Federal Trade Commission

THE REVISED TELEMARKETING RULE

Prepared Remarks of

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[1] The views expressed are those of the Commissioner and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner or staff.

Thank you very much for inviting me to speak to you this afternoon about the role of the Federal Trade Commission in prosecuting telemarketing fraud and, in particular, the proposed Telemarketing Rule. Before I discuss the Rule as currently proposed, I think it might be helpful to take a few steps back and describe briefly the genesis of the Rule to place it in historical context.

Purchasing goods and services over the telephone is an enormously convenient method of shopping for today's time-strapped consumers. Telemarketing also provides employment for millions of Americans. However, the growth of the telemarketing industry also created the opportunity for clever scam artists to defraud consumers, threatening to give the entire industry a black eye. As a result, Congress recognized, as far back as 1989 when the first bill on telemarketing fraud was introduced, the need to address the serious and growing problem of telemarketing fraud. Telemarketing fraud imposes substantial costs -- estimated to be as high as $40 billion -- on both consumers and the legitimate telemarketing industry. As the legislative process moved forward, congressional staff worked with all affected interests, including the American Telemarketing Association and the Direct Marketing Association and others, to draft a bill to combat the fraud in the industry, while not unduly burdening legitimate telemarketers. The Telemarketing and Consumer Fraud and Abuse Prevention Act was ultimately passed with broad bipartisan support, and was signed into law by President Clinton on August 16, 1994.

The legislation directed the FTC to issue a rule, within one year from the date of enactment of the Act, prohibiting deceptive and abusive telemarketing acts and practices. The

Act specifies that the rule contain a definition of deceptive telemarketing acts or practices. According to the statute, this definition may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering. The Act further specifies that, in order to prohibit other abusive acts or practices, the rule must include:

(1) a requirement prohibiting a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of the consumer's right to privacy;

(2) restrictions on the hours when unsolicited telephone calls can be made to consumers; and

(3) a requirement that telemarketers promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods and services, and make any other disclosures the Commission deems appropriate, including the nature and price of the goods or services being sold.

The Act also directs the Commission to consider record keeping requirements.

With that summary of the legislation and its history, let me turn to the second step in this process: the FTC's responsibility to draft a Telemarketing Rule. The Commission staff drew on the FTC's extensive experience in pursuing fraudulent telemarketers (over the past few years, the Commission has brought more than 120 telemarketing fraud cases in Federal court) to shape its initial recommendation, and, on February 9, 1995, the Commission published for public notice and comment a proposed Telemarketing Rule. We received hundreds of thoughtful comments on the proposal, and each was carefully reviewed and considered. In addition, the Commission held

an open Public Workshop on the proposed Rule April 18-20 in Chicago. The Workshop provided an additional forum for interested parties to discuss the proposed Rule and express their views further to Commission staff (and myself).

After reading the written comments and listening to the participants at the Workshop, it became clear that while we at the FTC understood the nature of the fraudulent telemarketing industry, we really did not fully understand or appreciate the nature and scope of the legitimate telemarketing industry. Initially, staff and others believed that, because there are fundamental differences between fraudulent operators and legitimate ones (scam artists never intend to fulfill their representations, while legitimate telemarketers do), the practices of fraudulent telemarketers and legitimate ones would be readily distinguishable. The first proposal contained a lengthy enumeration of prohibited practices that, we believed, were the exclusive hallmarks of fraud artists. We learned, however, that exactly the opposite is true; fraudulent operators purposely mimic the business practices of legitimate telemarketers to confuse, and ultimately defraud, the unwitting consumer.

The challenge before us -- to craft a rule that attacked the fraud in the telemarketing industry without unduly burdening the industry's legitimate players -- is indeed difficult. We soon realized, however, that the initially proposed Rule did not quite "get it right" -- that is, it did not strike the appropriate balance in attempting to prohibit fraudulent telemarketing activity without unduly burdening the legitimate industry. The Commission decided that, given the tight statutory deadline of August 16, 1995, it would be beneficial to all involved to publish a second

proposed Rule for notice and comment. The second proposal, which I will discuss more fully in a moment, was issued on June 1, 1995, and it attempted to address many of the concerns raised during the comment period. In my opinion, this second proposed Rule gets it "more right," although I am sure that, depending on the audience, there may be some difference of opinion on that score! In any event, I believe the message that we can take from this rulemaking process so far is that we in Washington are listening to you and we are attempting to address your concerns in a reasoned and responsive manner. It is undoubtedly in everyone's best interest to make sure government is responding appropriately, and we at the Federal Trade Commission want to ensure a fair and open marketplace for consumers and businesses alike.

Let me outline some of the changes that were made to the original proposal to respond to many of the concerns that were raised in the comments. In general, we attempted to craft a more narrow and fraud-focused rule, one that is more closely tied to the legislation's requirement to prohibit deceptive and abusive telemarketing practices. In addition, many of the requirements which, we were told, would have had the unintended effect of impairing the ability of legitimate businesses to engage in telemarketing were eliminated entirely.

Examples of Specific Changes: Initially, the proposed Rule had contained an extensive list of prohibited deceptive and abusive telemarketing practices. The purpose of the list was to provide some clear-cut guidance, for legitimate businesses and consumers alike, as to which telemarketing practices were deceptive and which were not. We learned, however, that many of the enumerated practices were not inherently deceptive or abusive. While fraudulent

telemarketers might often use such practices, these practices, standing alone, were not an appropriate indica of fraud. For example, the initially proposed Rule prohibited any telemarketer from offering or selling goods or services over the telephone to a person who had previously been solicited by the same telemarketer unless all the terms and conditions of the initial transaction had been fulfilled. While this provision was intended to address the problem of "reloading" -- a significant problem that the Commission has seen in dozens of its telemarketing fraud cases -- we soon learned that many legitimate businesses call their customers before full satisfaction has been made on a prior transaction. Indeed, legitimate sellers regard cultivating established customers in this way as one of the most effective selling techniques. Because this provision would have had the unintended effect of preventing legitimate telemarketers from calling customers to renew subscriptions, warranties, service contracts, and a host of other ongoing services prior to their expiration, and because there is nothing about this practice, in and of itself, that is inherently injurious to consumers, we have eliminated it from the second proposal.

Another somewhat related provision in the initially proposed Rule prohibited a telemarketer from making a sales call to a person's residence more than once within any three-month period. This provision was intended to address a problem that we have seen in many of the telemarketing fraud cases that we have prosecuted, where victims, especially the elderly, were called so often that eventually they purchased something simply to end the barrage of harassing phone calls. After listening to the many objections to this provision, and realizing that calls more frequent than once a month are not, in and of themselves, injurious to consumers, we

replaced the provision with one more narrowly tailored to prevent abusive telemarketing. The second proposal now prohibits a telemarketer to cause "any telephone to ring, or engage any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."

The initially proposed Rule prohibited a telemarketer from directing a courier to pick up payment from a consumer. Many commenters noted the ways in which this provision would harm legitimate businesses, including prohibiting C.O.D. transactions and preventing newspaper carriers from making door-to-door collections on their paper routes. Clearly, this was not what we had intended, and after reviewing all the comments, we concluded that a ban on the use of couriers is unworkable. While fraudulent telemarketers often use couriers to quickly obtain consumers' money, such telemarketers also engage in other conduct that is clearly deceptive or abusive and can be addressed by other parts of the rule.

Another change to the proposed Rule concerns the "assisting and facilitating" section. The Commission's experience with telemarketing fraud cases revealed that many of these scam artists are able to stay in business only with the assistance of an extensive support network, consisting of those who provide sucker lists, write marketing and promotional scripts, print travel coupons, and provide others tools of the trade. The original provision generated substantial comment that the knowledge standard was too vague, and that liability to third parties should attach only where the assistance or support is linked to the Rule violation. We listened to these comments. As a result, the second proposed Rule has been changed to require a heightened

standard of knowledge -- actual knowledge or conscious avoidance of knowledge -- and provides that the assistance must be both substantial and be related to the commission of the deception.

The revised definition of "telemarketing" follows more closely the statutory definition set forth in the Act. This change also limits telemarketing to telephone calls and excludes from coverage other "telephonic mediums." After considering many comments that objected to the Rule's coverage of on-line services, we agree that at the present time, we just do not have enough information about whether fraud is occurring on-line to justify its inclusion under the Rule.

We also substantially reduced the number of required disclosures, tying them more closely to the Act. Under the revised rule, a telemarketer would simply have to disclose the identity of the seller, the fact that he or she is making a sales call, the nature of the goods and services, and, if the call is part of a prize promotion, that no purchase is necessary to win.

The revised proposed Rule retains the limits on hours of calling -- calls are permitted only between 8 a.m. and 9 p.m. In fact, Fortune magazine recently called me on a Sunday morning at 8 a.m., but, with two small children, I had already been up three hours, read the entire Sunday paper, jogged 10 miles, and was just serving up a wholesome breakfast when the phone rang!

Calls to consumers who have stated they do not want to be called are still prohibited, although telemarketers will not be liable for inadvertently violating this provision provided the telemarketer has appropriate compliance procedures in place.

The revised rule still would cover most types of telephone sales transactions where a telemarketer initiates a call to a consumer. It would exempt telemarketing calls to consumers where the transaction is completed in a face-to-face sales presentation, where the call is otherwise subject to extensive requirements under other Commission rules (such as pay-per-call services and franchises), or where the consumer initiates the call and is not the result of a direct mail solicitation by the telemarketer. Catalog sales would remain exempt from the revised proposal's coverage, as would be business-to-business sales. The revised proposal also clarifies that nonprofit entities and other entities not under the Commission's jurisdiction would be exempt.

In closing, I believe that the Commission's experience in this Rulemaking proceeding demonstrates that government can be a responsive and necessary component in ensuring a fair and competitive marketplace. We all share the common goal of eliminating telemarketing fraud. By working cooperatively toward that end, I am confident that we can fashion a Final Rule that achieves maximum consumer protection with the minimum of regulatory burden.