

The Enterprise Prison Institute

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President

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

RE: Telemarketing Rulemaking Comment – FTC File R411001

Federal Trade Commission:

The Enterprise Prison Institute (“EPI”) is pleased to respond to the Federal Trade Commission’s request for comments on its Notice of Proposed Rulemaking (“NPRM”)¹ concerning revisions to the Telemarketing Sales Rule (“TSR”)². EPI’s comments respond specifically and exclusively to the Federal Trade Commission’s (“FTC”) concerns and questions regarding the access to and use of personal information by inmates as telemarketers.³ For purposes of this response, EPI shall refer to such activities as prison based telemarketing programs or “PBT Programs.”

EPI would be pleased to respond to additional inquiries and provide the FTC with more detailed information regarding PBT Programs. Accordingly, should the FTC intend to seek additional comments on or further discuss PBT Programs during its workshop scheduled for June 5-7, 2002, EPI would be pleased to participate in this workshop.

The Enterprise Prison Institute

EPI is a private research and consulting group. Among other things, EPI seeks to expand inmate training and work programs in prisons so inmates will be better prepared to enter civilian life after incarceration. EPI seeks out, researches, analyses, and comments upon private and public initiatives that provide in-prison

¹ 67 F.R. 4492-4546 (January 30, 2002).

² 16 CFR 310 et seq.

³ This comment shall not address the use of prison-based telemarketing by charitable organizations.

job training consistent with public safety, institutional security, and the public's belief that inmates should "go to work" in prison. EPI's benchmark research of the opinions of business and labor was conducted in Iowa in 1997 and in 1998. EPI published the results of the first-ever national public opinion poll on the issue of businesses employing inmates.

EPI is acutely aware of the sensitive balance that exists between the benefits of PBT Programs and the inherent public emotion associated with crime, prisons, and inmate work. In addition, EPI recognizes the importance of public and political support for these initiatives. Consequently, EPI seeks to provide valuable input on matters of public concern regarding these initiatives such as the FTC's NPRM consideration of PBT Programs.

I. Summary of Comments

In the NPRM, the FTC expresses concern with the misuse of personal information in connection with the use of prisoners as telemarketers.⁴ The FTC has not, however, proposed revising the Telemarketing Sales Rule to address PBT Programs, but rather acknowledges that the record to date on this issue is insufficient to propose any such revisions.⁵ Accordingly, the FTC seeks additional information regarding these activities before making any such recommendation.⁶ EPI agrees with this approach and is pleased to participate in this process. The following is a summary of EPI's comments:

- Private PBT Programs are rare and local in nature, employing approximately 300 inmates in just a few states.
- PBT Programs provide inmates with valuable and worthwhile work experiences.
- PBT Programs currently have in place policies, procedures and security mechanisms designed to limit inmate access to consumer information.
- PBT Programs currently employ significant and meaningful incentives for inmate compliance with PBT Program rules and significant and meaningful disincentives for inmate misconduct.
- Reports of misuse of consumer information by inmate telemarketers are rare and exaggerated, and consequently, consumer and regulatory concerns with these activities are fueled by a few anecdotal incidents reported in the media than by significant factual evidence.
- Addressing the FTC's privacy concerns with PBT Programs through revisions to the TSR is neither appropriate nor authorized by Congress.
- Prohibiting or regulating PBT Programs would not fully satisfy the FTC's concerns with the misuse of consumer information as entities not governed by the TSR would be exempt from such regulation.
- The FTC's concerns with the privacy abuses presented by PBT Programs exist equally in civilian telemarketing programs.

⁴ NPRM at 4524-25.

⁵ NPRM at 4525.

⁶ NPRM at 4539.

- Regulation, if any, of PBT Programs is most appropriate at the state level.

II. Prison Industry Work Programs

A. **General**

The Justice System Improvement Act of 1979⁷ gave rise to the federally-administered Prison Industry Enhancement program, or “PIE”. The PIE program was expanded by the Justice Assistance Act on October 12, 1984⁸ and expanded again in the Crime Control Act of 1990⁹. Among other things, PIE permitted states to create prison work programs whereby prisoners would be eligible to receive wages comparable to civilian workers. Deductions may be made for room and board, Federal and state taxes, family support, contributions to a state’s crime victim fund and contributions to an interest bearing account that the inmate may use upon release from incarceration.

The PIE program was created to encourage states and local governments to establish employment opportunities for inmates that mimic the private work environment. Significant for this comment is the fact that while Congress recognized the federal authority to regulate interstate commerce and the transportation of **goods** across state lines, it also recognized that **services** are exempt from this authority. (Federal Register, p.17009) Thus it empowered the states to manage these arrangements. Thus, the Congress, in enacting a Federal law giving birth to this program, elected to have the states manage these programs.

B. **Prison Based Telemarketing Programs**

The FTC notes in its NPRM that about “72,000 prisoners nationwide are employed in inmate work programs, including about 2,500 prisoners who work for private subcontractors in 38 states.”¹⁰ However, according to EPI’s estimates, the number of inmates used for telemarketing purposes is a small percentage of those numbers. In fact, EPI estimates that there are only ten private companies in the United States that employ approximately 300 inmates in PBT Programs.

Since PBT Program opportunities are limited, they are highly sought after by inmates. With a large application base, private industry employers are able to be more selective in whom they hire. The net result is a more highly educated and responsible worker pool. Inmates that are chosen to receive these opportunities realize the benefits that they provide. Thus, the 300 inmate workers currently working in PBT Programs appreciate, compete vigorously for, and seek to maintain, these jobs. There is, therefore, a strong incentive for these inmates to comply with, and not deviate from, the stringent rules governing their employment.

⁷ P.L. 96-157, Sec.827

⁸ P.L. 98-473, Sec.819

⁹ P.L. 101-647

¹⁰ NPRM at 4524.

C. Benefits of PBT Programs

The FTC has requested information regarding the benefits of prison-based telemarketing. The following is a summary of the benefits of these programs:

1. Financial Benefits to Inmates and Others. Although an inmate may earn up to \$8 an hour for participating in a PBT Program, the inmate often sees only a very small percentage of the amounts earned. Various allocations are subtracted from an inmate's paycheck. For example, a state will very often withhold a large percentage of an inmate's earned wages to cover a portion of the state's costs for incarcerating the inmate. In some instances, this percentage may be as high as 45% of the total wages earned by the inmate. These amounts reduce taxpayer burdens for these state costs.¹¹

An inmate's paycheck may also be reduced for the following:

- A percentage may be allocated to a state's prison industries program, which help states offset the administration costs of these projects.
- A percentage may be allocated to a state victim's relief fund.
- A percentage may be sent to an inmate's family for financial support while he/she is incarcerated.
- A percentage may be withheld and deposited into an interest bearing account for the benefit of the inmate when he/she is released.

2. Enhanced Inmate Behavior and Institutional Security. The first priority in a prison is institutional security. For this reason, every prison administrator seeks to have inmates working. Participation in work programs has proven to be effective in reducing incidents of adverse inmate behavior, and enhanced institutional security. For example, testifying on the Prison Industries Reform Act of 1999 before the House of Representatives in 1999, Reginald A. Wilkinson, Director of the Ohio Department of Rehabilitation and Correction, stated that "Prison jobs are a management tool to keep prisoners busy. When prisoners are forced to be idle, tension and violence increase, especially in light of prison crowding. Prison industry programs keep thousands of inmates productively involved."¹²

3. Reduction in Recidivism. The institutional incentives that work program jobs provide inmates also result in greater inmate participation and achievements in academic and treatment programs. More concretely, state studies demonstrate the positive impact of inmate work programs on recidivism. For example, in Florida, only 11% of the inmates who participated in prison industry

¹¹ One of the key beneficiaries of prison work programs is the taxpayer. Nationally, in the PIE program through June 30, 2001, \$107,051,665 has been deducted from inmate wages and are contributed to taxes, incarceration costs, aide to dependents, and victims programs. Additionally, as just one example, a Southwestern state service bureau that contracts with several state agencies reports saving taxpayers approximately \$1million a year.

¹² Oral Testimony of Reginald A. Wilkinson, Director of the Ohio Department of Rehabilitation and Correction, Submitted to The United States House of Representatives, House Judiciary Subcommittee on Crime; August 5, 1999.

work programs returned to prison after release as opposed to 27% for the general population. Similar results were observed in New York, 25% versus 55%, and Texas, 21% to 40%.¹³

D. PBT Program Safeguards and Compliance Incentives

PBT Programs are used for various purposes. Some companies use PBT Programs for customer service calls and other use them for inbound and outbound sales calls. Recognizing the public and regulatory sensitivity to inmate access to consumer personal information in connection with telemarketing activities, the private firms that utilize PBT Programs have invested significant financial and personnel resources in creating, maintaining and enforcing a secure environment intended to prevent inmate access to and use of consumer personal information. These efforts include physical and procedural measures, and less tangible, though extremely effective, incentives for compliance with Program rules and disincentives for misconduct.

1. Program Selection and Training.

Many private employers that utilize PBT programs carefully choose their “employees” from a prison’s general population. This screening process involves, among other things, an extensive review of an inmate’s general background, crime committed, education level, and behavior record while incarcerated. Not surprisingly, a large percentage of inmates that are selected to participate in PBT Programs have achieved a higher education level than the general inmate population. Further, only those inmates that demonstrate a sincere and good faith intention to work and comply with the employer’s policies and procedures are selected to participate.

Private employers also conduct extensive training sessions during which inmates are lectured on the employer’s security policies and procedures governing the program and the importance of compliance. These inmates are told that if they are found to violate these policies and procedures, they will be dismissed from the program.

2. Physical Security Measures

In addition to operating on the public stage and utilizing a system of incentives designed to encourage good behavior, PBT Program employers utilize numerous physical security procedures designed to limit inmate access to consumer information. The most prevalent physical security procedures involve correctional officers constantly checking and supervising inmate work protocol and their arriving and departing the work area. As prison telephone service work sites tend to be much smaller than non-prison work sites, it is common to have

¹³ See, Federal Bureau of Prisons PREP study (1992), which links inmate work experience with successful post release outcomes. In Florida, see Pride Enterprises Annual Report, Florida Department of Corrections Recidivism Studies. In New York, see Corecraft “Impact Study of The Division of Industries (Corecraft) Program. In Texas, Texas Department of Criminal Justice Analysis of Lockhart Work Program.

one production supervisor and/or one correctional officer for every 15 work stations.

i. No Writing Tools or Paper. Many PBT Program employers do not provide inmates with pens, pencils or paper when using the telephone. These measures eliminate the ability of an inmate to record personal information that may be received from a consumer. Even though EPI recognizes the possibility of an inmate obtaining personal information from a consumer during a telephone call, without the ability to record such information, and the expectation that the inmate will place or receive many calls during a session, this procedure significantly reduces the likelihood of an inmate maintaining this information for future use.

ii. Limited Access to Writing Tools or Paper. In some situations inmates may take orders directly from consumers. In these situations, inmates are provided with writing instruments and order forms upon entering their workstation area. However, inmates are not permitted to bring any other writing instruments or material with them into the area. Upon completing an order form, the form is immediately removed from the inmate workstation and delivered to a civilian representative for confirmation. Upon the end of an inmate's shift, all writing instruments and blank order forms are removed and the inmate is searched for stray forms.

iii. Use of Autodialers. Many PBT Program employers that use inmates for outbound telemarketing typically use an autodialer to deliver a call to an inmate's desktop upon the consumer answering the call. Depending on the autodialer software used, the only information that an inmate may be provided about that consumer will be his or her first name and city and state of residence. In these situations, an inmate is not provided with any information that would allow contact with the consumer, such as a last name, street address, or telephone number. If a consumer agrees to purchase a product, the inmate is instructed to transfer the call to a civilian representative who will accept the order and the consumer's personal contact information. The inmate is never provided access to consumer information.

iv. Inbound Calls. With respect to inbound calls, upon receiving the call, inmates are not provided with any information about the caller. The inmate is instructed to simply read a script (in the case of a sales call) and if the consumer agrees to purchase a product, the inmate either transfers the call to a civilian or completes an order form in conformance with the process described above.

With respect to customer service calls, inmates are typically provided with a booklet of responses to frequently asked questions so that consumers are not required to provide any specific information about themselves. For questions that are too difficult or that require the consumer to provide contact information, the call is transferred to a civilian. In each of these cases, inmates are not provided access to any consumer information.

v. Restriction on Outbound Calls Prison Telephones. The EPI is aware of several PBT Program employers that utilize a software program that restricts calls from being made from a prison payphone to telephone numbers that have either been called during a session or that have called in to the call center. The software allows a prison administrator to load all telephone numbers that have been called and that have called the call center to the prison's main telephone system so that a block is placed on such numbers should an inmate attempt to call a telephone number belonging to a consumer with whom he or she corresponded. This block lasts for approximately 30-60 days, a period of time which the software developer and/or PBT Program employer determined would be a sufficient amount of time to deter an inmate from trying to contact a consumer.

vi. Call Monitoring.

(A) As mentioned above, private employers that utilize PBT Programs recognize the sensitivity surrounding these programs. As a result, they expend significant time and monetary resources to ensure that inmates comply with their policy and procedure programs. Many of these employers have purchased telephone systems that allow constant or random monitoring of inmate calls by civilian employees. Violators are immediately dismissed from these assignments.

(B) Many PBT Programs also utilize a call-time monitoring software that detects if a call exceeds a particular time period. The logic here is that a call that exceeds an average time for an inmate to read a script might involve suspect activity. If a call exceeds a predetermined time, a civilian supervisor will remote access the call to determine whether the inmate is engaging in prohibited activity. As above, violators are dismissed from the program.

3. Inmate Incentives to Comply with PBT Program Rules

i. Prison Culture and Financial Incentives. The most effective procedure for safe-guarding information stems from the culture of prison life, which offers the highest and most sought after rewards for inmates who succeed at work program jobs. The prison regimen is comprised of rules, regulations, boredom, and, for most inmates, relative poverty. In economic terms, a prison is a community of consumers where the average "income" is about ***\$15 a month.***

Jobs that let inmates "escape" from the prison regimen and take home \$50 to \$300 a month are, understandably, extremely desirable. PBT Programs are, therefore, in high demand by inmates. Inmates vigorously compete to get and keep these jobs. This competition is based on an inmate's general conduct and academic or treatment program achievements. As a result, only those inmates who are the best behaved and most serious about improving themselves are eligible to participate in these programs. Private firm employers of these inmates

vouch for the impact of these incentives on inmates' positive attitudes, motivation and productivity.¹⁴

ii. Work Skills and Habits. PBT Programs provide inmates with the ability to learn and develop real and meaningful skills that are easily transferred to the civilian work environment. Private firms that operate PBT Programs often provide the best training that is available in the prison. (For a view of the impact these jobs can provide inmates, see the testimonials from women who have been trained and work in one Western state telemarketing center, Attachment, no. 1)

iii. Job Offers Upon Release. Perhaps the strongest incentive for an inmate to comply with a PBT Program's rules is the possibility of receiving a job offer upon being released from prison. Private employers in several states have a standing offer of employment to any inmate that completes his work without any adverse incidents. Some employers effectively act as employment agencies for released inmates.¹⁵

4. Inmate Disincentives for Misconduct

i. Loss of Job. While there are clear benefits to obtaining and keeping a PBT Program job, there is also an interest in not losing that job. Once an inmate loses a job for misconduct, he/she is prohibited from obtaining a job that might involve civilian contact.

ii. Loss of Job Program. One of the most dire consequences of individual misconduct is the closing of an entire job site. Stated otherwise, one individual's misconduct can jeopardize *everyone's* job. This consequence is understood by all inmates and the prison culture creates an environment where no inmate wants to be the one to jeopardize the program.

III. The FTC Should Not Revise the TSR to Address PBT Programs

While the EPI understands and appreciates the FTC's concerns with the misuse of consumer information in PBT Programs, it believes that the record does not support revising the TSR to address PBT Programs. In addition to the benefits that these programs provide to inmates, as described in detail above, the EPI believes for the following policy reasons, that the FTC should not revise the TSR to address these programs.

¹⁴ For a discussion and analysis of inmate employer attitudes, see: "Employing Prison Inmates: Does it Work? Survey results of private firms that employ state inmates in prisons in manufacturing, assembly and service jobs." The Enterprise Prison Institute, March 2002.)

¹⁵ See "Thinking Outside the Cellblock About Workforce Development," California Manufacturer, November 1999, Edwin Meese III, Knut A. Rostad.

A. Private PBT Programs Are Rare and Local in Nature

As mentioned above, EPI is only aware of 10 private employers utilizing PBT Programs. These firms currently employ approximately 300 inmates. EPI believes that revising the TSR to prohibit private PBT Programs is unwarranted given the small number of inmates actually employed in these programs. Further, since these programs currently operate in only a handful of states, EPI does not believe that Federal action is warranted and that regulation of PBT programs, if any, would be most appropriate at the state level, as discussed in greater detail below.

B. There is Insufficient Evidence of Inmate Misuse of Consumer Information to Warrant Regulation under the TSR

EPI urges the FTC to carefully consider the quality and quantity of the reports of the incidents giving rise to these proceedings. EPI notes that there is very little evidence in the record to support such regulation.

First, the NPRM cites very few incidents of actual inmate misuse of consumer information. The FTC notes in the NPRM a 1997 incident in Ohio where a prison inmate working in data processing sent a letter to a Ohio women.¹⁶ The NPRM also references a woman's testimony that her daughter was subject to an inappropriate conversation with a Utah inmate.¹⁷ Further references by the FTC in the NPRM appear to be exclusively a result of this one Utah incident.

Second, EPI notes that in 1999, the General Accounting Office, at the request of a Congressmen who had watched a news story on an inmate's use of a consumer's information, conducted a study on prison based work programs.¹⁸ Specifically, the report inquired as to the frequency and effects of inmate access to consumer personal information in connection with inmate work programs. This report found that inmate work programs allowed inmates limited access to two types of information: personal information and market information. In regards to the former, a total of 1,357 inmates had access to information which included consumer medical records, state, county or local licenses, auto registrations, unemployment records, student enrollment data, and accident reports.¹⁹ While the report did not indicate whether these jobs involved telemarketing, it did indicate that 75% were either data entry or duplicating/scanning.

Significantly, only 7% of the inmates who had access to consumer personal information were performing work for private firms; 93% were for government agencies. In this regard, we note that should the FTC institute a ban on inmate access to personal information in connection with telemarketing activities, more than 9 out of 10 of these programs would be exempt from such ban.

¹⁶ NPRM at 4524, FN 311.

¹⁷ NPRM at 4524-4525.

¹⁸ "Prison Work Programs, Inmates' Access to Personal Information" GAO/GGD-99-146

¹⁹ Id.

The GAO report also sought to determine “incidents of inmates misusing information obtained through . . . work programs”. The methodology used by GAO to gain this information and uncover incidents was exhaustive. GAO sought to identify any incident of misuse on record at any time. To supplement self-reporting by Departments of Corrections, GAO contacted each state office of Attorney General, searched different data bases, and even contacted the special interest groups who are reported to lobby against inmate work.²⁰

The result of this extensive search was the identification of nine incidents in eight states occurring between the years 1991 and 1999. Notably, only three of these nine incidents were the result of telemarketing for a private firm.

C. The FTC’s Concern With Inmate Access to Consumer Information Is a Privacy Issue and Not a Telemarketing Issue

The FTC’s concerns with the access to and use of consumer information by inmate telemarketers as an “abusive practice” is not a telemarketing issue but a privacy issue. In support of its claims of abuse, the FTC cites in the NPRM various incidents where an inmate obtained and used consumer information for a wrongful purpose. For example, in the NPRM, the FTC cites its 1997 report to Congress on the privacy implications of individual reference services as providing an example of abuse of consumer by a prison telemarketer.²¹ This was but one example of abuse cited by the FTC in that report. The report in fact referenced similar abuse by an unscrupulous employee, a car salesman, an Internet surfer and a hacker. By providing these examples, the FTC clearly intended to demonstrate to Congress that these types of abuses exist in various forms, and is not therefore limited to inmate telemarketing. Therefore, revising the TSR to address its concerns with the abuse of consumer information would only cover one method through which a perpetrator may access this information. The FTC’s concerns will still remain for information gathered through other media.

D. PBT Programs Should not be Treated as an Abusive Practice

In the NPRM, the FTC questions whether prison-based telemarketing ought to be banned as an abusive practice.²² EPI believes that the FTC’s concerns with these programs are not the types of abusive activities contemplated by the Telemarketing and Consumer Fraud and Abuse Act²³ (“Telemarketing Act”).

The FTC indicates in the NPRM that it is considering whether PBT Programs ought to be banned as an abusive practice as the “consumer privacy concerns that in no small measure prompted Congress to enact the Telemarketing Act are implicated by this Activity.”²⁴ EPI disagrees with this conclusion. Section 6102 of the Telemarketing Act states that “the Commission shall prescribe rules prohibiting deceptive telemarketing acts or practices *and other*

²⁰ Telephone interview with GAO staff representative Nancy A. Briggs, March 20, 2002.

²¹ Id.

²² NPRM at 4524.

²³ 15 U.S.C. § 6101-6108

²⁴ NPRM at 4524.

abusive telemarketing acts or practices.”²⁵ (Emphasis added). Following the general mandate for the FTC to proscribe rules to protect consumers from deceptive and abusive telemarketing practices, Congress included two provisions intended to limit the scope of the FTC’s authority. Relevant for these purposes is Section 6102(a)(3), which states in part

“(3) The Commission shall include in such rules respecting other abusive telemarketing acts or practices:

- (A) a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy,
- (B) restrictions on the hours of the day and night when unsolicited telephone calls can be made to consumers, and
- (C) a requirement that any person engaged in telemarketing for the sale of goods or services (make certain disclosures concerning such goods or services).

The FTC suggests in the NPRM that inmate telemarketing programs may be an abusive practice in that they compromise a consumer’s privacy (“[c]learly, the consumer privacy concerns that in no small measure prompted Congress to enact the Telemarketing Act are implicated by this activity.”)²⁶ EPI believes that in making this statement, the FTC intended to tie sub-section 3(A) above to this suggestion.²⁷ However, EPI does not believe that Congress intended to include within the ambit of this provision the concerns the FTC harbors with inmate telemarketing programs. Sub-section 3(A) very clearly mandates the FTC to proscribe rules that would prohibit a telemarketer from engaging in a “pattern of unsolicited telephone calls.” To be sure, the FTC’s concerns with PBT Programs as they relate to privacy do not appear to implicate the concept of a “pattern” of calls. EPI believes that the clear language of the Telemarketing Act requires that any activity the FTC deems to be abusive must involve a pattern of calls, which is very visibly absent from the FTC’s concerns with PBT Programs.

EPI also recognizes, however, the FTC’s ability to proscribe regulations to address abusive practices that are not specifically mandated in the Telemarketing Act. In fact, the FTC notes in the NPRM that “some of the practices previously prohibited as abusive under the (Telemarketing) Act flow directly from the Telemarketing Act’s emphasis on protecting consumer’s privacy.”²⁸ However, the FTC observes that “[w]hen the Commission seeks to identify practices as abusive that are less distinctly within (the Telemarketing Acts grant of authority), the Commission now thinks it appropriate and prudent to do so within the purview of its traditional unfairness analysis as developed in Commission jurisprudence and codified in the FTC Act.”²⁹ An unfair practice under this

²⁵ 15 U.S.C. § 6102(a)(1)

²⁶ NPRM at 4524.

²⁷ EPI notes that sub-sections (B) and (C) are not be relevant for purposes of this discussion as they concern call time and material disclosures, respectively, which are not necessarily implicated exclusively by inmate telemarketing activities.

²⁸ NPRM at 4511.

²⁹ Id.

jurisprudence is one that causes substantial injury to consumers that is not outweighed by any countervailing benefits, and is not reasonably avoidable. The FTC offers credit repair services, recovery services, and advance fee loan services as examples of its authority to proscribe regulations under this paradigm.

EPI respectfully submits that PBT Programs do not satisfy these criteria. Of significance, EPI observes that there is no information currently on the record to show that any misuse of consumer information in connection with PBT Programs has resulted in or even has the capacity to result in, substantial consumer injury. The FTC notes in the NPRM that each of the services it referenced as being abusive practices (credit repair services, recovery services, and advance fee loan services) “had been the subject of large numbers of consumer complaints and enforcement actions.”³⁰ EPI observes that PBT Programs are, to be sure, worlds away from the services the FTC considers to be abusive. EPI also notes Commissioner Swindle’s concerns with the FTC’s implicating unfairness principles when determining whether a practice is abusive under the Telemarketing Act. He cautions in his Concurring Statement to the NPRM,

[a]lthough these are laudable objectives, I have reservations about using unfairness principles under Section (of the FTC Act) to determine what is abusive for purposes of the Telemarketing Act. Nothing in the language of the Telemarketing Act or its legislative history indicates that Congress intended the Commission to use unfairness principles to determine which practices are abusive. Given that it amended the FTC Act to define unfairness the same year that it passed the Telemarketing Act, Congress presumably would have given some indication if it wanted us to employ unfairness principles to decide which telemarketing practices are abusive.³¹

E. Any Regulation of PBT Programs under the TSR Would Not Apply to Exempt, Governmental and Quasi-Governmental Entities that use Inmate Telemarketers

The FTC notes in the NPRM that “prison inmates are often used by federal and state governments, as well as private firms, to handle inbound calls to call centers or to make outbound telemarketing calls.”³² If the FTC were to revise the TSR to either prohibit or regulate the use of PBT Programs, these regulations would only apply to for-profit entities governed by the TSR that sell goods or services and not to exempt firms or governmental and quasi-governmental entities. While the EPI respects the FTC’s interest and mandate in protecting consumers from unscrupulous telemarketers and protecting consumer privacy interests, its issues with PBT Programs concern the misuse of consumer information and not the selling of a product or service. Thus, a threat to a

³⁰ NPRM at 4511.

³¹ Concurring Statement of Commission Swindle, NPRM at 4546.

³² NPRM at 4524.

consumer in this regard would not concern the distinction between exempt and non-exempt telemarketing, but rather the access to and potential for misuse of personal information.

Significantly, an exempt entity such as a bank or a telephone company, or a state or other governmental agency would be free to use inmate telemarketers without fear of prosecution while a private entity might either be prohibited from using the same telemarketers or be subject to regulation. Clearly, the privacy concerns that the FTC has espoused with respect to PBT Programs would continue to exist unchecked by exempt entities. EPI notes that Commissioner Swindle expressed these same concerns in his Concurring Statement to the NPRM. Referring to consumers' right to be "left alone in their homes," Commissioner Swindle notes that "their right to be let alone is invaded just as much by an unwanted call from an exempt entity (e.g., a bank or a telephone company) as it is by such a call from a covered entity (e.g., sporting goods manufacturer)."³³ In the end, the FTC's privacy concerns with PBT Programs would continue to exist.

It is also important to note here the GAO Report discussed in Section III.B. above, which revealed that only 7% of the inmates who had access to consumer information were performing work for private firms, while 93% were working for government agencies. Therefore, applying these percentages to telemarketing, should the FTC determine to prohibit or regulate PBT Programs, these restrictions would only apply to less than 10% of the inmates who had access to consumer information, whereas over 90% would not be governed by the regulations.

Further, if PBT Programs were prohibited or regulated, firms exempt from the TSR would have a clear competitive advantage over non-exempt firms. PBT Programs are often used because they are less costly than civilian telemarketing operations. Reducing operating costs allows sellers to reduce or keep product and service prices stable. Prohibiting non-exempt firms from using these programs or forcing them to incur additional costs to comply with regulations would cause them to spend more money and human resources on their telemarketing operations, which would likely be reflected in higher prices to consumers. On the other hand, exempt firms would not be subject to the prohibition or applicable regulations and would thus enjoy lower telemarketing costs.

F. The FTC's Privacy Concerns Exist Equally in Civilian Telemarketing Operations

The FTC's concerns with PBT Programs lie in the potential for privacy abuses by inmates. However, these same concerns exist equally for civilian telemarketing operations. Indeed, the FTC acknowledges this point in the NPRM, stating "[a]lthough it seems clear that prison-based telemarketing may cause significant unavoidable consumer injury, similar risks may occur from telemarketing employees who are not in prison."³⁴ EPI believes that any

³³ Swindle Concurring Statement, NPRM at 4545.

³⁴ NPRM at 4524.

regulation of PBT Programs would place firms that use inmate programs in a competitive disadvantage to firms that use civilian telemarketers for many of the same reasons set forth in the preceding section of this comment. Further, as any regulation of these programs would only apply to prison programs and not to civilian operations, the potential for abuse of consumer privacy identified by the FTC in the NPRM would continue to exist for civilian telemarketing operations.

G. Regulation of PBT Programs, if any, Should Reside with the States

The FTC asks whether PBT Programs are more appropriately addressed at the federal or state levels. The EPI believes the states are best prepared to address these issues for several reasons.

Of primary significance is the fact that the federal PIE program discussed above granted to the states the authority to authorize and manage private industry contracting for prison services. EPI has observed that the states have been extremely active in not just promoting prison industries programs in their respective states, but also taking action where they have identified problems. Even the FTC notes in the NPRM that several states have considered legislation that would require their respective corrections' departments to restrict inmate access to consumer personal information.³⁵ The FTC also notes in the NPRM that "the Utah State prison stopped using inmates as telemarketers after conceding that they could not ensure that prisoners would not misuse personal information they obtain."³⁶ These examples demonstrate the states' ability and interest in taking proactive measures to protect consumers.

PBT Programs are, by their nature, local. Each state manages its own prison industries program and should therefore be allowed to determine what product and service offerings are appropriate for their programs.

IV. Alternatives to Prohibiting PBT Programs

In the NPRM, the FTC questions whether there might be possible regulatory approaches to address prison-based telemarketing abuses rather than an outright ban of the practice.³⁷ In this regard, The FTC posits whether disclosure or monitoring requirements would be sufficient to address these concerns.

While EPI does not believe that PBT Programs should be prohibited or regulated under the TSR, it nevertheless recognizes the FTC's concerns with the potential for the misuse of consumer information in these situations. If the FTC finds that the record of these proceedings reveal that regulation of PBT programs on the Federal level is warranted, EPI respectfully submits that the FTC's objectives could be achieved through reasonable and meaningful regulation and not through an outright ban.

³⁵ NPRM at 4524 FN 312.

³⁶ Id.

³⁷ NPRM at 4525.

The FTC questions in the NPRM whether disclosure requirements are workable, and if so, whether they would adequately protect consumers from misuse of personal information.³⁸ The FTC does not, however, propose what types of disclosure would be appropriate for these purposes. Based on the FTC's concerns as expressed in the NPRM, EPI assumes that the FTC intended to mean disclosure to a consumer that he/she is speaking with an inmate. For the following reasons, EPI does not believe that this type of disclosure would be workable.

First, instituting a disclosure requirement does not directly further the FTC's concerns with protecting consumer privacy. In essence, the purpose of this requirement would be to simply put a consumer on notice that the person to whom he/she might provide personal information is an inmate. Even if the consumer provides the inmate with this information, this solution does not necessarily protect the provided information. An inmate may still use this information for an alternate, and wrongful, purpose.

Second, in an outbound call scenario, if an inmate is required to disclose that he/she is calling from a prison, the consumer might be confused as to the purpose of the call and on whose behalf the call is being made. The TSR currently requires a telemarketer to identify the seller and that the purpose of the call is to sell goods or services.³⁹ If an inmate were required to identify him/herself as an inmate or calling from a correctional institution, despite the other disclosures required to be made under the TSR, a consumer might reasonably believe that the call concerns a matter other than the actual product or service being offered for sale. For example, upon hearing that the call is from an inmate or a correctional institution, a consumer might assume that the call somehow concerns a prison related matter and might not give the inmate the opportunity to completely present the offer to the consumer.

Similarly, with respect to an inbound call, a consumer might, upon hearing that the receiving party is an inmate in a correctional institution, believe that he/she had called an incorrect number and never complete an intended transaction.

Further, with respect to both outbound and inbound calls, a consumer might believe that the product or service being offered is somehow associated with the correctional institution, which is not the case; only the call is being made from or received by the inmate.

In lieu of prohibiting PBT Programs, EPI believes that the FTC's concerns with these programs may be most appropriately addressed by requiring firms that engage in PBT Programs to institute policies and procedures designed to prevent inmate access to and misuse of consumer information. Many of the measures described in this comment would appear to satisfy these concerns. Notably, most private employers that utilize PBT Programs today have already adopted these types of security measures and, based upon the actual number of adverse incidents

³⁸ Id.

³⁹ 16 C.F.R. § 310.4(d).

reported to date, appear to be successful in stemming the types of violations described in the NPRM.

EPI believes that the FTC's privacy concerns with PBT Programs could be sufficiently addressed through a regulatory scheme similar to the TSR's current "do-not-call" prohibition codified at 16 C.F.R. § 310.4(b)(1)(ii). Although the TSR considers a violation of this prohibition to be an abusive practice, the TSR also provides that a company will not violate this prohibition if it complies with certain enumerated requirements intended to prevent such violation. Specifically, § 310.4(b)(2) provides that a firm will not be liable if it has established and implemented written procedures intended to comply with the prohibition, has trained its personnel in these procedures, and maintains and records lists of persons who request no further calls.

EPI believes that a similar scheme for PBT Programs would be appropriate given the record to date on these issues. Given the small number of incidents involving actual inmate abuse of consumer information, and the policies and procedures currently used by private enterprises to prevent such occurrences, EPI urges the FTC to consider adopting this type of regulatory scheme if it finds that regulation is warranted at all.

V. Conclusion

EPI recognizes and respects the FTC's interest in protecting consumer privacy interests. EPI also recognizes the concerns of the FTC and the general public in allowing inmates access to civilian contact information. However, EPI believes that the reasons expressed by the FTC for regulating PBT Programs and the record of adverse incidents in this area do not warrant federal action. Regulation, if any would be most appropriate at the state level.

If the FTC were to find the need to take some action in this area, EPI believes that the FTC could meet its objectives by requiring private firms to institute and maintain security measures intended to prevent the access to and misuse of consumer information by inmates.

Sincerely,