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ARTICLE

THE INVISIBLE HAND OF PREACQUIRED ACCOUNT MARKETING

PRENTISS COX*

Preacquired account marketing is a sales practice that allows companies to charge consumers for services they do not know they ordered and do not use. The practice depends on a seller's ability to access a consumer's financial account without the consumer directly providing her account number and other access information to that seller. This flips the power dynamic in the solicitation process by shifting the burden to the consumer to stop the seller from accessing her account, rather than requiring the seller to ask the consumer for her account information before her account can be charged. This is possible because the seller has paid a financial institution, such as a bank, or another seller who retains consumer account numbers for the right to charge the consumer's account. Tens of millions of consumers have been affected by this sales practice. Many of these consumers have diminished mental capacity or struggle with the English language, making it more likely that they will not understand that they are being charged. This Article recommends that state legislatures or the United States Congress adopt the proposed Uniform Consumer Account Control Act, a total ban on preacquired account marketing. Prohibiting this form of marketing is conceptually less difficult than many other areas of consumer protection regulation because the regulatory costs in this situation are almost non-existent. A total ban forces sellers to actually reach an understanding with consumers. Experience has shown that lesser remedies, such as improved disclosures, are insufficient to control rampant consumer misunderstanding. They do not solve the fundamental problem of shifting control of account access from the consumer to the seller in a way that facilitates sorting of consumers into those unaware of account charges.

I. INTRODUCTION

Preacquired account marketing ("preacquired marketing" or "preacquired account marketing") is a sales practice that allows companies to charge consumers for services they do not know they ordered and do not use. The practice depends on a seller's ability to access a consumer's financial account without the consumer directly providing her account number to that seller. This is possible because the seller has paid either a financial institution, such as a bank, or another seller that retains consumer account numbers for the right to charge the consumer's account. This process provides

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preacquired account marketers with preferential access to consumer accounts.

An overwhelming majority of consumers paying for services sold through preacquired account marketing are unaware their accounts have been charged, and thus are unaware they have "purchased" the service.[1] Preacquired marketing works only because it singles out consumers who do not understand the terms of the solicitation or consumers who become confused about the "free trial offer" terms that are a critical component of the practice.[2] Many of these consumers have diminished mental capacity or struggle with the English language, making it more likely that they will not understand that they are being charged.[3] Data from public enforcement actions and investigations demonstrate that this result occurs in all forms of preacquired account marketing.[4]

The number of consumers targeted by this questionable practice is in the tens of millions.[5] Many of the nation's largest financial institutions, including JP Morgan Chase, Citigroup, and Bank of America, are substantially involved in preacquired account marketing.[6]

Part II of this Article explains how preacquired account marketing works. The practice is used primarily in conjunction with the mass marketing of membership clubs, insurance policies, and other services. The issuers of consumer financial accounts, especially financial institutions that offer credit cards and checking accounts, contract with these sellers to allow the sellers to charge their customers' accounts. Alternatively, merchants, such as Orbitz[7] or Staples[8], sell their customers' account information to preacquired account marketers. Once sellers obtain the authority to charge consumer accounts, they use all forms of direct marketing to solicit these consumers, including direct mail, Internet marketing, and telephone calls.

Part III explores how this form of marketing causes consumer misunderstanding. Preacquired marketing flips the power dynamic in the solicitation process by shifting the burden to the consumer to stop the seller from accessing her account, rather than requiring the seller to ask the consumer for her account information before her account can be charged. A consumer normally provides her account number only after becoming assured that she understands the transaction. Preacquired marketing bypasses this gate-keep-

[1] *See infra* Part III.C & D.

[2] *See infra* Part III.B & C.

[3] *See infra* notes 111–15 and accompanying text.

[4] *See infra* Part III.D.1.

[5] *See infra* notes 39–40 and accompanying text.

[6] *See infra* notes 32–38 and accompanying text.

[7] OFFICE OF OVERSIGHT & INVESTIGATIONS MAJORITY STAFF, STAFF OF S. COMM. ON COMMERCE, SCI. & TRANSP., 111TH CONG., AGGRESSIVE SALES TACTICS ON THE INTERNET AND THEIR IMPACT ON AMERICAN CONSUMERS 13 (Comm. Print 2009) [hereinafter COMMITTEE REPORT].

[8] Affinion Group, Inc., Annual Report (Form 10-K), at 2 (Feb. 27, 2009) [hereinafter 2008 Affinion 10-K].

ing by the consumer. Part III catalogs the substantial evidence that preacquired marketing results in charges to millions of consumers who do not know that their accounts have been charged.

Part IV examines two efforts by the federal government to restrict preacquired account marketing. The first effort was part of the Gramm Leach Bliley Act ("GLBA"), which enacted privacy protections as part of the 1999 deregulation of the financial services industry.[9] A seeming total ban on preacquired marketing in the GLBA was turned into a sanction of the practice by regulations promulgated by federal agencies implementing the Act.[10] A more successful, but very limited, regulation was promulgated by the Federal Trade Commission in its 2002 amendments to the Telemarketing Sales Rule.[11] Part IV also looks at the limits on market-based and litigation responses to the problem.

Part V proposes the adoption of a Uniform Consumer Account Control Act ("UCACA").[12] The UCACA proposes a total ban on preacquired account marketing. A total ban is the appropriate remedy for preventing account charges to the millions of consumers who pay for unwanted services because of preacquired account marketing. The UCACA differentiates preacquired account marketing, in which the seller obtains the consumer's account information from a third party, from seller-retained account marketing, where the seller obtains account information from a consumer, and then that same seller uses the information in a later transaction with the same consumer. The UCACA limits the use of seller-retained account information with trial offers.

Part V also explains the rationale for completely forbidding the use of preacquired account marketing. Prohibiting this form of marketing is conceptually less difficult than many other areas of consumer protection regulation because the regulatory costs in this situation are almost non-existent.[13] There is little to no discernible benefit to consumers in allowing a seller access to their accounts without the consumers providing their account information. Any seller can avoid having to comply with the regulation simply by acquiring the consumer's account information from the consumer, a task all other types of sellers must accomplish. The real burden of this last step, of course, is that the seller must actually reach an understanding with the consumer that the consumer wants to pay for the merchandise.

[9] Gramm Leach Bliley Act ("GLBA"), Pub. L. No. 106—102, tit. V, § 502(d), 113 Stat. 1437 (1999) (codified at 15 U.S.C. § 6802(d) (2006)).

[10] *See, e.g.*, 12 C.F.R. § 40.12 (2009); *see also infra* notes 211–20 and accompanying text.

[11] *See* 16 C.F.R. § 310.4(a)(6) (2009); *see also infra* notes 208–22 and accompanying text.

[12] *See infra* app. A. Appendix A is the proposed UCACA.

[13] *See infra* Part IV.A.

II. Preacquired Account Marketing Sales Schemes

This Part describes the basic types of preacquired account marketing schemes and discusses the companies involved on both sides of the transaction—those selling services to consumers and those selling preferential access to consumer accounts.[14] The most commonly marketed item is a membership club sold by offering a free trial period.[15] This form of marketing permits a staggering number of charges to consumers' accounts.

A. *Preacquired Account Marketing is Based on Third-Party Authorization to Charge Consumer Accounts*

A seller uses preacquired account marketing by obtaining preferential access to charge a consumer's account from someone other than that consumer. The two sources from which the seller can obtain this account access are: (1) an account issuer, such as a financial institution; or (2) another seller that previously acquired the account number. These two types of preacquired marketing are described below.

1. *Preacquired Account Marketing Through Account Issuers*

Consumers hold a variety of accounts with financial institutions and merchants. Most consumers have multiple credit accounts, including credit cards, retailer charge cards, and mortgage loans.[16] Consumers also typically have multiple asset accounts, such as checking or savings accounts.[17] A seller using preacquired marketing (the "preacquired seller") gains preferential access to these consumer accounts by entering into a contract with the institution that issues these consumer accounts (the "account issuer"). The contract permits the preacquired seller to charge a consumer's account based on the preacquired seller's determination that the consumer has consented to the purchase.[18] This consent allows the preacquired seller to access the funds

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[14] This Article uses the word "service" for the products sold because the vast majority of this marketing allows account charges for services, especially membership clubs and insurance, although goods such as magazines are also charged through preacquired marketing. *See infra* notes 28–31 and accompanying text.

[15] NAT'L ASS'N OF ATT'YS GEN. ("NAAG"), COMMENTS AND RECOMMENDATIONS OF ATTORNEYS GENERAL IN THE MATTER OF: "TELEMARKETING REVIEW-COMMENT FTC FILE NO. P994414" 10 (2000), *available at* http://www.ftc.gov/bcp/rulemaking/tsr/comments/naag.pdf [hereinafter NAAG COMMENTS I]. The author was substantially involved in the production of this document, as well as all other NAAG submissions to the FTC on this subject, while an Assistant Attorney General in the Minnesota Office of the Attorney General.

[16] *See* Marilyn Lewis, *1 in 7 Americans Carry 10 or More Credit Cards*, MSN MONEY, Feb. 14, 2007, http://articles.moneycentral.msn.com/Banking/CreditCardSmarts/1In7AmericansCarries10CreditCards.aspx?GT1=9113.

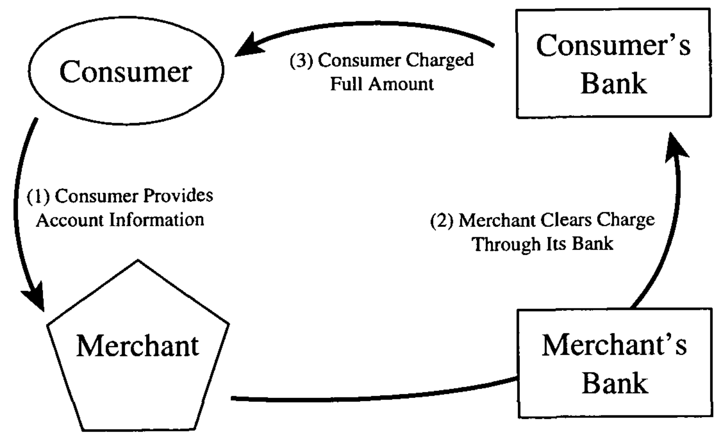
[17] Carol C. Bertaut & Martha Starr-McCluer, *Household Portfolios in the United States*, *in* HOUSEHOLD PORTFOLIOS 181, 181 (Luigi Guiso et al. eds., 2002).

[18] NAAG COMMENTS I, *supra* note 15, at 10–11.

from the account without obtaining either an account number (usually in the form of a credit or debit card) or a negotiable instrument (usually a check).[19]

The contracts between the preacquired seller and the account issuer typically require the preacquired seller to provide a form of proof that the consumer actually consented to the purchase. The proof of consent varies with the form of solicitation.[20] For a telemarketing call, for example, the preacquired seller usually tape records the end of the call where the consumer provides her birth date or similar information as alleged verification of authority to charge the account.[21] Upon receiving verification of the consumer's consent from the seller, the account issuer charges the full amount to the consumer's account, pays the seller a portion of the purchase price, and retains for itself a portion of the funds as a fee.[22]

Account charges for a typical consumer purchase, one not involving preacquired marketing, can be graphed as follows:



The consumer deals solely with the merchant as to the merchandise and solely with her financial institution as to the charge. The merchant deals

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[19] *Id.*

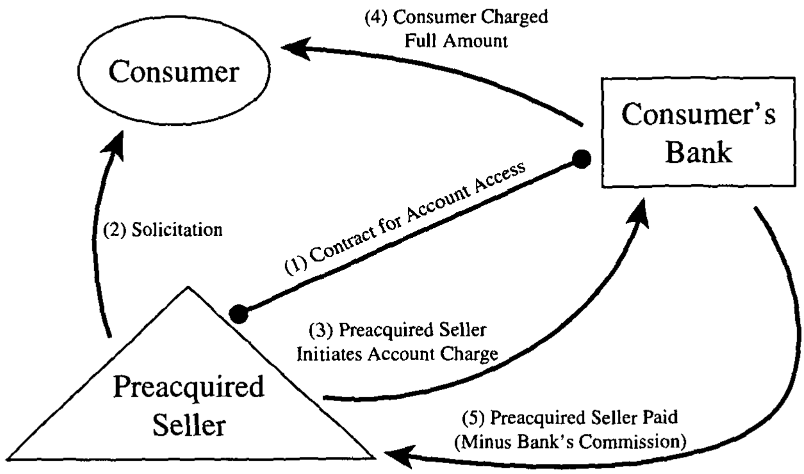
[20] NAAG, COMMENTS AND RECOMMENDATIONS OF ATTORNEYS GENERAL IN THE MATTER OF: TELEMARKETING REVIEW – COMMENT FTC FILE NO. R411001 30 (2002), *available at* http://www.ftc.gov/os/comments/dncpapercomments/04/naag.pdf [hereinafter NAAG COMMENTS II].

[21] NAAG COMMENTS I, *supra* note 15, at 12 ("Preacquired account marketers rarely, if ever, directly ask the consumer for authority to charge his or her account. Instead the telemarketer asks the consumer a general question about whether or not she or he understands the terms of the offer," including asking the consumer to verify her birth date or state mother's maiden name.).

[22] *See, e.g.*, 2008 Affinion 10-K, *supra* note 8, at 6 ("[T]he marketing partner markets our products and services to its customers, collects revenue from the customer and typically pays us a monthly fee per participant."); Vertrue, Inc., Annual Report (Form 10-K), at 5 (Sept. 12, 2006) [hereinafter Vertrue 10-K] ("We pay the partner either a royalty for initial and renewal membership fees or a fee per marketing offer or per sale. . . . [W]e pay the vendors a fee based on the number of members enrolled in the membership program or based on other agreed-upon factors.").

solely with the consumer as to the merchandise and solely with its own financial institution to obtain its funds for the merchandise.

In contrast, the schematic of a transaction involving a preacquired marketing contract between a seller and an account issuer may be graphed as follows:



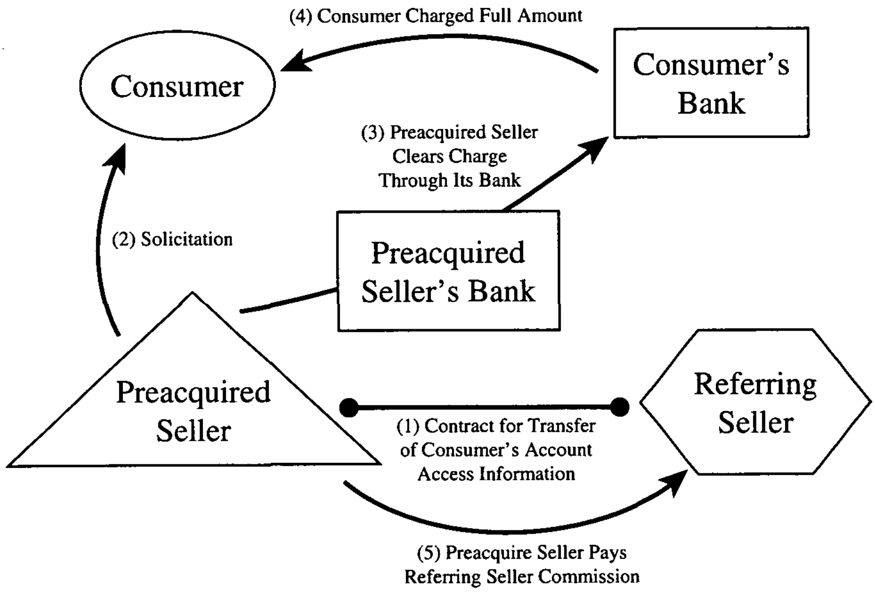
Unlike a typical consumer transaction, a preacquired account transaction starts with an agreement between the preacquired seller and the consumer's financial institution (or other account issuer), which allows the preacquired seller to have preferential account access—in other words, to "preacquire" this account access. Unlike a typical consumer purchase, preacquired marketing necessarily involves an initial solicitation by the seller. At no point does the consumer provide the seller with a check or credit card to finalize a sale. Instead, the seller initiates an account charge based on the authority it preacquired by signing a contract with the account issuer.

An example of a preacquired marketing transaction could begin when Girish receives a mail solicitation for a free trial in the Travel Now membership club, which offers discounts on travel services. The solicitation appears to Girish to be from his financial institution, Blue Bank, but the offer actually is from Travel Now, the preacquired seller that has a contract with Blue Bank allowing it to solicit Blue Bank customers and initiate charges to a Blue Bank customer's account if Travel Now determines that the customer has consented to its offer. If Girish returns an acceptance of the free trial offer, and fails to cancel during the trial period, Travel Now will initiate a charge on Girish's Blue Bank account. Blue Bank then charges Girish for the full amount of the membership club fee. Under its contract with Travel Now, Blue Bank retains a portion of the amount charged to Girish and pays the remainder to Travel Now.[23]

2. *Preacquired Account Marketing Through Referring Sellers*

The second conduit for preacquired marketing occurs through contracts between two sellers. Again, this type of arrangement begins with the preacquired seller entering into a contract to obtain special account access—in this case, by contracting with a merchant (the "referring seller") that previously obtained account access information from the consumer during a prior transaction. The referring seller gives the consumer's account information to the preacquired seller and, of course, is paid a portion of any charge collected from customers. Payments made to the referring seller for participating in this arrangement and selling the consumer's account number have been called "bounties,"[24] and these payments may exceed half of the amount obtained from consumers.[25]

This type of preacquired marketing may be graphed as follows:



[23] This hypothetical is based on allegations against Chase Bank. *See* Complaint for Injunction, Civil Penalties and Other Equitable Relief, People v. Chase Bank USA, N.A., No. GIC850483 (Cal. Super. Ct. July 12, 2005), *available at* http://ag.ca.gov/newsalerts/cms05/05-054_0a.pdf (describing agreements between Chase and Trilegiant, the corporate predecessor to Affinion).

[24] 2008 Affinion 10-K, *supra* note 8, at 97.

[25] COMMITTEE REPORT, *supra* note 7, at ii (stating that payments to referring sellers participating in Internet preacquired marketing were $792 million of $1.4 billion in revenue).

For example, Girish rents a car and pays for the rental by providing his credit card to 3Q Auto Rental ("3Q"), the referring seller. 3Q has a contract with Travel Now, the preacquired seller, which allows Travel Now to solicit 3Q customers and to charge the accounts used by 3Q customers to pay for their rental cars. Travel Now can use the customer and account information provided by 3Q to solicit Girish to accept a free trial offer in the Travel Now membership club, without Girish ever being asked to provide his account information. If Girish accepts the free trial offer, and fails to cancel during the trial period, Travel Now has access to the necessary account information from 3Q to charge Girish's account. 3Q and Travel Now then split the proceeds from the account charge.[26]

B. Preacquired Sellers and Their Partners Providing Account Access

The product most commonly sold through preacquired marketing is a membership club.[27] For example, preacquired sellers market home decorating clubs that provide discounts on furniture[28] and programs to help prevent identity theft.[29] Preacquired sellers also often sell insurance policies[30] and magazine subscriptions.[31]

Preacquired sellers are affiliated with a wide range of account issuers and referring sellers that can offer access to their customers' accounts. For example, in 2009, Affinion Group, the largest seller of membership programs through preacquired marketing, reported, "Our diversified base of marketing partners includes more than 5,500 companies in a wide variety of industries, including financial services, retail, travel, telecommunications,

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[26] This hypothetical is based on allegations against Budget Rental Car. *See* app. B and *infra* notes 65–69 and accompanying text (describing sample Budget-Everyday Values solicitation).

[27] NAAG COMMENTS I, *supra* note 15, at 10.

[28] *See, e.g.*, Encore Marketing Home & Garden Savings Club, http://www.encoremarketing.com (last visited Mar. 23, 2010) (follow links to "Our Programs", then "Membership Clubs", and then "Home & Garden Savings Club"); Provell Essentials for Home, http://www.provell.com (last visited Mar. 23, 2010) (follow links to "our programs", then "Essentials for Home").

[29] *See, e.g.*, Affinion Group, Privacy Guard, http://www.affiniongroup.com/products-services/membership/privacy_guard.cfm (last visited Mar. 23, 2010); Affinion Group, ID Secure, http://www.affiniongroup.com/products-services/membership/id_secure.cfm (last visited Mar. 23, 2010); Identity Guard, http://www.identityguard.com (last visited Mar. 23, 2010); Vertrue, Consumer Programs – Security, http://www.vertrue.com/consumer_prog_security.asp (last visited Mar. 23, 2010).

[30] NAAG COMMENTS II, *supra* note 20, at 30–38; *see also* 2008 Affinion 10-K, *supra* note 8, at 9–10 ("We offer four primary insurance programs that pertain to supplemental health or life insurance.); Vertrue 10-K, *supra* note 22, at 4 (describing insurance programs as including "life, supplemental health, accidental death, short-term and long-term disability").

[31] *Financial Privacy and Consumer Protection: Hearing on the Growing Concerns over the Way Consumers' Personal and Financial Information Is Being Shared or Sold by Their Financial Institutions Before the S. Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. 4–7 (2002) (statement of William H. Sorrell, Att'y Gen., The State of Vermont); NAAG COMMENTS II, *supra* note 20, at 30–38.

utilities and Internet. Select marketing partners include Bank of America, JPMorgan Chase, HSBC, Société Générale, Choice Hotels, Staples, 1-800-FLOWERS and Priceline."[32] Another large preacquired seller, Vertrue, Inc., stated in 2006, "Our membership programs are marketed, in many cases, through arrangements with our clients, which include banks and other financial institutions, e-commerce companies, direct response television companies, catalog companies, retailers, and other organizations with large numbers of individual customers."[33]

Preacquired marketing agreements with account issuers authorize the charge of credit accounts, such as credit cards or mortgage loans, and asset accounts, such as checking or savings accounts.[34] The typical account issuer is either a large financial institution or an operating subsidiary of the financial institution.[35] For example, in 2008, Affinion reported that it had contracts with "18 of the top 20 U.S. credit card issuers, 17 of the top 20 U.S. debit card issuers, 5 of the top 5 U.S. mortgage companies and 13 of the top 20 European retail banks."[36] Another preacquired account membership club seller, Intersections, Inc., described its largest clients in 2007 and 2008 as Bank of America, Citibank, Discover, and Capital One.[37] Preacquired marketing with account issuers extends beyond financial institutions to include any type of company that creates and maintains consumer accounts. Thus, utility, cable, and telecommunication companies sell preferential account access to preacquired sellers.[38]

A large number of consumers are solicited and charged for products, membership clubs, insurance policies, or other merchandise through preacquired marketing. Affinion alone claims over seventy million worldwide "members" in its consumer programs as a result of "over 800 million direct mail marketing pieces mailed annually," "80 million telemarketing contacts annually," and "over 1 million new online members added each year."[39] Vertrue more modestly claimed "approximately 5.8 million" members in 2006.[40]

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[32] 2008 Affinion 10-K, *supra* note 8, at 12. Affinion's largest "marketing partner" is JPMorgan Chase, which accounted for more than ten percent of its revenue. *Id.*

[33] *See* Vertrue 10-K, *supra* note 22, at 5.

[34] *See id.*

[35] *See* Affinion Group, Inc., Annual Report (Form 10-K), at 4 (Feb. 29, 2008).

[36] *Id.*

[37] Intersections, Inc., Annual Report (Form 10-K), at 6, 35 (Mar. 16, 2009).

[38] 2008 Affinion 10-K, *supra* note 8, at 4, 11 (noting that expansion into the "cable, telecom and utilities industries" is a key element of its business strategy); *see also, e.g.*, Posting of Sam Glover to Caveat Emptor, http://caveatemptorblog.com/t-mobile-scamming-customers (Jan. 7, 2010).

[39] Affinion Group, The Value of Partnership, http://www.affinion.com/our-expertise/case-studies/value_of_partnership.cfm (last visited Mar. 23, 2010).

[40] Vertrue 10-K, *supra* note 22, at 6; *see also infra* note 184 and accompanying text (noting that Vertrue, Affinion, and Webloyalty claim that over thirty-four million members were promised incentive payments).

C. Solicitation Methods

Preacquired marketing occurs through a variety of solicitation methods, including direct mail, Internet sales, and telemarketing. The following discussion describes the mechanics of these different methods in more detail.

1. Direct Mail

Direct mail solicitations occur in many forms, such as stand-alone solicitation letters, inserts in credit card or other bills, and detachable forms on the envelope of statements.[41] One popular format for direct mail is a "live check" sent to the consumer. The back of the check contains a statement that the consumer agrees to join a membership club or program and authorizes charges to her account if she fails to cancel within a set time period.[42] In 2009, Affinion reported that direct mail "remains [its] largest marketing medium in terms of new member acquisition, accounting for 45% of new joins globally in 2008."[43]

2. Internet "Post-Transaction" Preacquired Marketing

Internet sales are a growing market for preacquired account sellers.[44] After a consumer shopping on the Internet clicks the button to accept the purchase, she sees a screen that presents the solicitation membership club offered by the preacquired seller.[45] Sometimes this offer is presented in a pop-up box, but other times the consumer is directed to a new webpage where she is compelled to hit a button accepting or rejecting the solicitation in order to reach the confirmation page for the intended purchase.[46] These types of Internet solicitations by the preacquired seller have become known

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[41] 2008 Affinion 10-K, *supra* note 8, at 7 ("Our direct mail operations incorporate a variety of mailing types, including solo direct mail, detachable inserts, credit card inserts, statement inserts, promotion inserts, and other printed media.").

[42] *See infra* app. B; *see also, e.g.*, Herb Weisbaum, *Don't Cash that Check! It's a Scam*, MSNBC, Jan. 17, 2007, http://www.msnbc.msn.com/id/15104735/ns/business-consumer_news/.

[43] 2008 Affinion 10-K, *supra* note 8, at 7.

[44] Vertrue 10-K, *supra* note 22, at 5–6. Affinion projected a "compound annual growth rate of approximately 15.1% for Internet media from 2007 to 2012 in the [United States]." 2008 Affinion 10-K, *supra* note 8, at 6.

[45] COMMITTEE REPORT, *supra* note 7, at 2–3; *see also Aggressive Sales Tactics on the Internet and Their Impact on American Consumers: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 111th Cong. (2009) [hereinafter *Aggressive Sales Tactics Hearing*] (statement of Sen. Jay Rockefeller (D-W. Va.), Chairman, S. Comm. On Commerce, Science, and Transportation), *available at* http://commerce.senate.gov/public/index.cfm?p=HearingsandPressReleases&ContentRecord_id=1ab8d59f-73a4-4fd9-aa2a-611c85861f0c&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=dcb92227-73d9-4ff2-a610-9f43df72faa5. The author testified at this hearing. *See id.* (statement of Prentiss Cox, Associate Professor of Clinical Law, University of Minnesota Law School).

[46] COMMITTEE REPORT, *supra* note 7, at 2–3.

as "post-transaction marketing."[47] The transfer of the consumer's account number from the referring seller to the preacquired seller has been referred to as a "data pass" in the context of Internet preacquired marketing.[48]

In 2009, Senator Jay Rockefeller (D-W. Va.), Chairman of the U.S. Senate Committee on Commerce, Science, and Transportation (the "Committee" or "Senate Committee"), began an investigation into preacquired marketing practices on the Internet.[49] The Committee staff report that resulted from the initial phase of this investigation revealed that "more than 450 e-commerce companies and e-retailers" have acted as referring sellers with three of the largest preacquired sellers using Internet marketing—Affinion, Vertrue, and Webloyalty.[50] According to the Senate Committee Report, these three preacquired sellers have charged consumers more than $1.4 billion for membership clubs sold through the Internet, with more than half of that amount paid as "bounties" to the referring e-retailers.[51]

3. *Telemarketing and the "Upsell"*

Telemarketing solicitations using preacquired account authority have three distinct forms: (1) outbound telemarketing, (2) inbound telemarketing, and (3) Voice Response Unit ("VRU") systems. Outbound telemarketing is the familiar scenario in which a stranger calls a consumer's phone and attempts to sell her an unsolicited good or service.[52] An inbound telemarketing solicitation occurs when the consumer initiates a call to an account issuer or referring seller. After the initial transaction prompting the consumer's call is complete, the preacquired seller's product is presented to the consumer either by the account issuer, the referring seller, or by transfer to the preacquired seller.[53]

In 2006, Vertrue described its inbound telemarketing as targeting its partners' inbound callers who meet certain criteria.[54] These callers are offered "membership programs by the partner's service representative or by one of [Vertrue's] membership service representatives through a call transfer."[55] In return for access to the caller, Vertrue "pay[s] the partner either a royalty . . . or a fee per marketing offer or per sale."[56] For instance, Leah calls to order clothes from JCPenney and the representative agent asks Leah if she would like ten dollars off her order and a thirty-day free trial member-

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[47] *Id.* at 1–3.
[48] *Id.* at 2–5.
[49] *See generally id.*
[50] *Id.* at 13.
[51] *Id.* at 14. It appears from the context of the Committee Report that the $1.4 billion in revenue was generated during the time frame of 1999 to 2009. *Id.*
[52] *See* FTC Telemarketing Sales Rule, 16 C.F.R. § 310.2(u) (2009) (defining "Outbound telephone call").
[53] *See* NAAG COMMENTS II, *supra* note 20, at 33–34.
[54] Vertrue 10-K, *supra* note 22, at 5.
[55] *Id.*
[56] *Id.*

ship in JCPenney Perfect Home Rewards. If the representative deems Leah to have consented, the representative enrolls Leah in the rewards program.[57] If Leah fails to cancel her membership within thirty days, the account she used to pay for her clothes is charged for the club's monthly membership fee.[58]

VRUs, the ubiquitous computerized phone systems that require pressing numbers on the phone keypad to navigate through various menus, are similarly employed in preacquired marketing. Preacquired sellers refer to this type of solicitation as an "upsell,"[59] although it functions similarly to what is called "post-transaction" marketing in the Internet context.[60] Affinion describes its VRU program as follows:

> When a consumer contacts an affinity partner's call center to activate a credit or debit card, check their account balance or make another inquiry that can be handled electronically, the automated voice response system offers our product while the customer is waiting for, or after the completion of, the transaction or inquiry.[61]

D. *The Free Trial Offer*

Regardless of the solicitation channel, a constant companion of preacquired marketing is the free trial offer with negative option.[62] A typical free trial offer provides the consumer thirty days from enrollment to use the membership club, but some free trial periods, such as for insurance programs, can extend up to one year.[63] The free trial also contains a negative option, meaning that the consumer is charged the full price of the membership or service if she fails to cancel it within the trial period.[64]

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[57] *See* JCPenney Perfect Home Rewards, How Did I Enroll in JCPenney Perfect Home Rewards?, http://www.perfecthomerewards.com/help/how_did_i_enroll.php (last visited Mar. 23, 2010).

[58] *See id.*

[59] NAAG COMMENTS II, *supra* note 20, at 33–34.

[60] *See supra* Part II.C.2.

[61] 2008 Affinion 10-K, *supra* note 8, at 7.

[62] *See* 16 C.F.R. § 310.2(t) (2009) (defining "Negative option feature"); *see also* COMMITTEE REPORT, *supra* note 7, at 5–6; 2008 Affinion 10-K, *supra* note 8, at 34 ("Members are usually offered incentives (e.g. free credit reports or other premiums) and one to three month risk-free trial periods . . . ."); Vertrue 10-K, *supra* note 22, at 6 ("When consumers agree to enroll in a program, they generally receive a trial membership."); NAAG COMMENTS II, *supra* note 20, at 32 ("A constant companion of the preacquired account telemarketer is the opt-out free trial offer.").

[63] *See, e.g.*, Ruling as to Liability at 45, 54, 56, Iowa *ex rel.* Miller v. Vertrue, Inc., Equity No. EQ 53486 (Iowa Dist. Ct. Polk County Mar. 18, 2010), *available at* http://www.state.ia.us/government/ag/latest_news/releases/mar_2010/Vertrue_RULING_Ruling.pdf ("typical" Vertrue solicitation is a thirty-day free trial offer); *see also, e.g.*, app. B (thirty-day trial).

[64] *See* 16 C.F.R. § 310.3(t). Preacquired marketers also use negative options for automatic renewal of the charges. *See* COMMITTEE REPORT, *supra* note 7, at 2. Also, the amount of the charge may increase after the first year. *See, e.g.*, app. B (annual fee of $119.99 increases to $129.99 on automatic renewal in second year).

Appendix B is an example preacquired account solicitation where account access is provided by a referring seller. This sample solicitation also involves the combination of preacquired selling with a "live check," which is a negotiable instrument that obligates the consumer to the solicitation terms when cashed. The preacquired seller is Trilegiant (the company offering the "Everyday Values" club), and the referring seller is Budget, the car rental company.[65] The solicitation comes in an envelope with a Budget logo and contains three check-size pieces of paper: a check for $9.25; a larger print document with the Budget logo explaining the benefits of the offer; and a smaller print and denser disclosure page.[66] The benefit of money back on cash purchases is prominent in the solicitation. Conspicuously featured on the large print page is the following statement: "Please accept the enclosed check and use your $9.25 cash for whatever you wish."[67] In the middle of the disclosure page is the following paragraph:

> Your satisfaction and your relationship are always important. When you cash or deposit the enclosed check, we will automatically extend your membership for an additional eleven months following your thirty-day trial and bill the $119.99 annual fee to the card you have on file with Budget for a membership in Everyday Values unless you call 1-877-880-1825 to cancel during the thirty-day trial period and owe nothing. Your trial period begins when your membership materials arrive in four to five weeks. Everyday Values is not affiliated with Budget. Your second-year membership will be billed automatically at the $129.99 annual fee. Your membership for each year thereafter will be billed at the then-current fee, automatically billed annually to the same account unless you call to cancel. We will not have to ask for your account number or further consent in order to bill you.[68]

A similar statement appears above the endorsement line on the back of the check.[69] This is a typical free trial offer with negative option for a membership club sold by preacquired marketing.

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[65] Trilegiant is the corporate predecessor to Affinion, and both Trilegiant and Budget have had or currently have connections to Cendant Corporation. 2008 Affinion 10-K, *supra* note 8, at 1, 6; *see* Martin Bosworth, *Inside Trilegiant's Marketing Machine*, CONSUMERAFFAIRS.COM, July 21, 2005, http://www.consumeraffairs.com/news04/2005/trilegiant_inside.html.

[66] *See* app. B.

[67] *Id.*

[68] *Id.*

[69] *Id.*

III. Consumer Unawareness of Preacquired Marketing Account Charges

Astounding numbers of consumers are unaware that they are paying for services "sold" through preacquired marketing.[70] This is because preacquired sellers avoid obtaining the traditional cues used by consumers to signal consent to account charges. Instead, preacquired sellers rely on the contractual authorization from the account issuer or the referring seller to access the consumer's account. When combined with a "free trial offer," preacquired marketing leads to account charges for a substantial number of consumers who are unaware that their accounts were charged. The result is a marketing system that thrives solely because it results in account charges to consumers who did not want to purchase the service.

A. *Preacquired Marketing Generates Massive Misunderstanding Among Consumers*

A large number of consumers have complained to state attorneys general, the Better Business Bureau ("BBB"), and other consumer advocates that the preacquired account marketing practice is deceptive.[71] The BBB alone has received thousands of complaints about Affinion Group.[72] A BBB spokesperson found that "[t]he large volume and pattern of complaints BBB has received indicates that Affinion is not taking enough steps to ensure consumers understand exactly what they're getting into."[73] Vertrue, another preacquired marketing company, has received an "F" rating from the BBB because of the thousands of complaints filed against the company, and its failure to resolve those complaints.[74]

The companies themselves also receive large numbers of consumer complaints. The Senate Committee investigation found that the companies "receive millions of calls every year from angry, frustrated consumers" who

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[70] Committee Report, *supra* note 7, at iii ("Internal documents reviewed by Committee staff show that Affinion, Vertrue, and Webloyalty know that most of the 'members' they acquire through their aggressive online sales tactics do not understand they have been enrolled in a program that charges their credit or debit card on a recurring basis.").

[71] Committee Report, *supra* note 7, at 2; *see also, e.g.*, Petition in Equity at 14–16, Iowa *ex rel.* Miller v. Vertrue, Inc., Equity No. EQ 53486 (Iowa Dist. Ct. Polk County May 15, 2006), *available at* http://www.state.ia.us/government/ag/latest_news/releases/may_2006/MemberWorks_Vertue_PETITION_5_06.pdf (describing numerous complaints from consumers).

[72] Press Release, BBB, BBB Receives Thousands of Complaints on Mysterious Credit Card Charges: U.S. Marketing Company Is Charging Online Shoppers Every Month Without Their Knowledge (July 2, 2008), *available at* http://www.bbb.org/us/article/bbb-receives-thousands-of-complaints-on-mysterious-credit-card-charges-us-marketing-company-is-charging-online-shoppers-every-month-without-their-knowledge-5798.

[73] *Id.*

[74] BBB, Company Reliability Report: Vertrue, Inc., http://www.bbb.org/nebraska/business-reviews/advertising-direct-mail/vertrue-in-omaha-ne-107000028 (last visited Mar. 23, 2010).

have discovered their enrollment, and wish to cancel their membership or challenge charges to their accounts.[75] Customers contacting the companies "us[e] words like 'fraud,' 'tricked,' 'deceptive,' 'misleading,' 'scam,' 'deceitful,' 'dishonest,' 'betrayed,' and 'robbed' to describe their experiences."[76] Complaints at one referring seller rose to a level that an employee of the company described as "brutal and unprecedented."[77]

The large numbers of consumer complaints have led to consumer protection actions by public enforcement agencies. State attorneys general have brought several lawsuits against some of the largest banks in the nation for their roles in preacquired account marketing schemes.[78] The first suit against an account issuer was brought against U.S. Bancorp by thirty-nine state attorneys general.[79] The suit alleged violations of federal and state laws for U.S. Bancorp's sharing of bank account numbers and other personal financial data with preacquired sellers.[80] State attorneys general also have brought Unfair and Deceptive Acts and Practices ("UDAP") actions against the following account issuers for participation in preacquired marketing: Bank One (a multistate lawsuit involving twenty-nine states)[81]; Fleet Mortgage;[82] Citibank (a multistate lawsuit involving twenty-eight states);[83] Sears;[84] and Chase Manhattan.[85] State attorneys general enforcement actions against referring sellers engaged in preacquired marketing include cases against Tick-

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[75] COMMITTEE REPORT, *supra* note 7, at iii.

[76] *Id.*

[77] *Id.* at 27.

[78] *See infra* notes 80–89 and accompanying text.

[79] *See* Press Release, Wash. State Office of the Att'y Gen., Settlement With US Bank Helps Protect Consumer Privacy (Sept. 22, 2000), *available at* http://www.atg.wa.gov/pressrelease.aspx?&id=4716.

[80] Complaint at 11–16, Minnesota *ex rel.* Hatch v. US Bank Nat'l Ass'n, No. 99-872 (D. Minn. June 8, 1999) (on file with author).

[81] *See, e.g.*, Press Release, Office of the N.Y. Att'y Gen., First USA to Halt Vendors' Deceptive Solicitations: Agreement Extends Protections to Cover Millions of Credit Card Holders (Dec. 31, 2002), *available at* http://www.oag.state.ny.us/media_center/2002/dec/dec31a_02.html. FirstUSA is a subsidiary of Bank One Corporation. *See* Complaint, Lebensohn v. Bank One Corp., No. 99-CV-08120 (N.D. Ill. Dec. 14, 1999), *available at* http://securities.stanford.edu/1013/ONE99/complaint022500.htm.

[82] Minnesota *ex rel.* Hatch v. Fleet Mortgage Corp., 181 F. Supp. 2d 995 (D. Minn. 2001); Minnesota *ex rel.* Hatch v. Fleet Mortgage Corp., 158 F. Supp. 2d 962 (D. Minn. 2001). The author participated in all actions cited in this Article in which the Minnesota Attorney General's Office was involved.

[83] Assurance of Discontinuance, *In re* Citibank (N.Y. Att'y Gen. Feb. 27, 2002), *available at* http://www.oag.state.ny.us/media_center/2002/feb/feb27b_02_attach.pdf.

[84] *See, e.g.*, Press Release, Office of the Cal. Att'y Gen., Attorney General, District Attorneys Settle Consumer Protection Complaint Against Memberworks, Sears Over Discount Club Memberships (Apr. 27, 2001), *available at* http://ag.ca.gov/newsalerts/print_release.php?id=1076.

[85] Complaint for Injunction, Civil Penalties and Other Equitable Relief, *supra* note 23; *see also* Maria Aspan, *Check Is in the Mail; Is Reputation on the Line?*, AM. BANKER, March 14, 2008, *available at* 2008 WLNR 4932679. Following the settlement of this case, Chase reduced its use of "live checks" in preacquired account marketing and switched to the use of gift cards as an incentive to accept the free trial offer. *See* Maria Aspan, *JPM Chase Drops Check Offers in Favor of Plastic Variety*, AM. BANKER, June 30, 2008, *available at* 2008 WLNR 12131090.

etmaster, Time,[86] and, more recently, AT&T.[87] The Federal Trade Commission ("FTC") has also filed lawsuits against numerous referring sellers engaging in preacquired marketing with Triad Discount Buying Services.[88] Companies involved in the FTC matter included the following: Premier Club Services, L.L.C.; Premier Marketing Services of America, L.L.C.; Residents Resource Network, L.L.C.; and the Shoppers Edge, L.L.C., among numerous others.[89]

State attorneys general have repeatedly filed enforcement actions against many preacquired sellers as well. These include cases against Damark (now Provell, Inc.),[90] Blitz Media, Inc.,[91] BrandDirect Marketing, Inc. (a multistate lawsuit involving the Washington and Connecticut attor-

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[86] *See, e.g.*, Press Release, Office of the N.Y. Att'y Gen., Entertainment Giants Settle Massive Telemarketing Case: Spitzer Settles Case Involving "Free" Trial Offers of Magazines (Jan. 7, 2002), *available at* http://www.oag.state.ny.us/media_center/2002/jan/jan07a_02.html.

[87] *See* Assurance of Discontinuance, *In re* AT&T Mobility LLC, No. 09-2-00463-1 (Wash. Super. Ct. Feb. 26, 2009), *available at* http://www.atg.wa.gov/uploadedFiles/Home/News/Press_Releases/2009/AT&T%20Asurion%20AOD2-26-09.pdf.

[88] Stipulated Final Judgment and Order, FTC v. Smolev, No. 01-8922-CIV-ZLOCH (S.D. Fla. Dec. 10, 2002), *available at* http://www.ftc.gov/os/2001/10/triadsmolevorder.pdf; Complaint for Injunctive and Other Equitable Relief, FTC v. Smolev, No. 01-8922-CIV-ZLOCH (S.D. Fla. Oct. 23, 2001), *available at* http://www.ftc.gov/os/2001/10/triadsmolevcomplaint.pdf [hereinafter Smolev Complaint]. Twenty-nine states were also involved in the lawsuit. FTC Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4621 n.469 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310) (noting that twenty-nine states sued Triad Discount Buying Services); *see also* Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief, FTC v. TechnoBrands, Inc., No. 3:02-CV-86 (E.D. Va. Feb. 15, 2002) *available at* http://www.ftc.gov/os/2002/02/technobrandsstip.pdf; Complaint for Permanent Injunction and Other Equitable Relief, FTC v. TechnoBrands, Inc., No. 3:02-CV-86 (E.D. Va. Feb. 14, 2002), *available at* http://www.ftc.gov/os/2002/02/technobrandscmp.pdf; Press Release, Office of the Attorney Gen., Cornyn Gets Settlement in Hearing Aid Case, (Dec. 12, 2001), *available at* http://www.oag.state.tx.us/newspubs/newsarchive/2001/20011212techno.htm (explaining that the Texas Attorney General's Office, along with attorneys general from thirteen other states and the District of Columbia, settled claims against TechnoBrands, Inc.).

[89] For an inclusive list of the companies named in the FTC's lawsuit, see Smolev Complaint, *supra* note 88.

[90] Assurance of Discontinuance, Minnesota *ex rel.* Hatch v. Damark Int'l, Inc., No. C8-99-10638 (Minn. Dist. Ct. Ramsey County Dec. 3, 1999) (on file with author).

[91] *See* ILL. ATT'Y GEN.'S OFFICE, SUPPLEMENTAL COMMENTS OF THE ILLINOIS ATTORNEY GENERAL'S OFFICE IN THE MATTER OF: TELEMARKETING SALES RULE REVIEW-FTC FILE NO. R411001 1–2 (2002), *available at* http://www.ftc.gov/os/comments/dncpapercomments/supplement/ilag%5B1%5D.pdf.

neys general),[92] MemberWorks and its successor Vertrue,[93] and Trilegiant (a multistate lawsuit involving sixteen states).[94]

B. Understanding Consumer Misunderstanding

These consumer complaints and enforcement actions underscore the severity of the problem of consumer misunderstanding with preacquired marketing. The starting point for examining the genesis of this misunderstanding is looking at how preacquired marketing effectively transfers the control of consent to an account charge from the consumer to the seller. This core problem is then compounded by a layering of other sales tactics that have long been associated with consumer deception and misunderstanding. The end result of preacquired marketing is that many consumers never grasp the terms of the transaction, while other consumers become confused between the time of the initial solicitation and the account charge.

1. The Fundamental Issue: Preacquired Marketing Shifts the Control of Consent to the Account Charge from the Consumer to the Seller

Consumers use three shorthand methods of signaling consent to be charged in a consumer transaction: cash; a signature on an account instrument; or providing the seller an account number or other account access information. Handing cash to a seller obviously constitutes agreement to purchase a product or service. A signature signals consent to be charged when that signature is affixed to account information controlled by the consumer, such as negotiable instruments like a check.[95]

Providing an account number is increasingly the shorthand method of choice in everyday consumer transactions. Consumers perform this task in numerous ways, such as physically handing over their credit cards, swiping

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[92] Press Release, Office of the N.Y. Att'y Gen., Telemarketing Company Promises Reforms: Spitzer Reaches Settlement with Firm Using Bank Customer Information (Jan. 16, 2001), *available at* http://www.oag.state.ny.us/media_center/2001/jan/jan16a_01.html; Press Release, Wash. State Office of the Att'y Gen., Settlement with Discount Buying Club Highlights Privacy Concerns (Aug. 4, 2000), *available at* http://www.atg.wa.gov/pressrelease.aspx?&id=5010.

[93] Multiple states initiated separate actions against Memberworks' successor entity, Vertrue. *See, e.g.*, Ruling as to Liability, *supra* note 63; Second Amended Complaint, Minnesota *ex rel.* Hatch v. Memberworks, Inc., No. MC99-010056 (4th Dist. Minn. Apr. 17, 2000) (on file with author); Amended Complaint for Permanent Injunctive Relief and Other Statutory Relief, Florida *ex rel.* Crist v. Memberworks, Inc., No. 03-9797 (13th Jud. Cir. Ct. Fla. Oct. 2003), *available at* http://myfloridalegal.com/memberworks.pdf.

[94] *See, e.g.*, [Proposed] Permanent Injunction and Final Judgment, People v. Trilegiant Corp., No. GIC850483 (Cal. Super. Ct. San Diego County Aug. 2006), *available at* http://ag.ca.gov/cms_pdfs/press/2006-12-11_Trilegiant_Settlement_Judgment.pdf.

[95] In contrast to written instruments that permit immediate payment, consumers also consent to be obligated to make payments in the future through entering written contracts that do not require immediate payment; for instance, when signing an auto loan.

their cards in machines, reading account numbers over the phone, or entering their account numbers on websites.

Preacquired marketing effectively circumvents these shorthand methods of consent. The preacquired seller can charge the consumer's account when that seller determines the consumer consented rather than when the consumer provides the shorthand consent that would otherwise be required of the consumer to charge her account. This difference, in turn, flips the normal dynamic of the solicitation process, and thus confuses consumers. A survey by the American Association of Retired Persons ("AARP") found that many, if not most, consumers do not understand that their financial accounts can be accessed if they do not provide their account numbers to the seller in the context of a telemarketing transaction.[96]

In a preacquired marketing Internet transaction, for example, the consumer enters her account data before the preacquired portion of the solicitation occurs. Assume that a customer, Marisa, buys an airplane ticket online by entering her account information on the airline's website. She is then directed to a pop-up screen wanting to know if she is interested in "free" gas coupons. She hits the link, and a new screen appears promising the free gas coupons and discounts on other purchases if Marisa accepts a free thirty-day trial in a membership club.

It is at this point in the solicitation process that preacquired marketing takes a sharp turn from a typical consumer transaction. Marisa's acceptance of the free trial obligates her to pay the membership fee after the thirty days expires if she fails to affirmatively cancel the membership. The preacquired seller of the membership club has already obtained the right to authorize charges to Marisa's credit card from the referring seller, which, in this case, is the airline selling her the ticket. If the membership club seller had to get Marisa to enter her credit card information to obtain the "free" coupons, it is likely that Marisa would ask herself why a "free" offer requires a credit card. Instead, the membership club seller makes some form of disclosure that it and the airline, through their contract, consider Marisa's online acceptance after "review" of the disclosure adequate to demonstrate her consent to the later charge, if she fails to cancel within thirty days. The power dynamic has thus shifted from Marisa controlling consent of when an account charge occurs to the seller having control of that determination. This critical missing step—the seller asking the consumer for a well-understood acknowledgement of consent to an account charge—underlies the economic logic of preacquired marketing.

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[96] VT. ATT'Y GEN.'S OFFICE, SUPPLEMENTAL COMMENT IN THE MATTER OF: TELEMARKETING RULEMAKING FTC FILE NO. R411001 (2002), *available at* http://www.ftc.gov/os/comments/dncpapercomments/supplement/vtag.pdf. A plurality-46%-of consumers thought that a telemarketer could not charge a credit or debit card without obtaining the account number from the consumer, while a majority-51%-did not think a bank account could be charged in this manner. *Id.* at 2. Another 15% and 13%, respectively, did not know if this type of charge was possible. *Id.*

2. *The Layering of Practices Susceptible to Misunderstanding*

This potential for misunderstanding with preacquired marketing is compounded substantially by its ubiquitous pairing with a "free trial offer," which has long been seen as susceptible to abuse in consumer transactions.[97] The use of the word "free," or "risk-free," and the concept that the solicitation is only for a trial offer reduce the consumer's expected level of involvement in the transaction.[98] As a telemarketing script soliciting for a membership club put it, "we're sending you the information through the mail, so you don't have to make a decision on the phone."[99] Presenting the solicitation as a low-involvement marketing decision for the consumer exacerbates the problem of consumer misunderstanding with this marketing system. The consumer needs to be more vigilant in this type of solicitation, not less engaged, because the consumer has been deprived of the ultimate control over charges to her account.

Preacquired marketing solicitations also blur the identity of the preacquired seller and the account issuer or referring seller, so the consumer believes that the solicitation is for a service provided by the account issuer or referring seller.[100] In the Budget-Trilegiant "live check" solicitation described earlier, the envelope has a prominent logo for the referring seller, Budget, in the return address and on the first page of the solicitation.[101] The name "Budget" appears repeatedly throughout the solicitation.[102] But in the middle of a paragraph on the smaller type page is a statement that seems to contradict the overall impression of the solicitation: "Everyday Values is not affiliated with Budget."[103] The name of Trilegiant, the actual preacquired seller, appears only in footnote two on the back of this disclosure page.[104] The introduction of the offer as prominently associated with a trusted company, such as a business the consumer has already transacted with, further reduces the consumer's sense of involvement in the transaction or wariness to the deal. As Affinion states, "[our] direct marketing provides us with access to our marketing partners' large customer base, generally results in higher response rates as customers recognize and trust our marketing part-

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[97] Romualdo P. Eclavea, Annotation, *Advertising "Free Trial" of Merchandise As Deceptive Act or Practice or Unfair Method of Competition Violative of § 5(a)(1) of Federal Trade Commission Act (15 U.S.C.S. § 45(a)(1))*, 26 A.L.R. FED. 795 (1976); FTC, Trial Offers: The Deal Is in the Details, http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro16.shtm (last visited Mar. 24, 2010).

[98] *See* Edmund Mierzwinski, *Privacy Materials*, in CONSUMER FINANCIAL SERVICES LITIGATION 893, 930 (Practicing Law Inst. ed., 2001).

[99] Second Amended Complaint, *supra* note 93, at 7.

[100] *Aggressive Sales Tactics Hearing*, *supra* note 45 (statement of Benjamin Edelman, Assistant Professor, Harvard Business School).

[101] App. B.

[102] *Id.*

[103] *Id.*

[104] *Id.*

ners' brands and provides additional credibility and validation as to the quality of the program or service we are offering."[105]

The Senate Committee investigation produced evidence of the extent to which the combination of these practices leads consumers to "accept" a free trial offer that they would not accept if asked to enter their account numbers. Data from one of the major preacquired sellers on the Internet, Webloyalty, shows that consumers are approximately four times more likely to accept the free trial offer if the referring e-retailer passes the consumer's account information to the preacquired seller as opposed to requiring the consumer to enter her account information.[106]

3. *Deceived Consumers and Predictably Irrational Consumers*

If 70% of consumers will reject the preacquired seller's solicitation when asked for their full account number,[107] then that begs the question of whether consumers who "accepted" free trial offers through preacquired marketing ever really understood the terms of the offer. The typical consumer complaint is that the charge appearing on the consumer's account is unauthorized and that the consumer has no knowledge about the origin of the charge.[108] Preacquired marketing works in two general ways to reach this result: (1) by deceiving consumers, especially vulnerable consumers, about the terms of solicitation and account charge; and (2) by exploiting time- and decision-making biases of consumers. The following sections describe these two elements in greater detail.

a. *Deception and vulnerable consumers.*

Many consumers never grasp the fundamental terms of the preacquired marketing offer, and therefore are deceived by the transaction. Consumers who believe that their accounts cannot be charged unless they provide their account numbers may never understand that charges were possible from the offers presented to them.

Other consumers never understood that they were being solicited from third parties. The blurred identity between the preacquired seller and the referring seller or account issuer allows preacquired solicitations to appear as a routine part of the transaction or communication with the referring seller or account issuer. The "live check" direct mail offer appears to be a rebate or refund. Internet preacquired sellers, for instance, sometimes make the preacquired marketing solicitation appear to be a necessary step in the "check-out" process. Preacquired marketing on the Internet features "decep-

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[105] 2008 Affinion 10-K, *supra* note 8, at 5.
[106] COMMITTEE REPORT, *supra* note 7, at 16–17.
[107] *Id.*
[108] *Aggressive Sales Tactics* Hearing, *supra* note 45 (statement of Robert Meyer, Professor, Wharton School, University of Pennsylvania).

tive designs that invite consumers to conclude, mistakenly, that the offers come from the companies the consumers have chosen to frequent, and that the offers are a required part of the checkout process."[109] The solicitations used by preacquired sellers often have deceptive features that draw consumer attention away from the disclosures stating that their accounts will be charged if consumers fail to take further action.[110]

The vulnerability of consumers with mental impairment or limited English language proficiency brings this deception problem into sharp focus.[111] Consider the familiar preacquired solicitation of a membership club with free trial offer that is "accepted" by cashing a "live check." Esther Bilachek receives what appears to be a check from her bank for $6.35. She is eighty years old and lives independently, but her mental acuity is diminishing. The $6.35 check looks to her like a refund from her bank, which she trusts. The previously described deception problem is that Ms. Bilachek is never asked to provide her account number, so there is nothing to trigger that visceral response in her that awakens an understanding that cashing this check may result in an account charge. But what if Ms. Bilachek has such diminished mental capacity that she is not really capable of carefully evaluating the offer, even though she is fully aware that she should not hand over her account number? What if Ms. Bilachek is a Ukrainian immigrant who understands some English but is far from fluent? Or what if Ms. Bilachek has Alzheimer's disease?

An example of this latter circumstance appears in a transcript of the taped verification portion of a preacquired telemarketing call to Robert Steele, an eighty-five-year-old man with advanced Alzheimer's disease.[112] In order to verify the sale, the telemarketer has to ask for Mr. Steele's birth date five times.[113] The telemarketer mentions that his age, eighty-five years, "is not a very long time."[114] Mr. Steele replies, "It is if you stand on your head."[115] His bank account was charged for a membership club.[116] As the telemarketer's conversation with Mr. Steele demonstrates, he was unaware that he was consenting to a sale. Getting an Alzheimer's patient to take out his credit card to read its number is a very different proposition than getting an Alzheimer's patient to say his birth date, especially after five attempts.

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[109] *Id.* (statement of Benjamin Edelman, Assistant Professor, Harvard Business School).

[110] *Id.* (statement of Robert Meyer, Professor, Wharton School, University of Pennsylvania).

[111] *See id.* (statement of Prentiss Cox, Associate Professor, University of Minnesota Law School) (describing deception of elderly consumers through preacquired marketing). A lawsuit by Iowa Attorney General Tom Miller recently produced data suggesting that preacquired seller Vertrue caused charges to accounts disproportionately owned by the elderly. *See infra* text accompanying notes 139–43.

[112] Second Amended Complaint, *supra* note 93, at 15 & ex. 7.

[113] *Id.* at ex. 7.

[114] *Id.*

[115] *Id.* Public enforcement actions by state attorneys general are filled with examples of elderly consumers charged for membership clubs.

[116] *Id.* at 15.

b. Exploiting time and decision-making bias.

The clear potential for deception with this type of marketing does not mean preacquired marketing deceives all, or even most, consumers solicited at the time they are presented with the free trial offer. Preacquired marketing also can result in charges unwanted by and unknown to consumers who nonetheless grasped the initial solicitation either to some degree or fully.

The negative option aspect of the free trial offer is a key contributor to this result. Negative option marketing has long been known to raise issues of consumer misunderstanding resulting from this attenuation of the sales process.[117] Some consumers may not grasp that their accounts can be charged by negative options through free trial offers without further action by the consumers. As Wharton Business School Professor Robert Meyer explains:

> Naïve consumers with limited web experience may be taken in for no reason other than harboring beliefs that the sellers follow the same norms of ethical exchange that they have [come] to expect in traditional markets, where payment for goods and services is a volitional choice made by the consumer, not something one has to opt out of.[118]

Yet, consumers who understand the basic terms of the solicitation and the negative option mechanism with the free trial offer are still routinely subject to account charges for services they do not want or use. For a consumer to avoid an account charge when enticed by preacquired marketing solicitation, she has to perform two separate tasks: (1) understand the nature of this unusual and complex solicitation, and (2) then retain focus on the solicitation weeks after it has ended. Many consumers simply forget about the solicitation during the free trial period. This latter task is thus made more difficult because there is no real reminder of the need to cancel.[119]

The negative option, combined with other features of preacquired marketing, also is problematic because it works partly by exploiting consumer biases in decision-making. Professor Meyer describes these preacquired marketing free trial offers as resulting in an "unfortunate paradox" that consumers:

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[117] *See, e.g.*, Peter Bowal, *Reluctance To Regulate: The Case Of Negative Option Marketing*, 36 AM. BUS. L.J. 377, 378 (1999); Mark T. Spriggs & John R. Nevin, *Negative Option Selling Plans: Current Forms Versus Existing Regulation*, 15 J. PUB. POL'Y & MARKETING 227, 234–35 (1996); Dennis D. Lamont, Comment, *Negative Option Offers In Consumer Service Contracts: A Principled Reconciliation Of Commerce And Consumer Protection*, 42 UCLA L. REV. 1315 (1995).

[118] *Aggressive Sales Tactics* Hearing, *supra* note 45 (statement of Robert Meyer, Professor, Wharton School, University of Pennsylvania).

[119] Notice that the free trial offer is about to expire typically appears as junk mail and is often thrown out. NAAG COMMENTS II, *supra* note 20, at 49; *Aggressive Sales Tactics* Hearing, *supra* note 45 (statement of Robert Meyer, Professor, Wharton School, University of Pennsylvania).

> were drawn to the appeal of a "free trial" period in the belief that it allowed them to avoid taking the overt action of purchasing the services—when in fact, it had just the opposite effect. By accepting the free trial they were implicitly making the decision—which was surely unintentional—to make purchasing the passive act, and not purchasing the effortful one.[120]

The net result of the preacquired marketing technique is that even among consumers who had some understanding of the preacquired solicitation at the time of the offer, a substantial number of them will be mystified as to the reason that their accounts were charged for services of which they were unaware and which they did not want to purchase.

This marketing scheme is an extreme example of the type of market dysfunction described so persuasively by Professors Elizabeth Warren and Oren Bar-Gill in advocating for the creation of a Financial Product Safety Commission.[121] Warren and Bar-Gill observed that consumers have imperfect information in making choices about complex credit products and that consumers also behave irrationally in the credit market. In an important insight, Warren and Bar-Gill note that creditors sell higher cost products by engaging in detailed analyses of consumer patterns of credit use to identify and exploit consumer misunderstandings and flaws in risk analysis.[122] Similar to this concern in complex credit transactions, preacquired sellers have designed a marketing system based on consumer vulnerabilities that results in charges for services unknown, and thus essentially non-existent, to the consumer.

C. The Primary Regulatory Problem with Preacquired Marketing is Consumer Sorting

As described above, the flood of consumer complaints about account charges resulting from preacquired marketing comes from consumers who have varying levels of understanding about the transaction at the time of solicitation. The public policy problem presented by this type of marketing, however, is most apparent when examining the power this type of marketing has to segregate a sufficient number of consumers who are unaware that their accounts are being charged. Preacquired sellers and their business partners who sell account access use preacquired marketing the way wolves hunt caribou—they sort out the insufficiently attentive and vulnerable consumers.

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[120] *Aggressive Sales Tactics* Hearing, *supra* note 45 (statement of Robert Meyer, Professor, Wharton School, University of Pennsylvania).

[121] Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 98–100 (2008).

[122] *Id.* at 23–25.

The existing evidence regarding the consequences of this type of marketing makes such a predatory analogy appropriate.[123]

Consumers deemed by the preacquired seller to have accepted a free trial offer in a typical preacquired marketing solicitation can be grouped into the following four general categories:

> (1) those who accept the free trial offer at the outset because they are deceived about the offer and do not understand that their accounts can be charged if they fail to cancel;
> (2) those who accept the free trial offer with the understanding at the time of solicitation that there may be later account charges, but who forget about the solicitation entirely or at least fail to remember the need to cancel during the trial period to avoid account charges;
> (3) those who understand the offer and retain their focus on the matter through the trial period, but determine that they do not want the service and thus cancel during the trial period; and
> (4) those who understand the offer and retain their focus on the matter through the trial period and who do not cancel because they want the benefits and know that they are being charged.

Groups 1 and 2 can each be further divided into two subgroups: (A) consumers who notice the charge on their account statements and attempt to cancel the service and reverse the charges at that point; and (B) consumers who do not notice the charges and therefore continue to pay for a service for which they are unaware that they have been charged.[124]

These groups can be charted as follows:

GROUP	SUBGROUP A	SUBGROUP B
1	Never Understood Account Could be Charged; Saw Charge On Statement and Sought Cancellation	Never Understood Account Could be Charged; Did Not Notice Account Charged & Paid In Full
2	Understood Account Charge Possible At Solicitation But Forgot; Saw Charge On Statement and Sought Cancellation	Understood Account Charge Possible At Solicitation But Forgot; Did Not Notice Account Charged & Paid In Full
3	Understood Offer and Cancelled During Trial Period	
4	Understood Offer and Did Not Cancel During Trial Period; Desired To Pay For Service	

[123] *See infra* Part III.D.1.b – III.D.2.

[124] Subgroup B may also include some consumers who discovered the charges on their account statements, but did not take any action to cancel the service. Group 4 may contain some consumers initially in Groups 1 or 2, but who discover the charges on their account statements and decide at that point they want to pay for the service. The data from public enforcement actions and investigations discussed below suggests that very few consumers fit either of these profiles. *See id.*

It is easy to say that Group 1 was deceived by the solicitation and that Groups 3 and 4 were not deceived. Group 2 presents a strong, but more nuanced, argument about whether the consumer's misunderstanding constitutes deception.[125]

It is instructive to shift the focus from the varying levels of consumer cognition to how the seller makes business decisions based on the aggregate conduct of these groups. Put simply, a preacquired seller and its business partner providing the account access can profit if Groups 1 and 2 are sufficiently large, even if Group 4 is exceedingly small or non-existent. This is especially true if Groups 1B and 2B are sufficiently large, as these are consumers who fail to notice the charge and therefore do not take steps to have them stopped or reversed.[126] For services charged annually, such as most insurance policies and many membership clubs, consumers in Groups 1B and 2B provide the preacquired seller the full revenue charge for the first year of the service. These consumers are also likely to continue having the charge "automatically renewed" at a higher rate and assessed to their accounts annually or for a longer period, thus providing a predictably high revenue stream.[127] Consumers who are charged monthly may be more likely to notice the account charges because they are more frequent, but they may also be less likely to cancel promptly because the amounts are smaller and thus less noticeable.

This business model of consumer sorting becomes even more profitable for the preacquired seller and its business partners when considering the cost side of the equation. Not only do Group 1B and 2B consumers pay for the membership or other service in full, but they also cost nothing to service. Membership club benefits often depend on the consumer taking initiative to request the benefit. For example, a membership club might offer cash back on purchases or other refunds to consumers who fill out coupons and return them to the seller.[128] Because consumers in Groups 1B and 2B are unaware that they are paying for the service, these consumers presumably do not use the service and, thus, impose little to no cost on the preacquired seller for providing the service. The same is true for preacquired sellers of insurance policies. An insured cannot make a claim on a policy she does not know she holds.

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[125] *See infra* notes 237–42 and accompanying text.

[126] Because preacquired sellers often refuse to refund to consumers who are charged on an annual basis the portion of the service cost for the period before the account charge, the preacquired seller makes revenue from Groups 1A and 2A. *See, e.g.*, 2008 Affinion 10-K, *supra* note 8, at 21. Thus, anyone in Groups 1 and 2 can represent revenue to businesses engaged in preacquired marketing, although it is only Groups 1B and 2B that provide full revenue for the service.

[127] *Id.* (stating that "we experience a higher percentage of cancellations during the initial period as compared to renewal periods," and that "our profitability depends on recurring and sustained renewals").

[128] *See, e.g.*, app. B.

If preacquired marketing exists because it charges nearly all of its customers for services that they do not know they are paying for, it is clearly employing an undesirable consumer sorting scheme. A growing body of empirical evidence, reviewed in the next section, strongly suggests that preacquired marketing works in precisely this manner. The socially adverse impact of this marketing system operates regardless of whether the percentage of consumers subject to this result who never understand the solicitation is greater or smaller than the percentage of consumers who understood the account charge process at the time of solicitation and later forgot about their obligation to cancel during the free trial offer period.

D. *Statistical Evidence of Consumer Sorting with Preacquired Account Marketing*

State attorneys general have collected data in their investigations of preacquired marketing that shed light on the extent to which this type of marketing operates as a process to sort consumers unaware of charges to their accounts. The recent work of the Senate Committee provides strong corroborative evidence for this theory, and further shows that preacquired marketing on the Internet works almost identically to preacquired marketing in more established direct marketing channels.[129]

1. *State Attorneys General Actions and Investigations*

Data made public incident to consumer protection enforcement investigations includes information from actions taken by the state attorneys general of Iowa, Illinois, and Minnesota.

a. *Iowa Attorney General's Office Investigative Data.*

In 2006, Iowa Attorney General Tom Miller filed a law suit against preacquired seller Vertrue (formerly known as Memberworks).[130] The lawsuit cited a high volume of complaints by Iowans about unauthorized account charges resulting from a variety of preacquired marketing techniques, including telephone "upsells," Internet sales and direct mail.[131]

As part of the investigation leading to the lawsuit, the Iowa Attorney General's Office sent a survey in December 2004 to four hundred randomly-selected Iowans who were listed by Vertrue as recent members of a club

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[129] COMMITTEE REPORT, *supra* note 7, at 3–8, 17–24.

[130] Petition in Equity, *supra* note 71. On March 18, 2010, District Court Judge Robert Hutchison issued an order following trial finding that Vertrue and related defendants were liable for violations of the Iowa Buying Club Membership Law, IOWA CODE ANN. § 552A (West 2010), the Iowa Consumer Fraud Act, IOWA CODE ANN. § 714.16 (West 2010)), and the Older Iowans Law, IOWA CODE ANN. § 714.16A (West 2010). Ruling as to Liability, *supra* note 63.

[131] Petition in Equity, *supra* note 71, at 12.

(with membership beginning after April 1, 2003).[132] The eighty-six club members who returned responsive surveys stated their experiences as follows:[133]

> (1) 53 (or 61.6%) responded that they were unaware of the membership, and that the charge was totally unauthorized;
> (2) 23 (or 26.7%) stated that they were aware of the club, but that they never used it and believed that they had already cancelled;
> (3) 7 (or 8.1%) stated generally that the charges were "unauthorized," or not asked for; and
> (4) 3 (or 3.5%) gave unclear answers that indicated some awareness of the club, but dissatisfaction with the service, including one member who "felt coerced" into paying for the membership.[134]

The first and by far largest category of survey respondents fits closely with the definition of Groups 1B and 2B outlined in the previous section. The second largest group fits either in Groups 2A or 3. The striking result is that the number of survey respondents in Group 4 ranges somewhere between 0% and 3.5%, depending on whether customers who show some vague awareness of being a member are included, or are members because they "felt coerced."

During extensive litigation of this lawsuit, from 2006 through 2010, the Iowa Attorney General conducted an additional survey and further analysis of data regarding Vertrue membership clubs. First, in 2008, the Iowa Attorney General's Office conducted another survey of Iowans charged by Vertrue. This survey focused on Iowa consumers who were charged by Vertrue eighteen or more times within the prior year; in other words, a group most likely to be aware of and using the membership club.[135] The Iowa Attorney General's Office received forty-seven survey responses of the one hundred customers sent a survey.[136] The results were broken into four categories of the following sizes: unauthorized and unaware (twenty-five, or 53.2%); unauthorized but recalls solicitation (seven, or 14.9%); authorized and aware (fourteen, or 29.8%); and other (one, or 2.1%).[137] The first two of these categories directly fit into the Group 1B and 2B archetypes outlined above, and

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[132] *Id.* at 16–17; *see also id.* at 58–59 attach. 13.

[133] *Id.* at 58–59 attach. 13. Not included in this breakdown are the following: one member whose response was categorized as "unsure" and one survey that was returned with a note indicating that the member had passed away. *Id.*

[134] *Id.* Of the three members in this last group, the responses were summarized by the Iowa Attorney General's Office as follows: "doesn't recall but assumes she said yes," "felt coerced. . . and felt she [paid] more than she benefitted [sic]," and "somewhat aware and never used." *Id.*

[135] Plaintiff's Exhibit 456, Memo to Vertrue File from Marc Wallin, Iowa *ex rel.* Miller v. Vertrue, Inc., Equity No. EQ 53486 (Iowa Dist. Ct. Polk County Mar. 18, 2010) (on file with author).

[136] *Id.*

[137] *Id.*

these groups account for more than two-thirds of surveyed consumers. The third category fits into the Group 4 archetype. Even among consumers expressly selected for having been billed repeatedly as active club members, the number of customers in Group 4 accounted for just under 30% of surveyed consumers.

Second, the Iowa Attorney General's Office examined the reasons that Iowa consumers complained to the BBB about Vertrue and found that "unauthorized charges" were the reason for over three-quarters of the complaints. Three hundred randomly selected BBB complaints about Vertrue by Iowa consumers were examined and broken into three categories of the following sizes: (1) unauthorized charges/know nothing about (230, or 76.7%); (2) signed up, cancelled and still being charged (30, or 10.0%); or (3) authorized, but problems with program/miscellaneous (40, or 13.3%).[138]

Finally, the suit produced some data suggesting that Vertrue's customers were typically the elderly. A study conducted for Vertrue of online visitors to Vertrue's Privacy Matters club's website found that these online visitors were lopsidedly age fifty-five or older.[139] The number of users in this category was 46%, which represented by far the highest percentage of visitors relative to the general online population of any demographic group analyzed in the report.[140] The report notes that compared to a competing service, "the biggest skew is in visitors over age 55."[141]

The Iowa Attorney General's Office also examined the data produced by Vertrue to determine the prevalence of the elderly (65 and older) among consumers with frequent billings by Vertrue but no use of the benefits of Vertrue membership clubs. The study found the number of elderly in this group was 40.6%, whereas the percentage of elderly in the Iowa adult population was approximately 19.9%.[142] The study found an over-representation of elderly regardless of the method of solicitation.[143]

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[138] Plaintiff's Exhibit 458, Memo to Vertrue File from Marc Wallin Dated Oct. 13, 2009 at 1, Iowa *ex rel.* Miller v. Vertrue, Inc., Equity No. EQ 53486 (Iowa Dist. Ct. Polk County Mar. 18, 2010) (on file with author).

[139] Plaintiff's Exhibit 263C, "Privacy Matters Demographic and Lifestyle Data–Oct. 27" at 1, *Vertrue, Inc.* (Equity No. EQ 53486) [hereinafter Demographic & Lifestyle Data] (on file with author); *see also* Proposed Order by Plaintiff at 63, *Vertrue, Inc.* (Equity No. EQ 53486) (stating that this exhibit is an internal company document).

[140] Demographic & Lifestyle Data, *supra* note 139, at 6.

[141] *Id.* at 1.

[142] Plaintiff's Exhibit 228, Memo to Vertrue File from Marc Wallin Dated Oct. 15, 2009 at 1–2, *Vertrue, Inc.* (Equity No. EQ 53486) (on file with author). The memo describing this survey notes that census data from 2000, 2004, and 2008 showed the number of Iowans sixty-five and older represented between 19.4% and 19.9% of the Iowa population aged eighteen and over.

[143] *Id.* at 2 (finding the following percentage elderly: direct mail (46.7%), Internet (31.1%), outbound telemarketing (31.0%) and inbound telemarketing (52.1%).

b. Illinois Attorney General's Office Investigative Data.

The Office of Illinois Attorney General Lisa Madigan conducted a survey in 2004 of a national bank's customers who had been charged for one or more membership clubs after a direct mail solicitation.[144] The bank's customers had been mailed a "live check" for a small, odd amount, which enrolled them in a membership club if they failed to cancel during the trial period.[145] Fifty-six customers who cashed these checks were considered by the membership club seller to be active, paying members of the club at the time that they were first contacted by the Illinois Attorney General's Office or discovered they were paying for the program when surveyed.[146] However, none of these individuals stated that they were previously aware that they were members of this club or intended to be members. Of these fifty-six bank customers, thirty-seven expressly indicated that they were unaware that they were enrolled in and being charged for a membership club.[147] The remaining nineteen customers provided other responses, none of which indicated the Group 4 criteria of an awareness of the membership club and an intention to join the club at the time of the solicitation.[148] In terms of the four groups outlined above, none of the fifty-six "active" club members were in Group 4. At least thirty-seven and probably all fifty-six of the active club members were in Groups 1 and 2 (subgroups 1B and 2B), depending on whether they

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[144] Survey of Trilegiant Membership Club Members from Data Provided by the Illinois Attorney General's Office (2004) (unpublished survey) (on file with the Harvard Journal on Legislation and the author) [hereinafter Survey of Trilegiant Members]. The Illinois Attorney General's Office sent a letter to each of the consumers dated May 28, 2004 stating that the Attorney General's Office had obtained information indicating that the consumer had been charged for a membership club, that the Attorney General's Office would be contacting the consumer about this matter, and asking the consumer to collect information about the matter before the call. Letter from Lisa Madigan, Att'y Gen., State of Ill., to Consumers Charged for a Trilegiant Membership Club (May 28, 2004) (on file with the Harvard Journal on Legislation and the author). The data consists of a spreadsheet with the following fields: the name of the membership club (by initial); consumer statement recalling his or her memory of receiving or cashing a check; whether the consumer recalls being billed for this amount; whether the consumer was currently an active or cancelled member based on the records provided to the Illinois Attorney General's Office by the membership club seller; whether the consumer was voluntarily a member of the club; and "other." Survey of Trilegiant Members, *supra*. Not all fields contained data on the spreadsheet for each consumer contacted. *Id.*

[145] *See Survey of Trilegiant Members, supra* note 144.

[146] *Id.*

[147] *Id.* One of the thirty-seven consumers who did not know that she was enrolled in the program decided to remain an active member after speaking with the membership program when attempting to cancel. *Id.* The survey results also indicate seven individuals listed as active members for whom there are no survey responses. *Id.*

[148] *Id.* These nineteen responses included six consumers who stated that they knew they were members of the club. These members responded to the survey as follows: two stated that they did not remember cashing the check; two remembered cashing the check but did not understand at the time of cashing the check that it could lead to a charge for membership; one was unsure if the check was cashed because her spouse may have done so; and one was unsure if the check was cashed and was unaware that cashing the check could lead to membership. *Id.*

never understood the membership obligation in the solicitation or just completely forgot about it by the time the charge appeared.

Another 105 bank customers surveyed had been members of the club previously, but had cancelled their membership by the time they were contacted by the Illinois Attorney General's Office.[149] Over half of these 105 customers, 56 consumers (53.3%), did not remember cashing the check.[150] Another 43 (41.0%) consumers either remembered cashing the check or were unsure of having done so.[151] Twenty-seven (25.7%) of these 43 consumers did not understand that cashing the check could lead to membership and an account charge.[152] Thus, 83 of the overall 105 cancelling consumers, or 79%, seem to primarily fit the Group 1 profile. By implication then, only 22 (20.9%) of the 105 customers who had cancelled knew or may have known they were signing up for a membership club by cashing the check.[153] It is unclear from the data how many of these 22 consumers cancelled during the trial period as opposed to those who cancelled after noticing the account charge, so it is not known whether they fit into Group 2 (those charged for the membership in full and then cancelling) or Group 3 (those cancelling during the trial period).

Of the 161 consumers surveyed in total, none clearly met the profile of an individual in Group 4—a consumer who cashed the solicitation "live check," was a member of the club during the trial period, and knowingly retained a paying membership in the club.[154] This is further evidence that most consumers who are charged for memberships or other services are in fact unaware of being charged.

c. Minnesota Attorney General's Office Investigative Data.

Data from investigations by the Office of former Minnesota Attorney General Mike Hatch also showed that a large number of consumers charged as a result of preacquired marketing believed that they had not consented to such a charge.

Records received by the Minnesota Attorney General's Office from a subsidiary of one of the nation's largest banks indicated that 173,543 bank

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[149] *Id.* This data excludes four consumers who recall being contacted by a phone solicitation rather than a direct mail solicitation and six consumers listed as cancelled members for whom there are no survey responses. In addition, six consumers were coded as neither active nor cancelled, and their status could not be confirmed from the data provided.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.* Only seven of these twenty-two consumers clearly remembered cashing the check, stated they understood that doing so could lead to membership, and stated that they clearly remember being members. The remainder gave a variety of other responses.

[154] *Id.* Combining all three categories of membership status (active, cancelled, and other), only twenty of the 177 consumers (or 11.3%) expressly stated that they were ever aware they had enrolled in the membership program by cashing the check, and all of these twenty consumers cancelled the club membership. *Id.*

customers cancelled membership clubs or insurance policies sold through preacquired marketing during a thirteen-month period.[155] More than 55% of the customers cancelling the charge stated that "unauthorized bill" was the reason for the requested cancellation.[156] "Request to cancel," was the reason given for 32% of the total cancellations, which is a general category that includes an untold number of customers who believed that the charge was not authorized.[157] Making an unrealistically conservative assumption that only the 55% figure represents all of the customers who cancelled for the reason that they thought the charge unauthorized, that means that 95,573 customers of a single national bank subsidiary alleged unauthorized charges were made to their accounts as a result of preacquired marketing.[158]

The Minnesota Attorney General's Office also released data on cancellations of memberships by Minnesota customers of two different financial institutions involved in a preacquired marketing scheme for the sale of membership clubs using a thirty-day free trial offer.[159] The data reflect the period of time from membership club enrollment to date of cancellation.[160] Consumers who knowingly purchased the free trial offer would likely want to try the service and decide whether to stay enrolled or to cancel the membership during the free trial period to avoid being charged. If all consumers understood the free trial offer solicitation and acted rationally, therefore, the temporal pattern of cancellations should be heavily weighted toward cancellations during the free trial period. A graph of cancellations under this assumption of consumer understanding should look vaguely like the following:[161]

[155] MINN. ATT'Y GEN.'S OFFICE, SUPPLEMENTAL COMMENTS OF THE MINNESOTA ATTORNEY GENERAL'S OFFICE IN THE MATTER OF: TELEMARKETING SALES RULE REVIEW, FTC FILE No. R411001 4 (2002), *available at* http://www.ftc.gov/os/comments/dncpapercomments/supplement/minnag.pdf [hereinafter MINNESOTA COMMENTS]. The author worked on the production of this document while an Assistant Attorney General in the Minnesota Attorney General's Office.

[156] *Id.*

[157] *Id.*

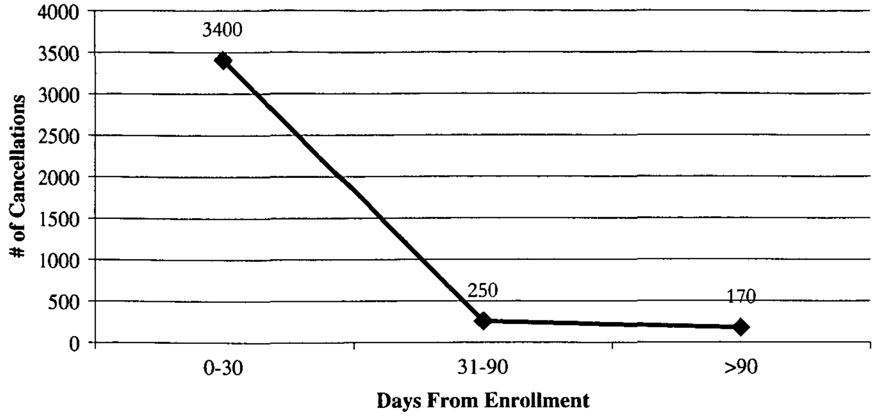
[158] *Id.*

[159] *Id.* at 5–6.

[160] *Id.* at 4.

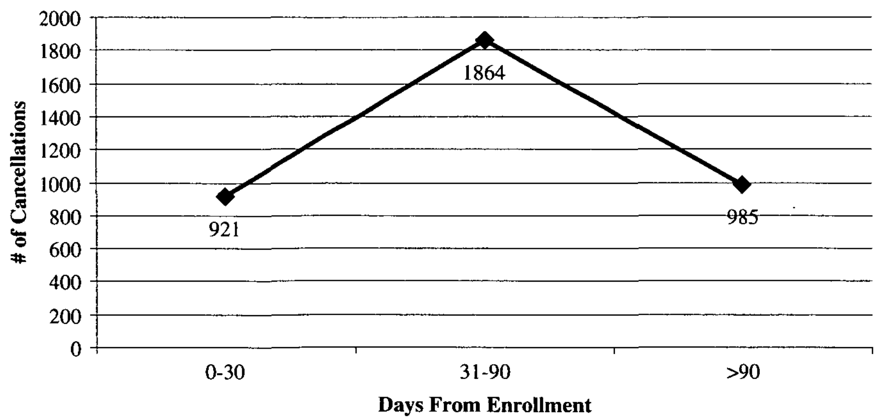
[161] The graph is a hypothetical chart of what customer cancellations may have looked like based on customers who fully understood the solicitation and acted rationally to cancel during the trial period and thus avoid an account charge. The numbers on the graph are derived from the Minnesota Attorney General's cancellation data, *id.*, and reflect the percentages one would expect to see in this scenario.

CHART A



The actual cancellation pattern from customers of the two financial institutions can be graphed as follows:[162]

CHART B



Specifically, only 24.6% (921 of 3770) of the banks' customers acted like Group 3 members and cancelled in the first thirty days.[163] About half of these customers, 49.4% (1864 of 3770), cancelled in the thirty-one- to ninety-day period after enrollment, when the free trial period had ended and the customers most likely noticed the initial charges on their account statements.[164]

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[162] *Id.*
[163] *Id.*
[164] *Id.*

The data are again consistent with a large majority of the cancelling customers not understanding the solicitation and canceling only after the charge appears on their accounts. In terms of the four-group outline, this would mean Groups 1A and 2A together are substantially larger than Group 3. Because only some percentage of consumers in Groups 1 and 2 will notice the charge on their account statements and sort into subgroup A, a substantially large number of consumers in Groups 1 and 2 likely implies that there is also a sizable number of consumers in Groups 1B and 2B who fail to notice the charges and pay for the full price of the membership club.

Evidence from the Minnesota Attorney General action against Fleet Mortgage Corporation, another financial institution, is also noteworthy. Fleet sold a variety of preacquired sellers the right to charge its customers' mortgage accounts.[165] The suit alleged that Fleet's written mortgage statements hid the charges in small print under the name "opt. prod." (optional product) at the bottom of the bills.[166] The suit also alleged that Fleet gave no written notice of the charges to homeowners using automatic draft for mortgage payments.[167] The investigation found an internal Fleet survey of its customer service representatives estimating that about 20% of all service calls were from mortgage customers complaining about these charges.[168] In the survey, Fleet employees shared the resentment created by the deceptive charges for these programs. Some of the comments from Fleet's service representatives about the charges included the following: "unethical," "a scam," and "a fraud."[169] One service representative stated, "[Homeowner] knows they are being slammed [with insurance] they never auth[orized]. [Homeowner] thinks unethical & bad business by us . . . . I agree with the customer."[170]

2. *The Senate Commerce Committee Investigation Data*

The Senate Commerce Committee investigation of preacquired marketing on the Internet similarly revealed low levels of actual consumer consent to account charges. In addition to anecdotal evidence of consumer misunderstanding and anger about account charges, the investigation unearthed data indicating extraordinarily low levels of consumer understanding about the memberships they allegedly purchased. The Senate report quotes an e-mail

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[165] Minnesota *ex rel.* Hatch v. Fleet Mortgage Corp., 158 F. Supp. 2d 962, 965 (D. Minn. 2001); *see also* Complaint at 17, *Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (No. 01-48/ADM).

[166] Complaint, *supra* note 165, at 8, 17–18.

[167] *Id.* at 17.

[168] *Id.* at 8–9, ex. 2.

[169] *Id.*

[170] *Id.* The settlement of this case provided for full reimbursement of membership club fees for Minnesota consumers. Stipulation of Settlement at 3, *Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (No. 01-CV-48/ADM/AJB). To obtain a refund, the consumer had to sign a statement that, "I did not expressly authorize the charges on my mortgage account for a membership program." MINNESOTA COMMENTS, *supra* note 155, at 5–6.

from a Webloyalty employee stating, "[a]t least 90% of our members don't know anything about the membership."[171]

The Senate Committee did not conduct its own surveys of purported club members, as did the Iowa and Illinois attorneys general, but rather reported on internal surveys of members by a preacquired seller and two of its referring sellers.[172] None of these surveys provided clear data on whether the members intended to purchase the service, but they do confirm that most of these consumers were unaware that they were members.[173] For example, a referring seller for Webloyalty surveyed 308 current and past members, half of whom were described as active.[174] The survey found that 76% of those surveyed either did not recall being offered the membership or thought they had declined the membership.[175] Surveys of other referring sellers to Webloyalty produced similar results.[176]

Cancellation data also reflected profound misunderstanding by consumers paying for club memberships. Webloyalty had 66,922 membership cancellations in the month of August 2003 alone, and the reason for cancellation stated by slightly more than 77% of those consumers was "Did Not Authorize/Was Not Aware."[177] The Senate investigation also produced strikingly similar results to those released by the Minnesota Attorney General's Office as to temporal cancellation patterns. Combined data for Affinion, Vertrue, or Webloyalty's memberships sales over the Internet showed that "about a quarter of their members (26.2%) cancel during the free 30-day period, less than a third of their members (29.5%) are still members after six months and only 13.9% remain members for more than one year."[178]

Consumers visiting preacquired seller websites, or calling these sellers, overwhelmingly did so for the purpose of cancelling the membership or complaining about the account charge. Affinion trains its call center employees to expect about 80% of calls to be from consumers wanting to cancel membership.[179] Similarly, a survey of Vertrue employees revealed that an estimated 98% of the seven million customer calls each year were for cancellation of membership.[180] The Senate investigation also found that a sample of one day of visitors to a Vertrue website identified 87% of those

[171] COMMITTEE REPORT, *supra* note 7, at iii.

[172] *Id.* at 18–20.

[173] *Id.* at 18 ("Internal data and member surveys commissioned by Affinion, Vertrue, and Webloyalty clearly show that the three companies understand that the majority of their paying 'members' have little or no awareness of their financial relationship with the companies.").

[174] *Id.* at 19.

[175] *Id.*

[176] *Id.* (noting that "[c]ustomer surveys conducted for Choice Hotels International, Inc. and Classmates.com, both Webloyalty partners, produced similar results").

[177] *Id.* at 18.

[178] COMMITTEE REPORT, *supra* note 7, at 22.

[179] *Id.* at 21 (citing AFFINION GROUP, INC., GREAT FUN NEW HIRE TRAINING MANUAL (2006)).

[180] *Id.* at iii.

website visitors as wanting to either find out about an unknown account charge or cancel membership.[181]

3. Usage data.

This lack of interest in the benefits of the service purportedly purchased by consumers raises the issue of usage of services purchased by preacquired sellers. If the thesis of this Article is accurate, then club members overwhelmingly are unaware of these benefits because they are unaware that they are even club members. Accordingly, usage numbers for these benefits should be low.

Again consider the Budget-Trilegiant solicitation as an example. Members in the Everyday Values club pay $119.99 annually for the membership and are promised three types of benefits: (1) a check for up to one hundred dollars for 2% credit card cash back on purchases up to five thousand dollars per year; (2) four checks of ten dollars each for reimbursement of gas or grocery expenses; and (3) various discounts at restaurants and retailers.[182] To obtain the one hundred dollars for credit card cash back, the club member must submit annually a copy of credit card statements totaling up to five thousand dollars.[183] Similarly, the club member is given four ten-dollar coupons to be submitted quarterly for the gas and grocery reimbursement.[184]

If club members were aware of the charge for the membership club, then a substantial number of club members paying the $119.99 membership fee should have either requested the one hundred dollars in credit card cash back or submitted at least one of the seasonal ten-dollar coupons. Yet this preacquired solicitation appears, on its face, to assume that at least a large number of members would not claim the benefits offered by the program. Revenue from each club member, which is $119.99 the first year and $129.99 the following year, is less than the $140 that each member could obtain by taking advantage of the offered reimbursements.[185] Thus, members using the service as intended would result in negative net revenue for the preacquired seller. This negative net revenue would exist even before considering the substantial sales costs, including the bank's or referring seller's share of revenue, and the operational costs of the preacquired seller.

Both the Iowa Attorney General case against Vertrue and the Senate investigation revealed very low levels of usage benefits by consumers paying for membership clubs. The Iowa case revealed that 863,970 Iowans were or had been in a Vertrue membership program, but 731,575 of these members, or 84.68%, never used any benefits of the club.[186] For Iowa members

[181] *Id.* at 18.
[182] *See* app. B.
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] Ruling as to Liability, *supra* note 63, at 15.

who were still considered active by Vertrue in May 2009, "91.5% of memberships involved no benefit usage whatsoever."[187]

The Senate investigation was unable to obtain comprehensive usage information from the preacquired sellers it investigated.[188] However, the limited data obtained indicates very low usage by consumers charged for membership clubs. The three companies examined in the Senate investigation promised over thirty-four million purported members that they would receive cash back or other incentives on joining the club; however, only 3% of members actually received the promised benefit.[189] Data from Webloyalty further suggest member usage of ".2% and 11.4% for a six month period between 2004 and 2005."[190] The Webloyalty survey of 308 members described above found only 1.6% who had received a promised "$10 cash back offer" and 1.3% who indicated use of program discounts.[191]

Furthermore, website usage for purposes of accessing program benefits appears to be negligible. The Senate report concluded that website usage was "very low" based on the limited data that the investigated preacquired sellers provided to the Senate Committee.[192] The information from Vertrue's website sample, which confirmed more than 87% of members visited the site to cancel, also showed that "[o]nly one member indicated he or she was there to 'find out more about my membership benefits' and none of the respondents were there to 'obtain [a] member ID'."[193]

E. Consumer Sorting with Seller-retained Account Information

Preacquired marketing is a distinct form of market conduct from a seller's retention and reuse of its consumer account numbers. A seller may retain a consumer's account number for ease of use in a later transaction. Sellers frequently retain account numbers to periodically bill consumers for on-going services or regular delivery of goods. Many websites routinely ask consumers buying merchandise if they want the site to retain their credit card numbers for later purchases.

Nonetheless, sellers do retain and reuse account numbers to engage in preacquired marketing-type behavior. For instance, Damark was a nationwide general catalog retailer with a substantial customer base.[194] Consumers

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[187] *Id.* at 34. These usage numbers were for benefit use traceable by Vertrue, but the trial court also found that benefits that were not traceable by Vertrue were not significantly used even by the "very rare individuals" that exhibited substantial use of traceable benefits. *Id.* at 16 n.22.

[188] COMMITTEE REPORT, *supra* note 7, at 24.

[189] *Id.* at 23.

[190] *Id.*

[191] *Id.* at 19, 23.

[192] *Id.* at 23.

[193] *Id.* at 19.

[194] Assurance of Discontinuance, Minnesota *ex rel.* Hatch v. Damark Int'l, Inc., No. C8-99-10638 (Ramsey County Dist. Ct. Dec. 2, 1999).

calling Damark would provide their credit card numbers to order goods from the company, and then Damark would use the credit cards provided by its customers to upsell its own membership clubs using trial offers with a negative option, resulting in the same problem of massive complaints of unauthorized charges.[195] Public enforcement actions revealed other companies that relied on merchandise sales as an introduction to the more profitable venture of preacquired marketing.[196] This conduct with seller-retained information mimics the tactics of preacquired marketing and creates the same adverse result of consumer misunderstanding and confusion. The proposed UCACA differentiates between these forms of seller-retained account marketing and limits the ban only to those sellers who mimic the preacquired marketing tactics.

IV. The Inadequacy of Current Regulatory, Market, and Litigation Responses

Neither market forces nor litigation has been or likely will be an effective solution to preacquired marketing. The only federal legislation on the matter was rendered effectively useless by regulations subsequently promulgated by federal financial institution regulators. Some limited progress in controlling preacquired marketing in the telemarketing context occurred through amendments to the Telemarketing Sales Rule.

A. *Failure of Market Self-Controls*

The market responses that can work to restrict deceptive practices are not effective in the context of preacquired marketing. Preacquired marketing works by sorting out less attentive and vulnerable consumers from a vast number of consumers actively solicited through direct marketing. Consumers do not initiate the buying process, and membership clubs are not the type of product that consumers commonly research through sources like *Consumer Reports*. Even if education could reach millions of consumers currently charged for unwanted services, these efforts would only slightly alter the percentage of consumers sorted into the vast numbers who reject the solicitation.

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[195] *Id.* Damark later changed its name to Provell. Provell, Inc., Annual Report (Form 10-K), at 3 (Apr. 17, 2002), *available at* http://www.sec.gov/Archives/edgar/data/883324/000091205702015504/a2073889z10-k.htm. Damark/Provell found the practice of selling membership clubs so profitable that it ceased its catalog operations to focus on becoming a preacquired seller with account issuers and referring sellers. *Id.* ("The Company had historically operated in three distinct businesses and marketplaces: catalog marketing, membership and e-fulfillment. The Company now operates in a single business segment: membership and customer relationship management programs."). Provell charged millions of consumers for membership clubs. *Id.* at 23.

[196] FTC Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4598 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310).

An obvious market solution to the problem is to rely on the adverse reputational consequences for the companies involved in this practice. Preacquired marketing is a direct marketing program, so reputational concerns have less impact on the preacquired seller. Consumers are responding to the solicitation rather than making an affirmative choice to seek out the seller. Perhaps more importantly, the primary initial brand presentation with preacquired marketing is the name of the account issuer or referring seller. One has to scour the footnotes of the sample Budget solicitation to find out that Trilegiant is the actual seller, for example.[197]

This leads to the more promising possibility of account issuers and referring sellers abandoning preacquired marketing relationships because of reputational interests. When this form of marketing was first exposed a decade ago, U.S. Bancorp agreed to stop cooperating with preacquired sellers, and some other banks joined that pledge.[198] Yet large consumer institutions, including major banks, still continue to form the backbone of this type of marketing.[199] Although the Senate Committee investigation directed substantial public attention to the problems with Internet preacquired marketing, the investigation clearly has not solved the problem. More than two months after the release of the report and hearing, only eight of the more than 450 e-commerce websites and retailers using preacquired marketing, albeit several of the most well-known and well-compensated, had announced to the Committee that they would withdraw from business relationships with preacquired sellers.[200]

One reason for the refusal to disassociate with preacquired sellers may be that the short-term profitability for the banks, other account issuers, and the referring sellers outweighs the reputational damage. The Senate Committee found that "more than 450 e-commerce companies and e-retailers" had engaged in preacquired marketing with just three preacquired sellers—Affinion, Vertrue, and Webloyalty—over the previous ten years,[201] and that eighty-eight of these companies had earned over one million dollars from their participation in preacquired marketing with these three companies, and nineteen of those eighty-eight companies had earned over ten million dollars.[202] As Professor Adam Levitin noted with regard to consumer financial

[197] *See* app. B.

[198] NATHANIEL STERLING, CAL. LAW REVISION COMM'N, STUDY B-400, FIRST SUPPLEMENT TO MEMORANDUM 2003-19 1–2 (2003), *available at* http://www.clrc.ca.gov/pub/2003/MM03-19s1.pdf.

[199] *See supra* notes 32–33 and accompanying text.

[200] Press Release, U.S. Senate Comm. on Commerce, Sci., & Transp., Internet Retailers—Including Fandango, Priceline.com and 1-800Flowers.com—Change Misleading Marketing Tactics in Response to Rockefeller's Landmark Investigation (Jan. 22, 2010), *available at* http://commerce.senate.gov/public/index.cfm?p=HearingsandPressReleases&ContentRecord_id=27af7162-5d3d-42bf-8f91-b160c7061a28&ContentType_id=77eb43da-aa94-497d-a73f-5c951ff72372&Group_id=165806cd-d931-4605-aa86-7fafc5fd3536.

[201] COMMITTEE REPORT, *supra* note 7, at 13.

[202] *Id.* at 14.

services generally, "Unfair, deceptive, and abusive practices . . . can be highly profitable."[203]

Perhaps a more compelling reason for why reputation is not an effective constraint may be that the adverse reputational consequences for the account issuers and sellers are mitigated by the structure of the trial offer. The solicitation is usually closely tied to the reputation of the account issuer or referring seller. Consumers who discover the account charges on their statements that they believe are unauthorized, however, see the preacquired seller listed as the initiator of the charge.[204] Many preacquired marketing companies use a variety of names, including abbreviations of the company name or names of one of their clubs.[205] These statements typically also have the phone number of the preacquired seller listed with the charge, so the consumer is directed to call the preacquired seller.[206] Further, if the consumer calls the account issuer or referring seller, it will refer the consumer to the preacquired seller.[207]

Because these unhappy consumers do not believe that they ever authorized the charges, they may be less likely to link the account issuers or referring sellers to their displeasure with the solicitations, which they do not remember at all or in significant detail. Thus, account issuers are able to use their reputations to help diffuse consumer resistance to the initial solicitation, while shifting the locus of responsibility to the preacquired seller when the displeased consumer complains of unauthorized charges.

Preacquired account marketing agreements have also been structured to insulate complaining consumers from the knowledge that the account issuers and referring sellers are partly responsible for the unwanted account charges. Contracts between preacquired sellers and account issuers regularly include provisions requiring that all customer complaints be referred to the preacquired seller and that financial institutions never have to code the complaints

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[203] Adam J. Levitin, *The Consumer Financial Protection Agency* 4 (Georgetown Law Pew Fin. Reform Project, Briefing Paper No. 2, 2009). Professor Levitin also makes the argument that banks in particular have faced conflicting pressures from safety and soundness regulation, which might encourage the profitability of deceptive practices and consumer protection regulation that would limit deceptive practices. *Id.* Professor Levitin observes, "[H]istorically consumer protection has not won out . . . ." *Id.*

[204] Mark Huffman, *Iowa Sues Vertrue for Consumer Fraud*, CONSUMERAFFAIRS.COM, May 31, 2006, http://www.consumeraffairs.com/news04/2006/05/ia_vertrue.html.

[205] *Id.* Charges by Vertrue appear on credit card statements as "MWI" or one of the club names "HomeWorks," "Simple Escapes," "Connections," "Essentials," or "Leisure Advantage." *Id.* Charges by Affinion Group, Inc. appear on credit card statements under up to seventy different club and business names. BBB, BBB Review of Affinion Group in Norwalk, CT, http://www.bbb.org/connecticut/business-reviews/buying-clubs-and-group-purchasing-service/affinion-group-in-norwalk-ct-41001179 (last visited Mar. 25, 2010); *see also* Affinion Group, Inc., Annual Report (Form 10-K), at ex. 21.1 (Feb. 26, 2010) (listing subsidiaries of Affinion Group, Inc.).

[206] COMMITTEE REPORT, *supra* note 7, at 24; MINNESOTA COMMENTS, *supra* note 155, at 1–2.

[207] MINNESOTA COMMENTS, *supra* note 155, at 2–3.

as a disputed charge under federal credit card dispute resolution rules.[208] The Senate investigation revealed that the same is true with referring sellers. The Senate report described an email from Affinion stating that it has a "STRICT no-no" policy on sending complaining customers back to the referring seller.[209] The Senate report concludes that "Affinion, Webloyalty, and Vertrue handle dissatisfied customers in order to insulate the partners from their own customers' criticism, which is commonly described as 'customer noise' by the companies."[210] Since the reputation of referring sellers is not affected by customer complaints, market forces will not work to curb the practice.

B. *Legislative and Rule-Making Responses*

The exposure of deception and massive consumer misunderstanding with preacquired marketing that has occurred through public enforcement actions has led to legislative and administrative attempts to ban its use.[211] Congress and the FTC took actions that appeared to be a ban on the use of preacquired marketing in certain contexts.[212] The seemingly broad congressional ban on preacquired account use by any financial institution, however, was completely neutered by regulation. Additionally, the much narrower initial FTC ban on preacquired account information in telemarketing was converted in the final regulation to a lesser restriction of the practice.

1. *Title V of the Gramm Leach Bliley Act*

The action against U.S. Bancorp by state attorneys general in 1999 triggered a flood of public disapproval of financial institutions' sharing account information with direct marketers.[213] This disapproval resulted in the quick addition of Title V to the GLBA in November 1999.[214] The GLBA included a provision that appears to ban preacquired marketing through account issuers, which was the subject of the U.S. Bancorp suit. Section 502(d) of Title V states:

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[208] *Id.* at 2–4.

[209] COMMITTEE REPORT, *supra* note 7, at 24–25.

[210] *Id.* at 24.

[211] In addition to the federal government actions discussed in this section, there has been limited activity at the state level to restrict preacquired marketing. Idaho has the only enacted state law on the topic, but it is limited to preacquired telemarketing. IDAHO CODE ANN. § 48-1003B (West 2009). It is similar to, but somewhat less protective than, the Telemarketing Sales Rule, 16 C.F.R. pt. 310 (2009).

[212] *See infra* notes 221–34 and accompanying text.

[213] *See, e.g.*, MINNESOTA COMMENTS, *supra* note 155.

[214] GLBA, Pub. L. No. 106-102, tit. V, §§ 501-09, 113 Stat. 1436-43 (1999) (codified at 15 U.S.C. §§ 6801-6809 (2006)). The influence of the U.S. Bancorp suit is discussed above. *See supra* note 198 and accompanying text.

> (d) *Limitations on the sharing of account number information for marketing purposes.* A financial institution shall not disclose, other than to a consumer reporting agency, an account number or similar form of access number or access code for a credit card account, deposit account, or transaction account of a consumer to any nonaffiliated third party for use in telemarketing, direct mail marketing, or other marketing through electronic mail to the consumer.[215]

At first read, this provision seems to ban the use of preacquired marketing between financial institutions and preacquired sellers. Title V of the GLBA, however, also authorized the promulgation of rules by the federal banking regulators and the FTC to enforce the Act.[216] The resulting "Regulation P," promulgated on June 1, 2000, essentially made section 502(d) meaningless as a limit on the process of preacquired marketing from the consumer's perspective or on the undesirable consequences from this type of marketing.[217] The relevant part of the regulation states, "An account number, or similar form of access number or access code, does not include a number or code in an encrypted form, as long as the bank does not provide the recipient with a means to decode the number or code."[218]

Under this rule, a financial institution can provide a preacquired seller the contact information and an encrypted number for the customer. When the preacquired seller obtains what it and the financial institution determine to be consent to an account charge, the preacquired seller identifies the customer to the financial institution, which decrypts the number and charges the customer's account. Thus, the rule very narrowly interprets the statute's prohibition on disclosing "an account number or similar form of access number or access code," and leaves the financial institution free to empower the preacquired seller to initiate charges to its customers' accounts.[219] This regulatory regime leaves the consumer misunderstanding problem in preacquired marketing wholly unaffected. From the consumer's perspective, there is no difference between how the solicitation and charges from a preacquired account transaction occurred before and after the enactment of Title V of the

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[215] *See* Pub. L. No. 106-102, tit. V, § 502(d), 113 Stat. 1437 (1999) (codified at 15 U.S.C. § 6802(d) (2006)).

[216] *See* § 504(a) (codified at 15 U.S.C. § 6804(a) (2006)).

[217] 12 C.F.R. § 40.12 (2009). Regulation P was adopted jointly by the federal banking regulators, the Federal Reserve Board, and the FTC, and an identical regulation was put in place in various sections of the code of federal regulations corresponding to the rules of each agency. *See* Michael A. Benoit and Elena A. Lovoy, *Recent Federal and State Consumer Financial Privacy Developments*, 57 BUS. LAW. 1209, 1209 n.2 (2002) (listing all the jointly enacted regulations).

[218] 12 C.F.R. § 40.12(c)(1) (2009).

[219] The Conference Committee on the GLBA specifically noted in its report that the federal regulators drafting Regulation P could take this narrow approach to interpreting the statute, but nothing in the Conference Committee Report required this action. H.R. REP. NO. 106-434, at 173 (1999) (Conf. Rep.).

GLBA. The consumer still has her account charged without providing her account number, and the encryption and decryption of that number occurs in the data processing systems of the financial institutions out of sight of the consumer.[220]

2. *Telemarketing Sales Rule*

Shortly after the enactment of the GLBA, and during the promulgation of Regulation P, the FTC tackled preacquired marketing issues in the context of telemarketing in its amendment of the Telemarketing Sales Rule ("TSR").[221] The TSR is the primary federal law governing the content and restrictions on telemarketing solicitations.[222] In its 2002–03 amendments to the TSR, the FTC enacted the federal do-not-call list.[223] Another part of the proposed amendments to the TSR at that time was a ban on preacquired marketing for telemarketing.[224]

The proposed rule published for comment by the FTC on January 30, 2002 expressly prohibited the use of preacquired marketing in telemarketing and declared it to be an abusive practice.[225] The final rule was less restrictive and it was more complicated. The FTC ultimately adopted a broad definition of "preacquired account information" as "any information that enables a seller or telemarketer to cause a charge to be placed against a customer's . . . account without obtaining the account number directly from the customer . . . during the telemarketing transaction pursuant to which the account will be charged."[226] The critical portion of the final rule required that telemarketers using preacquired account information in combination with a "free-to-pay conversion" (a free trial with negative option) must obtain from

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[220] Later guidance documents from the Office of the Comptroller of the Currency ("OCC") make clear the reach of section 502(d) only extends to whether the financial institution reveals unencrypted account numbers. OCC, OCC BULLETIN 2001-26 ATTACHMENT, PRIVACY OF CONSUMER FINANCIAL INFORMATION 28 (2001), *available at* http://www.occ.treas.gov/ftp/bulletin/2001-26a.pdf (requiring of examiners that they only "review a sample of telemarketer scripts used when making sales calls to determine whether the scripts indicate that the telemarketers have the account numbers of the institution's consumers.").

[221] 16 C.F.R. pt. 310 (2009).

[222] The other federal regulatory regime governing telemarketing limits when telemarketing and automatic dialing can be used, but not the content of the solicitation. 47 U.S.C. § 227 (2006); 47 C.F.R. § 64.1200 (2009).

[223] 16 C.F.R. § 310.4(b)(1)(iii)(B) (2009).

[224] Telemarketing Sales Rule, 67 Fed. Reg. 4492 (proposed Jan. 30, 2002) (to be codified at 16 C.F.R. pt. 310).

[225] The initial rule change proposed by the FTC would have prevented a telemarketer from using, and any other person (including financial institutions and other sellers) from disclosing, "billing information" for use in telemarketing. *Id.* at 4543 (to be codified at 16 C.F.R. § 310.4(a)(5)). Billing information was broadly defined to mean "any data that provides access to a consumer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account or debit card." *Id.* at 4540 (to be codified at 16 C.F.R. § 310.2(c)). The FTC commented in its notice of the proposed rule that these provisions would "effectively eliminate the trade in preacquired billing information." *Id.* at 4501.

[226] 16 C.F.R. § 310.2(w) (2009).

the consumer the last four digits of the consumer's account number to be charged.[227] The free-to-pay concept was intended to capture the use of free trial offers.[228] The FTC Statement on the rule summarized the intended effect as forcing the consumer "to reach into his or her wallet, and provide at least a portion of the account number to be charged."[229]

No public data exists directly reflecting the effectiveness of this restriction, and it is difficult to sort out the impact of the rule change.[230] A change in the pattern of public enforcement actions against preacquired marketing suggests that it may have worked to reduce preacquired telemarketing. Prior to the promulgation of the rule, public actions focused on telemarketing, while later cases focused more on direct mail and other forms of preacquired solicitation.[231] Conversely, it is clear that the amended rule proved easy to avoid by circumventing the narrow definition of "free-to-pay conversions." Sellers began to charge one dollar to the account immediately in order to evade the impact of the rule.[232] Preacquired sellers also have circumvented the rule by characterizing their relationship so that the preacquired seller is deemed to be a "wholesaler" of the membership club sold by the account issuer or referring seller.[233] Finally, it is difficult to sort the impact of this portion of the amended rule from the decline in telemarketing generally because of the do-not-call list, which proved highly popular and resulted in a tremendous contraction of the telemarketing industry.[234]

C. Public and Private Litigation Has Had a Limited Effect

Litigation also has been an ineffective control on preacquired marketing abuses. A decade of UDAP public enforcement actions has only led to required disclosures in some contexts.[235] Also, there is a limit to the remedies that most judges are likely to entertain in an UDAP action when an injunc-

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[227] § 310.4(a)(6)(i)(A).

[228] § 310.2(o). The FTC also added a definition for negative option as part of its implementation and regulation of this requirement. § 310.2(t).

[229] FTC Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4621 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310).

[230] *See generally Aggressive Sales Tactics Hearing*, *supra* note 45 (statement of Prentiss Cox, Associate Professor, University of Minnesota Law School).

[231] *See supra* notes 78–94 and accompanying text.

[232] *See, e.g.*, Bosworth, *supra* note 65.

[233] 2008 Affinion 10-K, *supra* note 8, at 6.

[234] Kathryn Clayton, *Don't Call Me: Learn Nuts and Bolts of Federal No-call Registry*, DESERET MORNING NEWS (Salt Lake City, Utah), July 3, 2003, at C01 (noting estimates of 80% reduction in telemarketing calls and a 25–50% reduction in the telemarketing industry).

[235] *See, e.g.*, Minnesota *ex rel.* Hatch v. Memberworks, Inc., No. MC99-010056 (4th Dist. Minn. Apr. 2000) (on file with Author) (requiring various disclosures and double refunds for certain future complainants); Assurance of Voluntary Compliance, *In re* Chase Bank USA, N.A. (Iowa Att'y Gen. Dec. 8, 2006), *available at* http://www.state.ia.us/government/ag/latest_news/releases/dec_2006/Chase%20AVC.pdf (requiring as part of a multistate settlement Chase have its marketers make various disclosures depending on whether the solicitation involved a live check offer); Assurance of Discontinuance, *In re* Citibank (N.Y. Att'y Gen. Feb. 27, 2002) (requiring as part of a multistate settlement that Citibank enter into agreements with

tion must be narrowly tailored to remedy a violation. If the allegations in the case are that many consumers are deceived by preacquired marketing solicitations, then the likely range of injunctive remedies probably will focus on better disclosures. More or better disclosures will not remedy the problem.[236] Not surprisingly, UDAP actions have very rarely resulted in even a partial ban on an entire marketing practice.

Private legal actions have had less success. Most private actions proceed partly or primarily on a UDAP theory.[237] Private litigants have had less success than public enforcement agencies in surviving motions to dismiss on this theory, and some cases have been dismissed because the disclosures were deemed by the court to be adequate to make the solicitation non-deceptive as a matter of law.[238] As the sample direct mail solicitations in the appendices show, preacquired sellers routinely disclose that consumers will be charged if they take the free benefits offered and fail to cancel the service within the specified trial period.[239] The argument that disclosures by preacquired sellers are inadequate to remedy consumer deception also has been made in numerous cases and in detailed analyses by Professors Meyer and Marotta-Wurgler,[240] but the existence of the disclosures has been an insurmountable hurdle for some private actions.[241] Because of the amount in dispute in each transaction, only class action cases are feasible for private

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preacquired sellers that mandate disclosures as to terms of sale, refund policy, automatic renewals, and other matters).

[236] *See infra* Part V.A.

[237] As with many areas of consumer protection law, preacquired account marketing abuses cannot be effectively addressed by traditional common law contract theories, which stress objective tests and impose a duty to read. *See* John D. Calamari, *Duty to Read - A Changing Concept,* 43 FORDHAM L. REV. 341 (1974). Usually, although not always, the preacquired seller and the account issuer enter into contracts requiring that the written disclosures or standardized oral disclosures contain the essential terms of the deal. Scholars have built compelling arguments for law reform that would apply a different legal framing to standard form contracts for consumer use. *See* Wayne R. Barnes, *Toward A Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3),* 82 WASH. L. REV. 227 (2007); Shmuel I. Becher, *A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts And Conventional Contract Law,* 42 U. MICH. J.L. REFORM 747 (2009). Yet, it remains an uphill battle in today's courts to attack contracts in which all relevant disclosures exist, however overshadowed the disclosures are by diverting information.

[238] *See, e.g., In re* Vertrue Inc. Marketing & Sales Practices Litig., 626 F. Supp. 2d 1318 (J.P.M.L. 2009); Spivey v. Adaptive Marketing, LLC, No. 07-cv-0779, 2009 WL 3064927 (S.D. Ill. Sept. 23, 2009). Legal theories other than deception also have been dismissed in putative class actions involving preacquired marketing. *See, e.g.,* Sanford v. Memberworks, Inc., No. 02CV0601, 2008 WL 4482159 (S.D. Cal. Sept. 30, 2008) (dismissing claims under the Electronic Funds Transfer Act and the Unordered Merchandise Act); Memberworks, Inc. v. Yance, 899 So.2d 940 (Ala. 2004) (granting Memberworks's motion to compel arbitration).

[239] See apps. B.

[240] *See Aggressive Sales Tactics Hearing, supra* note 45 (statements of Florencia Marotta-Wurgler, Associate Professor, New York University School of Law, and Robert Meyer, Professor, Wharton School, University of Pennsylvania).

[241] *Spivey,* 2009 WL 3064927.

litigation, and class certification also has proved problematic in some cases.[242]

V. The Case For Banning Preacquired Account Marketing

The best solution to unknown and unwanted account charges resulting from preacquired marketing is to ban its use by statute or rule. Preacquired marketing has unique features that should ease any concern about a blanket prohibition; specifically, the prohibition can easily be avoided by a seller (by simply asking for consumer account information), and the public benefit from this practice is negligible at best. The often difficult problem of constructing the proper scope for such a prohibition persists, but is more easily surmounted here than in comparable regulatory matters. The legislation proposed by this Article, entitled "Uniform Consumer Account Control Act" ("UCACA") is intended to reach this result.[243]

A. *The Rationale For Banning Preacquired Account Marketing*

The starting point for considering a ban on a marketplace practice is a clear understanding of the social costs and benefits from the activity. It is difficult to argue that market conduct shown to be significantly harmful to consumers but that produces no clear public benefit should be allowed. Preacquired sellers and advocates for unrestrained markets may nonetheless argue that measures short of a ban will suffice to remedy the problem. These arguments also are addressed below.

The only potential benefit to the public in allowing preacquired marketing has to derive from the seller avoiding the act of acquiring the account number and related account access data from the consumer who owns the account. This is because a seller that has the consent of the consumer to be charged for a transaction also could obtain payment by acquiring the account number directly from the consumer.

The TSR rule-making process developed a record for the alleged benefits of preacquired marketing. The FTC's Notice of Proposed Rule-Making published in conjunction with the initial proposed rule banning the use of preacquired account information in telemarketing sought industry response

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[242] *See* McNair v. Synapse Group, Inc., No. 06-5072, 2009 WL 1873582 (D.N.J. June 29, 2009) (denying class certification and holding that "even if it is accepted that Synapse's practices were deceptive and uniform, Plaintiffs make no attempt to provide a causation link; they do not adequately explain why the alleged conduct is likely to effect [sic] all class members in the same way."). *But see* Ritt v. Billy Blanks Enters., 870 N.E.2d 212 (Ohio Ct. App. 2007) (permitting class certification regarding UDAP claims against Memberworks and referring seller of "TaeBo" tapes).

[243] The UCACA proposed here does not include remedies or other important provisions that would need to be adapted to the context in which it is enacted. *See infra* app. A. Although suggested in the form of a uniform state law, the UCACA could be adopted by federal legislation or promulgated as a rule by a state or federal agency with appropriate authority.

on the following question: "What specific, quantifiable benefits to sellers or telemarketers result from preacquired account telemarketing?"[244] In its comments accompanying the final rule, the FTC found the response underwhelming:

> [A]lthough business and industry representatives acknowledged during the Rule Review that the practice of preacquired account telemarketing was quite common, maintaining that it was "very important" to them, they provided scant information that would help to quantify the benefits conferred by this practice or better explain how these benefits might outweigh the substantial consumer harm it can cause.[245]

In support of the practice's benefits, the industry first contended that preacquired marketing protected consumers' private financial data by not exposing actual account numbers to employees of the seller who might steal the numbers.[246] The FTC found that, "[t]he record does not reveal any reason to support the notion that the risk of identity theft is any different in [transactions where a consumer discloses his account information] than in transactions where the seller has opted to make use of preacquired account information."[247]

The second benefit claimed by the industry is that preacquired marketing is more efficient because the seller need not acquire the account number directly from the consumer. The FTC found this benefit trivial compared to the problem of consumer misunderstanding created by this marketing practice. Indeed, it is difficult to imagine how preacquired marketing is not much more expensive overall for the seller. The costs incurred by using the preacquired marketing method are much greater than the small cost incurred by nearly every other seller to obtain the account number from the consumer before charging her account. The preacquired seller must negotiate a contract with account issuers or other sellers that allow access to consumer account information, must split the profit of the transactions with these business partners, and then must make additional disclosures in the solicitation to describe the free trial offer and obtain some evidence of alleged consent to the transaction. All of these costs must be considered in establishing the price of the service. In any case, the FTC clearly is correct that this alleged benefit does not remotely justify the strong evidence of consumer deception with preacquired marketing.

The FTC did find one industry argument sufficiently persuasive to revise its previously proposed outright ban on using preacquired account infor-

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[244] FTC Telemarketing Sales Rule, 67 Fed. Reg. 4492, 4538 (proposed Jan. 30, 2002) (to be codified at 16 C.F.R. pt. 310).

[245] FTC Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4617 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310).

[246] *Id.* at 4618.

[247] *Id.*

mation during a telemarketing solicitation. It found that there are some beneficial, even expected, uses of account information in situations where "the consumer makes the decision to supply the billing information to the seller, and understands and expects that the information will be retained and reused for an additional purchase, should the consumer consent to that purchase."[248] The FTC provided the following examples of this situation: (1) the use of previously provided account numbers with a standing order for merchandise at a regular interval, such as quarterly orders for contact lenses; (2) leaving account numbers on file for a later purchase with the same seller, such as with an airline or Internet travel company; or (3) when the telemarketer "upsells" another product to the consumer during the same telephone call, in which case the FTC found that the consumer may expect "that the telemarketer will have retained, and be able to reuse, the account information the customer provided only moments ago."[249] The benefit in the first situation seems especially clear because it prevents the burden of a new sales transaction when both parties want to have a regularly scheduled delivery of merchandise.

The common thread in these situations is that they are all charges resulting from seller-retained account information, rather than preacquired marketing.[250] As detailed above, seller retained account information can be used in ways that are beneficial to, and within the expectations of, the consumer or it can be used in ways that mimic the deception problems of preacquired marketing.[251] The mixed character of seller retained account information does not mean that preacquired marketing creates public benefit. A consumer does not expect a company to which she has not given her account information to have special access to charging her account. Section B details this Article's proposed legislation banning preacquired marketing consistent with this difference.

B. *The Scope and Structure of the Prohibition*

Requiring that the consumer provide a preacquired seller with the same account access information as the consumer would be required to provide to any other seller is the most effective way to remedy the consumer misunderstanding created by preacquired marketing. The remaining problems with

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[248] *Id.* at 4617.

[249] *Id.* at 4619–20.

[250] As to the third situation identified by the FTC, *id.*, the reuse of account information by a seller in an "upsell" is different from the original seller switching the call to a second seller pursuant to a preacquired account marketing contract. There is every reason for the consumer to expect that she will have to provide her account number a second time to a new seller, whereas during a seller upsell the buyer may not have this expectation since she knows her account information is already on file.

[251] *See supra* notes 194–96 and accompanying text.

use of seller-retained account information should be addressed by prohibiting solicitations with trial offers.

1. *Different Sellers Should Not Use Preacquired Account Information*

The core of the proposed legislation, the UCACA, is the prohibition on preacquired marketing. The principle animating this prohibition is that the consumer should be in control of who causes charges to her accounts. The proposed legislation attempts to prevent account issuers or referring sellers from providing preferential access to consumer accounts in exchange for consideration to the account issuer or referring seller.[252]

a. *Referring seller preacquired account marketing.*

The proposed UCACA prohibits the use of preacquired account information by a seller and prohibits account issuers and referring sellers from assisting a seller to use such information.[253] The proposed definition of preacquired account information is "any information that enables a seller to cause an account charge to be placed against a consumer account without the account owner providing all account access information for his or her consumer account directly to that seller."[254] Account access information is defined as "the full account number, or other similar information, and any other information that the account issuer requires for parties other than the account owner to cause charges to the account owner's consumer account."[255] Read together, these definitions include all cases of referring sellers providing to the preacquired seller the information needed to charge a consumer's account. Thus, the UCACA prohibits this form of preacquired marketing by depriving preacquired sellers of the ability to purchase consumer account numbers and related account access information.

b. *Account issuer preacquired account marketing.*

These definitions should also work to ban preacquired marketing involving agreements with the account issuer. There is a potential circularity

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[252] Eliminating the sale and use of preacquired account information would not resolve concerns with consumer deception and misunderstanding resulting from negative options and free trial offers. *See supra* Part III.B.3.a–B.3.b. These problems extend beyond sellers using preacquired account information. The ban on the sale and use of preacquired account information would only prevent the consumer problems that occur from the combination of, or layering of, free trial offers and similar sales tactics with preacquired account marketing. In other words, preacquired sellers would at least be in the same position as other sellers who use these sales tactics.

[253] App. A (UCACA § 2, subdivs. 1–2).

[254] *Id.* (§ 1, subdiv. 9). This definition also encompasses account charges by preacquired sellers for automatic renewal of clubs or other merchandise following a preacquired account charge for the initial period.

[255] *Id.* (§ 1, subdiv. 1).

problem, however, when the UCACA is applied against an account issuer. The proposed definition of account access information refers to the information needed by third parties to charge the account.[256] The problem here is that the account issuer (e.g., bank) defines what constitutes the information needed for account access. Accordingly, an account issuer and preacquired seller could argue that the last four digits of a consumer's credit card, or hitting the appropriate "I agree" button on the Internet, constitutes "account access information" or "other similar information" needed to charge a consumer account because the account issuer has defined that information as sufficient account access information for that seller.

An alternative drafting option to clarify this situation is to restrict the definition of "account access information" to specific types of data permitted for a consumer to access his or her account, such as requiring the consumer to provide full account numbers. This restriction would do too much; it would likely prohibit legitimate transactions either currently in use with consumer accounts or that may develop in the future. The FTC took this restrictive approach in the TSR, but the scope of that regulation is much narrower, as it applies only to oral telemarketing transactions and even then only imposes certain restrictions rather than a ban. The UCACA would apply to a vastly greater number of transactions.

Another alternative would be to require the same account access information for the preacquired seller that is used for all other sellers. This is implied with the current definition.[257] Reading this restriction too broadly, however, may prove burdensome for some lesser-known current or future transactions in which the account issuer has a legitimate reason to offer differential account access criteria for various third parties attempting to charge a consumer account. Also, if the account issuer has only itself and the preacquired seller accessing the account, the information required for transaction confirmation in the preacquired marketing agreement would be the "other similar information" required for all third parties to access the account, thus making the account charge permissible. This situation might occur, for example, when a mortgage servicer, phone company, other utility or insurer allows only preacquired sellers and not other third parties to put charges on its customers' accounts.

The UCACA attempts to resolve the problem by including the following additional prohibition:

> No account issuer shall accept from a seller authorization to charge a consumer account as a result of an agreement between a seller and the account issuer that provides consideration to the account issuer and permits the seller to cause charges to a consumer

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[256] *Id.*
[257] *Id.*

account differently than sellers that have not provided similar consideration to the account issuer.[258]

The account issuer remains free to design differential access criteria to consumer accounts; it just cannot charge for this privilege. This restriction is consistent with the consumer controlling access to her account. There is no reason to allow account issuers to profit from allowing easier access to their customers' accounts.

c. Limiting the scope of regulation.

The proposed legislation contains several restrictions on the scope of the prohibition. The UCACA defines the type of account information that account issuers and referring sellers provide to the preacquired seller in a way that attempts to uniquely identify preacquired marketing while not encroaching on transactions in which the consumer provides account access information that she intends as authorization for a charge. Because the proposed solution is a total prohibition rather than some form of restriction on its use, the scope provisions comprise much of the drafting problem. There are three significant restrictions on the scope of the proposed UCACA prohibition.

First, the prohibition is limited to preacquired sellers that engage in a marketing program. All of the prohibitions and the key definitions are limited to a "seller," which is defined as a person who solicits in connection with a "marketing program."[259] A marketing program is further defined as "a plan, program or campaign to induce the purchase of merchandise by numerous consumers through telemarketing, direct mail marketing, Internet promotion or similar marketing methods."[260] This excludes from the scope of the UCACA isolated transactions between buyers and sellers. If a plumber and an electrician are both working on a job, the homeowner can still tell the plumber to put some miscellaneous charge on the bill of the electrician without concern about violating the prohibition in the UCACA. The preacquired account problem arises only in the context of broad marketing programs.[261]

Second, the definition of account access information makes clear that consumers can authorize payments through systems like PayPal by allowing account access information to occur through a "payment intermediary."[262] If

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[258] *Id.* (§ 2, subdiv. 3).

[259] App. A (UCACA § 1, subdiv. 10).

[260] *Id.* (§ 1, subdiv. 7).

[261] The seller definition also clarifies that a company cannot make charges using preacquired account information obtained from the affiliate, subsidiary, or parent company. *Id.* (§ 1, subdiv. 10). Each seller is a different "person." On the other hand, nothing in the UCACA prevents these companies from sharing information for other purposes permitted by GLBA or other laws. *See supra* notes 214–20. This sharing of information would not make the recipient a "seller" within the meaning of the UCACA unless it used the data to directly obtain consideration from the consumer.

[262] App. A (UCACA § 1, subdiv. 8).

the consumer establishes an account with such an intermediary and registers account numbers in the intermediary account, consumer authorization of a seller to access that account is functionally the same as providing the account numbers to the seller.

Third, the definition of "consumer" in the UCACA is incorporated in other definitions to effectively limit the scope of the prohibition to purchases made for "personal, family or household use." This is a familiar phrase in consumer protection regulation used to demarcate commercial transactions from consumer transactions.[263] There may be payment systems for commercial purchasers for which the restrictions in the UCACA are not appropriate. The preacquired marketing problem has been a deception problem for average consumers.[264]

2. *Limits on Use of Seller-retained Account Information*

Regulation of the reuse of account access information by sellers requires a more nuanced approach. Sellers clearly have legitimate reasons to retain and reuse account access information provided to them by consumers.[265] Sellers also have clearly abused reuse of such information in a way that mimics the problem of preacquired marketing.[266]

The UCACA only prohibits the use of seller-retained account information when the seller uses the retained account information to market a trial offer with negative option.[267] A seller cannot use a trial offer unless it obtains the account access information from the consumer solely for the purposes of making charges in connection with the trial offer.[268] As a practical matter, this means that information must be obtained twice in an upsell situation. This burden is warranted by the evidence showing the extraordinary deceptive potential of the combination of a trial offer and a seller's failure to obtain account information from the consumer during the solicitation, thereby circumventing short-hand signals for assent to an account charge. As with preacquired marketing, there is comfort in knowing that some over-reach as to the scope of this prohibition is inconsequential because the seller can always avoid the regulation simply by acquiring the account number again from the consumer. Or, the seller could try to obtain the consumer's consent to a purchase without the trial offer.

Section 3 of the UCACA also prohibits account issuers from using control over account charges to engage in similar trial offer upsells. As with

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[263] Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1449 (2004).

[264] One could imagine business fraud and deception with this type of marketing, but the risks of regulatory overreach seem to outweigh the inclusion of businesses in the protective scheme.

[265] *See supra* Part III.E.

[266] *See supra* notes 194–96.

[267] App. A (UCACA § 3, subdiv. 1).

[268] *Id.*

seller use of retained account information, to make a charge in connection with the trial offer, an account issuer is required to obtain the account access information from the consumer solely for that purpose.[269]

These provisions of the UCACA are important to prevent circumvention of the preacquired marketing prohibition. One example of such circumvention would be sellers advertising inexpensive products for the purpose of acquiring account numbers for use in a free trial offer with negative option.[270] Or, account issuers and referring sellers could bring the same sales operation in-house.[271] Without a prohibition on this practice involving marketing of trial offers, much of the deception with preacquired marketing will shift to in-house use of the same practice.

VI. The Inadequacy of Lesser Remedies

Policymakers and academics often hesitate, or even recoil, at the notion that a product or sales practice should be entirely banned other than for health and safety reasons.[272] Yet, when there is little to no benefit from a sales practice and a large public harm, the public is better served by a total prohibition on the practice rather than partial measures.

A less comprehensive remedy will not solve the problem with preacquired marketing. Required disclosures have often been the prospective remedy obtained in public enforcement litigation involving preacquired marketing. The TSR solution, requiring a seller to collect partial account access information directly from the consumer, is also an alternative to a ban on preacquired marketing. But neither of these remedies are sufficient to control the rampant consumer misunderstanding resulting from preacquired marketing because they do not solve the fundamental problem of shifting control of account access from the consumer to the seller in a way that facilitates sorting of consumers into those unaware of account charges.

A. *Disclosures*

Better disclosures of preacquired marketing have been mandated in many public enforcement actions against preacquired sellers, account issu-

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[269] *Id.* (§ 3, subdiv. 2).

[270] A preacquired account marketing version of this scenario underlay joint FTC and state attorneys general actions against multiple affiliated marketing companies. *See* FTC v. Smolev, No. 01-8922-CIV-ZLOCH (S.D. Fla. Dec. 10, 2002), *available at* http://www.ftc.gov/os/2001/10/triadsmolevorder.pdf.

[271] *See supra* note 233 and accompanying text describing the use of "wholesale" arrangements that purport to circumvent the requirements of the Telemarketing Sales Rule related to preacquired marketing.

[272] *See generally* Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803 (2008); Jonathon Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620 (2006). *But see* Daniel Schwarcz, *Beyond Disclosure: The Case for Banning Contingent Commissions*, 25 YALE L. & POL'Y REV. 289 (2007).

ers, and referring sellers.[273] In the action against Chase by fifteen state attorneys general, for example, one provision of the settlement required that Chase include certain specific language in its direct mail solicitations.[274] One such disclosure required that the seller of the membership club state in the solicitation that the consumer's failure to cancel a free trial offer would result in an account charge without the seller of the membership club obtaining the consumer's account number.

However, disclosures are increasingly viewed with suspicion as a regulatory strategy for controlling consumer deception and misunderstanding,[275] and disclosures are especially unlikely to solve the consumer misunderstanding with preacquired marketing for several reasons.[276] There are four particular reasons to be doubtful about the efficacy of any disclosure regime in the preacquired marketing context.

First, as described above, preacquired marketing shifts consumer focus in a way uncharacteristic of a typical sales transaction. Preacquired marketing removes the attention-focusing effect of requiring consumers to read out a long account number, an expiration date, and perhaps a CVV code with credit or debit cards. That makes disclosures even less likely to be effective because the consumer has reason to be less involved in the details of the solicitation if she does not believe that her account is being charged. Further, preacquired sellers have shown a remarkable sophistication in adapting their solicitation strategies to take advantage of consumer behavior.[277]

Second, better disclosures likely will not do much to remedy the time and decision-making bias created by preacquired marketing. A critical part of the preacquired marketing problem is that some consumers will understand the solicitation at the time it occurs, but will forget about the unusual terms of the free trial offer combined with the seller's preacquired access to the consumer's account.[278] Disclosures at the time of solicitation would not solve this aspect of the problem.

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[273] *See supra* Part III.D.

[274] *See* Assurance of Voluntary Compliance at 7–21, *In re* Chase Bank USA, N.A. (Iowa Att'y Gen. Dec. 8, 2006), *available at* http://www.state.ia.us/government/ag/latest_news/releases/dec_2006/Chase%20AVC.pdf (noting that the same settlement was entered in fifteen states cooperating in the enforcement action).

[275] Bar-Gill & Warren, *supra* note 121, at 28, 42 (summarizing research on inadequacy of credit card and mortgage disclosure requirements in affecting consumer behavior). *See generally* Geraint Howells, *The Potential and Limits of Consumer Empowerment by Information*, 32 J.L. & Soc'y 349 (2005) (describing the limited practical effectiveness of British and European Union disclosure rules).

[276] It is worth noting that state attorneys general have been bringing cases resulting in court-mandated disclosure for more than a decade, with little success in controlling the overall problem. *See supra* notes 78–94 and accompanying text.

[277] *See, e.g.*, 2008 Affinion 10-K, *supra* note 8, at 7 ("We have developed considerable expertise in direct mail marketing . . . we continually test variations of direct mail solicitations to drive higher customer response rates.").

[278] *See supra* Part III.B.3.b.

Third, improved disclosures would do little to solve the special problems created for vulnerable consumers by preacquired marketing. An eighty-five year old with mental diminishment from a stroke is not likely to be helped by better disclosures. As long as she refuses to give out her account number, failure to notice disclosures is not problematic. Preacquired marketing, however, allows the circumvention by the seller of the requirement of collecting the account number, and thus makes it possible to charge vulnerable consumers' accounts without regard to the adequacy of disclosure.

Finally, a disclosure regime would be complex and difficult to enact in this area. Preacquired marketers solicit across the entire range of direct marketing formats. The complex changes to the TSR meant to resolve preacquired marketing problems, including the various disclosure requirements,[279] would have to be implemented with the various forms of direct mail, Internet marketing, and other solicitation methods.[280] A disclosure regime with specific requirements for language and prominence would be hard to implement across all of these marketing formats. Furthermore, a complicated set of disclosure requirements would be much more difficult to enforce than the clearer bright-line prohibition on the sale of account access information proposed by the UCACA.

B. *Partial Account Information Collection*

Another possible remedy short of a ban is to adopt the approach of the TSR and require that consumers provide only the last four digits of their account numbers[281] or otherwise allow preacquired sellers to obtain from the consumer only partial account access information and rely on the allied account issuer or referring seller for the remainder. As noted above, it is unclear to what extent the TSR restriction of requiring the collection of partial account information has had an impact on preacquired account telemarketing. It does seem likely that some consumers, perhaps even many, will no doubt refuse to enter even the last four digits of their account number because it will trigger some concern for them that their account may be charged. This probably will result in a decrease in the number of consumers confused by the practice. While that is a good result, it is not a full solution to the consumer misunderstanding created by preacquired marketing.

The collection of four digits of an account number, rather than the full number along with an expiration date and CVV code for credit and debit

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[279] *See generally* FTC Telemarketing Sales Rule, 68 Fed. Reg. 4580 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310) (discussing changes to definitional terms, disclosures, and unfair practice provisions related to preacquired account telemarketing).

[280] *See, e.g.*, 2008 Affinion 10-K, *supra* note 8, at 7 ("Our direct mail operations incorporate a variety of mailing types, including solo direct mail, detachable inserts, credit card insert, statement inserts, promotion inserts, and other printed media.").

[281] FTC Telemarketing Sales Rule, 16 C.F.R. § 310.4(a)(6)(i)(A) (2009).

cards, will leave many consumers believing that they have not provided enough information to the soliciting entity to allow it to charge their accounts. This is particularly true because four-digit collection is used as a short-hand to confirm consumer identity in commerce rather than as confirmation of an account charge. As Professor Edelman states about the practice of collecting four digits of an account number:

> [I]t does not address the core deception that yields unrequested signups. In no other context site can typing just four digits begin a recurring billing relationship; consumers rightly and reasonably expect that entering a paid relationship requires typing an *entire* card number . . . . To a typical consumer, a request to reenter a portion of a card number looks more like a verification process than authorization.[282]

Furthermore, because the consumer will be providing less account access information than is typically required for consumer authorization for account access, preacquired sellers could ensconce this limited data collection in distracting details or context that makes the partial account information appear unrelated to the consumer's authorization of an account charge.

Another way to look at this issue is to ask why a referring seller or account issuer would want to have the consumer provide partial, but not complete, account access information. It is difficult to construct a justification for this distinction other than concerns about a decrease in revenue. Requiring partial account information collection rather than full account collection information serves no valid public policy purpose.

A further concern with partial data collection is that it would not solve whatever unintended consequence might occur with a ban on selling preacquired account information, which is the only reason for accepting a solution short of a ban. Any problem that arises with a ban that is related to the burden on sellers or account issuers having to contact consumers to obtain account information probably would occur by requiring that the consumer provide partial account information.

The lesser remedies to an outright ban are not effective solutions to the preacquired marketing problem. The proposed UCACA and its prohibition of the practice is the only way to protect consumers from the harmful effects of preacquired marketing.

VII. Conclusion

Preacquired marketing works like an invisible hand. Not the sort that magically aligns buyers and sellers in equilibrium to promote maximum wealth. Rather, an invisible hand that selectively reaches into the pockets of

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[282] *Aggressive Sales Tactics* Hearing, *supra* note 45 (statement of Benjamin Edelman, Assistant Professor, Harvard Business School).

those consumers who fall victim to this practice. Preacquired sellers are sizable companies who charge tens of millions of consumer accounts for billions of dollars in concert with some of the nation's largest financial institutions and sellers of goods or services. It appears that almost none of the consumers whose accounts are charged are aware of or want the service, and the deceptive effect of this type of marketing falls hardest on those with the least defenses against marketplace misconduct—people with limited English language skill or mental diminishment.

Preacquired account marketing should be banned. That it has not yet been prohibited in any form is consistent with a pervasive aversion in the last few decades to government rules that prohibit the use of sales practices or the sale of products. It is time to revisit, or at least qualify, the basis for that aversion in the context of this peculiarly unfair and deceptive form of marketing.

APPENDIX A

THE UNIFORM CONSUMER ACCOUNT CONTROL ACT

Section 1. **Definitions.**

Subdivision 1. **Account Access Information.** "Account access information" means the full account number, or other similar information, and any other information that the account issuer requires for parties other than the account owner to cause charges to the account owner's consumer account. Account access information also includes information required by a payment intermediary to cause charges to a consumer account.

Subdivision 2. **Account Issuer.** "Account issuer" means the issuer of a consumer account.

Subdivision 3. **Account Owner.** "Account owner" means a consumer who owns or controls a consumer account.

Subdivision 4. **Consumer.** "Consumer" means a natural person who purchases or attempts to purchase merchandise for personal, family or household use.

Subdivision 5. **Consumer Account.** "Consumer Account" means an asset, credit or trade account issued to an account owner, including but not limited to a credit card, debit card, checking, savings, utility, insurance, loan or other similar account regularly used by consumers.

Subdivision 6. **Merchandise.** "Merchandise" means any goods or services, including but not limited to insurance, membership programs, discounts on future purchases, or intangibles.

Subdivision 7. **Marketing Program.** "Marketing Program" means a plan, program or campaign to induce the purchase of merchandise by numerous consumers through telemarketing, direct mail marketing, Internet promotion or similar marketing methods. Marketing program includes a plan, program or campaign to induce the purchase of merchandise by numerous consumers in connection with a contact initiated by the consumer, including solicitations of consumers to purchase additional merchandise following an initial transaction initiated by the consumer.

Subdivision 8. **Payment Intermediary.** "Payment Intermediary" means an account established by an account owner where the account owner provides full account numbers for one or more of his or her consumer accounts for purposes of facilitating charges to those consumer accounts by third parties.

Subdivision 9. **Preacquired Account Information.** "Preacquired Account Information" means any information that enables a seller to cause an account charge to be placed against a consumer account without the account owner providing all account access information for his or her consumer account directly to that seller.

Subdivision 10. **Seller.** "Seller" means any person who obtains consideration from a consumer in exchange for merchandise or the promise to provide merchandise as part of a transaction conducted in connection with a marketing program. For purposes of this Act, separate legal entities, including an affiliate, parent and subsidiary corporations, are separate sellers.

Subdivision 11. **Trial Offer.** "Trial Offer" means the offer or sale of merchandise in which a consumer receives merchandise at no cost or a minimal cost for a specified period, but has the right to take affirmative action to cancel the obligation to pay for the merchandise during the specified period.

Section 2. **Prohibition on Preacquired Account Marketing.**

Subdivision 1. No seller may cause an account charge against a consumer account using preacquired account information.

Subdivision 2. No person may knowingly provide material assistance to a seller for the purpose of using preacquired account information to cause an account charge against a consumer account.

Subdivision 3. No account issuer shall accept from a seller authorization to charge a consumer account as a result of an agreement between a seller and the account issuer that provides consideration to the account issuer and permits the seller to cause charges to a consumer account differently than sellers that have not provided similar consideration to the account issuer.

Section 3. **Requirement to Obtain Account Access Information to Charge For Merchandise Sold Through Trial Offer.**

Subdivision 1. No seller may cause an account charge against a consumer account if the charge is made for merchandise offered or sold by the seller in connection with a trial offer and the seller did not obtain account access information from the consumer solely for purposes of charging for the merchandise offered or sold in connection with the trial offer.

Subdivision 2. No account issuer may cause an account charge against a consumer account if the charge is made for merchandise offered or sold by the account issuer in connection with a trial offer and the account issuer did not obtain account access information from the consumer solely for purposes of charging for the merchandise offered or sold in connection with the trial offer.

APPENDIX B

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And you can also collect up to $40.00 each year with four seasonal coupons worth $10.00 each toward gas and groceries, from any place you choose.[2] Plus, get special prearranged deals and deep discounts on the spot at famous names like The Sharper Image®, Pretzel Time®, Planet Hollywood®, Eddie Bauer®, and much more. Save up to $500.00 or more — even if you use only half of your Everyday Values discounts. In addition, save instantly at local favorites — again and again — at selected neighborhood restaurants, shops, and sports events and at thousands of participating properties of popular hotels, inns, and resorts.

Your satisfaction and your relationship are always important. When you cash or deposit the enclosed check, we will automatically extend your membership for an additional eleven months following your thirty-day trial and bill the $119.99 annual fee to the card you have on file with Budget for a membership in Everyday Values unless you call 1-877-880-1825 to cancel during the thirty-day trial period and owe nothing. Your trial period begins when your membership materials arrive in four to five weeks. Everyday Values is not affiliated with Budget. Your second-year membership will be billed automatically at the $129.99 annual fee. Your membership for each year thereafter will be billed at the then-current fee, automatically billed annually to the same account unless you call to cancel. We will not have to ask for your account number or further consent in order to bill you.

You also have our money-back guarantee. If you choose to discontinue during the trial period, you will pay nothing and owe nothing. And you can discontinue at any time after that and receive a refund of the unused portion of the then-current year's fee.

Sincerely,

Michael Lombardo

Michael Lombardo
Director, Everyday Values

KEEP FOR YOUR RECORDS

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[1] You will earn 2% money back for up to $5,000.00 of all new purchases charged each year to the credit card you used to enroll. Your total cash back is payable to you in a check upon submitting your monthly credit card statements totaling not more than $5,000.00 in the aggregate, at each anniversary of your enrollment in this program. You will have a full 90 days from your anniversary date to redeem the cash back you earn each year. You do not have to be an active member at the time of redemption. You must be an active member at the time of purchase. You continue to earn cash back as long as you are an active member of this program.

[2] Your Everyday Values membership materials will include four $10 coupons, two for gas and two for groceries. You can redeem one of the four coupons in each quarter of the year. Please allow 4 to 5 weeks for delivery.

EverydayValues is a service provided by Trilegiant Corporation, which may modify or improve any part of the service at any time and without prior notice. EverydayValues is a registered service mark of Trilegiant Corporation. For questions or comments call 1-877-880-1825.

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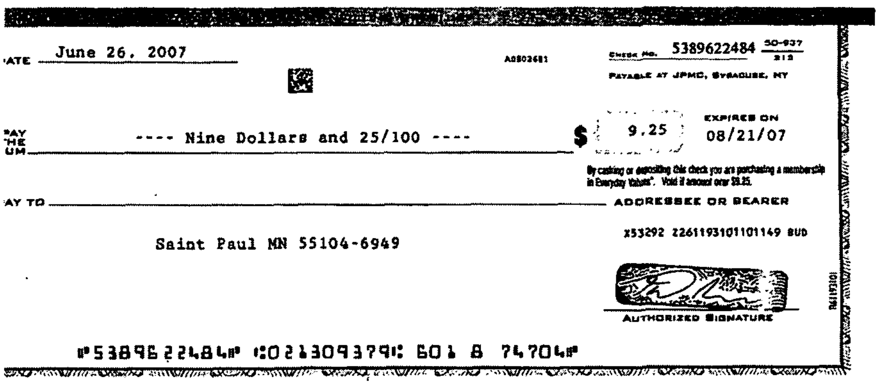


ATE June 26, 2007

A0802681

CHECK NO. 5389622484 50-937/212

PAYABLE AT JPMC, SYRACUSE, NY

AY THE UM ---- Nine Dollars and 25/100 ---- $ 9.25

EXPIRES ON 08/21/07

By cashing or depositing this check you are purchasing a membership in Everyday Values*. Void if amount over $9.25.

AY TO ADDRESSEE OR BEARER

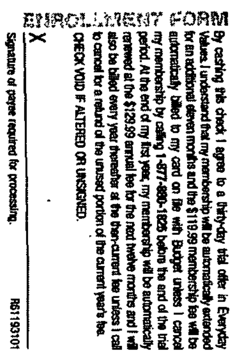
Saint Paul MN 55104-6949

x53292 22611931O1101149 BUD

AUTHORIZED SIGNATURE

R6119101

5389622484 021309379 601 8 74704



ENROLLMENT FORM

By cashing this check I agree to a thirty-day trial offer in Everyday Values. I understand that my membership will be automatically extended for an additional eleven months and the $119.99 membership fee will be automatically billed to my card on file with Budget unless I cancel my membership by calling 1-877-880-1825 before the end of the trial period. At the end of my first year, my membership will be automatically renewed at the $129.99 annual fee for the next twelve months and I will also be billed every year thereafter at the then-current fee unless I call to cancel for a refund of the unused portion of the current year's fee.

CHECK VOID IF ALTERED OR UNSIGNED.

X

Signature of payee required for processing. R6119101