



U.S. Department of Justice

Civil Division

Washington, DC 20530

November 13, 2014

Donald S. Clark, Secretary
Federal Trade Commission
Constitution Center
5th Floor, Suite 5610 (Annex B)
400 7th Street SW
Washington, DC 20024

Re: Telemarketing Sales Rule Regulatory Review, 16 CFR Part 310, Project No.
R411001

Dear Mr. Clark:

The Department of Justice supports a revision to the FTC's Telemarketing Sales Rule ("TSR") that would require telemarketers to retain accurate and usable records of the telemarketing calls that they make.

In the Department's experience litigating TSR cases on referral to the Attorney General, Trial Attorneys have had extreme difficulties collecting telemarketing call records that contain usable information. For example, call records of telemarketers obtained from telecommunications providers may contain, among other things, non-telemarketing calls or calls unrelated to the case. Substantial effort is required to get to square one—that is, to establish that the records reflect telemarketing calls and are related to the case being litigated. Furthermore, multiple defendants in TSR cases that the Department has litigated have attempted to assert as a defense the inaccuracies of *their own* telemarketing call records. This situation does not square with the consumer-protection purpose of the rule and erects substantial roadblocks to effective enforcement.

If FTC established a recordkeeping rule such that a seller or telemarketer's failure to maintain accurate records of its outbound telemarketing calls were itself a violation of the TSR, firms would not be able to gain an unfair litigation advantage by hiding records of their calling activities. The Department, of course, defers to the Commission's sound judgment as to how best to implement such a rule. That said, the Department believes that the easiest way to test compliance with such a rule would be something along the lines of the following: If a firm receives a compulsory request for its outbound telemarketing call records for a given product, can it respond to that request by producing an accurate (not overinclusive such that it contains non-telemarketing calls and not underinclusive such that it misses calls) list of outbound telemarketing calls related to

that product containing dates, times, destination numbers, origination numbers, and result codes for those calls?

Although there would be an additional burden on sellers and telemarketers to maintain accurate records of telemarketing calls, the Department's experience indicates that such a burden would be slight. Department attorneys have noticed technological advancements—even since 2005 when the FTC first referred National Do-Not-Call Registry cases to the Department—that lead them to be confident that most, if not all, reputable sellers and telemarketers currently maintain accurate records of their outbound calls. For one thing, computer data storage prices are no longer an obstacle to maintaining records. Also, the Department has learned that many telemarketers now use an Internet-based calling solution to place outbound calls. These systems naturally store more information—and more conveniently accessible information—than a standalone dialer. For these reasons, the Department believes that telemarketing operations would have no problem complying with an affirmative recordkeeping rule. We therefore strongly support the Commission adopting such a rule.