that consumers know when to expect the charge or debit. To comply with this requirement, it makes good sense to provide an actual date on which payment will be submitted: "This debit from your checking account will occur on April 14, 2016." However, it is acceptable for you to disclose an approximate date if you don't — or can't — know the actual date, provided the approximate date gives the consumer reasonable notice of when to expect the debit or charge. For example, you could tell a consumer, "The charge will appear on your next mortgage statement," or "Your account will be charged within two weeks from today."

Similarly, in a transaction involving a continuity plan, it would be sufficient for you to note when any initial charge will be submitted for payment, and then at what intervals each successive payment would be submitted, should the customer opt not to decline to purchase additional goods or services. For example, in a book club plan, you could tell a customer that the initial $4.95 charge would be debited from his or her bank account on May 15, and that each month after that, his or her account will be billed one week from the date of each successive shipment.

Billing information in specific enough terms that the consumer understands what account will be used to collect payment for the transaction

To identify the account with sufficient specificity for the customer or donor to understand what account will be charged, you must state the name of the account and enough other distinguishing information about the account to ensure that the customer understands which account will be charged.

For example, telling the consumer that the charge will be placed on his mortgage account is not specific enough information. It would be necessary to identify the account further, perhaps by the name of the lender and the property address, or a reference to some portion of the account number or expiration date. It is your obligation to ensure that the consumer knows specifically what account will be charged for the goods or services.

Assisting and Facilitating Sellers or Telemarketers Who Violate the TSR is Prohibited

It is a violation of the TSR to substantially assist a seller or telemarketer while knowing — or consciously avoiding knowing — that the seller or telemarketer is violating Sections 310.3(a), (c), or (d), or 310.4 of the TSR by engaging in deceptive or abusive telemarketing practices (including creditcard laundering). Therefore, taking deliberate steps to ensure one's own ignorance of a seller or telemarketer's TSR violations is an ineffective strategy to avoid liability. To violate the TSR, the assistance that a third-party provides must be more than just a casual or incidental dealing with a seller or telemarketer that is unrelated to a violation of the TSR. For example, cleaning a telemarketer's office, delivering lunches to the telemarketer's premises, or engaging in some other activity with little or no relation to the conduct that violates the TSR would not be enough to support liability as an assistor or facilitator.

Third parties who do business with sellers and telemarketers should be aware that their dealings may provide a factual basis to support an inference that they know — or deliberately remain ignorant of — the TSR violations of these sellers and telemarketers. For example, a third party who, directly or indirectly, (1) provides sellers or telemarketers with mailing lists, automated dialing software, or telephony services, (2) helps in creating sales scripts or direct mail pieces, or (3) furnishes any other substantial assistance while knowing or consciously avoiding knowing that the seller or telemarketer is engaged in a TSR violation may be violating the TSR.

Credit Card Laundering is Prohibited

Credit card laundering is the misuse of a "merchant account" with a financial institution. A merchant account is a kind of bank account: it is what a seller or telemarketer needs to gain access to a credit card collection and payment system and to get cash for goods and services sold. Obtaining access to the credit card system through another's merchant account without the authorization of the financial institution is credit card laundering. This practice violates the TSR, and is a criminal offense under federal law and the laws of some states.

Here's how the system works for companies that make legitimate use of the credit card system: To be able to accept payment from a consumer who wants to charge the price of goods or services to a credit card, a seller or telemarketer must have a "merchant account" with a financial institution that is a member of a credit card system (for example, Visa or MasterCard) that issued the consumer's credit card. When the consumer pays by credit card, the merchant generates a credit card sales draft. The seller then deposits the draft into the seller's merchant account, and obtains the cash amount of the deposited draft. The financial institution sends the credit card sales draft through the particular credit card system, which posts a corresponding charge to the consumer's credit card account.

In credit card laundering, sellers and telemarketers who are unable to establish a merchant account with a financial institution sometimes use the unlawful services of a launderer. A launderer opens a "back door" into the credit card system by providing access to a merchant account — and the whole credit card collection and payment system — without the authorization of the financial institution or the credit card system. Except as expressly permitted by a credit card system, it is a TSR violation for anyone:

> with a merchant account to deposit into the credit card system any credit card sales draft generated by a telemarketing transaction that is not the result of a sale to the buyer by the person who has the merchant account.
>
> to use or solicit someone who has a merchant account (or an employee, representative, or agent of someone who has a merchant account) to deposit into the credit card system any credit card sales draft generated by a telemarketing transaction that is not the result of a sale to the buyer by the person who has the merchant account.
>
> to obtain access to the credit card system through a business relationship or an affiliation with a merchant, when the access is not authorized under the terms of the merchant account or by the applicable credit card system.

Unauthorized Billing

It is a violation of the TSR to cause billing information to be submitted for payment — directly or indirectly — without the express **informed consent** of the customer or donor. The TSR requires that in any telemarketing transaction, sellers and telemarketers obtain the express informed consent of the customer or donor to be charged a specific amount on a particular identified account to pay for the goods or services offered, or to make a charitable contribution.

Express Informed Consent Is Required in Every Telemarketing Transaction

The TSR contains no specific requirements for how sellers and telemarketers must obtain express informed consent in transactions where they do not use **pre-acquired account information.** As a practical matter, however, in these transactions it would be necessary for you to get the account number to be charged from the consumer, because the information isn't available any other way. In obtaining this information from the consumer, you must get her express agreement to be charged for the goods or services being offered and to be charged using the account number she provides. Any false or misleading statement to induce someone to divulge her account information to pay for goods or services or to make a charitable contribution is an additional TSR violation.

What is express informed consent? Under the TSR, consent is **express** if it is affirmatively and unambiguously articulated by the consumer. Silence is not express consent, nor is an ambivalent response like, "Well, maybe . . .," "Gee, I don't know about that . . .," or a non-commital "uh-huh." For consent to be **informed,** a consumer, prior to giving consent, must receive all the disclosures required by the TSR.

For example, consent would not meet the requirement that it be "informed" if the consumer does not receive all the TSR's required material disclosures — both the prompt oral disclosures for outbound calls and the disclosures of all material information required in all telemarketing transactions. **Consent** is an affirmative statement that the consumer agrees to purchase the goods or services (or to make the charitable contribution) and is aware that the charges will be billed to a particular account.

Obtaining Express Informed Consent in Telemarketing Transactions Involving Pre-acquired Account Information

Pre-acquired account information is any information that enables sellers and telemarketers to place a charge against a consumer's account without getting the account information directly from the consumer during the transaction for which the account will be charged. The use of pre-acquired account information radically changes the usual dynamic in sales transactions, which requires that a telemarketer obtain the customer's acceptance of the offer, as well as the customer's account number to be charged. Telemarketers using pre-acquired account information are able to cause a charge to a consumer's account without getting the account number from the consumer during the transaction. The TSR establishes safeguards to protect consumers in all telemarketing transactions in which sellers and telemarketers have pre-acquired account information.

The TSR establishes separate requirements for pre-acquired account information transactions involving **"free-to-pay conversion"** offers. That's because when used together with free-to-pay conversion offers, pre-acquired account information has resulted in significant numbers of unauthorized charges to consumers who think they can't be charged at the end of a free trial because they haven't provided their account information. The TSR specifies what sellers and telemarketers must do to prevent this from occurring and to get a consumer's express informed consent.

Free-to-pay conversion offers, sometimes known as "free-trial offers," are offers or agreements where customers receive a product or service for free for an initial period and then incur an obligation to pay unless they take affirmative action to cancel before the end of the period.

When pre-acquired account information is used and the offer includes a free-to-pay conversion feature, telemarketers must:

obtain from the customer at least the last four digits of the account number to be charged.

obtain the customer's express agreement to be charged for the goods or services and to be charged using the account number for which the customer has provided at least the last four digits.

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

Obtaining the last four digits from the customer: To meet the requirement that sellers and telemarketers "obtain from the customer" at least the last four digits of the account number to be charged, you must ask the customer to provide this information, and the customer must provide it to demonstrate an understanding that by doing so, she is agreeing to make a purchase. You must inform the customer that you have the customer's account number or the ability to charge the account without getting the full account number from the consumer. Reading the information to the customer and asking for confirmation of the digits is not complying with the TSR. Neither is it sufficient to read the digits to the customer, and then ask the customer to recite them back. In addition, it is not adequate to reuse digits that a customer may have provided for identification purposes during another portion of the call — such as in an inbound call where you ask the customer to provide his or her account number by pressing digits on the telephone keypad.

Express Agreement to be Charged: To meet the requirement that telemarketers get a customer's express agreement to be charged for the goods and services — and to be charged using the account number for which she has provided at least four digits — you must ensure that the consumer expressly and unambiguously agrees both to the purchase and the means of payment. The four digits the customer provides must actually be the last four digits of the account to be charged. If the four digits the customer provides aren't the last four digits of the account, the customer hasn't expressly agreed to be charged, and the transaction is void for lack of express verifiable authorization.

This is **not** to be interpreted as mandating that a seller or telemarketer have the unencrypted last four digits of a customer's account number to compare the digits the customer provides to the actual account number. **Rather, the agencies that issued rules under the Gramm-Leach-Bliley Act caution financial institutions against sharing the unencrypted last four digits of a customer's account with a telemarketer, even to ensure that the customer has provided these digits accurately in giving express informed consent.** The meaning here is simply that a charge cannot be processed unless the four digits provided by the customer are in fact the last four digits of the account to be charged. One way to ensure that the four digits match is to perform a real-time inquiry to verify that the leading digits of the pre-acquired account number plus the four provided by the customer are a valid account. There are other ways to do this; the TSR does not require any particular method.

Audio Recording of the Transaction: In a transaction where sellers and telemarketers have pre-acquired account information and are offering goods or services on a free-to-pay conversion basis, the entire telemarketing transaction must be recorded on audio. The audio recording must capture the material terms provided to the consumer, as well as the context and manner in which the offer is presented, because this can be critical to demonstrate that a consumer's consent is both express and informed. In a single-transaction call, this means taping the entire call; in a multi-purpose call it means recording the entirety of each transaction using pre-acquired account information coupled with a free-to-pay conversion offer.

In a situation where telemarketers are bound by state law to obtain consent to record the transaction, they may ask permission to tape before beginning to record; this is the only portion of the call that may be conducted without recording. If it is necessary to explain the purpose of the call or to identify the seller to obtain the customer's permission to record, telemarketers must reiterate this information once the recording begins to demonstrate that the required prompt disclosures were made in the outbound call.

When pre-acquired account information is used but the offer does not include a free-to-pay conversion feature, telemarketers must:

at a minimum, identify the account to be charged with enough specificity for the customer or donor to understand.

obtain the customer or donor's express agreement to be charged for the goods or services and to be charged using the account number the seller or telemarketer has identified.

The TSR's requirements for obtaining express informed consent in these transactions are less strict than when a free-to-pay conversion feature is involved. That's because while pre-acquired account information itself can lead to unauthorized billing, the record shows this is less likely when there's no free-to-pay conversion offer.

Identifying the Account with Sufficient Specificity: A telemarketer must state the name of the account and enough other distinguishing information about the account to ensure that the customer understands which account will be charged. For example, it is not good enough to tell the consumer only that a charge will be placed on his Visa credit card. You must identify the card more precisely, either by stating the name of the issuing bank, or some portion of the account number. As the telemarketer, you are obligated to ensure that the consumer knows exactly which account will be charged for the goods or services. The underlying intention of the TSR is that the telemarketer expressly inform the customer that the seller or telemarketer already has the number of the customer's specifically identified account or has the ability to charge that account without getting the account number from the consumer.

Express Agreement to be Charged: The TSR does not specify a particular procedure for sellers and telemarketers to follow when using pre-acquired account information without a free-to-pay conversion so you can demonstrate that the customer has expressly agreed to be charged. To comply with this requirement, you must elicit an affirmative and unambiguous statement from the consumer that demonstrates his intention to agree to be charged, and to be charged on a specific account. Silence is not a substitute for such a statement, nor are ambivalent or non-commital responses like, "Well, maybe . . ." or "uh-huh."

Protecting Consumers' Privacy

The TSR prohibits sellers and telemarketers from engaging in certain abusive practices that infringe on a consumer's right to be let alone. The TSR's privacy protections include prohibitions on:

- calling a person whose number is on the National Do Not Call Registry or a person who has asked not to get telemarketing calls from a particular company or charity.
- misusing a Do Not Call list.
- denying or interfering with a person's Do Not Call rights.
- calling outside the permissible hours.
- abandoning an outbound telephone call.
- placing an outbound telephone call delivering a prerecorded message to a person without that person's express written agreement to receive such calls, and without providing an automated interactive opt-out mechanism.
- failing to transmit Caller ID information.
- using threats, intimidation, or profane or obscene language.
- causing any telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass.

The Do Not Call Provisions

The original TSR contained a provision prohibiting calls to any consumer who previously asked not to get calls from or on behalf of a particular seller. Amendments to the TSR retain that provision, and also prohibit calls to any numbers consumers have placed on the National Do Not Call Registry maintained by the FTC.

The Entity-Specific Do Not Call Provision

It is a TSR violation to call any consumer who has asked not to be called again (the "entity-specific Do Not Call" provision). A telemarketer may not call a consumer who previously has asked not to receive any more calls from or on behalf of a particular seller or charitable organization. It also is a TSR violation for a seller that has been asked by a consumer not to call again to cause a telemarketer to call that consumer. Sellers and telemarketers are responsible for maintaining their individual Do Not Call lists of consumers who have asked not to receive calls placed by, or on behalf of, a particular seller. Calling a consumer who has asked not to be called potentially exposes a seller and telemarketer to a civil penalty of $43,792 for each violation.

What if a consumer asks a specific division of a corporation not to call? Does a call from a different division violate the TSR? Distinct corporate divisions generally are considered separate sellers under the TSR. Factors relevant to determining whether distinct divisions of a single corporation are treated as separate sellers include whether there is substantial diversity between the operational structure of the divisions and whether the goods or services sold by the divisions are substantially different from each other. If a consumer tells one division of a company not to call again, a distinct corporate division of the same company may make another telemarketing call to that consumer. Nevertheless, a single seller without distinct corporate divisions may not call a consumer who asks not to be called again, even if the seller is offering a different good or service for sale.

On the question of charitable solicitations, telefunders must maintain individual Do Not Call lists for charities on whose behalf they make telemarketing calls. Calling someone who has asked not to be called on behalf of a charitable organization potentially exposes the telefunder that places the call to a civil penalty of $43,792 for each violation.

Example:

Charity A is a non-profit charitable organization not covered by the TSR. Charity A engages Telefunder 1, a for-profit service bureau subject to the TSR, to conduct fundraising telephone campaigns on its behalf. Charity A uses Telefunder 1 to conduct a fundraising campaign for six months, then uses Telefunder 2, another for-profit service bureau, for the next six months. It will violate the TSR for Telefunder 2 to initiate an outbound telephone call on behalf of Charity A to a person who has already asked not to be called on behalf of Charity A. It is the responsibility of Telefunder 2 to get the Do Not Call list relating to Charity A compiled and maintained by Telefunder 1, and to keep from placing calls to anyone on that list when calling on behalf of Charity A.
If Telefunder 2 also conducts a fundraising campaign for Charity B, Telefunder 2 may call potential donors on behalf of Charity B even if they're on Charity A's Do Not Call list. But when calling on behalf of Charity B, Telefunder 2 may not call potential donors on Charity B's Do Not Call list.

The National Do Not Call Registry Requirements

The FTC's National Do Not Call Registry has been accepting registrations from consumers who choose not to receiving telemarketing sales calls since June 27, 2003. Consumers can place their telephone numbers on the National Registry online or by calling a toll-free number. Only phone numbers are included in the National Registry. This means that all household members who share a number will stop receiving most telemarketing calls after the number is registered. Consumers may register both their residential "land line" telephone numbers and their wireless phone numbers.

Sellers, telemarketers, and their service providers have been able to access the Registry through a dedicated website since September 2003. It is a TSR violation to make any covered calls without having accessed the Registry. Sellers and telemarketers must update their call lists — that is, delete all numbers in the National Do Not Call Registry from their lists — at least every 31 days.

Sellers and telemarketers are prohibited from calling any consumer whose number is in the database. Violators will be subject to civil penalties of up to $41,484 for each violation, as well as injunctive remedies.

What types of calls are not covered by the National Do Not Call Registry? The Do Not Call provisions do not cover calls from political organizations, charities, telephone surveyors, or companies with which a consumer has an existing business

relationship. Some sellers are exempt from the FTC's Rules but are required to access the National Registry under the FCC's Rules. Other sellers (charities and political organizations) are exempt from accessing the National Registry under both agencies' rules. These exempt sellers still may access the National Registry voluntarily and do not have to pay a fee for that access. They must, however, submit appropriate certification information to gain access to the National Registry. See fcc.gov.

The prohibition on calls to numbers on the Registry does not apply to business-to-business calls or calls to consumers from or on behalf of charities. Still, telefunders calling to solicit charitable contributions must honor a donor's request not to be called on behalf of a particular charitable organization.

If a call includes a telephone survey and a sales pitch, is it covered? Yes. Callers purporting to take a survey, but also offering to sell goods or services, must comply with the Do Not Call provisions. But if the call is for the sole purpose of conducting a survey, it is exempt. However, sellers and telemarketers should also be aware that the FCC regulates telemarketing calls. See fcc.gov.

How the National Do Not Call Registry Works

Accessing the Registry

Who can access the National Registry? Access to the National Registry is limited to sellers, telemarketers, and other service providers. Sellers are companies that provide, offer to provide, or arrange for others to provide goods or services to a customer in return for some type of payment as part of a telemarketing transaction. Telemarketers are companies that make telephone calls to consumers on behalf of sellers. Service providers are companies that offer services to sellers engaged in telemarketing transactions, such as providing lists of telephone numbers to call, or removing telephone numbers from the sellers' lists.

Can I use numbers on the National Registry for any purpose other than preventing telemarketing calls? No. The National Registry may not be used for any purpose other than preventing telemarketing calls to the telephone numbers on the Registry. Any entity that accesses the National Registry will be required to certify, under penalty of law, that it is accessing the Registry solely to comply with the TSR or to prevent calls to numbers on the Registry.

How can I access the National Registry? The FTC has a fully automated and secure website — telemarketing.donotcall.gov — to provide members of the telemarketing industry with access to the National Registry's database of telephone numbers, sorted by area code. The first time you access the National Registry, you must provide identifying information about yourself and your company. If you are a telemarketer or service provider accessing the National Registry on behalf of your seller-clients, you will be required to identify your seller-clients and provide their unique account numbers. The only consumer information available from the National Registry is telephone numbers. After you (or the company telemarketing on your behalf) have accessed the National Registry the first time, you'll have the option of downloading only changes in the data that have occurred since the last time you accessed the Registry.

What information must I provide to access the National Registry? The first time you access the system, you will be asked to provide certain limited identifying information, such as your company name and address, contact person, and the contact person's telephone number and email address. If you are accessing the National Registry on behalf of a seller-client, you also will have to identify that seller-client.

How often will I have to access the National Registry and remove numbers from my calling list? You must synchronize your lists with an updated version of the National Registry every 31 days.

How often may I download data from the National Registry? You will be able to access data as often as you like during the course of your annual period for those area codes for which you have paid. However, to protect system integrity, you may download data files from the National Registry only once in any 24-hour period.

What information can I access from the National Registry? The only consumer information that companies receive from the National Registry is registrants' telephone numbers. The numbers are sorted and available by area code. Companies may

access as many area codes as desired (and paid for), by selecting, for example, all area codes within a certain state. Of course, companies may access the entire National Registry.

May I check just a few numbers at a time to see if they are registered? Companies that have provided the required identification information and certification and paid the appropriate fee (if they want to access more than five area codes) may check a small number of telephone numbers (10 or less) at a time via interactive Internet pages. This permits small volume callers to comply with the Do Not Call requirements of the TSR without having to download a potentially large list of all registered telephone numbers within a particular area.

What format does the National Registry use? Data is available from the National Registry using Internet-based formats and download methods that serve both small and large businesses. Data also is available in three different sets: full lists, change lists, and small list look-ups. Full lists and change lists are available as flat files or XML tagged data files.

With a web browser, you can access a secure webpage that allows you to select the download set that you prefer. For the small list look-up, you will be asked to enter from one to 10 telephone numbers on an online form. After entering the numbers and clicking on a button, the National Registry will display the list of numbers you entered and whether each number is in the Registry.

You are limited to the numbers in the area code(s) to which you have subscribed. The full list contains just 10-digit telephone numbers, with a single number on each line. For the change list in flat file format, each line of the file contains a telephone number, the download date, and an “A” (for Added) or “D” (for Deleted). The change list data is fixed-width fields.

For both flat files and XML tagged data, if you select a change list, you will be provided all telephone numbers that have been added to, or deleted from, the National Registry since the date of your previous access. Change lists, for both flat files and XML tagged data, are available to provide changes on a daily basis (representing the additions and deletions from the day before).

To assist in automating the download process, the National Registry offers the option to set up Web services for requesting change lists in XML tagged data format.

Paying for Access

How much does it cost to access the Registry? Under the Do-Not-Call Registry Fee Extension Act of 2007, the annual fees for accessing the Registry are increased at the rate of change of the consumer price index, unless the change is less than 1 percent, in which case the fees will not be adjusted. For fiscal year 2022, beginning October 1, 2021, the annual fee is $69 for each area code of data accessed or $19,017 for access to every area code in the registry, whichever is less. The first 5 area codes of data may be accessed at no charge. Certain exempt organizations may access all data at no charge.

How often will I have to pay a fee? The fee must be paid annually. Payment of the fee provides access to the data for an “Annual Subscription Period” which is defined as the twelve months following the first day of the month in which the seller paid the fee. For example, a seller who pays its annual fee on September 15, 2019, has an “annual period” that runs from September 1, 2019 through August 31, 2020.

If a Seller adds area codes at any point during their Annual Subscription PeriodPeriod, they may be required to make additional payments.

Who must pay the fee? All sellers covered by the TSR must pay the appropriate fee for an area code of data before they call, or cause a telemarketer to call, any consumer within that area code, even those consumers whose telephone numbers are not on the National Registry. The only exceptions are for sellers that call only consumers with which they have an existing business relationship or written agreement to call, and do not access the National Registry for any other purpose. Charities and political organizations that voluntarily want to suppress calls to consumers whose numbers are on the Registry may access the Registry at no cost.

Telemarketers and service providers may access the National Registry, at no cost, through the use of their seller-client's unique Subscription Account Number (SAN). Even though they are not required by law to do so, telemarketers and service providers may gain access to the National Registry on their own behalf, but they must pay a separate fee for that ability. But before placing calls on behalf of a seller-client, telemarketers are required to ensure that their seller-client has paid the appropriate annual fee.

How can I pay the fee? Fees are payable via credit card (which permits the transfer of data in the same session, if the payment is approved) or electronic fund transfer (EFT). EFT requires you to wait approximately three days for the funds to clear before data access can be provided. You must pay the fee prior to gaining access to the National Registry. Sellers and exempt entities can pay the fee directly or through their telemarketers or service providers (to which the seller or exempt entity has provided the necessary authority).

What if I pay for a small number of area codes, and then later in the year expand my business to call more area codes? Will I have to pay twice? If you need to access data from more area codes than you initially selected, you may do so, but you will have to pay for access to those additional area codes. For fiscal year 2022, beginning October 1, 2021, obtaining additional data from the National Registry during the first six months of your Annual Subscription Period will require a payment of $69 for each new area code. During the second six-month period, the charge to obtain data from each new area code is $35. Payment for additional data provides you with access to the additional data for the remainder of your Annual Subscription Period. Adding area codes to a subscription does not affect the length of the Annual Subscription Period.

What happens after I pay for access? After payment is processed, you will be given a unique Subscription Account Number (SAN) and permitted access to the appropriate portions of the National Registry. On subsequent visits to the website, you will be able to download either a full updated list of numbers from your selected area codes or a more limited list, consisting of changes to the National Registry (both additions and deletions) that have occurred since the day of your last download. This limits the amount of data that you need to download during each visit. The change list will consist of each phone number that has changed, whether it was added or deleted, and the download date.

What if I want to share the cost of the fee with another seller? The TSR flatly prohibits sharing the fee for Registry access. If sharing were permitted, fees would have to be much higher to cover the cost of maintaining the Registry.

If I'm a telemarketer or service provider working for a seller, can I use the seller's account number to access the National Registry? A telemarketer or other service provider working on behalf of a seller may access the National Registry directly or through the use of its seller-client's unique account number. If access is gained through its seller-client's account number, the telemarketer or service provider will not have to pay a separate fee for that access. The extent of its access will be limited to the area codes requested and paid for by its seller-client. The telemarketer or service provider also will be permitted to access the National Registry at no additional cost, once the annual fee has been paid by its seller-client. Of course, sellers or telemarketers must use a version of the National Registry that's no more than 31 days old before they make any telemarketing calls.

If a telemarketer or service provider is accessing the National Registry directly — that is, if a telemarketer or service provider decides to obtain the information on its own behalf — it will have to pay a separate fee and comply with all requirements placed on sellers accessing the Registry. Such a telemarketer or service provider will be provided a subscription account number (SAN) that can be used only by that company. In other words, that SAN is not transferrable.

What if a seller uses one telemarketer at the beginning of the year and switches to another later in the year? Will the seller have to pay twice? No. Each seller will have a unique subscription account number (SAN) that it can share with the telemarketers and service providers who may access the National Registry on the seller's behalf.

Compliance

What happens to companies that don't pay for access to the National Registry? A company that is a seller or telemarketer could be liable for placing any telemarketing calls (even to numbers NOT on the National Registry) unless the

seller has paid the required fee for access to the Registry. Violators may be subject to fines of up to $43,792 per violation. Each call may be considered a separate violation. However, sellers and telemarketers should also be aware that the FCC regulates telemarketing calls. See fcc.gov.

What if I call a number that's not on the National Registry without checking the Registry first? It's against the law to call (or cause a telemarketer to call) any number on the National Registry (unless the seller has an established business relationship with the consumer whose number is being called, or the consumer agreed in writing to receive calls placed by or on behalf of the seller). But it's also against the law for a seller to call (or cause a telemarketer to call) any person whose number is within a given area code unless the seller first has paid the annual fee for access to the portion of the National Registry that includes numbers within that area code.

In addition, it's against the law for a telemarketer, calling on behalf of a seller, to call any person whose number is within a given area code unless the seller has first paid the annual fee for access to the portion of the National Registry that includes numbers within that area code. Telemarketers must make sure that their seller-clients have paid for access to the National Registry before placing any telemarketing calls on their behalf. However, sellers and telemarketers should also be aware that the FCC regulates telemarketing calls. See fcc.gov.

What's my liability if my company inadvertently calls a number on the National Registry? The TSR has a "safe harbor" for inadvertent mistakes. If a seller or telemarketer can show that, as part of its routine business practice, it meets all the requirements of the safe harbor, it will not be subject to civil penalties or sanctions for mistakenly calling a consumer who has asked for no more calls, or for calling a person on the National Registry. However, sellers and telemarketers should also be aware that the FCC regulates telemarketing calls. See fcc.gov.

How do the registries operated by the FTC, the, FCC, and the various states fit together? Since June of 2003, the FTC and the FCC jointly and cooperatively have enforced a single National Do Not Call Registry. Together, the FTC and the FCC have jurisdiction over nearly all sales calls placed to U.S. consumers.

Some thirteen states still administer their own do not call registries. The TSR does NOT preempt state law, so sellers, telemarketers, and others who do telemarketing will have to check with various states to determine what is required for compliance at the state level. See fcc.gov. A full copy of the FCC's regulations can be found at: https://www.law.cornell.edu/cfr/text/47/64.1200.

Troubleshooting

What if I have problems when I try to access the National Registry? Visit telemarketing.donotcall.gov for help during regular business hours via a secure electronic form or send an email to the registry Help Desk at tmhelp@donotcall.gov.

How does the National Registry impact small, home-based direct sellers?

FTC staff does not contemplate enforcing the National Do Not Call Registry provisions against individuals who make sales calls out of their own homes to personal friends, family members, or small numbers of personal referrals. In fact, most of the calls made by such small direct sellers probably would be local or "intrastate" calls, and therefore not covered by the TSR. The TSR applies to telemarketing campaigns that involve more than one interstate call.

Nevertheless, small home-based direct sellers should be aware that the Do Not Call regulations of the FCC cover intrastate calls. The FCC regulations exempt "personal relationship" calls — where the party called is a family member, friend, or acquaintance of the telemarketer making the call.

As a matter of goodwill, small direct sellers may want to avoid contacting a person whose number is on the Registry.

Where can I get more information about compliance? The best source of information about complying with the Do Not Call provisions of the TSR is ftc.gov/donotcall. It includes business information about the National Registry.

It's important that sellers and others involved in telemarketing recognize that both the FTC and the FCC regulate telemarketing practices. Those involved in telemarketing should review regulations put in place by both agencies. The FCC's regulations can be found at: https://www.law.cornell.edu/cfr/text/47/64.1200.

Do Not Call Safe Harbor

If a seller or telemarketer can establish that as part of its routine business practice, it meets the following requirements, it will not be subject to civil penalties or sanctions for erroneously calling a consumer who has asked not to be called, or for calling a number on the National Registry:

- the seller or telemarketer has established and implemented written procedures to honor consumers' requests that they not be called.
- the seller or telemarketer has trained its personnel, and any entity assisting in its compliance, in these procedures.
- the seller, telemarketer, or someone else acting on behalf of the seller or charitable organization has maintained and recorded an entity-specific Do Not Call list.
- the seller or telemarketer uses, and maintains records documenting, a process to prevent calls to any telephone number on an entity-specific Do Not Call list or the National Do Not Call Registry, provided that the process involves using a version of the National Registry downloaded no more than 31 days before the date any call is made.
- the seller, telemarketer, or someone else acting on behalf of the seller or charitable organization monitors and enforces compliance with the entity's written Do Not Call procedures.
- the call is a result of error.

What happens if a consumer is called after he or she has asked not to be called? If a seller or telemarketer calls a consumer who has:

- placed his number on the National Registry
- not given written and signed permission to call
- either no established business relationship with the seller, or has asked to get no more calls from or on behalf of that seller . . .

the seller and telemarketer may be liable for a TSR violation. If an investigation reveals that neither the seller nor the telemarketer had written Do Not Call procedures in place, both will be liable for the TSR violation. If the seller had written Do Not Call procedures, but the telemarketer ignored them, the telemarketer will be liable for the TSR violation; the seller also might be liable, unless it could demonstrate that it monitored and enforced Do Not Call compliance and otherwise implemented its written procedures. Ultimately, a seller is responsible for keeping a current entity-specific Do Not Call list, either through a telemarketing service it hires or its own efforts.

What does "error" mean? If a seller or telemarketer has and implements written Do Not Call procedures, it will not be liable for a TSR violation if a subsequent call is the result of error. But it may be subject to an enforcement investigation, which would focus on the effectiveness of the procedures in place, how they are implemented, and if all personnel are trained in Do Not Call procedures. If there is a high incidence of "errors," it may be determined that the procedures are inadequate to comply with the TSR's Do Not Call requirements, the safe harbor is not fulfilled, and the calls violate the TSR. On the other hand, if there is a low incidence of "errors," there may not be a TSR violation. The determination of whether an excusable "error" occurs is based on the facts of each case. A safe rule of thumb to ensure that adequate Do Not Call procedures are implemented is to test periodically for quality control and effectiveness.

Exemptions to the National Do Not Call Registry Requirements

The Established Business Relationship Exemption

Sellers and telemarketers may place live telemarketing calls from a sales agent (but not automated calls or robocalls) to a consumer with whom a seller can demonstrate it has an established business relationship, provided the consumer has not asked to be on the seller's entity-specific Do Not Call list. The TSR states that there are two kinds of established business relationships. One is based on the consumer's purchase, rental, or lease of the seller's goods or services, or a financial transaction between the consumer and seller, within 18 months preceding a telemarketing call. The 18-month period runs from the date of the last payment, transaction, or shipment between the consumer and the seller. The other is based on a consumer's inquiry or application regarding a seller's goods or services, and exists for three months starting from the date the consumer makes the inquiry or application. This enables sellers to return calls to interested prospects even if their telephone numbers are on the National Registry.

Examples:

A magazine seller may make a live telemarketing call to a customer whose number is on the National Registry for 18 months after the date of the customer's last payment for magazines or for 18 months after the seller's last shipment date of magazines, whichever is later.

A consumer calls a company to ask for more information about a particular product. If the company returns the consumer's call within three months from the date of the inquiry, whether the consumer's telephone number is on the National Registry is immaterial. But after that three month period, the company would need either the consumer's express agreement to get more calls or a transaction-based established business relationship to support more calls.

To whom does the established business relationship apply? An established business relationship is between a seller and a customer; it is not necessarily between one of the seller's subsidiaries or affiliates and that customer. The test for whether a subsidiary or affiliate can claim an established business relationship with a sister company's customer is: would the customer expect to receive a call from such an entity, or would the customer feel such a call is inconsistent with having placed his or her number on the National Do Not Call Registry?

Factors to be considered in this analysis include the nature and type of goods or services offered and the identity of the affiliate. Are the affiliate's goods or services similar to the seller's? Is the affiliate's name identical or similar to the seller's? The greater the similarity between the nature and type of goods sold by the seller and any subsidiary or affiliate and the greater the similarity in identity between the seller and any subsidiary and affiliate, the more likely it is that the call would fall within the established business relationship exemption.

Examples:

A consumer who purchased aluminum siding from "Alpha Company Siding," a subsidiary of "Alpha Corp.," likely would not be surprised to receive a call from "Alpha Company Kitchen Remodeling," also a subsidiary of "Alpha Corp." The name of the seller and the subsidiary are similar, as are the type of goods or services offered — home repair and remodeling.

If a consumer buys a computer with peripherals — printer, keyboard, speakers — from a local retail store, the consumer will have an established business relationship with that store for 18 months from the date of purchase. In addition, the consumer may have an established business relationship with the computer manufacturer and possibly the manufacturer of the peripherals, as well as the operating system manufacturer, as long as the customer has a contractual relationship with any of these entities. If the printer comes with a manufacturer's written warranty, the manufacturer of the printer has an established business relationship with the customer. If the operating system comes

with a manufacturer's written warranty, the manufacturer of the system has an established business relationship with the customer, too.

However, if a consumer buys a subscription to a magazine from a magazine publisher that happens to be owned by a corporation with diverse holdings, the customer's established business relationship would exist only with the magazine publisher, not the corporate parent or any other corporate subsidiaries.

The Written Permission to Call Exemption

The TSR lets sellers and telemarketers call any consumer they can demonstrate has expressly agreed, in writing, to receive calls by or on behalf of the seller, even if the consumer's number is in the National Do Not Call Registry. The consumer's express agreement must be in writing and must include the number to which calls may be made and the consumer's signature. The signature may be a valid electronic signature, if the agreement is reached online.

If a seller seeks a consumer's permission to call, the request must be clear and conspicuous, and the consumer's assent must be affirmative. If the request is made in writing, it cannot be hidden; printed in small, pale, or non-contrasting type; hidden on the back or bottom of the document; or buried in unrelated information where a person would not expect to find such a request. A consumer must provide consent affirmatively, such as by checking a box. For example, a consumer responding to an email request for permission to call would not be deemed to have provided such permission if the "Please call me" button was pre-checked as a default.

In the FTC's enforcement experience, sweepstakes entry forms often have been used in a deceptive manner to obtain "authorization" from a consumer to incur a charge or some other detriment. Authorization or permission obtained through subterfuge is ineffective. The FTC scrutinizes any use of such sweepstakes entry forms as a way to get a consumer's permission to place telemarketing calls to her number.

Other Provisions Relating to Do Not Call

Selling or Using a Do Not Call List for Purposes Other than Compliance

It's a violation of the TSR for anyone to sell, rent, lease, buy, or use an entity-specific Do Not Call list or the National Registry for any purpose other than complying with the Rule's Do Not Call provisions or preventing calls to numbers on such lists. This provision applies to list brokers, third-party services, and others, in addition to sellers and telemarketers. It is intended to ensure that consumers' phone numbers on Do Not Call lists and the National Registry are not misused. It is a violation of this provision for a seller to market its own entity-specific Do Not Call list to another entity for use as a "do call" list.

Sellers and telemarketers (on behalf of sellers) must purchase access to the relevant Do Not Call data from the National Registry database. The TSR prohibits participating in any arrangement to share the cost of accessing the National Registry database. A telemarketer may not divide the costs to access the National Registry database among various client sellers; access for each client seller must be purchased separately. Similarly, a telemarketer may not access the National Registry to obtain Do Not Call data and transfer the data to or share it with another telemarketer.

Denying or Interfering with Someone's Do Not Call Rights

It's a TSR violation to deny or interfere with someone's right to be placed on the National Do Not Call Registry or on any entity-specific Do Not Call list. This provision prohibits a telemarketer from refusing to accept a consumer's entity-specific Do Not Call request, including harassing any person who makes such a request, hanging up on that person, failing to honor the request, requiring the person to listen to a sales pitch before accepting the request, assessing a charge or fee for honoring the request, requiring the person to call a different number to submit the request, or requiring the person to identify the seller making the call or on whose behalf the call is made. In addition, if a seller or telemarketer fails to diligently capture information

about a consumer's Do Not Call request and add it to the appropriate entity-specific Do Not Call list, it will lose the benefit of the TSR's safe harbor for inadvertent violations. It would also violate this part of the TSR for any person to purport to accept telephone numbers or other information for entry into the National Do Not Call Registry. No data from third parties is accepted into the National Do Not Call Registry.

Calling Time Restrictions

Unless a telemarketer has a person's prior consent to do otherwise, it's a violation of the TSR to make outbound telemarketing calls to the person's home outside the hours of 8 a.m. and 9 p.m. local time at the location called.

Call Abandonment (and Safe Harbor)

The TSR expressly prohibits telemarketers from abandoning any outbound telephone call, but has an alternative that allows some flexibility while enabling you to avoid liability under this provision.

Abandoned calls often result from telemarketers' use of predictive dialers to call consumers. Predictive dialers promote telemarketers' efficiency by simultaneously calling multiple consumers for every available sales representative. This maximizes the amount of time telemarketing sales representatives spend talking to consumers and minimizes representatives' "downtime." But it also means some calls are abandoned: consumers are either hung up on or kept waiting for long periods until a representative is available.

Under the TSR's definition, an outbound telephone call is "abandoned" if a person answers it and the telemarketer does not connect the call to a sales representative within two seconds of the person's completed greeting. **The use of prerecorded message telemarketing, where a sales pitch begins with or is made entirely by a prerecorded message, violates the TSR because the telemarketer is not connecting the call to a sales representative within two seconds of the person's completed greeting.**

The abandoned call safe harbor provides that a telemarketer will **not** face enforcement action for violating the call abandonment prohibition if the telemarketer:

> uses technology that ensures abandonment of no more than three percent of all calls answered by a live person, measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.
>
> allows the telephone to ring for 15 seconds or four rings before disconnecting an unanswered call.
>
> plays a recorded message stating the name and telephone number of the seller on whose behalf the call was placed whenever a live sales representative is unavailable within two seconds of a live person answering the call.
>
> maintains records documenting adherence to the three requirements above.

To take advantage of the safe harbor, a telemarketer must first ensure that a live representative takes the call in at least 97 percent of the calls answered by consumers. Calls answered by machine, calls that are not answered at all, and calls to non-working numbers do not count in this calculation. (Note that calls that are answered by machine and that deliver prerecorded messages raise other concerns. See "Telemarketing Calls That Deliver Prerecorded Messages.")

The "per calling campaign" measure

A telemarketer running simultaneous campaigns (on behalf of the same or different sellers) cannot average the abandonment rates for all campaigns, offsetting for example, a six percent abandonment rate for one campaign with a zero percent abandonment rate for another. Each separate campaign is subject to a maximum abandonment rate of three percent measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.

A telemarketer also must eliminate "early hang-ups" by allowing an unanswered call to ring either four times or for 15 seconds before disconnecting the call. This element of the safe harbor ensures that consumers have a reasonable time to answer a call and are not subjected to "dead air" after one, two, or three rings.

In addition, in the small permissible percentage of calls in which a live representative may not be available within two seconds of the consumer's completed greeting, the telemarketer must play a recorded message. The message must state the name and telephone number of the seller responsible for the call, enabling the consumer to know who was calling and, should the consumer wish, to return the call. The Rule expressly states that sellers and telemarketers still must comply with relevant state and federal laws, including, but not limited to, the Telephone Consumer Protection Act (47 U.S.C. § 227) and FCC regulations at 47 C.F.R. Part 64.1200. The FCC regulations prohibit such recorded messages from containing a sales pitch, but, like the TSR provision discussed here, require that the message state "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 recorded message must not contain a sales pitch. The number on the recorded message must be one to which a consumer can call to place an entity specific Do Not Call request.

Finally, a telemarketer wishing to avail itself of the safe harbor for abandoned calls must keep records that document its compliance with the first three safe harbor components in accordance with the recordkeeping provision of the TSR (Section 310.5). The records must establish that the abandonment rate has not exceeded three percent and that the ring time and recorded message requirements have been fulfilled.

Telemarketing Calls That Deliver Prerecorded Messages

In August of 2008, the FTC adopted amendments to the TSR that directly address the use of prerecorded messages in telemarketing. Under those amendments, the TSR expressly prohibits outbound telemarketing calls that deliver a prerecorded message unless the seller has obtained the call recipient's prior signed, written agreement to receive such calls from that seller. The prohibition applies to prerecorded message calls regardless of whether they are answered by a person or by an answering machine or voice mail service. With certain exceptions (explained below), the prohibition applies to all calls that deliver a prerecorded message, regardless of whether the number called is listed on the National Do Not Call Registry. THE PROHIBITION APPLIES TO CALLS THAT DELIVER ANY PRERECORDED MESSAGE, REGARDLESS OF WHETHER THE PRERECORDED MESSAGE IS PLAYED OR SELECTED BY A LIVE OPERATOR.

Moreover, even when the seller has the call recipient's prior agreement to receive prerecorded message calls, the message must provide an automated interactive opt-out mechanism that is announced and made available at the outset of the message (right after the required prompt disclosures described above). The opt-out mechanism must remain available throughout the duration of the call. If a call delivering a prerecorded message possibly might be answered "live" by a consumer, the message must include a voice-activated or telephone keypress automated mechanism that will automatically add the number called to the seller's entity-specific Do Not Call list and then immediately terminate the call. If a call possibly might be picked up by an answering machine, or voicemail service, then the message must include a toll-free number that, when called, will connect a caller to the same automated opt-out mechanism, which must be available "24/7" for the duration of the calling campaign.

In addition, sellers or telemarketers placing calls that deliver a prerecorded message must also comply with three additional requirements that mirror those of the abandoned call prohibition. Specifically, they must:

> allow the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;
>
> play the prerecorded message within two seconds after the recipient of the call completes his or her greeting; and
>
> comply with all other requirements of the TSR and other applicable federal and state laws.

The Written Agreement Requirement

Calls delivering a prerecorded message may be placed only to individuals who have provided the seller with a signed, written agreement to receive such calls. Therefore, prerecorded message calls are prohibited if the seller does not possess a written

agreement from the individual to whom such a call is placed to receive such calls. The existence of an “established business relationship” does not does not permit a seller or telemarketer to place a prerecorded message call.

The TSR requires that the seller have a written agreement with the called party for all calls delivering prerecorded messages, with the two exceptions discussed below. The written agreement is required regardless of whether the number called is on the National Do Not Call Registry. Nor does it matter whether a call delivering a prerecorded message is answered “live” by a person or by an answering machine or voicemail service. In all cases, the seller must have the call recipient’s prior written agreement to receive prerecorded message calls at the number called.

What must the written agreement contain?

A written agreement need only contain:

unambiguous evidence that a call recipient is willing to receive telephone calls that deliver a prerecorded message by or on behalf of a specific seller;

the telephone number to which such messages may be delivered; and

the call recipient’s signature.

Although no particular form or language is required, an acceptable model is provided here.

I would like to receive telephone calls that deliver prerecorded messages from [ABC Co.] that provide special sales offers such as ____________ _________________at this telephone number: (_____)____________.	
Yes	No
________[Signature]________	

Does a consumer’s written agreement to receive prerecorded message calls from a seller permit others, such as the seller’s affiliates or marketing partners, to place such calls? No. The TSR requires that the written agreement identify the single “specific seller” authorized to deliver prerecorded messages. The authorization does not extend to other sellers, such as affiliates, marketing partners, or others.

Are there specific procedures for obtaining a consumer’s written agreement to receive calls that deliver prerecorded messages? There are three essentials:

1. Before the consumer agrees, the seller must **clearly and conspicuously disclose the consequences** of agreeing — namely, that the agreement will result in the seller delivering prerecorded messages to the consumer via telemarketing calls;
2. The seller may **not** require, directly or indirectly, that a consumer agree to receive prerecorded message calls as a precondition for purchasing or receiving any good or service; and
3. The seller must give the consumer an opportunity to designate the telephone number to which the calls may be placed.

Sellers bear the burden of demonstrating that these prerequisites have been met, and that they possess the required written agreements from consumers to receive prerecorded calls for all such calls that they place.

Is there a particular medium or format the seller must use in obtaining a consumer's written agreement to receive calls that deliver prerecorded messages? A seller need not obtain or retain the consumers agreement in paper form. The TSR expressly permits sellers to use electronic records that comply with the Electronic Signatures In Global and National Commerce Act ("E-SIGN"). Therefore, a seller may use a written agreement that is both created and retained in electronic form, so long as the seller can demonstrate that the seller's procedures comply with E-SIGN, and conform to the TSR's written agreement requirements. Thus, consumers' express agreements to receive prerecorded message calls could be obtained by means of email, a website form, a telephone keypress during a live call with a sales agent, or a voice recording.

The Requirement that Prerecorded Telemarketing Messages Include an Automated Interactive Opt-Out Mechanism

Calls that deliver a prerecorded message must include an automated interactive opt-out mechanism that is announced and made available for the call recipient to use at the outset of the message. The opt-out must follow immediately after the initial disclosures — explained in the section on *Prompt Disclosures in Outbound Telemarketing Calls* — that the TSR imposes on all telemarketing calls.

> In the case of a prerecorded message to induce the purchase of a good or service, the opt-out mechanism must be announced and made available to use immediately after the mandatory disclosures — the seller's identity, that the purpose of the call is to sell goods or services, the nature of the goods or services, and, if a prize promotion is offered, the fact that no purchase or payment is necessary to participate.
>
> In the case of a prerecorded message call placed by a telefunder to solicit charitable contributions on behalf of a non-profit organization, the opt-out mechanism must be announced and made available to use immediately after the mandatory disclosure of the identity of the charitable organization on behalf of which the call is made, and the fact that the purpose of the call is to solicit a charitable contribution.

Sellers and telemarketers using prerecorded telemarketing calls must employ automated technology capable of automatically placing a consumer's telephone number on the seller's Do Not Call list in response either to spoken words, or the pressing of a specified key on the telephone keypad.

If it is possible that a prerecorded telemarketing call may be answered by a consumer in person, the message must disclose at the outset (as discussed above) how to use the required voice-or-keypress-activated interactive opt-out mechanism to add the consumer's number to the seller's entity-specific Do Not Call list. Moreover, the opt-out mechanism must:

> be available for call recipients to use at any time during the message;
>
> when invoked, automatically add the call recipient's number to the seller's entity-specific Do Not Call list; and
>
> after the call recipient's number has been added to the seller's internal Do Not Call list, immediately disconnect the call.

By contrast, if it's possible that a prerecorded telemarketing call may be picked up by an answering machine or voice mail service, the message must disclose at the outset a toll-free number that, when called, connects the caller directly to the same type of voice-or-keypress-activated interactive opt-out mechanism that will add the number called to the seller's Do Not Call list. The opt-out mechanism provided must:

> be accessible at any time throughout the telemarketing campaign, including non-business hours;
>
> automatically add the call recipient's number to the seller's entity-specific Do Not Call list; and
>
> immediately thereafter disconnect the call.

When would both a voice or keypress activated mechanism and a toll-free number be required? Both would be required whenever a seller or telemarketer cannot be certain that no consumer will answer the call in person.

May the opt-out mechanism transfer an opt-out request to an operator or sales representative? No, the opt-out provision specifies that the mechanism must "automatically add the number called to the seller's entity-specific Do Not Call list." This means the mechanism must work in a way that does not require human intervention. The additional requirement

that the opt-out mechanism "once invoked, immediately disconnect the call" after adding the call recipient's telephone number to the seller's Do Not Call list bars the intervention of an operator or sales representative.

May the opt-out mechanism require a repeat confirmation of the opt-out request before adding a number to the seller's Do Not Call list? No, the provision specifies that the opt-out mechanism must "automatically add" the number called to the seller's entity-specific Do Not Call list."

May the opt-out mechanism connect to a menu that includes the required opt-out option? No, the opt-out mechanism, once invoked, must "automatically add" the number called to the seller's entity-specific Do Not Call list, then immediately terminate the call.

If a recipient of a call delivering a prerecorded message calls the toll-free number provided in the message, must the call recipient's number automatically be added to the seller's internal Do Not Call list? Yes. All calls to the toll free number must "connect directly" to an opt-out mechanism that "automatically adds" the number originally called to the seller's entity-specific Do Not Call list. The provision assumes that the recipient of the prerecorded message call will call back the number provided on the same line on which she received the prerecorded call. As a practical matter, ANI (automatic number identification) may be used to capture the telephone number that calls into the toll-free number. This is the "number called" to which the prerecorded message was delivered.

Must the toll-free number provided in a prerecorded telemarketing message, regardless of when it receives a return call from a consumer, connect the return call to an automated opt-out mechanism? Yes. The TSR specifies that the opt-out mechanism must be "accessible at any time throughout the duration of the telemarketing campaign." This means that both the toll-free number and the opt-out mechanism itself be operational "24/7" so that regardless of the day or time that a consumer listens to a prerecorded message on his or her answering machine or voice mail service, the consumer, if he or she wishes, can immediately exercise the right to opt-out of future calls.

If a prerecorded telemarketing campaign lasts only a short time (for example, one or two days), how long must the toll-free number provided in the prerecorded message be accessible?The toll-free number must be available for the "duration of the telemarketing campaign." In the case of a short one or two-day campaign, the toll-free number should be available for a reasonable time thereafter to permit consumers to exercise their opt-out rights after listening to the message.

Calls that Deliver Purely "Informational" Prerecorded Messages

The TSR amendments prohibiting prerecorded messages in telemarketing do not apply to calls delivering prerecorded messages that are purely informational — for example, flight cancellation messages. Purely informational calls — as opposed to calls soliciting sales or charitable contributions — do not fall within the Rule's definition of "telemarketing" — "a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution." Thus, the prohibition on prerecorded telemarketing messages does not apply to purely informational messages. The following are examples of purely informational messages:

a reminder of a single appointment previously scheduled at the call recipient's request;

reminders of a series of recurring appointments previously scheduled at the call recipient's request (for example, weekly dance class reminders; quarterly pest control service reminders);

an update on a prior sales transaction (for example, a notification of order status, shipping information, delivery dates and times, or overdue payments); or

a recall notification.

"Mixed" Messages: Any prerecorded informational message that includes a sales or solicitation component to induce, directly or indirectly, a purchase of goods or services or a charitable contribution is prohibited, unless the seller has obtained the call recipient's prior written agreement to receive prerecorded message calls. If a call delivers a prerecorded message that includes any content tending to induce a consumer to purchase a good or service (whether or not the good or service is related to a prior purchase), or to alter the terms of a prior transaction, then the call is not purely informational. Instead, such a

call is a telemarketing message that is prohibited, unless agreed to in advance. Examples of informational messages that are prohibited because they are combined with a telemarketing message include messages that provide any information about:

- the availability of any product or service, whether or not the message provides a means for purchasing it;
- the availability of additional options or upgrades for a previously purchased product or service;
- the availability of alternative terms or conditions for a previously purchased product or service; and
- the availability of an extended warranty (or service contract) on a previously purchased product or service.

Exemptions from the Prerecorded Call Requirements

Two general types of prerecorded message calls that would otherwise be prohibited by the TSR are nevertheless expressly exempted from coverage. First, the amendments completely exempt certain prerecorded healthcare message calls. Second, the amendments partially exempt prerecorded message calls placed on behalf of a non-profit charitable organization by a for-profit telemarketer to members of, or previous donors to, the charitable organization on behalf of which the calls are being placed. The paragraphs immediately below explain these exemptions in greater detail.

Healthcare Message Exemption

This exemption is limited to calls permitted under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), pursuant to regulations issued by the Department of Health and Human Services. The only healthcare calls that are exempt are those “made by, or on behalf of, a covered entity or its business associate, as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.”

The HIPAA Privacy Rule permits only three types of calls, whether “live” or prerecorded, by a healthcare provider or its business associates without a patient’s prior authorization – namely:

- calls to describe a health-related product or service that is provided by, or included in a plan of benefits of, the covered entity making the communication;
- calls for treatment of the individual; and
- calls for case management or care coordination for the individual, or to direct or recommend alternative treatments, therapies, health care providers, or settings of care to the individual.

Only these three categories of prerecorded healthcare message calls are exempt from the TSR prohibition of telemarketing calls that deliver a prerecorded message. Some examples of exempt healthcare-related HIPAA calls are prerecorded messages calls made by or on behalf of a:

- pharmacy to provide prescription refill reminders;
- medical provider to provide medical appointment or other reminders (for example, availability of flu shots or mammograms);
- durable medical equipment supplier to document that a patient has used his or her current supply (for example, of insulin needles or respiratory supplies) before sending additional supplies; and
- case manager to check on a patient’s condition.

Prerecorded messages involving products or services not prescribed by a doctor or other healthcare provider as part of a plan of treatment, and therefore not within the healthcare exemption would include, for example prerecorded message calls made by or on behalf of a provider of:

- vitamins, minerals, or alternative medical therapies;
- gym or health club memberships; or
- weight loss products or programs.

Charitable Fundraising Messages Exemption

As noted above, non-profit organizations — those entities that are not organized to carry on business for their own, or their members' profit — are not covered by the TSR because the FTC Act specifically exempts them from the FTC's jurisdiction. As explained above, however, the USA PATRIOT Act, passed in 2001, brought charitable solicitations by for-profit telemarketers within the scope of the TSR. As a result, most of the TSR's provisions are applicable to "telefunders" — telemarketers who solicit charitable contributions.

Nevertheless, the FTC has partially exempted certain calls placed by telefunders from the prerecorded message prohibition. Under this exemption, telefunders may place calls delivering prerecorded messages to prior donors and members of the charity on behalf of which the calls are placed, even if the charity does not have the call recipients' express written agreement to receive such calls.

This is only a partial exemption because telefunders still must comply with the other requirements of the prohibition, including the automated interactive opt-out requirements and the three additional requirements that mirror those of the abandoned call prohibition. Specifically:

> to allow the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;
>
> to play the prerecorded message within two seconds after the recipient of the call completes his or her greeting; and
>
> to comply with all other requirements of the TSR and other applicable federal and state laws.

The partial exemption only relieves telefunders from complying with the written agreement requirement.

Transmitting Caller ID Information

It is a violation of the TSR to fail to transmit or cause to be transmitted the phone number, and, when available by the telemarketer's phone company, the name of the telemarketer to any consumer's caller identification service.

To comply with this requirement, a telemarketer may transmit its own number and, where available, its own name, to consumers' caller identification services. The TSR also allows a substitution of the name of the seller (or charitable organization) on whose behalf the telemarketer is calling, and the seller's (or charitable organization's) customer (or donor) service telephone number, which is answered during regular business hours. The TSR allows a service bureau calling on behalf of many client-sellers to transmit a client-seller's customer service number (or the donor service number of a charitable organization client) as well as the names of these entities, if the service bureau's phone company has the capacity to transmit this information.

There may be situations when a consumer who subscribes to a Caller ID service does not receive a telemarketer's transmission of Caller ID information despite the fact that the telemarketer has arranged with its carrier to transmit this information in every call. This can happen if the Caller ID information is dropped somewhere between the telemarketer's call center and the consumer's telephone. Telemarketers who can show that they took all available steps to ensure transmission of Caller ID information in every call will not be liable for isolated inadvertent instances when the Caller ID information fails to make it to the consumer's receiver. Nevertheless, a telemarketer's use of calling equipment that is not capable of transmitting Caller ID information is no excuse for failure to transmit the required information.

The FCC's telemarketing regulations under the TCPA also include provisions governing the transmission of Caller ID (47 C.F.R. § 64.1200).

Threats, Intimidation, and Profane or Obscene Language

Sellers and telemarketers are prohibited from using threats, intimidation, and profane or obscene language in a telemarketing transaction. This prohibition covers all types of threats, including threats of bodily injury, financial ruin, and threats to ruin credit. It also prohibits intimidation, including acts that put undue pressure on a consumer, or that call into question a person's

intelligence, honesty, reliability, or concern for family. Repeated calls to an individual who has declined to accept an offer also may be viewed as an act of intimidation.

Calling Consumers Repeatedly or Continuously, with the Intent to Annoy, Abuse or Harass

A consumer asks to be placed on a company's Do Not Call list. If the telemarketer who receives that request decides to dial the consumer's number repeatedly, hanging up each time or making obnoxious or offensive remarks to the consumer in retaliation, the calls would violate this provision of the TSR. Repeated calls urging a consumer to take advantage of an offer also would violate this provision, provided they are made with the intent to annoy, abuse or harass.

Fraudulent Telemarketing Operations

Several distinct practices occur in fraudulent telemarketing operations. The TSR takes specific aim at these practices.

Disclosing or Receiving Unencrypted Account Numbers for Consideration

Along with the provisions on express verifiable authorization and unauthorized billing, another provision is designed to ensure that consumers are not charged without their consent. Basically, the TSR makes it illegal to disclose or receive unencrypted account numbers for consideration, unless the disclosure or receipt is to process a payment for a transaction the consumer has consented to after receiving all necessary disclosures and other protections the TSR provides. Other than processing a transaction to which the consumer has consented, there is no legitimate purpose for disclosing or receiving a consumer's unencrypted account number. Because of the likelihood that people illicitly trading in unencrypted account numbers will misuse the information by placing unauthorized charges against consumers' accounts, this practice is deemed abusive and is prohibited under the TSR.

The term "unencrypted" means not only complete, visible account numbers, whether provided in lists or singly, but also encrypted information with a key to decrypt. "Consideration" can take a variety of forms, all of which are aimed at compensating the provider of the account number information. Forms of consideration include cash or other forms of payment for the list up front or after the sale, and payment of a percentage of each "sale" made using the account numbers, among others.

Payment Restrictions on Sales of Credit Repair Services

Credit repair services promise consumers with a bad credit history that they can remove negative information from, or otherwise improve, a consumer's credit history, credit record or credit rating, regardless of whether the information is accurate.

The TSR prohibits sellers and telemarketers from requesting or receiving payment for credit repair services before two events occur:

> One, the time frame during which the seller has promised services will be provided must have expired. Sellers can represent the time frame for the delivery of the services either orally or in writing, including in the contract for the services. If there's a discrepancy between the various representations by the credit repair seller, the longest time frame represented determines when payment may be requested or received.
>
> Two, the seller must provide the consumer with evidence that the improvement promised in the consumer's credit record has been achieved. The evidence must be a consumer report from a consumer reporting agency, issued more than six months after the results were achieved. Nothing in the TSR affects the requirement in the Fair Credit Reporting Act (FCRA) that a consumer report may be obtained only for a specific permissible purpose.

This prohibition is directed at the deceptive marketing and sale of bogus credit repair services; it is not directed at the non-deceptive telemarketing of secured credit cards or legitimate credit monitoring services. No one can permanently remove or “erase” negative entries on a consumer’s credit report if the information is accurate and current. Deceptive credit repair services may be able to cause negative credit information to disappear from a consumer’s credit report temporarily by flooding a credit bureau with letters disputing the accuracy of the negative entries. But once the credit bureau verifies with creditors that the negative items are accurate, they will reappear on a consumer’s credit report and stay there for up to seven years and, in the case of a bankruptcy, for 10 years. If an item is inaccurate, incomplete, or more than seven or 10 years old, consumers can remove or correct the information themselves at no charge if they follow the dispute procedures in the FCRA. Consumers do not need the services of a third party to correct an inaccurate or out-of-date credit report. No one can do anything to “repair” a bad credit report that is accurate and up to date.

Payment Restrictions on Sales of Recovery Services

So-called “recovery services” target consumers who have already been victimized by fraud. In these operations, a deceptive telemarketer calls a consumer who has lost money or failed to receive a promised prize in a previous scam. The recovery room telemarketer falsely promises to recover the lost money or the promised prize, in exchange for a fee paid in advance. But even after the fee is paid, the services promised are not provided. Typically, the consumer never hears from the telemarketer again.

The TSR prohibits any recovery service from asking for or accepting payment for any goods or services claiming to help a consumer recover funds paid in a previous transaction — or to recover anything of value promised to a consumer in a previous transaction — until seven business days after the funds or other items recovered are delivered to the consumer. It doesn’t matter whether the previous transaction was a telemarketing transaction or a transaction that took place in other media, like online.

The TSR’s restriction on when recovery rooms can ask for and accept payment does not apply to services provided by licensed attorneys.

This prohibition does not cover debt collection services. In fact, debt collection services are not covered by the TSR in general, because they are not “conducted to induce the purchase of goods or services” — a prerequisite for TSR coverage as dictated by the TSR’s definition of “telemarketing.” Debt collectors must comply with the FTC’s Fair Debt Collection Practices Act (FDCPA).

Payment Restrictions on Sales of Advance-Fee Loans

In advance-fee loan schemes, a telemarketer, in exchange for a fee paid in advance, promises to get a loan or a credit card for a consumer or represents a high likelihood of success in getting or arranging a loan or other extension of credit for a consumer, regardless of the consumer’s credit history or credit record. After the consumer pays the fee, he or she typically doesn’t receive the promised loan or other extension of credit. Advance-fee loans generally are marketed to consumers who have bad credit histories or difficulty getting credit for other reasons. The Rule prohibits sellers and telemarketers who guarantee or represent a high likelihood of success in obtaining or arranging a loan or other extension of credit from asking for or accepting payment until a consumer gets the extension of credit promised.

This prohibition on advance fees for loans or other extensions of credit applies only if sellers and telemarketers guarantee or represent a high likelihood of success in obtaining or arranging for a loan or other extension of credit. Legitimate creditors may offer various extensions of credit through telemarketing and may require an application fee or appraisal fee in advance. There must be no guarantee or representation of a high likelihood that the consumer will obtain the extension of credit. This prohibition in the TSR does not apply to firm, “pre-approved” offers of credit by creditors who properly use a “pre-screened” list in accordance with the FTC staff commentary on the FCRA.

Payment Restrictions on Sales of Debt Relief Services

A debt relief service is a program that claims directly, or implies, that it can renegotiate, settle, or in some way change the terms of a person's debt to an unsecured creditor or debt collector. That includes reducing the balance, interest rates or fees a person owes. These services include debt settlement, debt negotiation, and credit counseling.

The TSR prohibits sellers and telemarketers from requesting or receiving payment for providing debt relief services until three requirements are met:

> You must have renegotiated, settled, reduced or otherwise changed the terms of at least one of the customer's debts.
>
> Your customer must agree to the settlement agreement, debt management plan, or other result reached with the creditor due to your service. According to the TSR, the agreement from the creditor must be in writing, although your customer may agree to it orally. You can't take your fee in advance by getting your customer to agree to a blanket "pre-approval" of any settlement you might be able to negotiate in the future.
>
> Your customer must have made at least one payment to the creditor or debt collector as a result of the agreement you negotiated.

It's illegal to front-load your fees. If your customer has multiple debts enrolled in your program and you've settled one of them, you may collect a portion of your full fee — as long as you also have completed the three required steps in connection with that debt. The TSR gives you two options for calculating your fee if your customer has enrolled multiple debts:

> **Proportional fee.** According to the TSR, your fee must "bear the same proportional relationship to the total fee for renegotiating, settling, reducing, or altering the terms of the entire debt balance as the individual debt amount bears to the entire debt amount." The "individual debt amount" and the "entire debt amount" refer to what your customer owed at the time she enrolled the debt in the service. So if you settle a proportion of a customer's total debt enrolled with you, you may get that same proportion of your total fee.
>
> **Percentage of savings.** If you base your fee on a percentage of what your customer saved as a result of your service (often called a contingency fee), the percentage you charge must be the same for each of a customer's debts. Further, the amount saved must be based on the difference between the amount of debt enrolled in the program and the amount of money required to satisfy the debt.

Under the TSR, you may require your customers to set aside your fee and funds to pay debts in a dedicated account as long as:

> the account is held at an insured financial institution;
>
> the customer owns the funds (including any interest accrued), controls them, and can withdraw them at any time;
>
> you don't own or control the company administering the account or have any affiliation with it;
>
> you don't split fees with the company administering the account; and
>
> the customer can stop working with you at any time without penalty. If the customer decides to end the relationship with you, you must return the money in the account to the customer within seven business days (minus any fees you've earned from the account in compliance with the TSR).

The independent company that administers the account may charge the customer a reasonable fee, but it may not transfer any of the customer's funds to you — directly or indirectly — until you have renegotiated, settled, reduced, or otherwise changed the terms of at least one of your customer's debts and met all the related requirements in the TSR.

It's illegal to provide "substantial assistance" to another company if you know they're violating the TSR, or if you remain deliberately ignorant of their actions. To avoid liability for facilitating violations of the TSR, companies that administer dedicated accounts should review the policies, procedures and operations of the debt relief providers to ensure they're complying with the advance fee ban provision of the TSR, including the provision relating to dedicated accounts. As they continue to administer dedicated accounts, companies also should investigate consumer complaints and disputed payments.

Some companies administering dedicated accounts may not be subject to the FTC's jurisdiction, but laws enforced by other government agencies may apply to them.

Recordkeeping Requirements

The TSR requires most sellers and telemarketers to keep certain records that relate to their telemarketing activities. The Rule's recordkeeping requirements do not apply to sellers and telemarketers of nondurable office and cleaning supplies. The following records must be maintained for two years from the date that the record is produced:

- advertising and promotional materials
- information about prize recipients
- sales records
- employee records
- all verifiable authorizations or records of express informed consent or express agreement.

Advertising and Promotional Materials

Sellers and telemarketers must keep at least one specimen copy of all substantially different advertising, brochures, telemarketing scripts, and promotional materials. It's not necessary to keep copies of documents that are virtually identical except for immaterial variations or minor alterations. Obviously, if no scripts or advertising or promotional materials are used in connection with the telemarketing activity, no materials need to be retained.

Information about Prize Recipients

The TSR requires sellers and telemarketers to maintain the name and last known address of each prize recipient, as well as the prize awarded, for all prizes represented to be worth at least $25. The value of a prize is determined by what you directly state or imply to a consumer. If you represent to a consumer — directly or by implication — that a prize is worth $25 or more, you must keep records about the prize recipients, even if the actual value of the prize is less than $25. On the other hand, when there are no direct or implied representations about the value of a prize, you must keep records for prizes that cost you $25 or more to purchase.

Sales Records

The TSR requires sellers and telemarketers to maintain the following information about your sales:

- the name and last known address of each customer;
- the goods or services purchased;
- the date the goods or services were shipped or provided; and
- the amount the customer paid for the goods or services.

Only records relating to actual sales need to be maintained; you are not required to keep records of all customer contacts when customers do not make a purchase.

Consumer credit products: For offers of consumer credit products subject to the TILA and Regulation Z, compliance with the recordkeeping requirements under those regulations is sufficient for compliance with the TSR recordkeeping requirement.

Magazine sales: For the sale of magazines through a fulfillment house — where sellers and telemarketers do not know or have control over the dates of shipment — you may comply with the requirement to keep a record of the shipment date by keeping a record of the date the order was placed with the fulfillment house or the date that the service is to begin.

Employee Records

Sellers and telemarketers must keep employee records for all current and former employees directly involved in telephone sales. These records include the name (and any fictitious name used), the last known home address and telephone number, and the job title(s) of each employee. If fictitious names are used by employees, the TSR requires that each fictitious name be traceable to a specific employee. Businesses must maintain up-to-date information on current employees and last-known information on former employees. Sellers and telemarketers are not required to update information on former employees. In addition, records of individuals not directly involved in telephone sales do not have to be kept for purposes of the TSR. Nevertheless, information like this may be required under other state or federal laws.

Verifiable Authorizations or Records of Express Informed Consent or Express Agreement

When the method of payment is not a credit card (subject to the protections of TILA and Regulation Z), or a debit card (subject to the protections of the EFTA and Regulation E), sellers and telemarketers must obtain a consumer's express verifiable authorization before causing billing information to be submitted for payment. The TSR requires you to maintain a record of all verifiable authorizations that must be provided or received under the TSR. This requirement does not apply to conventional checks, written, signed, and mailed to you by the consumer, or to certain other methods, listed in the section on express verifiable authorization.

Sellers and telemarketers should retain records of the verifiable authorization for each transaction, in any form, manner, or format consistent with the methods of authorization permitted under the TSR. For example, if you obtain a written authorization from the consumer, a copy of it must be maintained; if authorization is by audio recording, a copy of the recording must be maintained. While the recording may be retained in any format, it must include all the information that must be disclosed to the consumer, as well as the consumer's oral authorization. If a consumer gives written confirmation, you must maintain all the information provided in the confirmation.

For records of express informed consent and express agreement (required by the unauthorized billing provision of the TSR [Section 310.4(a)(6)] and the National Do Not Call Registry provision [Section 310.4(b)(1)(iii)(B)(i)]), you must create and maintain records of consent and agreement for each required transaction, and keep them in much the same way you keep such records in the ordinary course of business.

Maintaining Records

The TSR is not intended to impose any new recordkeeping procedures on sellers and telemarketers. You may maintain the records in any manner, format or place that you keep such records in the ordinary course of business, including in electronic storage, on microfiche or on paper.

Who Must Keep Records?

Sellers and telemarketers do not have to keep duplicative records if they have a written agreement allocating responsibility for complying with the recordkeeping requirements. Without a written agreement between the parties, or if the written agreement is unclear as to who must maintain the required records, telemarketers must keep employee records, while sellers must keep the advertising and promotional materials, information on prize recipients, sales records, and verifiable authorizations. In the event of dissolution or termination of the business of a seller or telemarketer, the principal of the business must maintain all records of the business. In the event of a sale, assignment, or other change in ownership of the seller or telemarketer's business, the successor business must maintain the records.

Does the TSR require that other information be maintained concerning the verifiable authorizations? No, but it is sound policy for sellers and telemarketers who use the written confirmation method of authorization for non-debit and credit card payments to maintain records showing that the confirmation was sent to the customer before the customer's billing information was submitted for payment. In addition, you may want to keep records of any refunds you provide to consumers

who claim that the written confirmation was inaccurate. If law enforcement authorities get consumer complaints about unauthorized billing, they may ask the seller or telemarketer to produce the information to show that the TSR requirements were followed.

Who Can Enforce the TSR?

The FTC, the states, and private citizens may bring civil actions in federal district courts to enforce the TSR. State attorneys general or any other officer authorized by the state to bring actions on behalf of its residents may bring actions by the states. Private citizens may bring an action to enforce the TSR if they have suffered $50,000 or more in actual damages.

If state officials or private citizens bring a legal action under the TSR, they must provide written notice of their action to the FTC before filing a complaint, if feasible, or immediately upon filing the action. The notice must include a copy of the complaint and any other pleadings to be filed with the court. Private litigants and state officials should send such notices to:

Office of the Director
Attn: Do Not Call Program Manager
Bureau of Consumer Protection
Federal Trade Commission
Washington, D.C. 20580

State officials also may submit electronic notice, and copies of pleadings, through the Consumer Sentinel website.

Penalties for Violating the Rule

Anyone who violates the TSR is subject to civil penalties of up to $43,792 for each violation. In addition, violators may be subject to nationwide injunctions that prohibit certain conduct, and may be required to pay redress to injured consumers.

The FTC has information available about the following topics at business.ftc.gov.

FTC's Franchise Rule

FTC's 900-Number Rule

FTC's Cooling Off Rule

FTC's Mail or Telephone Order Merchandise Rule

FTC's Negative Option Rule

Continuity Plans

Fair Credit Reporting Act

FTC's Fair Debt Collection Practices Act

The Truth in Lending Act

The FCC has information about the TCPA.

Federal Communications Commission
Consumer & Governmental Affairs Bureau
Complaints & Inquiries Division
445 12th Street, S.W.
Washington, D.C. 20554
email:fccinfo@fcc.gov
fcc.gov

fcc.gov/cgb/complaints.html
1-888-CALL-FCC (1-888-225-5322) voice
1-888-TELL-FCC (1-888-835-5322) TTY

[Note: Edited August 30 2021, to reflect increase in telemarketer fees for the Do Not Call Registry.]

[Note: Edited January, 2021, to reflect Inflation-Adjusted Civil Penalty Maximums.]

[Note: Edited January 30, 2020, to track the language of the Rule and to add examples to the section *Assisting and Facilitating Sellers or Telemarketers Who Violate the TSR is Prohibited* .]

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Introduction

The Federal Trade Commission (FTC) amended the Telemarketing Sales Rule (TSR) in 2003, 2008, 2010 and 2015. Like the original TSR issued in 1995, the amended Rule gives effect to the Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFPA). This legislation gives the FTC and state attorneys general law enforcement tools to combat telemarketing fraud, gives consumers added privacy protections and defenses against unscrupulous telemarketers, and helps consumers tell the difference between fraudulent and legitimate telemarketing. This guide describes the types of organizations and activities that are subject to the TSR and explains how to comply.

Certain key provisions:

- require disclosures of specific information
- prohibit misrepresentations
- limit when telemarketers may call consumers
- require transmission of Caller ID information
- prohibit abandoned outbound calls, subject to a safe harbor
- prohibit unauthorized billing
- apply to all upsells, even in unsolicited calls from a consumer
- set payment restrictions for the sale of certain goods and services
- require that specific business records be kept for two years

In addition:

- in August 2008, the Commission adopted additional amendments to the TSR that directly address the use of prerecorded messages in telemarketing calls.
- in August 2010, the Commission further amended the TSR to address deceptive and abusive practices associated with debt relief services.
- in December 2015, the Commission further amended the TSR to prohibit the use of remotely created payment orders and checks, cash-to-cash money transfers, and cash reload mechanisms in both outbound and inbound telemarketing. The amendments also expanded the TSR's prohibition of recovery services to apply to losses in any prior transaction, not just prior telemarketing transactions, and clarified a number of Do Not Call and other TSR provisions.

All of these amendments are explained in this guide.

If your telemarketing campaigns involve any calls across state lines — whether you make outbound calls or receive calls in response to advertising — you may be subject to the TSR's provisions.

The Federal Communications Commission (FCC) enforces the Telephone Consumer Protection Act (TCPA), which also regulates telemarketing. For more information about the TCPA, contact the FCC at fcc.gov. Many states also have laws regulating telemarketing. For information about a particular state's laws, contact the state attorney general's office or another state consumer protection agency.

Who Must Comply with the TSR?

The TSR regulates "telemarketing" — defined in the Rule as "a plan, program, or campaign . . . to induce the purchase of goods or services or a charitable contribution" involving more than one interstate telephone call. (The FCC regulates both

intrastate and interstate calling.) With some important exceptions, any businesses or individuals that take part in “telemarketing” must comply with the TSR. This is true whether, as “*telemarketers*,” they initiate or receive phone calls to or from consumers, or as “*sellers*,” they provide, offer to provide, or arrange to provide goods or services to consumers in exchange for payment. It makes no difference whether a company makes or receives calls using low-tech equipment or the newest technology. Similarly, it makes no difference whether the calls are made from outside the United States; so long as they are made to consumers in the United States. Those making the calls, unless otherwise exempt, must comply with the TSR’s provisions. If the calls are made to induce the purchase of goods, services, or a charitable contribution, the company is engaging in “telemarketing.”

Certain sections of the TSR apply to individuals or companies *other* than “sellers” or “telemarketers” if these individuals or companies provide substantial assistance or support to sellers or telemarketers. The Rule also applies to individuals or companies that help telemarketers gain unauthorized access to the credit card system by using another merchant’s account to charge consumers, a practice known as credit card laundering.

Charities and For-Profit Telemarketers Calling on Their Behalf

Although tax exempt non-profit charities that conduct their own telemarketing are not covered by the TSR, the USA PATRIOT Act, passed in 2001, brought charitable solicitations by for-profit telemarketers within the scope of the TSR. As a result, most of the TSR’s provisions now are applicable to “telefunders” — telemarketers who solicit charitable contributions on behalf of non-profit charities.

Telefunders must:

- make certain prompt disclosures in every outbound call.
- get express verifiable authorization if accepting payment by methods other than credit or debit card.
- maintain records for 24 months.
- comply with the entity-specific Do Not Call requirements, but are exempt from the National Do Not Call Registry provision.
- include a prompt keypress or voice-activated opt-out mechanism in any prerecorded message call on behalf of a non-profit organization to a member of, or previous donor to, the non-profit.

Telefunders may not:

- make a false or misleading statement to induce a charitable contribution.
- make any of several specific prohibited misrepresentations.
- engage in credit card laundering.
- place “cold” calls that deliver prerecorded messages.
- engage in acts defined as abusive under the TSR, such as calling before 8 a.m. or after 9 p.m., disclosing or receiving consumers’ unencrypted account information, and denying or interfering with a consumer’s right to be placed on a Do Not Call list.

Exemptions from the TSR

Some Types of Businesses and Individuals

Some types of businesses, individuals, and activities are outside the FTC's jurisdiction, and not covered by the TSR. Certain calls or callers also are completely or partially exempt from the Rule's provisions. The following sections explain the coverage of the Rule and the exemptions.

The FCC's jurisdiction extends to some entities and activities that are not subject to regulation by the FTC. For more information about the FCC's rules, visit fcc.gov.

Some types of businesses are not covered by the TSR even though they conduct telemarketing campaigns that may involve some interstate telephone calls to sell goods or services. These three types of entities are not subject to the FTC's jurisdiction, and are not covered by the TSR:

- banks, federal credit unions, and federal savings and loans.
- common carriers — such as long-distance telephone companies and airlines — when they are engaging in common carrier activity.
- non-profit organizations — those entities that are not organized to carry on business for their own, or their members', profit.

Nevertheless, any individual or company that contracts with one of these three types of entities to provide telemarketing services must comply with the TSR.

Examples:

- A non-bank company that contracts with a bank to provide telemarketing services on the bank's behalf is covered.
- A non-airline company that contracts with an airline to provide telemarketing services on behalf of the airline is covered.
- A company that is acting for profit is covered by the TSR if it solicits charitable contributions on behalf of a non-profit organization.

Sellers of Certain Investments

Under the Telemarketing Act, a number of entities and individuals associated with them that sell investments and are subject to the jurisdiction of the Securities and Exchange Commission or the Commodity Futures Trading Commission are not covered by the TSR — even if they engage in a plan, program, or campaign to sell through interstate telephone calls. However, these entities and individuals **are** covered by the FCC's telemarketing rules.

These entities are: brokers, dealers, transfer agents, municipal securities dealers, municipal securities brokers, government securities brokers, and government securities dealers (as those terms are defined in Section 202(a)(11) of the Investment Advisers Act of 1940); and futures commission merchants, including brokers, commodity trading advisers, commodity pool operators, leverage transaction merchants, floor brokers, or floor traders (as those terms are defined in Section 6(1) of the Commodity Exchange Act).

The Business of Insurance

The McCarran-Ferguson Act provides that the FTC Act, and by extension, the TSR, are applicable to the business of insurance to the extent that such business is not regulated by state law. Whether the McCarran-Ferguson exemption removes insurance-related telemarketing from coverage of the TSR depends on the extent to which state law regulates insurance telemarketing. If state law regulates the telemarketing at issue and enforcement of the TSR would conflict with and effectively

supersede those statelaws, then the TSR would not apply. Unlike the jurisdictional exemptions for banks and non-profit organizations, which do not extend to third-party telemarketers making calls on their behalf, in the case of the telemarketing of insurance products and services, the TSR does not necessarily apply simply because the campaign is conducted by a third-party telemarketer.

Some Types of Calls

Some types of calls also are not covered by the Rule, regardless of whether the entity making or receiving the call is covered. These include:

- unsolicited calls from consumers.
- calls placed by consumers in response to a catalog.
- business-to-business calls unless they involve retail sales of nondurable office or cleaning supplies, or solicit sales or charitable contributions from employees.
- calls made in response to general media advertising (with some important exceptions).
- calls made in response to direct mail advertising (with some important exceptions).

Exemptions Explained

Unsolicited Calls from Consumers

Any call from a consumer that is not placed in response to a solicitation by the seller, charitable organization, or telemarketer is exempt from coverage. Because the consumer initiates the call without any inducement from the seller or telemarketer, the call is not considered part of a telemarketing plan, program, or campaign conducted to sell goods or services or to induce a charitable contribution. Some examples include calls to:

- make hotel, airline, car rental, or similar reservations.
- contact a department store or charity without prompting from an advertisement or solicitation.

Calls are not considered "unsolicited" when placed by consumers in response to a prerecorded call. If a seller or telemarketer "upsells" a consumer during an unsolicited call initiated by the consumer, the upsell is covered by the TSR.

Calls Made in Response to a Catalog

Generally, the TSR does not apply to calls placed by consumers in response to a mailed catalog if the catalog:

- 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;
- has been issued at least once a year; and
- the catalog seller doesn't solicit consumers by phone, but only receives calls initiated by consumers in response to the catalog, and during the calls, only accepts orders without additional solicitation. The catalog seller may give the consumer information about — or attempt to sell the consumer — other items in the same catalog that prompted the consumer's call or in a similar catalog.

If a telemarketer offers goods or services that are not in the catalog that prompted the consumer's call — or in a substantially similar catalog — the sales transaction is covered by the TSR. Regardless of the TSR's application to a particular sale, catalog merchandise sales also are covered by the FTC's Mail or Telephone Order Merchandise Rule (16 C.F.R. Part 435).

Business-to-Business Solicitation Calls, Unless They Involve the Sale of Nondurable Office or Cleaning Supplies, or Solicit Sales or Charitable Contributions from Employees

Most phone calls between a telemarketer and a business are exempt from the TSR. However, business-to-business calls to induce the retail sale of nondurable office or cleaning supplies are not exempt and must comply with the TSR. Examples of nondurable office or cleaning supplies include paper, pencils, solvents, copying machine toner, and ink — in short, anything that, when used, is depleted, and must be replaced. Goods like software, copiers, computers, mops, and buckets are considered durable because they can be used again.

Although sellers and telemarketers involved in telemarketing sales to businesses of nondurable office or cleaning supplies must comply with the TSR's requirements and prohibitions, the TSR specifically exempts them from the recordkeeping requirements and from the National Do Not Call Registry provisions. These sellers and telemarketers do not have to create or keep any particular records, or purge numbers on the National Do Not Call Registry from their call lists to comply with the TSR.

In addition, telemarketing calls that solicit consumers at their work — that is, calls to business lines that solicit individual employees to buy products or services for their own use or make personal charitable contributions — also are not business-to-business solicitations and are not exempt from the TSR.

Calls Made in Response to General Media Advertising

The TSR generally does not apply to calls consumers make in response to general media advertising, such as TV commercials; infomercials; home shopping programs; radio ads; print ads in magazines, newspapers, the Yellow Pages, or online directories; and banner ads and other forms of mass media advertising and solicitation. Telemarketers receiving these kinds of inbound calls from consumers nevertheless have to comply with **three important requirements:**

First, the prohibitions on certain payment methods, namely the use of remotely created payment orders and remotely created checks, cash-to-cash money transfers, and cash reload mechanisms, apply to inbound calls in response to general media advertising. If a seller or telemarketer uses remotely created payment orders or checks, or accepts cash-to-cash money transfers or cash reload mechanisms, it will violate the TSR.

> **Remotely created payment orders and checks** are electronic checks that merchants can create after obtaining a consumer's bank account number. These are different from paper checks that consumers write and sign.
>
> **Cash-to-cash money transfers** are made electronically from one person to another in a different location by money transfer providers like MoneyGram and Western Union.
>
> **A cash reload mechanism** is an authorization code PIN number or other security measure that allows consumers to convert cash into an electronic form.

Sellers and telemarketers that comply with these prohibitions in inbound telemarketing remain exempt from the TSR requirements if they otherwise qualify for the general media exemption. Therefore, they are covered by the TSR only if they violate the prohibition.

Second, if a seller or telemarketer "upsells" a consumer during a call initiated by the consumer, the upsell is covered by the TSR.

Third, the TSR **does** cover calls from consumers in response to general media advertisements relating to:

> franchises not covered by the FTC's Franchise Rule,
>
> business opportunities not covered by the FTC's Business Opportunity Rule,
>
> credit card loss protection,

- credit repair,
- recovery services,
- advance-fee loans,
- investment opportunities, or
- debt relief services

An investment opportunity is anything that is offered, offered for sale, sold, or traded based on representations about past, present, or future income, profit, or appreciation. Examples of investment opportunities include art, rare coins, oil and gas leases, precious or strategic metals, gemstones, or FCC license or spectrum lottery schemes. In addition, business ventures that are not covered by the FTC's Franchise Rule are investment opportunities.

Calls Made in Response to Direct Mail Advertising

Direct mail advertising includes, but is not limited to, postcards, flyers, door hangers, brochures, "certificates," letters, email, faxes, or similar methods of delivery sent to an identified person or family urging them to call a specified phone number about an offer of some sort. For purposes of the TSR, "direct mail" is not limited to messages sent by conventional mail delivery or private couriers. The exemption for calls responding to direct mail advertising is available both to telemarketers soliciting sales of goods or services and to telefunders soliciting charitable contributions.

Sales solicitations: Generally, consumer calls in response to a direct mail solicitation that clearly, conspicuously, and truthfully makes the disclosures required by the TSR are exempt from the TSR. These disclosures are:

- cost and quantity;
- material restrictions;
- limitations or conditions;
- any "no-refund" policy; and
- if the offer includes a prize promotion, credit card loss protection, or a negative option feature, the information about any of those elements of the offer required by the TSR.

If you are a seller or telemarketer who uses direct mail, you may use this exemption only if your direct mail solicitation messages make the disclosures required by Section 310.3(a)(1) of the TSR clearly, conspicuously, and truthfully.

Charitable solicitations: Consumer calls in response to direct mail messages that solicit charitable contributions are exempt, provided they contain no material misrepresentation about:

- the nature, purpose, or mission of the entity on whose behalf the contribution is requested;
- the tax deductibility of any contribution;
- the purpose for which the contribution will be used;
- the percentage or amount of the contribution that will go to a charitable organization or program;
- any material aspect of a prize promotion; or
- a charitable organization or telemarketer's affiliations, endorsements, or sponsorships.

There is no exemption for calls responding to any direct mail advertising that relates to credit card loss protection, credit repair, recovery services, advance-fee loans, investment opportunities, prize promotions, debt relief services, franchises not covered by the FTC's Franchise Rule, or business opportunities not covered by the FTC's Business Opportunity Rule. This is regardless of whether the advertisement makes the disclosures required by the TSR and contains no misrepresentations.

In addition, as with the general media exemption, it is a violation of the TSR for a seller or telemarketer engaged in direct mail solicitation to accept remotely created payment orders or checks, cash-to-cash money transfers, or cash reload mechanisms.

However, sellers and telemarketers that comply with these prohibitions in inbound telemarketing remain exempt from the TSR's requirements. Therefore, they are covered by the TSR only if they violate the prohibition.

Lastly, **"upselling" is not exempt.** Upselling occurs when a seller or telemarketer tries to sell additional goods or services during a single phone call, after an initial transaction. Any instances of upselling following an exempt transaction are covered by the TSR.

Even if the initial transaction is exempt because it's an unsolicited call from a consumer, a response to a general media advertisement or certain direct mail solicitations, or an outbound non-sales call (say, a customer service call), any upsell following the initial transaction is subject to all relevant provisions of the TSR.

Examples:

A consumer calls a department store to ask about the price of a microwave oven. Because the call is not the result of a solicitation by the seller, the initial inquiry is exempt from the Rule. If the seller tries to upsell a refrigerator during the same call, the upsell transaction is subject to the TSR.

A consumer calls in response to an infomercial advertising a home gym product for sale. If the home gym product is the only item offered during the call, the call is exempt. But if the telemarketer offers a free-trial offer to a cookbook series after the sales pitch for the home gym, the cookbook offer constitutes a separate transaction and is an upsell covered by the TSR. If both the home gym product and the cookbook series are prominently featured in the general media advertisement, transactions involving either or both products fall within the general media exemption. But if the cookbook is visible on the set of the infomercial, mentioned only in passing, or mentioned as an afterthought, pitching the cookbook during the a consumer's call about the home gym product is considered an upsell and is not exempt from the TSR.

Partial Exemptions

Some calls are exempt from most provisions of the TSR, but not all. These include:

- calls relating to the sale of 900-Number pay-per-call services.
- calls relating to the sale of franchises and business opportunities.
- calls that are part of a transaction that involves a face-to-face sales presentation.

Calls Relating to the Sale of 900-Number Services

The sale of 900-Number pay-per-call services, which is subject to the FTC's 900-Number Rule, is exempt from most provisions of the TSR. Still, to comply with the TSR, sellers of pay-per-call services must not:

- call any number on the National Do Not Call Registry or on that seller's Do Not Call list.
- deny or interfere with a person's right to be placed on any Do Not Call Registry.
- call outside permissible calling hours.
- place robocalls to consumers who have not agreed to accept them.
- abandon calls.
- fail to transmit Caller ID information.
- threaten or intimidate a consumer or use obscene language.

cause any telephone to ring or engage a person in conversation with the intent to annoy, abuse, or harass the person called.

Partial coverage under the TSR does not affect the obligation of sellers and providers of 900-Number Services to comply with the 900-Number Rule (16 C.F. R. Part 308).

Calls Relating to the Sale of Franchises and Business Opportunities

Calls relating to the sale of franchises that are covered by the FTC's Franchise Rule (16 C.F.R. Part 436) and business opportunities subject to the Business Opportunities Rule (16 C.F.R. Part 437) are exempt from most provisions of the TSR but not all. Sellers and telemarketers selling franchises subject to the Franchise Rule or business opportunities subject to the Business Opportunities Rule must not:

call numbers that are on the National Do Not Call Registry or on that seller's Do Not Call list.

deny or interfere with a person's right to be placed on any Do Not Call Registry.

call outside permissible calling hours.

place robocalls to consumers who have not agreed to accept them.

abandon calls.

fail to transmit Caller ID information.

threaten or intimidate a consumer or use obscene language.

cause any telephone to ring or engage a person in conversation with the intent to annoy, abuse, or harass the person called.

Partial coverage under the TSR does not affect the obligation of franchisors to comply with the Franchise Rule or the Business Opportunity Rule.

Calls that are Part of a Transaction Involving a Face-to-Face Sales Presentation

The TSR generally does not cover telephone transactions where the sale of goods or services or a charitable contribution is not completed until after a face-to-face presentation by the seller or charitable organization, and the consumer is not required to pay or authorize payment until then. This exemption is for transactions that begin with a face-to-face sales presentation and are completed in a phone call, as well as those that begin with a phone call and are completed in a face-to-face sales presentation.

The key to the face-to-face exemption is the direct, substantive and personal contact between the consumer and seller. The goal of the TSR is to protect consumers against deceptive or abusive practices that can arise when a consumer has no direct contact with an invisible and anonymous seller other than the telephone sales call. A face-to-face meeting provides the consumer with more information about — and direct contact with — the seller, and helps limit potential problems the TSR is designed to remedy.

Nevertheless, even in transactions where there is a face-to-face meeting, telemarketers must not:

call numbers on the National Do Not Call Registry or on that seller's Do Not Call list.

deny or interfere with a person's right to be placed on any Do Not Call Registry.

call outside permissible calling hours.

place robocalls to consumers who have not agreed to accept them.

abandon calls.

fail to transmit Caller ID information.

threaten or intimidate a consumer or use obscene language.

cause any telephone to ring or engage a person in conversation with the intent to annoy, abuse, or harass the person called.

If the transaction is completed in a face-to-face meeting at the consumer's home or away from the seller's place of business, the seller must comply with the FTC's Cooling Off Rule (16 C.F.R. Part 429).

Requirements for Sellers and Telemarketers

Sellers and Telemarketers Must Disclose Material Information

The TSR requires sellers and telemarketers, whether making outbound calls to consumers or receiving inbound calls from consumers, to provide certain material information before the consumer pays for the goods or services that are the subject of the sales offer. **Material** information is information that would likely affect a person's choice of goods or services or the person's decision to make a charitable contribution. More simply, it is information a consumer needs to make an informed decision about whether to buy goods or services or make a donation. Sellers and telemarketers may provide the material information either orally or in writing. Failure to provide any of the required information truthfully and in a **"clear and conspicuous"** manner, before the consumer pays for the goods or services offered, is a deceptive telemarketing act or practice that violates the TSR and subjects a seller or telemarketer to a civil penalty of $43,792 for each violation.

Clear and Conspicuous: Clear and conspicuous means that information is presented in a way that is difficult to miss and that ordinary consumers will easily notice and understand, so that required disclosures are communicated as effectively as the sales message.

When **written,** clear and conspicuous information must be printed in the same language(s) as the sales offer(s) in a type size that a consumer can readily see and understand; that has the same emphasis and degree of contrast with the background as the sales offer; and that is not buried on the back or bottom, or in unrelated information that an ordinary consumer wouldn't think important enough to read. When a seller or telemarketer makes required disclosures in a written document that is sent to a consumer and follows up with an outbound sales call to the consumer, the disclosures are considered clear and conspicuous only if they are sent close enough in time to the call so that the consumer associates the call with the written disclosures.

When disclosures are **oral**, clear and conspicuous means at an understandable speed and pace, and in the same language(s)and in the same tone and volume as the sales offer(s) so that ordinary consumers can easily hear and understand it. When making outbound calls, a telemarketer must promptly disclose certain types of information to consumers orally in the sales presentation. For purposes of the TSR, **"promptly"** means before any sales pitch is given and before any charitable solicitation is made. Required information about a prize promotion must be given before or when the prize offered is described.

Before a Consumer Consents to Pay: Sellers and telemarketers must give a consumer the information required by Section 310.3(a)(1) of the TSR before:

Getting a consumer's consent to buy — or persuading a consumer to send full or partial payment by check.

Asking for any credit card, bank account or other payment information.

Requesting, arranging for, or asking a consumer to request or arrange for a courier to pick up payment for the goods or services offered. Couriers include Federal Express, DHL, UPS, agents of the seller or telemarketer, or any other person who will go to a consumer's home or other location to pick up payment for the goods or services being offered.

When sellers and telemarketers have pre-acquired account information, they must provide the required disclosures before the customer provides express informed consent. Pre-acquired account information is any information that enables you to cause

a charge against a consumer's account without obtaining the account number directly from the consumer during the transaction for which the consumer will be charged.

What Information Must Sellers and Telemarketers Provide to Consumers?

When sellers and telemarketers offer to sell goods or services, they must provide the consumer with material information about the offered goods or services necessary to avoid misleading consumers. The term **material** means likely to affect someone's choice of goods or services or decision to make a charitable contribution, or someone's conduct with regard to a purchase or donation.

The TSR specifies seven broad categories of material information that sellers and telemarketers must give consumers:

1. Cost and Quantity

The TSR requires sellers and telemarketers to disclose the total cost to buy, receive, or use the offered goods or services. While disclosing the total number of installment payments and the amount of each payment satisfies this requirement, the number and amount of such payments must correlate to the billing schedule that will be implemented. For example, the TSR's requirements would not be met if you were to state the product's cost per week if the consumer has to pay installments on a monthly or quarterly basis. The TSR also requires you to tell a consumer the total quantity of goods the consumer must pay for and receive. You must provide both these items of material information to the consumer before the consumer pays for the goods or services that are the subject of the sales offer. You may provide this material information orally or in writing, as long as the information is clear and conspicuous.

Sometimes, the total cost and quantity are not fixed when the initial transaction takes place, but, instead, are determined over time. For example, in a **negative option plan**, like those offered by some book clubs, the consumer may agree to buy a certain number of items over a specified time period. The consumer gets periodic announcements of the selections; each announcement describes the selection, which will be sent automatically and billed to the consumer unless the consumer tells the company not to send it. Similarly, a **continuity plan** is a type of negative option plan that offers subscriptions to collections of goods. During the course of the plan, the consumer can choose to purchase some or all the items offered in the collection. Consumers who agree to buy an introductory selection also agree to receive additional selections on a regular schedule until they cancel their subscription to the plan.

Both negative option and continuity plans are structured to give consumers the opportunity to buy a series of products over time. The cost of the plan as a whole is determined by the number and type of items the consumer decides to accept in the series, and at the time of the initial sales offer, neither the seller nor the consumer necessarily knows how much product the consumer will purchase, or the total cost of the products.

To comply with the TSR, a seller or telemarketer offering a negative option or a continuity plan must disclose the total costs and quantity of goods or services that are part of the initial offer; the total quantity of additional goods or services that a consumer must purchase over the duration of the plan; and the cost, or range of costs, to purchase each additional good or service separately. You may provide this material information orally or in writing, as long as the information is clear and conspicuous. In addition, some negative option plans are subject to the FTC's Negative Option Rule (16 C.F.R. Part 426).

Cost and Quantity Disclosure in the Marketing of Credit Products: If sellers and telemarketers are offering credit products subject to the Truth in Lending Act (TILA) or Regulation Z, compliance with the credit disclosure requirements and the timing of the disclosures mandated by TILA or Regulation Z constitute compliance with the total cost and quantity disclosure requirements of the TSR with respect to the credit instrument. Nevertheless, the **cost and quantity** of any goods or services purchased with that credit also must be disclosed.

2. Material Restrictions, Limitations, or Conditions

The TSR requires sellers and telemarketers to disclose all material restrictions, limitations, or conditions to purchase, receive, or use goods or services that they are offering to the consumer. Material information is information that a consumer needs to make an informed purchasing decision. A material restriction, limitation, or condition is one that, if known to the consumer, would likely affect the decision to purchase the goods or services offered; to purchase them at the offered price; to purchase them from that particular seller; or to make a charitable contribution. Examples of material information that must be disclosed include:

- in the case of an offer of a credit card, a requirement that a consumer make a deposit in order to receive and use the card (that is, that the credit card is a secured card).
- in the case of a vacation certificate, a restriction, limitation, or condition that prevents a purchaser from using the certificate during the summer; or that requires a purchaser to make reservations a year in advance to travel using the certificate; or that requires the consumer to incur expenses beyond the price of the certificate to redeem the certificate for a vacation.
- the underlying illegality of goods or services, such as the illegality of foreign lottery chances.

Sellers and telemarketers may disclose orally or in writing information about material restrictions, limitations, or conditions to purchase, receive, or use the goods or services being offered, as long as the information is clear and conspicuous and disclosed before the consumer pays.

3. No-Refund Policy

If there's a policy of honoring requests for refunds, cancellations of sales or orders, exchanges, or re-purchases, sellers and telemarketers must disclose information about the policy only if they make a statement about the policy during the sales presentation. If the sales presentation includes a statement about such a policy, it also must include a clear and conspicuous disclosure of all terms and conditions of the policy that are likely to affect a consumer's decision on whether to buy the goods or services offered.

If the seller's policy is that "all sales are final" — that is, no refunds, cancellations of sales or orders, or exchanges or re-purchases are allowed — the TSR requires you to let consumers know before they pay for the goods or services being offered. You may give this information to consumers orally or in writing, as long as the information is clear and conspicuous.

4. Prize Promotions

A *prize promotion* includes any sweepstakes or other game of chance, and any representation that someone has won, has been selected to receive, or may be eligible to receive a prize or purported prize. A *prize* is anything offered and given to a consumer by chance.

For the element of chance to be present, all that is necessary under the TSR is that if the consumer is guaranteed to receive an item, at the time of the offer the telemarketer does not identify the specific item that the person will receive. For example, say you send a solicitation promising recipients that they will receive one of four or five listed items but you do not tell recipients which of the listed items they will receive. In that case, any item the consumer receives is a prize, and the solicitation is a prize promotion.

A seller or telemarketer that offers a prize promotion must provide consumers with several items of information before the consumer pays for any goods or services being offered. This information may be given to consumers orally or in writing, as long as the information is clear and conspicuous. You must tell consumers:

- the odds of winning the prize(s). If the odds can't be calculated in advance because they depend on the number of people who enter the promotion, for example, you must tell that to consumers, along with any other factors used to calculate the odds.
- that they can participate in the prize promotion or win a prize without buying anything or making any payment, and that any purchase or payment will not increase the chances of winning. When offering a prize promotion in outbound calls,

you must disclose this information orally and promptly. A legitimate prize promotion does not require any purchase or payment of money for a consumer to participate or win. If a purchase or payment of money is required for eligibility for a prize, it is not a prize promotion; it is a lottery, which is generally unlawful under federal and state lottery laws.

how they can enter the prize promotion without paying any money or purchasing any goods or services. This disclosure must include instructions on how to enter, or an address or local or toll-free telephone number where consumers can get the no-purchase/no-payment entry information.

any material costs or conditions to receive or redeem any prize. For example, if one of the offered prizes is a "vacation," but the recipient must pay for her own accommodations, that's a cost or condition that is likely to affect the consumer's response to the offer and therefore, must be disclosed.

5. Credit Card Loss Protection

A seller or telemarketer offering a credit card loss protection plan — one that claims to protect, insure, or otherwise limit a consumer's liability in the event of unauthorized use of a customer's credit card — must disclose the limits on a cardholder's liability under federal law for unauthorized use of a credit card (15 U.S.C. § 1643). Since the law limits cardholder liability for unauthorized use — for example, when a credit card is lost or stolen — to no more than $50, disclosure of this information to consumers will help ensure that they have the material information necessary to decide whether the protection plan offered is worth the cost.

6. Negative Option Features

The term "negative option feature" is used in the TSR. This occurs when the seller interprets the consumer's silence, or failure to take an affirmative action to reject goods or services or cancel an agreement, as acceptance of the offer. One type of negative option offer is a "free-to-pay conversion" offer (also known as a "free-trial offer"), where customers receive a product or service for free for an initial period and then have to pay for it if they don't take some affirmative action to cancel before the end of the period. Other types of negative option features include continuity plans and other arrangements where consumers automatically receive and incur charges for shipments in an ongoing series unless they take affirmative action to stop the shipment.

Under the TSR, any seller or telemarketer whose offer of a product or service involves a negative option feature must truthfully, clearly, and conspicuously disclose three pieces of information:

1. the fact that the customer's account will be charged unless he or she takes an affirmative action — such as canceling — to avoid the charge.

2. the date(s) on which the charge(s) will be submitted for payment.

3. the specific steps the customer must take to avoid the charges.

While the best practice is to provide an actual date on which payment will be submitted, it is acceptable to give an approximate date if you don't — or can't — know the actual date, provided the approximate date gives the consumer reasonable notice of when to expect the debit or charge. As for disclosing how the consumer can avoid charges, it is not sufficient under the TSR to say that a consumer would have to call a toll-free number to cancel without giving the number.

7. Debt Relief Services

The TSR defines a "debt relief service" as a program that claims directly, or implies, that it can renegotiate, settle, or in some way change the terms of a person's debt to an unsecured creditor or debt collector. That includes reducing the balance, interest rates or fees a person owes.

Under the TSR, any seller or telemarketer of a debt relief service must truthfully, clearly, and conspicuously disclose five pieces of information:

how much the service costs as well as any material restrictions, limitations or conditions on the debt relief service. If the sales presentation includes a statement about the refund policy, you must also include a clear and conspicuous disclosure of all terms and conditions of the policy;

how long it will take the consumer to achieve the represented results based on a good faith estimate;

how much money a customer must save before you'll make a settlement offer to creditors;

the possible consequences if the customer fails to make timely payments to creditors; and

the customer's rights regarding dedicated accounts if you ask or require your customers to set aside funds in a dedicated account.

Prompt Oral Disclosures in Outbound Sales Calls and Upselling Transactions

An **outbound call** is a call initiated by a telemarketer to a consumer. The TSR requires that a telemarketer making an outbound sales call **promptly** disclose, before any sales pitch is given, the following four items of information truthfully, clearly, and conspicuously:

1. **The identity of the seller.** The seller is the entity that provides goods or services to the consumer in exchange for payment. The identity of the telemarketer, or person making the call, need not be disclosed if it is different from the identity of the seller. If the seller commonly uses a fictitious name that is registered with appropriate state authorities, it is fine to use that name instead of the seller's legal name.
2. **That the purpose of the call is to sell goods or services.** The TSR requires that the purpose of the call be disclosed truthfully and promptly to consumers. How you describe or explain the purpose of the call is up to you, as long as your description is not likely to mislead consumers. For example, it would be untruthful to state that a call is a "courtesy call" if it's a sales call.
3. **The nature of the goods or services being offered.** This is a brief description of items you are offering for sale.
4. **In the case of a prize promotion, that no purchase or payment is necessary to participate or win, and that a purchase or payment does not increase the chances of winning.** If the consumer asks, you must disclose — without delay — instructions on how to enter the prize promotion without paying any money or purchasing any goods or services.

These same disclosures must be made in an **upselling** transaction if any of the information in these disclosures is different from the initial disclosures (if the initial transaction was an outbound call subject to the TSR) or if no disclosures were required in the initial transaction, like a non-sales customer service call. For example, in an **external upsell,** where the second transaction in a single telephone call involves a second seller, you must tell the consumer the identity of the second seller — the one on whose behalf the upsell offer is being made. On the other hand, in an **internal upsell,** where additional goods or services are offered by the same seller as the initial transaction, no new disclosure of the seller's identity is necessary because the information is the same as that provided in the initial transaction.

Prompt Oral Disclosures in Outbound Calls to Solicit Charitable Contributions

Telefunders must make two clear and conspicuous oral disclosures promptly before any charitable solicitation is made:

1. **The identity of the charitable organization on whose behalf the solicitation is being made.** The charitable organization is the entity on whose behalf a charitable contribution is sought. The identity of the telemarketer, or person making the call, need not be disclosed. If the charitable organization commonly uses a fictitious name that is registered with appropriate state authorities, that name may be disclosed instead of the charitable organization's legal name.

2. **That the purpose of the call is to solicit a charitable contribution.** The TSR requires that the purpose of the call be disclosed promptly to consumers. How the purpose of the call is described or explained is up to you, as long as your description or explanation is not likely to mislead consumers.

How does a for-profit company that telemarkets for a non-profit organization make the required oral disclosures? When a for-profit company makes interstate calls to solicit charitable contributions for a non-profit organization, the for-profit telemarketer must make the required prompt disclosures for charitable solicitation calls. The company must identify the entity on behalf of which the charitable solicitation is made, and state that the purpose of the call is to solicit a charitable contribution. However, if a for-profit company solicits charitable contributions on behalf of a charity and offers goods or services that are of more than nominal value — a book, magazine subscription, or perhaps a membership — to induce donations, the required oral disclosures for both sales **and** charitable contributions must be made. “Nominal” means a value less than the amount of any contribution being solicited. In a situation where the goods or services offered are of nominal value, stating the name of the non-profit organization on whose behalf the call is being made is sufficient.

Examples:

“I am calling on behalf of [name of non-profit organization] to offer you a subscription to the organization’s newsletter, which [description of newsletter], and to ask for a donation to help support the work of [name of non-profit organization].”

“I am calling for [name of non-profit organization] to seek your support. For a donation of $25 or more, [name of non-profit organization] will extend to you a one-year membership, which entitles you to [description of the membership]. Your donation will help us to continue the [non-profit organization’s] important work . . .”

Multiple Purpose Calls. Some calls have more than one purpose. They may involve the sale of goods or services and another objective, like conducting a prize promotion or determining customer satisfaction. They may involve a charitable solicitation combined with a prize promotion. In any multiple purpose call where the seller or telemarketer is planning to sell goods or services in at least some of the calls, the four sales disclosures above must be made promptly — that is, during the first part of the call before the non-sales portion of the call. Similarly, in any multiple purpose call where the telemarketer is planning to solicit charitable contributions in at least some of the calls, the two charitable solicitation disclosures must be made promptly — that is, during the first part of the call, before the noncharitable solicitation part of the call.

Example:

A seller calls a consumer to determine whether he or she is satisfied with a previous purchase and then plans to move into a sales presentation if the consumer is satisfied. Since the seller plans to make a sales presentation in at least some of the calls (the seller plans to end the call if the consumer is not satisfied), the four sales disclosures above must be made promptly during the initial portion of the call and before inquiring about customer satisfaction.

However, a seller may make calls to welcome new customers and ask whether they are satisfied with goods or services they recently purchased. If the seller doesn’t plan to sell anything to these customers during any of these calls, the four oral sales disclosures are not required. That’s the case even if customers ask about the sellers’ other goods or services, and the seller responds by describing the goods or services. Because the seller has no plans to sell goods or services during these calls, the disclosures are not required.

Misrepresentations are Prohibited

The TSR prohibits sellers and telemarketers from making false or misleading statements to induce anyone to pay for goods or services or make a charitable contribution. For example:

- you cannot falsely claim that you need a consumer's bank account number or credit card number only for identification purposes, when, in fact, you will use the number as payment for the goods or services offered.
- a seller of precious metals cannot induce anyone to invest by falsely claiming that the seller offers the metals at or near wholesale price.
- it would be illegal under the TSR to solicit a charitable contribution by claiming that 100 percent of the funds collected would benefit the stated charity, when only 30 percent of the money goes to the charity.

In addition, the TSR prohibits sellers and telemarketers from misrepresenting specific categories of information about a telemarketing transaction that are likely to affect a consumer's decision to purchase the goods or services offered. The TSR also prohibits both express and implied misrepresentations. Sellers and telemarketers cannot circumvent the TSR by creating a false impression in a consumer's mind through the artful use of half-truths or misleading or incomplete information.

In sales transactions, the TSR prohibits misrepresentations about the following:

1. Cost and Quantity

The TSR prohibits sellers and telemarketers from misrepresenting the total costs to purchase, receive, or use the goods or services offered, or the quantity of goods or services offered at the stated price. For example, you may not tell consumers that they may purchase a magazine subscription for three years at $1.50 a month, when that rate is an introductory rate that will expire after the first year.

2. Material Restrictions, Limitations, or Conditions

The TSR prohibits sellers and telemarketers from misrepresenting any material restriction, limitation, or condition to purchase, receive, or use goods or services offered to the consumer. For example, you may not falsely claim that a hotel certificate may be used any time at any major hotel chain in the country, when it can be used only at certain times or at a limited number of hotels.

3. Performance, Efficacy, or Central Characteristics

The TSR prohibits sellers and telemarketers from misrepresenting any material aspect of the performance, efficacy, nature, or central characteristics of the goods or services offered to the consumer. For example, it's a violation of the TSR to falsely claim that:

- a water processor offered for sale can eliminate all known contaminants from tap water.
- a service offered by the seller can improve a person's credit rating.
- a machine will operate properly without maintenance.
- precious metals outperform other types of investments.
- a seller can recover money lost by the consumer in a previous transaction.
- a purchaser of a business venture can earn "more money in a week than you now earn in a year" or achieve specific levels of income.

4. Refund, Repurchase, or Cancellation Policies

The TSR prohibits sellers and telemarketers from misrepresenting any material aspect — one that likely would have an effect on the consumer's purchasing decision — of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies. For example, the TSR prohibits you from claiming that "our policy is to make our customers happy — if at any time

you're not absolutely delighted, just send the merchandise back," if there are time limits, "restocking" charges, or other important restrictions on the return of the goods. It also prohibits sellers and telemarketers from claiming that tickets may be cancelled any time up to the date of an event when such cancellation requests would not be honored.

5. Material Aspects of Prize Promotions

The TSR prohibits sellers and telemarketers from misrepresenting any material aspect of a prize promotion: you may not lie about any aspect of a prize promotion that is likely to affect a consumer's decision to buy any goods or services offered in conjunction with a prize promotion, to buy them at the offered price, or to buy them from you. For example, you may not misrepresent:

> the odds of being able to receive a prize (for example, falsely saying that everyone who enters is guaranteed to win a prize, or falsely claiming that a particular person is "the top winner in the entire state").
>
> the nature or value of a prize (for example, falsely claiming a prize is an "expensive genuine diamond tennis bracelet," when the prize has only nominal value or doesn't contain any diamonds).
>
> that a purchase or payment is required to win a prize or participate in a prize promotion (for example, falsely claiming that a consumer must buy magazine subscriptions to enter a prize promotion).

6. Material Aspects of Investment Opportunities

The TSR prohibits sellers and telemarketers from misrepresenting any material aspect of an investment opportunity. You may not make any false or misleading statements about an investment opportunity that are likely to affect a prospective purchaser's decision to invest. You may not misrepresent any information needed to make an informed investment decision. Examples of material aspects of an investment opportunity include: the risk involved in the investment, the liquidity of the investment, or the earnings potential or profitability of the investment. Depending on the nature of the investment opportunity, other material aspects may include markup over acquisition costs; past performance, marketability, or value of an investment; or fees charged in credit-financed purchases of precious metals.

7. Affiliations, Endorsements, or Sponsorships

The TSR prohibits sellers and telemarketers from misrepresenting affiliations with — or endorsements or sponsorships by — any person, organization, or government entity. For example, you cannot falsely claim that you're a member of the Better Business Bureau or the local chamber of commerce, or that you're affiliated with the local police or some national charity. Neither can you create the impression in a consumer's mind that the postal permit number displayed on a mail solicitation is a sign that the U.S. Postal Service has approved a promotion. In addition, sellers and telemarketers cannot falsely claim or create the impression in a consumer's mind that they are related to or affiliated with a company with which the consumer usually does business.

8. Credit Card Loss Protection

The TSR prohibits sellers and telemarketers from misrepresenting that any customer needs offered goods or services to receive protection against unauthorized charges that he or she already has under federal law (15 U.S.C. § 1643). For example, you cannot falsely claim that a consumer who doesn't buy the credit card loss protection you're offering might be liable for thousands of dollars in unauthorized charges should a credit card be stolen. In fact, the law caps a customer's liability for unauthorized charges on her credit card at $50.

9. Negative Option Features

The TSR prohibits sellers and telemarketers from misrepresenting any material aspect of a negative option feature of an offer, including: the fact that the consumer's account will be charged unless the consumer takes an affirmative action to avoid the charges, the dates the charges will be submitted for payment, and the specific steps the customer must take to avoid the charges. For example, the TSR prohibits you from representing that to avoid being charged, the consumer need only call a toll-free number to cancel if, in fact, the number is never answered. In this case, you would be misrepresenting the specific steps the customer must take to avoid the charge, because the steps described wouldn't achieve that purpose.

10. Debt Relief Services

The TSR prohibits sellers and telemarketers from misrepresenting any material aspect of a debt relief service, either explicitly or by implication, including: the amount of money or the percentage of the debt someone may save by using your service; the amount of time necessary to get the results you represent; the amount of money or the percentage of each outstanding debt the customer must accumulate before you'll begin your attempts to negotiate, settle or modify the terms with creditors; the amount of money or the percentage of each outstanding debt the customer must accumulate before you'll make a bona fide offer to negotiate, settle or modify the terms with creditors; the effect of your service on the customer's creditworthiness; the effect of your service on the collection efforts of any creditors or debt collectors; the percentage or number of customers who have gotten the results you represent; and whether your business is a bona fide nonprofit entity.

In charitable solicitation calls, the TSR prohibits misrepresentations about:

1. The Nature, Purpose, or Mission of the Entity on Whose Behalf the Solicitation is Made

The TSR prohibits telefunders from misrepresenting the nature, purpose, or mission of any entity on whose behalf a charitable contribution is being solicited. It would violate the TSR for a telefunder to claim, expressly or by implication, that a charitable contribution is being requested on behalf of a charity that seeks to protect endangered species if the purpose of the charity is to support a local petting zoo of barnyard animals. And a telefunder may not represent that a charitable organization engages in cancer research if the organization simply educates the public about cancer through its fundraising calls.

2. Tax Deductibility

Whether a contribution is tax deductible — or an organization is tax exempt — may be an important consideration when potential donors are deciding whether or how much to contribute. The TSR therefore prohibits telefunders from misrepresenting, expressly or by implication, that any charitable contribution is partly or fully tax deductible, or falsely implying that an organization on whose behalf a contribution is solicited is "tax exempt."

3. Purpose of a Contribution

The TSR prohibits telefunders from misrepresenting how the requested contribution will be used. This includes not only how a donation will be spent, but also the locality where the direct effect of the donation will be felt. The purpose for which a contribution is sought usually is important to a donor, and any misrepresentations about that would be likely to mislead a consumer. It would violate the TSR for you to state or imply that a donation will benefit sick children in the local area if the money collected is not spent to benefit sick children or is not spent to benefit sick kids in the donor's local area. You also cannot claim that a donation will be used to pay for bullet-proof vests for local law enforcement officers if the money goes to some other purpose. The charitable purpose described to potential donors may not be peripheral or incidental to the primary purpose for which the donation will be used.

4. Percentage or Amount of Contribution that Goes to the Charitable Organization or Program

The TSR prohibits telefunders from misrepresenting the percentage or amount of the contribution that goes to a charitable organization or program. This prohibition covers statements made in response to the questions of potential donors, as well as unprompted standalone statements. Even though the TSR does not require you to affirmatively disclose the percentage or amount of the contribution that goes to a charitable organization or program, if a potential donor raises the question, you must answer truthfully and must not misrepresent this information in any way.

5. Material Aspects of Prize Promotions

The TSR prohibits telefunders from misrepresenting any material aspects of a prize promotion in conjunction with a charitable solicitation. You may not make a false statement about any aspect of a prize promotion that could affect a donor's decision to make a charitable contribution in conjunction with the prize promotion.

6. Affiliations, Endorsements, or Sponsorship

The TSR prohibits telefunders from misrepresenting their own or a charitable organization's affiliation with, or endorsement or sponsorship by, any person, organizations, or government entity. For example, you cannot falsely claim that the organization on whose behalf you are calling is affiliated with, sponsored by, endorsed by, or otherwise approved by any other entity or organization. Nor could you falsely claim to be endorsed or "approved by" the local police. In addition, you cannot falsely claim — or create the impression — that you are related to or affiliated with a charity that the donor has heard of or contributed to in the past.

Payment Methods Other than Debit and Credit Cards

The TSR requires "express verifiable authorization" when the payment is made by a method other than a credit card (subject to the Truth in Lending Act and Regulation Z), or a debit card (subject to the Electronic Fund Transfer Act (EFTA) and Regulation E). Because many novel payment methods lack protection against unauthorized charges and dispute resolution rights should the customer be unhappy with the goods or services, the TSR requires that when customers in telemarketing transactions pay by such methods, sellers and telemarketers must meet a higher standard for proving authorization. This provision, the prohibition on sharing unencrypted account numbers, and the requirement that a consumer's express informed consent be obtained in every telemarketing transaction, are in place to protect consumers from unauthorized charges.

What about remotely created payment orders, remotely created checks, cash-to-cash money transfers, and cash reload mechanisms? The use of these four payment methods in both inbound and outbound telemarketing is prohibited by the TSR. Remotely created payment orders and checks create an unreasonable risk of consumer loss by allowing fraudulent merchants to create unsigned checks that debit a consumer's bank account without authorization. Cash-to-cash money transfers and cash reload mechanisms likewise allow anonymous fraudsters to disappear with money paid by consumers for undelivered goods and services.

What about cash, checks, and money orders? The "express verifiable authorization" requirement does not apply to conventional checks that the consumer writes, signs, and mails, or to payments by postal money order, cash, gift certificates, or direct billing (where the customer or donor receives a written bill or statement before having to pay). These payment methods have been used for years, and consumers are familiar with the advantages and relative risks of each. But there are payment methods that consumers may be unfamiliar with and that lack fundamental protections. In the latter instance, the TSR requires more proof of authorization to protect consumers from unauthorized charges: If payment is made by mortgage or utility billing (where goods or services other than the mortgage or utility payment is billed on these accounts), or a similar unconventional method, a telemarketer must obtain the customer or donor's "express verifiable authorization."

Who is responsible for obtaining verifiable authorization? Under the TSR, sellers and telemarketers that receive payment by methods other than credit or debit cards are responsible for obtaining verifiable authorization in those transactions. Even if you use the services of a third party to process or submit billing information other than credit or debit card information, you are responsible for ensuring that the disclosure requirements of the TSR for verifying authorization are met. Under the TSR, a third party also can be held liable for violating the TSR if the third party substantially assists a seller or telemarketer and knows — or consciously avoids knowing — that the seller or telemarketer is violating the TSR by failing to obtain verifiable authorization.

Processing and submitting account information constitutes substantial assistance to a seller or telemarketer. Therefore, if a third party is processing account information for a seller or telemarketer, the third party should ensure that whoever is obtaining consumers' account information obtains verifiable authorization in accordance with the TSR's requirements. A third party who processes and submits bank account information cannot avoid liability by not asking questions about whether authorization procedures comply with the TSR. Indeed, a third party can be held liable under the TSR if it knows that the authorization procedures do not comply with the TSR and it processes or submits account information for payment anyway.

Does the TSR apply if I only supply the software to process or submit bank account information for payment? Maybe. Providing the means to submit a consumer's account information for payment constitutes substantial assistance to a seller or telemarketer. If the seller or telemarketer who is using the software is violating the TSR, a law enforcement agency may ask

about the extent to which the software provider ensured that authorization procedures were in place to comply with the TSR. A software provider cannot sell its product with its "eyes closed" to the business practices used by the software purchaser, consciously avoiding any knowledge of the wrongdoing. Deceptive telemarketers favor novel payment methods, like remotely created payment orders or checks. Therefore, third parties should know who they're doing business with — and whether the people they do business with are complying with the TSR.

Under the TSR, authorization is considered verifiable if it is obtained in one of three ways:

- advance written authorization from the consumer;
- an audio recording of the consumer giving express oral authorization; or
- written confirmation of the transaction sent to the consumer before you submit the charge for payment.

Here are the requirements for each type of authorization.

Written Authorization

Any form of written authorization from a consumer is acceptable, as long as it has the consumer's signature. For example, a consumer may transmit written authorization to the seller or telemarketer by facsimile or may send a "voided" signed check as written authorization. An electronic signature also is valid, provided it would be recognized as a valid signature under applicable federal or state contract law.

Oral Authorization

Any audio recording of an oral authorization payment must clearly demonstrate that the consumer has received each of eight specific pieces of information about the transaction and that the consumer has authorized that funds be taken from (or charged to) his or her account based on the required disclosures by the seller or telemarketer. A general question like, "Do you understand all the terms of the sale?" followed by a consumer's "uh-huh" or "yeah" is not enough to demonstrate authorization. The tape recording must show that the consumer received each piece of information below and that, based on this information, the consumer understood and acknowledged each term of the transaction and authorized the transaction.

State laws vary on permitting the recording of telephone conversations and the requirements to obtain consent of the recorded party. Consult an attorney for guidance on these issues.

The seller or telemarketer must clearly and conspicuously state, and the consumer must acknowledge:

- the goods and services being purchased, or the charitable contribution for which payment authorization is sought.
- the number of debits, charges, or payments (if more than one).
- the date the debits, charges, or payments will be submitted for payment.
- the amount of the debits, charges, or payments.
- the customer or donor's name.
- the customer or donor's billing information, identified in specific enough terms that the consumer understands which account will be used to collect payment for the transaction.
- a telephone number that is answered during normal business hours by someone who can answer the consumer's questions.
- the date of the consumer's oral authorization.

The TSR also requires that the audio recording of the oral authorization must be made available upon request to the customer or donor, as well as to the customer or donor's bank or other billing entity.

The Electronic Fund Transfer Act (EFTA)

Other laws, such as the EFTA (15 U.S.C. § 1693 *et seq.*), may impose different obligations about obtaining a consumer's authorization of a charge. It is the responsibility of each seller and telemarketer to determine how to comply with all applicable laws and rules. Compliance with the TSR requirements for obtaining authorization does not eliminate the obligation to comply with EFTA and other applicable laws.

Authorization by Written Confirmation

If sellers and telemarketers choose verifiable authorization through written confirmation, they must send the confirmation to the consumer via first class mail — and identify it clearly and conspicuously as confirmation of payment — **before** submitting the consumer's billing information for payment. That does not mean that you must wait to submit this information until a consumer **receives** the confirmation: The TSR requires only that you **send** it before you submit the billing information for payment.

The written confirmation must contain all the information required in an audio recording of an oral authorization. In addition, if you choose to use the written confirmation method of authorization, you must have a refund policy in place and must disclose in the written confirmation how to obtain a refund if the consumer disputes the written confirmation. The TSR's prohibition on misrepresenting a refund policy applies in the context of obtaining verifiable authorization by means of written confirmation.

The TSR leaves it to sellers and telemarketers to determine what procedures are necessary to ensure that confirmations are sent prior to submission, to put these procedures in place, and to ensure that records are generated and maintained to document that confirmations are sent at the appropriate time and required refunds are provided.

Note: In transactions involving pre-acquired account information combined with a free-to-pay conversion, sellers and telemarketers may not use the written confirmation method of obtaining authorization. In these transactions, written confirmation does not constitute "express verifiable authorization."

Date the debit, charge, or payment will be submitted for payment

This disclosure ensures that consumers know when to expect the charge or debit. To comply with this requirement, it makes good sense to provide an actual date on which payment will be submitted: "This debit from your checking account will occur on April 14, 2016." However, it is acceptable for you to disclose an approximate date if you don't — or can't — know the actual date, provided the approximate date gives the consumer reasonable notice of when to expect the debit or charge. For example, you could tell a consumer, "The charge will appear on your next mortgage statement," or "Your account will be charged within two weeks from today."

Similarly, in a transaction involving a continuity plan, it would be sufficient for you to note when any initial charge will be submitted for payment, and then at what intervals each successive payment would be submitted, should the customer opt not to decline to purchase additional goods or services. For example, in a book club plan, you could tell a customer that the initial $4.95 charge would be debited from his or her bank account on May 15, and that each month after that, his or her account will be billed one week from the date of each successive shipment.

Billing information in specific enough terms that the consumer understands what account will be used to collect payment for the transaction

To identify the account with sufficient specificity for the customer or donor to understand what account will be charged, you must state the name of the account and enough other distinguishing information about the account to ensure that the customer understands which account will be charged.

For example, telling the consumer that the charge will be placed on his mortgage account is not specific enough information. It would be necessary to identify the account further, perhaps by the name of the lender and the property address, or a reference to some portion of the account number or expiration date. It is your obligation to ensure that the consumer knows specifically what account will be charged for the goods or services.

Assisting and Facilitating Sellers or Telemarketers Who Violate the TSR is Prohibited

It is a violation of the TSR to substantially assist a seller or telemarketer while knowing — or consciously avoiding knowing — that the seller or telemarketer is violating Sections 310.3(a), (c), or (d), or 310.4 of the TSR by engaging in deceptive or abusive telemarketing practices (including creditcard laundering). Therefore, taking deliberate steps to ensure one's own ignorance of a seller or telemarketer's TSR violations is an ineffective strategy to avoid liability. To violate the TSR, the assistance that a third-party provides must be more than just a casual or incidental dealing with a seller or telemarketer that is unrelated to a violation of the TSR. For example, cleaning a telemarketer's office, delivering lunches to the telemarketer's premises, or engaging in some other activity with little or no relation to the conduct that violates the TSR would not be enough to support liability as an assistor or facilitator.

Third parties who do business with sellers and telemarketers should be aware that their dealings may provide a factual basis to support an inference that they know — or deliberately remain ignorant of — the TSR violations of these sellers and telemarketers. For example, a third party who, directly or indirectly, (1) provides sellers or telemarketers with mailing lists, automated dialing software, or telephony services, (2) helps in creating sales scripts or direct mail pieces, or (3) furnishes any other substantial assistance while knowing or consciously avoiding knowing that the seller or telemarketer is engaged in a TSR violation may be violating the TSR.

Credit Card Laundering is Prohibited

Credit card laundering is the misuse of a "merchant account" with a financial institution. A merchant account is a kind of bank account: it is what a seller or telemarketer needs to gain access to a credit card collection and payment system and to get cash for goods and services sold. Obtaining access to the credit card system through another's merchant account without the authorization of the financial institution is credit card laundering. This practice violates the TSR, and is a criminal offense under federal law and the laws of some states.

Here's how the system works for companies that make legitimate use of the credit card system: To be able to accept payment from a consumer who wants to charge the price of goods or services to a credit card, a seller or telemarketer must have a "merchant account" with a financial institution that is a member of a credit card system (for example, Visa or MasterCard) that issued the consumer's credit card. When the consumer pays by credit card, the merchant generates a credit card sales draft. The seller then deposits the draft into the seller's merchant account, and obtains the cash amount of the deposited draft. The financial institution sends the credit card sales draft through the particular credit card system, which posts a corresponding charge to the consumer's credit card account.

In credit card laundering, sellers and telemarketers who are unable to establish a merchant account with a financial institution sometimes use the unlawful services of a launderer. A launderer opens a "back door" into the credit card system by providing access to a merchant account — and the whole credit card collection and payment system — without the authorization of the financial institution or the credit card system. Except as expressly permitted by a credit card system, it is a TSR violation for anyone:

> with a merchant account to deposit into the credit card system any credit card sales draft generated by a telemarketing transaction that is not the result of a sale to the buyer by the person who has the merchant account.
>
> to use or solicit someone who has a merchant account (or an employee, representative, or agent of someone who has a merchant account) to deposit into the credit card system any credit card sales draft generated by a telemarketing transaction that is not the result of a sale to the buyer by the person who has the merchant account.
>
> to obtain access to the credit card system through a business relationship or an affiliation with a merchant, when the access is not authorized under the terms of the merchant account or by the applicable credit card system.

Unauthorized Billing

It is a violation of the TSR to cause billing information to be submitted for payment — directly or indirectly — without the express **informed consent** of the customer or donor. The TSR requires that in any telemarketing transaction, sellers and telemarketers obtain the express informed consent of the customer or donor to be charged a specific amount on a particular identified account to pay for the goods or services offered, or to make a charitable contribution.

Express Informed Consent Is Required in Every Telemarketing Transaction

The TSR contains no specific requirements for how sellers and telemarketers must obtain express informed consent in transactions where they do not use **pre-acquired account information.** As a practical matter, however, in these transactions it would be necessary for you to get the account number to be charged from the consumer, because the information isn't available any other way. In obtaining this information from the consumer, you must get her express agreement to be charged for the goods or services being offered and to be charged using the account number she provides. Any false or misleading statement to induce someone to divulge her account information to pay for goods or services or to make a charitable contribution is an additional TSR violation.

What is express informed consent? Under the TSR, consent is **express** if it is affirmatively and unambiguously articulated by the consumer. Silence is not express consent, nor is an ambivalent response like, "Well, maybe . . .," "Gee, I don't know about that . . .," or a non-commital "uh-huh." For consent to be **informed,** a consumer, prior to giving consent, must receive all the disclosures required by the TSR.

For example, consent would not meet the requirement that it be "informed" if the consumer does not receive all the TSR's required material disclosures — both the prompt oral disclosures for outbound calls and the disclosures of all material information required in all telemarketing transactions. **Consent** is an affirmative statement that the consumer agrees to purchase the goods or services (or to make the charitable contribution) and is aware that the charges will be billed to a particular account.

Obtaining Express Informed Consent in Telemarketing Transactions Involving Pre-acquired Account Information

Pre-acquired account information is any information that enables sellers and telemarketers to place a charge against a consumer's account without getting the account information directly from the consumer during the transaction for which the account will be charged. The use of pre-acquired account information radically changes the usual dynamic in sales transactions, which requires that a telemarketer obtain the customer's acceptance of the offer, as well as the customer's account number to be charged. Telemarketers using pre-acquired account information are able to cause a charge to a consumer's account without getting the account number from the consumer during the transaction. The TSR establishes safeguards to protect consumers in all telemarketing transactions in which sellers and telemarketers have pre-acquired account information.

The TSR establishes separate requirements for pre-acquired account information transactions involving **"free-to-pay conversion"** offers. That's because when used together with free-to-pay conversion offers, pre-acquired account information has resulted in significant numbers of unauthorized charges to consumers who think they can't be charged at the end of a free trial because they haven't provided their account information. The TSR specifies what sellers and telemarketers must do to prevent this from occurring and to get a consumer's express informed consent.

Free-to-pay conversion offers, sometimes known as "free-trial offers," are offers or agreements where customers receive a product or service for free for an initial period and then incur an obligation to pay unless they take affirmative action to cancel before the end of the period.

When pre-acquired account information is used and the offer includes a free-to-pay conversion feature, telemarketers must:

obtain from the customer at least the last four digits of the account number to be charged.

obtain the customer's express agreement to be charged for the goods or services and to be charged using the account number for which the customer has provided at least the last four digits.

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

Obtaining the last four digits from the customer: To meet the requirement that sellers and telemarketers "obtain from the customer" at least the last four digits of the account number to be charged, you must ask the customer to provide this information, and the customer must provide it to demonstrate an understanding that by doing so, she is agreeing to make a purchase. You must inform the customer that you have the customer's account number or the ability to charge the account without getting the full account number from the consumer. Reading the information to the customer and asking for confirmation of the digits is not complying with the TSR. Neither is it sufficient to read the digits to the customer, and then ask the customer to recite them back. In addition, it is not adequate to reuse digits that a customer may have provided for identification purposes during another portion of the call — such as in an inbound call where you ask the customer to provide his or her account number by pressing digits on the telephone keypad.

Express Agreement to be Charged: To meet the requirement that telemarketers get a customer's express agreement to be charged for the goods and services — and to be charged using the account number for which she has provided at least four digits — you must ensure that the consumer expressly and unambiguously agrees both to the purchase and the means of payment. The four digits the customer provides must actually be the last four digits of the account to be charged. If the four digits the customer provides aren't the last four digits of the account, the customer hasn't expressly agreed to be charged, and the transaction is void for lack of express verifiable authorization.

This is **not** to be interpreted as mandating that a seller or telemarketer have the unencrypted last four digits of a customer's account number to compare the digits the customer provides to the actual account number. **Rather, the agencies that issued rules under the Gramm-Leach-Bliley Act caution financial institutions against sharing the unencrypted last four digits of a customer's account with a telemarketer, even to ensure that the customer has provided these digits accurately in giving express informed consent.** The meaning here is simply that a charge cannot be processed unless the four digits provided by the customer are in fact the last four digits of the account to be charged. One way to ensure that the four digits match is to perform a real-time inquiry to verify that the leading digits of the pre-acquired account number plus the four provided by the customer are a valid account. There are other ways to do this; the TSR does not require any particular method.

Audio Recording of the Transaction: In a transaction where sellers and telemarketers have pre-acquired account information and are offering goods or services on a free-to-pay conversion basis, the entire telemarketing transaction must be recorded on audio. The audio recording must capture the material terms provided to the consumer, as well as the context and manner in which the offer is presented, because this can be critical to demonstrate that a consumer's consent is both express and informed. In a single-transaction call, this means taping the entire call; in a multi-purpose call it means recording the entirety of each transaction using pre-acquired account information coupled with a free-to-pay conversion offer.

In a situation where telemarketers are bound by state law to obtain consent to record the transaction, they may ask permission to tape before beginning to record; this is the only portion of the call that may be conducted without recording. If it is necessary to explain the purpose of the call or to identify the seller to obtain the customer's permission to record, telemarketers must reiterate this information once the recording begins to demonstrate that the required prompt disclosures were made in the outbound call.

When pre-acquired account information is used but the offer does not include a free-to-pay conversion feature, telemarketers must:

at a minimum, identify the account to be charged with enough specificity for the customer or donor to understand.

obtain the customer or donor's express agreement to be charged for the goods or services and to be charged using the account number the seller or telemarketer has identified.

The TSR's requirements for obtaining express informed consent in these transactions are less strict than when a free-to-pay conversion feature is involved. That's because while pre-acquired account information itself can lead to unauthorized billing, the record shows this is less likely when there's no free-to-pay conversion offer.

Identifying the Account with Sufficient Specificity: A telemarketer must state the name of the account and enough other distinguishing information about the account to ensure that the customer understands which account will be charged. For example, it is not good enough to tell the consumer only that a charge will be placed on his Visa credit card. You must identify the card more precisely, either by stating the name of the issuing bank, or some portion of the account number. As the telemarketer, you are obligated to ensure that the consumer knows exactly which account will be charged for the goods or services. The underlying intention of the TSR is that the telemarketer expressly inform the customer that the seller or telemarketer already has the number of the customer's specifically identified account or has the ability to charge that account without getting the account number from the consumer.

Express Agreement to be Charged: The TSR does not specify a particular procedure for sellers and telemarketers to follow when using pre-acquired account information without a free-to-pay conversion so you can demonstrate that the customer has expressly agreed to be charged. To comply with this requirement, you must elicit an affirmative and unambiguous statement from the consumer that demonstrates his intention to agree to be charged, and to be charged on a specific account. Silence is not a substitute for such a statement, nor are ambivalent or non-commital responses like, "Well, maybe . . ." or "uh-huh."

Protecting Consumers' Privacy

The TSR prohibits sellers and telemarketers from engaging in certain abusive practices that infringe on a consumer's right to be let alone. The TSR's privacy protections include prohibitions on:

- calling a person whose number is on the National Do Not Call Registry or a person who has asked not to get telemarketing calls from a particular company or charity.
- misusing a Do Not Call list.
- denying or interfering with a person's Do Not Call rights.
- calling outside the permissible hours.
- abandoning an outbound telephone call.
- placing an outbound telephone call delivering a prerecorded message to a person without that person's express written agreement to receive such calls, and without providing an automated interactive opt-out mechanism.
- failing to transmit Caller ID information.
- using threats, intimidation, or profane or obscene language.
- causing any telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass.

The Do Not Call Provisions

The original TSR contained a provision prohibiting calls to any consumer who previously asked not to get calls from or on behalf of a particular seller. Amendments to the TSR retain that provision, and also prohibit calls to any numbers consumers have placed on the National Do Not Call Registry maintained by the FTC.

The Entity-Specific Do Not Call Provision

It is a TSR violation to call any consumer who has asked not to be called again (the “entity-specific Do Not Call” provision). A telemarketer may not call a consumer who previously has asked not to receive any more calls from or on behalf of a particular seller or charitable organization. It also is a TSR violation for a seller that has been asked by a consumer not to call again to cause a telemarketer to call that consumer. Sellers and telemarketers are responsible for maintaining their individual Do Not Call lists of consumers who have asked not to receive calls placed by, or on behalf of, a particular seller. Calling a consumer who has asked not to be called potentially exposes a seller and telemarketer to a civil penalty of $43,792 for each violation.

What if a consumer asks a specific division of a corporation not to call? Does a call from a different division violate the TSR? Distinct corporate divisions generally are considered separate sellers under the TSR. Factors relevant to determining whether distinct divisions of a single corporation are treated as separate sellers include whether there is substantial diversity between the operational structure of the divisions and whether the goods or services sold by the divisions are substantially different from each other. If a consumer tells one division of a company not to call again, a distinct corporate division of the same company may make another telemarketing call to that consumer. Nevertheless, a single seller without distinct corporate divisions may not call a consumer who asks not to be called again, even if the seller is offering a different good or service for sale.

On the question of charitable solicitations, telefunders must maintain individual Do Not Call lists for charities on whose behalf they make telemarketing calls. Calling someone who has asked not to be called on behalf of a charitable organization potentially exposes the telefunder that places the call to a civil penalty of $43,792 for each violation.

Example:

Charity A is a non-profit charitable organization not covered by the TSR. Charity A engages Telefunder 1, a for-profit service bureau subject to the TSR, to conduct fundraising telephone campaigns on its behalf. Charity A uses Telefunder 1 to conduct a fundraising campaign for six months, then uses Telefunder 2, another for-profit service bureau, for the next six months. It will violate the TSR for Telefunder 2 to initiate an outbound telephone call on behalf of Charity A to a person who has already asked not to be called on behalf of Charity A. It is the responsibility of Telefunder 2 to get the Do Not Call list relating to Charity A compiled and maintained by Telefunder 1, and to keep from placing calls to anyone on that list when calling on behalf of Charity A.

If Telefunder 2 also conducts a fundraising campaign for Charity B, Telefunder 2 may call potential donors on behalf of Charity B even if they’re on Charity A’s Do Not Call list. But when calling on behalf of Charity B, Telefunder 2 may not call potential donors on Charity B’s Do Not Call list.

The National Do Not Call Registry Requirements

The FTC’s National Do Not Call Registry has been accepting registrations from consumers who choose not to receiving telemarketing sales calls since June 27, 2003. Consumers can place their telephone numbers on the National Registry online or by calling a toll-free number. Only phone numbers are included in the National Registry. This means that all household members who share a number will stop receiving most telemarketing calls after the number is registered. Consumers may register both their residential “land line” telephone numbers and their wireless phone numbers.

Sellers, telemarketers, and their service providers have been able to access the Registry through a dedicated website since September 2003. It is a TSR violation to make any covered calls without having accessed the Registry. Sellers and telemarketers must update their call lists — that is, delete all numbers in the National Do Not Call Registry from their lists — at least every 31 days.

Sellers and telemarketers are prohibited from calling any consumer whose number is in the database. Violators will be subject to civil penalties of up to $41,484 for each violation, as well as injunctive remedies.

What types of calls are not covered by the National Do Not Call Registry? The Do Not Call provisions do not cover calls from political organizations, charities, telephone surveyors, or companies with which a consumer has an existing business

relationship. Some sellers are exempt from the FTC's Rules but are required to access the National Registry under the FCC's Rules. Other sellers (charities and political organizations) are exempt from accessing the National Registry under both agencies' rules. These exempt sellers still may access the National Registry voluntarily and do not have to pay a fee for that access. They must, however, submit appropriate certification information to gain access to the National Registry. See fcc.gov.

The prohibition on calls to numbers on the Registry does not apply to business-to-business calls or calls to consumers from or on behalf of charities. Still, telefunders calling to solicit charitable contributions must honor a donor's request not to be called on behalf of a particular charitable organization.

If a call includes a telephone survey and a sales pitch, is it covered? Yes. Callers purporting to take a survey, but also offering to sell goods or services, must comply with the Do Not Call provisions. But if the call is for the sole purpose of conducting a survey, it is exempt. However, sellers and telemarketers should also be aware that the FCC regulates telemarketing calls. See fcc.gov.

How the National Do Not Call Registry Works

Accessing the Registry

Who can access the National Registry? Access to the National Registry is limited to sellers, telemarketers, and other service providers. Sellers are companies that provide, offer to provide, or arrange for others to provide goods or services to a customer in return for some type of payment as part of a telemarketing transaction. Telemarketers are companies that make telephone calls to consumers on behalf of sellers. Service providers are companies that offer services to sellers engaged in telemarketing transactions, such as providing lists of telephone numbers to call, or removing telephone numbers from the sellers' lists.

Can I use numbers on the National Registry for any purpose other than preventing telemarketing calls? No. The National Registry may not be used for any purpose other than preventing telemarketing calls to the telephone numbers on the Registry. Any entity that accesses the National Registry will be required to certify, under penalty of law, that it is accessing the Registry solely to comply with the TSR or to prevent calls to numbers on the Registry.

How can I access the National Registry? The FTC has a fully automated and secure website — telemarketing.donotcall.gov — to provide members of the telemarketing industry with access to the National Registry's database of telephone numbers, sorted by area code. The first time you access the National Registry, you must provide identifying information about yourself and your company. If you are a telemarketer or service provider accessing the National Registry on behalf of your seller-clients, you will be required to identify your seller-clients and provide their unique account numbers. The only consumer information available from the National Registry is telephone numbers. After you (or the company telemarketing on your behalf) have accessed the National Registry the first time, you'll have the option of downloading only changes in the data that have occurred since the last time you accessed the Registry.

What information must I provide to access the National Registry? The first time you access the system, you will be asked to provide certain limited identifying information, such as your company name and address, contact person, and the contact person's telephone number and email address. If you are accessing the National Registry on behalf of a seller-client, you also will have to identify that seller-client.

How often will I have to access the National Registry and remove numbers from my calling list? You must synchronize your lists with an updated version of the National Registry every 31 days.

How often may I download data from the National Registry? You will be able to access data as often as you like during the course of your annual period for those area codes for which you have paid. However, to protect system integrity, you may download data files from the National Registry only once in any 24-hour period.

What information can I access from the National Registry? The only consumer information that companies receive from the National Registry is registrants' telephone numbers. The numbers are sorted and available by area code. Companies may

access as many area codes as desired (and paid for), by selecting, for example, all area codes within a certain state. Of course, companies may access the entire National Registry.

May I check just a few numbers at a time to see if they are registered? Companies that have provided the required identification information and certification and paid the appropriate fee (if they want to access more than five area codes) may check a small number of telephone numbers (10 or less) at a time via interactive Internet pages. This permits small volume callers to comply with the Do Not Call requirements of the TSR without having to download a potentially large list of all registered telephone numbers within a particular area.

What format does the National Registry use? Data is available from the National Registry using Internet-based formats and download methods that serve both small and large businesses. Data also is available in three different sets: full lists, change lists, and small list look-ups. Full lists and change lists are available as flat files or XML tagged data files.

With a web browser, you can access a secure webpage that allows you to select the download set that you prefer. For the small list look-up, you will be asked to enter from one to 10 telephone numbers on an online form. After entering the numbers and clicking on a button, the National Registry will display the list of numbers you entered and whether each number is in the Registry.

You are limited to the numbers in the area code(s) to which you have subscribed. The full list contains just 10-digit telephone numbers, with a single number on each line. For the change list in flat file format, each line of the file contains a telephone number, the download date, and an “A” (for Added) or “D” (for Deleted). The change list data is fixed-width fields.

For both flat files and XML tagged data, if you select a change list, you will be provided all telephone numbers that have been added to, or deleted from, the National Registry since the date of your previous access. Change lists, for both flat files and XML tagged data, are available to provide changes on a daily basis (representing the additions and deletions from the day before).

To assist in automating the download process, the National Registry offers the option to set up Web services for requesting change lists in XML tagged data format.

Paying for Access

How much does it cost to access the Registry? Under the Do-Not-Call Registry Fee Extension Act of 2007, the annual fees for accessing the Registry are increased at the rate of change of the consumer price index, unless the change is less than 1 percent, in which case the fees will not be adjusted. For fiscal year 2022, beginning October 1, 2021, the annual fee is $69 for each area code of data accessed or $19,017 for access to every area code in the registry, whichever is less. The first 5 area codes of data may be accessed at no charge. Certain exempt organizations may access all data at no charge.

How often will I have to pay a fee? The fee must be paid annually. Payment of the fee provides access to the data for an “Annual Subscription Period” which is defined as the twelve months following the first day of the month in which the seller paid the fee. For example, a seller who pays its annual fee on September 15, 2019, has an “annual period” that runs from September 1, 2019 through August 31, 2020.

If a Seller adds area codes at any point during their Annual Subscription PeriodPeriod, they may be required to make additional payments.

Who must pay the fee? All sellers covered by the TSR must pay the appropriate fee for an area code of data before they call, or cause a telemarketer to call, any consumer within that area code, even those consumers whose telephone numbers are not on the National Registry. The only exceptions are for sellers that call only consumers with which they have an existing business relationship or written agreement to call, and do not access the National Registry for any other purpose. Charities and political organizations that voluntarily want to suppress calls to consumers whose numbers are on the Registry may access the Registry at no cost.

Telemarketers and service providers may access the National Registry, at no cost, through the use of their seller-client's unique Subscription Account Number (SAN). Even though they are not required by law to do so, telemarketers and service providers may gain access to the National Registry on their own behalf, but they must pay a separate fee for that ability. But before placing calls on behalf of a seller-client, telemarketers are required to ensure that their seller-client has paid the appropriate annual fee.

How can I pay the fee? Fees are payable via credit card (which permits the transfer of data in the same session, if the payment is approved) or electronic fund transfer (EFT). EFT requires you to wait approximately three days for the funds to clear before data access can be provided. You must pay the fee prior to gaining access to the National Registry. Sellers and exempt entities can pay the fee directly or through their telemarketers or service providers (to which the seller or exempt entity has provided the necessary authority).

What if I pay for a small number of area codes, and then later in the year expand my business to call more area codes? Will I have to pay twice? If you need to access data from more area codes than you initially selected, you may do so, but you will have to pay for access to those additional area codes. For fiscal year 2022, beginning October 1, 2021, obtaining additional data from the National Registry during the first six months of your Annual Subscription Period will require a payment of $69 for each new area code. During the second six-month period, the charge to obtain data from each new area code is $35. Payment for additional data provides you with access to the additional data for the remainder of your Annual Subscription Period. Adding area codes to a subscription does not affect the length of the Annual Subscription Period.

What happens after I pay for access? After payment is processed, you will be given a unique Subscription Account Number (SAN) and permitted access to the appropriate portions of the National Registry. On subsequent visits to the website, you will be able to download either a full updated list of numbers from your selected area codes or a more limited list, consisting of changes to the National Registry (both additions and deletions) that have occurred since the day of your last download. This limits the amount of data that you need to download during each visit. The change list will consist of each phone number that has changed, whether it was added or deleted, and the download date.

What if I want to share the cost of the fee with another seller? The TSR flatly prohibits sharing the fee for Registry access. If sharing were permitted, fees would have to be much higher to cover the cost of maintaining the Registry.

If I'm a telemarketer or service provider working for a seller, can I use the seller's account number to access the National Registry? A telemarketer or other service provider working on behalf of a seller may access the National Registry directly or through the use of its seller-client's unique account number. If access is gained through its seller-client's account number, the telemarketer or service provider will not have to pay a separate fee for that access. The extent of its access will be limited to the area codes requested and paid for by its seller-client. The telemarketer or service provider also will be permitted to access the National Registry at no additional cost, once the annual fee has been paid by its seller-client. Of course, sellers or telemarketers must use a version of the National Registry that's no more than 31 days old before they make any telemarketing calls.

If a telemarketer or service provider is accessing the National Registry directly — that is, if a telemarketer or service provider decides to obtain the information on its own behalf — it will have to pay a separate fee and comply with all requirements placed on sellers accessing the Registry. Such a telemarketer or service provider will be provided a subscription account number (SAN) that can be used only by that company. In other words, that SAN is not transferrable.

What if a seller uses one telemarketer at the beginning of the year and switches to another later in the year? Will the seller have to pay twice? No. Each seller will have a unique subscription account number (SAN) that it can share with the telemarketers and service providers who may access the National Registry on the seller's behalf.

Compliance

What happens to companies that don't pay for access to the National Registry? A company that is a seller or telemarketer could be liable for placing any telemarketing calls (even to numbers NOT on the National Registry) unless the

seller has paid the required fee for access to the Registry. Violators may be subject to fines of up to $43,792 per violation. Each call may be considered a separate violation. However, sellers and telemarketers should also be aware that the FCC regulates telemarketing calls. See fcc.gov.

What if I call a number that's not on the National Registry without checking the Registry first? It's against the law to call (or cause a telemarketer to call) any number on the National Registry (unless the seller has an established business relationship with the consumer whose number is being called, or the consumer agreed in writing to receive calls placed by or on behalf of the seller). But it's also against the law for a seller to call (or cause a telemarketer to call) any person whose number is within a given area code unless the seller first has paid the annual fee for access to the portion of the National Registry that includes numbers within that area code.

In addition, it's against the law for a telemarketer, calling on behalf of a seller, to call any person whose number is within a given area code unless the seller has first paid the annual fee for access to the portion of the National Registry that includes numbers within that area code. Telemarketers must make sure that their seller-clients have paid for access to the National Registry before placing any telemarketing calls on their behalf. However, sellers and telemarketers should also be aware that the FCC regulates telemarketing calls. See fcc.gov.

What's my liability if my company inadvertently calls a number on the National Registry? The TSR has a "safe harbor" for inadvertent mistakes. If a seller or telemarketer can show that, as part of its routine business practice, it meets all the requirements of the safe harbor, it will not be subject to civil penalties or sanctions for mistakenly calling a consumer who has asked for no more calls, or for calling a person on the National Registry. However, sellers and telemarketers should also be aware that the FCC regulates telemarketing calls. See fcc.gov.

How do the registries operated by the FTC, the, FCC, and the various states fit together? Since June of 2003, the FTC and the FCC jointly and cooperatively have enforced a single National Do Not Call Registry. Together, the FTC and the FCC have jurisdiction over nearly all sales calls placed to U.S. consumers.

Some thirteen states still administer their own do not call registries. The TSR does NOT preempt state law, so sellers, telemarketers, and others who do telemarketing will have to check with various states to determine what is required for compliance at the state level. See fcc.gov. A full copy of the FCC's regulations can be found at: https://www.law.cornell.edu/cfr/text/47/64.1200.

Troubleshooting

What if I have problems when I try to access the National Registry? Visit telemarketing.donotcall.gov for help during regular business hours via a secure electronic form or send an email to the registry Help Desk at tmhelp@donotcall.gov.

How does the National Registry impact small, home-based direct sellers?

FTC staff does not contemplate enforcing the National Do Not Call Registry provisions against individuals who make sales calls out of their own homes to personal friends, family members, or small numbers of personal referrals. In fact, most of the calls made by such small direct sellers probably would be local or "intrastate" calls, and therefore not covered by the TSR. The TSR applies to telemarketing campaigns that involve more than one interstate call.

Nevertheless, small home-based direct sellers should be aware that the Do Not Call regulations of the FCC cover intrastate calls. The FCC regulations exempt "personal relationship" calls — where the party called is a family member, friend, or acquaintance of the telemarketer making the call.

As a matter of goodwill, small direct sellers may want to avoid contacting a person whose number is on the Registry.

Where can I get more information about compliance? The best source of information about complying with the Do Not Call provisions of the TSR is ftc.gov/donotcall. It includes business information about the National Registry.

It's important that sellers and others involved in telemarketing recognize that both the FTC and the FCC regulate telemarketing practices. Those involved in telemarketing should review regulations put in place by both agencies. The FCC's regulations can be found at: https://www.law.cornell.edu/cfr/text/47/64.1200.

Do Not Call Safe Harbor

If a seller or telemarketer can establish that as part of its routine business practice, it meets the following requirements, it will not be subject to civil penalties or sanctions for erroneously calling a consumer who has asked not to be called, or for calling a number on the National Registry:

the seller or telemarketer has established and implemented written procedures to honor consumers' requests that they not be called.

the seller or telemarketer has trained its personnel, and any entity assisting in its compliance, in these procedures.

the seller, telemarketer, or someone else acting on behalf of the seller or charitable organization has maintained and recorded an entity-specific Do Not Call list.

the seller or telemarketer uses, and maintains records documenting, a process to prevent calls to any telephone number on an entity-specific Do Not Call list or the National Do Not Call Registry, provided that the process involves using a version of the National Registry downloaded no more than 31 days before the date any call is made.

the seller, telemarketer, or someone else acting on behalf of the seller or charitable organization monitors and enforces compliance with the entity's written Do Not Call procedures.

the call is a result of error.

What happens if a consumer is called after he or she has asked not to be called? If a seller or telemarketer calls a consumer who has:

placed his number on the National Registry

not given written and signed permission to call

either no established business relationship with the seller, or has asked to get no more calls from or on behalf of that seller . . .

the seller and telemarketer may be liable for a TSR violation. If an investigation reveals that neither the seller nor the telemarketer had written Do Not Call procedures in place, both will be liable for the TSR violation. If the seller had written Do Not Call procedures, but the telemarketer ignored them, the telemarketer will be liable for the TSR violation; the seller also might be liable, unless it could demonstrate that it monitored and enforced Do Not Call compliance and otherwise implemented its written procedures. Ultimately, a seller is responsible for keeping a current entity-specific Do Not Call list, either through a telemarketing service it hires or its own efforts.

What does "error" mean? If a seller or telemarketer has and implements written Do Not Call procedures, it will not be liable for a TSR violation if a subsequent call is the result of error. But it may be subject to an enforcement investigation, which would focus on the effectiveness of the procedures in place, how they are implemented, and if all personnel are trained in Do Not Call procedures. If there is a high incidence of "errors," it may be determined that the procedures are inadequate to comply with the TSR's Do Not Call requirements, the safe harbor is not fulfilled, and the calls violate the TSR. On the other hand, if there is a low incidence of "errors," there may not be a TSR violation. The determination of whether an excusable "error" occurs is based on the facts of each case. A safe rule of thumb to ensure that adequate Do Not Call procedures are implemented is to test periodically for quality control and effectiveness.

Exemptions to the National Do Not Call Registry Requirements

The Established Business Relationship Exemption

Sellers and telemarketers may place live telemarketing calls from a sales agent (but not automated calls or robocalls) to a consumer with whom a seller can demonstrate it has an established business relationship, provided the consumer has not asked to be on the seller's entity-specific Do Not Call list. The TSR states that there are two kinds of established business relationships. One is based on the consumer's purchase, rental, or lease of the seller's goods or services, or a financial transaction between the consumer and seller, within 18 months preceding a telemarketing call. The 18-month period runs from the date of the last payment, transaction, or shipment between the consumer and the seller. The other is based on a consumer's inquiry or application regarding a seller's goods or services, and exists for three months starting from the date the consumer makes the inquiry or application. This enables sellers to return calls to interested prospects even if their telephone numbers are on the National Registry.

Examples:

A magazine seller may make a live telemarketing call to a customer whose number is on the National Registry for 18 months after the date of the customer's last payment for magazines or for 18 months after the seller's last shipment date of magazines, whichever is later.

A consumer calls a company to ask for more information about a particular product. If the company returns the consumer's call within three months from the date of the inquiry, whether the consumer's telephone number is on the National Registry is immaterial. But after that three month period, the company would need either the consumer's express agreement to get more calls or a transaction-based established business relationship to support more calls.

To whom does the established business relationship apply? An established business relationship is between a seller and a customer; it is not necessarily between one of the seller's subsidiaries or affiliates and that customer. The test for whether a subsidiary or affiliate can claim an established business relationship with a sister company's customer is: would the customer expect to receive a call from such an entity, or would the customer feel such a call is inconsistent with having placed his or her number on the National Do Not Call Registry?

Factors to be considered in this analysis include the nature and type of goods or services offered and the identity of the affiliate. Are the affiliate's goods or services similar to the seller's? Is the affiliate's name identical or similar to the seller's? The greater the similarity between the nature and type of goods sold by the seller and any subsidiary or affiliate and the greater the similarity in identity between the seller and any subsidiary and affiliate, the more likely it is that the call would fall within the established business relationship exemption.

Examples:

A consumer who purchased aluminum siding from "Alpha Company Siding," a subsidiary of "Alpha Corp.," likely would not be surprised to receive a call from "Alpha Company Kitchen Remodeling," also a subsidiary of "Alpha Corp." The name of the seller and the subsidiary are similar, as are the type of goods or services offered — home repair and remodeling.

If a consumer buys a computer with peripherals — printer, keyboard, speakers — from a local retail store, the consumer will have an established business relationship with that store for 18 months from the date of purchase. In addition, the consumer may have an established business relationship with the computer manufacturer and possibly the manufacturer of the peripherals, as well as the operating system manufacturer, as long as the customer has a contractual relationship with any of these entities. If the printer comes with a manufacturer's written warranty, the manufacturer of the printer has an established business relationship with the customer. If the operating system comes

with a manufacturer's written warranty, the manufacturer of the system has an established business relationship with the customer, too.

However, if a consumer buys a subscription to a magazine from a magazine publisher that happens to be owned by a corporation with diverse holdings, the customer's established business relationship would exist only with the magazine publisher, not the corporate parent or any other corporate subsidiaries.

The Written Permission to Call Exemption

The TSR lets sellers and telemarketers call any consumer they can demonstrate has expressly agreed, in writing, to receive calls by or on behalf of the seller, even if the consumer's number is in the National Do Not Call Registry. The consumer's express agreement must be in writing and must include the number to which calls may be made and the consumer's signature. The signature may be a valid electronic signature, if the agreement is reached online.

If a seller seeks a consumer's permission to call, the request must be clear and conspicuous, and the consumer's assent must be affirmative. If the request is made in writing, it cannot be hidden; printed in small, pale, or non-contrasting type; hidden on the back or bottom of the document; or buried in unrelated information where a person would not expect to find such a request. A consumer must provide consent affirmatively, such as by checking a box. For example, a consumer responding to an email request for permission to call would not be deemed to have provided such permission if the "Please call me" button was pre-checked as a default.

In the FTC's enforcement experience, sweepstakes entry forms often have been used in a deceptive manner to obtain "authorization" from a consumer to incur a charge or some other detriment. Authorization or permission obtained through subterfuge is ineffective. The FTC scrutinizes any use of such sweepstakes entry forms as a way to get a consumer's permission to place telemarketing calls to her number.

Other Provisions Relating to Do Not Call

Selling or Using a Do Not Call List for Purposes Other than Compliance

It's a violation of the TSR for anyone to sell, rent, lease, buy, or use an entity-specific Do Not Call list or the National Registry for any purpose other than complying with the Rule's Do Not Call provisions or preventing calls to numbers on such lists. This provision applies to list brokers, third-party services, and others, in addition to sellers and telemarketers. It is intended to ensure that consumers' phone numbers on Do Not Call lists and the National Registry are not misused. It is a violation of this provision for a seller to market its own entity-specific Do Not Call list to another entity for use as a "do call" list.

Sellers and telemarketers (on behalf of sellers) must purchase access to the relevant Do Not Call data from the National Registry database. The TSR prohibits participating in any arrangement to share the cost of accessing the National Registry database. A telemarketer may not divide the costs to access the National Registry database among various client sellers; access for each client seller must be purchased separately. Similarly, a telemarketer may not access the National Registry to obtain Do Not Call data and transfer the data to or share it with another telemarketer.

Denying or Interfering with Someone's Do Not Call Rights

It's a TSR violation to deny or interfere with someone's right to be placed on the National Do Not Call Registry or on any entity-specific Do Not Call list. This provision prohibits a telemarketer from refusing to accept a consumer's entity-specific Do Not Call request, including harassing any person who makes such a request, hanging up on that person, failing to honor the request, requiring the person to listen to a sales pitch before accepting the request, assessing a charge or fee for honoring the request, requiring the person to call a different number to submit the request, or requiring the person to identify the seller making the call or on whose behalf the call is made. In addition, if a seller or telemarketer fails to diligently capture information

about a consumer's Do Not Call request and add it to the appropriate entity-specific Do Not Call list, it will lose the benefit of the TSR's safe harbor for inadvertent violations. It would also violate this part of the TSR for any person to purport to accept telephone numbers or other information for entry into the National Do Not Call Registry. No data from third parties is accepted into the National Do Not Call Registry.

Calling Time Restrictions

Unless a telemarketer has a person's prior consent to do otherwise, it's a violation of the TSR to make outbound telemarketing calls to the person's home outside the hours of 8 a.m. and 9 p.m. local time at the location called.

Call Abandonment (and Safe Harbor)

The TSR expressly prohibits telemarketers from abandoning any outbound telephone call, but has an alternative that allows some flexibility while enabling you to avoid liability under this provision.

Abandoned calls often result from telemarketers' use of predictive dialers to call consumers. Predictive dialers promote telemarketers' efficiency by simultaneously calling multiple consumers for every available sales representative. This maximizes the amount of time telemarketing sales representatives spend talking to consumers and minimizes representatives' "downtime." But it also means some calls are abandoned: consumers are either hung up on or kept waiting for long periods until a representative is available.

Under the TSR's definition, an outbound telephone call is "abandoned" if a person answers it and the telemarketer does not connect the call to a sales representative within two seconds of the person's completed greeting. **The use of prerecorded message telemarketing, where a sales pitch begins with or is made entirely by a prerecorded message, violates the TSR because the telemarketer is not connecting the call to a sales representative within two seconds of the person's completed greeting.**

The abandoned call safe harbor provides that a telemarketer will **not** face enforcement action for violating the call abandonment prohibition if the telemarketer:

> uses technology that ensures abandonment of no more than three percent of all calls answered by a live person, measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.
>
> allows the telephone to ring for 15 seconds or four rings before disconnecting an unanswered call.
>
> plays a recorded message stating the name and telephone number of the seller on whose behalf the call was placed whenever a live sales representative is unavailable within two seconds of a live person answering the call.
>
> maintains records documenting adherence to the three requirements above.

To take advantage of the safe harbor, a telemarketer must first ensure that a live representative takes the call in at least 97 percent of the calls answered by consumers. Calls answered by machine, calls that are not answered at all, and calls to non-working numbers do not count in this calculation. (Note that calls that are answered by machine and that deliver prerecorded messages raise other concerns. See "Telemarketing Calls That Deliver Prerecorded Messages.")

The "per calling campaign" measure

A telemarketer running simultaneous campaigns (on behalf of the same or different sellers) cannot average the abandonment rates for all campaigns, offsetting for example, a six percent abandonment rate for one campaign with a zero percent abandonment rate for another. Each separate campaign is subject to a maximum abandonment rate of three percent measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.

A telemarketer also must eliminate "early hang-ups" by allowing an unanswered call to ring either four times or for 15 seconds before disconnecting the call. This element of the safe harbor ensures that consumers have a reasonable time to answer a call and are not subjected to "dead air" after one, two, or three rings.

In addition, in the small permissible percentage of calls in which a live representative may not be available within two seconds of the consumer's completed greeting, the telemarketer must play a recorded message. The message must state the name and telephone number of the seller responsible for the call, enabling the consumer to know who was calling and, should the consumer wish, to return the call. The Rule expressly states that sellers and telemarketers still must comply with relevant state and federal laws, including, but not limited to, the Telephone Consumer Protection Act (47 U.S.C. § 227) and FCC regulations at 47 C.F.R. Part 64.1200. The FCC regulations prohibit such recorded messages from containing a sales pitch, but, like the TSR provision discussed here, require that the message state "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 recorded message must not contain a sales pitch. The number on the recorded message must be one to which a consumer can call to place an entity specific Do Not Call request.

Finally, a telemarketer wishing to avail itself of the safe harbor for abandoned calls must keep records that document its compliance with the first three safe harbor components in accordance with the recordkeeping provision of the TSR (Section 310.5). The records must establish that the abandonment rate has not exceeded three percent and that the ring time and recorded message requirements have been fulfilled.

Telemarketing Calls That Deliver Prerecorded Messages

In August of 2008, the FTC adopted amendments to the TSR that directly address the use of prerecorded messages in telemarketing. Under those amendments, the TSR expressly prohibits outbound telemarketing calls that deliver a prerecorded message unless the seller has obtained the call recipient's prior signed, written agreement to receive such calls from that seller. The prohibition applies to prerecorded message calls regardless of whether they are answered by a person or by an answering machine or voice mail service. With certain exceptions (explained below), the prohibition applies to all calls that deliver a prerecorded message, regardless of whether the number called is listed on the National Do Not Call Registry. THE PROHIBITION APPLIES TO CALLS THAT DELIVER ANY PRERECORDED MESSAGE, REGARDLESS OF WHETHER THE PRERECORDED MESSAGE IS PLAYED OR SELECTED BY A LIVE OPERATOR.

Moreover, even when the seller has the call recipient's prior agreement to receive prerecorded message calls, the message must provide an automated interactive opt-out mechanism that is announced and made available at the outset of the message (right after the required prompt disclosures described above). The opt-out mechanism must remain available throughout the duration of the call. If a call delivering a prerecorded message possibly might be answered "live" by a consumer, the message must include a voice-activated or telephone keypress automated mechanism that will automatically add the number called to the seller's entity-specific Do Not Call list and then immediately terminate the call. If a call possibly might be picked up by an answering machine, or voicemail service, then the message must include a toll-free number that, when called, will connect a caller to the same automated opt-out mechanism, which must be available "24/7" for the duration of the calling campaign.

In addition, sellers or telemarketers placing calls that deliver a prerecorded message must also comply with three additional requirements that mirror those of the abandoned call prohibition. Specifically, they must:

- allow the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;
- play the prerecorded message within two seconds after the recipient of the call completes his or her greeting; and
- comply with all other requirements of the TSR and other applicable federal and state laws.

The Written Agreement Requirement

Calls delivering a prerecorded message may be placed only to individuals who have provided the seller with a signed, written agreement to receive such calls. Therefore, prerecorded message calls are prohibited if the seller does not possess a written

agreement from the individual to whom such a call is placed to receive such calls. The existence of an "established business relationship" does not does not permit a seller or telemarketer to place a prerecorded message call.

The TSR requires that the seller have a written agreement with the called party for all calls delivering prerecorded messages, with the two exceptions discussed below. The written agreement is required regardless of whether the number called is on the National Do Not Call Registry. Nor does it matter whether a call delivering a prerecorded message is answered "live" by a person or by an answering machine or voicemail service. In all cases, the seller must have the call recipient's prior written agreement to receive prerecorded message calls at the number called.

What must the written agreement contain?

A written agreement need only contain:

unambiguous evidence that a call recipient is willing to receive telephone calls that deliver a prerecorded message by or on behalf of a specific seller;

the telephone number to which such messages may be delivered; and

the call recipient's signature.

Although no particular form or language is required, an acceptable model is provided here.

<table>
<tr><td colspan="2">I would like to receive telephone calls that deliver prerecorded messages from [ABC Co.] that provide special sales offers such as ____________ _________________at this telephone number: (_____)____________.</td></tr>
<tr><td>Yes</td><td>No</td></tr>
<tr><td colspan="2">________[Signature]________</td></tr>
</table>

Does a consumer's written agreement to receive prerecorded message calls from a seller permit others, such as the seller's affiliates or marketing partners, to place such calls? No. The TSR requires that the written agreement identify the single "specific seller" authorized to deliver prerecorded messages. The authorization does not extend to other sellers, such as affiliates, marketing partners, or others.

Are there specific procedures for obtaining a consumer's written agreement to receive calls that deliver prerecorded messages? There are three essentials:

1. Before the consumer agrees, the seller must **clearly and conspicuously disclose the consequences** of agreeing — namely, that the agreement will result in the seller delivering prerecorded messages to the consumer via telemarketing calls;
2. The seller may **not** require, directly or indirectly, that a consumer agree to receive prerecorded message calls as a precondition for purchasing or receiving any good or service; and
3. The seller must give the consumer an opportunity to designate the telephone number to which the calls may be placed.

Sellers bear the burden of demonstrating that these prerequisites have been met, and that they possess the required written agreements from consumers to receive prerecorded calls for all such calls that they place.

Is there a particular medium or format the seller must use in obtaining a consumer's written agreement to receive calls that deliver prerecorded messages? A seller need not obtain or retain the consumers agreement in paper form. The TSR expressly permits sellers to use electronic records that comply with the Electronic Signatures In Global and National Commerce Act ("E-SIGN"). Therefore, a seller may use a written agreement that is both created and retained in electronic form, so long as the seller can demonstrate that the seller's procedures comply with E-SIGN, and conform to the TSR's written agreement requirements. Thus, consumers' express agreements to receive prerecorded message calls could be obtained by means of email, a website form, a telephone keypress during a live call with a sales agent, or a voice recording.

The Requirement that Prerecorded Telemarketing Messages Include an Automated Interactive Opt-Out Mechanism

Calls that deliver a prerecorded message must include an automated interactive opt-out mechanism that is announced and made available for the call recipient to use at the outset of the message. The opt-out must follow immediately after the initial disclosures — explained in the section on *Prompt Disclosures in Outbound Telemarketing Calls* — that the TSR imposes on all telemarketing calls.

> In the case of a prerecorded message to induce the purchase of a good or service, the opt-out mechanism must be announced and made available to use immediately after the mandatory disclosures — the seller's identity, that the purpose of the call is to sell goods or services, the nature of the goods or services, and, if a prize promotion is offered, the fact that no purchase or payment is necessary to participate.
>
> In the case of a prerecorded message call placed by a telefunder to solicit charitable contributions on behalf of a non-profit organization, the opt-out mechanism must be announced and made available to use immediately after the mandatory disclosure of the identity of the charitable organization on behalf of which the call is made, and the fact that the purpose of the call is to solicit a charitable contribution.

Sellers and telemarketers using prerecorded telemarketing calls must employ automated technology capable of automatically placing a consumer's telephone number on the seller's Do Not Call list in response either to spoken words, or the pressing of a specified key on the telephone keypad.

If it is possible that a prerecorded telemarketing call may be answered by a consumer in person, the message must disclose at the outset (as discussed above) how to use the required voice-or-keypress-activated interactive opt-out mechanism to add the consumer's number to the seller's entity-specific Do Not Call list. Moreover, the opt-out mechanism must:

> be available for call recipients to use at any time during the message;
>
> when invoked, automatically add the call recipient's number to the seller's entity-specific Do Not Call list; and
>
> after the call recipient's number has been added to the seller's internal Do Not Call list, immediately disconnect the call.

By contrast, if it's possible that a prerecorded telemarketing call may be picked up by an answering machine or voice mail service, the message must disclose at the outset a toll-free number that, when called, connects the caller directly to the same type of voice-or-keypress-activated interactive opt-out mechanism that will add the number called to the seller's Do Not Call list. The opt-out mechanism provided must:

> be accessible at any time throughout the telemarketing campaign, including non-business hours;
>
> automatically add the call recipient's number to the seller's entity-specific Do Not Call list; and
>
> immediately thereafter disconnect the call.

When would both a voice or keypress activated mechanism and a toll-free number be required? Both would be required whenever a seller or telemarketer cannot be certain that no consumer will answer the call in person.

May the opt-out mechanism transfer an opt-out request to an operator or sales representative? No, the opt-out provision specifies that the mechanism must "automatically add the number called to the seller's entity-specific Do Not Call list." This means the mechanism must work in a way that does not require human intervention. The additional requirement

that the opt-out mechanism "once invoked, immediately disconnect the call" after adding the call recipient's telephone number to the seller's Do Not Call list bars the intervention of an operator or sales representative.

May the opt-out mechanism require a repeat confirmation of the opt-out request before adding a number to the seller's Do Not Call list? No, the provision specifies that the opt-out mechanism must "automatically add" the number called to the seller's entity-specific Do Not Call list."

May the opt-out mechanism connect to a menu that includes the required opt-out option? No, the opt-out mechanism, once invoked, must "automatically add" the number called to the seller's entity-specific Do Not Call list, then immediately terminate the call.

If a recipient of a call delivering a prerecorded message calls the toll-free number provided in the message, must the call recipient's number automatically be added to the seller's internal Do Not Call list? Yes. All calls to the toll free number must "connect directly" to an opt-out mechanism that "automatically adds" the number originally called to the seller's entity-specific Do Not Call list. The provision assumes that the recipient of the prerecorded message call will call back the number provided on the same line on which she received the prerecorded call. As a practical matter, ANI (automatic number identification) may be used to capture the telephone number that calls into the toll-free number. This is the "number called" to which the prerecorded message was delivered.

Must the toll-free number provided in a prerecorded telemarketing message, regardless of when it receives a return call from a consumer, connect the return call to an automated opt-out mechanism? Yes. The TSR specifies that the opt-out mechanism must be "accessible at any time throughout the duration of the telemarketing campaign." This means that both the toll-free number and the opt-out mechanism itself be operational "24/7" so that regardless of the day or time that a consumer listens to a prerecorded message on his or her answering machine or voice mail service, the consumer, if he or she wishes, can immediately exercise the right to opt-out of future calls.

If a prerecorded telemarketing campaign lasts only a short time (for example, one or two days), how long must the toll-free number provided in the prerecorded message be accessible?The toll-free number must be available for the "duration of the telemarketing campaign." In the case of a short one or two-day campaign, the toll-free number should be available for a reasonable time thereafter to permit consumers to exercise their opt-out rights after listening to the message.

Calls that Deliver Purely "Informational" Prerecorded Messages

The TSR amendments prohibiting prerecorded messages in telemarketing do not apply to calls delivering prerecorded messages that are purely informational — for example, flight cancellation messages. Purely informational calls — as opposed to calls soliciting sales or charitable contributions — do not fall within the Rule's definition of "telemarketing" — "a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution." Thus, the prohibition on prerecorded telemarketing messages does not apply to purely informational messages. The following are examples of purely informational messages:

- a reminder of a single appointment previously scheduled at the call recipient's request;
- reminders of a series of recurring appointments previously scheduled at the call recipient's request (for example, weekly dance class reminders; quarterly pest control service reminders);
- an update on a prior sales transaction (for example, a notification of order status, shipping information, delivery dates and times, or overdue payments); or
- a recall notification.

"Mixed" Messages: Any prerecorded informational message that includes a sales or solicitation component to induce, directly or indirectly, a purchase of goods or services or a charitable contribution is prohibited, unless the seller has obtained the call recipient's prior written agreement to receive prerecorded message calls. If a call delivers a prerecorded message that includes any content tending to induce a consumer to purchase a good or service (whether or not the good or service is related to a prior purchase), or to alter the terms of a prior transaction, then the call is not purely informational. Instead, such a

call is a telemarketing message that is prohibited, unless agreed to in advance. Examples of informational messages that are prohibited because they are combined with a telemarketing message include messages that provide any information about:

- the availability of any product or service, whether or not the message provides a means for purchasing it;
- the availability of additional options or upgrades for a previously purchased product or service;
- the availability of alternative terms or conditions for a previously purchased product or service; and
- the availability of an extended warranty (or service contract) on a previously purchased product or service.

Exemptions from the Prerecorded Call Requirements

Two general types of prerecorded message calls that would otherwise be prohibited by the TSR are nevertheless expressly exempted from coverage. First, the amendments completely exempt certain prerecorded healthcare message calls. Second, the amendments partially exempt prerecorded message calls placed on behalf of a non-profit charitable organization by a for-profit telemarketer to members of, or previous donors to, the charitable organization on behalf of which the calls are being placed. The paragraphs immediately below explain these exemptions in greater detail.

Healthcare Message Exemption

This exemption is limited to calls permitted under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), pursuant to regulations issued by the Department of Health and Human Services. The only healthcare calls that are exempt are those “made by, or on behalf of, a covered entity or its business associate, as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.”

The HIPAA Privacy Rule permits only three types of calls, whether “live” or prerecorded, by a healthcare provider or its business associates without a patient’s prior authorization – namely:

- calls to describe a health-related product or service that is provided by, or included in a plan of benefits of, the covered entity making the communication;
- calls for treatment of the individual; and
- calls for case management or care coordination for the individual, or to direct or recommend alternative treatments, therapies, health care providers, or settings of care to the individual.

Only these three categories of prerecorded healthcare message calls are exempt from the TSR prohibition of telemarketing calls that deliver a prerecorded message. Some examples of exempt healthcare-related HIPAA calls are prerecorded messages calls made by or on behalf of a:

- pharmacy to provide prescription refill reminders;
- medical provider to provide medical appointment or other reminders (for example, availability of flu shots or mammograms);
- durable medical equipment supplier to document that a patient has used his or her current supply (for example, of insulin needles or respiratory supplies) before sending additional supplies; and
- case manager to check on a patient’s condition.

Prerecorded messages involving products or services not prescribed by a doctor or other healthcare provider as part of a plan of treatment, and therefore not within the healthcare exemption would include, for example prerecorded message calls made by or on behalf of a provider of:

- vitamins, minerals, or alternative medical therapies;
- gym or health club memberships; or
- weight loss products or programs.

Charitable Fundraising Messages Exemption

As noted above, non-profit organizations — those entities that are not organized to carry on business for their own, or their members' profit — are not covered by the TSR because the FTC Act specifically exempts them from the FTC's jurisdiction. As explained above, however, the USA PATRIOT Act, passed in 2001, brought charitable solicitations by for-profit telemarketers within the scope of the TSR. As a result, most of the TSR's provisions are applicable to "telefunders" — telemarketers who solicit charitable contributions.

Nevertheless, the FTC has partially exempted certain calls placed by telefunders from the prerecorded message prohibition. Under this exemption, telefunders may place calls delivering prerecorded messages to prior donors and members of the charity on behalf of which the calls are placed, even if the charity does not have the call recipients' express written agreement to receive such calls.

This is only a partial exemption because telefunders still must comply with the other requirements of the prohibition, including the automated interactive opt-out requirements and the three additional requirements that mirror those of the abandoned call prohibition. Specifically:

> to allow the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;
>
> to play the prerecorded message within two seconds after the recipient of the call completes his or her greeting; and
>
> to comply with all other requirements of the TSR and other applicable federal and state laws.

The partial exemption only relieves telefunders from complying with the written agreement requirement.

Transmitting Caller ID Information

It is a violation of the TSR to fail to transmit or cause to be transmitted the phone number, and, when available by the telemarketer's phone company, the name of the telemarketer to any consumer's caller identification service.

To comply with this requirement, a telemarketer may transmit its own number and, where available, its own name, to consumers' caller identification services. The TSR also allows a substitution of the name of the seller (or charitable organization) on whose behalf the telemarketer is calling, and the seller's (or charitable organization's) customer (or donor) service telephone number, which is answered during regular business hours. The TSR allows a service bureau calling on behalf of many client-sellers to transmit a client-seller's customer service number (or the donor service number of a charitable organization client) as well as the names of these entities, if the service bureau's phone company has the capacity to transmit this information.

There may be situations when a consumer who subscribes to a Caller ID service does not receive a telemarketer's transmission of Caller ID information despite the fact that the telemarketer has arranged with its carrier to transmit this information in every call. This can happen if the Caller ID information is dropped somewhere between the telemarketer's call center and the consumer's telephone. Telemarketers who can show that they took all available steps to ensure transmission of Caller ID information in every call will not be liable for isolated inadvertent instances when the Caller ID information fails to make it to the consumer's receiver. Nevertheless, a telemarketer's use of calling equipment that is not capable of transmitting Caller ID information is no excuse for failure to transmit the required information.

The FCC's telemarketing regulations under the TCPA also include provisions governing the transmission of Caller ID (47 C.F.R. § 64.1200).

Threats, Intimidation, and Profane or Obscene Language

Sellers and telemarketers are prohibited from using threats, intimidation, and profane or obscene language in a telemarketing transaction. This prohibition covers all types of threats, including threats of bodily injury, financial ruin, and threats to ruin credit. It also prohibits intimidation, including acts that put undue pressure on a consumer, or that call into question a person's

intelligence, honesty, reliability, or concern for family. Repeated calls to an individual who has declined to accept an offer also may be viewed as an act of intimidation.

Calling Consumers Repeatedly or Continuously, with the Intent to Annoy, Abuse or Harass

A consumer asks to be placed on a company's Do Not Call list. If the telemarketer who receives that request decides to dial the consumer's number repeatedly, hanging up each time or making obnoxious or offensive remarks to the consumer in retaliation, the calls would violate this provision of the TSR. Repeated calls urging a consumer to take advantage of an offer also would violate this provision, provided they are made with the intent to annoy, abuse or harass.

Fraudulent Telemarketing Operations

Several distinct practices occur in fraudulent telemarketing operations. The TSR takes specific aim at these practices.

Disclosing or Receiving Unencrypted Account Numbers for Consideration

Along with the provisions on express verifiable authorization and unauthorized billing, another provision is designed to ensure that consumers are not charged without their consent. Basically, the TSR makes it illegal to disclose or receive unencrypted account numbers for consideration, unless the disclosure or receipt is to process a payment for a transaction the consumer has consented to after receiving all necessary disclosures and other protections the TSR provides. Other than processing a transaction to which the consumer has consented, there is no legitimate purpose for disclosing or receiving a consumer's unencrypted account number. Because of the likelihood that people illicitly trading in unencrypted account numbers will misuse the information by placing unauthorized charges against consumers' accounts, this practice is deemed abusive and is prohibited under the TSR.

The term "unencrypted" means not only complete, visible account numbers, whether provided in lists or singly, but also encrypted information with a key to decrypt. "Consideration" can take a variety of forms, all of which are aimed at compensating the provider of the account number information. Forms of consideration include cash or other forms of payment for the list up front or after the sale, and payment of a percentage of each "sale" made using the account numbers, among others.

Payment Restrictions on Sales of Credit Repair Services

Credit repair services promise consumers with a bad credit history that they can remove negative information from, or otherwise improve, a consumer's credit history, credit record or credit rating, regardless of whether the information is accurate.

The TSR prohibits sellers and telemarketers from requesting or receiving payment for credit repair services before two events occur:

> One, the time frame during which the seller has promised services will be provided must have expired. Sellers can represent the time frame for the delivery of the services either orally or in writing, including in the contract for the services. If there's a discrepancy between the various representations by the credit repair seller, the longest time frame represented determines when payment may be requested or received.
>
> Two, the seller must provide the consumer with evidence that the improvement promised in the consumer's credit record has been achieved. The evidence must be a consumer report from a consumer reporting agency, issued more than six months after the results were achieved. Nothing in the TSR affects the requirement in the Fair Credit Reporting Act (FCRA) that a consumer report may be obtained only for a specific permissible purpose.

This prohibition is directed at the deceptive marketing and sale of bogus credit repair services; it is not directed at the non-deceptive telemarketing of secured credit cards or legitimate credit monitoring services. No one can permanently remove or "erase" negative entries on a consumer's credit report if the information is accurate and current. Deceptive credit repair services may be able to cause negative credit information to disappear from a consumer's credit report temporarily by flooding a credit bureau with letters disputing the accuracy of the negative entries. But once the credit bureau verifies with creditors that the negative items are accurate, they will reappear on a consumer's credit report and stay there for up to seven years and, in the case of a bankruptcy, for 10 years. If an item is inaccurate, incomplete, or more than seven or 10 years old, consumers can remove or correct the information themselves at no charge if they follow the dispute procedures in the FCRA. Consumers do not need the services of a third party to correct an inaccurate or out-of-date credit report. No one can do anything to "repair" a bad credit report that is accurate and up to date.

Payment Restrictions on Sales of Recovery Services

So-called "recovery services" target consumers who have already been victimized by fraud. In these operations, a deceptive telemarketer calls a consumer who has lost money or failed to receive a promised prize in a previous scam. The recovery room telemarketer falsely promises to recover the lost money or the promised prize, in exchange for a fee paid in advance. But even after the fee is paid, the services promised are not provided. Typically, the consumer never hears from the telemarketer again.

The TSR prohibits any recovery service from asking for or accepting payment for any goods or services claiming to help a consumer recover funds paid in a previous transaction — or to recover anything of value promised to a consumer in a previous transaction — until seven business days after the funds or other items recovered are delivered to the consumer. It doesn't matter whether the previous transaction was a telemarketing transaction or a transaction that took place in other media, like online.

The TSR's restriction on when recovery rooms can ask for and accept payment does not apply to services provided by licensed attorneys.

This prohibition does not cover debt collection services. In fact, debt collection services are not covered by the TSR in general, because they are not "conducted to induce the purchase of goods or services" — a prerequisite for TSR coverage as dictated by the TSR's definition of "telemarketing." Debt collectors must comply with the FTC's Fair Debt Collection Practices Act (FDCPA).

Payment Restrictions on Sales of Advance-Fee Loans

In advance-fee loan schemes, a telemarketer, in exchange for a fee paid in advance, promises to get a loan or a credit card for a consumer or represents a high likelihood of success in getting or arranging a loan or other extension of credit for a consumer, regardless of the consumer's credit history or credit record. After the consumer pays the fee, he or she typically doesn't receive the promised loan or other extension of credit. Advance-fee loans generally are marketed to consumers who have bad credit histories or difficulty getting credit for other reasons. The Rule prohibits sellers and telemarketers who guarantee or represent a high likelihood of success in obtaining or arranging a loan or other extension of credit from asking for or accepting payment until a consumer gets the extension of credit promised.

This prohibition on advance fees for loans or other extensions of credit applies only if sellers and telemarketers guarantee or represent a high likelihood of success in obtaining or arranging for a loan or other extension of credit. Legitimate creditors may offer various extensions of credit through telemarketing and may require an application fee or appraisal fee in advance. There must be no guarantee or representation of a high likelihood that the consumer will obtain the extension of credit. This prohibition in the TSR does not apply to firm, "pre-approved" offers of credit by creditors who properly use a "pre-screened" list in accordance with the FTC staff commentary on the FCRA.

Payment Restrictions on Sales of Debt Relief Services

A debt relief service is a program that claims directly, or implies, that it can renegotiate, settle, or in some way change the terms of a person's debt to an unsecured creditor or debt collector. That includes reducing the balance, interest rates or fees a person owes. These services include debt settlement, debt negotiation, and credit counseling.

The TSR prohibits sellers and telemarketers from requesting or receiving payment for providing debt relief services until three requirements are met:

> You must have renegotiated, settled, reduced or otherwise changed the terms of at least one of the customer’s debts.
>
> Your customer must agree to the settlement agreement, debt management plan, or other result reached with the creditor due to your service. According to the TSR, the agreement from the creditor must be in writing, although your customer may agree to it orally. You can’t take your fee in advance by getting your customer to agree to a blanket “pre-approval” of any settlement you might be able to negotiate in the future.
>
> Your customer must have made at least one payment to the creditor or debt collector as a result of the agreement you negotiated.

It’s illegal to front-load your fees. If your customer has multiple debts enrolled in your program and you’ve settled one of them, you may collect a portion of your full fee — as long as you also have completed the three required steps in connection with that debt. The TSR gives you two options for calculating your fee if your customer has enrolled multiple debts:

> **Proportional fee.** According to the TSR, your fee must “bear the same proportional relationship to the total fee for renegotiating, settling, reducing, or altering the terms of the entire debt balance as the individual debt amount bears to the entire debt amount.” The “individual debt amount” and the “entire debt amount” refer to what your customer owed at the time she enrolled the debt in the service. So if you settle a proportion of a customer’s total debt enrolled with you, you may get that same proportion of your total fee.
>
> **Percentage of savings.** If you base your fee on a percentage of what your customer saved as a result of your service (often called a contingency fee), the percentage you charge must be the same for each of a customer’s debts. Further, the amount saved must be based on the difference between the amount of debt enrolled in the program and the amount of money required to satisfy the debt.

Under the TSR, you may require your customers to set aside your fee and funds to pay debts in a dedicated account as long as:

> the account is held at an insured financial institution;
>
> the customer owns the funds (including any interest accrued), controls them, and can withdraw them at any time;
>
> you don’t own or control the company administering the account or have any affiliation with it;
>
> you don’t split fees with the company administering the account; and
>
> the customer can stop working with you at any time without penalty. If the customer decides to end the relationship with you, you must return the money in the account to the customer within seven business days (minus any fees you’ve earned from the account in compliance with the TSR).

The independent company that administers the account may charge the customer a reasonable fee, but it may not transfer any of the customer’s funds to you — directly or indirectly — until you have renegotiated, settled, reduced, or otherwise changed the terms of at least one of your customer’s debts and met all the related requirements in the TSR.

It’s illegal to provide “substantial assistance” to another company if you know they’re violating the TSR, or if you remain deliberately ignorant of their actions. To avoid liability for facilitating violations of the TSR, companies that administer dedicated accounts should review the policies, procedures and operations of the debt relief providers to ensure they’re complying with the advance fee ban provision of the TSR, including the provision relating to dedicated accounts. As they continue to administer dedicated accounts, companies also should investigate consumer complaints and disputed payments.

Some companies administering dedicated accounts may not be subject to the FTC's jurisdiction, but laws enforced by other government agencies may apply to them.

Recordkeeping Requirements

The TSR requires most sellers and telemarketers to keep certain records that relate to their telemarketing activities. The Rule's recordkeeping requirements do not apply to sellers and telemarketers of nondurable office and cleaning supplies. The following records must be maintained for two years from the date that the record is produced:

- advertising and promotional materials
- information about prize recipients
- sales records
- employee records
- all verifiable authorizations or records of express informed consent or express agreement.

Advertising and Promotional Materials

Sellers and telemarketers must keep at least one specimen copy of all substantially different advertising, brochures, telemarketing scripts, and promotional materials. It's not necessary to keep copies of documents that are virtually identical except for immaterial variations or minor alterations. Obviously, if no scripts or advertising or promotional materials are used in connection with the telemarketing activity, no materials need to be retained.

Information about Prize Recipients

The TSR requires sellers and telemarketers to maintain the name and last known address of each prize recipient, as well as the prize awarded, for all prizes represented to be worth at least $25. The value of a prize is determined by what you directly state or imply to a consumer. If you represent to a consumer — directly or by implication — that a prize is worth $25 or more, you must keep records about the prize recipients, even if the actual value of the prize is less than $25. On the other hand, when there are no direct or implied representations about the value of a prize, you must keep records for prizes that cost you $25 or more to purchase.

Sales Records

The TSR requires sellers and telemarketers to maintain the following information about your sales:

- the name and last known address of each customer;
- the goods or services purchased;
- the date the goods or services were shipped or provided; and
- the amount the customer paid for the goods or services.

Only records relating to actual sales need to be maintained; you are not required to keep records of all customer contacts when customers do not make a purchase.

Consumer credit products: For offers of consumer credit products subject to the TILA and Regulation Z, compliance with the recordkeeping requirements under those regulations is sufficient for compliance with the TSR recordkeeping requirement.

Magazine sales: For the sale of magazines through a fulfillment house — where sellers and telemarketers do not know or have control over the dates of shipment — you may comply with the requirement to keep a record of the shipment date by keeping a record of the date the order was placed with the fulfillment house or the date that the service is to begin.

Employee Records

Sellers and telemarketers must keep employee records for all current and former employees directly involved in telephone sales. These records include the name (and any fictitious name used), the last known home address and telephone number, and the job title(s) of each employee. If fictitious names are used by employees, the TSR requires that each fictitious name be traceable to a specific employee. Businesses must maintain up-to-date information on current employees and last-known information on former employees. Sellers and telemarketers are not required to update information on former employees. In addition, records of individuals not directly involved in telephone sales do not have to be kept for purposes of the TSR. Nevertheless, information like this may be required under other state or federal laws.

Verifiable Authorizations or Records of Express Informed Consent or Express Agreement

When the method of payment is not a credit card (subject to the protections of TILA and Regulation Z), or a debit card (subject to the protections of the EFTA and Regulation E), sellers and telemarketers must obtain a consumer's express verifiable authorization before causing billing information to be submitted for payment. The TSR requires you to maintain a record of all verifiable authorizations that must be provided or received under the TSR. This requirement does not apply to conventional checks, written, signed, and mailed to you by the consumer, or to certain other methods, listed in the section on express verifiable authorization.

Sellers and telemarketers should retain records of the verifiable authorization for each transaction, in any form, manner, or format consistent with the methods of authorization permitted under the TSR. For example, if you obtain a written authorization from the consumer, a copy of it must be maintained; if authorization is by audio recording, a copy of the recording must be maintained. While the recording may be retained in any format, it must include all the information that must be disclosed to the consumer, as well as the consumer's oral authorization. If a consumer gives written confirmation, you must maintain all the information provided in the confirmation.

For records of express informed consent and express agreement (required by the unauthorized billing provision of the TSR [Section 310.4(a)(6)] and the National Do Not Call Registry provision [Section 310.4(b)(1)(iii)(B)(i)]), you must create and maintain records of consent and agreement for each required transaction, and keep them in much the same way you keep such records in the ordinary course of business.

Maintaining Records

The TSR is not intended to impose any new recordkeeping procedures on sellers and telemarketers. You may maintain the records in any manner, format or place that you keep such records in the ordinary course of business, including in electronic storage, on microfiche or on paper.

Who Must Keep Records?

Sellers and telemarketers do not have to keep duplicative records if they have a written agreement allocating responsibility for complying with the recordkeeping requirements. Without a written agreement between the parties, or if the written agreement is unclear as to who must maintain the required records, telemarketers must keep employee records, while sellers must keep the advertising and promotional materials, information on prize recipients, sales records, and verifiable authorizations. In the event of dissolution or termination of the business of a seller or telemarketer, the principal of the business must maintain all records of the business. In the event of a sale, assignment, or other change in ownership of the seller or telemarketer's business, the successor business must maintain the records.

Does the TSR require that other information be maintained concerning the verifiable authorizations? No, but it is sound policy for sellers and telemarketers who use the written confirmation method of authorization for non-debit and credit card payments to maintain records showing that the confirmation was sent to the customer before the customer's billing information was submitted for payment. In addition, you may want to keep records of any refunds you provide to consumers

who claim that the written confirmation was inaccurate. If law enforcement authorities get consumer complaints about unauthorized billing, they may ask the seller or telemarketer to produce the information to show that the TSR requirements were followed.

Who Can Enforce the TSR?

The FTC, the states, and private citizens may bring civil actions in federal district courts to enforce the TSR. State attorneys general or any other officer authorized by the state to bring actions on behalf of its residents may bring actions by the states. Private citizens may bring an action to enforce the TSR if they have suffered $50,000 or more in actual damages.

If state officials or private citizens bring a legal action under the TSR, they must provide written notice of their action to the FTC before filing a complaint, if feasible, or immediately upon filing the action. The notice must include a copy of the complaint and any other pleadings to be filed with the court. Private litigants and state officials should send such notices to:

Office of the Director
Attn: Do Not Call Program Manager
Bureau of Consumer Protection
Federal Trade Commission
Washington, D.C. 20580

State officials also may submit electronic notice, and copies of pleadings, through the Consumer Sentinel website.

Penalties for Violating the Rule

Anyone who violates the TSR is subject to civil penalties of up to $43,792 for each violation. In addition, violators may be subject to nationwide injunctions that prohibit certain conduct, and may be required to pay redress to injured consumers.

The FTC has information available about the following topics at business.ftc.gov.

FTC's Franchise Rule

FTC's 900-Number Rule

FTC's Cooling Off Rule

FTC's Mail or Telephone Order Merchandise Rule

FTC's Negative Option Rule

Continuity Plans

Fair Credit Reporting Act

FTC's Fair Debt Collection Practices Act

The Truth in Lending Act

The FCC has information about the TCPA.

Federal Communications Commission
Consumer & Governmental Affairs Bureau
Complaints & Inquiries Division
445 12th Street, S.W.
Washington, D.C. 20554
email:fccinfo@fcc.gov
fcc.gov

fcc.gov/cgb/complaints.html
1-888-CALL-FCC (1-888-225-5322) voice
1-888-TELL-FCC (1-888-835-5322) TTY

[Note: Edited August 30 2021, to reflect increase in telemarketer fees for the Do Not Call Registry.]

[Note: Edited January, 2021, to reflect Inflation-Adjusted Civil Penalty Maximums.]

[Note: Edited January 30, 2020, to track the language of the Rule and to add examples to the section *Assisting and Facilitating Sellers or Telemarketers Who Violate the TSR is Prohibited* .]

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(b) It is deceptive for an Industry Member to offer or confer an academic, professional, or occupational degree, if the award of such degree has not been Approved by the appropriate State educational agency or Accredited by a nationally recognized accrediting agency, unless it clearly and conspicuously discloses, in all advertising and promotional materials that contain a reference to such degree, that its award has not been Approved or Accredited by such an agency.

(c) It is deceptive for an Industry Member to offer or confer a high school diploma unless the program of instruction to which it pertains is substantially equivalent to that offered by a resident secondary school, and unless the student is informed, by a clear and conspicuous disclosure in writing prior to enrollment, that the Industry Member cannot guarantee or otherwise control the recognition that will be accorded the diploma by institutions of higher education, other schools, or prospective employers, and that such recognition is a matter solely within the discretion of those entities.

[78 FR 68991, Nov. 18, 2013]

§ 254.7 Deceptive sales practices.

(a) It is deceptive for an Industry Member to use advertisements or promotional materials that misrepresent, directly or indirectly, expressly or by implication, that employment is being offered or that a talent hunt or contest is being conducted. For example, captions such as, ''Men/women wanted to train for * * * ,'' ''Help Wanted,'' ''Employment,'' ''Business Opportunities,'' and words or terms of similar import, may falsely convey that employment is being offered and therefore should be avoided.

(b) It is deceptive for an Industry Member to fail to disclose to a prospective student, prior to enrollment, the total cost of the program of instruction and the school's refund policy if the student does not complete the program of instruction.

(c) It is deceptive for an Industry Member to fail to disclose to a prospective student, prior to enrollment, all requirements for successfully completing the course or program of instruction and the circumstances that would constitute grounds for terminating the student's enrollment prior to completion of the program of instruction.

[78 FR 68991, Nov. 18, 2013]

PART 255—GUIDES CONCERNING USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING

Sec.
255.0 Purpose and definitions.
255.1 General considerations.
255.2 Consumer endorsements.
255.3 Expert endorsements.
255.4 Endorsements by organizations.
255.5 Disclosure of material connections.

AUTHORITY: 38 Stat. 717, as amended; 15 U.S.C. 41 - 58.

SOURCE: 74 FR 53138, Oct. 15, 2009, unless otherwise noted.

§ 255.0 Purpose and definitions.

(a) The Guides in this part represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. Specifically, the Guides address the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute. The Guides set forth the general principles that the Commission will use in evaluating endorsements and testimonials, together with examples illustrating the application of those principles. The Guides do not purport to cover every possible use of endorsements in advertising. Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue.

(b) For purposes of this part, an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the

name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.

(c) The Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act and for purposes of this part. The term endorsements is therefore generally used hereinafter to cover both terms and situations.

(d) For purposes of this part, the term product includes any product, service, company or industry.

(e) For purposes of this part, an expert is an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, which knowledge is superior to what ordinary individuals generally acquire.

Example 1: A film critic's review of a movie is excerpted in an advertisement. When so used, the review meets the definition of an endorsement because it is viewed by readers as a statement of the critic's own opinions and not those of the film producer, distributor, or exhibitor. Any alteration in or quotation from the text of the review that does not fairly reflect its substance would be a violation of the standards set by this part because it would distort the endorser's opinion. [*See* §255.1(b).]

Example 2: A TV commercial depicts two women in a supermarket buying a laundry detergent. The women are not identified outside the context of the advertisement. One comments to the other how clean her brand makes her family's clothes, and the other then comments that she will try it because she has not been fully satisfied with her own brand. This obvious fictional dramatization of a real life situation would not be an endorsement.

Example 3: In an advertisement for a pain remedy, an announcer who is not familiar to consumers except as a spokesman for the advertising drug company praises the drug's ability to deliver fast and lasting pain relief. He purports to speak, not on the basis of his own opinions, but rather in the place of and on behalf of the drug company. The announcer's statements would not be considered an endorsement.

Example 4: A manufacturer of automobile tires hires a well-known professional automobile racing driver to deliver its advertising message in television commercials. In these commercials, the driver speaks of the smooth ride, strength, and long life of the tires. Even though the message is not expressly declared to be the personal opinion of the driver, it may nevertheless constitute an endorsement of the tires. Many consumers will recognize this individual as being primarily a racing driver and not merely a spokesperson or announcer for the advertiser. Accordingly, they may well believe the driver would not speak for an automotive product unless he actually believed in what he was saying and had personal knowledge sufficient to form that belief. Hence, they would think that the advertising message reflects the driver's personal views. This attribution of the underlying views to the driver brings the advertisement within the definition of an endorsement for purposes of this part.

Example 5: A television advertisement for a particular brand of golf balls shows a prominent and well-recognized professional golfer practicing numerous drives off the tee. This would be an endorsement by the golfer even though she makes no verbal statement in the advertisement.

Example 6: An infomercial for a home fitness system is hosted by a well-known entertainer. During the infomercial, the entertainer demonstrates the machine and states that it is the most effective and easy-to-use home exercise machine that she has ever tried. Even if she is reading from a script, this statement would be an endorsement, because consumers are likely to believe it reflects the entertainer's views.

Example 7: A television advertisement for a housewares store features a well-known female comedian and a well-known male baseball player engaging in light-hearted banter about products each one intends to purchase for the other. The comedian says that she will buy him a Brand X, portable, high-definition television so he can finally see the strike zone. He says that he will get her a Brand Y juicer so she can make juice with all the fruit and vegetables thrown at her during her performances. The comedian and baseball player are not likely to be deemed endorsers because consumers will likely realize that the individuals are not expressing their own views.

Example 8: A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog's fur noticeably softer and shinier, and that in her opinion,

the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guides.

Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchases and its computer has generated a coupon for a free trial bag of this new brand. Again, her posting would not be deemed an endorsement under the Guides.

Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.

§ 255.1 General considerations.

(a) Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser. [*See* § 255.2(a) and (b) regarding substantiation of representations conveyed by consumer endorsements.

(b) The endorsement message need not be phrased in the exact words of the endorser, unless the advertisement affirmatively so represents. However, the endorsement may not be presented out of context or reworded so as to distort in any way the endorser's opinion or experience with the product. An advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented. An advertiser may satisfy this obligation by securing the endorser's views at reasonable intervals where reasonableness will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors' products, and the advertiser's contract commitments.

(c) When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product. [*See* § 255.1(b) regarding the ''good reason to believe'' requirement.](d)Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers [*see* § 255.5]. Endorsers also may be liable for statements made in the course of their endorsements.

Example 1: A building contractor states in an advertisement that he uses the advertiser's exterior house paint because of its remarkable quick drying properties and durability. This endorsement must comply with the pertinent requirements of § 255.3 (Expert Endorsements). Subsequently, the advertiser reformulates its paint to enable it to cover exterior surfaces with only one coat. Prior to continued use of the contractor's endorsement, the advertiser must contact the contractor in order to determine whether the contractor would continue to specify the paint and to subscribe to the views presented previously.

Example 2: A television advertisement portrays a woman seated at a desk on which rest five unmarked computer keyboards. An announcer says, ''We asked X, an administrative assistant for over ten years, to try these five unmarked keyboards and tell us which one she liked best.''The advertisement portrays X typing on each keyboard and then picking the advertiser's brand. The announcer asks her why, and X gives her reasons. This endorsement would probably not represent that X actually uses the advertiser's keyboard at work. In addition, the endorsement also may be required to meet the standards of § 255.3 (expert endorsements).

Example 3: An ad for an acne treatment features a dermatologist who claims that the product is ''clinically proven'' to work. Before giving the endorsement, she received a write-up of the clinical study in question, which indicates flaws in the design and conduct of the study that are so serious that they preclude any conclusions about the efficacy of the product. The dermatologist is subject to liability for the false statements she made in the advertisement. The advertiser is also liable for misrepresentations made through the endorsement. [*See* Section 255.3 regarding the product evaluation that an expert endorser must conduct.

Example 4: A well-known celebrity appears in an infomercial for an oven roasting bag that purportedly cooks every chicken perfectly in thirty minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the bag. In each attempt, the chicken is undercooked

after thirty minutes and requires sixty minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the oven roasting bag and places the bag in one oven. He then takes a chicken roasting bag from a second oven, removes from the bag what appears to be a perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just thirty minutes, this is the product you need. A significant percentage of consumers are likely to believe the celebrity's statements represent his own views even though he is reading from a script. The celebrity is subject to liability for his statement about the product. The advertiser is also liable for misrepresentations made through the endorsement.

Example 5: A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser's products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition. The advertiser is subject to liability for misleading or unsubstantiated representations made through the blogger's endorsement. The blogger also is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services. [*See* §255.5.]

In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.

§ 255.2 Consumer endorsements.

(a) An advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, *i.e.*, without using endorsements. Consumer endorsements themselves are not competent and reliable scientific evidence.

(b) An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.[105]

(c) Advertisements presenting endorsements by what are represented, directly or by implication, to be ''actual consumers'' should utilize actual

[105] The Commission tested the communication of advertisements containing testimonials that clearly and prominently disclosed either ''Results not typical'' or the stronger ''These testimonials are based on the experiences of a few people and you are not likely to have similar results.''Neither disclosure adequately reduced the communication that the experiences depicted are generally representative. Based upon this research, the Commission believes that similar disclaimers regarding the limited applicability of an endorser's experience to what consumers may generally expect to achieve are unlikely to be effective.

Nonetheless, the Commission cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement. Although the Commission would have the burden of proof in a law enforcement action, the Commission notes that an advertiser possessing reliable empirical testing demonstrating that the net impression of its advertisement with such a disclaimer is non-deceptive will avoid the risk of the initiation of such an action in the first instance.

consumers in both the audio and video, or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.

Example 1: A brochure for a baldness treatment consists entirely of testimonials from satisfied customers who say that after using the product, they had amazing hair growth and their hair is as thick and strong as it was when they were teenagers. The advertiser must have competent and reliable scientific evidence that its product is effective in producing new hair growth.

The ad will also likely communicate that the endorsers' experiences are representative of what new users of the product can generally expect. Therefore, even if the advertiser includes a disclaimer such as, ''Notice: These testimonials do not prove our product works. You should not expect to have similar results,'' the ad is likely to be deceptive unless the advertiser has adequate substantiation that new users typically will experience results similar to those experienced by the testimonialists.

Example 2: An advertisement disseminated by a company that sells heat pumps presents endorsements from three individuals who state that after installing the company's heat pump in their homes, their monthly utility bills went down by $100, $125, and $150, respectively. The ad will likely be interpreted as conveying that such savings are representative of what consumers who buy the company's heat pump can generally expect. The advertiser does not have substantiation for that representation because, in fact, less than 20% of purchasers will save $100 or more. A disclosure such as, ''Results not typical'' or, ''These testimonials are based on the experiences of a few people and you are not likely to have similar results'' is insufficient to prevent this ad from being deceptive because consumers will still interpret the ad as conveying that the specified savings are representative of what consumers can generally expect. The ad is less likely to be deceptive if it clearly and conspicuously discloses the generally expected savings and the advertiser has adequate substantiation that homeowners can achieve those results. There are multiple ways that such a disclosure could be phrased, *e.g.*, ''the average homeowner saves $35 per month,'' ''the typical family saves $50 per month during cold months and $20 per month in warm months,'' or ''most families save 10% on their utility bills.''

Example 3: An advertisement for a cholesterol-lowering product features an individual who claims that his serum cholesterol went down by 120 points and does not mention having made any lifestyle changes. A well-conducted clinical study shows that the product reduces the cholesterol levels of individuals with elevated cholesterol by an average of 15% and the advertisement clearly and conspicuously discloses this fact. Despite the presence of this disclosure, the advertisement would be deceptive if the advertiser does not have adequate substantiation that the product can produce the specific results claimed by the endorser (*i.e.*, a 120-point drop in serum cholesterol without any lifestyle changes).

Example 4: An advertisement for a weight-loss product features a formerly obese woman. She says in the ad, ''Every day, I drank 2 WeightAway shakes, ate only raw vegetables, and exercised vigorously for six hours at the gym. By the end of six months, I had gone from 250 pounds to 140 pounds.''The advertisement accurately describes the woman's experience, and such a result is within the range that would be generally experienced by an extremely overweight individual who consumed WeightAway shakes, only ate raw vegetables, and exercised as the endorser did. Because the endorser clearly describes the limited and truly exceptional circumstances under which she achieved her results, the ad is not likely to convey that consumers who weigh substantially less or use WeightAway under less extreme circumstances will lose 110 pounds in six months. (If the advertisement simply says that the endorser lost 110 pounds in six months using WeightAway together with diet and exercise, however, this description would not adequately alert consumers to the truly remarkable circumstances leading to her weight loss.)The advertiser must have substantiation, however, for any performance claims conveyed by the endorsement (e.g., that WeightAway is an effective weight loss product).

If, in the alternative, the advertisement simply features ''before'' and ''after'' pictures of a woman who says ''I lost 50 pounds in 6 months with WeightAway,'' the ad is likely to convey that her experience is representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (*e.g.*, ''most women who use WeightAway for six months lose at least 15 pounds'').

If the ad features the same pictures but the testimonialist simply says, ''I lost 50 pounds with WeightAway,'' and WeightAway users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (*e.g.*, ''most women who use WeightAway lose 15 pounds'').

Example 5: An advertisement presents the results of a poll of consumers who have used the advertiser's cake mixes as well as their own recipes. The results purport to show that the majority believed that their families could not tell the difference between the

advertised mix and their own cakes baked from scratch. Many of the consumers are actually pictured in the advertisement along with relevant, quoted portions of their statements endorsing the product. This use of the results of a poll or survey of consumers represents that this is the typical result that ordinary consumers can expect from the advertiser's cake mix.

Example 6: An advertisement purports to portray a ''hidden camera'' situation in a crowded cafeteria at breakfast time. A spokesperson for the advertiser asks a series of actual patrons of the cafeteria for their spontaneous, honest opinions of the advertiser's recently introduced breakfast cereal. Even though the words ''hidden camera'' are not displayed on the screen, and even though none of the actual patrons is specifically identified during the advertisement, the net impression conveyed to consumers may well be that these are actual customers, and not actors. If actors have been employed, this fact should be clearly and conspicuously disclosed.

Example 7: An advertisement for a recently released motion picture shows three individuals coming out of a theater, each of whom gives a positive statement about the movie. These individuals are actual consumers expressing their personal views about the movie. The advertiser does not need to have substantiation that their views are representative of the opinions that most consumers will have about the movie. Because the consumers' statements would be understood to be the subjective opinions of only three people, this advertisement is not likely to convey a typicality message.

If the motion picture studio had approached these individuals outside the theater and offered them free tickets if they would talk about the movie on camera afterwards, that arrangement should be clearly and conspicuously disclosed. [*See* §255.5.]

§ 255.3 Expert endorsements.

(a) Whenever an advertisement represents, directly or by implication, that the endorser is an expert with respect to the endorsement message, then the endorser's qualifications must in fact give the endorser the expertise that he or she is represented as possessing with respect to the endorsement.

(b) Although the expert may, in endorsing a product, take into account factors not within his or her expertise (*e.g.*, matters of taste or price), the endorsement must be supported by an actual exercise of that expertise in evaluating product features or characteristics with respect to which he or she is expert and which are relevant to an ordinary consumer's use of or experience with the product and are available to the ordinary consumer. This evaluation must have included an examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement. To the extent that the advertisement implies that the endorsement was based upon a comparison, such comparison must have been included in the expert's evaluation; and as a result of such comparison, the expert must have concluded that, with respect to those features on which he or she is expert and which are relevant and available to an ordinary consumer, the endorsed product is at least equal overall to the competitors' products. Moreover, where the net impression created by the endorsement is that the advertised product is superior to other products with respect to any such feature or features, then the expert must in fact have found such superiority. [*See* §255.1(d) regarding the liability of endorsers.]

Example 1: An endorsement of a particular automobile by one described as an ''engineer'' implies that the endorser's professional training and experience are such that he is well acquainted with the design and performance of automobiles. If the endorser's field is, for example, chemical engineering, the endorsement would be deceptive.

Example 2: An endorser of a hearing aid is simply referred to as ''Doctor'' during the course of an advertisement. The ad likely implies that the endorser is a medical doctor with substantial experience in the area of hearing. If the endorser is not a medical doctor with substantial experience in audiology, the endorsement would likely be deceptive. A non-medical ''doctor'' (e.g., an individual with a Ph.D. in exercise physiology) or a physician without substantial experience in the area of hearing can endorse the product, but if the endorser is referred to as ''doctor,'' the advertisement must make clear the nature and limits of the endorser's expertise.

Example 3: A manufacturer of automobile parts advertises that its products are approved by the ''American Institute of Science.''From its name, consumers would infer that the ''American Institute of Science'' is a bona fide independent testing organization with expertise in judging automobile parts and that, as such, it would not approve any automobile part without first

testing its efficacy by means of valid scientific methods. If the American Institute of Science is not such a bona fide independent testing organization (*e.g.*, if it was established and operated by an automotive parts manufacturer), the endorsement would be deceptive. Even if the American Institute of Science is an independent bona fide expert testing organization, the endorsement may nevertheless be deceptive unless the Institute has conducted valid scientific tests of the advertised products and the test results support the endorsement message.

Example 4: A manufacturer of a non-prescription drug product represents that its product has been selected over competing products by a large metropolitan hospital. The hospital has selected the product because the manufacturer, unlike its competitors, has packaged each dose of the product separately. This package form is not generally available to the public. Under the circumstances, the endorsement would be deceptive because the basis for the hospital's choice—convenience of packaging—is neither relevant nor available to consumers, and the basis for the hospital's decision is not disclosed to consumers.

Example 5: A woman who is identified as the president of a commercial ''home cleaning service'' states in a television advertisement that the service uses a particular brand of cleanser, instead of leading competitors it has tried, because of this brand's performance. Because cleaning services extensively use cleansers in the course of their business, the ad likely conveys that the president has knowledge superior to that of ordinary consumers. Accordingly, the president's statement will be deemed to be an expert endorsement. The service must, of course, actually use the endorsed cleanser. In addition, because the advertisement implies that the cleaning service has experience with a reasonable number of leading competitors to the advertised cleanser, the service must, in fact, have such experience, and, on the basis of its expertise, it must have determined that the cleaning ability of the endorsed cleanser is at least equal (or superior, if such is the net impression conveyed by the advertisement) to that of leading competitors' products with which the service has had experience and which remain reasonably available to it. Because in this example the cleaning service's president makes no mention that the endorsed cleanser was ''chosen,'' ''selected,'' or otherwise evaluated in side-by-side comparisons against its competitors, it is sufficient if the service has relied solely upon its accumulated experience in evaluating cleansers without having performed side-by-side or scientific comparisons.

Example 6: A medical doctor states in an advertisement for a drug that the product will safely allow consumers to lower their cholesterol by 50 points. If the materials the doctor reviewed were merely letters from satisfied consumers or the results of a rodent study, the endorsement would likely be deceptive because those materials are not what others with the same degree of expertise would consider adequate to support this conclusion about the product's safety and efficacy.

§ 255.4 Endorsements by organizations.

Endorsements by organizations, especially expert ones, are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member, and whose judgments are generally free of the sort of subjective factors that vary from individual to individual. Therefore, an organization's endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization. Moreover, if an organization is represented as being expert, then, in conjunction with a proper exercise of its expertise in evaluating the product under § 255.3 (expert endorsements), it must utilize an expert or experts recognized as such by the organization or standards previously adopted by the organization and suitable for judging the relevant merits of such products. [*See* § 255.1(d) regarding the liability of endorsers.]

Example: A mattress seller advertises that its product is endorsed by a chiropractic association. Because the association would be regarded as expert with respect to judging mattresses, its endorsement must be supported by an evaluation by an expert or experts recognized as such by the organization, or by compliance with standards previously adopted by the organization and aimed at measuring the performance of mattresses in general and not designed with the unique features of the advertised mattress in mind.

§ 255.5 Disclosure of material connections.

When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed. For example, when an endorser who appears in a television commercial is neither represented in the advertisement as an expert nor is

known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reason to know or to believe that if the endorsement favored the advertised product some benefit, such as an appearance on television, would be extended to the endorser. Additional guidance, including guidance concerning endorsements made through other media, is provided by the examples below.

Example 1: A drug company commissions research on its product by an outside organization. The drug company determines the overall subject of the research (*e.g.*, to test the efficacy of a newly developed product) and pays a substantial share of the expenses of the research project, but the research organization determines the protocol for the study and is responsible for conducting it. A subsequent advertisement by the drug company mentions the research results as the ''findings'' of that research organization. Although the design and conduct of the research project are controlled by the outside research organization, the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project. Therefore, the advertiser's payment of expenses to the research organization should be disclosed in this advertisement.

Example 2: A film star endorses a particular food product. The endorsement regards only points of taste and individual preference. This endorsement must, of course, comply with §255.1; but regardless of whether the star's compensation for the commercial is a $1 million cash payment or a royalty for each product sold by the advertiser during the next year, no disclosure is required because such payments likely are ordinarily expected by viewers.

Example 3: During an appearance by a well-known professional tennis player on a television talk show, the host comments that the past few months have been the best of her career and during this time she has risen to her highest level ever in the rankings. She responds by attributing the improvement in her game to the fact that she is seeing the ball better than she used to, ever since having laser vision correction surgery at a clinic that she identifies by name. She continues talking about the ease of the procedure, the kindness of the clinic's doctors, her speedy recovery, and how she can now engage in a variety of activities without glasses, including driving at night. The athlete does not disclose that, even though she does not appear in commercials for the clinic, she has a contractual relationship with it, and her contract pays her for speaking publicly about her surgery when she can do so. Consumers might not realize that a celebrity discussing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity's endorsement. Without a clear and conspicuous disclosure that the athlete has been engaged as a spokesperson for the clinic, this endorsement is likely to be deceptive. Furthermore, if consumers are likely to take away from her story that her experience was typical of those who undergo the same procedure at the clinic, the advertiser must have substantiation for that claim.

Assume that instead of speaking about the clinic in a television interview, the tennis player touts the results of her surgery—mentioning the clinic by name—on a social networking site that allows her fans to read in real time what is happening in her life. Given the nature of the medium in which her endorsement is disseminated, consumers might not realize that she is a paid endorser. Because that information might affect the weight consumers give to her endorsement, her relationship with the clinic should be disclosed.

Assume that during that same television interview, the tennis player is wearing clothes bearing the insignia of an athletic wear company with whom she also has an endorsement contract. Although this contract requires that she wear the company's clothes not only on the court but also in public appearances, when possible, she does not mention them or the company during her appearance on the show. No disclosure is required because no representation is being made about the clothes in this context.

Example 4: An ad for an anti-snoring product features a physician who says that he has seen dozens of products come on the market over the years and, in his opinion, this is the best ever. Consumers would expect the physician to be reasonably compensated for his appearance in the ad. Consumers are unlikely, however, to expect that the physician receives a percentage of gross product sales or that he owns part of the company, and either of these facts would likely materially affect the credibility that consumers attach to the endorsement. Accordingly, the advertisement should clearly and conspicuously disclose such a connection between the company and the physician.

Example 5: An actual patron of a restaurant, who is neither known to the public nor presented as an expert, is shown seated at the counter. He is asked for his ''spontaneous'' opinion of a new food product served in the restaurant. Assume, first, that the advertiser had posted a sign on the door of the

restaurant informing all who entered that day that patrons would be interviewed by the advertiser as part of its TV promotion of its new soy protein ''steak.'' This notification would materially affect the weight or credibility of the patron's endorsement, and, therefore, viewers of the advertisement should be clearly and conspicuously informed of the circumstances under which the endorsement was obtained.

Assume, in the alternative, that the advertiser had not posted a sign on the door of the restaurant, but had informed all interviewed customers of the ''hidden camera'' only after interviews were completed and the customers had no reason to know or believe that their response was being recorded for use in an advertisement. Even if patrons were also told that they would be paid for allowing the use of their opinions in advertising, these facts need not be disclosed.

Example 6: An infomercial producer wants to include consumer endorsements for an automotive additive product featured in her commercial, but because the product has not yet been sold, there are no consumer users. The producer's staff reviews the profiles of individuals interested in working as ''extras'' in commercials and identifies several who are interested in automobiles. The extras are asked to use the product for several weeks and then report back to the producer. They are told that if they are selected to endorse the product in the producer's infomercial, they will receive a small payment. Viewers would not expect that these ''consumer endorsers'' are actors who were asked to use the product so that they could appear in the commercial or that they were compensated. Because the advertisement fails to disclose these facts, it is deceptive.

Example 7: A college student who has earned a reputation as a video game expert maintains a personal weblog or ''blog'' where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.

Example 8: An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer's product. Knowledge of this poster's employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.

Example 9: A young man signs up to be part of a ''street team'' program in which points are awarded each time a team member talks to his or her friends about a particular advertiser's products. Team members can then exchange their points for prizes, such as concert tickets or electronics. These incentives would materially affect the weight or credibility of the team member's endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.

PART 259—GUIDE CONCERNING FUEL ECONOMY ADVERTISING FOR NEW AUTOMOBILES

Sec.

259.1 Purpose.
259.2 Definitions.
259.3 Qualifications and disclosures.
259.4 Advertising guidance.

AUTHORITY: 15 U.S.C. 41–58.

SOURCE: 82 FR 43687, Sept. 19, 2017, unless otherwise noted.

§ 259.1 Purpose.

The Guide in this part contains administrative interpretations of laws enforced by the Federal Trade Commission. Specifically, the Guide addresses the application of Section 5 of the FTC Act (15 U.S.C. 45) to the use of fuel economy information in advertising for new automobiles. This guidance provides the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with this Guide may result in corrective action by the Commission under Section

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MADE IN USA STANDARD

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Introduction

The Federal Trade Commission (FTC) is charged with preventing deception and unfairness in the marketplace. The FTC Act gives the Commission the power to bring law enforcement actions against false or misleading claims that a product is of U.S. origin. Traditionally, the Commission has required that a product advertised as *Made in USA* be "all or virtually all" made in the U.S. After a comprehensive review of *Made in USA* and other U.S. origin claims in product advertising and labeling, the Commission announced in December 1997 that it would retain the "all or virtually all" standard. The Commission also issued an Enforcement Policy Statement on U.S. Origin Claims to provide guidance to marketers who want to make an unqualified *Made in USA* claim under the "all or virtually all" standard and those who want to make a qualified *Made in USA* claim.

This publication provides additional guidance about how to comply with the "all or virtually all" standard. It also offers some general information about the U.S. Customs Service's requirement that all products of foreign origin imported into the U.S. be marked with the name of the country of origin.

This publication is the Federal Trade Commission staff's view of the law's requirements. It is not binding on the Commission. The Enforcement Policy Statement issued by the FTC is at the end of the publication.

Basic Information About *Made In USA* Claims

Must U.S. content be disclosed on products sold in the U.S.?

U.S. content must be disclosed on automobiles and textile, wool, and fur products (*see page 15*). There's no law that requires most other products sold in the U.S. to be marked or labeled *Made in USA* or have any other disclosure about their amount of U.S. content. However, manufacturers and marketers who choose to make claims about the amount of U.S. content in their products must comply with the FTC's *Made in USA* policy.

What products does the FTC's *Made in USA* policy apply to?

The policy applies to all products advertised or sold in the U.S., except for those specifically subject to country-of-origin labeling by other laws (*see pages 15-17*). Other countries may have their own country-of-origin marking requirements. As a result, exporters should determine whether the country to which they are exporting imposes such requirements.

What kinds of claims does the Enforcement Policy Statement apply to?

The Enforcement Policy Statement applies to U.S. origin claims that appear on products and labeling, advertising, and other promotional materials. It also applies to all other forms of marketing, including marketing through digital or electronic mechanisms, such as Internet or e-mail.

A *Made in USA* claim can be express or implied.

> **Examples** of express claims: *Made in USA*. "Our products are American-made." "USA."

In identifying implied claims, the Commission focuses on the overall impression of the advertising, label, or promotional material. Depending on the context, U.S. symbols or geographic references (for example, U.S. flags, outlines of U.S. maps, or references to U.S. locations of headquarters or factories) may convey a claim of U.S. origin either by themselves, or in conjunction with other phrases or images.

> **Example:** A company promotes its product in an ad that features a manager describing the "true American quality" of the work produced at the company's American factory. Although there is no express representation that the company's product is made in the U.S., the overall — or net — impression the ad is likely to convey to consumers is that the product is of U.S. origin.

Brand names and trademarks

Ordinarily, the Commission will not consider a manufacturer or marketer's use of an American brand name or trademark by itself as a U.S. origin claim. Similarly, the Commission is not likely to interpret the mere listing of a company's U.S. address on a package label in a non-prominent way as a claim of U.S. origin.

> **Example:** A product is manufactured abroad by a well-known U.S. company. The fact that the company is headquartered in the U.S. also is widely known. Company pamphlets for its foreign-made product prominently feature its brand name. Assuming that the brand name does not specifically denote U.S. origin (that is, the brand name is not "Made in America, Inc."), using the brand name by itself does not constitute a claim of U.S. origin.

Representations about entire product lines

Manufacturers and marketers should not indicate, either expressly or implicitly, that a whole product line is of U.S. origin ("Our products are made in USA") when only some products in the product line are made in the U.S. according to the "all or virtually all" standard.

Does the FTC pre-approve *Made in USA* claims?

The Commission does not pre-approve advertising or labeling claims. A company doesn't need approval from the Commission before making a *Made in USA* claim. As with most other advertising claims, a manufacturer or marketer may make any claim as long as it is truthful and substantiated.

The Standard For Unqualified *Made In USA* Claims

What is the standard for a product to be called *Made in USA* without qualification?

For a product to be called *Made in USA*, or claimed to be of domestic origin without qualifications or limits on the claim, the product must be "all or virtually all" made in the U.S. The term "United States," as referred to in the Enforcement Policy Statement, includes the 50 states, the District of Columbia, and the U.S. territories and possessions.

What does "all or virtually all" mean?

"All or virtually all" means that all significant parts and processing that go into the product must be of U.S. origin. That is, the product should contain no — or negligible — foreign content.

What substantiation is required for a *Made in USA* claim?

When a manufacturer or marketer makes an unqualified claim that a product is *Made in USA*, it should have — and rely on — a "reasonable basis" to support the claim at the time it is made. This means a manufacturer or marketer needs competent and reliable evidence to back up the claim that its product is "all or virtually all" made in the U.S.

What factors does the Commission consider to determine whether a product is "all or virtually all" made in the U.S.?

The product's final assembly or processing must take place in the U.S. The Commission then considers other factors, including how much of the product's total manufacturing costs can be assigned to U.S. parts and processing, and how far removed any foreign content is from the finished product. In some instances, only a small portion of the total manufacturing costs are attributable to foreign processing, but that processing represents a significant amount of the product's overall processing. The same could be true for some foreign parts. In these cases, the foreign content (processing or parts) is more than negligible, and, as a result, unqualified claims are inappropriate.

> **Example:** A company produces propane barbecue grills at a plant in Nevada. The product's major components include the gas valve, burner and aluminum housing, each of which is made in the U.S. The grill's knobs and tubing are imported from Mexico. An unqualified *Made in USA* claim is not likely to be deceptive because the knobs and tubing make up a negligible portion of the product's total manufacturing costs and are insignificant parts of the final product.

Example: A table lamp is assembled in the U.S. from American-made brass, an American-made Tiffany-style lampshade, and an imported base. The base accounts for a small percent of the total cost of making the lamp. An unqualified *Made in USA* claim is deceptive for two reasons: The base is not far enough removed in the manufacturing process from the finished product to be of little consequence and it is a significant part of the final product.

What items should manufacturers and marketers include in analyzing the percentage of domestic content in a particular product?

Manufacturers and marketers should use the cost of goods sold or inventory costs of finished goods in their analysis. Such costs generally are limited to the total cost of all manufacturing materials, direct manufacturing labor, and manufacturing overhead.

Should manufacturers and marketers rely on information from American suppliers about the amount of domestic content in the parts, components, and other elements they buy and use for their final products?

If given in good faith, manufacturers and marketers can rely on information from suppliers about the domestic content in the parts, components, and other elements they produce. Rather than assume that the input is 100 percent U.S.-made, however, manufacturers and marketers would be wise to ask the supplier for specific information about the percentage of U.S. content before they make a U.S. origin claim.

Example: A company manufactures food processors in its U.S. plant, making most of the parts, including the housing and blade, from U.S. materials. The motor, which constitutes 50 percent of the food

processor's total manufacturing costs, is bought from a U.S. supplier. The food processor manufacturer knows that the motor is assembled in a U.S. factory. Even though most of the parts of the food processor are of U.S. origin, the final assembly is in the U.S., and the motor is assembled in the U.S., the food processor is not considered "all or virtually all" American-made if the motor itself is made of imported parts that constitute a significant percentage of the appliance's total manufacturing cost. Before claiming the product is *Made in USA*, this manufacturer should look to its motor supplier for more specific information about the motor's origin.

Example: On its purchase order, a company states: "Our company requires that suppliers certify the percentage of U.S. content in products supplied to us. If you are unable or unwilling to make such certification, we will not purchase from you." Appearing under this statement is the sentence, "We certify that our ___ have at least ___% U.S. content," with space for the supplier to fill in the name of the product and its percentage of U.S. content. The company generally could rely on a certification like this to determine the appropriate country-of-origin designation for its product.

How far back in the manufacturing process should manufacturers and marketers look?

To determine the percentage of U.S. content, manufacturers and marketers should look back far enough in the manufacturing process to be reasonably sure that any significant foreign content has been included in their assessment of foreign costs. Foreign content incorporated early in the manufacturing process often will be less

significant to consumers than content that is a direct part of the finished product or the parts or components produced by the immediate supplier.

> **Example:** The steel used to make a single component of a complex product (for example, the steel used in the case of a computer's floppy drive) is an early input into the computer's manufacture, and is likely to constitute a very small portion of the final product's total cost. On the other hand, the steel in a product like a pipe or a wrench is a direct and significant input. Whether the steel in a pipe or wrench is imported would be a significant factor in evaluating whether the finished product is "all or virtually all" made in the U.S.

Are raw materials included in the evaluation of whether a product is "all or virtually all" made in the U.S.?

It depends on how much of the product's cost the raw materials make up and how far removed from the finished product they are.

> **Example:** If the gold in a gold ring is imported, an unqualified *Made in USA* claim for the ring is deceptive. That's because of the significant value the gold is likely to represent relative to the finished product, and because the gold — an integral component — is only one step back from the finished article. By contrast, consider the plastic in the plastic case of a clock radio otherwise made in the U.S. of U.S.-made components. If the plastic case was made from imported petroleum, a *Made in USA* claim is likely to be appropriate because the petroleum is far enough removed from the finished product, and is an insignificant part of it as well.

Qualified Claims

What is a qualified *Made in USA* claim?

A qualified *Made in USA* claim describes the extent, amount or type of a product's domestic content or processing; it indicates that the product isn't entirely of domestic origin.

> **Example:** "60% U.S. content." "Made in USA of U.S. and imported parts." "Couch assembled in USA from Italian Leather and Mexican Frame."

When is a qualified *Made in USA* claim appropriate?

A qualified *Made in USA* claim is appropriate for products that include U.S. content or processing but don't meet the criteria for making an unqualified *Made in USA* claim. Because even qualified claims may imply more domestic content than exists, manufacturers or marketers must exercise care when making these claims. That is, avoid qualified claims unless the product has a significant amount of U.S. content or U.S. processing. A qualified *Made in USA* claim, like an unqualified claim, must be truthful and substantiated.

> **Example:** An exercise treadmill is assembled in the U.S. The assembly represents significant work and constitutes a "substantial transformation" (a term used by the U.S. Customs Service — *see pages 13-14*). All of the treadmill's major parts, including the motor, frame, and electronic display, are imported. A few of its incidental parts, such as the handle bar covers, the plastic on/off power key, and the treadmill mat, are manufactured in the U.S. Together, these parts account for approximately three percent of the total cost of all the parts. Because the value of the U.S.-made parts is negligible compared to the value of all the parts, a claim on the treadmill that it is "Made in USA of U.S. and Imported Parts" is deceptive. A

claim like "Made in U.S. from Imported Parts" or "Assembled in U.S.A." (*see page 13*) would not be deceptive.

U.S. origin claims for specific processes or parts

Claims that a particular manufacturing or other process was performed in the U.S. or that a particular part was manufactured in the U.S. must be truthful, substantiated, and clearly refer to the specific process or part, not to the general manufacture of the product, to avoid implying more U.S. content than exists.

Manufacturers and marketers should be cautious about using general terms, such as "produced," "created" or "manufactured" in the U.S. Words like these are unlikely to convey a message limited to a particular process. Additional qualification probably is necessary to describe a product that is not "all or virtually all" made in the U.S.

In addition, if a product is of foreign origin (that is, it has been substantially transformed abroad), manufacturers and marketers also should make sure they satisfy Customs' markings statute and regulations that require such products to be marked with a foreign country of origin (*see page 14*). Further, Customs requires the foreign country of origin to be preceded by "Made in," "Product of," or words of similar meaning when any city or location that is not the country of origin appears on the product.

Example: A company designs a product in New York City and sends the blueprint to a factory in Finland for manufacturing. It labels the product "Designed in USA — Made in Finland." Such a specific processing claim would not lead a reasonable consumer to believe that the whole product was made in the U.S. The Customs Service requires the product to be marked "Made in," or "Product of" Finland since the product

is of Finnish origin and the claim refers to the U.S. Examples of other specific processing claims are: "Bound in U.S. — Printed in Turkey." "Hand carved in U.S. — Wood from Philippines." "Software written in U.S. — Disk made in India." "Painted and fired in USA. Blanks made in (foreign country of origin)."

Example: A company advertises its product, which was invented in Seattle and manufactured in Bangladesh, as "Created in USA." This claim is deceptive because consumers are likely to interpret the term "Created" as *Made in USA* — an unqualified U.S. origin claim.

Example: A computer imported from Korea is packaged in the U.S. in an American-made corrugated paperboard box containing only domestic materials and domestically produced expanded rigid polystyrene plastic packing. Stating *Made in USA* on the package would deceive consumers about the origin of the product inside. But the company could legitimately make a qualified claim, such as "Computer Made in Korea — Packaging Made in USA."

Example: The Acme Camera Company assembles its cameras in the U.S. The camera lenses are manufactured in the U.S., but most of the remaining parts are imported. A magazine ad for the camera is headlined "Beware of Imported Imitations" and states "Other high-end camera makers use imported parts made with cheap foreign labor. But at Acme Camera, we want only the highest quality parts for our cameras and we believe in employing American workers. That's why we make all of our lenses right here in the U.S." This ad is likely to convey that more than a specific product part (the lens) is of U.S. origin. The marketer should be prepared to substantiate the broader U.S. origin claim conveyed to consumers viewing the ad.

Comparative Claims

Comparative claims should be truthful and substantiated, and presented in a way that makes the basis for comparison clear (for example, whether the comparison is to another leading brand or to a previous version of the same product). They should truthfully describe the U.S. content of the product and be based on a meaningful difference in U.S. content between the compared products.

> **Example:** An ad for cellular phones states "We use more U.S. content than any other cellular phone manufacturer." The manufacturer assembles the phones in the U.S. from American and imported components and can substantiate that the difference between the U.S. content of its phones and that of the other manufacturers' phones is significant. This comparative claim is not deceptive.

> **Example:** A product is advertised as having "twice as much U.S. content as before." The U.S. content in the product has been increased from 2 percent in the previous version to 4 percent in the current version. This comparative claim is deceptive because the difference between the U.S. content in the current and previous version of the product are insignificant.

Assembled in USA Claims

A product that includes foreign components may be called "Assembled in USA" without qualification when its principal assembly takes place in the U.S. and the assembly is substantial. For the "assembly" claim to be valid, the product's last "substantial transformation" (*see page 14*) also should have occurred in the U.S. That's why a "screwdriver" assembly in the U.S. of foreign components into a final product at the end of the manufacturing process doesn't usually qualify for the "Assembled in USA" claim.

Example: A lawn mower, composed of all domestic parts except for the cable sheathing, flywheel, wheel rims and air filter (15 to 20 percent foreign content) is assembled in the U.S. An "Assembled in USA" claim is appropriate.

Example: All the major components of a computer, including the motherboard and hard drive, are imported. The computer's components then are put together in a simple "screwdriver" operation in the U.S., are not substantially transformed under the Customs Standard, and must be marked with a foreign country of origin. An "Assembled in U.S." claim without further qualification is deceptive.

The FTC and The Customs Service

What is the U.S. Customs Service"s jurisdiction over country-of-origin claims?

The Tariff Act gives Customs and the Secretary of the Treasury the power to administer the requirement that imported goods be marked with a foreign country of origin (for example, "Made in Japan").

When an imported product incorporates materials and/or processing from more than one country, Customs considers the country of origin to be the last country in which a "substantial transformation" took place. Customs defines "substantial transformation" as a manufacturing process that results in a new and different product with a new name, character, and use that is different from that which existed before the change. Customs makes country-of-origin determinations using the "substantial transformation" test on a case-by-case basis. In some instances, Customs uses a "tariff shift" analysis, comparable to "substantial transformation," to determine a product's country of origin.

What is the interaction between the FTC and Customs regarding country-of-origin claims?

Even if Customs determines that an imported product does not need a foreign country-of-origin mark, it is not necessarily permissible to promote that product as *Made in USA*. The FTC considers additional factors to decide whether a product can be advertised or labeled as *Made in USA*.

Manufacturers and marketers should check with Customs to see if they need to mark their products with the foreign country of origin. If they don't, they should look at the FTC's standard to check if they can properly make a *Made in USA* claim.

The FTC has jurisdiction over foreign origin claims on products and in packaging that are beyond the disclosures required by Customs (for example, claims that supplement a required foreign origin marking to indicate where additional processing or finishing of a product occurred).

The FTC also has jurisdiction over foreign origin claims in advertising and other promotional materials. Unqualified U.S. origin claims in ads or other promotional materials for products that Customs requires a foreign country-of-origin mark may mislead or confuse consumers about the product's origin. To avoid misleading consumers, marketers should clearly disclose the foreign manufacture of a product.

> **Example:** A television set assembled in Korea using an American-made picture tube is shipped to the U.S. The Customs Service requires the television set to be marked "Made in Korea" because that's where the television set was last "substantially transformed." The company's World Wide Web page states "Although our televisions are made abroad, they always contain U.S.-made picture tubes." This statement is not deceptive. However, making the statement "All our

picture tubes are made in the USA" — without disclosing the foreign origin of the television's manufacture — might imply a broader claim (for example, that the television set is largely made in the U.S.) than could be substantiated. That is, if the statement and the entire ad imply that any foreign content or processing is negligible, the advertiser must substantiate that claim or net impression. The advertiser in this scenario would not be able to substantiate the implied *Made in USA* claim because the product was "substantially transformed" in Korea.

Other Statutes

What are the requirements of other federal statutes relating to country-of-origin determinations?

Textile Fiber Products Identification Act and Wool Products Labeling Act — Require a *Made in USA* label on most clothing and other textile or wool household products if the final product is manufactured in the U.S. of fabric that is manufactured in the U.S., regardless of where materials earlier in the manufacturing process (for example, the yarn and fiber) came from. Textile products that are imported must be labeled as required by the Customs Service. A textile or wool product partially manufactured in the U.S. and partially manufactured in another country must be labeled to show both foreign and domestic processing.

On a garment with a neck, the country of origin must be disclosed on the front of a label attached to the inside center of the neck — either midway between the shoulder seams or very near another label attached to the inside center of the neck. On a garment without a neck, and on other kinds of textile products, the country of origin must appear on a conspicuous and readily accessible label on the inside or outside of the product.

Catalogs and other mail order promotional materials for textile and wool products, including those disseminated on the Internet, must disclose whether a product is made in the U.S., imported or both.

The Fur Products Labeling Act requires the country of origin of imported furs to be disclosed on all labels and in all advertising. For copies of the Textile, Wool or Fur Rules and Regulations, or the new business education guide on labeling requirements, call the FTC's Consumer Response Center (202-382-4357). Or visit the FTC online at **www.ftc.gov**. Click on Consumer Protection.

American Automobile Labeling Act — Requires that each automobile manufactured on or after October 1, 1994, for sale in the U.S. bear a label disclosing where the car was assembled, the percentage of equipment that originated in the U.S. and Canada, and the country of origin of the engine and transmission. Any representation that a car marketer makes that is required by the AALA is exempt from the Commission's policy. When a company makes claims in advertising or promotional materials that go beyond the AALA requirements, it will be held to the Commission's standard. For more information, call the Consumer Programs Division of the National Highway Traffic Safety Administration (202-366-0846).

Buy American Act — Requires that a product be manufactured in the U.S. of more than 50 percent U.S. parts to be considered *Made in USA* for government procurement purposes. For more information, review the Buy American Act at 41 U.S.C. §§ 10a-10c, the Federal Acquisition Regulations at 48 C.F.R. Part 25, and the Trade Agreements Act at 19 U.S.C. §§ 2501-2582.

What To Do About Violations

What if I suspect noncompliance with the FTC's *Made in USA* standard or other country-of-origin mislabeling?

Information about possible illegal activity helps law enforcement officials target companies whose practices warrant scrutiny. If you suspect noncompliance, you may file a complaint online with the FTC Complaint Assistant at ftc.gov/complaint or send an e-mail to **MUSA@ftc.gov**. If you know about import or export fraud, file a complaint with U.S. Customs and Border Protection at **https://apps.cbp.gov/eallegations/**. Examples of fraudulent practices involving imports include removing a required foreign origin label before the product is delivered to the ultimate purchaser (with or without the improper substitution of a *Made in USA* label) and failing to label a product with a required country of origin.

You also can contact your state Attorney General and your local Better Business Bureau to report a company. Or you can refer your complaint to the National Advertising Division (NAD) of the Council of Better Business Bureaus by calling (212) 754-1320. NAD handles complaints about the truth and accuracy of national advertising. You can reach the Council of Better Business Bureaus on the web at **adweb.com/adassoc17.html**.

Finally, the **Lanham Act** gives any person (such as a competitor) who is damaged by a false designation of origin the right to sue the party making the false claim. Consult a lawyer to see if this private right of action is an appropriate course of action for you.

For More Information

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair business practices in the marketplace and to provide information to help consumers spot, stop, and avoid them. To file a complaint or to get free information on consumer issues, visit **ftc.gov** or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. The FTC enters consumer complaints into the Consumer Sentinel Network, a secure online database and investigative tool used by hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to **www.sba.gov/ombudsman**.

Enforcement Policy Statement on U.S. Origin Claims

I. Introduction

The Federal Trade Commission ("FTC" or "Commission") is issuing this statement to provide guidance regarding its enforcement policy with respect to the use of *Made in USA* and other U.S. origin claims in advertising and labeling. The Commission has determined, as explained below, that unqualified U.S. origin claims should be substantiated by evidence that the product is all or virtually all made in the United States. This statement is intended to elaborate on principles set out in individual cases and advisory opinions previously issued over the course of many years by the Commission. This statement, furthermore, is the culmination of a comprehensive process in which the Commission has reviewed its standard for evaluating U.S. origin claims. Throughout this process, the Commission has solicited, and received, substantial public input on relevant issues. The Commission anticipates that from time to time, it may be in the public interest to solicit further public comment on these issues and to assess whether the views expressed in this statement continue to be appropriate and reflect consumer perception and opinion, and to determine whether there are areas on which the Commission could provide additional guidance.

The principles set forth in this enforcement policy statement apply to U.S. origin claims included in labeling, advertising, other promotional materials, and all other forms of marketing, including marketing through digital or electronic means such as the Internet or electronic mail. The statement, moreover, articulates the Commission's enforcement policy with respect to U.S. origin claims for all products advertised

or sold in the United States, with the exception of those products specifically subject to the country-of-origin labeling requirements of the Textile Fiber Products Identification Act,[1] the Wool Products Labeling Act,[2] or the Fur Products Labeling Act.[3] With respect to automobiles or other passenger motor vehicles, nothing in this enforcement policy statement is intended to affect or alter a marketer's obligation to comply with the requirements of the American Automobile Labeling Act[4] or regulations issued pursuant thereto, and any representation required by that Act to appear on automobile labeling will not be considered a deceptive act or practice for purposes of this enforcement policy statement, regardless of whether the representation appears in labeling, advertising or in other promotional material. Claims about the U.S. origin of passenger motor vehicles other than those representations required by the American Automobile Labeling Act, however, will be governed by the principles set forth in this statement.

II. Background

Both the FTC and the U.S. Customs Service have responsibilities related to the use of country-of-origin claims. While the FTC regulates claims of U.S. origin under its general authority to act against deceptive acts and practices, foreign-origin markings on products (*e.g.*, "Made in Japan") are regulated primarily by the U.S. Customs Service ("Customs" or "the Customs Service") under the Tariff Act of 1930. Specifically, Section 304 of the Tariff Act, 19 U.S.C. § 1304, administered by the Secretary of the Treasury and the Customs Service, requires that all products of foreign origin imported into the United States be marked with the name of a foreign country of origin. Where an imported product incorporates materials and/or processing from more than one country, Customs considers the country of origin to be the last country in which a "substantial transformation"

took place. A substantial transformation is a manufacturing or other process that results in a new and different article of commerce, having a new name, character and use that is different from that which existed prior to the processing. Country-of-origin determinations using the substantial transformation test are made on a case-by-case basis through administrative determinations by the Customs Service.[5]

The FTC also has jurisdiction over foreign origin claims in packaging insofar as they go beyond the disclosures required by the Customs Service (*e.g.*, claims that supplement a required foreign origin marking, so as to represent where additional processing or finishing of a product occurred). In addition, the Commission has jurisdiction over foreign-origin claims in advertising, which the U.S. Customs Service does not regulate.

Where Customs determines that a good is not of foreign origin (*i.e.*, the good undergoes its last substantial transformation in the United States), there is generally no requirement that it be marked with any country of origin. For most goods, neither the Customs Service nor the FTC requires that goods made partially or wholly in the United States be labeled with *Made in USA* or any other indication of U.S. origin.[6] The fact that a product is not required to be marked with a foreign country of origin does not mean that it is permissible to promote that product as *Made in USA.* The FTC will consider additional factors, beyond those considered by the Customs Service in determining whether a product is of foreign origin, in determining whether a product may properly be represented as *Made in USA.*

This statement is intended to address only those issues related to *U.S.* origin claims. In developing appropriate country-of-origin labeling for their products, marketers are urged also to consult the U.S. Customs Service's marking regulations.

III. Interpreting U.s. Origin Claims: The FTC's Deception Analysis

The Commission's authority to regulate U.S. origin claims derives from Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, which prohibits "unfair or deceptive acts or practices." The Commission has set forth its interpretations of its Section 5 authority in its Deception Policy Statement,[7] and its Policy Statement Regarding Advertising Substantiation Doctrine.[8] As set out in the Deception Policy Statement, the Commission will find an advertisement or label deceptive under Section 5, and therefore unlawful, if it contains a representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances, and that representation or omission is material. In addition, objective claims carry with them the implication that they are supported by valid evidence. It is deceptive, therefore, to make a claim unless, at the time the claim is made, the marketer possesses and relies upon a reasonable basis substantiating the claim. Thus, a *Made in USA* claim, like any other objective advertising claim, must be truthful and substantiated.

A representation may be made by either express or implied claims. "*Made in USA*" and "Our products are American made" would be examples of express U.S. origin claims. In identifying implied claims, the Commission focuses on the overall net impression of an advertisement, label, or other promotional material. This requires an examination of both the representation and the overall context, including the juxtaposition of phrases and images, and the nature of the transaction. Depending on the context, U.S. symbols or geographic references, such as U.S. flags, outlines of U.S. maps, or references to U.S. locations of headquarters or factories, may, by themselves or in conjunction with other phrases or images, convey a claim of U.S. origin. For

example, assume that a company advertises its product in an advertisement that features pictures of employees at work at what is identified as the company's U.S. factory, these pictures are superimposed on an image of a U.S. flag, and the advertisement bears the headline "American Quality." Although there is no express representation that the company's product is *Made in USA,* the net impression of the advertisement is likely to convey to consumers a claim that the product is of U.S. origin.

Whether any particular symbol or phrase, including an American flag, conveys an implied U.S. origin claim, will depend upon the circumstances in which the symbol or phrase is used. Ordinarily, however, the Commission will not consider a marketer's use of an American brand name[9] or trademark,[10] without more, to constitute a U.S. origin claim, even though some consumers may believe, in some cases mistakenly, that a product made by a U.S.-based manufacturer is made in the United States. Similarly, the mere listing of a company's U.S. address on a package label, in a nonprominent manner, such as would be required under the Fair Packaging and Labeling Act,[11] is unlikely, without more, to constitute a *Made in USA* claim.

IV. Substantiating U.S. Origin Claims: The "All Or Virtually All" Standard

Based on its review of the traditional use of the term *Made in USA,* and the record as a whole, the Commission concludes that consumers are likely to understand an unqualified U.S. origin claim to mean that the advertised product is "all or virtually all" made in the United States. Therefore, when a marketer makes an unqualified claim that a product is *Made in USA,* it should, at the time the representation is made, possess and rely upon a reasonable basis that the product is in fact all or virtually all made in the United States.[12, 13]

A product that is all or virtually all made in the United States will ordinarily be one in which all significant parts[14] and processing that go into the product are of U.S. origin. In other words, where a product is labeled or otherwise advertised with an unqualified *Made in USA* claim, it should contain only a *de minimis*, or negligible, amount of foreign content. Although there is no single "bright line" to establish when a product is or is not "all or virtually all" made in the United States, there are a number of factors that the Commission will look to in making this determination. To begin with, in order for a product to be considered "all or virtually all" made in the United States, the final assembly or processing of the product must take place in the United States. Beyond this minimum threshold, the Commission will consider other factors, including but not limited to the portion of the product's total manufacturing costs that are attributable to U.S. parts and processing; and how far removed from the finished product any foreign content is.

A. Site of Final Assembly or Processing

The consumer perception evidence available to the Commission indicates that the country in which a product is put together or completed is highly significant to consumers in evaluating where the product is "made." Thus, regardless of the extent of a product's other U.S. parts or processing, in order to be considered all or virtually all made in the United States, it is a prerequisite that the product have been last "substantially transformed" in the United States, as that term is used by the U.S. Customs Service — *i.e.*, the product should not be required to be marked "made in [foreign country]" under 19 U.S.C. § 1304.[15] Furthermore, even where a product is last substantially transformed in the United States, if the product is thereafter assembled or processed (beyond *de minimis* finishing processes) outside the United States, the Commission is unlikely to consider that

product to be all or virtually all made in the United States. For example, were a product to be manufactured primarily in the United States (and last substantially transformed there) but sent to Canada or Mexico for final assembly, any U.S. origin claim should be qualified to disclose the assembly that took place outside the United States.

B. Proportion of U.S. Manufacturing Costs

Assuming the product is put together or otherwise completed in the United States, the Commission will also examine the percentage of the total cost of manufacturing the product that is attributable to U.S. costs (*i.e.*, U.S. parts and processing) and to foreign costs.[16] Where the percentage of foreign content is very low, of course, it is more likely that the Commission will consider the product all or virtually all made in the United States. Nonetheless, there is not a fixed point for all products at which they suddenly become "all or virtually all" made in the United States. Rather, the Commission will conduct this inquiry on a case-by-case basis, balancing the proportion of U.S. manufacturing costs along with the other factors discussed herein, and taking into account the nature of the product and consumers' expectations in determining whether an enforcement action is warranted. Where, for example, a product has an extremely high amount of U.S. content, any potential deception resulting from an unqualified *Made in USA* claim is likely to be very limited, and therefore the costs of bringing an enforcement action challenging such a claim are likely to substantially outweigh any benefit that might accrue to consumers and competition.

C. Remoteness of Foreign Content

Finally, in evaluating whether any foreign content is significant enough to prevent a product from being

considered all or virtually all made in the United States, the Commission will look not only to the percentage of the cost of the product that the foreign content represents, but will also consider how far removed from the finished product the foreign content is. As a general rule, in determining the percentage of U.S. content in its product, a marketer should look far enough back in the manufacturing process that a reasonable marketer would expect that it had accounted for any significant foreign content. In other words, a manufacturer who buys a component from a U.S. supplier, which component is in turn made up of other parts or materials, may not simply assume that the component is 100% U.S. made, but should inquire of the supplier as to the percentage of U.S. content in the component.[17] Foreign content that is incorporated further back in the manufacturing process, however, will often be less significant to consumers than that which constitutes a direct input into the finished product. For example, in the context of a complex product, such as a computer, it is likely to be insignificant that imported steel is used in making one part of a single component (*e.g.*, the frame of the floppy drive). This is because the steel in such a case is likely to constitute a very small portion of the total cost of the computer, and because consumers purchasing a computer are likely, if they are concerned about the origin of the product, to be concerned with the origin of the more immediate inputs (floppy drive, hard drive, CPU, keyboard, etc.) and perhaps the parts that, in turn, make up those inputs. Consumers are less likely to have in mind materials, such as the steel, that are several steps back in the manufacturing process. By contrast, in the context of a product such as a pipe or a wrench for which steel constitutes a more direct and significant input, the fact that the steel is imported is likely to be a significant factor in evaluating whether the finished product is all or virtually all made in the United States. Thus, in some circumstances, there

may be inputs one or two steps back in the manufacturing process that are foreign and there may be other foreign inputs that are much further back in the manufacturing process. Those foreign inputs far removed from the finished product, if not significant, are unlikely to be as important to consumers and change the nature of what otherwise would be considered a domestic product.

In this analysis, raw materials[18] are neither automatically included nor automatically excluded in the evaluation of whether a product is all or virtually all made in the United States. Instead, whether a product whose other parts and processing are of U.S. origin would not be considered all or virtually all made in the United States because the product incorporated imported raw materials depends (as would be the case with any other input) on what percentage of the cost of the product the raw materials constitute and how far removed from the finished product the raw materials are.[19] Thus, were the gold in a gold ring, or the clay used to make a ceramic tile, imported, an unqualified *Made in USA* claim for the ring or tile would likely be inappropriate.[20] This is both because of the significant value the gold and the clay are likely to represent relative to the finished product and because the gold and the clay are only one step back from the finished articles and are integral components of those articles. By contrast, were the plastic in the plastic case of a clock radio that was otherwise all or virtually all made in the United States found to have been made from imported petroleum, the petroleum is far enough removed from, and an insignificant enough input into, the finished product that it would nonetheless likely be appropriate to label the clock radio with an unqualified U.S. origin claim.

V. Qualifying U.S. Origin Claims

A. Qualified U.S. Origin Claims Generally

Where a product is not all or virtually all made in the United States, any claim of U.S. origin should be adequately qualified to avoid consumer deception about the presence or amount of foreign content. In order to be effective, any qualifications or disclosures should be sufficiently clear, prominent, and understandable to prevent deception. Clarity of language, prominence of type size and style, proximity to the claim being qualified, and an absence of contrary claims that could undercut the effectiveness of the qualification, will maximize the likelihood that the qualifications and disclosures are appropriately clear and prominent.

Within these guidelines, the form the qualified claim takes is up to the marketer. A marketer may make any qualified claim about the U.S. content of its products as long as the claim is truthful and substantiated. Qualified claims, for example, may be general, indicating simply the existence of unspecified foreign content (*e.g.*, "Made in USA of U.S. and imported parts") or they may be specific, indicating the amount of U.S. content (*e.g.*, "60% U.S. content"), the parts or materials that are imported (*e.g.*, "Made in USA from imported leather"), or the particular foreign country from which the parts come ("Made in USA from French components").[21]

Where a qualified claim takes the form of a general U.S. origin claim accompanied by qualifying information about foreign content (*e.g.*, "Made in USA of U.S. and imported parts" or "Manufactured in U.S. with Indonesian materials"), the Commission believes that consumers are likely to understand such a claim to mean that, whatever foreign materials or parts the product contains, the last assembly, processing, or finishing of the product occurred in the United States. Marketers therefore should avoid using such

claims unless they can substantiate that this is the case for their products. In particular, such claims should only be made where the product was last substantially transformed in the United States. Where a product was last substantially transformed abroad, and is therefore required by the U.S. Customs Service to be labeled "Made in [foreign country]," it would be inappropriate, and confusing, to use a claim such as "Made in USA of U.S. and imported parts."[22]

B. Claims about Specific Processes or Parts

Regardless of whether a product as a whole is all or virtually all made in the United States, a marketer may make a claim that a particular manufacturing or other process was performed in the United States, or that a particular part was manufactured in the United States, provided that the claim is truthful and substantiated and that reasonable consumers would understand the claim to refer to a specific process or part and not to the general manufacture of the product. This category would include claims such as that a product is "designed" or "painted" or "written" in the United States or that a specific part, *e.g.*, the picture tube in a television, is made in the United States (even if the other parts of the television are not). Although such claims do not expressly disclose that the products contain foreign content, the Commission believes that they are normally likely to be specific enough so as not to convey a general claim of U.S. origin. More general terms, however, such as that a product is, for example, "produced,"or "manufactured" in the United States, are likely to require further qualification where they are used to describe a product that is not all or virtually all made in the United States. Such terms are unlikely to convey to consumers a message limited to a particular process performed, or part manufactured, in the United States. Rather, they are likely to be understood by consumers as

synonymous with *Made in USA* and therefore as unqualified U.S. origin claims.

The Commission further concludes that, in many instances, it will be appropriate for marketers to label or advertise a product as "Assembled in the United States" without further qualification. Because "assembly" potentially describes a wide range of processes, however, from simple, "screwdriver" operations at the very end of the manufacturing process to the construction of a complex, finished item from basic materials, the use of this term may, in some circumstances, be confusing or misleading to consumers. To avoid possible deception, "Assembled in USA" claims should be limited to those instances where the product has undergone its principal assembly in the United States and that assembly is substantial. In addition, a product should be last substantially transformed in the United States to properly use an "Assembled in USA" claim. This requirement ensures against potentially contradictory claims, *i.e.*, a product claiming to be "Assembled in USA" while simultaneously being marked as "Made in [foreign country]." In many instances, this requirement will also be a minimum guarantee that the U.S. assembly operations are substantial.

C. Comparative Claims

U.S. origin claims that contain a comparative statement (*e.g.*, "More U.S. content than our competitor") may be made as long as the claims are truthful and substantiated. Where this is so, the Commission believes that comparative U.S. origin claims are unlikely to be deceptive even where an unqualified U.S. origin claim would be inappropriate. Comparative claims, however, should be presented in a manner that makes the basis for the comparison clear (*e.g.*, whether the comparison is being made to another leading brand or to a previous version of the same product). Moreover, comparative

claims should not be used in a manner that, directly or by implication, exaggerates the amount of U.S. content in the product, and should be based on a meaningful difference in U.S. content between the compared products. Thus, a comparative U.S. origin claim is likely to be deceptive if it is made for a product that does not have a significant amount of U.S. content or does not have significantly more U.S. content than the product to which it is being compared.

D. U.S. Customs Rules and Qualified and Comparative U.S. Origin Claims

It is possible, in some circumstances, for marketers to make certain qualified or comparative U.S. origin claims (including claims such as that the product contains a particular amount of U.S. content, certain claims about the U.S. origin of specific processes or parts, and certain comparative claims) even for products that are last substantially transformed abroad and which therefore must be marked with a foreign country of origin. In making such claims, however, marketers are advised to take care to follow the requirements set forth by the U.S. Customs Service and to ensure, for purposes of Section 5 of the FTC Act, that the claim does not deceptively suggest that the product is made with a greater amount of U.S. parts or processing than is in fact the case.

In looking at the interaction between the requirements for qualified and comparative U.S. origin claims and those for foreign origin marking, the analysis is slightly different for advertising and for labeling. This is a result of the fact that the Tariff Act requires foreign origin markings on articles or their containers, but does not govern claims in advertising or other promotional materials.

Thus, on a product label, where the Tariff Act requires that the product be marked with a foreign country of origin, Customs regulations permit indications of U.S. origin only

when the foreign country of origin appears in close proximity and is at least of comparable size.[23] As a result, under Customs regulations, a product may, for example, be properly marked "Made in Switzerland, finished in U.S." or "Made in France with U.S. parts," but it may not simply be labeled "Finished in U.S." or "Made with U.S. parts" if it is deemed to be of foreign origin.

In advertising or other promotional materials, the Tariff Act does not require that foreign origin be indicated. The Commission recognizes that it may be possible to make a U.S. origin claim in advertising or promotional materials that is sufficiently specific or limited that it does not require an accompanying statement of foreign manufacture in order to avoid conveying a broader and unsubstantiated meaning to consumers. Whether a nominally specific or limited claim will in fact be interpreted by consumers in a limited matter is likely to depend on the connotations of the particular representation being made (*e.g.*, "finished" may be perceived as having a more general meaning than "painted") and the context in which it appears. Marketers who wish to make U.S. origin claims in advertising or other promotional materials without an express disclosure of foreign manufacture for products that are required by Customs to be marked with a foreign country of origin should be aware that consumers may believe the literal U.S. origin statement is implying a broader meaning and a larger amount of U.S. content than expressly represented. Marketers are required to substantiate implied, as well express, material claims that consumers acting reasonably in the circumstances take from the representations. Therefore, the Commission encourages marketers, where a foreign-origin marking is required by Customs on the product itself, to include in any qualified or comparative U.S. origin claim a clear, conspicuous, and understandable disclosure of foreign manufacture.

Endnotes

1. 15 U.S.C. § 70.
2. 15 U.S.C. § 68.
3. 15 U.S.C. § 69.
4. 49 U.S.C. § 32304.
5. For goods from NAFTA countries, determinations are codified in "tariff shift" regulations. 19 C.F.R. § 102.
6. For a limited number of goods, such as textile, wool, and fur products, there are, however, statutory requirements that the U.S. processing or manufacturing that occurred be disclosed. *See*, *e.g.*, Textile Fiber Products Identification Act, 15 U.S.C. § 70(b).
7. Letter from the Commission to the Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983); *reprinted in Cliffdale Associates, Inc.*, 103 F.T.C. 110, appendix (1984).
8. 49 Fed. Reg. 30,999 (1984); *reprinted in Thompson Medical Co.*, 104 F.T.C. 648, appendix (1984).
9. This assumes that the brand name does not specifically denote U.S. origin, *e.g.*, the brand name is not "Made in America, Inc."
10. For example, a legal trademark consisting of, or incorporating, a stylized mark suggestive of a U.S. flag will not, by itself, be considered to constitute a U.S. origin claim.
11. 15 U.S.C. § 1451 *et seq*.
12. For purposes of this Enforcement Policy Statement, "United States" refers to the several states, the District of Columbia, and the territories and possessions of the United States. In other words, an unqualified *Made in USA* claim may be made for a product that is all or virtually all manufactured in U.S. territories or possessions as well as in the 50 states.
13. In addition, marketers should not represent, either expressly or by implication, that a whole product line is of U.S. origin (*e.g.*, "Our products are Made in USA") when only some products in the product line are, in fact, made in the United States. Although not the focus of this Enforcement Policy Statement, this is a principle that has been addressed in Commission cases both within and outside the U.S. origin context. *See*, *e.g.*, *Hyde Athletic Industries*, FTC Docket No. C-3695 (consent order December 4, 1996) (complaint alleged

that respondent represented that all of its footwear was made in the United States, when a substantial amount of its footwear was made wholly in foreign countries); *New Balance Athletic Shoes, Inc.*, FTC Docket No. 9268 (consent order December 2, 1996) (same); *Uno Restaurant Corp.*, FTC Docket No. C-3730 (consent order April 4, 1997) (complaint alleged that restaurant chain represented that its whole line of thin crust pizzas were low fat, when only two of eight pizzas met acceptable limits for low fat claims); *Häagen-Dazs Company, Inc.*, FTC Docket No. C-3582 (consent order June 7, 1995) (complaint alleged that respondent represented that its entire line of frozen yogurt was 98% fat free when only certain flavors were 98% fat free).

14. The word "parts" is used in its general sense throughout this enforcement policy statement to refer to all physical inputs into a product, including but not limited to subassemblies, components, parts, or materials.
15. It is conceivable, for example, that occasionally a product imported into the United States could have a very high proportion of its manufacturing costs be U.S. costs, but is nonetheless not considered by the U.S. Customs Service to have been last substantially transformed in the United States. In such cases, the product would be required to be marked with a foreign country of origin and an unqualified U.S. origin claim could not appropriately be made for the product.
16. In calculating manufacturing costs, manufacturers should ordinarily use as their measure the cost of goods sold or finished goods inventory cost, as those terms are used in accordance with generally accepted accounting principles. Such costs will generally include (and be limited to) the cost of manufacturing materials, direct manufacturing labor, and manufacturing overhead. Marketers should also note the admonishment below that, in determining the percentage of U.S. content, they should look far enough back in the manufacturing process that a reasonable marketer would expect that it had accounted for any significant foreign content.
17. For example, assume that a company manufactures lawn mowers in its U.S. plant, making most of the parts (housing, blade, handle, etc.) itself from U.S. materials. The engine, which constitutes 50% of the total cost of manufacturing the lawn mower, is bought from a U.S. supplier, which, the lawn mower manufacturer knows, assembles the engine in a U.S. factory. Although most of the parts and the final

assembly of the lawn mower are of U.S. origin and the engine is assembled in the United States, the lawn mower will not necessarily be considered all or virtually all made in the United States. This is because the engine itself is made up of various parts that may be imported and that may constitute a significant percentage of the total cost of manufacturing the lawn mower. Thus, before labeling its lawn mower *Made in USA*, the manufacturer should look to its engine supplier for more specific information as to the engine's origin. For instance, were foreign parts to constitute 60% of the cost of producing the engine, then the lawn mower would contain a total of at least 30% foreign content, and an unqualified *Made in USA* label would be inappropriate.

18. For purposes of this Enforcement Policy Statement, the Commission considers raw materials to be products such as minerals, plants or animals that are processed no more than necessary for ordinary transportation.

19. In addition, because raw materials, unlike manufactured inputs, may be inherently unavailable in the United States, the Commission will also look at whether or not the raw material is indigenous to the United States, or available in commercially significant quantities. In cases where the material is not found or grown in the United States, consumers are likely to understand that a *Made in USA* claim on a product that incorporates such materials (*e.g.*, vanilla ice cream that uses vanilla beans, which, the Commission understands, are not grown in the United States) means that all or virtually all of the product, except for those materials not available here, originated in the United States. Nonetheless, even where a raw material is nonindigenous to the United States, if that imported material constitutes the whole or essence of the finished product (*e.g.*, the rubber in a rubber ball or the coffee beans in ground coffee), it would likely mislead consumers to label the final product with an unqualified *Made in USA* claim.

20. Nonetheless, in these examples, other, qualified claims could be used to identify truthfully the domestic processing that took place. For example, if the gold ring was designed and fabricated in the United States, the manufacturer could say that (*e.g.*, "designed and fabricated in U.S. with 14K imported gold"). Similarly, if the ceramic tile were manufactured in the United States from imported clay, the manufacturer could indicate that as well.

21. These examples are intended to be illustrative, not exhaustive; they do not represent the only claims or disclosures that would be permissible under Section 5 of the FTC Act. As indicated, however, qualified claims, like any claim, should be truthful and substantiated and should not overstate the U.S. content of a product. For example, it would be inappropriate for a marketer to represent that a product was "Made in U.S. of U.S. and imported parts" if the overwhelming majority of the parts were imported and only a single, insignificant part was manufactured in the United States; a more appropriate claim would be "Made in U.S. of imported parts."
22. On the other hand, that the last substantial transformation of the product takes place in the United States may not alone be sufficient to substantiate such a claim. For example, under the rulings of the U.S. Customs Service, a disposable razor is considered to have been last substantially transformed where its blade is made, even if it is thereafter assembled in another country. Thus, a disposable razor that is assembled in Mexico with a U.S.-made blade and other parts of various origins would be considered to have been last substantially transformed in the United States and would not have to bear a foreign country-of-origin marking. Nonetheless, because the final assembly of the razor occurs abroad, it would be inappropriate to label the razor "Made in U.S. of U.S. and imported parts." It would, however, likely be appropriate to label the razor "Assembled in Mexico with U.S.-made blade," "Blade made in United States, razor assembled in Mexico" or "Assembled in Mexico with U.S. and imported parts."
23. 19 C.F.R. § 134.46. Specifically, this provision provides that:

    In any case in which the words "United States," or "American," the letters "U.S.A.," any variation of such words or letters, or the name of any city or locality in the United States, or the name of any foreign country or locality other than the country or locality in which the article was manufactured or produced appear on an imported article or its container, and those words, letters or names may mislead or deceive the ultimate purchaser as to the actual country of origin of the article, there shall appear, legibly and permanently, in close proximity to such words, letters or name, and in at least a comparable size, the name of the country of origin preceded by "Made in," "Product of," or other words of similar meaning.

    In a *Federal Register* notice announcing amendments to this provision, the Customs Service indicated that, where a product has a foreign

origin, any references to the United States made in the context of a statement relating to any aspect of the production or distribution of the product (*e.g.*, "Designed in USA," "Made for XYZ Corporation, California, U.S.A.," or "Distributed by ABC, Inc., Colorado, USA") would be considered misleading to the ultimate purchaser and would require foreign country-of-origin marking in accordance with the above provision. 62 Fed. Reg. 44,211, 44,213 (1997).

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Statement of Policy Regarding Comparative Advertising

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(a) *Introduction*

The Commission's staff has conducted an investigation of industry trade associations and the advertising media regarding their comparative advertising policies. In the course of this investigation, numerous industry codes, statements of policy, interpretations and standards were examined. Many of the industry codes and standards contain language that could be interpreted as discouraging the use of comparative advertising. This Policy Statement enunciates the Commission's position that industry self-regulation should not restrain the use by advertisers of truthful comparative advertising.

(b) *Policy Statement*

The Federal Trade Commission has determined that it would be of benefit to advertisers, advertising agencies, broadcasters, and self-regulation entities to restate its current policy concerning comparative advertising.[(1)] Commission policy in the area of comparative advertising encourages the naming of, or reference to competitors, but requires clarity, and, if necessary, disclosure to avoid deception of the consumer. Additionally, the use of truthful comparative advertising should not be restrained by broadcasters or self-regulation entities.

(c) The Commission has supported the use of brand comparisons where the bases of comparison are clearly identified. Comparative advertising, when truthful and non-deceptive, is a source of important information to consumers and assists them in making rational purchase decisions. Comparative advertising encourages product improvement and innovation, and can lead to lower prices in the marketplace. For these reasons, the Commission will continue to scrutinize carefully restraints upon its use.

(1) *Disparagement*

Some industry codes which prohibit practices such as "disparagement," "disparagement of competitors," "improper disparagement," "unfairly attacking," "discrediting," may operate as a restriction on comparative advertising. The Commission has previously held that disparaging advertising is permissible so long as it is truthful and not deceptive. In *Carter Products, Inc.,* 60 F.T.C. 782 modified [1963 trade cases ¶ 70,902], 323 F.2d 523 (5th Cir. 1963), the Commission narrowed an order recommended by the hearing examiner which would have prohibited respondents from disparaging competing products through the use of false or misleading pictures, depictions, or demonstrations, "or otherwise" disparaging such products. In explaining why it eliminated "or otherwise" from the final order, the Commission observed that the phrase would have prevented:

> respondents from making truthful and nondeceptive statements that a product has certain desirable properties or qualities which a competing product or products do not possess. Such a comparison may have the effect of disparaging the competing product, but we know of no rule of law which prevents a seller from honestly informing the public of the advantages of its products as opposed to those of competing products. 60 F.T.C. at 796.

Industry codes which restrain comparative advertising in this manner are subject to challenge by the Federal Trade Commission.

(2) *Substantiation*

On occasion, a higher standard of substantiation by advertisers using comparative advertising has been required by self-regulation entities. The Commission evaluates comparative advertising in the same manner as it evaluates all other advertising techniques. The ultimate question is whether or not the advertising has a tendency or capacity to be false or deceptive. This is a factual issue to be determined on a case-by-case basis. However, industry codes and interpretations that impose a higher standard of substantiation for comparative claims than for unilateral claims are inappropriate and should be revised.

1. For purposes of this Policy Statement, comparative advertising is defined as advertising that compares alternative brands on objectively measurable attributes or price, and identifies the alternative brand by name, illustration or other distinctive information.

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Environmental Claims

Summary of the Green Guides

General Environmental Benefit Claims

- Marketers should not make broad, unqualified general environmental benefit claims like 'green' or 'eco-friendly.' Broad claims are difficult to substantiate, if not impossible.
- Marketers should qualify general claims with specific environmental benefits. Qualifications for any claim should be clear, prominent, and specific.
  - When a marketer qualifies a general claim with a specific benefit, consumers understand the benefit to be significant. As a result, marketers shouldn't highlight small or unimportant benefits.
  - If a qualified general claim conveys that a product has an overall environmental benefit because of a specific attribute, marketers should analyze the trade-offs resulting from the attribute to prove the claim.

Claiming "Green, made with recycled content" may be deceptive if the environmental costs of using recycled content outweigh the environmental benefits of using it.

Carbon Offsets

- Marketers should have competent and reliable scientific evidence to support carbon offset claims. They should use appropriate accounting methods to ensure they measure emission reductions properly and don't sell them more than once.
- Marketers should disclose whether the offset purchase pays for emission reductions that won't occur for at least two years.
- Marketers should not advertise a carbon offset if the law already requires the activity that is the basis of the offset.

Certifications and Seals of Approval

- Certifications and seals may be endorsements. According to the FTC's Endorsement Guides:
  - Marketers should disclose any material connections to the certifying organization. A material connection is one that could affect the credibility of the endorsement.
  - Marketers shouldn't use environmental certifications or seals that don't clearly convey the basis for the certification, because the seals or certifications are likely to convey general environmental benefits.
  - To prevent deception, marketers using seals or certifications that don't convey the basis for the certification should identify, clearly and prominently, specific environmental benefits.

- Marketers can qualify certifications based on attributes that are too numerous to disclose by saying, "Virtually all products impact the environment. For details on which attributes we evaluated, go to [a website that discusses this product]." The marketer should make sure that the website provides the referenced information, and that the information is truthful and accurate.
- A marketer with a third-party certification still must substantiate all express and implied claims.

Compostable

- Marketers who claim a product is compostable need competent and reliable scientific evidence that all materials in the product or package will break down into — or become part of — usable compost safely and in about the same time as the materials with which it is composted.
- Marketers should qualify compostable claims if the product can't be composted at home safely or in a timely way. Marketers also should qualify a claim that a product can be composted in a municipal or institutional facility if the facilities aren't available to a substantial majority of consumers.

Degradable

- Marketers may make an unqualified degradable claim only if they can prove that the "entire product or package will completely break down and return to nature within a reasonably short period of time after customary disposal." The "reasonably short period of time" for complete decomposition of solid waste products? One year.
    - Items destined for landfills, incinerators, or recycling facilities will not degrade within a year, so unqualified biodegradable claims for them shouldn't be made.

Free-of

- Marketers can make a free-of claim for a product that contains some amount of a substance if:
    1. the product doesn't have more than trace amounts or background levels of the substance;
    2. the amount of substance present doesn't cause harm that consumers typically associate with the substance; and
    3. the substance wasn't added to the product intentionally
- It would be deceptive to claim that a product is "free-of" a substance if it is free of one substance but includes another that poses a similar environmental risk.
- If a product doesn't contain a substance, it may be deceptive to claim the product is "free-of" that substance if it never has been associated with that product category.

Non-Toxic

- Marketers who claim that their product is non-toxic need competent and reliable scientific evidence that the product is safe for both people and the environment.

Ozone-Safe and Ozone-Friendly

- It is deceptive to misrepresent that a product is ozone-friendly or safe for the ozone layer or atmosphere.

Recyclable

- Marketers should qualify recyclable claims when recycling facilities are not available to at least 60 percent of the consumers or communities where a product is sold.
- The lower the level of access to appropriate facilities, the more a marketer should emphasize the limited availability of recycling for the product.

If recycling facilities for a product are not available to at least 60 percent of consumers or communities, a marketer can state, "This product may not be recyclable in your area." If recycling facilities for a product are available to only a few consumers, a marketer should use stronger qualifying language: "This product is recyclable only in the few communities that have appropriate recycling programs."

Recycled Content

- Marketers should make recycled content claims only for materials that have been recovered or diverted from the waste stream during the manufacturing process or after consumer use.
- Marketers should qualify claims for products or packages made partly from recycled material – for example, "Made from 30% recycled material."
- Marketers whose products contain used, reconditioned, or re-manufactured components should qualify their recycled content claims clearly and prominently to avoid deception about the components.

Refillable

- Marketers shouldn't make unqualified refillable claims unless they provide a way to refill the package. For example, they can provide a system to collect and refill the package or sell a product consumers can use to refill the original package.

Made with Renewable Energy

- Marketers shouldn't make unqualified renewable energy claims based on energy derived from fossil fuels unless they purchase renewable energy certificates (RECs) to match the energy use.
- Unqualified renewable energy claims may imply that a product is made with recycled content or renewable materials. One way to minimize the risk of misunderstanding is to specify the source of renewable energy clearly and prominently (say, 'wind' or 'solar energy').
- Marketers should not make an unqualified "made with renewable energy" claim unless all, or virtually all, the significant manufacturing processes involved in making the product or package are powered with renewable energy or non-renewable energy, matched by RECs.
- Marketers who generate renewable energy – say, by using solar panels – but sell RECs for all the renewable energy they generate shouldn't claim they "use" renewable energy. Using the term "hosting" would be deceptive in this circumstance.

Made with Renewable Materials

- Unqualified claims about renewable material may imply that a product is recyclable, made with recycled content, or biodegradable. One way to minimize that risk is to identify the material used clearly and prominently, and explain why it is renewable.
- Marketers should qualify renewable materials claims unless an item is made entirely with renewable materials, except for minor and incidental components.

"Our flooring is made from 100% bamboo, which grows at the same rate, or faster, than we use it."

"This package is made from 50% plant-based renewable materials. Because we turn fast-growing plants into bio-plastics, only half of our product is made from petroleum-based materials."

Source Reduction

- Marketers should qualify a claim that a product or package is lower in weight, volume, or toxicity clearly and prominently to avoid deception about the amount of reduction and the basis for comparison. For example, rather than saying the product generates "10 percent less waste," the marketer could say the product generates "10 percent less waste than our previous product."

To view the complete Green Guides, information for business, and legal resources related to environmental marketing, go to business.ftc.gov.