

UNORDERED MERCHANDISE
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SYNOPSIS OF FEDERAL TRADE COMMISSION
DECISIONS CONCERNING UNORDERED MERCHANDISE

The Federal Trade Commission has determined that the following acts or practices of sending and/or attempting to collect payment for unordered merchandise are unfair and deceptive and are unlawful under Section 5(a)(1) [15 U.S.C. §45(a)(1)] of the Federal Trade Commission Act [15 U.S.C. §§41-58]:

It is an unfair and deceptive act or practice to:

- (1) send any merchandise by any means without the prior expressed request or consent of the recipient unless such merchandise has attached to it a clear and conspicuous statement that the recipient may treat the merchandise as a gift and has the right to retain; use, discard, or dispose of it in any manner that the recipient sees fit without any obligation whatsoever to the sender; 1/
- (2) send any communication that in any manner seeks to obtain payment for or return of merchandise shipped without the prior expressed request or consent of the recipient. 2/

From the foregoing, it should be clear that it is unlawful to send any bill or dunning communication for unordered merchandise (i.e., merchandise sent without the prior expressed request or consent of the recipient). Under

1/ In the Matter of Sunshine Art Studios, Inc., et al., Docket 8825, Initial Decision December 20, 1971, 81 F.T.C. 836, 853, 857-59, 865-71, 880. Affirmed by the Commission at 882-84, 886-88, November 30, 1972. Affirmed by the United States Court of Appeals, First Circuit, July 23, 1973, Sunshine Art Studios, Inc., et al. v. F.T.C., 481 F.2d 1171, 1173-74. Golden Fifty Pharmaceutical Co., et al., Docket 8792, 77 F.T.C. 277, 280-81, 289-90 (1970). See also Section 3009 of the Postal Reorganization Act (39 U.S.C. §3009, copy attached).

2/ Ibid.

Section 3009 of the Postal Reorganization Act, it is also unlawful even to send unordered merchandise unless it consists of: (1) free samples clearly and conspicuously marked as such, or (2) merchandise sent by a charitable organization soliciting contributions. In either case, the merchandise must have attached to it a clear and conspicuous statement that the recipient may treat the merchandise as a gift and may retain, use, discard, or dispose of it in any manner he or she sees fit without any obligation whatsoever to the sender. 3/

Section 3009 of the Postal Reorganization Act and the Synopsis of the Commission's determinations cited above are stated in terms which are intended to cover the many and various methods and means which have been or might be employed to send or bill for unordered merchandise. To offer additional guidance, the following are brief synopses of merely some of the more specific acts and practices which the Commission has determined to be unlawful in connection with the sending and billing for unordered merchandise. The list is not complete or all-inclusive but merely suggestive of some related practices that also have been determined to be unlawful.

It is an unfair and deceptive act or practice to:

- (3) pad or "kite" [e.g., increase, expand, inflate, or raise without prior expressed customer approval] orders or prices. 4/

3/ See Postal Reorganization Act, 39 U.S.C. §3009. Also, the Commission has issued two enforcement policy statements to advise the legal and business communities that it considers Section 3009 to be a proper interpretation of Section 5 of the Federal Trade Commission Act insofar as the sending or billing for unordered merchandise are concerned -- whether it is sent by U.S. mail or by nonmail shipment. See 35 Federal Register 14328 (Sept. 11, 1970) and 43 Federal Register 4113 (Jan. 31, 1978).

4/ In the Matter of Star Office Supply Company, et al., Docket 8749, Initial Decision April 11, 1969, 77 F.T.C. 383, 402-03. Affirmed by the Commission April 16, 1970, at 443-44, 446, 447, 455.

- (4) send merchandise which differs with respect to brand name, type, quantity, size, or quality from that represented in inducing orders or from that ordered by the purchaser; 5/
- (5) fail or refuse to accept bona fide cancellations or thwart and prevent cancellations of all or part of orders by customers who assert bona fide reasons therefor; 6/
- (6) represent, directly or indirectly, that a recipient of merchandise sent on "approval" (a) has a contract or agreement with the sender, or (b) must either pay for or return the merchandise:
 - (i) unless the recipient has expressly requested or consented to receive such merchandise on approval, or
 - (ii) if the recipient has specifically requested the sender not to ship the merchandise; 7/

5/ Ibid. See also ibid at 419.

6/ Ibid. See also In the Matter of Sunshine Art Studios, Inc., et al., note 1 supra, 81 F.T.C. 836, 837, 857, 880, 882-84, 887, 888; In the Matter of Golden Fifty Pharmaceutical Co., et al., note 1 supra at 280-81, 289-90.

7/ In the Matter of Sunshine Art Studios, Inc., et al., note 1 supra, 81 F.T.C. 836, 837, 851-53, 856-59, 865-71, 880, 882-84.

- (7) represent, directly or indirectly, that persons accepting a free offer will be under no obligation when, in fact, those accepting the free offer are (or are later informed that they are) obligated to (a) notify the sender to cancel further shipments, or (b) purchase or return additional shipments of merchandise; 8/
- (8) represent, contrary to fact, that the shipper of unordered merchandise has a bona fide order for it. 9/

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Distributors of Unordered Merchandise, Unnamed

8/ In the Matter of Golden Fifty Pharmaceutical Co., et al., note 1 supra at 288-90. For additional guidance regarding use of the word "FREE" see the Commission's Guide Concerning Use of the Word "FREE" and Similar Representations at Title 16 of Code of Federal Regulations, Part 251.

9/ In the Matter of May Goldberg, Trading As Norman Company, et al., Docket 3812, Commission Decision, March 29, 1945, 40 F.T.C. 296, 300-01.