

March 28, 2002

BY FEDERAL EXPRESS

Office of the Secretary
Federal Trade Commission
Room 159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Telemarketing Rulemaking - Comment. FTC File No. R411001

To Whom It May Concern:

These comments are submitted by the Make-A-Wish Foundation(r) of America in response to the request by the Federal Trade Commission (the "FTC" or the "Commission") for public comment on the proposed amendments to the Telemarketing Sales Rule, 16 C.F.R. Part 310 (the "TSR"). We confine our comments to the proposed amendments that apply to telemarketers soliciting charitable contributions.

We appreciate this opportunity to comment on the proposed amendments to the TSR. Our comments are not meant as an indictment of the telemarketing industry in general; rather, it is our hope that we might draw attention to the problem of "charitable telemarketing fraud" in recognition of the fact that there are an unknown number of telemarketers who do engage in deceitful, fraudulent and abusive practices that victimize legitimate charities like ours, as well as well-meaning donors throughout the United States.

From our perspective, it has become increasingly apparent during the past decade that: (1) certain charitable telemarketers deliberately misrepresent the identity and/or nature of the organizations on whose behalf they are calling, in an attempt to deceive consumers; and (2) many of those same telemarketers resort to harassment and abusive tactics while misrepresenting the identities of the organizations on whose behalf they are acting. This type of charitable telemarketing fraud is a problem of the utmost concern to legitimate charities and donors alike, and it is our sincere hope that the amendments to the TSR will adequately address it.

The Make-A-Wish Foundation

The Make-A-Wish Foundation of America is a national nonprofit organization with 80 chapters located throughout the United States (collectively, the "Make-A-Wish Foundation"). We are the largest wish-granting organization in the world. Founded in 1980, we have granted the wishes of more than 88,000 special children across the country who are courageously battling life-threatening illnesses.

The Make-A-Wish Foundation does not engage in any telemarketing activities whatsoever. In fact, since our inception 22 years ago, we have always maintained a strict policy prohibiting telephone solicitations in our name.

While we recognize that telemarketing can be a legitimate and beneficial method of fundraising for some charitable organizations, we have chosen to spend our donors' money on granting children's wishes, instead of paying professional telemarketers.¹

Despite the fact that we do not use telemarketers, hardly a week goes by that we do not receive complaints and/or inquiries from people who report that they have been called by solicitors who either told them, or misled them into believing, that the solicitation was being made by the Make-A-Wish Foundation, or on our behalf. These complaints began in the early 1990s and have escalated since that time.

Accompanying these comments is an Appendix that contains a representative sample of the telemarketing complaints our National Office and chapters have received over the years. Exhibit 1 of the Appendix contains some of the written complaints we have received (in reverse chronological order); Exhibit 2 documents still more complaints of this nature that we have taken over the telephone (also in reverse chronological order).²

Deceptive and Abusive Charitable Telemarketing Practices

Many of the complaints we receive are from people who report that the telemarketer who called them expressly stated that the solicitation was being made by or on behalf of "the Make-A-Wish Foundation" (and, in many instances, these people have assured us the misrepresentation was repeated more than once during the call). Others report that the solicitor claimed to be calling from the "Children's Make-A-Wish Foundation" - an organization that, to the best of our knowledge, does not exist. Still others have reported that the telemarketer, in an apparent artful attempt to imply an association with the Make-A-Wish Foundation, began the solicitation with a statement like: "Mrs. Jones, are you familiar with the Make-A-Wish Foundation? You are? That's great. Well, we have children who need wishes. Can you help by making a donation?" (i.e., the telemarketer does not expressly state that the solicitation is on Make-A-Wish's behalf - but the association is certainly implied, and the telemarketer does not go on to disclose the true identity of the organization on whose behalf the call is being made).³

Once a consumer agrees to make a donation during a telephone solicitation, a follow-up pledge form is generally sent in the mail, which directs the donor to make a check payable to an organization other than the Make-A-Wish Foundation (usually another wish-granting organization, often with a name similar to ours). Apparently, the hope is that the donor either (a) will not notice that the donation does not go to the Make-A-Wish Foundation, or (b) will assume that there is a legitimate reason for the discrepancy. Surely many people follow through on these pledges with the belief that their donations are going to the Make-A-Wish Foundation, when in reality they are not. Other people do notice the problem, however, and call us to inquire.

Some people have reported to us that they directly questioned whether or not the telemarketer calling them was indeed affiliated with the Make-A-Wish Foundation. Among the false responses reported are:

- * "Yes, we are."
- * "We're a subsidiary of Make-A-Wish."
- * "We have a sister/brother relationship with Make-A-Wish."
- * "We're just like Make-A-Wish, but they have so many children they can't get to them all - so they refer children to [us]."

* We "are raising money for the Make-A-Wish Foundation so no child goes without a wish."

* "Well, Make-A-Wish needs more people to help grant wishes - that's what we're here for."

In addition to these misrepresentations, our reports also indicate that many charitable telemarketers act in a patently offensive and abusive manner to individuals who indicate that they cannot or will not donate funds, or who request that written information be sent to them first. These actions are reprehensible enough on their own, but the problem is compounded when the recipient of the abuse has been told or led to believe that the solicitation was being made by or on behalf of the Make-A-Wish Foundation.

The following are excerpts from representative samples of the written complaints about abusive behavior we have received in recent years (all of which are included in Exhibit 1 of the Appendix):

Letter dated June 4, 2001

On Friday evening, May 18, 2001 at approximately 5:15 PM CDT, I received a telephone call from a young woman who stated that her name was Sarah [] and that she represented your organization. This was obviously a fund-raising call as Ms. [] described the purpose of your foundation and all the wonderful things that you do for dying children and their families. As a retired hospice RN, I know of the Make-A-Wish good deeds but listened patiently as Ms. [] continued speaking.

Because I had been interrupted in the middle of food preparation, I had the telephone receiver cradled between my head and my shoulder. Unfortunately it slipped off and Ms. [] probably thought that I had hung up on her. As I retrieved the wayward receiver and brought it to my ear, I heard Ms. [] say, "F***ing whore!" before she abruptly disconnected the call. I was flabbergasted to hear those words from someone who claims to represent any organization but especially Make-A-Wish

. . .

Comments posted on Web site (January 31, 2002)

I just received an unsolicited phone call from Christine at your foundation when I ask to be taken off the phone list her reply was "you just don't care do you?" I did not feel that it was necessary to tell Christine that I have dedicated my life's work to help children who have chronic illnesses at our Children's Hospital of Michigan. . . . I am offended by intrusions of telephone solicitors into my limited private time. Rudeness and unfounded assumptions of your worker has done nothing to change those feelings. I respectfully submit that your workers receive training in this area.

Comments posted on Web site (February 6, 2002)

Wednesday, 2/6/02 6:45 PM, received a phone call from a telemarketer representing your company. I have two small children, just got in the door from work. Telemarketer introduced himself as "Jim, calling on behalf of the Make-A-Wish Foundation." I informed him that it was a bad time right now, but he hung up on me before I even finished my sentence. I understand that your company does a lot of good things. I respect that. It's time to stop using rude mercenaries to solicit on your behalf. . .

There can be little doubt that the Make-A-Wish Foundation has lost, and continues to lose, donations because of such harassment. We have been told over and over by people contacting us to complain about "our" rude and aggressive telemarketers that they have been driven over the edge and will no longer support our organization. For example:

E-Mail dated September 19, 2001

In the past 3 weeks I have received 2 calls from the Make A Wish Foundation. I have given in the past but this year my husband has had 4 surgeries & we are tight for money as we are retirees. Both calls have been from very rude people who have argued with me or hung up. I donate to groups who I feel are grateful for any amount I can scrape up but I feel that some people in your group have a very bad attitude.

I am letting you know because other people may have been subjected to the same treatment & you may lose support without knowing why.

E-Mail dated December 9, 2001

A few minutes ago, I received yet another call from [your telemarketing firm] again and . . . I told this female telemarketer that I told them yesterday to put me on the do not call list and why was I being called again? She hung up.

I have donated to your cause many times in the past - but now refuse to do so when you employ a company that harasses people.

E-Mail dated March 6, 2002

After this call, I will not be giving any money to your foundation. I hope, for your sake, you can obtain people with better manners to represent you. I am sure you do a lot of wonderful things for many young people, but there are many other organizations who also do wonderful things and don't harass people to reach their objective.

E-Mail dated July 30, 2001

I just received a call from "Sabrina" from your organization requesting a donation. I told her that we just could not give this year. She was very rude & hung up on me. We have given in the past years & would gladly give now if possible. She does not know our family's situation. If this is the way she handles her calls, I can guarantee that your donations will decline - and that is a shame - because the children & their families will suffer because of it.

Although responding to these kinds of complaints drains our resources and distracts us from carrying out our charitable mission, we welcome the opportunity to set the record straight. Our biggest concern has always been that the people from whom we hear - i.e., those who (a) either cared enough or were angry enough to call the matter to our attention, and (b) had the time to do so - represent only the tip of the iceberg. There is no way of knowing how many other people have had similar experience but, because they did not communicate with us, will continue to believe that the Make-A-Wish Foundation engages in these sorts of abusive fundraising practices.

Further complicating the problem is the fact that many telemarketers make it a practice to hide their true identities by blocking their names and telephone

numbers from appearing on caller ID devices. Many of the people who complain to us about telemarketing calls report that their caller ID devices showed the call to be "blocked," "unavailable," or simply "out of area" - and/or that the *69 service does not work to redial the number. Without such identifying information, we are missing a key piece of information that might enable us to put a stop to the fraudulent use of the Make-A-Wish Foundation name. Because we are generally unable to ascertain the identity of the offender, in most cases we cannot take meaningful action to address the problem.

It is our hope that these problems can be adequately addressed by the TSR as it will be amended. To that end, we offer the following comments and suggestions.

Comments and Suggestions Regarding Proposed TSR Amendments

We support the proposed changes to the TSR, with the following exceptions and further additions. It is our suggestion that the FTC:

1. Prohibit telemarketers from misrepresenting the identity of the organization on whose behalf they are soliciting funds by adding the word "identity" in Section 310.3(d)(1) (i.e., modifying it to prohibit misrepresentations of "the identity, nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested");
2. In Section 310.4(e), require that telemarketers performing charitable solicitations disclose the fact that they are paid professional fundraisers;
3. In Section 310.4(a)(6), prohibit telemarketing firms from substituting the name and telephone number of the actual charitable organization on whose behalf the call is being placed for the name of the telemarketing firm that is placing the call;
4. In Section 310.4(a)(6), affirmatively require that every telemarketing company make its name and telephone number available on caller ID (as opposed to simply prohibiting the blocking of such information);
5. Prohibit telemarketers from prematurely hanging up on the individuals whom they call by including such behavior in Section 310.4 as an "abusive telemarketing act or practice"; and
6. Clarify that the TSR, with its amendments, applies not only to fundraising calls made by telemarketers within the United States, but also to telemarketers (including telemarketers performing fundraising on behalf of charitable organizations) who call consumers within the United States from international destinations.

Each of these comments and suggestions is discussed in more detail below:

Comment No. 1: It is our belief that, although such a prohibition should be manifest, Section 310.3(d)(1) of the TSR should be amended to prohibit the misrepresentation of the identity of the organization on whose behalf a charitable contribution is being solicited. As described above, such misrepresentations are a pervasive problem, and we believe that this issue should be addressed by adding the word "identity" in Section 310.3(d)(1) (modifying it to prohibit misrepresentations of "the identity, nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested").

Comment No. 2: We urge the FTC to require that telemarketers performing charitable solicitations disclose the fact that they are paid professional fundraisers. Although Section 310.3(a)(1) sets forth several mandatory disclosures that telemarketers must make to a customer before the customer pays for the goods or services offered, under the proposed amendments to the TSR no parallel mandatory disclosures are required of telemarketers soliciting charitable contributions. While we recognize that mandatory disclosure of certain information, such as the percentage of funds retained by the telemarketer as opposed to being turned over to the charity, has been held unconstitutional,⁴ there is no doubt that requiring a solicitor to disclose the simple fact that he or she is a paid professional fundraiser would serve to protect consumers' interests and yet pass constitutional muster.⁵

Comment No. 3: As it is our belief that telemarketers should be required to disclose their professional status, we also oppose the proposed portion of Section 310.4(a)(6) that would allow telemarketers to substitute on caller ID devices the name and/or telephone number of the actual charitable organization on whose behalf the call is being placed for their own personally identifying information. First, such a rule would lead customers to believe that solicitation calls were coming directly from the charitable organization itself - as opposed to from a paid telemarketing firm - thereby concealing the fact that less than 100% of any donation is going to the charity itself. Second, because many charitable organizations employ numerous telemarketing firms, such a rule would hinder those organizations in their efforts to respond to consumer complaints about abusive telemarketing practices. If a consumer calls a charity to complain of rude telemarketing behavior, but only has the name and number of the organization itself (as opposed to the name and number of the telemarketing firm that placed the call), there is no effective way to pinpoint the source of the abuse.

Comment No. 4: We support an amendment to the TSR that would affirmatively require that every telemarketing company make its name and telephone number available on caller ID (as opposed to simply prohibiting the blocking of such information). Although some may argue that such identifying information is of "little use to the consumer,"⁶ we believe that such identifying information would serve the public in myriad ways, and would be a critical step to solving the problem of charitable telemarketing fraud. Requiring the disclosure of identifying information to caller ID devices would not only allow consumers to screen out unwanted calls, but the provision of such information would also act as a measure forcing telemarketers to adhere to the strictures of the TSR and other regulations governing telemarketing conduct, and would allow for those rules to be enforced if and when they are violated.

Allowing telemarketers to block their identifying information from appearing on caller ID devices is tantamount to granting them a license to commit fraud and abuse. If telemarketers are allowed to act anonymously, there is no incentive for them to regulate their own behavior and no recourse for those that they anonymously harm. If they are prohibited from hiding behind a shield of anonymity, however, they will necessarily be more likely to adhere to the rules regulating their conduct and, should they still choose to disregard the laws governing them, their victims will be able to take action. The laws meant to prevent telemarketing fraud and abuse simply cannot be enforced against anonymous offenders.

Comment No. 5: As an additional protection against abusive behaviors, we suggest that Section 310.4 be amended to prohibit telemarketers from prematurely hanging up on the individuals whom they call by identifying such behavior as an

"abusive telemarketing act or practice." It is a commonplace occurrence for some telemarketers to abruptly hang up on consumers if they believe that the consumer will not make a donation, and this one of the complaints that we receive with the most frequency. Clearly, such behavior is impolite and insulting to the consumer. Perhaps more importantly, because the hang-ups often occur after a consumer has requested further information about the soliciting charity or has questioned the identity of the organization on whose behalf the telemarketer is calling, this behavior prevents the consumer from ascertaining the identity of abusive telemarketers.

Comment No. 6: Finally, with the recent influx of complaints we have received regarding fraudulent telemarketing calls originating from outside of the United States, we urge the Commission to clarify the fact that that the TSR, with its amendments, applies not only to fundraising calls made by telemarketers within the United States, but also applies to telemarketers (including telemarketers performing fundraising on behalf of charitable organizations) who call consumers in the United States from offshore locations. There should be no doubt that the TSR acts to protect Americans from fraudulent telephone solicitations, no matter where those calls originate.

Conclusion

Charitable telemarketing fraud is a critical problem that affects not only the Make-A-Wish Foundation, but also all other legitimate charities and thousands of well-meaning donors throughout the United States. We hope the problem will be minimized (if not eliminated) by the amendments to the TSR, and we urge the FTC to incorporate the changes we have suggested.

We would like to thank the Commission for addressing this important issue and for providing us with an opportunity to submit these comments on the proposed TSR amendments. Should the Commission have any questions regarding our comments, or if we can be of any further assistance whatsoever, please do not hesitate to contact us.

Respectfully submitted,

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Vice President & General Counsel

Martha H. Kimes
Assistant General Counsel

1 We have been informed that telemarketers generally receive a substantial percentage (often 75% or more) of the donations that they raise.

2 For the purpose of these Comments, we have redacted the names, addresses and other information identifying the individuals who have contacted us with complaints, as well as any specific organizations or telemarketers named in those complaints. We will be pleased to provide this information separately if it would be of assistance to the Commission.

3 It has recently been reported to us that U.S. citizens have begun to receive fraudulent telephone solicitations - purportedly "on behalf of the Make-

A-Wish Foundation" - from telemarketers located in the Philippines. It may be a coincidence that we began to receive such complaints about offshore telemarketing shortly after the "Crimes Against Charitable Americans Act of 2001" was signed into law; however, we are concerned that this may be an attempt by telemarketers to place themselves outside the effective reach of U.S. laws that regulate their behavior.

4 Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988); see also Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947 (1984); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

5 Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 at 799 n. 11 ("[N]othing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny.").

6 Federal Trade Commission, Notice of Proposed Rulemaking, Telemarketing Sales Rule, p. 63 ("Comments from representatives of the telemarketing industry state that, even if it were possible to transmit a name and telephone number [via caller ID], the information would be of little use to the consumer because the number shown most likely would be the number of the telemarketer's central switchboard or trunk exchange rather than a useful number, such as a customer service number, where the consumer could ask to be placed on a 'do not call' list.").