

The Honorable James L. Robart

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION and
STATE OF WASHINGTON,

Plaintiffs,

v.

DEBT SOLUTIONS, INC., a Florida
corporation, also doing business as DSI
Financial, Inc., and Accelerated Financial, Inc.;
DSI FINANCIAL, INC., a Florida corporation,
also doing business as Accelerated Financial,
Inc.; DSI DIRECT, INC., a Florida
corporation; PACIFIC CONSOLIDATION
SERVICES, INC., a Washington corporation,
also doing business as DSI Financial, Inc., and
Accelerated Financial, Inc.; KENNETH
SCHWARTZ, individually and as an officer of
Debt Solutions, Inc., DSI Financial, Inc., and
DSI Direct, Inc.; JENNIFER RUTH
WHALEN, aka Jennifer Ruth Krizan,
individually and as an officer of Pacific
Consolidation Services, Inc., and DSI Direct,
Inc.; DAVID SCHWARTZ, individually and
as a manager of Pacific Consolidation
Services, Inc.; and GREG MOSES,
individually and as a manager of Pacific
Consolidation Services and DSI Direct, Inc.,

Defendants.

Case No. CV06-0298JLR

**STIPULATED FINAL JUDGMENT
AND ORDER FOR PERMANENT
INJUNCTION AND OTHER
EQUITABLE RELIEF AS TO ALL
DEFENDANTS**

This matter comes before the Court on the stipulation of Plaintiffs Federal Trade Commission
("FTC" or "Commission") and the State of Washington ("State"), and Defendants Debt Solutions, Inc.,

1 also doing business as DSI Financial, Inc., and Accelerated Financial, Inc.; DSI Financial, Inc., also
2 doing business as Accelerated Financial, Inc.; DSI Direct, Inc.; Pacific Consolidation Services, Inc.,
3 also doing business as DSI Financial, Inc., and Accelerated Financial, Inc.; Kenneth Schwartz; Jennifer
4 Ruth Whalen; David Schwartz; and Greg Moses (hereafter "Defendants").

5 On March 6, 2006, Plaintiffs jointly filed a Complaint for Injunctive and Other Equitable
6 Relief, including restitution. Plaintiff FTC filed the Complaint under Sections 5(a), 13(b), and 19 of
7 the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a), 53(b), and 57b, and the
8 Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108, and Plaintiff
9 State filed the Complaint under Section 4(a) of the Telemarketing and Consumer Fraud and
10 Abuse Prevention Act, 15 U.S.C. § 6103 (a), the Washington Unfair Business Practices-Consumer
11 Protection Act ("Washington CPA"), Wash.Rev.Code § 19.86.020, and the Washington Commercial
12 Telephone Solicitation Act ("Washington CTSA"), Wash.Rev.Code §19.158. The Plaintiffs also
13 moved for an *Ex Parte* Application for Temporary Restraining Order with Asset Freeze, which
14 application was denied, Order Permitting Limited Expedited Discovery, and Order to Show Cause Why
15 a Preliminary Injunction Should Not Issue pursuant to Rule 65 of the Federal Rules of Civil Procedure.
16 On April 3, 2006, this Court entered a Preliminary Injunction.

17 Now Plaintiffs and Defendants, negotiating through their respective counsel, have agreed to
18 settlement of this action and consent to entry of this Stipulated Final Judgment and Order for
19 Permanent Injunction and Other Equitable Relief ("Order") without adjudication of any issue of fact or
20 law and entry of this Order shall constitute a full, complete, and final settlement of all matters in
21 dispute arising from the Complaint in this action to the date of entry of this Order. The parties further
22 agree that entry of this Order in the docket by the Court will constitute notice to them of the terms and
23 conditions of the Order. Plaintiffs and Defendants, having requested the Court to enter this Order, the
24 Court hereby finds and orders as follows:

25 FINDINGS OF FACT

- 26 1. This Court has jurisdiction over the subject matter of this case and the parties hereto.
27 Venue in the Western District of Washington is proper.
- 28 2. The alleged activities of Defendants are in or affecting commerce, as defined in Section

1 4 of the FTC Act, 15 U.S.C. § 44.

2 3. The allegations of the Complaint support relief against Defendants under Sections 5(a),
3 13(b), and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 53(b), and 57b, the Telemarketing and Consumer
4 Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108, the Washington CPA, Wash. Rev. Code
5 § 19.86.020, and the Washington CTSA, Wash. Rev. Code §19.158, to seek the relief it has requested.

6 4. Plaintiff FTC has the authority under Sections 13(b) and 19 of the FTC Act, 15 U.S.C.
7 §§ 53(b) and 57b, and the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C.
8 §§ 6101-6108, to seek the relief it has requested. Plaintiff State of Washington has the authority under
9 Section 4(a) of the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6103
10 (a), the Washington CPA, Wash. Rev. Code § 19.86.020, and the Washington CTSA, Wash. Rev. Code
11 §19.158, to seek the relief it has requested.

12 5. Defendants have not admitted to liability as to the charges in the Complaint, and their
13 consent to entry of this Order shall not be interpreted to constitute an admission that they have engaged
14 in any violations of any law or regulation.

15 6. Defendants acknowledge that they have read the provisions of this Order and have
16 agreed to abide by them. Defendants consent freely and without coercion to entry of this Stipulated
17 Final Judgment and Order for Permanent Injunction in the interest of settling this litigation, and
18 acknowledge that they understand the provisions of this Order and are prepared to abide by its terms.
19 At all times, Defendants have been represented by counsel, including during the negotiations that led to
20 this Order.

21 7. Defendants waive all rights to seek appellate review or otherwise challenge or contest
22 the validity of this Order.

23 8. Defendants waive and release any claim they may have against the FTC and the State,
24 and their employees, representatives, or agents.

25 9. Defendants waive all rights that may arise under the Equal Access to Justice Act, 28
26 U.S.C. § 2412.

27 10. This Order is remedial in nature and shall not be construed as the payment of a fine,
28 penalty, punitive assessment, or forfeiture.

1 11. Entry of this Order is in the public interest.

2
3 **DEFINITIONS**

4 A. **“Assets”** means any legal or equitable interest in, right to, or claim to any real or
5 personal property including, but not limited to, chattel, goods, instruments, equipment, fixtures, general
6 intangibles, effects, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits,
7 receivables (as those terms are defined in the Uniform Commercial Code), and all cash, wherever
8 located.

9 B. **“Assisting others”** means providing any of the following goods or services to another
10 person: (1) serving as an officer, director, or consultant; (2) performing customer service functions,
11 including, but not limited to, receiving or responding to customer complaints; (3) formulating or
12 providing, or arranging for the formulation or provision of, any script or any other material for
13 communicating with customers or potential customers; (4) providing the names of, or assisting in the
14 generation of, potential customers, including, but not limited to, arranging for the automated delivery
15 of messages to potential customers; (5) performing marketing services of any kind; or (6) providing
16 any other substantial help or aid, while knowing or consciously avoiding knowing that the person
17 receiving assistance is engaged in an act or practice that is prohibited by this Order.

18 C. **“Consumer”** means an actual or potential purchaser, customer, or licensee.

19 D. **“Debt Negotiation or Debt Elimination Product, Service, or Program”** means any
20 product, service, or program that includes or purports to include:

- 21 (1) The receipt of a debtor’s monies, or evidences thereof, for the purpose of
22 distribution among creditors in payment, or partial payment, of the debtor’s
23 obligations; or
24 (2) Acting, or offering or attempting to act, as an intermediary between a debtor and
25 his or her creditors for the purpose of settling, negotiating, or in any way altering
26 the terms of payment of any debt; or
27 (3) Showing or purporting to show consumers how to restructure, consolidate,
28 liquidate, accelerate, settle, or alter the terms of payment of any debt; or

1 (4) Providing any service to a consumer relating to managing his or her debts.

2 E. **“Defendants”** means Debt Solutions, Inc., also doing business as DSI Financial, Inc.,
3 and Accelerated Financial, Inc.; DSI Financial, Inc., also doing business as Accelerated Financial, Inc.;
4 DSI Direct, Inc.; Pacific Consolidation Services, Inc., also doing business as DSI Financial, Inc., and
5 Accelerated Financial, Inc.; Kenneth Schwartz; Jennifer Ruth Whalen; David Schwartz; and Greg
6 Moses, and each of them, by whatever names each might be known.

7 F. **“Document”** is synonymous in meaning and equal in scope to the usage of the term in
8 Federal Rule of Civil Procedure 34(a), and includes writings, drawings, graphs, charts, photographs,
9 audio and video recordings, computer records, and other data compilations from which information can
10 be obtained and translated, if necessary, through detection devices into reasonably usable form. A draft
11 or non-identical copy is a separate document within the meaning of the term.

12 G. **“Person”** means any individual, group, unincorporated association, limited or general
13 partnership, corporation, or other entity.

14 H. **“Telemarketing Sales Rule” or “Rule”** means the FTC Rule entitled “Telemarketing
15 Sales Rule,” 16 C.F.R. § 310.

16 I. **“Telemarketing”** is as defined in 16 C.F.R. § 310.2 (cc).

17 J. **“Outbound telephone call”** is as defined in 16 C.F.R. § 310.2 (u).

18 K. **“Telemarketer”** is as defined in 16 C.F.R. § 310.2 (bb).

19 L. In connection with telemarketing, a **“customer”** means any person who is or may be
20 required to pay for goods or services offered through telemarketing.

21 M. **“Representatives”** means successors, assigns, officers, agents, servants, and employees
22 of Defendants and those persons in active concert or participation with them who receive actual notice
23 of this Order by personal service or otherwise.

24 N. **“Material”** means likely to affect a person’s choice of, or conduct regarding, goods,
25 services, or a charitable contribution.

26 O. **“Clearly and conspicuously” or “clear and conspicuous”** means:

27 (1) In print communications, that the message shall be in a type size and location
28 sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that

1 contrasts with the background against which it appears;

2 (2) In communications disseminated orally, that the message shall be delivered in a
3 volume and cadence sufficient for an ordinary person to hear and comprehend it;

4 (3) In communications made through an electronic medium (such as television,
5 video, radio, and interactive media such as the Internet, online services, and software), that the
6 message shall be presented simultaneously in both the audio and visual portions of the
7 communication;

8 (4) In any communication presented solely through visual or audio means, that the
9 message shall be made through the same means in which the communication is presented:

10 (a) Any audio message shall be delivered in a volume and cadence sufficient
11 for an ordinary consumer to hear and comprehend it, and

12 (b) Any visual message shall be of a size and shade, with a degree of
13 contrast to the background against which it appears and shall appear on
14 the screen for a duration and in a location, sufficiently noticeable for an
15 ordinary consumer to read and comprehend it;

16 Regardless of the medium used to disseminate it, the message shall be in understandable
17 language and syntax. Nothing contrary to, inconsistent with, or in mitigation of, the message shall be
18 used in any communication.

19 P. “National Do Not Call Registry” means the National Do Not Call Registry maintained
20 by the Federal Trade Commission pursuant to 16 C.F.R. § 310.4(b)(1)(iii)(B).

21
22 **I. BAN ON TELEMARKETING OR SALE OF ANY DEBT NEGOTIATION
23 OR DEBT ELIMINATION PRODUCT, SERVICE, OR PROGRAM**

24 **IT IS THEREFORE ORDERED** that Defendants Kenneth Schwartz and Jennifer Whalen are
25 permanently restrained and enjoined from engaging or participating, or assisting others who are
26 engaged or participating, directly or indirectly, or through any business entity or other device, in the
27 telemarketing, advertising, promotion, offering of sale, or sale of any debt negotiation or debt
28 elimination product, program, or service. Nothing in this Order shall be construed as being an

1 exception to this Section.

2
3 **II. PROHIBITIONS AGAINST MATERIAL MISREPRESENTATIONS**

4 **IT IS THEREFORE ORDERED** that Defendants, their officers, agents, servants, and
5 employees, and those persons in active concert or participation with any of them who receive actual
6 notice of this Order by personal service or otherwise, whether acting directly or through any
7 corporation, subsidiary, division, or other device, in connection with the advertising, marketing,
8 promoting, offering for sale, or sale of any debt negotiation or debt elimination product, service, or
9 program, are hereby permanently restrained and enjoined from misrepresenting, or assisting others in
10 misrepresenting, expressly or by implication, orally or in writing, any fact material to a consumer's
11 decision to purchase or accept the good, service, or program, including, but not limited to, the
12 following:

13 A. That consumers who purchase Defendants' product, service, or program will have their
14 credit card or loan interest rates reduced substantially as a result of Defendants negotiating reduced
15 interest rates with consumers' creditors;

16 B. That consumers who purchase Defendants' product, service, or program will save a
17 substantial amount of money in a short time as a result of Defendants negotiating reduced interest rates
18 with consumers' creditors;

19 C. That consumers who purchase Defendants' product, service, or program will be able to
20 pay off their debt substantially faster without increasing their monthly payments as a result of
21 Defendants negotiating reduced interest rates with consumers' creditors;

22 D. That consumers who purchase Defendants' product, service, or program will be able to
23 reduce their monthly payments on their credit cards or loans as a result of Defendants negotiating
24 reduced interest rates with consumers' creditors;

25 E. That Defendants have special relationships and contacts with consumers' credit card
26 companies or lenders that enable them to negotiate lower interest rates for consumers;

27 F. That Defendants' product, services, or program is endorsed or approved by any entity,
28 including, but not limited to, the Financial Standards Council of Canada and the Registered Financial

1 Planners Institute of North America; and

2 G. Any material term, condition, or limitation of a refund, cancellation, exchange, or
3 repurchase policy.

4
5 **III. PROHIBITION AGAINST MATERIAL OMISSIONS**

6 **IT IS FURTHER ORDERED** that Defendants, their officers, agents, servants, and employees,
7 and those persons in active concert or participation with any of them who receive actual notice of this
8 Order by personal service or otherwise, whether acting directly or through any corporation, subsidiary,
9 division, or other device, in connection with the advertising, marketing, promoting, offering for sale, or
10 sale of any debt negotiation or debt elimination product, service, or program, are hereby permanently
11 restrained and enjoined from failing to disclose, clearly and conspicuously, prior to the time when a
12 consumer purchases such product, service, or program, all information material to a consumer's
13 decision to buy the product, service, or program, including, but not limited to, if applicable, that the
14 savings guaranteed to consumers are not the result of Defendants' negotiating reduced interest rates
15 with consumers' creditors but, instead, are achieved over a substantial time period if consumers follow
16 a computer-generated payment schedule over the life of their debt.

17
18 **IV. VIOLATIONS OF THE TELEMARKETING SALES RULE**
19 **PROHIBITED**

20 **IT IS FURTHER ORDERED** that Defendants, their officers, agents, servants, and employees,
21 and those persons in active concert or participation with any of them who receive actual notice of this
22 Order by personal service or otherwise, whether acting directly or through any corporation, subsidiary,
23 division, or other device, in connection with telemarketing, are hereby permanently restrained and
24 enjoined from violating or assisting others to violate any provision of the Telemarketing Sales Rule, 16
25 C.F.R. Part 310, as currently promulgated or as it may hereafter be amended, including, but not limited
26 to:

27 A. Misrepresenting, directly or by implication, any material aspect of the performance,
28 efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer, in

1 violation of Section 310.3(a)(2)(iii) of the Rule, 16 C.F.R. § 310.3(a)(2)(iii), including, but not limited
2 to, the misrepresentations set forth in Section II.A - E;

3 B. Misrepresenting, directly or by implication, a seller's or telemarketer's affiliation with,
4 or endorsement or sponsorship by, any person or government entity, in violation of Section
5 310.3(a)(2)(vii) of the Rule, 16 C.F.R. § 310.3(a)(2)(vii);

6 C. Failing to disclose truthfully, and in a clear and conspicuous manner, before a customer
7 pays for goods and services offered, all the material terms and conditions of a refund, cancellation,
8 exchange, or repurchase policy, if the seller or telemarketer has such a policy and informs the customer
9 about such policy, in violation of Section 310.3(a)(1)(iii) of the Rule, 16 C.F.R. § 310.3(a)(1)(iii);

10 D. In connection with telemarketing, initiating or causing others to initiate an outbound
11 telephone call to a person's telephone number on the National Do Not Call Registry, in violation of
12 Section 310.4(b)(1)(iii)(B) of the Rule, 16 C.F.R. § 310.4(b)(1)(iii)(B);

13 E. In connection with telemarketing, initiating or causing others to initiate an outbound
14 telephone call to a telephone number within a given area code without first paying, either directly or
15 through another person, the required annual fee for access to the telephone numbers within that area
16 code that are included in the National Do Not Call Registry, in violation of Section 310.8 of the Rule,
17 16 C.F.R. § 310.8; and

18 F. In connection with telemarketing, initiating or causing others to initiate an outbound
19 telephone call to any person when that person previously has stated that he or she does not wish to
20 receive an outbound telephone call made by or on behalf of the seller whose goods or services are
21 being offered, in violation of Section 310.4(b)(1)(iii)(A), 16 C.F.R. § 310.4(b)(1)(iii)(A);

22 *Provided, however,* that if the Commission promulgates rules that modify or supercede the
23 Telemarketing Sales Rule, in whole or in part, Defendants shall comply fully and completely with all
24 applicable requirements thereof, after the effective date of any such rules.

25
26 **V. PROHIBITIONS OF VIOLATIONS OF STATE LAW**

27 IT IS FURTHER ORDERED that Defendants, in connection with telemarketing, are hereby
28 permanently restrained and enjoined from violating or assisting others to violate any provision of the

1 Washington CPA and the Washington CTSA, including, but not limited to:

2 A. Misrepresenting, directly or by implication, any material aspect of the performance,
3 efficacy, nature, or central characteristics of goods or services that are the subject of the sales offer, in
4 violation of Wash. Rev. Code §§ 19.86.020 and 158.040 (1), including, but not limited to, the
5 representations set forth in Section I.A - E of this Order;

6 B. Misrepresenting, directly or by implication, a seller's or telemarketer's affiliation with,
7 or endorsement or sponsorship by, any person or government entity, in violation of Wash. Rev. Code
8 §§ 19.86.020 and 158.040 (1);

9 C. Failing to disclose truthfully, and in a clear and conspicuous manner, before a customer
10 pays for goods and services offered, all the material terms and conditions of a refund, cancellation,
11 exchange, or repurchase policy, if the seller or telemarketer has such a policy and informs the
12 consumers about such policy, in violation of Wash. Rev. Code §§ 19.86.020, 158.040 (1), and 158.110
13 (4) and (6);

14 *Provided, however,* that if the Washington CPA or the Washington CTSA is amended, in whole
15 or in part, Defendants shall comply fully and completely with all applicable requirements thereof, after
16 the effective date of any such amendment.

17 18 VI. DISCLOSURE OF CONSUMER DATA

19 **IT IS FURTHER ORDERED** that Defendants and their officers, agents, servants, and
20 employees, and all other persons in active concert or participation with them who receive actual notice
21 of this Order by personal service or otherwise, are permanently restrained and enjoined from selling,
22 renting, leasing, transferring, or otherwise disclosing the name, address, telephone number, credit card
23 number, bank account number, e-mail address, or other identifying information of any person who paid
24 any money to any Defendant to this action, at any time prior to entry of this Order, in connection with
25 the advertising, marketing, promoting, offering for sale, or sale of any debt negotiation or debt
26 elimination product, service, or program, directly or indirectly. *Provided, however,* that Defendants
27 may disclose such identifying information to a law enforcement agency or as required by any law,
28 regulation, or court order.

VII. MONETARY JUDGMENT

IT IS FURTHER ORDERED that:

A. Judgment is entered against Defendants jointly and severally in the amount of \$23,255,420.00. Payment of this amount shall be suspended, subject to the conditions set forth in Section VIII of this Order.

B. In the event that a monetary payment under this Section of this Order becomes due, all funds paid to the Commission shall be deposited into a fund administered by the Commission or its agent to be used for equitable relief, including, but not limited to, consumer restitution and any attendant expenses for the administration of such equitable relief. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after redress is completed, the Commission may apply any remaining funds for such other equitable relief, including consumer information remedies, as it determines to be reasonably related to Defendants' practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited in the United States Treasury as disgorgement. Defendants shall have no right to challenge the Commission's choice of remedies under this Section. No portion of any payments or assets assigned under the judgment herein shall be deemed a payment of any fine, penalty, or punitive assessment.

C. In accordance with 31 U.S.C. § 7701, Defendants are hereby required, unless they have done so already, to furnish to the Commission their respective taxpayer identifying numbers (social security numbers or employer identification numbers) which shall be used for the purposes of collecting and reporting on any delinquent amount arising out of Defendants' relationship with the government.

D. For the purposes of any subsequent proceedings to enforce payments required by this Section of this Order, including, but not limited to, a non-dischargeability action filed in a bankruptcy proceeding, Defendants waive any right to contest the allegations in the Commission's Complaint.

VIII. RIGHT TO REOPEN

1
2 **IT IS FURTHER ORDERED** that, by agreeing to this Order, Defendants reaffirm and attest
3 to the truthfulness, accuracy, and completeness of all of the financial information they provided to the
4 Plaintiffs prior to entry of this Order. Plaintiffs' agreement to this Order is expressly premised upon
5 the truthfulness, accuracy, and completeness of Defendants' financial condition as represented in the
6 financial information that they provided to the Commission, which contains material information upon
7 which Plaintiffs relied in negotiating and agreeing to the terms of this Order. If, upon motion by the
8 Commission, this Court finds that one or more Defendants failed to disclose any material asset, or
9 materially misrepresented the value of any asset, or made any other material misrepresentation in or
10 omission from the financial information they provided to Plaintiffs, the Court shall terminate the
11 suspension of the monetary judgment as to the offending Defendants, and the entire judgment amount
12 of \$23,255,420.00, less any amount already paid to the Commission, shall be immediately due and
13 payable by those Defendants jointly and severally; *provided, however*, that in all other respects this
14 Order shall remain in full force and effect unless otherwise ordered by the Court; and *provided further*,
15 that proceedings instituted under this Section are in addition to and not in lieu of any other civil or
16 criminal remedies as may be provided by law, including any other proceedings Plaintiffs may initiate to
17 enforce this Order. Solely for purposes of this Section, Defendants waive any right to contest any of
18 the allegations in the Plaintiffs' Complaint.

IX. MONITORING COMPLIANCE OF SALES PERSONNEL

19
20 **IT IS FURTHER ORDERED** that Defendants, in connection with any business where (1) a
21 Defendant is the majority owner of the business or directly or indirectly manages or controls the
22 business, and (2) the business is engaged in telemarketing or marketing or assisting others engaged in
23 the advertising, marketing, promoting, offering for sale, or sale of any debt negotiation or debt
24 elimination product, service, or program, are hereby permanently restrained and enjoined from:
25

26 A. Failing to take reasonable steps sufficient to monitor and ensure that all employees and
27 independent contractors engaged in sales or other customer service functions comply with Sections I
28 through VI of this Order. Such steps shall include adequate monitoring of sales presentations or other

1 calls with consumers and shall also include, at a minimum, the following: (1) listening to the oral
2 representations made by persons engaged in sales or other customer service functions; (2) establishing
3 a procedure for receiving and responding to consumer complaints; and (3) ascertaining the number and
4 nature of consumer complaints regarding transactions in which each employee or independent
5 contractor is involved; *provided*, that this Section does not authorize or require Defendants to take any
6 steps that violate any federal, state, or local laws;

7 B. Failing promptly to investigate fully any consumer complaint received by any business
8 to which this Section applies; and

9 C. Failing to take corrective action with respect to any sales person who Defendants
10 determine is not complying with this Order, which may include training, disciplining, and/or
11 terminating such sales person.

12
13 **X. DISTRIBUTION OF ORDER BY DEFENDANTS**

14 **IT IS FURTHER ORDERED** that, for a period of three (3) years from the date of entry of this
15 Order, Defendants shall deliver copies of this Order as directed below:

16 A. **Corporate Defendants:** Defendants Debt Solutions, Inc, DSI Financial, Inc., DSI
17 Direct, Inc., and Pacific Consolidation Services, Inc., shall deliver a copy of this Order to all of their
18 principals, officers, directors, and managers. Defendants Debt Solutions, Inc, DSI Financial, Inc., DSI
19 Direct, Inc., and Pacific Consolidation Services, Inc., also shall deliver a copy of this Order to all of
20 their employees, agents, and representatives who engage in conduct related to the subject matter of this
21 Order. For current personnel, delivery shall be within five (5) days of service of this Order upon
22 Defendants Debt Solutions, Inc, DSI Financial, Inc., DSI Direct, Inc., and Pacific Consolidation
23 Services, Inc. For new personnel, delivery shall occur prior to them assuming their responsibilities.

24 B. **Individual Defendants Kenneth Schwartz, Jennifer Whalen, David Schwartz, and**
25 **Greg Moses as Control Persons:** For any business that Kenneth Schwartz, Jennifer Whalen, David
26 Schwartz, or Greg Moses controls, directly or indirectly, or in which they have a majority ownership
27 interest, such Defendant shall deliver a copy of this Order to all principals, officers, directors, and
28 managers of that business. Such Defendant shall also deliver a copy of this Order to all employees,

1 agents, and representatives of that business who engage in conduct related to the subject matter of this
2 Order. For current personnel, delivery shall be within five (5) days of service of this Order upon
3 defendant Kenneth Schwartz, Jennifer Whalen, David Schwartz, and Greg Moses. For new personnel,
4 delivery shall occur prior to them assuming their responsibilities.

5 **C. Kenneth Schwartz, Jennifer Whalen, David Schwartz, or Greg Moses as Employees**
6 **or Non-Control Persons:** For any business where Kenneth Schwartz, Jennifer Whalen, David
7 Schwartz, or Greg Moses is not a controlling person of said business but otherwise engages in conduct
8 related to the subject matter of this Order, such Defendant shall deliver a copy of this Order to all
9 principals and managers of such business before engaging in such conduct.

10 **D.** Defendants shall secure a signed and dated statement acknowledging receipt of the
11 Order, within thirty (30) days of delivery, from all persons receiving a copy of the Order pursuant to
12 this Section.

13
14 **XI. COMPLIANCE REPORTING BY DEFENDANTS**

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

17 **A.** For a period of three (3) years from the date of entry of this Order,

18 1. Defendants Kenneth Schwartz, Jennifer Whalen, David Schwartz, and Greg
19 Moses shall notify Plaintiffs of the following:

20 a. Any changes in residence, mailing address, and telephone number of
21 Kenneth Schwartz, Jennifer Whalen, David Schwartz, or Greg Moses,
22 within ten (10) days of the date of such change;

23 b. Any changes in employment status (including self-employment) of
24 Kenneth Schwartz, Jennifer Whalen, David Schwartz, or Greg Moses,
25 and any change in the ownership of Debt Solutions, Inc, DSI Financial,
26 Inc., DSI Direct, Inc., or Pacific Consolidation Services, Inc., within ten
27 (10) days of such change. Such notice shall include the name and address
28 of each business that Kenneth Schwartz, Jennifer Whalen, David

1 Schwartz, or Greg Moses, is affiliated with, employed by, creates or
2 forms, or performs services for; a statement of the nature of the business
3 and a statement of Kenneth Schwartz, Jennifer Whalen, David Schwartz,
4 or Greg Moses's, duties and responsibilities in connection with the
5 business or employment;

6 c. Any changes in Kenneth Schwartz, Jennifer Whalen, David Schwartz, or
7 Greg Moses's, names or use of any aliases or fictitious names; and

8 2. Defendants shall notify Plaintiffs of any changes in corporate structure of Debt
9 Solutions, Inc, DSI Financial, Inc., DSI Direct, Inc., and Pacific Consolidation
10 Services, Inc., or any business entity that Kenneth Schwartz, Jennifer Whalen,
11 David Schwartz, or Greg Moses, directly or indirectly controls or has an
12 ownership interest in, that may affect compliance obligations arising under this
13 Order, including, but not limited to, a dissolution, assignment, sale, merger, or
14 other action that would result in the emergence of a successor entity; the creation
15 or dissolution of a subsidiary, parent, or affiliate that engages in any acts or
16 practices subject to this Order; the filing of a bankruptcy petition; or a change in
17 the corporate name or address, at least thirty (30) days prior to such change,
18 *provided* that, with respect to any proposed change in the corporation about
19 which the Defendants learn less than thirty (30) days prior to the date such action
20 is to take place, Defendants shall notify Plaintiffs as soon as is practicable after
21 obtaining such knowledge.

22 B. One hundred eighty (180) days after the date of entry of this Order, Defendants each
23 shall provide a written report to Plaintiffs, sworn to under penalty of perjury, setting
24 forth in detail the manner and form in which they have complied and are complying with
25 this Order. This report shall include, but not be limited to:

26 1. **For Kenneth Schwartz, Jennifer Whalen, David Schwartz, and Greg Moses:**

27 a. Their then-current residence addresses, mailing addresses, and telephone
28 numbers;

b. Their then-current employment and business addresses and telephone numbers, a description of the business activities of each such employer or business, and the title and responsibilities of Kenneth Schwartz, Jennifer Whalen, David Schwartz, or Greg Moses, for each such employer or business; and

c. Any other changes required to be reported under Subparagraph A of this Section.

2. **For All Defendants:**

a. A copy of each acknowledgment of receipt of this Order, obtained pursuant to Section X of this Order; and

b. Any other changes required to be reported under Subparagraph A of this Section.

C. For the purposes of this Order, Defendants shall, unless otherwise directed by Plaintiffs' authorized representatives, mail all written notifications to:

Associate Director of Enforcement
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

Re: *FTC v. Debt Solutions, Inc., et al.*, Civil Action No. C06-10298JLR

D. For purposes of compliance reporting and monitoring required by this Order, Plaintiffs are authorized to communicate directly with Defendants.

XII. RECORD KEEPING PROVISIONS

IT IS FURTHER ORDERED that for a period of six (6) years from the date of entry of this Order, Defendants, and their officers, agents, servants, employees, corporations, successors, and assigns, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, including by facsimile, in connection with any business where: (1) any Defendant is the majority owner of the business, or directly or indirectly manages or controls the business, and (2) the business is engaged in conduct related to the subject matter of this Order, are

1 hereby permanently restrained and enjoined from failing to create and retain the following records:

- 2 A. Accounting records that reflect the cost of goods or services sold, revenues generated,
3 and the disbursement of such revenues;
- 4 B. Personnel records accurately reflecting: the name, address, and telephone number of
5 each person employed in any capacity by such business, including as an independent
6 contractor; that person's job title or position; the date upon which the person
7 commenced work; and the date and reason for the person's termination, if applicable;
- 8 C. Customer files containing the names, addresses, telephone numbers, dollar amounts
9 paid, quantity of items or services purchased, and description of items or services
10 purchased, to the extent such information is obtained in the ordinary course of business;
- 11 D. Complaints and refund requests (whether received directly, indirectly, or through any
12 third party) and any responses to those complaints or requests;
- 13 E. Copies of all sales scripts, training materials, advertisements, or other marketing
14 materials; and
- 15 F. All records and documents necessary to demonstrate full compliance with each provision
16 of this Order, including but not limited to, copies of acknowledgments of receipt of this
17 Order, required by Section X of this Order.

18
19 **XIII. COMPLIANCE MONITORING**

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

22 A. Within ten (10) days of receipt of written notice from a representative of Plaintiffs,
23 Defendants each shall submit additional written reports, sworn to under penalty of perjury; produce
24 documents for inspection and copying; appear for deposition; and/or provide entry during normal
25 business hours to any business location in such Defendant's possession or direct or indirect control to
26 inspect the business operation;

27 B. In addition, Plaintiffs are authorized to monitor compliance with this Order by all lawful
28 means including, but not limited to, the following:

1 FOR PLAINTIFF FEDERAL TRADE COMMISSION:

2
3 s/ Nadine Samter

4 NADINE S. SAMTER, WSBA # 23881
5 DAVID M. HORN, WSBA # 13514
6 ELEANOR DURHAM, Member MD Bar
7 915 Second Avenue, Suite 2896
8 Seattle, Washington 98174
9 (206) 220-6350
10 Fax: (206) 220-6366
11 Email: nsamter@ftc.gov; edurham@ftc.gov; dhorn@ftc.gov

8 FOR PLAINTIFF STATE OF WASHINGTON:

9 ROBERT M. MCKENNA
10 Attorney General


11 s/Jack G. Zurlini, Jr.

12 JACK G. ZURLINI, JR., WSBA # 30621
13 Assistant Attorney General
14 Consumer Protection Division
15 1116 West Riverside Avenue
16 Spokane, WA 99201
17 (509) 458-3538
18 Fax: (509) 458-3548
19 Email: jackz@atg.wa.gov

17 FOR DEFENDANTS:

18
19 Jennifer Whalen, individually and as
20 an officer of Pacific Consolidation Services, Inc.,
21 and DSI Direct, Inc.

22 Kenneth Schwartz, individually and as an officer
23 of Debt Solutions, Inc., DSI Financial, Inc., and
24 DSI Direct, Inc.

25 
26 David Schwartz, individually and as a manager
27 of Pacific Consolidation Services, Inc.

28 Greg Moses, individually and as a manager of
Pacific Consolidation Services, Inc.

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13 DSI Direct, Inc.

14 David Schwartz, individually and as a manager
15 of Pacific Consolidation Services, Inc.

16 Greg Moses, individually and as a manager of
17 Pacific Consolidation Services, Inc.

19 Donald Kellman, WSBA # 15319
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21 680 Rock Pointe Tower
22 Spokane, WA 99201-2354
23 (509) 325-8717
24 Fax: (509) 325-8486
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26 Seymour Glanzer, Pro Hac Vice
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915 Second Ave., S.E. 2896
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1 FOR PLAINTIFF FEDERAL TRADE COMMISSION:

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13 Attorney General

14 s/Jack G. Zurlini, Jr.

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Seattle, WA 98101
12 (206) 623-7292

13 Attorneys for Defendants Debt Solutions, Inc.,
DSI Financial, Inc., DSI Direct, Inc., Pacific
14 Consolidation Services, Inc., Kenneth Schwartz,
Jennifer Whalen, David Schwartz, and Greg Moses

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PART 310—TELEMARKETING SALES RULE

Section Contents

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-

Authority: 15 U.S.C. 6101–6108.

Source: 68 FR 4669, Jan. 29, 2003, unless otherwise noted.

§ 310.1 Scope of regulations in this part.



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

§ 310.2 Definitions.



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

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

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

(d) *Caller identification service* means a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the

telephone call, and displayed on a device in or connected to the subscriber's telephone.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(y) *Prize promotion* means:

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

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

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

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

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

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

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

§ 310.3 Deceptive telemarketing acts or practices.



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

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

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

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer;²

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

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

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

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

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

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

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

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

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

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

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

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

(v) Any material aspect of a prize promotion including, but not limited to, the odds of being able to

receive a prize, the nature or value of a prize, or that a purchase or payment is required to win a prize or to participate in a prize promotion;

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

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

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

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

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

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

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

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

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

(ii) Express oral authorization which is audio-recorded and made available upon request to the customer or donor, and the customer's or donor's bank or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer's or donor's receipt of all of the following information:

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

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

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

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

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

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

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

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

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

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

(c) *Credit card laundering*. Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for:

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

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

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

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

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

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

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

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

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

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

§ 310.4 Abusive telemarketing acts or practices.



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls established to comply with §310.4(b)(1)(iii);

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

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

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

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

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

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

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

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

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

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

(ii) It has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to §310.4(b)(3)(i);

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

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to §310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process;

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

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

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

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

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

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

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

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

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

(d) *Required oral disclosures in the sale of goods or services.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

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

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

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

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

receiving the call, the following information:

- (1) The identity of the charitable organization on behalf of which the request is being made; and
- (2) That the purpose of the call is to solicit a charitable contribution.

[68 FR 4669, Jan. 29, 2003, as amended at 69 FR 16373, Mar. 29, 2004]

§ 310.5 Recordkeeping requirements.



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

- (1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;
- (2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of \$25.00 or more;
- (3) The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;⁸

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

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

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

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

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

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

§ 310.6 Exemptions.



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

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

(1) The sale of pay-per-call services subject to the Commission's Rule entitled "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992," 16 CFR Part 308, *provided*, however, that this exemption does not apply to the requirements of §§310.4(a)(1), (a)(7), (b), and (c);

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

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

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

(5) Telephone calls initiated by a customer or donor in response to an advertisement through any medium, other than direct mail solicitation, *provided*, however, that this exemption does not apply to calls initiated by a customer or donor in response to an advertisement relating to investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or advertisements involving goods or services described in §§310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls;

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

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

§ 310.7 Actions by states and private persons.



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

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

state.

§ 310.8 Fee for access to the National Do Not Call Registry.



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(a) It is a violation of this Rule for any seller to initiate, or cause any telemarketer to initiate, an outbound telephone call to any person whose telephone number is within a given area code unless such seller, either directly or through another person, first has paid the annual fee, required by §310.8(c), for access to telephone numbers within that area code that are included in the National Do Not Call Registry maintained by the Commission under §310.4(b)(1)(iii)(B); *provided*, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§310.4(b)(1)(iii)(B)(*i*) or (*ii*), and the seller does not access the National Do Not Call Registry for any other purpose.

(b) It is a violation of this Rule for any telemarketer, on behalf of any seller, to initiate an outbound telephone call to any person whose telephone number is within a given area code unless that seller, either directly or through another person, first has paid the annual fee, required by §310.8(c), for access to the telephone numbers within that area code that are included in the National Do Not Call Registry; *provided*, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§310.4(b)(1)(iii)(B)(*i*) or (*ii*), and the seller does not access the National Do Not Call Registry for any other purpose.

(c) The annual fee, which must be paid by any person prior to obtaining access to the National Do Not Call Registry, is \$62 per area code of data accessed, up to a maximum of \$17,050; *provided*, however, that there shall be no charge for the first five area codes of data accessed by any person, and *provided further*, that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the National Do Not Call Registry without being required under this Rule, 47 CFR 64.1200, or any other Federal law. Any person accessing the National Do Not Call Registry may not participate in any arrangement to share the cost of accessing the registry, including any arrangement with any telemarketer or service provider to divide the costs to access the registry among various clients of that telemarketer or service provider.

(d) After a person, either directly or through another person, pays the fees set forth in §310.8(c), the person will be provided a unique account number which will allow that person to access the registry data for the selected area codes at any time for twelve months following the first day of the month in which the person paid the fee ("the annual period"). To obtain access to additional area codes of data during the first six months of the annual period, the person must first pay \$62 for each additional area code of data not initially selected. To obtain access to additional area codes of data during the second six months of the annual period, the person must first pay \$31 for each additional area code of data not initially selected. The payment of the additional fee will permit the person to access the additional area codes of data for the remainder of the annual period.

(e) Access to the National Do Not Call Registry is limited to telemarketers, sellers, others engaged in or causing others to engage in telephone calls to consumers, service providers acting on behalf of such persons, and any government agency that has law enforcement authority. Prior to accessing the National Do Not Call Registry, a person must provide the identifying information required by the operator of the registry to collect the fee, and must certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent telephone calls to telephone numbers on the registry. If the person is accessing the registry on behalf of sellers, that person also must identify each of the sellers on whose behalf it is accessing the registry, must provide each seller's unique account number for access to the national registry, and must certify, under penalty of law, that the sellers will be using the information gathered from the registry solely to comply with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on the registry.

[68 FR 45144, July 31, 2003, as amended at 69 FR 45585, July 30, 2004; 70 FR 43280, July 27, 2005; 71 FR 43054, July 31, 2006]

§ 310.9 Severability.



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

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Last updated: February 19, 2007