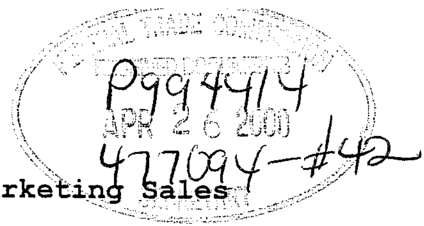

Response to the Request for Comment on the Telemarketing Sales Rule

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Congress in 1994 directed the FTC "to combat telemarketing fraud by providing law enforcement agencies with powerful new tools, and to give consumers new protections" and "to issue a rule prohibiting deceptive and abusive telemarketing acts or practices." [1] Reese Brothers operates a telemarketing service bureau, acting as an agent for sellers and for nonprofits. In evaluating the effectiveness of the Telemarketing Sales Rule (TSR), in the context of industry and environmental changes since TSR was implemented and in the context of prospective changes, Reese Brothers (and telemarketers and sellers generally, certainly those who will be submitting comments to the FTC) must emphasize the effects of TSR on business practices absent of deception and fraud.

The effectiveness of TSR in preventing deceptive and abusive telemarketing sales is difficult for legitimate sellers and legitimate telemarketers to assess. Accurate comparative data (before and since TSR) in measuring the extent and cost of fraud and in analyzing the impact of TSR in preventing fraud will be welcome. There is no doubt that FTC and Partnership for Consumer Education efforts have been effective in creating strong public awareness of TSR and telemarketing abuse and deceptive practices in the most at-risk sectors. However, reliable and precise measures of the extent and costs of abuse and fraud are virtually non-existent: Historic data about prosecutions are non-comparable and speak more to focus than to underlying facts; nor does historic data provide measures of comparability as to the percent of transactions (whether by number, value, or type) that

are deceptive or comparability to alternative means of selling that would be helpful in determining whether prevention efforts should be directed to defects in the medium or selling in general.

Some data specific to selling category (credit repair, office supplies, etc.) was presented prior to TSR and was instrumental in the crafting of TSR and in public awareness and enforcement efforts subsequent to TSR. One other major ongoing initiative has broadly focussed on senior citizens. It would be instructive to analyze data and determine whether this is the most effective use of FTC efforts: That is, are senior citizens targeted by specific categories of abusive or deceptive sellers rather than broadly by all categories? And would efforts be more valuable, if narrowly targeted to these categories? And would the same methodologies be extensible to public education campaigns generally?

Given the limitations of the data, we believe that the FTC should focus its efforts in the following ways:

- Identify problematic categories of sellers, with a high incidence of abusive or deceptive practices, and create targeted standards and public education programs to address these specific problem areas. When possible identify both the sellers and their most likely victims and use knowledge of both in creating campaigns.
- Identify which components of TSR and which FTC initiatives successfully prevented or impacted fraud and which created violations that were ineffective in preventing fraud other or only added an additional (neither necessary nor sufficient) punitive weapon to the prosecutorial arsenal.
- And conversely, identify which components of TSR added the most complexity and induced the most confusion for legitimate telemarketers and consumers.

- Identify good selling practices that provide safe harbors and public education programs to reinforce these good practices. Safe harbors should be limited to well-designed and auditable processes.
- Work with the state regulatory community to simplify the environment for interstate marketers and avoid duplicative compliance initiatives. These tend to negatively impact legitimate sellers and consumers without preventing fraud or improving consumer privacy.
- Outreach to sellers to educate them to the FTC's goals, which are to prevent deceptive and abusive acts and practices rather than prevention of error per se.

There is a major difference to practitioners between identifying and forbidding abusive or deceptive acts and practices and in mandating specific practices. We believe that the FTC has and should continue to emphasize the former, in respect to punitive actions, and it should provide for optional process-oriented safe-harbor standards (rather than specific practices) for the latter. The purpose of TSR is to prevent certain *systematic* (whether or not premeditated) patterns. Practitioners who can demonstrate bona fide processes to prevent and identify defective compliance or error should be encouraged; and the defects or errors of such practitioners, whether detected or not, should not be deemed violations, so long as defects or errors are corrected when identified.[2]

The reasons for our concern in emphasizing safe harbor practices are

- The scale and the complexity of telemarketing activity are such that good practices are the only way for a good faith practitioner to insure stable results over time.

- Practices can be systematically analyzed and compared from both private and public benefit perspectives.

- An absence of systematic practices suggests an absence of controls that are likely to be associated with problems of interest to the FTC.

- Standards will encourage development of practices and technologies that support standards and enable cost-effective implementations that benefit the consumer.

- Absent safe harbors, sellers are rewarded for implementing defensive rather than proactive programs that are managed by exhaustive inspection and literalism, which are by nature more expensive and less responsive to consumer needs.

- It should not be the goal of the FTC to actually mandate specific processes. Rather the FTC should create a minimum set of standards (such as it has with disclosure) and by policy encourage telemarketers and sellers to manage their programs and provide for clear, consistent, and consumer-friendly correctives.

In a more specific vein, we recommend that the FTC:

- Issue directives or guidelines on the topic of mandatory disclosures and specifically permit timely written disclosures that complement shorter material disclosures, as these are in many cases more consumer-friendly and suitable to presentation over the phone

- Identify clearly the legal *de minimus* of a call and actively encourage sellers to focus on responsible and responsive selling process rather than replicating a literal script.

- Whenever possible, play recordings of "what fraud sounds like" when publicizing acts of fraud. Without such concrete examples, the public can easily be left with a false impression that most fraud is insidious in small ways and hard to detect, whereas it is typically obvious to the average person. This is the best kind of consumer education.

Costs of Compliance

Costs vary significantly by product or service being sold and the extent and complexity of the associated disclosures. Disclosures associated with sales increase the length of a sales presentation by factors ranging from 10% to 50% of a sales presentation. In addition, the way in which sellers have understood the TSR and other regulations has resulted in some defensive practices by sellers that are inefficient and possibly harmful to consumers.

Standard practice since TSR has been to ask the buyer's permission to record all or part of a sale on tape, as a mutual protection and to allow for post-sale independent verification. The associated post-sale verification process typically takes about 50% of the time of the sales presentation itself, plus the cost of the recording media, transport, and storage. On average post-sale compliance increases the direct operating cost of a telemarketing campaign by about 4% to 7%. A reduction of these costs is anticipated in the future, as digital processes for recording and retrieving become affordable and operationally viable; however, the mechanical improvements are partially offset by the increases in labor cost and the likelihood of increased sample/verification rates.

The FTC should consider how it might create a safe harbor for post-sale verification that would explicitly permit valid statistical sampling techniques rather than inspection of 100% of sales.

Increasingly, we have seen sellers engage in 100% post-sale inspection of all sales tapes, in some cases due to a belief that it is legally required and it other cases out of defensive fear. Our experience has been that most sellers operate in the incorrect understanding that the purpose of TSR is to prevent all error, rather than deceptive selling and reasonably preventable error that result from ineffective policies and procedures. While it may be desirable in and of itself for these sellers to prevent error, the belief that this is a legally mandated requirement actually results in highly inefficient processes that may or may not be beneficial from an aggregate customer point of view, due to the expense of the process. In effect, in shifting the focus from fraud to error (in shifting from process and sampling to exhaustive inspection), the problem of error or unintentional defect has become a "commons problem" whereby no individual consumer has the incentive to tolerate imperfection in his or her transaction even though it may hurt all. While a seller may certainly have legitimate business reasons to engage in inspection at high sampling rates and "end to end' validation, such scrupulousness should be at the seller's option and part of the benefit of doing business with a given seller and not a defensive legal necessity. Buyers should be able to make a choice among sellers who use different practices and choose lower costs, for example, over 100% end-to-end inspection, so long as the sellers use bona fide processes to protect the consumer from fraud and negligent practices.

Similarly, sellers have tended to interpret the FTC directive for material disclosure protectively and to engage not only in pre-sale material disclosure but also exhaustive disclosure of non-

material terms and conditions and/or disclosures whose length and complexity are best served by written disclosure. The result is to overwhelm the consumer and sometimes even to aggravate the consumer by prolonged literal recitations. We recommend that the FTC expand on the topic of mandatory disclosures and allow for timely written disclosures (and appropriate refund/return policies) that complement shorter material disclosures suitable to presentation over the phone.

Similarly, sellers have more and more created literal telemarketing scripts (as opposed to call guides). The motivation is self-protective: A large seller may employ thousands of telemarketers either directly or through agents, with varying skills, and each of these telemarketers talks to many consumers, who also have varying skills and who speak a variety of languages. By attempting to specify each word uttered on a call and by vetting each script through a legal department, the seller is able by extension to vet each telemarketing call. However, in asserting primacy to the legal nature of the sales presentation, the consumer is increasingly subject to more robot-like presentations and less responsive and customized answers. At a minimum, such practices aggravate feelings of intrusiveness among consumers, who perceive highly scripted calls as impersonal at best and offensive at worst. Encouraging live sellers to act like automated message players also encourages consumers to request not to be called, as such messages are perceived as little different than voice-delivered direct mail.

We do not believe that the FTC intended to dehumanize the telemarketing channel in promulgating TSR. Indeed, we believe the FTC intended on encouraging consumer-centric and highly responsive telemarketing selling. However, TSR is being interpreted defensively by sellers. We recommend that the FTC undertake more educational efforts directed at sellers, clearly identifying the legal *de minimus* of a call and actively

encouraging sellers to focus on a responsible and responsive selling process rather than replicating a literal script. Prescribing a literal script derives from the same defensive thinking as 100% end-to-end inspection of all sales, but it is increasingly the trend. Once again, we believe that the consumer's best guarantor of a good telemarketing is the process. In this case, bona fide and well-documented processes for agent training and call monitoring should serve as a safe harbor.

Record keeping costs have become increasingly burdensome, particularly as interpreted by sellers. Industry practice is to store audiotapes of sales for two to three years, to satisfy FTC record keeping and for future retrieval in the event of disputes. The physical media and warehousing of the media result in about a 2% increase in operating costs, and our experience is that these records are used infrequently and for disputes whose value typically is less than $100. It would be desirable for the FTC to distinguish between warranties and representations that perdure and the bona fides of a telemarketing transaction in respect to the telemarketing qua telemarketing component. Advice to sellers that would enable the reduction in the duration of tape storage would be useful. This period might be limited to storing tapes for 90 days after a sale, delivery of services or merchandise, and presentment of associated charges in writing (including any periodic renewals that have not been otherwise disclosed clearly in writing). The record keeping requirement might also be tied to the value of a sale, with lengthier requirements for higher valued sales.

Changes in marketplace

Since 1995 the marketplace has changed dramatically, resulting in a dramatic reduction in outbound telemarketing. Most estimates

of industry size have been speculative, but publicly available information and anecdotal information confirm the trend:

The largest outbound telemarketing firms have incurred huge write-offs since TSR, involving their outbound telemarketing capacity. For example, according to its 10-K filings with the SEC, APAC closed 15 call centers (1252 workstations) in 1998 and an additional 19 call centers (1843 workstations) in 1999, leaving a current capacity of 4148 workstations for 2000. This is a reduction equal to 75% of its current outbound capacity. Similarly, Telespectrum closed 15 centers in 1998, with a capacity of 2011 workstations. In other words, the reductions in capacity in these two companies alone resulted in a loss of capacity larger than a company the size of APAC, the company with the largest remaining outbound capacity. And the trend shows no sign of abating: ITC has announced its first quarter 2000 outbound telemarketing results and these show a 25% revenue decline from 1999.

The reduction in industry capacity has been accompanied and partially accomplished by a consolidation into increasingly larger companies. For example, Telespectrum (a rollup of 6 firms) merged with IDRC, CSG consolidated four different companies, APAC acquired ITI, and Aegis was the product of a reverse-merger between ATC and IQI, which itself was a merger of several large telemarketing firms.

The result of the above activities has been to reduce the number of providers, to increase the size of the industry participants and the percent of the sector activity that is performed by these large firms, and to reduce the capacity of the industry. From a regulatory perspective, this suggests an improved environment, in which the industry is dominated by a smaller group of larger, accountable firms. Due to the broad client bases of the remaining firms and the fact that both the companies and their

clients are predominantly public companies, the need for self-enforced regulatory compliance and the processes that support compliance are more important.[3] Private companies that compete in this environment must compete on the basis of regulatory compliance and history, not just cost.

Conclusions that would result from this changed environment:

- Business continuity and size of an entity correlate with characteristics that make telemarketing-specific anti-fraud regulation less needed.
- FTC initiatives should concentrate on those telemarketing areas where large providers and large sellers do not dominate. Though large entities are not immune to fraud, they are more accountable by the diversity of scrutiny they receive, and they have known, fixed locations.
- Identify problematic categories of sellers, with a high incidence of abusive or deceptive practices, and create targeted standards and public education programs to address these specific problem areas.
- FTC initiatives are more likely to be needed where sellers conduct their own telemarketing, as the closed-loop nature of accountabilities affords more opportunity for problems.

Changes in Telemarketing Technology

There have been very few changes in outbound dialing technology since TSR that have impacted the practice of outbound telemarketing. Dialers have not appreciably changed. Nor is it expected that they will.

The increase in sources and diversity of "do not call" lists has proved a challenge, primarily due to the increasing speed of the update cycle. As this subject is a matter addressed separately by the FTC, comments on this subject are not included here.

Digital voice logging/storage technologies are most relevant to the FTC and protection of consumers. These technologies will enable broader use of call recording, so that there is an easily retrievable and complete record of what transpires during a telemarketing call. To date, digital voice-date recording has remained costly and operationally problematic in an outbound telemarketing environment. It is anticipated that these problems will be overcome. Currently, state laws regulating the recording of telemarketing calls with one party consent may be in conflict, and the FTC should work to make one-party consent for legal record purposes universally permissible. Such a record would also enable the FTC to determine whether complaints involve isolated errors or a consistent pattern of abuse.

Since TSR, consumer technology for managing and screening calls has dramatically changed. In addition to the change from analog to digital answering machines, there have been a variety of new technologies that enable increasing fine-tuned call screening by consumers, including automated screening (positive or negative) by pre-authorized phone number, display of the calling party's phone number (ANI), voice announcement mechanisms, etc.

Changes in Regulation

Numerous telemarketing-related regulations have been passed at the state level since TSR. Many of these are duplicative and some are in conflict with the letter and the spirit of TSR. As these are a matter of public record and many of the resulting

problems quite obvious, we will only comment on the effect of such accumulating regulation.

We believe that the profusion of state level regulation, which is in fast and regular flux, creates confusion and sometimes a nuance that renders compliance quite difficult for telemarketers. The tendency at the state level has been to extend regulatory focus to matters of judgment that verge on etiquette. Individuals conducting calls are increasingly being mandated to make specifically worded and mandated disclosures, which are chilling to free speech and whose variety is typically literal rather than material. And individuals, often with a high school education, are being increasingly required to make fine discernments that would test a lawyer; and the rules may vary call by call, based on the state of the consumer-- during the course of a fast-paced conversation.

"Do not call" regulation protects the segment of the population that does not wish to be called or only wishes to be called by specific parties. In protecting those consumers who do wish to be called, the FTC should attempt to address the inadvertent impacts of regulation and how regulation may cause poor communications that impact consumers negatively, as noted above.

Current Exemptions

Our experience is that the current exemptions have not resulted in any loss of consumer protections, nor have they created opportunistic abuse by telemarketers. Exemptions for general media advertising should be continued.

Specific Sector Issues

Telemarketing sales of a good or service (such as a magazine or a credit card) in which a portion of the sale (or revenue resulting from the sale) is given by the seller to a nonprofit: The FTC has included these sales within the scope of TSR. However, in terms of disclosure there remains a gap in regulation. States almost universally regulate fundraising by nonprofits (and professional solicitors), usually by the public filing of contracts and campaign financial statements. However, in the case of commercial sales regulated by TSR, there is no such requirement by most states to disclose the financial results of those nonprofit-related components of a commercial sale. This gap creates a situation whereby there is no external validation of the "truth of the offer." There is no public filing with any public entity to validate that the benefit eventually provided to the nonprofit is actually consistent with the stated disclosures to the consumer prior to sale. Nor does the nonprofit typically have the authority or the ability to accomplish validation in a meaningful manner. The FTC should consider creating a means to assure the public that the promised benefit to the nonprofit is occurring, as false or incomplete disclosure in matters involving commercial sponsors (for example, an event where "a part of every ticket goes to charity" or where part of the purchase cost of a product in a grocery is given to a charity) has been identified as an area of abuse by states.

Government call centers: Increasingly government is using telemarketing for a variety of purposes, directly and through outsource providers. This use of telemarketing was not anticipated by TSR and may present some unique problems that are appropriately incorporated into TSR, using the analogy of nonprofits engaging in interstate commerce vs. fundraising. Governmental or governmental chartered agencies engage in activities such as collections and sales of products or services (such as the United States Post Office) that would normally require certain disclosures or use of "do not call" lists.

[1] FTC Request for Comments on the Telemarketing Sales Rule

[2] RBI in the mid-90's conducted several proprietary experiments that studied the "failure rate" of pledges made over the telephone to nonprofits. Failures included intentional falsifications by agents and consumers as well as misunderstandings. Data consistently yielded a 2% to 3% "buyer's remorse" rate among consumers. No follow-up studies have been made.

[3] The traditional justification for regulating telemarketing fraud and abuse as channel related—that is, in a different way than other fraud and abuse—has been the possible lack of fixed location of the telemarketer ("the internet problem") and the resultant lack of recourse (versus, for example, returning merchandise to a store when a salesperson misrepresents something about merchandise). To the extent that the industry is increasingly dominated by large firms, there is less cause for channel-driven rationales that treat telemarketing as a unique regulatory channel.

Direct marketing, as it has moved from physical to network locations and addressing, has increasingly abstracted the "address" of the target, which has concomitantly abstracted the location of the sender. The size of the direct marketing firm or its agent and the associated "identify" or "brand" can be understood as a form of substitute address/location. The product being sold is relevant in a similar way.