U.S. Department of Justice

Criminal Division

Assistant Attorney General *Washington, D.C. 20530*

March 29, 2002

The Honorable Joseph S. Clark
Secretary of The Federal Trade Commission
600 Pennsylvania Avenue, NW, Room 159
Washington, DC 20580

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

Dear Secretary Clark:

This letter presents the comments of the Criminal Division of the United States Department of Justice ("Criminal Division") on the Commission's Notice of Proposed Rulemaking to amend the Telemarketing Sales Rule ("Rule"), 67 Fed. Reg. 4492 (2002). At the outset, the Criminal Division wishes to express its appreciation to the Commission and its staff for their longstanding commitment to combating telemarketing fraud. Throughout the past decade, the Commission has played a leading role – through its promulgation of the original Rule, its enforcement proceedings, and its development of information resources such as the Consumer Sentinel database -- in ensuring that law enforcement and regulatory agencies can closely coordinate their efforts for maximum impact on fraudulent telemarketing operations. With the increasing internationalization of mass-marketing fraud, through both telemarketing and the Internet, it will be more important than ever for the Commission to continue to play that role, and to remain an innovative and aggressive participant in enforcing federal laws that protect consumers from fraud and deception.

A. Section 310.2 - Definitions

The Criminal Division agrees with the Commission's decision not to change the definition of "telemarketing" to make the Rule applicable only when more than one telephone is used in conducting a plan, program, or campaign to induce the purchase of goods or services. *See* 67 Fed. Reg. at 4501. Apart from the fact that the Telemarketing Consumer Fraud and Abuse Prevention Act defines "telemarketing" to include the use of one or more telephones, as the Rule notes, *see* 67 Fed. Reg. at 4501, the Criminal Division notes that there have been cases in which fraudulent telemarketers used only one or two telephones in a single location to contact prospective victims. The ambit of the Rule should remain broad enough to encompass both small-scale and larger-scale telemarketing operations.

B. Section 310.3 - Deceptive Telemarketing Acts or Practices

1. Subsection 310.3(a)(1)

Subsection 310.3(a)(1) of the Rule makes it a deceptive telemarketing act or practice for a seller or telemarketer to fail to make certain disclosures truthfully "before a customer pays[1] for goods or services offered . . . ." 67 Fed. Reg. at 4541. Footnote 1 in this subsection states: "When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment." *Id.*

The Criminal Division notes that many criminal telemarketers, particularly those engaging in cross-border fraud schemes, have been directing victims to send their payments of nonexistent "taxes" or "fees" by money-transmission services, rather than by mail or commercial courier services. This technique serves the interests of criminal telemarketers in two ways. First, it reduces the time that the criminals must wait to receive and convert the victims' payments, from a day or more to hours or even minutes. Second, it limits the victims' legal options for recovery of their funds, should they become suspicious about the legitimacy of the telemarketers who contacted them. Unlike checks, on which the victim can stop payment, or credit-card charges, for which the victim can seek chargebacks, transmission of cash by a money-transmission service leaves the victim no resource once the criminal telemarketer has picked up the funds at an office of that service, assuming that the service has complied with any applicable laws and internal policies.

For this reason, the Criminal Division recommends that the Commission consider adding the following sentence to the end of footnote 1 to address the use of money-transmission services: "Similarly, when a seller or telemarketer directs a customer to use a money-transmission service to wire payment, the seller or telemarketer must make the disclosure required by § 310.3(a)(1) before directing the customer to take money to an office or agent of a money-transmission service to wire payment."

2. Subsection 310.3(a)(1)(ii)

Subsection 310.3(a)(1)(ii) requires disclosure, in part, of "[a]ll material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer . . . ." 67 Fed. Reg. at 4541. In response to a comment by the National Association of Attorneys General that this subsection requires disclosure of "the illegal nature of any goods and services offered," such as the foreign lottery chances that many fraudulent telemarketers offer U.S. residents, the

Commission stated its belief that the Rule's definition of "material" "is sufficiently clear and broad enough to encompass the illegality of goods or services offered." *Id.* 4503.[1]

The Criminal Division notes that for much of the last decade, telemarketing schemes that solicit victims with fraudulent sales of foreign lottery chances have been one of the most numerous and persistent forms of telemarketing fraud in North America. The Criminal Division recommends that the Commission consider including in subsection 310.3(a)(1)(ii) a specific and unambiguous reference to the illegality of goods and services that the seller or telemarketer is offering. The Criminal Division believes that this change could be highly beneficial, for both enforcement actions and public education and prevention activities by the Commission and other law enforcement agencies.

While legitimate telemarketing organizations will undoubtedly make every effort to comply with the revised Rule, fraudulent telemarketers are likely to claim ignorance of any legal obligation to disclose the illegal nature of the goods or services they are offering, unless that type of disclosure is clearly stated on the face of the Rule. A clear statement of that type would also allow law enforcement and regulatory agencies, in preparing public education programs and materials on telemarketing fraud, to tell the public unambiguously that such disclosures are specifically required by federal law. One possible formulation of that statement would be to revise subsection 310.3(a)(1)(ii) as follows: "All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer, including but not limited to the illegal nature of the goods or services in the United States."

This formulation, which is modeled on subsection 310.3(a)(2)(v) of the Rule, should probably also be included, for consistency's sake, in subsection 310.3(a)(2)(ii) of the Rule. That latter subsection prohibits misrepresenting, directly or by implication, in the sale of goods or services "[a]ny material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer." *See* 67 Fed. Reg. at 4541.

3. Section 310.3(a)(1)(iv) - Disclosures Regarding Prize Promotions

Subsection 310.3(a)(1)(iv) requires, in part, that in any prize promotion, the seller or telemarketer disclose the odds of being able to receive the prize. 67 Fed. Reg. at 4541. The Criminal Division notes that many criminal telemarketing operations that used prize promotions have resorted to

---

[1] In connection with this observation, the Rule noted in passing that foreign lottery telemarketing schemes "may also violate anti-racketeering laws relating to gambling, 18 U.S.C. 1952-1953, 1084." 67 Fed. Reg. at 4502-03 n.93. The Criminal Division notes that such schemes, because of their inherently fraudulent nature and operations, may also violate numerous federal fraud statutes, such as mail fraud, 18 U.S.C. §1341, wire fraud, 18 U.S.C. §1343, and even financial institution fraud, 18 U.S.C. §1344.

statements regarding the odds of a victim's winning that may be literally true but nonetheless deceptive or misleading. For example, the so-called "one in five" or "mystery" pitches typically have guaranteed victims that they will receive one of five "fabulous" prizes. In the end, the victim did receive one of the promised prizes, but almost invariably that prize was a so-called "gimme gift," which has a low actual market value but which the telemarketer fraudulently represents to the consumer as having a far higher value.

Law enforcement agents have reported that in some of these schemes, prospective victims who asked the odds of winning a prize were told, "The odds are one in one." In literal terms, the representation may be true, in that each victim receives one of the promised prizes, albeit the "gimme gift" rather than other high-value prizes that are mentioned during the "pitch." The Criminal Division therefore recommends that the Commission consider including a brief explanation, in the text of the Rule or a footnote, of what it means by "the odds of being able to receive the prize." For example, a footnote could state that in the case of prize promotions that guarantee consumers will win one of several listed prizes, the disclosure must state the odds with respect to each of those prizes.

4. Section 310.3(a)(1)(vi) - Disclosures in the Sale of Credit Card Protection

The Criminal Division agrees with the Commission that it is appropriate to modify the Rule to include specific provisions that address the telemarketing of credit-card loss protection plans. So many telemarketing schemes offering credit-card protection plans and "guaranteed" credit cards to consumers have proved to be fraudulent that the Commission needs to expand the Rule to address the problem effectively.

C. Section 310.4 - Abusive Telemarketing Acts or Practices

1. Section 310.4(b)(1)(iii) - "Do-Not-Call" List

Section 310.4(b)(1)(iii) would allow consumers to place themselves on a "do-not-call" registry that the Commission would maintain. The Criminal Division agrees with the Commission that creation of a "do-not-call" list, with the proviso that consumers can choose to receive calls from specific sellers or charitable organizations, is a timely and appropriate step in balancing consumer and business interests. The experience of law enforcement and regulatory authorities has shown that maintenance of a purely voluntary list by industry, or of separate "do-not-call" lists by various states, has not proved effective for consumers in ensuring that they will not receive unwanted telemarketing calls.

Some members of the business community may feel that establishment of a national "do-not-call" list will not deter fraudulent or criminal telemarketers from ignoring the requirement and contacting prospective victims. In this regard, the Criminal Division notes that establishing the requirement of a national "do-not-call" list is likely to provide greater protection for consumers in two respects. First,

fraudulent telemarketers are even more likely to ignore a purely voluntary "do-not-call" list than a "do-not-call" list that can be enforced by federal authorities and state attorneys general. Second, the creation of a mandatory "do-not-call" list will provide the Commission and state attorneys general with another specific legal ground for enforcement actions under the Rule. That authority will be particularly beneficial for consumers who have been repeatedly victimized by telemarketing schemes, and who therefore will likely have the strongest need to ensure that they not receive unwanted telemarketing calls.

2. Section 310.4(d) - Required Oral Disclosures in the Sale of Goods or Services

Subsection 310.4(d)(1) requires that a telemarketer, in an outbound telephone call to induce the sale of goods or services, truthfully disclose, among other things, "[t]he identity of the seller . . . ." 67 Fed. Reg. at 4543. The Criminal Division notes that this provision is an essential requirement for outbound telemarketing calls, particularly with reference to fraudulent telemarketing operations. In many fraudulent telemarketing schemes, telemarketers routinely use "phone names," false names that conceal their true identity and increase the difficulties for law enforcement agencies in effectively investigating the schemes.

In this regard, the Criminal Division notes that many telemarketing fraud schemes involve false statements and misrepresentations by telemarketers about their position or title in the organization that employs them. For example, multiple fraudulent telemarketers in the same organization may falsely claim to be "the President" of the company. Some criminal telemarketers even engage in false impersonation of law enforcement agents or judicial officials, claiming that they are "with the FBI" or "with U.S. (or Canadian) Customs." While these latter claims may violate various federal criminal statutes, they also are inherently deceptive in character and therefore deserving of the Commission's consideration for inclusion in the Rule. The Criminal Division recommends that the Commission revise subsection 310.4(d)(1) to read as follows: "the identity of the seller, and the seller's title or position in the company that employs him or her."

3. Other Proposed Abusive Telemarketing Acts or Practices

In the Rule, the Commission stated that it is declining to prohibit the sale of lists of known telemarketing fraud victims. It explained that some participants in the Commission's July 2000 Forum on the Rule believed "that it was extremely difficult to define 'victim'," and that such a prohibition might infringe on a consumer's "sovereignty in the matter of which telemarketing calls he or she might wish to receive, simply because the consumer had once been defrauded." 67 Fed. Reg. at 4526. It also stated its belief "that any telemarketer attempting to defraud those who have previously been victimized by telemarketing fraud will violate one or more existing provisions of the Rule, and thus be subject to liability without a provisions addressing sucker lists." *Id.*

As the Notice accompanying the Rule indicates, few acts or practices in commerce are more likely to "assist or facilitate" fraudulent telemarketing than the buying and selling of so-called "mooch lists" or "sucker lists." *See* 67 Fed. Reg. at 4492 n.4. "Mooch lists" should not be confused with the lists of potential contacts – whether consumers or investors – that legitimate business enterprises compile or purchase to sell legitimate goods or services. Criminal telemarketers, by definition, organize their enterprises with the specific intent to defraud or deceive. To achieve maximum efficiency in these enterprises, they want to obtain leads for people likely to respond to fraudulent "pitches." Both criminal telemarketers and law enforcement agents know that the best sources of such leads are the lists of persons whom criminal telemarketers have successfully defrauded in the past – i.e., "mooch lists" and "sucker lists."

On the first point mentioned above, the Criminal Division agrees that, in the abstract, it may seem difficult to define potential recipients of telemarketing calls as "victims" merely because their names appear on a list of prospective contacts. In searches of fraudulent telemarketing operations, however, law enforcement agents have often found so-called "mooch lists" or "sucker lists" showing that the persons on those lists have been contacted and have sent substantial amounts of money (e.g., thousands or even tens of thousands of dollars) in the past to other fraudulent operations, and sometimes even showing the ages of the persons on the lists. The only sources for such specialized lists are other criminal telemarketers (whether acquired through purchase or theft), or independent list brokers (often former fraudulent telemarketers themselves) who are known to criminal telemarketers as reliable providers of such lists. In these circumstances, the persons on "mooch lists" can fairly be characterized as prospective victims.

On the second point mentioned above, the Criminal Division notes that for most victims whose names appear on the "mooch lists" just described, the issue is not whether they have "once been defrauded." Law enforcement investigators and prosecutors have often encountered telemarketing fraud victims who admit to having been contacted dozens of times by apparently fraudulent telemarketers. Fraudulent telemarketing operations, in short, have no respect for consumer sovereignty or consumer rights. To criminal telemarketers, any deceptive or abusive tactic – including multiple calls to wear down a potential victim's resistance, false promises that they can help victims recover funds they have lost to other telemarketers, or use of threatening language or false assertions of governmental authority – may be acceptable so long as it results in "closing" a fraudulent transaction with the victim.

On the third point mentioned above, the Criminal Division does not dispute the general concept that a fraudulent telemarketer who uses a "mooch list" to solicit victims of previous schemes will violate other provisions of the Rule. The Department's experience with telemarketing fraud schemes, however, indicates the use of such lists is precisely what makes so many telemarketing schemes so harmful to consumers. Criminal telemarketers are willing to pay up to several dollars per name on "mooch lists" because they know the persons on those lists are especially susceptible or vulnerable to fraudulent telemarketing solicitations, and especially likely to be persuaded to send substantial sums of money they can ill afford to lose. The use of "mooch lists" thus involves a greater risk of harm to more

potential victims, and a greater risk of substantial losses by those victims, than "cold-calling" or other random forms of contacting consumers would create. It therefore constitutes an abusive act or practice that the Rule should specifically prohibit in some fashion.

For these reasons, the Criminal Division believes that it would be sound public policy for law enforcement and regulatory agencies to use their combined authority to combat the use of "mooch lists" by telemarketing fraud schemes. At the same time, the Criminal Division acknowledges that it may be difficult for the Department or the Commission to prove that, at the time that a particular list provider had sold contact lists to a seller or telemarketer, the provider knew or consciously avoided knowing that the seller or telemarketer had engaged in violations of the Rule or other violations relating to telemarketing fraud. *See* 67 Fed. Reg. at 4542. The Department's experience with telemarketing fraud prosecutions indicates that people who are in the business of selling "mooch lists" to criminal telemarketers typically do not discuss the fraudulent nature of the telemarketers' scheme before selling the lists. Criminal telemarketers do not need to discuss such matters with "mooch list" providers, any more than thieves need to discuss with their "fences" the manner in which they stole goods being fenced.

To reconcile these two considerations, the Criminal Division recommends that the Commission amend the Rule by adding a provision in section 310.4 – perhaps numbered as section 310.4(f) – that would prohibit a seller or telemarketer who is engaged in any act or practice that violates sections 310.3(a), (c), or (d) or 310.4(a)-(e) from purchasing lists of prospective contacts from any source. One possible formulation of this provision would read as follows: "(f) *Purchase of contact lists.* It is an abusive telemarketing act or practice and a violation of this Rule for a seller or telemarketer who is engaged in any act or practice that violates §§ 310.3(a), (d), or (d) or 310.4(a)-(e) to purchase any list of prospective customers or donors from any source."

Such a provision would have three significant benefits. First, if the Commission found that a seller or telemarketer who had engaged in any other deceptive or abusive act or practice that violated the Rule had also violated the "mooch list" prohibition, it could ensure that any injunctive relief it sought in enforcement proceedings would include a prohibition on any further purchases of "mooch lists" by any individual or corporate defendants in the action. Because fraudulent telemarketers have sometimes continued their operations even after being subjected to civil or criminal enforcement proceedings, any evidence that the enjoined telemarketer had bought "mooch lists" thereafter could constitute a basis for criminal contempt proceedings.

Second, the Commission could enhance the effects of that injunction by serving a copy on any list provider known to have done business with the fraudulent telemarketer. As a result, the list provider would have two choices: to cease doing business with that telemarketer, thereby hampering the telemarketer's ability to continue his fraudulent solicitations; or to continue doing business with the telemarketer, thereby subjecting the list provider to the risk of a separate enforcement action by the Commission for assisting and facilitating the telemarketer in violation of section 310.3(b).

Third, the provision would enable the Commission to address, at least in part, the targeting of vulnerable victims by fraudulent telemarketers, without having to grapple with the difficulties of defining what constitutes "vulnerability" or "targeting." *See* 67 Fed. Reg. at 4526. By placing the onus on the fraudulent seller or telemarketer to refrain from buying "mooch lists," the Rule would not interfere with consumer prerogatives to receive information in genuine arm's length transactions with legitimate sellers of goods and services or trustworthy solicitors for legitimate charitable causes.

The Criminal Division would be pleased to provide further explanation of these comments in any manner that would be appropriate in your rulemaking process. Thank you for your consideration of these comments.

Sincerely,

/s/

Michael Chertoff
Assistant Attorney General