

Re: The applicability of the Telemarketing Sales Rule -- the Telemarketing Rule generally imposes no restrictions on the legitimate fundraising activities of nonprofit organizations.

[American Telephone Fundraisers Association, Inc., P/R #]

December 15, 1995

Dear Mr. Paper:

This letter responds to your request on behalf of the American Telephone Fundraisers Association, Inc. for an advisory opinion concerning the applicability of the Telemarketing Sales Rule, 16 CFR Part 310, to fundraising telephone calls made by for-profit companies on behalf of nonprofit organizations. The Association seeks advice on the scope of the Rule's coverage as it may apply to fundraising activities of Association members that involve the use of the telephone.

Although the Telemarketing Sales Rule does not apply to entities over which the Commission lacks jurisdiction, it does apply to for-profit telemarketers acting on behalf of such entities. The Commission's view, however, is that telephone fundraising activities on behalf of nonprofit organizations will constitute a "plan, program or campaign which is conducted to induce the purchase of goods or services." As discussed below, this means that the Rule ordinarily imposes no restrictions on legitimate fundraising activities undertaken on behalf of nonprofit organizations.

The Telemarketing Act states that, "[N]o activity is outside the jurisdiction of [the FTC] Act shall be affected by this Act." Section 6(a) of the Telemarketing Act, Pub L. No. 103-297 (to be codified at 15 U.S.C. 6105(a)). Therefore, because the FTC Act does not apply to any entity that is not "organized to carry on business for its own profit or that of its members," neither does the Telemarketing Act or the Telemarketing Sales Rule. *See* 15 U.S.C. 44; *Community Blood Bank v. FTC*, 405 F.2d 1011 (8th Cir. 1969). The Rule, like the FTC Act, however, does apply to a company acting for profit even when it is providing services to a nonprofit organization. Statement of Basis and Purpose, Telemarketing Sales Rule, 60 Fed. Reg. 43,842, at 43,843 (Aug. 23, 1995).

The Rule's applicability to fundraising telephone calls made by for-profit companies depends on whether such calls fall within the definition of "telemarketing." The Rule defines telemarketing as a "plan, program or campaign which is conducted to induce the purchase of goods or services." 16 CFR 310.2(u). This language is identical to the pertinent section of the Telemarketing Act. Section 7(4) (to be codified at 15 U.S.C. 6106(4)). Thus, the critical question in determining coverage under the Rule is whether a call is conducted to induce a "purchase of goods or services."

The Commission's understanding is that telephone fundraising on behalf of nonprofit organizations is not, in fact, typically undertaken as part of a "plan, program or campaign . . . conducted to induce the purchase of goods or services" (emphasis added). This is true despite the fact that fundraising campaigns often involve the incidental provision of goods or services, such as premiums, memberships, or other incentives for donations.¹ Legitimate fundraising activity is conducted primarily to elicit donations and not to induce purchases. Even when donors receive gifts, premiums, memberships or other incentives, representatives of the non-profit sector have advised the Commission that legitimate charities generally do not conduct telephone solicitations in which the stated or actual value of goods or services offered exceeds the amount of a donor's payment. The Commission's enforcement experience suggests that fraudulent telemarketers, in contrast, obtain money from consumers by promising goods or services with inflated values as consideration for smaller "donations."

Thus, the Commission concludes that only if goods or services offered in a covered telemarketing telephone call as an inducement for the consumer's payment have an actual or claimed value equal to or greater than the amount of the donor's payment, is such a call conducted for the purpose of inducing a purchase. Consequently, only calls of that nature would fall within the definition of "telemarketing" and be subject to the applicable requirements of the Telemarketing Sales Rule. The Commission's construction of the term "telemarketing," as defined in the Act and the Rule, is fully consistent with the legislative purpose of the Telemarketing Act. The

¹ Section 170(f)(8) of the Internal Revenue Code provides that contributions of more than \$250 are eligible charitable deductions for the donor only where the donee organization has provided a description and good faith estimate of the value of any goods or services provided as consideration, in whole or in part, for the donation. 26 U.S.C. 170(f)(8). In addition, a taxpayer may claim a deduction only for the difference between a payment to a charitable organization and the market value of any benefit received in return. 3 Fed. Tax Serv. (CCH) A:17-41[4] (1995).

Commission's interpretation permits efficient interdiction of fraud without encumbering the legitimate use of telemarketing by sellers of good or services or by non-profit entities. In sum, the Telemarketing Rule generally imposes no restrictions on the legitimate fundraising activities of nonprofit organizations.

As is true of all Commission advisory opinions, this letter is limited to the proposed conduct described in the request. The Commission retains the right to reconsider the questions involved, and with notice to the requesting party in accordance with Section 1.3(b) of the Commission's Rules of Practice, 16 CFR 1.3(b), to rescind or revoke its opinion should the proposed conduct result in significant consumer injury, the purposes of the conduct be found not to be legitimate, or the public interest so require.