



National Headquarters

April 9, 2002

Office of the Secretary
Rm. 159
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

RE: Notice of Proposed Rulemaking to Amend the Federal Trade Commission's Telemarketing Sales Rule, 16 CFR Part 310 [67 Fed. Reg. 4491; Jan. 30, 2002]

This letter is to provide public comments on behalf of the American Red Cross regarding the *Notice of Proposed Rulemaking* (Rule or Proposed Rule) *to Amend the Federal Trade Commission's (Commission) Telemarketing Sales Rule (TSR)*. Our comments will address the national "do not call" registry, potential changes to the TSR resulting from language contained in the USA PATRIOT Act, and the use of predictive dialing.

The American Red Cross is dedicated to saving lives, easing suffering and restoring hope at home and around the world. The Red Cross annually mobilizes relief to the victims of more than 67,000 disasters nationwide and has been the primary supplier of lifesaving blood and blood products in the United States for more than 50 years. In the year 2000, the Red Cross trained almost 12 million people in vital lifesaving skills and delivered more than 21 million locally relevant community services. The organization also assisted international disaster and conflict victims in close to 40 locations around the globe, and its emergency communication centers processed 1.2 million calls in support of U.S. military families. All American Red Cross assistance is free, made possible by voluntary donations of time, blood, and money from the American people.

We are an independent, not-for-profit organization that relies primarily on the generosity of the American people, corporations and foundations for support. In FY2000, the Red Cross channeled \$2.2 billion worth of assistance to people through Armed Forces Emergency Services, Biomedical Services, Disaster Services, Health, Safety and Community Services and International Services--all made possible by the American public.

Together, we can save a life

Changes to the TSR

Under the Rule, the Commission is proposing to modify the TSR by creating a centralized national “do not call” registry (Registry). This Registry would enable consumers to eliminate most telemarketing calls simply by making one call to the Commission.

The Proposed Rule also proposes changes to the TSR mandated by the recently enacted USA PATRIOT Act. Prompted by the events of September 11, this legislation, among other things, directs the Commission to expand the TSR to cover calls made to solicit charitable contributions. Currently, the **TSR** covers only calls made to sell goods and services. By law, non-profit charitable organizations are exempt from the FTC’s jurisdiction and the USA PATRIOT Act does not change this status. However, the USA PATRIOT Act does enable the FTC to act against for-profit companies that engage in fraudulent, deceptive, or abusive practices when they solicit charitable contributions on behalf of charities or purported charities.

Finally, the Commission is seeking to clarify that the use of predictive dialers that result in “dead air” violates the TSR.

The National “Do Not Call” Registry

Based on the exemption of non-profit entities from the FTC Act (15 U.S.C. 45(a)(2)) it is the understanding of the American Red Cross that we are not required to comply with any of the requirements of the TSR when solicitations for charitable contributions or blood donations are made by Red Cross employees or volunteers. It is also our understanding that the Red Cross would continue to enjoy this exemption regardless of any future changes that might be made to the TSR as a result of the Proposed Notice. Thus, the Red Cross would not need to access a national “do not call” registry if calls for charitable contributions or blood donations were made by Red Cross employees or volunteers.

We are requesting clarification that solicitations made by Red Cross employees or volunteers would not fall under the jurisdiction of the FTC, the requirements of the existing TSR, or modifications made to it resulting from the Proposed Notice. As such, the Red Cross would not need to access a national “do not call” list.

USA PATRIOT Act and changes to the TSR

Section 1011(b)(3) of the USA PATRIOT Act amends the definition of “telemarketing” that appears in the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 USC 6106(4) by expanding such definition to cover any “plan, program, or campaign which is conducted to induce... a charitable contribution, donation, or gift of money **or any other thing of value**, by use of one or more telephones and which involves more than one interstate telephone call.. .” (emphasis added). As a result, for-profit vendors who solicit charitable contributions and donations of blood for the American Red Cross might fall under the jurisdiction of the FTC and, therefore, the TSR.

From the time a donor gives blood until the time a patient in need receives it, hundreds of steps must occur. Blood is donated voluntarily **from** one person to help save a life. Thus, blood donations are given freely. There are, **of** course, costs associated with collecting, testing, processing and distributing blood donations to hospitals. To recover these costs, the **Red Cross** and all not-for-profit blood centers must charge fees to hospitals. These fees are designed to recover costs and to invest in capital improvements to ensure there is up-to-date equipment, facilities, trained staff and much more within the confines of a non-profit organization. However, the voluntary donation, itself, is given freely.

The American Red Cross believes that calls to solicit blood donations do not fall under the language in the USA **PATRIOT Act** because blood donations are not a “thing of value” in a fiduciary sense. As **a** result, requests made by the Red Cross or its for-profit vendors for blood donation should not fall under the jurisdiction of the FTC.

Additionally, state “blood shield” laws, where applicable, generally exempt blood, tissue, and organ donations from product liability claims, including strict liability or breach of implied warranties. A majority of states have accomplished this goal by enacting statutes that define blood and tissue collection activities as medical services. Blood components intended for transfusion have been almost universally exempted from consideration as a sale of a product because **of** their unique status. It is defined under federal statutes, and regulated by the Food and Drug Administration as a biologic as well as a drug, requiring a physician’s prescription (see., e.g. 21 CFR 600.3(h) and 607.3(b)). Furthermore, because of the unique nature of blood donations and the need to ensure an adequate blood supply it surely could not have been the intent of Congress to inhibit or otherwise impair the ability of non-profit blood centers to make calls to request voluntary blood donations.

We are requesting clarification that solicitations made on behalf of the Red Cross by for-profit companies for blood donations would not fall under the jurisdiction of the FTC, the requirements of the existing TSR, or modifications made to it resulting from the Proposed Notice.

We are also requesting clarification that for-profit vendors calling on behalf of the Red Cross would not need to access a national “do not call” registry. Requiring for-profit vendors to access a national “do not call” list to remove names from their list of individuals to contact, will surely reduce the ability of such centers to collect blood. This will have a direct and profound impact on the safety of patients who require this life-saving product.

Predictive Dialers

Certain units of the American Red Cross and some of its for-profit vendors currently use “predictive” or “automatic” dialers and pre-recorded messages to contact previous blood donors. These calls are performed to encourage future blood donations. We also use these techniques to remind donors of appointment commitments, thank donors for their participation in the blood donor program, and other similar activities that promote a relationship with a blood donor. As noted above, the supply of blood in the United States is often fragile. We have used predictive dialing techniques and pre-recorded messages

to enhance our ability to obtain blood that is needed every day to save lives throughout this country. It is **an** efficient, cost-effective, and proven method to encourage donations. Presently, only **5%** of eligible individuals in this country donate blood. Even those who make **an** appointment to donate often fail to show up for their donation.

As noted above, blood donations are given freely and are not considered a “product” or “thing of value”. The Red Cross believes that use of these methods by the Red Cross or our for-profit vendors would not fall under the FTC’s jurisdiction.

We are requesting clarification that the use of predictive dialers and prerecorded messages made by the Red Cross, or on behalf of the Red Cross by for-profit companies, for blood donations would not fall under the jurisdiction of the FTC, the requirements of the existing TSR, or modifications made to it resulting from the Proposed Notice.

The Red Cross would like to thank the Commission for the opportunity to provide comments. We hope our views and requests for clarification will serve as constructive input during the future rulemaking process. If you have **any** questions please contact me at (202) 639-3031.

Sincerely,



Kurt Kroemer
Director, Regulatory Affairs
Government Relations Department