



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division of Marketing Practices

April 5, 2007

Mitchell N. Roth, Esq.
Williams Mullen
8270 Geensboro Drive, Suite 700
McLean, Virginia 22102

Dear Mr. Roth:

This letter responds to your request of June 28, 2006, seeking an informal advisory opinion from staff of the Federal Trade Commission (the "Commission" or the "FTC") regarding the application of the Telemarketing Sales Rule ("TSR" or "the Rule"), 16 C.F.R. Part 310, to a business plan involving the telemarketing of automobile service contracts.¹ In the proposed plan, your client would supply auto service contracts under a sales program developed and maintained by a third party. You request guidance on whether the third party in this plan would be both a "telemarketer" and a "seller" under the TSR, and whether your client would be neither. Based on your letter's description of the proposed plan, we agree with your letter's determination that the third party would meet the Rule's definition of a "telemarketer," and its definition of a "seller." However, we also believe that your client would meet the definition of a "seller."

Relevant Rule Provisions

The TSR defines the terms "seller," "telemarketer," and "telemarketing" as follows:

Seller means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration;

Telemarketer means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor;

Telemarketing means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more

¹ FTC staff generally understands such a contract to be a promise to perform or pay for automobile repairs or services. See "Auto Service Contracts," May 1997 (FTC consumer education pamphlet available at <http://www.ftc.gov/bcp/conline/pubs/autos/autoserv.pdf>). We further understand that automobile service contracts sold by automobile dealers are frequently handled by independent companies called administrators, and that such administrators may act as claims adjusters, authorizing payment of claims to any dealers under the contract. *Id.*

telephones and which involves more than one interstate telephone call

16 C.F.R. §§ 310.2(z), (bb), and (cc).²

Discussion

In your letter's description of your client's proposed business plan, you state that your client will, among other things: sell and administer automobile mechanical breakdown contracts; supply the service contract for sale under a program developed and maintained by a third party; serve as the administrator of the service contract and take responsibility for claims payments and administering contractual obligations; and receive a predetermined wholesale cost per service contract sold.

You state that the third party will, among other things: develop its own sales strategy; develop its own marketing strategy and materials; develop scripts relevant to the sale of service contracts; manage its own sales persons and sales methods/programs; maintain all licenses and bonds required of a telemarketing seller; dictate retail product pricing; take responsibility for collecting payment; conduct all fulfillment services; and inform customers that it is selling the service contracts on its own behalf.

The staff agrees with your letter's assertion that the third party in the proposed plan would meet the Rule's definitions of both "telemarketer" and "seller." The third party would apparently initiate or receive telephone calls to or from a customer. It appears that, by "conduct[ing] all fulfillment services" and "inform[ing] consumers that it is selling the Service Contracts on its own behalf," the third party would also provide or offer to provide services to the customer. Because the third party is responsible for "collection of payment," it would provide or offer to provide these services in exchange for consideration. Finally, the third party would initiate or receive these calls, and provide or offer to provide these services, in connection with telemarketing. Therefore, the third party would likely meet the Rule's definitions of both a "telemarketer" and a "seller."

However, the staff disagrees with your letter's assertion that your client would meet neither of these definitions. Our view, based on your letter's discussion of the proposed business plan, is that your client would meet the Rule's definition of a "seller." According to your letter, your client would be "responsible for claims payment and administration of contractual obligations under the Service Contract," and would thus provide services to the customer. In other words, your client would remain responsible to provide the consumer with the services that

² When the Commission amended the TSR in 2003, 68 Fed. Reg. 4580 (Jan. 29, 2003), these definitions were modified pursuant to the USA PATRIOT Act, Pub. L. 107-56 (Oct. 26, 2001), to reach not only calls made to induce purchases, but also those made to induce charitable contributions. Otherwise, the definitions are substantively the same as in the original rule, although they were renumbered. 60 Fed. Reg. 43843 (Aug. 23, 1995).

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comprise, in large measure, what the consumer is purchasing. In return, your client would “receive a predetermined wholesale cost per service contract sold.” Finally, your Client would perform these services in connection with telemarketing. We believe that this activity is sufficient to bring your client’s role in the proposed business plan within the Rule’s definition of a “seller.” We note that neither the text of the Rule itself nor the Statement of Basis and Purpose that accompanied it when issued suggest that in a given transaction one and only one party can be a “seller” for purposes of Rule coverage. Arrangements such as described in your letter may result in more than one “seller” in a particular transaction.

The fact that the marketing campaign for the sales contract would be developed and executed by a third party is not determinative as to the question of who meets the definition of “seller” under the Rule. As the Commission noted in the Statement of Basis and Purpose for the original TSR:

the term [‘seller’] includes not only persons who, in connection with a telemarketing transaction, provide or offer to provide goods and services to the customer in exchange for consideration, but also persons who, in connection with a telemarketing transaction, arrange for others to provide goods or services to the customer [T]he Rule’s coverage cannot be avoided by structuring a sale so that someone other than the seller actually provides the goods or services directly to the customer.

60 Fed. Reg. 43844, Aug. 23, 1995. In light of our conclusion that your client would meet the Rule’s definition of a “seller” under the described business plan, we advise that your client would remain within the scope of the Rule’s coverage.

The opinions expressed in the foregoing discussion and the basis for this conclusion are those of Commission staff only and are not attributable to, nor binding on, the Commission itself or any individual Commissioner. I hope this discussion is helpful to you. If you have any further questions, please do not hesitate to contact me at 202-326-2330.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary Ivens", written in a cursive style.

Gary Ivens