

**BEFORE THE FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580**

In the Matter of

Telemarketing Rulemaking – Comment FTC File No. R411001

COMMENTS AND RECOMMENDATIONS

OF

Avinta Communications, Inc., Sunnyvale, California 94085-1445

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Summary

Avinta Communications, Inc. (Avinta) opposes the proposed changes to the Telemarketing Sales Rule (TSR or the Rule). In specific, Avinta respectfully requests the Commission to reconsider portions of the Rule with respect to the initiation of an “outbound call” and the establishment of National “Do Not Call” Registry issues. Telecommunications technology has advanced so much since the beginning of this series of proceedings over a decade ago that there exist several very simple retail consumer electronic devices that allow individual consumers to completely avoid unwanted calls. It is no longer necessary to expend the government’s resources on regulating and managing this matter.

1. Background

A. As early as 1965, California Public Utility Commission investigated the question of unsolicited telephone calls. (Page 67, Ref. 238)

B. In 1987, Florida established the first State “do-not-call” list, primarily intended to protect senior citizens. (Page 67, Ref. 239)

C. In 1991, Congress enacted Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. 227. (Page 2, Ref. 2)

D. On August 16, 1994, President Clinton signed into law the Telemarketing Consumer Fraud and Abuse Prevention Act (Telemarketing Act). (Page 2, Ref. 1)

E. On August 16, 1995, FTC adopted Telemarketing Sales Rule (TSR), 16 CFR Part 310. (Page 3, Ref. 7)

F. On February 8, 1996, FCC adopted Telecommunications Act of 1996 under TCPA, 47 CFR 64.1200. (Page 66, Ref. 235)

G. As telecommunication equipment technology advances, the use of sophisticated Predictive-Dialers introduces an additional consumer frustration due to the “dead air” that the Dialers produce in an effort to improve the productivity of the Telemarketers (Pages 81 – 85, Refs. 287 – 305).

H. State of Kentucky has identified that "... over 95% of the business or non-profit organizations which conduct telemarketing sales are exempt under the act ...". (<http://www.law.state.ky.us/cp/nocall.htm>)

I. Through the referral by FTC and the encouragement by many States, the Direct Marketing Association's (DMA) Telephone Preference Service (TPS) has accumulated a list of 4 million telephone numbers as of June 2001 indicating that the owners of these telephone numbers do not wish to receive outbound telemarketing calls (Page 68, Ref. 241). According to DMA's web site, a consumer is required to pay a \$5 processing fee to register online. ("There is no charge for registering by mail. However, registering by mail may delay inclusion in the TPS file.")

As a result, the DMA could potentially have received a revenue of up to \$20 million dollars based on a governmental Rule under which the organization's own members are the primary subjects being regulated. From an outsider's perspective, either way, the consumer is the loser.

J. Among a dozen or more States with established "Do Not Call" programs, some even treat this process not as a service, but more like a business by charging consumers annual handling fees (Page 124, Section IX, Paragraph D. 5. j.). Again, consumers are not getting the full support that these programs might be implying.

K. Section 310.7 (Page 141) of TSR grants States and private persons the authority to enforce this statute without outlining any specifics. This unique arrangement does not seem to offer any solid backing to the consumers. Without explicit guidelines, victims have to find their way through the legal system mazes in individual States. In particular, the \$50,000 monetary harm threshold (Page 108, Ref. 418) makes most of individual consumer's sufferings not significant enough to be qualified for pursuing this provision.

L. State "Do Not Call" programs do not have a simple process for the complainant to report violations, or to receive compensation, if any. Most States require the filling out of complaint forms. Besides detailed information about the caller that is hard to gather, these forms also ask the victim to supply additional personal information such as E-Mail address and work phone number as well as to be available as a witness in court. This

kind of “burden of proof” is understandable because of the need to safeguard against abuse. However, such complexity and associated psychological stress deter most consumers from filing a complaint. This is a reality that the telemarketing industry has based upon to approach its quarry to start with. And, its victims are exploited further afterwards.

M. Even so, “consumers are responding in such overwhelming numbers (Page 68, Ref. 240) to the State “do-not-call” statutes that some States’ telephone systems have crashed.” (Page 69, Ref. 242)

The telemarketer problems have been so severe that any partial solution has been eagerly embraced by consumers. However, the current regulations and practices have not been effective. Without a quantum change, these activities will most likely continue very much along their original course and consumers will still be the losers.

2. Root Cause Analysis

A. The fundamental reason that Telemarketing calls appear to be primarily targeted at consumers is because the residential telephone equipment is “inferior” to that used by businesses.

B. In a business, telephone calls are normally routed by PBX (Private Branch eXchange) switching equipment handled by receptionists or operators. Thus, telemarketing calls are routinely intercepted by employees who have no authority to expend funds. With the advent of Auto-Attendant (AA) equipped PABX (Private Automatic Branch eXchange), nearly all telemarketing calls to businesses are blocked silently without ever being noticed, as long as callers do not know any valid extension number to dial. Even if they do get through, such calls at work are generally regarded as much less intrusive than those made to private residences.

C. What makes telemarketing activity much more disturbing and irritating than other forms of direct marketing, such as those through postal or electronic mail, is because this is a form of “real time” communication. When the phone rings, consumers have the instinctive reaction “to drop whatever they may be doing and race to the telephone”. (Page 82, Ref. 292)

D. Without PABX capability on their residential telephone lines, consumers are directly exposed to telemarketer’s intrusions to their “right to

be left alone” in the homes. (Paragraph 4 of “Concurring Statement of Commissioner Orson Swindle in Telemarketing Sales Rule Review, File No. R411001)

E. To provide some protection to consumer’s privacy, local telephone companies have been offering unwanted call screening services based on Caller-ID technology. Among the major local exchange carriers, these services cost from a few to nearly ten dollars per month. Installation charges ranges from free to over ten dollars. The simplest form of these is just a caller filter based on a finite list of acceptable calling telephone numbers. Some sophisticated ones have a database for consumer to maintain up to 10 access codes, each consists of a 10-digit number. Apparently, this is for desired callers who often have to call from locations not pre-determined. Although each payment of these services may be within affordable range, their effectiveness versus operation procedures and long-term monthly charges for combined services remains to be seen.

3. Available Retail Consumer Products

A. Utilizing a miniature PABX for fending off telemarketers by consumers has long been technically feasible (US Patent Nos.: 5,022,069 & 5,317,631, Dates: June 4, 1991 & May 31, 1994, respectively). However, residential telephone wiring constraints (random wiring and difficulties in setting up direct outlet jacks) make the installation of a miniature conventional PABX still impractical for most of the cases.

B. A distributed PABX (dPABX, US Patent No.: 5,596,631, Date: January 21, 1997) for single line telephone service has finally eliminated this last hurdle. This technology has been implemented as stand-alone add-on modules to work with existing telephone instruments, as well as can be built into new telephone sets. Both forms are readily available, neither requires any handling of the existing telephone wiring.

C. Although this dPABX was designed for a SOHO (Small Office Home Office) entity to project a professional image to outsiders, a single dPABX module can provide “Stop Junk Calls” service very effectively and naturally in residential settings.

D. This dPABX differentiates itself from other products that are specifically designed to “Stop Junk Calls” by its unique AA capability. With

properly phrased greeting, the AA subsystem prevents a caller from realizing that the call is being screened, thus relieving psychologically those would-be victims who often worry about confronting unwanted callers by any explicit means, even if it is fully legal and supported by Federal statute.

E. Furthermore, the “password” used in this dPABX to “Stop Junk Calls” is actually technically an extension number which can be changed by the consumer at will and then given only to desired callers. Consequently, whenever it is over-distributed, a new “password” can be chosen to start the process over again by restricting all calls at the onset. Of course, this setup becomes a “moving target” that Telemarketers have to deal with.

4. Recommendations

A. The Commission, in the referenced Proposed Rulemaking made an observation that **“technology advances at a rapid pace in the telecommunications industry; what is impossible today may be commonplace in the future.”** (Page 63, First paragraph)

The Commission’s prediction has become reality. In fact, the retail market already offers various devices that are capable of addressing this age-old problem, albeit each at a different level of proficiency.

B. Since the consumer electronics industry has already provided cost effective tactics for blocking unwanted calls, it would be an opportune time for the Commission to review the overall situation rather than to further expand an already complex set of Rules and Regulations, whose enforcement imposes an undue burden on the government as well as the consumer.

C. Therefore, it is recommended that the Commission consider establishing an information clearing facility for disseminating product descriptions to advise the general public about the availability of retail products that could block unwanted calls, without waiting for, nor relying on government regulations.

D. This facility could be set up in the following manner:

a. Initially, information about all available retail products would be published with a disclaimer such as, “All of the products listed below have not been evaluated nor endorsed by FTC.”

b. At a later date, misleading products can be removed from this referral site, when consumer feedback indicates that the product’s description is false.

c. It may be even better to utilize a rating system that tallies the consumer reviews or comments for each product, similar to a practice exercised by Internet merchandise trading operations, such as Amazon, eBay, etc. This mechanism will allow consumer feedback to regulate or self-govern the viability of a product.

E. The above counter proposal may appear on the surface to be asking the government to promote private products. However, it would be much more effective and less costly, to provide a central information clearing house for assisting consumers to deal with this issue on their own, than to continue the existing regulatory activities.

F. Consequently, much of the governmental activities in this area that have been evolving around a vintage telephony technology base, can be scaled back significantly.

G. Among various other retail devices that are designed specifically to stop telemarketers, Avinta will make its generic dPABX technology available to all electronic equipment manufacturers who are interested in producing this type of Enhanced Telephone (ET) station equipment (either add-on or built-in). This ET can not only address the telemarketer issues at hand, but also modernize the residential telephony in a way that is probably beyond the scope of this forum.

5. Answers to “General Questions for Comment”

(Page 116, IX. Questions for Comment on the Proposed Rule)

(a) “What is the effect (including any benefits and costs), if any, on consumer?”: With less than \$90.00 current one-time retail cost of electronic modules, any consumer can have a very graceful (innocent appearance to the calling party and silent to the called party) technique to fully screen incoming telephone calls, thus eliminating the need for any form of “Do Not Call” Registry.

(b) **“What is the impact (including any benefits and costs), if any, on individual firms that must comply with the Rule?”**: The individual firms would experience significantly increased number of outbound calls that are answered by residential dPABXs resulting in “completed calls yet unsuccessful sessions” (connection established, but no actual conversation conducted).

(c) **“What is the impact (including any benefits and costs) if any, on industry?”**: The telemarketing industry has to find a less disruptive alternative method to conduct business.

(d) **“What changes, if any, should be made to the proposed Rule to minimize any cost to industry or consumers?”**: The proposed Rule should be simplified by removing the portions that deal with the regulation of outbound call setups and the establishment of National “Do Not Call” Registry. The savings would be in the reduction of governmental burden due to this matter, and the elimination of consumer frustrations.

(e) **“How would each suggested change affect the benefits that might be provided by the proposed Rule to consumers or industry?”**: The suggested change can stop the fundamental problems that the proposed Rule is attempting to regulate, even before they get started.

(f) **“How would the proposed Rule affect small business entities with respect to costs, profitability, competitiveness, and employment?”**: It will offer them a much freer environment to conduct their business (but with lower success rates).

Respectfully submitted,

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