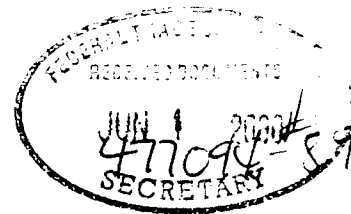




OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN



May 30, 2000

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

Re: *Telemarketing Review – Comment. FTC File No. P994414*

Dear Commissioners:

On behalf of Texas consumers, I appreciate the opportunity to comment on the Federal Trade Commission's ("FTC") Telemarketing Sales Rule ("TSR" or "Rule"), 16 C.F.R. Part 301.

Telemarketing fraud continues to be a significant consumer issue and the TSR is an important tool for States in their fight against fraudulent telemarketing schemes. By allowing States to bring a single federal action against a common telemarketer, the Rule provides significant efficiencies for the States. In addition, the Rule often creates an enforcement avenue that might not otherwise be available under State law. As the primary enforcer of consumer protection laws, I believe the Rule should remain in effect and should be further strengthened to more effectively address recent developments in the telemarketing area.

The States have now had five years to bring enforcement actions under TSR and it is important to examine the Rule in light of those experiences.

A recent development in the telemarketing area in Texas and across the country is the sale of account information from credit card purveyors to third parties. Telemarketing companies that acquire consumers' account information prior to calling the consumers often do not clearly disclose the fact that they have the consumers' account information. These sales calls usually promote a "free trial offer" or "trial membership" as part of the pitch. Consequentially, consumers often believe that because they have not given any account information to the sales person, they will not be billed after the trial period is over. However, because the telemarketer has the account information, the telemarketer is able to bill the account without explicit approval from consumers. Thus, at the end of the month the charge appears on the credit card or the money is taken from the bank account. Texas recommends that the FTC study this issue carefully and amend the Rule to provide strong safeguards for consumers who are targeted by these telemarketing companies. Telemarketers who have pre-acquired consumer credit account

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information should not be able to "close" a sale without disclosing in a clear and conspicuous manner that they have a consumer's account number, the anticipated billing date and the total amount that the consumer is agreeing to pay.

Another recent trend in the telemarketing area is the growth of offshore telemarketing companies using U.S.-based companies to assist them in their fraudulent schemes. These offshore companies are generally beyond the reach of U.S. jurisdiction. Thus, in order to combat fraudulent schemes that originate outside the U.S., it is important for the FTC and the States to be able to effectively bring enforcement actions against third parties that assist these companies. For this reason, Texas supports amending the standard of proof required by section 310.3(b) of the Rule for third parties who assist or facilitate in illegal telemarketing plans. Currently the standard is a "knows or consciously avoids knowing" standard. This standard is not used in other areas of enforcement and can restrict the ability of law enforcement agencies to pursue third parties such as list brokers or the entities that obtain drop boxes for payment mailings. We support modifying the standard to a "knew or should have known" standard, which does not necessarily require proof of actual mental state of the third party assister.

Furthermore, based on our experience, Texas believes the TSR could be improved by tightening certain definitions and expanding certain exemptions.

For instance, section 310.4(d) of the Rule requires telemarketers to make certain oral disclosures to consumers "promptly." The Rule, however, does not define "promptly" and therefore is somewhat ambiguous. We recommend amending this section of the Rule to state that "promptly" means "prior to making the sales presentation." This definition would help clarify that the following disclosures must be made *at the onset of any call*: (1) the caller's true first and last name; (2) the seller's identity; and (3) that at least one purpose of the call is to sell goods or services.

Texas also supports amending the definition of "total costs" in section 310.3(a)(1)(i) of the Rule to clarify that: (1) disclosure of total costs must include the entire amount the consumer will pay if he or she agrees to the purchase (*i.e.*, not simply \$7.00 a month, but \$84.00 for the year of the contract); (2) total costs should be disclosed before payment information is discussed or elicited from the consumer; and (3) total costs should be disclosed and confirmed in both the sales portion and the verification portion of the call.

Finally, section 310.6 of the Rule exempts certain calls from the Rule. Specifically, section 310.6(g) exempts calls to any business "except calls involving the retail sale of nondurable office or cleaning supplies." In Texas, small businesses are increasingly becoming the targets of illegal telemarketing practices. In particular, small businesses are being targeted by fraudulent telemarketing schemes, involving the sale of Internet or Website services.

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In order to protect small businesses from these fraudulent telemarketing practices, we urge that the exemption be eliminated altogether for small businesses, or in the alternative, that it be amended to cover the sale of Internet and Website services to small businesses.

Thank you for this opportunity to comment on the TSR. We consider this Rule a valuable aid to our enforcement efforts. We encourage the Rule's continued existence and urge you to consider strengthening the Rule as described above. We believe that this can be accomplished without imposing unreasonable restrictions upon the marketplace.

Sincerely,

A handwritten signature in black ink, appearing to read "John Cornyn". The signature is written in a cursive, flowing style with a large initial "J".

John Cornyn
Attorney General of Texas



OFFICE OF THE ATTORNEY GENERAL

FACSIMILE COVER SHEET

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Date: May 30, 2000

Pages (including cover page): 4

Comments:

Catie - Attached is a letter from Attorney General John Cornyn regarding the Telemarketing Sales Rule. Thanks for walking this down to the Secretary's office for us. I appreciate your help.

Cathie