

HB

339





# FISCAL NOTE

**STATE OF ALASKA**  
**2004 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: CSHB 339(L&C)  
 (H) Publish Date: 2/5/04

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: LAW  
 Title "An Act relating to negative option plans for RDU Civil  
sales, to charges for goods or services..." Component Commercial & Fair Business  
 Sponsor Representative Meyer  
 Requester House Labor & Commerce Component No. \_\_\_\_\_

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

Prepared by: Kathryn A. Daughetee, Director  
 Division Administrative Services  
 Approved by: Kathryn Daughetee for Gregg D. Renkes, Attorney General  
 Agency Department of Law

Phone 465-3673  
 Date/Time 2/1/04 2:16 PM  
 Date 2/1/2004

# FISCAL NOTE

**STATE OF ALASKA**  
**2004 LEGISLATIVE SESSION**

Fiscal Note Number: 2  
 Bill Version: CSHB 339(L&C)  
 (H) Publish Date: 2/5/04

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: DCED  
 Title Trade Practices RDU Banking, Securities & Corp (115)  
 Component Banking, Securities & Corp  
 Sponsor Representative Meyer  
 Requester Labor & Commerce Component No. 1233

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This legislation has no impact on the operations of the Department.

Prepared by: Mark Davis, Director Phone (907) 465-2521  
 Division Banking, Securities & Corporations Date/Time 2/2/04 1:56 PM  
 Approved by: Edgar Blatchford, Commissioner Date 2/2/2004  
 Agency Department of Community & Economic Development

# ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair  
Rep. Tom Anderson, Vice-Chair  
Rep. Jim Holm  
Rep. Dan Ogg  
Rep. Ralph Samuels  
Rep. Les Gara  
Rep. Max Gruenberg



State Capitol, Room 120  
Juneau, AK 99801-1182  
(907) 465-4990  
Fax (907) 465-6592

## House Judiciary Committee

### Memorandum

**To:** Terri Bannister, Leg. Legal  
**From:** Vanessa Tondini, Committee Aide  
House Judiciary Committee  
**Date:** March 25, 2004  
**Re:** CS Request

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Please create a final draft House Judiciary Committee Substitute for work order # 23-LS1265\U, HB 339. The bill was passed out of committee today with no amendments.

If you have any questions, please call me at 4990.

The information attached to this memo is **CONFIDENTIAL** an/or privileged. It is intended to be reviewed initially by only the individual named above. If the reader of this Memorandum is not the intended recipient or a representative of the intended recipient, you are hereby notified that any review, dissemination, or copying of the information contained herein is prohibited. If you have received this in error, please immediately notify the sender by telephone and return this to the sender at the above address.

AMENDMENT

✓ Page 2, line 3

Delete: "(3) a description of the seller's refund, cancellation, exchange, and repurchase policies; and"

Insert: "(3) the right to cancel; and"

✓ Page 2, line 8:

After: "express"

Delete: "written"

Insert: "verifiable"

✓ Page 2, line 9-12

Delete: "The seller shall obtain the written consent on a form prepared by the seller. The form prepared by the seller must include the information required by (b) of this section and the consumer's acknowledgement that the consumer has received and understands the information in the consent."

Insert: A seller who provides goods or services to a consumer for a free trial period has the burden of proving that the seller provided the information required by (b) of this section and that the consumer gave express verifiable consent to the free trial period.

✓ Page 2, line 16

Insert new subsection (e)

(e) If the consumer agrees to a free trial period by telephone, the seller shall comply with the following:

- (1) the seller shall send the consumer an invoice which the consumer may pay or write "cancel" on the invoice and return to the seller;
- (2) the seller shall disclose by telephone the consumer's right to cancel and how to cancel;

- (3) the seller shall record the disclosures required in subsection (b) of this section as well as the consumer's express verifiable consent required by subsection (c) of this section; and
- (4) the seller shall send the consumer written confirmation at least 10 days before charging the consumer's account which will include a telephone number the consumer may use to cancel. The telephone number provided to the consumer to use to cancel must be operative during the consumer's normal business hours.

**Page 2**

**Insert new subsection (f)**

(f) In a free trial period, when a consumer cancels goods or services to be provided after the end of a free trial period, the seller must cancel the billing or credit the consumer's account within 30 days for unused goods or services.

**Page 2**

Re-letter the remaining subsections accordingly

AMENDMENT

**Page 2, line 28**

**Delete:** "written authorization"

**Insert:** "verifiable consent"

**Page 2, line 29**

**After:** "plan"

**Delete:** ". The form of the written authorization must be a statement by the buyer that the buyer received"

**Insert:** ", after the seller has provided"

**Page 3, line 2**

**Delete:** subsection (c)

**Insert:** new subsection (c)

(c) In a telephone sale, the seller shall provide the buyer with a disclosure of all material terms and conditions, including, but not limited to, the fact that the consumer's account will be charged unless the consumer takes an affirmative action to avoid the charges; the date the charge will be submitted for payment, and the specific steps the consumer must take to avoid the charge.

**Page 3, line 11**

**Delete:** subsection (d)

**Insert:** new subsection (d)

(d) In an opt-out marketing plan, when a consumer cancels goods or services, the seller shall cancel the billing or credit the consumer's account within 30 days for unused goods or services.

**Page 3**

**Delete:** subsection (e)

**Insert:** new subsection (e)

(e) A seller who charges a buyer for goods or services under an opt-out marketing plan has the burden of proving the buyer provided the verifiable consent required by (b) of this section and was given the disclosures required by (c) of this section.

**Page 3**

Re-letter next subsection as subsection (f)

**Page 3**

Re-letter next subsection as subsection (g)

# Amendment

Gara

Insert at P. 2 line 24

✓

(g) Within 30 days of the first billing, the consumer must be provided a form that clearly states how the consumer can discontinue service without payment. The form shall provide a ~~space~~ box or other space allowing the consumer to indicate they wish to discontinue service, and must be accompanied by a return envelope.



# REPRESENTATIVE KEVIN MEYER

HOUSE DISTRICT 30

## MEMORANDUM

**DATE:** March 26, 2004  
**TO:** House Judiciary Committee Members  
**FROM:** Representative Kevin Meyer *KM*  
**RE:** Blank Committee Substitute for HB 339 Trade Practices  
Version 23-LS1265\U

Attached to this memo are the blank committee substitute for HB 339 Trade Practices and a memo from legal services regarding the drafting of the committee substitute.

The following changes have been incorporated into the blank committee substitute:

All references to "express written consent" have been deleted and replaced with "express verifiable consent."

Page 2, line 3:

Paragraph (3) was deleted, and the following was inserted as new paragraph (3):

(3) a description of the consumer's right to cancel

Page 2, line 6:

Subsection (c) was deleted, and the following was inserted as new subsection (c):

(c) Before providing goods or services to a consumer for a free trial period, a seller shall obtain express verifiable consent from the consumer to the free trial period.

Page 2, line 8:

Subsection (d) was deleted, and the following was inserted as new subsection (d)

(d) The seller has the burden of proving that the seller provided the required disclosures under (b) of this section and that the consumer gave express verifiable consent to the free trial period under (c) of this section.

Page 2, line 11:

A new subsection (e) was inserted. The new subsection (e) incorporates Rep. Gara's amendment.

Page 3, line 2:

A new subsection (i) was inserted. Subsection (i) defines the word "seller" as it is used in this section.

Page 3, line 10:

The information requirements that the seller must provide to the consumer before obtaining consent are now outlined in paragraphs (1)-(4)

Page 3, line 31

A new paragraph (2) was inserted. Paragraph (2) defines the word "seller" as it is used in this section.

If you have any questions regarding the above changes to HB 339, please do not hesitate to contact my office. This bill will be heard in the House Judiciary Committee on March 29, 2004.

Thank you for your time and consideration of this matter.

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101


State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

March 26, 2004

**SUBJECT:** CSHB 339( ) relating to certain marketing practices  
(Work Order No. 23-LS1265\U)

**TO:** Representative Kevin Meyer  
Attn: Suzanne

**FROM:**  Theresa L. Bannister  
Legislative Counsel

This memo accompanies a draft of the committee substitute described above.

1. Telephone recording requirement. In proposed sec. 45.45.920, this draft does not include the proposed paragraph that requires recording the conversation when the transaction is conducted by telephone. I spoke with Ed Sniffen about other parts of the bill, but did not clarify this material with him. However, from the gist of his comments relating to the telephone provision proposed for sec. 45.45.930, it seemed to me that this recording requirement may not actually be what he wants--in light of the change to "verifiable consent" and the question whether the situation requires that telephone conversations be handled differently. However, if he does want this included, I would suggest making the recording requirement subject to the consent of the consumer. In addition, I have a couple of other questions that I would want to ask about it.
2. Definition of term. Since "express verifiable consent" is an important term in the bill, and since its parameters are not clear, its meaning should be defined or otherwise clearly established in the bill.

If I may be of further assistance, please advise.

TLB:mdr  
04-117.mdr

Enclosure

## SUPPLEMENTAL STATEMENT

Robert B. Flint  
Representing Direct Marketers/Publishers  
Before House Judiciary Committee  
HB 339

March 18, 2004

The following addresses some of the points raised at the hearing regarding regulation of free trial and "opt out marketing" plans ("Trial Plan").

1. Effectiveness of Right to Cancel. A key feature of Trial Plans is the right to cancel after the customer agrees to the Trial Plan. In actual practice, this right is routinely and effectively exercised by consumers. The following are cancellation statistics from actual companies:

<u>Type of Marketer</u>	<u>Percent of Trial, Items Canceled</u>
Books	48

2. Consumer Protection at Initial Contract Stage. To supplement existing Federal Trade Commission regulations and certain state statutes such as the Unwanted Merchandise Act, Direct Marketers have proposed that HB 339 specify that the seller has the burden of proof to establish.

- a. Seller has made required disclosures to customer;
- b. Customer has given express agreement.

A very significant overall additional protection for outbound (seller) telemarketing is the Federal Do Not Call List, now at 57,000,000.

3. Objection. The major stumbling block on the HB 339 proposal is the added restrictions obligations and inflexibility placed on direct marketers after the contract is made. The Attorney General's changes do not conform to actual nationwide business practices.

4. Problems with Special Alaska Conditions. Alaska is a very small market. Its population is about one quarter of one percent of the United States. Alaska cannot drive the national marketing standards the same way as a very large state can. Direct marketing is a discount business where, of course, cost is very important to both seller and consumer. Special conditions for a tiny segment of the national market will raise costs at least for Alaska consumers and cause some sellers to make offers invalid in

HARTIG RHODES HOGE & LEKISCH

MEMO

To: Suzanne Cunningham  
From: Robert B. Flint  
Subject: HB 339  
Date: March 17, 2004

As a follow-up to our phone conversation yesterday on the two points we discussed, (e) is a big concern. The alternative method that Anne provided conforms to actual business practice today and, for outbound (seller) calls, FTC regulations. To require a seller to do all four would be a new requirement on nationwide business for the Alaska market only.

My fear, as I expressed late yesterday, is that some will decide on a cost basis to invalidate offers to Alaska. Alaska is only about one quarter of one percent of the U.S. population. The same problem is present in the amendments the Department of Law put in H.B. 15 last month requiring all periodicals to register and comply with Alaska's Telemarketing Act, AS 45.63, which no other state requires. All the cures proposed for the perceived problem could turn out worse than the problem. I do not think it is the intent to stop or diminish promotional discounting offers to Alaskans.

As to "verifiable" I am not sure what that adds. The ordinary dictionary definition is just some kind of evidence which I believe is automatic anyway since the burden of proof section assumes that. Is something more intended? Black's Law Dictionary says sworn statement.

RBF/art

cc: Anne Darr  
Ed Sniffer  
Kent Dawson



# REPRESENTATIVE KEVIN MEYER

HOUSE DISTRICT 30

## MEMORANDUM

**DATE:** March 26, 2004  
**TO:** House Judiciary Committee Members  
**FROM:** Representative Kevin Meyer *KM*  
**RE:** Blank Committee Substitute *KM* IB 339 Trade Practices  
Version 23-LS1265\U

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(c) Before providing goods or services to a consumer for a free trial period, a seller shall obtain express verifiable consent from the consumer to the free trial period.

Page 2, line 8:

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(d) The seller has the burden of proving that the seller provided the required disclosures under (b) of this section and that the consumer gave express verifiable consent to the free trial period under (c) of this section.

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A new subsection (e) was inserted. The new subsection (e) incorporates Rep. Gara's amendment.

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Thank you for your time and consideration of this matter.

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## MEMORANDUM

March 26, 2004

**SUBJECT:** CSHB 339( ) relating to certain marketing practices  
(Work Order No. 23-LS1265\U)

**TO:** Representative Kevin Meyer  
Attn: Suzanne

**FROM:**  Theresa L. Bannister  
Legislative Counsel

This memo accompanies a draft of the committee substitute described above.

1. Telephone recording requirement. In proposed sec. 45.45.920, this draft does not include the proposed paragraph that requires recording the conversation when the transaction is conducted by telephone. I spoke with Ed Sniffen about other parts of the bill, but did not clarify this material with him. However, from the gist of his comments relating to the telephone provision proposed for sec. 45.45.930, it seemed to me that this recording requirement may not actually be what he wants--in light of the change to "verifiable consent" and the question whether the situation requires that telephone conversations be handled differently. However, if he does want this included, I would suggest making the recording requirement subject to the consent of the consumer. In addition, I have a couple of other questions that I would want to ask about it.

2. Definition of term. Since "express verifiable consent" is an important term in the bill, and since its parameters are not clear, its meaning should be defined or otherwise clearly established in the bill.

If I may be of further assistance, please advise.

TLB:mdr  
04-117.mdr

Enclosure

23-LS1265\U  
Bannister  
3/26/04

**CS FOR HOUSE BILL NO. 339( )**  
**IN THE LEGISLATURE OF THE STATE OF ALASKA**  
**TWENTY-THIRD LEGISLATURE - SECOND SESSION**

**BY**

**Offered:**  
**Referred:**

**Sponsor(s): REPRESENTATIVES MEYER, Dahlstrom, Anderson, Gara**

**A BILL**  
**FOR AN ACT ENTITLED**

1 **"An Act relating to opt-out marketing plans for sales, to free trial periods for goods or**  
2 **services, and to acts that are unlawful as unfair trade practices."**

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 **\* Section 1. AS 45.45 is amended by adding new sections to read:**

5 **Sec. 45.45.920. Free trial period. (a) Notwithstanding a provision in**  
6 **AS 45.02 to the contrary, a seller may not offer, promote, advertise, or provide a**  
7 **consumer with goods or services for a free trial period unless the seller complies with**  
8 **all the conditions of this section.**

9 **(b) When offering, promoting, or advertising consumer goods or services for a**  
10 **free trial period, a seller shall clearly and conspicuously disclose all material terms and**  
11 **conditions of the free trial period, including**

12 **(1) all material restrictions, limitations, terms, and conditions of the**  
13 **free trial period, including any obligation by the consumer to purchase a minimum**  
14 **quantity of goods or services after the free trial period ends;**

1 (2) a description of all charges that will be imposed after the free trial  
2 period ends, including charges for shipping and handling;

3 (3) a description of the consumer's right to cancel; and

4 (4) any other obligations the consumer assumes by accepting or using  
5 the goods or services during the free trial period.

6 (c) Before providing goods or services to a consumer for a free trial period, a  
7 seller shall obtain express verifiable consent from the consumer to the free trial period.

8 (d) The seller has the burden of proving that the seller provided the disclosures  
9 required under (b) of this section and that the consumer gave express verifiable  
10 consent to the free trial period under (c) of this section.

11 (e) If a consumer agrees to a free trial period under (c) of this section, the  
12 seller shall, at least 15 days before charging the consumer's account, send the  
13 consumer a written confirmation that clearly and conspicuously states how the  
14 consumer can cancel or discontinue receiving the product or service without payment  
15 or further obligation. The confirmation form must provide a box or space allowing  
16 the consumer to indicate that the service or product is not wanted, and must be  
17 accompanied by a return envelope. The return envelope is not required if the form is  
18 contained on a card that can be returned without an envelope. The written  
19 confirmation may be sent with, or included on, a billing invoice as long as the  
20 statement explaining how to cancel receiving the product or service is made in a font  
21 size at least as large as the largest font used elsewhere on the invoice.

22 (f) At the end of the free trial period, a seller may not charge a consumer for  
23 any goods or services provided during or otherwise related to the free trial period  
24 unless the seller has complied with (b), (c), and (e) of this section.

25 (g) This section does not apply to a seller who provides goods or services to a  
26 consumer for free if the consumer does not assume any obligation by accepting the  
27 free goods or services.

28 (h) This section does not apply to

29 (1) a telephonic seller who is registered under AS 45.63 and who  
30 complies with AS 45.63; or

31 (2) a prenotification negative option plan that is regulated by 16 C.F.R.

1 425 and that complies with 16 C.F.R. 425.

2 (i) In this section, "seller" means a person who engages in the business of  
3 selling, contracting for the sale, arranging for the sale of, or arranging for a free trial  
4 period for goods or services.

5 **Sec. 45.45.930. Opt-out marketing plans.** (a) Notwithstanding a provision  
6 in AS 45.02 to the contrary, a seller may not use an opt-out marketing plan to sell  
7 goods or services unless the seller complies with all of the provisions of this section.

8 (b) Before using an opt-out marketing plan, a seller shall obtain express  
9 verifiable consent from the buyer that confirms that the buyer agrees to the use of the  
10 plan. The seller shall provide the following information before obtaining the consent:

11 (1) a description of the material terms and conditions of the plan,  
12 including a description of the goods or services that will be offered;

13 (2) that the buyer's account will be charged unless the buyer takes an  
14 affirmative action to avoid the charge;

15 (3) the date the charge will be submitted for payment; and

16 (4) the specific steps the buyer must take to avoid the charge.

17 (c) A seller who charges a buyer for goods or services under an opt-out  
18 marketing plan has the burden of proving that the buyer provided the express  
19 verifiable consent required by (b) of this section and was given the disclosures  
20 required by (b) of this section.

21 (d) This section does not apply to

22 (1) a telephonic seller who is registered under AS 45.63 and who  
23 complies with AS 45.63; or

24 (2) a prenotification negative option plan that is regulated by 16 C.F.R.  
25 425 and that complies with 16 C.F.R. 425.

26 (e) In this section,

27 (1) "opt-out marketing plan" means an arrangement under which a  
28 seller provides an announcement to a buyer that identifies goods or services that the  
29 seller intends to provide to the buyer, unless, by a specific date or within a specific  
30 time frame, the buyer notifies the seller not to provide the goods or services;

31 (2) "seller" includes a person who engages in the business of selling,

1           contracting for the sale of, or arranging for the sale of goods or services.

2   \* Sec. 2. AS 45.50.471(b) is amended by adding new paragraphs to read:

3                   (47) violating AS 45.45.920 (free trial period);

4                   (48) violating AS 45.45.930 (opt-out marketing plans).



# REPRESENTATIVE KEVIN MEYER

HOUSE DISTRICT 30

## MEMORANDUM

**DATE:** March 15, 2004  
**TO:** House Judiciary Committee Members  
**FROM:** Representative Kevin Meyer  
**RE:** Blank Committee Substitute for HB 339

---

Attached to this memo is a blank committee substitute for CS HB 339(L&C). I would like the committee to adopt this committee substitute in lieu of the Labor and Commerce version.

The key changes encompassed in the blank committee substitute are as follows:

1. The "free trial period" section of the bill has been revised so it reads better. Language in subsection (b) was changed to require disclosure of the seller's refund, cancellation, and exchange policy. Also, two parts of the same subsection regarding total charges and shipping and handling have been combined.
2. The heading of AS 45.45.930 has been changed to "Opt-out marketing plans." This change clarifies that this statute is different from the "negative option plan" under federal regulations. It expresses the intent of the legislation more accurately, without confusion about what is required by federal law and the state statute.
3. Two parts of AS 45.45.930 were combined so the bill now requires essentially two things, in regards to the use of opt-out marketing plans:
  - a. Written consent from a buyer to the use of an opt-out plan that includes the disclosure of material terms and conditions of the plan, and
  - b. At least 15 days before the goods or services are provided to the buyer, a seller must send a written notice to the buyer that explains the plan and how the buyer can "opt-out."
4. Both sections of the bill have been amended to add a provision that exempts a telephonic seller who is registered with the state under the Alaska Telephonic Solicitation Act, or anyone subject to regulation under 16 C.F.R. 425.

Thank you for your time and consideration of this matter. If you have questions prior to the committee hearing, feel free to contact my office.

23-LS1265VS  
Bannister  
3/5/04

**CS FOR HOUSE BILL NO. 339( )**

**IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-THIRD LEGISLATURE - SECOND SESSION**

**BY**

**Offered:  
Referred:**

**Sponsor(s): REPRESENTATIVES MEYER, Dahlstrom, Anderson**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to opt-out marketing plans for sales, to free trial periods for goods or**  
2 **services, and to acts that are unlawful as unfair trade practices."**

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 **\* Section 1.** AS 45.45 is amended by adding new sections to read:

5 **Sec. 45.45.920. Free trial period.** (a) Notwithstanding a provision in  
6 AS 45.02 to the contrary, a seller may not offer, promote, advertise, or provide a  
7 consumer goods or services for a free trial period unless the seller complies with all  
8 the conditions of this section.

9 (b) When offering, promoting or advertising consumer goods or services for a  
10 free trial period, a seller shall clearly and conspicuously disclose all material terms and  
11 conditions of the free trial period, including

12 (1) all material restrictions, limitations, terms, and conditions of the  
13 free trial period, including any obligation by the consumer to purchase a minimum  
14 quantity of goods or services after the free trial period ends;

1 (2) a description of all charges that will be imposed after the free trial  
2 period ends, including charges for shipping and handling;

3 (3) a description of the seller's refund, cancellation, exchange, and  
4 repurchase policies; and

5 (4) any other obligations the consumer assumes by accepting or using  
6 the goods or services during the free trial period.

7 (c) Before providing goods or services to a consumer for a free trial period, a  
8 seller shall obtain express written consent from the consumer to the free trial period.  
9 The seller shall obtain the written consent on a form prepared by the seller. The form  
10 prepared by the seller must include the information required by (b) of this section and  
11 the consumer's acknowledgment that the consumer has received and understands the  
12 information in the consent.

13 (d) At the end of the free trial period, a seller may not charge a consumer for  
14 any goods or services provided during or otherwise related to the free trial period  
15 unless the seller has complied with (b) and (c) of this section.

16 (e) This section does not apply to a seller who provides goods or services to a  
17 consumer for free if the consumer does not assume any obligation by accepting the  
18 free goods or services.

19 (f) This section does not apply to

20 (1) a telephonic seller who is registered under AS 45.63 and who  
21 complies with AS 45.63; or

22 (2) a prenotification negative option plan that is regulated by 16 C.F.R.  
23 425 and that complies with 16 C.F.R. 425.

24 **Sec. 45.45.930. Opt-out marketing plans.** (a) Notwithstanding a provision  
25 in AS 45.02 to the contrary, a seller may not use an opt-out marketing plan to sell  
26 goods or services unless the seller complies with all provisions of this section.

27 (b) Before using an opt-out marketing plan, a seller shall obtain express  
28 written authorization from the buyer that confirms that the buyer agrees to the use of  
29 the plan. The form of the written authorization must be a statement by the buyer that  
30 the buyer received a description of the material terms and conditions of the plan,  
31 including a description of the goods or services that will be offered, and that the buyer

1 understands the terms and conditions.

2 (c) At least 15 days before a seller charges a buyer for goods or services  
3 provided under an opt-out marketing plan, the seller shall provide the buyer with a  
4 written notice that contains

5 (1) a clearly written description of the plan, including a description of  
6 the goods or services being offered;

7 (2) a statement of the amount that will be charged and the date when  
8 the charge will be imposed if the buyer does not cancel the sale; and

9 (3) the specific steps that the buyer may take to cancel the charge by  
10 telephone, by regular mail, or by electronic mail.

11 (d) A seller who charges a buyer for goods or services under an opt-out  
12 marketing plan has the burden of proving that the buyer provided the authorization  
13 required by (b) of this section and was given the notice required by (c) of this section.

14 (e) This section does not apply to

15 (1) a telephonic seller who is registered under AS 45.63 and who  
16 complies with AS 45.63; or

17 (2) a prenotification negative option plan that is regulated by 16 C.F.R.  
18 425 and that complies with 16 C.F.R. 425.

19 (f) In this section,

20 (1) "opt-out marketing plan" means an arrangement under which a  
21 seller provides an announcement to a buyer that identifies goods or services that the  
22 seller intends to provide to the buyer, unless, by a specific date or within a specific  
23 time frame, the buyer notifies the seller not to provide the goods or services;

24 (2) "seller" means a person who engages in the business of selling  
25 goods or services.

26 \* **Sec. 2.** AS 45.50.471(b) is amended by adding new paragraphs to read:

27 (47) violating AS 45.45.920 (free trial period);

28 (48) violating AS 45.45.930 (opt-out marketing plans).



# REPRESENTATIVE KEVIN MEYER

---

HOUSE DISTRICT 30

## MEMORANDUM

DATE: February 5, 2004

TO: Representative Lesil McGuire  
Chair, House Judiciary Committee

FROM: Representative Kevin Meyer *Kevin Meyer*

RE: CS HB 339 (L&C) Trade Practices

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At your earliest convenience, please schedule CS HB 339(L&C) for a hearing in the House Judiciary Committee.

CS HB 339(L&C) prohibits the use of negative option plans, or free trial periods, to sell goods or services unless specific requirements and disclosures are made to the consumer.

Thank you for your time and consideration of this matter.



# REPRESENTATIVE KEVIN MEYER

HOUSE DISTRICT 30

## SPONSOR STATEMENT

### CS HB 339 (L&C)

**“An Act relating to negative option plans for sales, to free trial periods for goods or services, and to acts that are unlawful as unfair trade practices.”**

CS HB 339(L&C) prohibits the use of negative option plans, or free trial periods, to sell goods or services unless specific requirements and disclosures are made to the consumer.

Under CS HB 339(L&C), a negative option plan is defined as an arrangement under which a seller provides goods or services to a person and charges the person for the goods or services without express consent from the consumer. Essentially, a negative option plan requires the consumer to take action to avoid initial or continuing charges. Some businesses see the use of negative option plans as a successful marketing ploy; enabling a business to get a product out to a critical number of people, without fully disclosing the terms of the plan, and receiving compensation through unwilling and/or uneducated consumers.

Free trial periods are also a great way to try new products or services without making a long-term commitment to a membership, subscription, or extended service contract. However, consumers should always receive adequate information concerning the extent of the free trial period, and what obligations are required of them.

CS HB 339 (L&C) establishes clear guidelines for businesses to follow that do not result in consumer deception. The required disclosures under CS HB 339 (L&C) include: providing information pertaining to charges, how charges are calculated and collected, and any and all consumer obligations. The consumer disclosures required in CS HB 339 (L&C) are the same for free trial periods and for the use of negative option plans.

Over the past two years, complaints to the Federal Trade Commission (FTC) about unordered merchandise has increased by nearly 60%. Negative option plans and free trial period scams account for a significant amount of all new reports. Consumers are also turning to state Attorney General Offices' to complain of unfair and deceptive trade practices by businesses engaging in these plans. Over the past year, there have been a number of high-profile cases, where the State has intervened on behalf of Alaskans.

CS HB 339 (L&C) aligns Alaska statutes with the current federal rules on negative option marketing and free trial periods. It removes uncertainty in statute of what the role and responsibility is of businesses in protecting consumers and their interests.

Last Updated: February 4, 2004

Email: [Representative\\_Kevin\\_Meyer@legis.state.ak.us](mailto:Representative_Kevin_Meyer@legis.state.ak.us) • Toll Free: (866) 465-4945  
Session: State Capitol, Juneau, Alaska 99801-1182 • Phone: (907) 465-4945 Fax: (907) 465-3476  
Interim: 716 W. 4th Ave., Anchorage, Alaska 99501-2133 • Phone: (907) 269-0199 Fax: (907) 269-0197

# FISCAL NOTE

**STATE OF ALASKA**  
**2004 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: CSHB 339(L&C)  
 (H) Publish Date: 2/5/04

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: LAW  
 Title "An Act relating to negative option plans for RDU Civi:  
sales, to charges for goods or services..." Component Commercial & Fair Business  
 Sponsor Representative Meyer  
 Requester House Labor & Commerce Component No. \_\_\_\_\_

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** *(Attach a separate page if necessary)*

Prepared by: Kathryn A. Daughhete, Director Phone 465-3673  
 Division Administrative Services Date/Time 2/1/04 2:16 PM  
 Approved by: Kathryn Daughhete for Gregg D. Renkes, Attorney General Date 2/1/2004  
 Agency Department of Law

# FISCAL NOTE

**STATE OF ALASKA**  
**2004 LEGISLATIVE SESSION**

Fiscal Note Number: 2  
 Bill Version: CSHB 339(L&C)  
 (H) Publish Date: 2/5/04

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: DCED  
 Title Trade Practices RDU Banking, Securities & Corp (115)  
 Component Banking, Securities & Corp  
 Sponsor Representative Meyer  
 Requester Labor & Commerce Component No. 1233

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This legislation has no impact on the operations of the Department.

Prepared by: Mark Davis, Director Phone (907) 465-2521  
 Division Banking, Securities & Corporations Date/Time 2/2/04 1:56 PM  
 Approved by: Edgar Blatchford, Commissioner Date 2/2/2004  
 Agency Department of Community & Economic Development

## Electronic Code of Federal Regulations

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*e-CFR*

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<sup>TM</sup>

THIS DATA CURRENT AS OF THE FEDERAL REGISTER DATED SEPTEMBER 8, 2003

## 16 CFR - CHAPTER I - PART 425

[View Part](#)**§ 425.1 The rule.**

(a) In connection with the sale, offering for sale, or distribution of goods and merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice, for a seller in connection with the use of any negative option plan to fail to comply with the following requirements:

(1) Promotional material shall clearly and conspicuously disclose the material terms of the plan, including:

(i) That aspect of the plan under which the subscriber must notify the seller, in the manner provided for by the seller, if he does not wish to purchase the selection;

(ii) Any obligation assumed by the subscriber to purchase a minimum quantity of merchandise;

(iii) The right of a contract-complete subscriber to cancel his membership at any time;

(iv) Whether billing charges will include an amount for postage and handling;

(v) A disclosure indicating that the subscriber will be provided with at least ten (10) days in which to mail any form, contained in or accompanying an announcement identifying the selection, to the seller;

(vi) A disclosure that the seller will credit the return of any selections sent to a subscriber, and guarantee to the Postal Service or the subscriber postage to return such selections to the seller when the announcement and form are not received by the subscriber in time to afford him at least ten (10) days in which to mail his form to the seller;

(vii) The frequency with which the announcements and forms will be sent to the subscriber and the maximum number of announcements and forms which will be sent to him during a 12-month period.

(2) Prior to sending any selection, the seller shall mail to its subscribers, within the time specified by paragraph (a)(3) of this section:

(i) An announcement identifying the selection;

(ii) A form, contained in or accompanying the announcement, clearly and conspicuously disclosing that the

subscriber will receive the selection identified in the announcement unless he instructs the seller that he does not want the selection, designating a procedure by which the form may be used for the purpose of enabling the subscriber so to instruct the seller, and specifying either the return date or the mailing date.

(3) The seller shall mail the announcement and form either at least twenty (20) days prior to the return date or at least fifteen (15) days prior to the mailing date, or provide a mailing date at least ten (10) days after receipt by the subscriber, provided, however, that whichever system the seller chooses for mailing the announcement and form, such system must provide the subscriber with at least ten (10) days in which to mail his form.

(b) In connection with the sale or distribution of goods and merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, it shall constitute an unfair or deceptive act or practice for a seller in connection with the use of any negative option plan to:

(1) Refuse to credit, for the full invoiced amount thereof, the return of any selection sent to a subscriber, and to guarantee to the Postal Service or the subscriber postage adequate to return such selection to the seller, when:

(i) The selection is sent to a subscriber whose form indicating that he does not want to receive the selection was received by the seller by the return date or was mailed by the subscriber by the mailing date;

(ii) Such form is received by the seller after the return date, but has been mailed by the subscriber and postmarked at least 3 days prior to the return date;

(iii) Prior to the date of shipment of such selection, the seller has received from a contract-complete subscriber, a written notice of cancellation of membership adequately identifying the subscriber; however, this provision is applicable only to the first selection sent to a canceling contract-complete subscriber after the seller has received written notice of cancellation. After the first selection shipment, all selection shipments thereafter are deemed to be unordered merchandise pursuant to section 3009 of the Postal Reorganization Act of 1970, as adopted by the Federal Trade Commission in its public notice, dated September 11, 1970;

(iv) The announcement and form are not received by the subscriber in time to afford him at least ten (10) days in which to mail his form.

(2) Fail to notify a subscriber known by the seller to be within any of the circumstances set forth in paragraphs (b)(1)(i) through (iv) of this section, that if the subscriber elects, the subscriber may return the selection with return postage guaranteed and receive a credit to his account.

(3) Refuse to ship within 4 weeks after receipt of an order merchandise due subscribers as introductory and bonus merchandise, unless the seller is unable to deliver the merchandise originally offered due to unanticipated circumstances beyond the seller's control and promptly makes a reasonably equivalent alternative offer. However, where the subscriber refuses to accept alternatively offered introductory merchandise, but instead insists upon termination of his membership due to the seller's failure to provide the subscriber with his originally requested introductory merchandise, or any portion thereof, the seller must comply with the subscriber's request for cancellation of membership, provided the subscriber returns to the seller any introductory merchandise which already may have been sent him.

(4) Fail to terminate promptly the membership of a properly identified contract-complete subscriber upon his written request.

(5) Ship, without the express consent of the subscriber, substituted merchandise for that ordered by the subscriber.

(c) For the purposes of this part:

(1) *Negative option plan* refers to a contractual plan or arrangement under which a seller periodically sends to subscribers an announcement which identifies merchandise (other than annual supplements to previously acquired merchandise) it proposes to send to subscribers to such plan, and the subscribers thereafter receive and are billed for the merchandise identified in each such announcement, unless by a date or within a time specified by the seller with respect to each such announcement the subscribers, in conformity with the provisions of such plan, instruct the seller not to send the identified merchandise.

(2) *Subscriber* means any person who has agreed to receive the benefits of, and assume the obligations entailed in, membership in any negative option plan and whose membership in such negative option plan has been approved and accepted by the seller.

(3) *Contract-complete subscriber* refers to a subscriber who has purchased the minimum quantity of merchandise required by the terms of membership in a negative option plan.

(4) *Promotional material* refers to an advertisement containing or accompanying any device or material which a prospective subscriber sends to the seller to request acceptance or enrollment in a negative option plan.

(5) *Selection* refers to the merchandise identified by a seller under any negative option plan as the merchandise which the subscriber will receive and be billed for, unless by the date, or within the period specified by the seller, the subscriber instructs the seller not to send such merchandise.

(6) *Announcement* refers to any material sent by a seller using a negative option plan in which the selection is identified and offered to subscribers.

(7) *Form* refers to any form which the subscriber returns to the seller to instruct the seller not to send the selection.

(8) *Return date* refers to a date specified by a seller using a negative option plan as the date by which a form must be received by the seller to prevent shipment of the selection.

(9) *Mailing date* refers to the time specified by a seller using a negative option plan as the time by or within which a form must be mailed by a subscriber to prevent shipment of the selection. (38 Stat. 717, as amended; 15 U.S.C. 41-58)

[38 FR 4896; Feb. 22, 1973; 38 FR 6991, Mar. 15, 1973, as amended at 63 FR 44562, Aug. 20, 1998]





Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

For Release: November 1, 2001

## FTC Testimony Details Deceptive Negative Option Marketing and the Deceptive Sale of Credit and Credit Card-Related Services

The Federal Trade Commission's recent enforcement action against deceptive negative option marketing programs as well as Commission actions involving credit card sales and credit card loss protection services were detailed today in testimony before the House Committee on Financial Services, Subcommittee on Financial Institutions and Consumer Credit.

The testimony, presented by Elaine Kolish, Associate Director of FTC's Bureau of Consumer Protection's Division of Enforcement, included information about the Commission's recent crackdown against a group of buying clubs, including Triad Discount Buying Service, Inc., its related companies, and their operator, Ira Smolev, for failure to disclose, or to disclose adequately, the terms of negative option or "free trial" offers. "Negative option marketing is particularly troubling," Kolish explained, "when marketers, as they did in the *Smolev* case, already have consumers' credit card or billing account information and can easily charge consumers' accounts without their permission or when marketers fail to disclose that consumers' credit card numbers will be transferred to another company and charged unless consumers call to cancel."

Kolish also presented examples of FTC's aggressive challenges against deceptive marketing of credit and credit card-related services. The testimony cited the October 18, 2001 FTC filing of nine cases, most of which involved the alleged deceptive telemarketing of "guaranteed loans," worthless credit card protection services, and "protection" from identity theft, and additional cases challenging the deceptive telemarketing of major credit cards, such as VISA and MasterCard.

Included in the testimony was information about the numerous consumer education publications the Commission has disseminated to help consumers protect themselves. Among the publications mentioned were: "Prenotification Negative Option Plans;" "Trial Offers: The Deal is in the Details;" "Gold and Platinum Cards;" "Secured Credit Card Marketing Scams;" and "FTC Consumer Alert! Credit Card Loss Protection Offers: They're the Real Steal." Kolish urged consumers who may have had their credit card numbers transferred or charged without their knowledge or consent to report their experiences by filing a complaint with the FTC in writing, online at [www.ftc.gov](http://www.ftc.gov), or by calling the FTC's toll-free number, 1-877-FTC-HELP. "Consumer reports are essential to our investigations," said Kolish, "as information about where such practices are occurring and which companies are engaging in them is critical to effective state and federal law enforcement efforts."

FTC publications mentioned in the testimony are available at [www.ftc.gov](http://www.ftc.gov).

Copies of the testimony are available from the FTC's Web site at <http://www.ftc.gov> and also from the FTC's Consumer Response Center, Room 130, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The FTC works for the consumer to prevent fraudulent, deceptive and

### Related Documents:

[Prenotification Negative Option Plans](#)

[Trial Offers: The Deal is in the Details Prenotification Negative Option Plans](#)

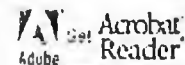
[Gold and Platinum Cards](#)

[Secured Credit Card Marketing Scams](#)

[FTC Consumer Alert! Credit Card Loss Protection Offers: They're the Real Steal](#)

[Prepared Statement of the Federal Trade Commission Concerning Its Recent Enforcement Action Against Ira Smolev, Triad, and Related Parties](#)

[Text of the Commission Testimony](#)



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 any of 150 consumer topics, call toll-free, 1-877-FTC-HELP (1-877-382-4357), or use the complaint form at [www.ftc.gov](http://www.ftc.gov). The FTC enters Internet, telemarketing, identity theft and other fraud-related complaints into Consumer Sentinel, a secure, online database available to hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

**MEDIA CONTACT:**

Cathy MacFarlane  
*Office of Public Affairs*  
202-326-3657

**STAFF CONTACT:**

Elaine Kolish  
*Bureau of Consumer Protection*  
202-326-3042

(FTC File No. 992-3255)

(<http://www.ftc.gov/opa/2001/11/kolish.htm>)

PREPARED STATEMENT  
OF THE FEDERAL TRADE COMMISSION

Before the

COMMITTEE ON FINANCIAL SERVICES  
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT  
UNITED STATES HOUSE OF REPRESENTATIVES

Washington, D.C.

November 1, 2001

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### I. Introduction

Mr. Chairman and members of the Committee, I am Elaine Kolish, Associate Director of the Bureau of Consumer Protection's Division of Enforcement at the Federal Trade Commission.<sup>(1)</sup> I am pleased to have this opportunity to provide information concerning the Commission's recent enforcement action against Ira Smolev, Triad, and related parties.<sup>(2)</sup> That case was brought as part of the Commission's crackdown on deceptive negative option marketing programs that fail to disclose, or to disclose adequately, the terms of negative option or "free trial" offers. These practices have resulted in consumers being charged or billed for goods and services without authorization.<sup>(3)</sup> Negative option marketing is particularly troubling when marketers, as they did in the *Smolev* case, already have consumers' credit card or billing account information and can easily charge consumers' accounts without their permission or when marketers fail to disclose that consumers' credit card numbers will be transferred to another company and charged unless consumers call to cancel.

This testimony describes the *Smolev* case and other recent Commission actions involving deceptive negative option marketing and the deceptive sale of credit cards and credit card loss protection services. In addition, this statement describes FTC consumer education materials designed, for example, to help consumers understand negative option offers and minimize the risk of having their billing information transferred or used without their knowledge or consent.

### II. Background

The FTC is the federal government's primary consumer protection agency. Congress has directed the FTC, under the FTC Act, to take action against "unfair or deceptive acts or practices" in almost all sectors of our economy and to promote vigorous competition in the marketplace.<sup>(4)</sup> As part of our activity, the Commission monitors complaints about all types of negative option marketing. Although the number of complaints in this general area has been increasing, one of the specific segments with a particularly dramatic increase in complaints is buying clubs. Buying clubs provide members with specified benefits over a period of time, including, for example, discounts on goods, health services, and legal services. From 1998 to 2000, buying clubs jumped from the 26<sup>th</sup> to the 11<sup>th</sup> most frequently complained about subject in the FTC's Consumer Sentinel complaint database. Thus, this area has attracted increased FTC attention, as well as the attention of the State Attorneys General.

### III. *Smolev/Triad* Case and Negative Option Marketing

On October 24, 2001, the FTC announced that a group of buying clubs including Triad Discount Buying Service, Inc., its related companies and their operator, Ira Smolev, will pay more than \$9 million to settle charges brought by the FTC and State Attorneys General that the defendants misled consumers into accepting trial buying club memberships and obtained consumers' credit card account numbers without the consumers' knowledge or authorization from telemarketers pitching the buying clubs.<sup>(5)</sup> Consumers then were enrolled in the clubs and charged up to \$96 in yearly membership fees. Of the amount to be paid, \$8.3 million is earmarked for consumer restitution, and \$750,000 will cover state investigative costs. The multi-state investigation, which

was led by Florida and Missouri, resulted in more than 40 states' entering into the settlement agreement.

From 1996 to 2000, the Triad companies contracted with numerous independent telemarketers to "upsell"<sup>(6)</sup> the Triad buying clubs. The telemarketers generally marketed their own products and services through outbound calls or inbound calls in response to advertising, direct mail, or infomercials. After customers purchased products or services from these telemarketers and provided their credit card numbers for payment, the telemarketers promoted a 30-day free trial in the Triad buying club as a thank-you for purchasing the telemarketers' products or services. The Commission's complaint alleges that the telemarketing scripts did not disclose or disclose sufficiently that consumers had to call the defendants and cancel their membership before the end of the trial period to avoid being automatically enrolled as a member and charged an annual fee. In addition, consumers were unaware that their credit card numbers were being transferred from the telemarketer they called to Triad.

In addition to providing monetary relief, the Triad Order requires Ira Smolev and the Triad companies to drastically revise their marketing practices to prevent future deception. The Order prohibits them from misrepresenting "free" offers of goods or services and from failing to disclose any obligations placed on consumers who accept trial offers. The Order also prohibits them from: (1) obtaining consumers' billing information, including credit card account numbers and unique identifying information, from third parties without the consumers' express authorization; (2) disseminating the information (with a few narrow exceptions, such as to process an authorized charge); and (3) signing up new members or renewing existing memberships without express, verifiable authorization from the consumer.<sup>(7)</sup>

In addition to the FTC and state actions against Triad, since 1999 several states have taken enforcement action against three other buying club marketers, Damark International,<sup>(8)</sup> MemberWorks<sup>(9)</sup> and Brand Direct Marketing ("BDM"),<sup>(10)</sup> based on their marketing practices. These matters involved alleged practices like those at issue in the *Smolev* matter.

The FTC and State Attorneys General are continuing to investigate other companies that are engaged in negative option marketing, including offers for buying clubs, that may be misleading to consumers. Past FTC cases have involved book offers,<sup>(11)</sup> website services,<sup>(12)</sup> and Internet services,<sup>(13)</sup> among others. On October 4, during remarks at the 2001 Privacy Conference in Cleveland, Ohio,<sup>(14)</sup> FTC Chairman Muris announced that, as part of the FTC's review of the Telemarketing Sales Rule, he will recommend consideration of amendments to address abuses concerning pre-acquired account information to ensure that this type of information is not used to bill consumers for goods or services they did not want.<sup>(15)</sup>

#### IV. Actions Involving Credit Card Sales and Credit Card Loss Protection Services

The FTC has aggressively challenged deceptive marketing of credit and credit card-related services. Most recently, on October 18, 2001, the FTC announced the filing of nine cases, most of which involve the alleged deceptive telemarketing of "guaranteed loans," worthless credit card protection services, and "protection" from identity theft.<sup>(16)</sup>

The FTC has brought cases challenging the deceptive marketing by telemarketers of major credit cards, such as VISA and MasterCard. For example, in January 2001, the Commission obtained a settlement with American Consumer Membership Services, Inc. and its principal resolving charges that they deceptively telemarketed offers of pre-approved, guaranteed VISA or MasterCard credit cards for a \$69 fee to consumers with credit problems. Instead of the promised cards, consumers received vouchers, coupons, and other offers, and occasionally credit card applications with lists of banks to which they could apply for a credit card. Applying for these credit cards often required additional bank fees of as much as \$150. The settlement bans the defendants from engaging in any telemarketing, or in the advertising, marketing, or sale of credit cards, loans or other extensions of credit. In addition, it requires the payment of over \$40,000 in consumer redress.<sup>(17)</sup> In other similar cases, the FTC alleged that the companies misrepresented that consumers whose credit cards are lost or stolen are at risk for unlimited charges, when in fact under the Truth-in-Lending Act consumers are not responsible for any unauthorized credit card charges over \$50, and major credit card companies typically waive this fee too.

## V. Consumer Education

To help consumers protect themselves, the Commission has widely disseminated numerous consumer education publications.<sup>(18)</sup> To help consumers understand negative option and trial offers and reduce the risk of having their credit card numbers transferred or charged without authorization, the Commission has issued two publications - "Prenotification Negative Option Plans" and "Trial Offers: The Deal is in the Details." The FTC also has issued consumer education materials addressing the deceptive marketing of gold credit cards and credit card loss protection programs, including "Gold and Platinum Cards;" "Secured Credit Card Marketing Scams;" and "FTC Consumer Alert! Credit Card Loss Protection Offers: They're the Real Steal." We hope that consumers who may have had their credit card numbers transferred or charged without their knowledge or consent will report their experiences by filing a complaint with the FTC. Consumers who feel that they have been defrauded can file complaints with the FTC in writing, online at [www.ftc.gov](http://www.ftc.gov), or by calling the FTC's toll-free number, 1-877-FTC HELP. Information about where such practices are occurring and which companies are engaging in them is critical to effective state and federal law enforcement efforts.<sup>(19)</sup>

## VI. Conclusion

The Commission appreciates the opportunity provided by the Subcommittee to describe our efforts to tackle the deceptive marketing of negative option and free trial offers and the improper transfer or misuse of consumers' billing information, as well as other deceptive practices involving the sale of credit cards and credit card loss protection services.

### Endnotes:

1. The views expressed in this statement represent the views of the Commission. My oral statement and responses to any questions you may have are my own, and do not necessarily represent the views of the Commission or of any individual Commissioner.
2. *FTC v. Ira Smolev*, No. 01-8922 CIV ZLOCH (S.D. Fla.) (filed Oct. 23, 2001).
3. A negative option is any type of sales term, contract provision, or buying plan that requires an affirmative action on the consumer's part to prevent a sale from taking place. This type of marketing is legal as long as the seller clearly discloses all the material terms and conditions up front and the consumer accepts the offer.
4. The FTC has broad law enforcement responsibilities under the FTC Act, 15 U.S.C. § 41 *et seq.* The statute provides the agency with jurisdiction over most of the economy. Certain entities, such as depository institutions and common carriers, are wholly or partially exempt from FTC jurisdiction, as is the business of insurance. In addition to the FTC Act, the FTC has enforcement responsibilities under more than 40 statutes.
5. The press release and related documents are available at [www.ftc.gov/opa/2001/10/triad.htm](http://www.ftc.gov/opa/2001/10/triad.htm). Specifically, the complaint alleges that defendants misrepresented that: (1) consumers who agree to the offer of a 30-day trial membership incur no obligation to take any action to avoid having their credit cards charged for the membership; (2) consumers agreed to accept the trial memberships, or agreed to purchase memberships, for which defendants charged them; and (3) only the cost of the products purchased from defendants' third-party telemarketers would be charged to the consumers' credit card accounts and no other charges to the accounts would be made without the consumers' further express authorization. The complaint also alleges that defendants failed to disclose or to disclose adequately that a consumer who fails to contact defendants within 30 days and cancel the membership is automatically enrolled as a member and charged an annual fee, and that the member is charged a renewal fee each subsequent year unless the member cancels the membership. In addition, it alleges that defendants, directly and through their third-party telemarketers, failed to disclose that the consumers' financial information is turned over to defendants, who charge the consumer's credit card for the membership. Finally, the complaint alleges that defendants violated the Telemarketing Sales Rule ("TSR") by not disclosing material terms and conditions of the offers up front.
6. Upselling is the practice of marketing additional products after a consumer has agreed to purchase a different product. In this case, for example, two sellers entered into a joint marketing agreement to offer products or services during the same telephone call. The first seller telemarketed its own products or services. After consumers provided financial information to pay for their orders, the first seller offered the second seller's products or services.
7. The Order also enjoins violations of the Telemarketing Sales Rule, and requires Ira Smolev and the Triad companies to retain a third party monitor to oversee their future business operations and report to the FTC. Finally, the Order requires Ira Smolev to maintain a \$1.5 million escrow account before he markets goods or services to the general public or assists others engaging in telemarketing.
8. In 1999, Minnesota obtained an Assurance of Discontinuance from Damark International to resolve allegations that it deceived consumers by offering a free trial membership in its buying clubs without disclosing that consumers must affirmatively act to cancel the membership within 30 days to avoid a credit card charge.
9. At least four states -- Minnesota, New York, Nebraska, and California -- have obtained either an Assurance of Voluntary Compliance ("AVC") or a court settlement with MemberWorks. Nebraska obtained an AVC in February 2001 that applies

nationwide. The AVC requires MemberWorks to provide refunds to consumers alleging unauthorized charges and includes detailed conduct provisions applicable to MemberWorks' marketing of membership programs.

10. In August 2000, BDM agreed to be bound by a federal court order resolving allegations that BDM violated the TSR and state consumer protection laws. *State of Connecticut and State of Washington v. Brand Direct Marketing, Inc.*, No. 300CV1456-GLG (D. Conn., Aug. 9, 2000). The states filed this action in federal court to enforce the TSR pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §6101 *et seq.* The states have authority to bring such TSR enforcement actions under 15 U.S.C. § 6103(a). Pursuant to this Order, BDM paid \$1.9 million in penalties, fees and consumer education funds, and about \$11 million in restitution. In addition, BDM is required to make specific disclosures about its ability to directly charge consumers' credit cards. Finally, the order requires BDM to improve its cancellation, automatic renewal, and refund procedures.

11. For example, the Commission recently obtained a consent decree against a book company for allegedly violating the Prenotification Plan Negative Option Rule, 16 C.F.R. Part 425, the TSR, and the Unordered Merchandise Statute, 39 U.S.C. § 3009. *FTC v. Creative Publishing Int'l, Inc.*, No. 01-945 (DWF/AJB) (D. Minn. May 30, 2001). That case involved allegations that consumers were not told all the terms and conditions of the plan they were unwittingly signed up for when they agreed to receive a book on a free preview basis. Those consumers who paid for the book were sent notices, without their authorization, that other books would be sent to them unless they cancelled.

12. See e.g., *FTC v. Shared Network Services, LLC*, No. CIV. S-99-1087 WBS JFM (E.D. Cal.); *FTC v. Wazzu Corp.*, No. SACV-99-762-AHS (C.D. Cal.); and *FTC v. U.S. Republic Communications, Inc.*, No. 4:99-CV-3657 (S.D. Tex.). The defendants in these cases represented that small businesses would have an opportunity to review website services for a 30-day trial period before being charged for the services. The defendants made it nearly impossible for businesses to cancel, however, by failing to provide information about how to contact the defendants or by providing that information weeks after the telemarketing call.

13. In 1998, the Commission challenged the free trial-period marketing practices of three Internet Service Providers ("ISPs"). The Commission alleged that the ISPs failed to disclose adequately that consumers who do not cancel free Internet services during a 30-day trial period would incur charges on their credit cards (the consumers provided their credit card numbers to the ISPs to initiate the free trial periods). The consent orders require the ISPs to disclose clearly and prominently any obligation to cancel the service in order to avoid being charged, and to provide at least one reasonable means of canceling. See *America Online, Inc.*, No. C-3787, *Prodigy Servs. Corp.*, No. C-3788, and *CompuServe, Inc.*, No. C-3789 (Mar. 16, 1998).

14. Chairman Muris' remarks can be found at [www.ftc.gov/speeches/muris/01asp1002.htm](http://www.ftc.gov/speeches/muris/01asp1002.htm).

15. 16 C.F.R. Part 310. As with any rulemaking, the Commission will carefully consider the record developed during the proceeding before making a final decision.

16. The press release announcing the "Ditch the Pitch" cases is at [www.ftc.gov/os/2001/10/ditch.htm](http://www.ftc.gov/os/2001/10/ditch.htm).

17. *FTC v. American Consumer Membership Services, Inc.*, No. 99 CV 1206 (N.D.N.Y.) (complaint filed Aug. 5, 1999).

18. These publications are available at [www.ftc.gov/bcp/online/pubs](http://www.ftc.gov/bcp/online/pubs).

19. Recently issued voluntary self-regulatory guidelines also may help address and prevent deception and consumer confusion over negative option marketing practices, as well as the use of pre-acquired account information. On October 14, 2001, the Electronic Retailing Association's board approved industry self-regulatory guidelines that address negative option marketing (called advance consent marketing by the industry), made compliance with them a condition of membership, and advised members not to do business with other companies not adhering to the guidelines. In addition, the Magazine Publishers Association and companies such as Time-Life have formally adopted the guidelines, and it appears that other companies and associations also may do so. These guidelines explain the disclosures that are required for various types of negative option marketing (e.g., automatic renewals, free trial offers) and advise sellers "to be sensitive to the privacy concerns of consumers and regulators in connection with the use and disclosure of consumers' account billing information." The guidelines further provide that "sellers and their agents and their service providers should not transfer a consumer's account billing information to any unaffiliated third party other than a billing or processing agent without the consumer's express authorization." We are hopeful that as the self-regulatory guidelines become more widely known and adopted, they will have a significant impact on industry practices and reduce consumer confusion and complaints about negative option marketing techniques. The guidelines are available at [www.retailing.org](http://www.retailing.org).

## Prenotification Negative Option Plans

You see the ads on TV, in magazine and newspaper inserts, and on the Internet: "5 Books for \$1," "10 CDs for FREE," or "4 Videos for 49¢ each." By joining some of the clubs that are offering these deals, you may become a member of a "prenotification negative option plan." That means you are agreeing to receive merchandise automatically unless you tell the club not to send it.

### How Prenotification Plans Work

Often, you can join a plan simply by accepting an introductory offer of some merchandise, often at a discounted price. Then, you pay full price for additional merchandise.

Joining a plan means you agree to the plan's sales method as long as you're a member. As a plan member, you will receive periodic announcements describing merchandise that you can buy. These announcements are important because the merchandise is sent to you automatically unless you return the form rejecting the offer within the specified time.

Each time you receive an announcement, you have two choices:

A. If you want the merchandise, do nothing. It will be sent automatically. Some plans require you to pay for the merchandise when you get it. Other plans send the merchandise "on approval," which means you can try it for a specified period. If you return the merchandise, you don't have to pay for it.

OR

B. If you don't want the merchandise, you must say so and return the rejection form included with the announcement within a specified time, usually 10 days. Make sure you follow the instructions on the form. Some plans also let you use the rejection form to order other merchandise.

### The Prenotification Negative Option Rule

The Federal Trade Commission enforces the Prenotification Negative Option Rule. The Rule requires companies to give you information about their plans, clearly and conspicuously, in any promotional materials that consumers can use to enroll. If the sales presentation for a plan is made orally, say on the phone, the terms and conditions still must be disclosed clearly and conspicuously during the presentation. For example, companies must tell you:

- whether there's a minimum purchase obligation;
- how and when you can cancel your membership;
- how many announcements and rejection forms you'll receive each year, and how often you'll receive them;

- how to reject merchandise;
- the deadline for returning the rejection form to avoid shipment of the merchandise; and
- whether billing charges include postage and handling.

### **Minimum Purchase Obligations and Canceling Memberships**

Some plans require that you buy a certain amount of merchandise at the club's regular prices. If that's the case, the minimum purchase obligation must be disclosed clearly and conspicuously. Once you've satisfied the minimum purchase requirements, you can cancel your membership. If the club has no minimum purchase obligation, you can cancel your membership any time.

If you want to cancel your membership, send your request in writing. The company must cancel your membership promptly. If the company sends additional merchandise after receiving your written cancellation notice, you need to return the first item that is sent. You may consider any additional shipments as unordered merchandise and keep them as a gift.

However, to avoid dunning notices, it's best to tell the company that you're no longer a member each and every time you receive unordered merchandise. You can do that by sending the company a copy of your cancellation letter.

### **Announcements and Rejection Forms**

The company must tell you how often and how many announcements and rejection forms you'll receive each year and how often you will receive them. The company also must tell you whether billing charges for each item include postage and handling.

The rejection form comes with, or is a part of, the announcement. In some plans, the rejection form can be used to decline merchandise and to choose a different item. The announcement must give you at least 10 days to decide if you want the merchandise and mail back the form. The form includes a "return date" B the date the form must be received by the company, or a "mailing date" B the date you must mail the form to the company. No matter which date the company uses, you have at least 10 days to respond.

If you don't get at least 10 days, and you receive an unwanted shipment, you can return the merchandise to the company for a full credit to your account. The company must pay for the return postage.

### **Bonus Merchandise**

To attract new members, some companies advertise special introductory offers, like "5 Books for \$1." By law, a company must ship the merchandise within 30 days of receiving your order. If the merchandise can't be shipped within that time, the company may offer you an equivalent alternative. If you don't want the alternative, you can cancel your membership. The company must honor your cancellation request, as long as you return the

introductory merchandise.

## Another Type of Clubs or Plans

Some book, CD or video clubs may involve membership in another type of plan called a "Continuity plan." "Continuity plans" automatically send merchandise or provide services until you tell them to stop, without sending an announcement or a rejection form before each shipment. While these plans are **not** covered under the FTC's Prenotification Negative Option Rule, basic consumer protection principles apply: Sellers must give consumers information about the plan's terms and conditions, clearly and conspicuously, in their promotional materials.

Some continuity plans provide an "approval" period so you can check out the merchandise and decide whether to keep it and pay for it. Many programs selling collectibles, like stamps or coins, work this way. Other continuity plans require you to pay for merchandise when you receive it.

## Protect Yourself

Before you agree to any prenotification plan:

***Read the terms and conditions*** of the plan carefully so you understand the obligations of membership before you join.

***Compare costs.*** The introductory merchandise may be substantially discounted but you may be required to buy additional merchandise at the club's regular prices and to pay shipping and handling on those purchases. Do the math to compare the club's prices and the shipping charges against those of other sellers.

***Keep copies of plan documentation*** that explain the terms and conditions of the plan and the rejection forms you return to the seller. It's also a good idea to keep documentation of the date you mailed the rejection forms.

***Check out the seller.*** Contact your local consumer protection agency or the Better Business Bureau to find out if they have any complaints on file. A record of complaints may indicate questionable practices, but a lack of complaints doesn't necessarily mean that the seller is without problems. Unscrupulous businesses or business people often change names and locations to hide complaint histories.

## Where to Complain

If you have a problem with your plan, try to resolve it with the seller first. If you're dissatisfied with the response, contact your local Better Business Bureau or local consumer protection agency.

You also may file a complaint with the FTC.

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 [www.ftc.gov](http://www.ftc.gov) or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. The FTC enters Internet, telemarketing, identity theft and other fraud-related complaints into Consumer Sentinel, a secure, online database available to hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.



*May 2001*

## Trial Offers: The Deal Is in the Details

Chances are you've gotten offers to try a product or service through a "free trial." Companies use these offers to sell a variety of items, from books and CDs to videos, magazines, hosiery and Internet access. But as part of a trial offer, a company also must tell you if any conditions are attached to the deal.

The Federal Trade Commission (FTC) carefully monitors the marketing practices in this area and offers this information to help you make wise purchasing decisions. Be a savvy consumer: read the fine print and ask questions. Trial offers can be a great way to try new products or services without making a long-term commitment to a membership, subscription or extended service contract. But by accepting the free trial offer, you may be agreeing to buy additional products and services - if you don't cancel.

### What Does "No Risks or Obligations" Really Mean?

A company may claim its free trial offer has no risk or obligation for the consumer. And that may be true, but only if you take timely action to avoid future obligations. For example, you may have to contact the company to cancel **during the trial period** to avoid receiving additional goods or services or to pay for what you've already received. By not canceling, you may be agreeing to let the company enroll you in a membership, subscription or service contract, and to charge the fees to your credit card.

### How Conditional Trial Offers Work

Here are a few examples of conditional free trial offers:

- A company offers you an introductory package of free books, CDs or videos. If you accept the offer, you may be agreeing to enroll in a club that will send you the products and bill you **until you cancel**.
- A company offers you the first three issues of a magazine for free. Unless you cancel **after** receiving the third issue, you may be agreeing to a one-year subscription that is automatically renewed each year.
- A company offers you free Internet service for 30 days or 700 hours, whichever comes first (30 days = 720 hours). Unless you cancel **within** the 30-day period or **after** you use the 700 hours, you may be agreeing to pay for continuous Internet service.
- A company offers you a free pair of pantyhose. By accepting the offer, you may be agreeing to receive a second pair as well. You also may be agreeing that, if you keep and pay for the second pair, the company may ship you a third pair. This may continue **until** you tell the company to cancel your account.

### Make Sure You Know Who's Selling What

Sometimes, you call a company for one reason and at the end of the transaction, you may be told about a trial offer that another company is offering. This is called upselling. If you receive such an offer, pay close attention to the terms and conditions. Make sure you understand **who** you're dealing with and **what** you're agreeing to. By accepting the trial offer, you may be agreeing to let the company you called in the first place give your credit card account information to another seller.

If you don't cancel **during** the trial period, your credit card may be charged by the second seller for the product or service offered for the trial period. If you don't recognize the seller, you may think the charge is an unauthorized transaction. In fact, by accepting the trial offer, you may have agreed to pay if you didn't cancel **before** the trial period ended.

## It's The Law

According to the law, companies must clearly and prominently disclose the "material" terms of their trial offers before you give your consent. Material terms may include:

- the fact that by accepting the trial offer, you're actually agreeing to be enrolled in a membership, subscription or service contract or paying for additional products and services if you don't cancel **within** the trial period;
- how much time you have to cancel before you incur charges;
- the cost or range of costs of goods or services you'll receive if you don't cancel during the trial period;
- how to cancel **during** the trial period;
- whether you'll be charged a non-refundable membership fee if you don't cancel **within** the trial period;
- whether fees will be charged automatically to the credit card you used to buy other goods or services.

## Protect Yourself

Trial offers are promoted through all kinds of media: newspaper and magazine ads, TV and radio commercials, direct mail, and the phone and Internet. In print ads and offers, the material terms may appear in fine print as a footnote at the bottom of a page, or on the back of the offer. Read the whole offer carefully before you decide whether it's a good deal for you. When offers are made orally - whether by radio, TV or on the phone - listen carefully to the message. If you don't understand the details, ask the caller to repeat the terms and conditions as many times as it takes until you get it. If you're not satisfied with the responses, consider taking your business elsewhere. Never give in to pressure to agree to a deal.

Here are some questions you may want to ask the seller:

- Is the free trial offer related to a membership, subscription or extended service contract?

- Do I have to contact the company to avoid receiving more merchandise or services? If so, how much time do I have? What is my deadline?
- Who do I contact to cancel? How do I cancel? By letter? By phone? By email?
- Will I get other products with the free item? If so, will I have to pay for them or send them back if I don't want them? How long do I have to decide before incurring a charge?
- How do I stop getting additional merchandise or services?
- Is there a membership fee? If so, is it refundable?
- Will you automatically bill my credit card for anything?
- Who is offering the trial - you or another company? What is the name and address of the company?

## Where to Complain

If you have a problem with a trial offer, try to resolve it with the seller first. If you're dissatisfied with the response, contact your local Better Business Bureau or local consumer protection agency.

You also may file a complaint with the FTC. 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 any of 150 consumer topics, call toll-free, 1-877-FTC-HELP (1-877-382-4357), or use the complaint form at [www.ftc.gov](http://www.ftc.gov). The FTC enters Internet, telemarketing, identity theft and other fraud-related complaints into Consumer Sentinel, a secure, online database available to hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

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 [www.ftc.gov](http://www.ftc.gov) or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. The FTC enters Internet, telemarketing, identity theft and other fraud-related complaints into Consumer Sentinel, a secure, online database available to hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.



July 2001



## FTC gets complaints of negative options gone wild

BY DAVID S. HILZENRATH  
The Washington Post

Timothy Cain of Rochester, N.Y., said he was trying to simplify his Christmas shopping last winter when he visited the Web site of "Girls Gone Wild" and bought a pair of videos for his brother for \$9.99 plus shipping. He was incensed, though, when additional videos started arriving monthly, along with \$24.98 in charges on his credit card.

Unwittingly, he had purchased a subscription, Cain said, a fact that was "hidden" in the Web site.

The videos' producer, Mantra Films Inc., uses an increasingly common marketing strategy known as a "negative option," which requires the consumer to take action to avoid continuing charges. The video series, in which spring break revelers expose themselves for roving cameras, has become a hot seller.

Negative options can be a convenience for consumers, but they are also "ripe for abuse," said Reilly Dolan, assistant director for enforcement in the Federal Trade Commission's bureau of consumer protection. Over the past two years, complaints to the FTC about unordered merchandise have increased by 60 percent, and negative-option marketing accounts for a significant part of that, he said.

Cain filed a complaint with the Better Business Bureau, one of 843 grievances about Mantra filed over the past three years, according to William Mitchell, president of the BBB chapter in the Los Angeles area, where Mantra is based.

The Experian credit reporting bureau's ConsumerInfo.com subsidiary has been the subject of 960 complaints to the BBB over the same time period, Mitchell said, and the bureau revoked ConsumerInfo.com's membership in 2001 when it refused to improve disclosures.

The related FreeCreditReport.com site offers a "FREE credit report in seconds" and adds: "So what's the catch? There isn't one!" But many consumers who took advantage of the offer didn't realize they were enrolling in a credit monitoring service until the annual \$79.95 charge showed up on their credit card statements, a BBB report said.

Under federal consumer protection standards, marketers must disclose significant terms of a transaction in a "clear and conspicuous" fashion. "Whether a disclosure meets this standard is measured by its performance -- that is, how consumers actually perceive and understand the disclosure within the context of the entire ad," an FTC guidance says.

The "Girls Gone Wild" subscription feature is discussed deep in a "Terms and Conditions" section of the videos' Web site, and it is possible to order the merchandise without ever seeing that text.

"I think it's extremely misleading," said the BBB's Mitchell. "It's fairly obvious that the whole thing is set up to rope people into this automatic reorder program and then of course make it difficult to extricate yourself from that situation."

Asked recently why the company doesn't disclose the terms more conspicuously, Mantra spokesman Bill Horn said, "We are going to evaluate it, and we're sure to make some changes.

"While Mantra feels that the monthly subscription service aspect of Web-based ordering is clear for consumers, you have made some interesting points about how some consumers may be confused or may choose not to read the terms of the sale," Horn said.

The FTC occasionally takes action against companies for inadequate disclosure of negative options. In 1997, it accused America Online of failing to make clear that consumers would automatically be charged for continuing service if they didn't cancel before their free trials ended. AOL settled the case by agreeing to make clearer disclosures.

Last November, the FTC alleged that marketers of books such as "Best of Martha Stewart" and "Southern Living Christmas" failed to properly disclose the negative-option feature of offers made through mail and phone solicitations. Oxmoor House and its parent, Southern Progress Corp., agreed to pay penalties of \$500,000 to settle an FTC complaint.

The company agreed to change the wording in its offers, but Southern Progress spokeswoman Laura Hardin said there was "nothing legally wrong with the way we market the books."

The subscription aspect of the ConsumerInfo.com program is explained in small print under the heading "Privacy Policy Notice" after the consumer fills out two screens of ordering information.

Why isn't the disclosure displayed up front on the site? "You can't put everything on one page," Experian spokesman Donald Girard replied. "I think the font type would be so small that you would not really get the message across very clearly."

The terms are more prominently displayed on another Experian Web site

advertising similar services.

ConsumerInfo.com, which has 1.2 million subscribers, takes the complaints seriously and resolves most of them quickly, Girard said.

As for Mantra, Horn said, the number of complaints about "Girls Gone Wild" doesn't show a huge percentage of unhappy customers, considering the millions of videos sold annually.

In a December television interview, Mantra founder and Chief Executive Joseph Francis, 30, said the company had sold "tens of millions" of videos "and sales have been in the hundreds of millions."

Despite his frustration with the company, Cain expressed admiration for its money-making power. "It's a thing of beauty if you look at it from the other side," he said. "It's just very rigged in their favor."

Mantra said Cain had to return the goods to get his money back, but would not refund the \$4.99 shipping and handling charge.

On Mantra's online order form, the "Agree to Terms" box is automatically checked -- as a convenience, Horn said. Only by clicking on the word "Terms" would the consumer see them. Section 8A of the terms says, "Certain products offered by Mantra consist of a subscription," but the site does not explicitly say which ones.

Elsewhere on the site are references to a "MONTHLY PREVIEW PROGRAM" with the notation "CANCEL ANY TIME," but Horn agreed those references alone don't explain the negative option, and one could place an order without ever seeing them.

A BBB report on Mantra suggested recipients of unordered merchandise dispute unauthorized charges with their credit card issuer.

The report also noted that, under federal law, consumers are entitled to keep unordered merchandise without paying for it.

Click here to return to story:

[http://charleston.net/stories/051203/bus\\_12marketing.shtml](http://charleston.net/stories/051203/bus_12marketing.shtml)



# Free trial offers: Are they actually good deals?

By AL TOBIN  
Better Business Bureau

Free trial offers are used by many companies to sell everything from books to CDs, from magazines to Internet access. Trial offers can be a great way to try out new products or services without making a long-term commitment. You should be aware, however, that by accepting a free trial offer, you might be agreeing to buy additional products and services, if you do not cancel within a specified period of time.

Before you accept a free trial offer, be sure you know what your obligations will be. For example, you may have to contact the company to cancel during the trial period to avoid receiving goods or services or to avoid paying for what you have already received. By not canceling, you may be agreeing to let the company enroll you in a membership, subscription or service contract, and to charge the fees to your credit card.

Pay close attention to the "material" terms advertisers use. According to the law, companies must clearly and prominently disclose the material terms of their trial offers before you give your consent. Material terms may include:

**Trial offers can be a great way to try out new products or services without making a long-term commitment. You should be aware, however, that by accepting a free trial offer, you might be agreeing to buy additional products and services if you do not cancel within a specified period of time.**

- how much time you have to cancel before you incur charges;
- the fact that by accepting the trial offer, you are actually agreeing to be enrolled in a membership, subscription or service contract or agreeing to pay for additional products and services if you do not cancel within the trial period;
- the cost or range of costs of goods or services you will receive if you do not cancel during the trial period;
- how to cancel during the trial period;
- whether you will be charged a non-refundable membership fee if you do not cancel within the trial period; and,
- whether fees will be charged automatically to the credit card you used to buy other goods or services.

Trial offers are promoted through all types of media: newspaper and magazine ads, TV and radio commer-

cial, direct mail, and the phone and Internet. In print ad offers, the material terms may appear in fine print as a footnote at the bottom of a

page, or on the back of the offer. To protect yourself, read the entire offer carefully before you decide whether it is a good deal for you. When offers are made orally – whether by radio, TV or on the phone – listen carefully to the message. If you do not understand the details, ask the caller to repeat the terms and conditions as many times as it takes until you understand. Or, ask them to send you the terms and conditions in writing. Never give-in to pres-

sure to agree to a deal.

The BBB, along with the Federal Trade Commission, suggest you ask the following questions:

- Is the free trial offer related to a membership, subscription or extended service contract?
- Do I have to contact the company to avoid receiving more merchandise or services?
- Who do I contact to cancel?
- Will I receive other

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## Free trial offers . . .

*continued from page 26*

products with the free item? If so, will I have to pay for them or send them back if I do not want them? How long do I have to decide before incurring a charge?

- Is there a membership fee? If so, is it refundable?
- Will you automatically bill my credit card for anything?
- Who is offering the trial – you or another company? What is the name and address of the company?

If you have a problem with a trial offer, try to resolve it with the seller first. If you are dissatisfied with the response, contact the Better Business Bureau ([www.bbb.org](http://www.bbb.org)), Federal Trade Commission ([www.ftc.gov](http://www.ftc.gov)) or your local consumer protection agency.

*Al Tobin is chief executive officer for Better Business Bureau of Alaska, Inc.*

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FOR IMMEDIATE RELEASE: October 28, 2003

## **STATE FILES SUIT AGAINST ACS FOR UNFAIR BUSINESS PRACTICES**

(Juneau, AK) – Attorney General Gregg Renkes filed a complaint against ACS Wireless and its holding company, ACS Communications, Inc. for violations of Alaska Consumer Protection Act in connection with ACS' promotion of its "Voice Connect" wireless product earlier this year.

ACS promoted the new service through a "negative option" or "opt out" campaign, which required customers to notify the company if they did not want it. The company automatically billed customers \$2.00 if they failed to notify ACS that they did not want "Voice Connect" by the required deadline. The charge continued each month until the customer cancelled the plan.

"Consumers should never have to pay for a product or service not expressly requested by the consumer," said Attorney General Gregg Renkes. "These types of marketing tactics are inherently deceptive and open the door for a variety of consumer abuses. We want to make it clear that this kind of marketing will not be tolerated in Alaska."

The state's complaint asks the court to prohibit ACS from engaging in this kind of opt-out marketing in the future. It also asks the court to make ACS give refunds to consumers who were signed-up for "Voice Connect" as a result of this marketing tactic and pay the state civil penalties of \$5,000 for each consumer who was a target of this conduct.

Alaska Communications Systems Group, Inc. (ACS) provides long distance and facilities-based local telephone, wireless, data, network, and Internet services throughout Alaska. The Anchorage-based company serves residents in 74 communities throughout the state, including Anchorage, Fairbanks, Juneau, Kenai/Soldotna, Kodiak, and Sitka. It sells services to three-fourths of the state's population.

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	<i>Kindly join us in celebration of Spring</i>	<i>May 2nd, 2003</i>
	11:00am - 2:00pm (440 E. Benson)	
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**LIKE IT OR NOT, you may be paying for wireless feature**  
**VOICE-ACTIVATED DIALING: Customers must tell ACS, MTA they don't want it.**By RICHARD RICHTMYER  
Anchorage Daily News  
(Published: May 2, 2003)

It may look like more junk mail from your cell phone company, but if you toss it away without looking at it, you might unwittingly be signing up and paying for a calling feature you don't want.

ACS Wireless and MTA Wireless both recently added voice-activated dialing to their calling features, making it available to all their customers free for a trial period. But at the end of the trial period, the onus is on customers to notify the company if they don't want to pay \$2 a month for the new feature, not if they do.

That practice, known as opt-out marketing, is perfectly legal, according to the Federal Communications Commission, the agency that regulates wireless telephone companies.

As long as they clearly disclose the terms in writing and notify customers in a timely fashion, cell phone companies may add calling features to their customers' existing service plans and require them to opt out if they don't want them, an agency spokeswoman said.

The add-on feature at issue allows customers to simply speak the name of the person being called rather than dial the number.

ACS Wireless, which introduced its Voice Connect service in early March, has twice sent out "bill stuffers" -- fliers tucked in with the monthly bill -- notifying its 82,000 subscribers throughout the state that they would automatically be billed for the new service unless they canceled it, according to Mary Anne Pease, a spokeswoman for the Anchorage-based company. ACS is a unit of Alaska Communications Systems, which also provides local and long-distance phone service as well as Internet access.

ACS also did two mass mailings, sending postcards to customers advising them about the service and the need to opt out if they didn't want it, Pease said.

But Helen Clough, an ACS Wireless customer in Juneau, said she never saw the bill stuffers. And she nearly pitched the postcard in the trash because on the surface, she thought it looked like junk mail.

On the outside of the card is a picture of an ACS Wireless phone with floppy dog ears and a tail. To the right of the picture it says, "Stay? Want to keep Voice Connect? It's your choice."

You have to break a seal to open the card. Inside are more information about the Voice Connect service and a postage-paid form to mail if you want to opt out.

"It's totally deceptive," Clough said. "There's nothing on the outside to indicate that money's involved. It's like it was specifically designed so that you wouldn't see it."

MTA Wireless also has sent bill stuffers to its roughly 8,000 customers from Talkeetna to Eagle River, as well as a letter describing the service, which it calls Talk to Me VoiceDial, company spokeswoman

Jackie Whitstine said.

MTA Wireless is a unit of Matanuska Telephone Association, which also provides regular phone and Internet service.

The letter, mailed in a regular MTA envelope, also includes an opt-out form that can be mailed back with your next phone bill.

Both companies are providing the service in partnership with an outfit called Preferred Voice, which supplies the computer hardware, software and billing systems that make it work. Neither ACS nor MTA is bearing any of those costs. Dallas-based Preferred Voice takes a cut of the fees for the service.

Mary Merritt, Preferred Voice's vice president of finance, said the company requires most of its customers to use opt-out marketing.

"It's so we get a return on the investment in our technology," she said.

The technology is expensive to deploy, and without a critical number of customers it wouldn't pay for itself, she said.

ACS believes customers will like the feature if only they'll try it, Pease said. As is often true with new technology, getting people to sample it can be a challenge. That's why ACS decided to give customers a free trial, she said.

Wireless companies that choose not to go with the opt-out plan have to make a large, upfront payment and agree to make fixed monthly payments to Preferred Voice, according to Merritt.

"It would have required a huge investment on their part, which might have prevented them from providing the service at all," she said.

This was the first time ACS has used opt-out marketing, and it caused enough of a backlash among customers to make it the last, according to Pease.

"The intent was to get new technology out into the marketplace, not to get people to pay for something they don't want to use," she said. "This is not the way we'll be introducing new features in the future."

The free trial period for ACS Wireless' voice-activated dialing service is over at the end of May. On Wednesday, Pease said the only way to avoid the \$2 a month fee is to contact ACS and opt out. But on Thursday she said only customers who have tried Voice Connect will need to opt out to avoid the fee. Those who have not used it will not be billed, she said.

MTA used the opt-out method recently when it introduced a service used to screen out junk e-mail. The company will continue to use the technique but will do so judiciously, Whitstine said.

"We feel like it's still a very valuable method for us, but we want to be very careful in what features we deploy like this," she said.

June 14 will be the end of MTA's free-use period, and all customers, whether they tried the voice dialing feature or not, will need to opt out if they don't want it, Whitstine said.

At the end of this month, the company will send a second letter reminding customers that they must opt out if they don't want the service. It will be delivered in an envelope with the words "Important Account Information" printed on the front, Whitstine said.

MTA also will offer up to six months' credit to customers who neglect to opt out because they were

not aware that they had to, she said.

Daily News reporter Richard Richtmyer can be reached at [rrichtmyer@adn.com](mailto:rrichtmyer@adn.com) or 257-4344.

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**Wireless feature requires opt-out from customers**

ANCHORAGE (AP) - ACS Wireless and MTA Wireless both recently added voice-activated dialing to their calling features, and are offering it free to customers for a trial period.

The tricky part, known as opt-out marketing, means if customers ignore the offer, they will end up paying \$2 a month for it.

The practice is perfectly legal, according to the Federal Communications Commission, the agency that regulates wireless telephone companies. Cell phone companies can add calling features to customers' existing service plans and require them to opt-out of them as long as they clearly disclose the terms in writing and notify customers.

The add-on feature at issue allows customers to simply speak the name of the person being called rather than dial the number.

ACS Wireless, which introduced its Voice Connect service in early March, has twice sent out fliers tucked into monthly bills, notifying its 82,000 subscribers that they would automatically be billed for the new service unless they canceled it, according to Mary Anne Pease, a spokeswoman for the Anchorage-based company.

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your choice."

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"It's so we get a return on the investment in our technology," she said.

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