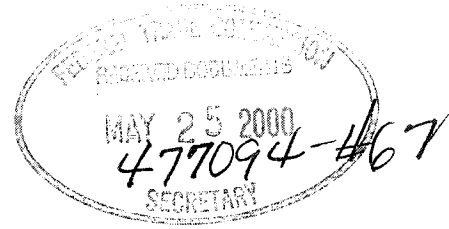


From: Stephen Gardner <gardner1@airmail.net>
To: FTC.SERIUS("tsr@ftc.gov")
Date: Wed, May 24, 2000 6:49 PM
Subject: File No. P994414, Telemarketing Review



Attached please find my comments to the Telemarketing Review, in DOS text format. Six paper copies of the comment will be mailed to the Commission.

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Before the
Federal Trade Commission
Washington, DC

File No. P994414

Telemarketing Review

1. My name is Stephen Gardner. I am a consumer advocate and lawyer. A brief biography of my experience is attached at the end of this filing. My comments are filed by me individually, and not on behalf of any individual or group. The purpose of my comments is to make two points. First, there is no reason to weaken the existing consumer protections found in the Telemarketing Sales Rule, 16 CFR 310 ("Rule"). Second, there is evidence of significant abuses of consumers' privacy by the use of prisoners as telemarketers. This suggests that the Commission should amend the Rule to address these abuses.

I.

The Rule Should Not Be Weakened.

2. The Rule as it is now in effect is a reasonable regulation of an industry that is by its very nature intrusive into the lives of Americans. Some, indeed, would say that the Rule is too reasonable, and does not go far enough. In the context of this comment, the only criticism of the Rule is that it does not protect Americans, and children in particular, from deliberate privacy invasions by prisoner telemarketers, as I will discuss in the second section of this comment.
3. As currently in effect, the Rule is quite narrowly drafted and includes no provisions that are not necessary to insure a minimum control over deceptive and abusive practices by telemarketers. I am not aware of any costs imposed by the Rule that are not far outweighed by the benefits to consumers. In most respects, the Rule applies the general law of unfairness and deception, as embodied in Section 5 of the FTC Act, to the practices of telemarketers. For example, the Rule prohibits deceptive practices (Section 310.3) and abusive practices (Section 310.4). Section 5 already generally applies to these types of practices. Essentially, the Rule defines explicitly the requirements of existing law, and therefore serves primarily to advise ethical and honest telemarketers of the limits of their behavior.
4. There is nothing in the field of telemarketing that has changed since the Rule was first adopted that militates in favor of any reduced vigilance or lessened restraints on the practices of telemarketers. Indeed, in my own experience, it appears that the use of telemarketing is on the rise, which calls even more strongly for keeping the current protections of the Rule, and only amending it to improve the lot of the victims of telemarketing abuse.

II.

The Rule Should Be Amended to Prevent Privacy Abuses by Prisoners.

5. One major change in telemarketing practices that appears to have come about since the initial adoption of the Rule is a very bad thing—the use of convicted felons who are prisoners in state penal institutions as telemarketers. The very idea of granting access to private data and the home telephones of American consumers to those whose acts have landed them in prison is a terrible, terrible idea.
6. And it is an idea that is wholeheartedly sponsored by state prison officials, who apparently

place more value on the benefits to the prisons (financial or otherwise) of giving their prisoners access to the personal and private lives of Americans than on the costs to the security and peace of mind of those who receive these calls.

7. I came to learn the details of this problem after meeting April Jordan, who has already filed her own comments to this proceeding. In her comments, April details the solicitation of her teenage daughter by prisoners acting under authority of the Utah prison system, and I will not repeat her story in this comment.

8. As a consumer advocate, I find that granting prisoners unfettered access to consumers' home telephones has far many more costs to the consumer, both potential and actual, than any benefit to the telemarketing company in the form of a source of cheap indentured labor.

9. As the father of a young daughter, I find the possibility that my child could become the recipient of similar phone calls a deeply disturbing and chilling one.

10. The best course is for the Commission to ban outright the use of prisoner labor in telemarketing. There is a solid legal basis for doing so, using the Commission's unfairness jurisdiction. I can conjure up no more unfair practice in telemarketing than the use of prisoners.

11. Recognizing that the Commission may be hesitant to ban the use of prisoners without Congressional mandate, it seems both simple and clear that the Commission should at least insist that telemarketers who permit prisoners to be their point of contact with consumers insure that they consumers know the nature of the person to whom they are speaking. That is, the Commission should amend the Rule to require affirmative and clear disclosure at the very start of each and every contact by a prisoner.

12. Specifically, I propose that the Commission amend Section 310.4(d) of the Rule on "required oral disclosures," by inserting the following language as subsection (I) and renumbering each other subsection:

Prior to any other statement, the fact that the caller is currently in prison, jail, or other penal institution, when such is the case, the location of the penal institution, and the name and prisoner number of the caller.

13. In our economic system, one of the components that is essential to an efficient functioning of any marketplace is the free flow of information, which is best accomplished by educating the consumer. The fact that a telemarketing call comes from a prisoner is a material fact to virtually any person in the United States. The failure to so advise will result in deception.

14. This reasonable requirement will have no intrinsic cost to the telemarketer, and would provide needed information, and thus considerable benefit, to the consumers who receive the calls. In fact, the only foreseeable "cost" to the telemarketer is a lost sale, if the consumer uses the information to terminate the call. The loss of a sale through a more efficient marketplace is not part of any valid cost-benefit analysis.

15. An absolute ban on this practice is the preferred step. Telling the truth to the consumer does not have the immediate curative result, but is quite reasonable and cost-effective.

Conclusion

16. The Commission should not retreat from any of the existing consumer protections in the Rule, but should take the strongest possible action to prevent the abuse of consumers by prisoners working undercover as honest members of society.

Dated May 24, 2000.

Respectfully submitted,

Stephen Gardner

Biography of Stephen Gardner

Attorney in private practice, focussing on consumer class actions, representing individuals and such organizations as Center for Auto Safety and Center for Science in the Public Interest. B.A. 1972, J.D. 1975 University of Texas.

Employment: From 1992-1995, Assistant Dean of Clinical Education and visiting assistant professor of law at Southern Methodist University. Formerly assistant attorney general in Texas and New York, from 1982 until 1991, involved in major consumer-protection initiatives against such companies as AAMCO, Mobil Oil, Kellogg Company, and TCI Cable. In 1991, Gardner coordinated efforts of numerous attorneys general and the Federal Trade Commission to investigate and bring law enforcement actions against TRW and other major consumer reporting agencies for violations of the Fair Credit Reporting Act.

Major publications: CONSUMER CLASS ACTIONS, National Consumer Law Center (contributing author); UNFAIR AND DECEPTIVE ACTS AND PRACTICES, National Consumer Law Center (contributing author); Lost in the Supermarket: Consumer Confusion and Marketing Mania, Nutrition Labeling Handbook 1995; See Dick and Jane Sue: A Primer on State Consumer Protection Laws, American Law Institute 1992; How Green Were My Values: Regulation of Environmental Marketing Claims, Toledo Law Review 1991; Caveat Vendor (editor), State Bar of Texas 1980-1982.

Of_fices: Member, Board of Directors, Consumers Union of U.S., Inc., 1997-present; Member and Officer, Board of Directors, National Association of Consumer Advocates, 1996-present; Consumer Advisory Council, Federal Reserve Board, 1986-1989; Consumer Law Fellow, National Consumer Law Center, 1980.

Awards: Center for Science in the Public Interest, "Nutrition Action Hall of Fame" 1991; Adweek Magazine's "Top Ten Enemies of Advertising" 1991; National Association of Attorneys General "Marvin Award" 1988.

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