

April 15, 2002

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

RE: Telemarketing Rulemaking—Comment FTC File No. R411001

Dear Secretary Clark:

On behalf of NetCoalition, I am writing to submit comments regarding the proposed telemarketing sales rule, 67 Fed. Reg. 4492 (January 30, 2002). NetCoalition serves as the public policy voice for Internet companies on key legislative and administrative proposals affecting the online world. Members include AOL Time Warner, Doubleclick, Inktomi, Lycos, Verio, and Yahoo!.

The proposed Telemarketing Sales Rule ("the proposed TSR") is intended to combat telemarketing fraud by providing law enforcement agencies with new tools to protect consumers and small businesses. Under current law, companies engaging in business-to-business telemarketing are generally exempt from the various disclosure and recordkeeping requirements imposed by the Federal Trade Commission ("the FTC" or "the Commission"). This exemption does not apply, however, to the sales of non-durable office or cleaning supplies.

The proposed TSR would expand the activities that would not be covered by the business-to-business telemarketing exemption to include the solicitation of charitable contributions and the sales of Internet and Web services. *Id.* at 4544. The Commission states that it is necessary to exclude the sales of Internet and Web services from the business-to-business exemption because this area has emerged as one of the leading sources of complaints of fraud by small businesses. *Id.* at 4531-32.

In addition, the FTC cites four cases where the Commission has successfully prosecuted companies that have engaged in "cramming" - the fraudulent telemarketing of offers for "free" Web hosting services. *Id.* at 4531-21 n.398 (citing *F.T.C. v. U.S. Republic Communications, Inc.*, Case No. H-99-3657 (S.D. Tex. Filed Oct. 21, 1999); *F.T.C. v. Shared Network Svcs., LLC*, Case No. S-99-1087-WBS JFM (E.D. Cal. June 12, 1999); *FTC v. WebViper LLC d/b/a Yellow Web Svcs*, Case No. 99-T-589-N (M.D. Ala. June 9, 1999); *F.T.C. v. Wazzu Corp.*, Case No. SA CV-99-762 AHS (Anx), (C.D. Cal. Filed June 7, 1999).

In these cases, despite the offers for "free" Web hosting, small businesses were charged before the end of the "free" trial periods or after the businesses had requested that the service be canceled. In two of the cases cited by the FTC, *Shared Network Services* and *Wazzu*, the Commission successfully obtained a temporary restraining order. In *WebViper*, the FTC

successfully obtained a stipulated preliminary injunction. And, in *U.S. Republic Communications, Inc.*, the Commission successfully obtained a stipulated, final order for a permanent injunction and other equitable relief. These injunctions and equitable orders demonstrate that the Commission, without the proposed TSR, has successfully prosecuted fraudulent telemarketing of Web services against small businesses.

Consequently, it is not clear that the proposed TSR's application to Internet and Web services is necessary, especially when balanced against the new compliance costs that would be imposed on the majority of companies that engage in lawful business-to-business telemarketing of Internet and Web services. For example, under the proposed TSR, a covered telemarketer would be required to keep for two years: (1) all related advertising brochures, telemarketing scripts, and promotional materials; (2) the name and last known address of each known prize recipient; (3) the name and last known address of each customer, the goods or services purchased, and the date such goods or services were shipped or provided; (4) the name and last known address of current and former employees directly involved in the telemarketing; and (5) all verifiable authorizations required to be provided or received under the rule. Proposed Rule, 67 Fed. Reg. 4544 (January 30, 2002).

Therefore, we encourage the Commission to eliminate "Internet services" and "Web services" from the exceptions to the business-to-business exemption in the proposed TSR. If, however, the Commission decides to apply the proposed TSR to these services we encourage the consideration of the following recommendations in order to more precisely target the FTC's concerns.

1. Clarify the Application of the Term "Web services." As currently drafted, the TSR defines "Web services" as "designing, building, creating, publishing, maintaining, providing or hosting a website on the Internet." *Id.* at 4541. The supplementary information attached to the proposed TSR, however, states that the Commission "intends for this term to encompass any and all services related to the World Wide Web." *Id.* at 4500 [emphasis added].

Obviously, the intended application of the definition of "Web services" is much broader than the actual definition included in the proposed TSR. If the Commission intends to apply this rule to "any and all services related to the World Wide Web," then any business-to-business telemarketing of anything related to the Web would be subject to the disclosure and recordkeeping requirements of the rule. Consequently, we urge the Commission to clarify that the application of the definition of "Web services" would cover only those items specifically included in the definition in the proposed TSR.

2. Narrow the Proposed TSR to Cover only Web Services. The cramming cases cited by the FTC involve the telemarketing of web designing and hosting services, which fall under the Commission's proposed definition of "Web services." None of the cases cited by the Commission involves the activities that fall within the FTC's definition of "Internet services," which means "the provision, by an Internet service provider, or another, of access to the Internet." *Id.* at 4541. We believe that the FTC has not provided justification to exclude the telemarketing of "Internet services" from the business-to-business exemption. Consequently, we urge the Commission to drop "Internet services" from the exception provision included in the business-to-business exemption of the proposed TSR.

3. Treat Equally all Businesses that Provide Internet Services. The Telemarketing Consumer Fraud and Abuse Prevention Act ("the Telemarketing Act"), the Act for which the TSR was promulgated, states that the Telemarketing Act only applies to those activities which are governed by the FTC Act. *See* 15 U.S.C. § 6105 (2002). Under the FTC Act, the FTC can regulate "the organization, business, conduct, practices, and management of any person, partnership, or corporation." 15 U.S.C. § 45 (2002). However, section 45 specifically excludes "banks and common carriers" from the regulatory authority of the FTC. *Id.* Moreover, the proposed TSR explicitly provides that the TSR is governed by the jurisdiction of the FTC Act. *See* 67 Fed.Reg. 4497 (January 30, 2002).

As such, the FTC Act, the Telemarketing Act, and the TSR deny the FTC the authority to regulate the organization, business, conduct, practices, and management of common carriers. Furthermore, even a common carrier that participates in non-common carrier activities would be exempt from the proposed TSR. "The exemption is in terms of status as a common carrier subject to the Interstate Commerce Act, not activities subject to regulation under the Act." *F.T.C. v. Miller*, 549 F.2d 452, 455 (7th Cir. 1977).

In other words, a common carrier that additionally provides Internet and Web services would be exempt from the new restrictions imposed on business-to-business telemarketing in the proposed TSR. As such, if the proposed TSR is adopted, the effect would appear to arbitrarily discriminate among companies that are providing identical services but which fall under the jurisdiction of different agencies.

Conclusion. We support the Commission's vigorous prosecution of companies that engage in fraudulent telemarketing practices. However, the FTC's successful record of obtaining temporary restraining orders and injunctive and equitable relief against crammers, demonstrates that a new rule is not necessary. Instead, the answer to addressing the problem of increased incidences of cramming may lie in dedicating more resources to enforcement and prosecution. Moreover, if the rule were adopted, some companies would be forced to comply while others that provide the same services would be exempt.

If the Commission decides to move forward with this proposal, however, we encourage it to narrow its scope to specifically target cramming and to not create additional burdens for companies that lawfully telemarket Internet services. Thank you for this opportunity to submit comments.

Sincerely,

Kevin S. McGuinness
Executive Director