

Complaint

IN THE MATTER OF

DICK'S SPORTING GOODS, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4240; File No. 071 0196
Complaint, November 18, 2008 – Decision, November 18, 2008*

This consent order addresses an agreement between Golf Galaxy, Inc., a wholly owned subsidiary of Dick's Sporting Goods, Inc., and Golf Town Canada Inc. The original 1998 agreement between the two provided that Golf Galaxy would provide consulting services to Golf Canada, which wished to launch a chain of golf superstores in Canada similar to the Golf Galaxy stores in the United States. Golf Galaxy and Golf Canada entered into an amended agreement in 2004 that extended the duration of the restraints on competition beyond the expiration dates contemplated in the 1998 agreement. The proposed order enjoins Golf Galaxy from dividing or allocating markets for the retail sale of golf merchandise. In addition, the order prevents Golf Galaxy from enforcing any non-compete provision beyond the date originally provided for in the 1998 agreement. More specifically, the provision of the 2004 agreement prohibiting Golf Canada from operating any retail store in the United States will no longer be enforceable as of October 8, 2009. The prohibition on Golf Canada's engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy will also no longer be enforceable. The order would not interfere with Golf Galaxy's ability to enter into written agreements to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with the sale of golf merchandise where such agreement is reasonably related to a lawful consulting arrangement or lawful joint venture agreement; and is reasonably necessary to achieve such agreement's procompetitive benefits.

Participants

For the *Commission*: Jeffrey H. Fischer, Geoffrey M. Green, Melanie Sabo, and Melissa Westman-Cherry.

For the *Respondent*: Wendy Newton, Buchanan Ingersoll & Rooney PC.

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Dick's Sporting Goods, Inc., a corporation, hereinafter sometimes referred to as "Respondent," has violated the provisions of said Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint stating its charges in that respect as follows:

1. Respondent Dick's Sporting Goods, Inc. ("Dick's"), is a corporation organized, and existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 300 Industry Drive, RIDC Park West, Pittsburgh, PA 15275. Golf Galaxy, Inc. ("Golf Galaxy"), a wholly owned subsidiary of Dick's, is a corporation organized, and existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 7275 Flying Cloud Dr., Eden Prairie, MN 55344. In 2007, Dick's acquired all of the issued and outstanding stock of Golf Galaxy.

2. The acts and practices of Respondent, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. Golf Galaxy operates a chain of golf superstores in the United States. Golf Galaxy stores offer a broad selection of golf merchandise and related services, including golf clubs, equipment, accessories, clothing, lessons, swing analysis, and golf club fitting.

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4. In 1998, the founders of Golf Town Canada Inc. (“Golf Canada”) wished to launch a chain of golf superstores in Canada similar to the Golf Galaxy superstores.

5. In June 1998, Golf Canada and Golf Galaxy entered into a Consulting Agreement (the “1998 Agreement”). Golf Galaxy agreed therein: (i) to develop and present an initial training program for certain Golf Canada employees, (ii) to provide Golf Canada on an ongoing basis with useful business documents, including construction blueprints, merchandising plans, and sales reports, and (iii) to provide continuing consulting support to Golf Canada.

6. In consideration for these consulting services, Golf Galaxy received shares of Golf Canada, a seat on the company’s board of directors, and cash payments.

7. The 1998 Agreement restrained Golf Canada from competing with Golf Galaxy. Specifically, Golf Canada was barred: (i) from operating any retail store in the United States during the term of the 1998 Agreement and for five years thereafter, and (ii) from engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy during the term of the 1998 Agreement and for two years thereafter.

8. Between 1998 and 2004, with the assistance of Golf Galaxy, Golf Canada opened thirteen retail locations in Canada.

9. In October 2004, Golf Galaxy and Golf Canada ended their consulting arrangement, and Golf Galaxy sold its shares of Golf Canada. Golf Galaxy and Golf Canada entered into a new contract (the “2004 Amended Consulting Agreement”) that terminated all consulting obligations, effective immediately, but extended the duration of the restraints on competition beyond the expiration dates contemplated in the 1998 Agreement.

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10. The 2004 Amended Consulting Agreement bars Golf Canada: (i) from operating any retail store in the United States for nine years (until June 2013), and (ii) from engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy for six years (until June 2010). In addition, the 2004 Amended Consulting Agreement for the first time prohibits Golf Galaxy from opening a store in Canada (until June 2008). The agreement between Golf Galaxy and Golf Canada to extend the restraints on competition beyond the term specified in the 1998 Agreement is not reasonably necessary for the formation, efficient operation, or dissolution of the collaboration between the parties.

11. The effect of the agreement to extend the non-compete terms beyond what was originally contemplated in the 1998 Agreement, if implemented, would be to restrain competition unreasonably, to increase prices, and to injure consumers.

Violations Alleged

12. As set forth in Paragraph 9 above, Respondent agreed to restrain competition in violation of Section 5 of the Federal Trade Commission Act, as amended.

13. The acts and practices of Respondent, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighteenth day of November, 2008, issues its complaint against Respondent.

By the Commission.

Decision and Order

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of Golf Galaxy, Inc., which is now a wholly owned subsidiary of Dick’s Sporting Goods, Inc. (hereinafter “Respondent”), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

Decision and Order

1. Respondent Dick's Sporting Goods, Inc., is a corporation organized, and existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 300 Industry Drive, RIDC Park West, Pittsburgh, PA 15275.

2. Golf Galaxy, Inc., a wholly owned subsidiary of Respondent, is a corporation organized, and existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 7275 Flying Cloud Dr., Eden Prairie, MN 55344.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "Respondent" means Dick's Sporting Goods, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and subsidiaries, divisions, groups, and affiliates controlled by Dick's Sporting Goods, Inc. (including Golf Galaxy, Inc.); and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Commission" means the Federal Trade Commission.
- C. "2004 Amended Consulting Agreement" means the October 8, 2004, "Amended and Restated Consulting Agreement" between Golf Galaxy, Inc. and Golf Town Canada Inc. (Attachment A hereto).

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- D. “Golf Canada” means Golf Town Canada Inc., a corporation organized, and existing and doing business under and by virtue of the laws of Canada, with its office and principal place of business located at First Markham Place, 3265 Hwy 7 East, Unit 2, Markham, ON L3R 3P9, Canada.
- E. “Sale of Golf Merchandise” means the sale of any product or service related to golf, including, but not limited to, golf clubs, equipment, accessories, clothing, lessons, swing analyses, and club fitting.
- F. “United States” means the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and all territories, dependencies, and possessions of the United States of America.

II.**IT IS FURTHER ORDERED** that:

- A. Respondent cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, with any party engaged in the Sale of Golf Merchandise, to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with the Sale of Golf Merchandise.

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Provided, however, that it shall not of itself constitute a violation of Paragraph II.A. of this Order for Respondent to continue to implement and enforce the 2004 Amended Consulting Agreement, except to the extent prohibited by Paragraph II.B. of this Order.

Provided, further, however, that Respondent may enter into, attempt to enter into, or comply with a written agreement to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with the Sale of Golf Merchandise that (1) is reasonably related to a lawful consulting arrangement, lawful joint venture agreement, or lawful merger, acquisition or sale agreement; and (2) is reasonably necessary to achieve such agreement's procompetitive benefits.

- B. Respondent cease and desist from, directly or indirectly, or through any corporate or other device, implementing or enforcing:
 - 1. Paragraph 2.3 of the 2004 Amended Consulting Agreement with respect to conduct that takes place on or after October 8, 2009; and
 - 2. Paragraph 4.1 of the 2004 Amended Consulting Agreement with respect to conduct that takes place on or after thirty (30) days from the date on which this Order becomes final and thereafter.

III.

IT IS FURTHER ORDERED that within thirty (30) days of this Order becoming final:

- A. Respondent shall execute a document that unilaterally waives:

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1. Respondent's rights to enforce Paragraph 2.3 of the 2004 Amended Consulting Agreement with respect to conduct that takes place on or after October 8, 2009; and
 2. Respondent's right to enforce Paragraph 4.1 of the 2004 Amended Consulting Agreement with respect to conduct that takes place on or after thirty (30) days from the date on which this Order becomes final and thereafter.
- B. Respondent shall submit to Golf Canada, with a return receipt, the executed original document required in Paragraph III.A.

IV.**IT IS FURTHER ORDERED** that:

- A. Within sixty (60) days after the date the Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondent has complied, is complying, and will comply with this Order including, but not limited to, a copy of the document required in Paragraph III.A. and proof of Golf Canada's receipt of such document.
- B. One (1) year after the date the Order becomes final, annually for the next two (2) years on the anniversary of the date the Order becomes final, and at other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

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V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Respondent,
- B. Any proposed acquisition, merger or consolidation of Respondent, or
- C. Any other change in Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order, upon written request, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

Analysis to Aid Public Comment

VII.

IT IS FURTHER ORDERED that this Order shall terminate on November 18, 2028.

By the Commission.

**NON-PUBLIC APPENDIX A
2004 AMENDED AND RESTATED CONSULTING
AGREEMENT**

**[Redacted From The Public Record
But Incorporated By Reference]**

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Dick's Sporting Goods, Inc. ("Dick's" or "Respondent"). Dick's, through its wholly-owned subsidiary Golf Galaxy, operates a chain of golf superstores in the United States. The agreement settles charges that Dick's violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by agreeing with a potential competitor to allocate markets. The proposed consent order has been placed on the public record for 30 days to receive comments

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from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate comment on the proposed order. The analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by Respondent that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

I. The Complaint

The allegations of the complaint are summarized below:

Golf Galaxy operates a chain of golf superstores in the United States. Golf Galaxy stores offer a broad selection of golf merchandise and related services, including golf clubs, equipment, accessories, clothing, lessons, swing analysis, and golf club fitting. The founders of Golf Town Canada Inc. (“Golf Canada”) wished to launch a chain of golf superstores in Canada similar to the Golf Galaxy stores.

In June 1998, Golf Canada and Golf Galaxy entered into a consulting agreement (the “1998 Agreement”). Golf Galaxy agreed therein: (i) to develop and present an initial training program for certain Golf Canada employees, (ii) to provide Golf Canada on an ongoing basis with useful business documents, including construction blueprints, merchandising plans, and sales reports, and (iii) to provide continuing consulting support to Golf Canada. In consideration for these consulting services, Golf Galaxy received shares of Golf Canada, a seat on the company’s board of directors, and cash payments.

Analysis to Aid Public Comment

Certain provisions of the 1998 Agreement restrained Golf Canada from competing with Golf Galaxy. Specifically, Golf Canada was barred: (i) from operating any retail store in the United States during the term of the 1998 Agreement and for five years thereafter, and (ii) from engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy during the term of the 1998 Agreement and for two years thereafter.

Between 1998 and 2004, with the assistance of Golf Galaxy, Golf Canada opened thirteen retail locations in Canada.

In October 2004, Golf Galaxy sold its shares of Golf Canada and the parties terminated all consulting obligations effective immediately. Golf Galaxy and Golf Canada entered into a new contract (the “2004 Amended Agreement”) that, *inter alia*, extended the duration of the restraints on competition beyond the expiration dates contemplated in the 1998 Agreement. The 2004 Amended Agreement bars Golf Canada: (i) from operating any retail store in the United States for nine years (until June 2013), and (ii) from engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy for six years (until June 2010). In addition, the 2004 Amended Agreement for the first time prohibits Golf Galaxy from opening a store in Canada (until June 2008).

II. Legal Analysis

There are two distinct sets of restraints in this matter.

One set was agreed upon by Golf Galaxy and Golf Canada in 1998 when their consulting relationship was launched. These restraints appear to have been reasonably necessary to the formation and/or efficient operation of the parties’ collaboration. For example, Golf Canada’s commitment not to compete in the United States during the term of the consulting relationship (and

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for five years thereafter) may have been necessary in order to induce Golf Galaxy to share with Golf Canada certain valuable, confidential, and proprietary information.¹ The Commission therefore does not challenge these 1998 restrictions.

The parties entered into a second set of restraints in 2004, contemporaneous with the decision to terminate their collaboration. The 2004 restraints provide for a division of markets well beyond the term contemplated in the 1998 Agreement, and are the subject of the Commission's claim in this matter. Under the 1998 Agreement, Golf Canada's undertaking to forgo competing in the United States would have expired five years after termination of the consulting relationship; since the consulting relationship ended in 2004, the noncompete would have expired five years later in 2009. With the 2004 Amended Agreement the noncompete was extended from 2009 until 2013 – four years longer than what was contemplated under the original 1998 Agreement.

The 2004 Amended Agreement may be analyzed under the framework articulated by the Commission in the *PolyGram* case.² Agreements between competitors to divide markets are treated by the courts as presumptively anticompetitive, or inherently suspect. *E.g.*, *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 134 (1998) (horizontal market division is unlawful per se); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (same); Timothy J. Muris, *The Rule of Reason After California Dental*, 68 Antitrust L. J. 527, 536 (2000) (“[C]ourts already consider price fixing and market division to be inherently suspect.”). When an agreement is deemed inherently suspect, the parties can avoid summary condemnation under the antitrust laws by advancing a legitimate

¹ See *e.g.*, *Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 189 (7th Cir. 1985).

² *Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), *aff=d*, 416 F.3d 29 (D.C. Cir. 2005). See also *N. Tex. Speciality Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

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(cognizable and plausible) efficiency justification for the restraint.³

Here, the Commission found reason to believe that the 2004 restraints serve no pro-competitive purpose. This second set of restraints was *not* reasonably necessary for the formation or efficient operation of the collaboration between Golf Galaxy and Golf Canada. Significantly, the 2004 restraints cannot be said to induce or facilitate cooperation between Golf Galaxy and Golf Canada – for the simple reason that, after 2004, no further cooperation was contemplated. These restraints served only to provide Golf Galaxy’s shareholders with additional protection from competition, with no advantage to U.S. consumers. Because there is no efficiency rationale for the 2004 agreement between Golf Galaxy and Golf Canada to divide markets, such agreement constitutes an unreasonable restraint on trade, and is properly judged to be illegal.

Application of the ancillary restraints framework leads to precisely the same conclusion. The D.C. Circuit has explained:

To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose. Of course, the restraint imposed must be related to the efficiency sought to be achieved. If it is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary.⁴

³ *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35-36 (D.C. Cir. 2005).

⁴ *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986).

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The legitimate and competitive purpose of the consulting arrangement, in place from 1998 through 2004, was to enable Golf Canada to benefit from Golf Galaxy's experience and expertise. However, as alleged in the Complaint, the 2004 restraints did nothing to encourage, facilitate, or promote this collaboration. (Again, after 2004, no ongoing cooperation was contemplated.) Certainly, the dissolution of a collaboration does not, of itself, provide a rationale for the ex-partners to adopt new and expanded limitations upon future competition. *See Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995) (market division agreement adopted by lawyers following dissolution of their partnership judged per se unlawful). In short, the challenged restraints are naked rather than ancillary.

III. The Proposed Consent Order

Dick's (the parent of Golf Galaxy) has signed a consent agreement containing a proposed consent Order. The proposed consent Order enjoins the company from dividing or allocating markets for the retail sale of golf merchandise. In addition, the proposed Order will prevent Golf Galaxy from enforcing any non-compete provision beyond the date originally provided for in the 1998 Agreement. More specifically, the provision of the 2004 Amended Agreement prohibiting Golf Canada from operating any retail store in the United States will no longer be enforceable as of October 8, 2009, and thereafter. The prohibition on Golf Canada's engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy will no longer be enforceable as of thirty (30) days from the date on which the Order becomes final and thereafter.

The proposed Order would not interfere with the company's ability to enter into written agreements to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with the sale of golf merchandise where

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such agreement is reasonably related to a lawful consulting arrangement or lawful joint venture agreement; and is reasonably necessary to achieve such agreement's procompetitive benefits.

The proposed Order will expire in 20 years.

Complaint

IN THE MATTER OF

**PREMIER CAPITAL LENDING, INC.,
AND
DEBRA STILES**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4241; File No. 072 3004**Complaint, December 10, 2008 – Decision, December 10, 2008*

This consent order addresses failures by Premier Capital Lending, Inc. (PLC) and Debra Stiles to provide reasonable and appropriate safeguards to protect personal information, as well as false or misleading representations respondents made about the security provided for such information. The order prohibits the respondents from misrepresenting the extent to which PLC maintains and protects the privacy, confidentiality, or security of personal information from or about consumers. The order requires the respondents to establish and maintain a comprehensive information security program in writing that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. The security program must contain administrative, technical, and physical safeguards appropriate to respondents' size and complexity, the nature and scope of its activities, and the sensitivity of the personal information collected from or about consumers. The respondents are required not to violate any provision of the Gramm-Leach-Bliley Act Safeguards Rule and Privacy Rule. The order requires that the respondents obtain periodic assessments and reports from a qualified, objective, independent third-party professional, certifying, among other things, that PCL has in place a security program that provides protections that meet or exceed the protections required by the order and that PCL's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumers' personal information is protected. Other provisions require the respondents to retain documents relating to their compliance with the order and to disseminate the order to persons with responsibilities relating to the subject matter of the order. The order requires Stiles to notify the Commission of changes in her business or employment in connection with providing financial products and services. The respondents must also notify the FTC of changes in PCL's corporate status and submit periodic compliance reports.