

**CHARLES B. CHERNOFSKY**  
*DIRECT MAIL/ADVERTISING REGULATORY COMPLIANCE*

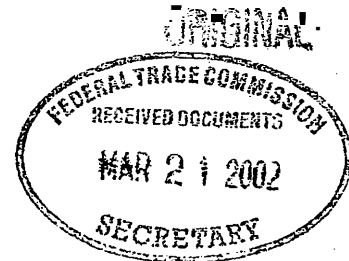
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**VIA AIRBORNE EXPRESS**

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



**Re: Telemarketing Rulemaking - Comments  
FTC File No. R411001**

Gentlemen:

On behalf of Craftmatic Organization, Inc. and its Independent Distributors the enclosed comments on the proposed changes to the Telemarketing Sales Rule are submitted. Enclosed please find six (6) written copies of the comments and a CD in Word Perfect 9.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles B. Chernofsky".

Charles B. Chernofsky

**CBC:hr**

cc: Craftmatic Organization, Inc.  
American Teleservices Association  
Direct Marketing Association

**TELEMARKETING RULEMAKING-COMMENTS  
FTC File No. R41 1001**

**SUBMITTED ON BEHALF OF:  
CRAFTMATIC ORGANIZATION, INC.  
and  
THE CRAFTMATIC INDEPENDENT DISTRIBUTORS**

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**INTRODUCTION**

Craftmatic Organization, Inc. is the creator of the Craftmatic Adjustable Bed, world-wide the most recognized name in electric adjustable beds, for both health and leisure use in the home. Craftmatic began selling its electric adjustable bed in 1974 in the Commonwealth of Pennsylvania. The Company has grown, through nine independent distributors to provide coverage for the entire Continental United States, and Puerto Rico. There are also company-owned retail operations in the United States, England, Scotland, Wales and Northern Ireland. Annually, Craftmatic and its distributors sell 50,000 beds directly to United States and Puerto Rico consumers, accounting for more than \$100 million in sales. More than 700,000 Craftmatic Adjustable Beds have been sold throughout the world.

The Craftmatic Adjustable Bed is promoted heavily through local, regional and national television advertising, direct mail advertising, magazine and newspaper inserts and in recent years telemarketing to prospective consumers. Telemarketing for Craftmatic and its distributors has two aspects:

1. Customers who respond to the Company's advertising and insert programs by mail or by calling an independent 800 telephone company. The mail responses request a telephone number where the consumer may be reached. The 800 telephone company acquires the consumer's name, address and telephone number. Those telephone numbers are stored in Predictive Dialers for a later call by a telemarketing operator from either the Company or the local distributor; and
2. Consumers whom Craftmatic believes, because of their demographics, would have an interest in a Craftmatic Adjustable Bed. Existing Craftmatic bed owners are also called to determine if they would like to trade-in their existing bed for an upgraded or larger size model or to replace an old mattress.

**In both instances the consumer is asked to set an appointment with a Craftmatic sales representative for a visit with the consumer in their home to present the Bed and its benefits. There is no attempt to sell the bed during these telemarketing calls. No sales presentation occurs without a prior appointment.**

Craftmatic does not manufacture. The Bed is crafted to Craftmatic's specifications by Leggett & Platt. Mattresses for the Bed must be specially designed to withstand the constant bending associated with an adjustable bed. Craftmatic's largest supplier of these special mattresses is Southerlands, Inc. of Nashville, Tennessee.

Craftmatic and its distributors throughout the United States and Puerto Rico employ approximately 500 telemarketing operators working two shifts per day, six days per week. The demographics of a typical operator/telemarketer are: (i) **an** undereducated individual in the lower range of the economical scale; (ii) a person providing a second income to a household through either **a** second job or a spouse; or (iii) a senior citizen seek to augment their social security-retirement income. **An** operator/telemarketer is **an** entry level position where success build self-esteem providing the incentive to seek or move up to a better position. These are the people who can least afford a reduction in income and those who would be most affected by the proposed changes to the Telemarketing Sales Rule.

The "domino effect" of these regulations **has** to be considered as well. If the business and employment of Craftmatic and other telemarketers is reduced so are the number of sales representatives, office personnel as well **as** the business and employment of their suppliers, manufacturers, advertising companies, printing businesses, television, newspapers, etc. The list of those affected is endless.

In 2001 telemarketing, business to business and business to consumer, provided six million (6,000,000) jobs and had total sales of \$661 Billion with sales to consumers accounting for \$278 Billion. While there may be a small vocal group demanding that telemarketing be prohibited or severely restricted, the consumer has supported telemarketing by casting their vote with their wallet to the tune of \$278 Billion annually. There can be no doubt that further restrictions on telemarketing **will** drastically affect those numbers and will do so in a time when the object of the government should be to strengthen a weakening economy rather than further weakening it by restrictive action that is not needed.

### **1. The Need For a National Do Not Call "DNC" List:**

Both the FTC Regulations under the Telemarketing and Consumer Fraud Prevention and Abuse Act and the FCC Regulations under the Telephone Consumer Protection Act require each telemarketer to maintain its own DNC list of consumers who specifically request that the telemarketer not call again. As of February 1, 2002 approximately twenty (20) States have enacted their own legislation requiring the maintenance of a Statewide DNC list and an additional 20 plus States have such legislation pending.

Even if the FTC were to provide that its proposed National DNC list preempts State laws, rules and/or regulations, such preemption would be applicable only to interstate telemarketing leaving telemarketing within the telemarketer's home State still to be regulated by that State. The proposed regulations would add another layer of regulation and cost over and above what now exists and what will continue to exist to cover intrastate telemarketing.

Maintenance of a National DNC would not be a simple matter. Craftmatic does not telemarket from a single call center. Each distributor markets to its licensed territory through its own call center. To purchase a national list would be more than is needed and its sheer numbers increase the likelihood of error, resulting in unwanted calls. Such a national list would have to be continuously maintained for area code changes (a regular occurrence), discontinued numbers (a daily occurrence) and because of the local nature of many telemarketing companies, be available on an area code and three digit exchange numbers basis.

A National DNC list would provide little benefit to the consumer over and above the existing FTC and FCC requirements for the maintenance of company specific DNC lists and the ever increasing number of State mandated lists.

## **2. Craftmatic Has a 1 Exemption:**

At present Craftmatic and its distributors are exempt from the Rule.

### **§310.6(c) Exemptions**

The following acts or practices are exempt from this Rule:

(c) Telephone calls in which the sale of goods or services is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation by the seller;

Craftmatic is concerned with the changes proposed to the exemption provided for in §310.6(c) and its negative impact on its business, its suppliers, its employees and the economy as a whole.

The Commission has proposed a limitation on that exemption:

(c) Telephone calls in which the sale of goods or services or charitable solicitations is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation by the seller or charitable organization, provided however, that this exemption does not apply to the requirements of §310.4(a)(1) and §310.4(a)(6), (b), and (c);

Of these limitations Craftmatic believes that **5310.4(b)(1)(iii)(B)** puts an unreasonable burden on Craftmatic's method of doing business **as well as** on other companies who do not complete a sale over the telephone.. Craftmatic is in **compliance** with the provisions of both the Telemarketing and Consumer Fraud Prevention **and** Abuse Act and the Telephone Consumer Protection Act wherein the Company and each distributor maintains **an** in-house Do Not Call List and **limits** their calls to the hours **as** set forth in the regulations issued thereunder. Further, Craftmatic **and** its distributors are in compliance with State laws, rules and regulations governing telemarketing, including but not limited to the purchase and implementation of the State DNC lists.

**5310.4(b)(1)(iii)(B)** declares the following to be an "abusive telemarketing act or practice":

(iii) Initiating any outbound telephone call to a person when that person previously has:

(B) Placed his or her name and/or telephone number on a do-not-call registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls, unless the seller or charitable organization **has** obtained the express verifiable authorization of such person to place calls to that person. Such authorizations shall be deemed verifiable if either of the following means are employed:

(1) Express written authorization by the consumer or donor which clearly evidences his or her authorization that calls made by or on behalf of a specific seller or charitable organization may be placed to the consumer or donor, and which shall include the telephone number to which the calls may be placed and the signature of the consumer or donor: or

(2) Express oral authorization, which is recorded and which clearly evidences the authorization of the consumer or donor that calls made by or on behalf of a specific seller or charitable organization may be placed to the consumer or donor; provided, however, that the recorded oral authorization shall **only** be deemed effective when the telemarketer receiving such authorization is able to verify that the authorization is being made from the telephone number to which the consumer or donor, **as** the case may be, is authorizing access.

More specifically it the definitions of "express written authorization" and "express oral authorization" that are most troublesome. The regulations issued under the TCPA §64.1200(f)(3)(i) exempt a telephone call: To any person with that person's prior express invitation or permission. That standard is acceptable and logical.

Presently when a consumer responds in writing to a Craftmatic advertisement or by calling an 800 number, the consumer is requested to provide their telephone number. Given the negative notoriety of telemarketing, it is inconceivable that a consumer providing their telephone

number would not **expect** a telephone call concerning the product advertised. If the consumer does not provide a telephone number, then the name and address is matched to determine if a telephone number is available, and then matched again against the company and State DNC list absolutely eliminating calls to a consumer who has expressed their wishes not to receive a call. This system works and is in no need for expansion through further restrictions.

Adding a requirement that a telemarketing company obtain and maintain, for an undisclosed period of time, the express written or recorded express oral permission to call is a burden without a benefit. In an era where the government seeks **to** reduce the paperwork required of businesses this requirement is a flagrant and costly violation of that goal.

Craftmatic receives tens of thousands business reply cards yearly from consumers which are now entered in the house computer system and then destroyed. These would now be required to be signed by the consumer and stored. Consumers, naturally, would have a reluctance to sign **a** request for more information for fear that their signature would be considered **an** order for the product.

Craftmatic as do most other television advertisers uses and "800" answering service. Under the express written and oral permission recording regulation those service companies would have to record each and every inbound call and store them in such a manner that they could be recalled by a particular advertiser, by consumer.

The FTC belittles the awareness of the consumer. When a consumer provides an advertiser with a telephone number it is implicit that they will receive a telephone call from the advertiser about a purchase of the product. In Craftmatic's **case** that subsequent call is not to sell but rather to **set** an appointment for a **sales** presentation. 'A simple hang-up by the consumer, a "no thank you", or a request to be put on the company's DNC list is all that is necessary to protect the consumer.

The requirement for express written permission, with a signature, or recording of express oral permission will not provide the consumer with any additional protection against the unscrupulous telemarketer, for with there exists adequate laws. Its only effect will be to stifle the legitimate telemarketing company, increase the cost of business and in fact constrain the volume of business with the negative effects previously mentioned on the employees and supplies of that company.

### **3. The Proposed Regulations Are Too Extensive:**

In as much as the use of the telephone for sales is a form of commercial advertising it is protected by the First Amendment, providing that the speech is truthful. Unless commercial speech proposes **an** unlawful activity or is misleading or fraudulent, the speech cannot be burdened. Any other regulation of speech will be upheld only if it: (a) serves a substantial government interest; (b) directly advances that interest; (c) is narrowly tailored to serve that interest; and (d) is not more

extensive ~~than~~ is necessary to protect that interest. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 431 (1980).

While it may be argued that the proposed regulation meets the first three prongs of the test, it certainly does not meet the final prong of the test...not more extensive than is necessary to protect that interest. The object is to balance the individual privacy rights with commercial free speech rights.

The establishment of a National Do Not Call List with its attendant costs to both business and government without any evidence that the presently mandated company specific lists and the State lists do not adequately protect the consumer is clearly "more extensive than is necessary to protect: any perceived interest. The requirement of Written permission, with a signature, or oral recorded permission is ~~far~~ more extensive and burdensome than what is necessary to protect any conceivable public interest.

### CONCLUSION

Craftmatic respects that the Commission has devoted a great deal of time and effort in reviewing the issues addressed by the proposed regulations. We urge the Commission to balance the perceived need for a National Do Not Call List and the additional limitations placed on those who do not make a sale over the telephone, but rather seek an appointment for a later face-to-face sales presentation, against the privacy benefits that might be realized by the consumer and the cost to business, to the government and the economy in adopting the proposed regulations.

Respectfully submitted,



Craftmatic Organization, Inc.  
By: Charles B. Chernofsky  
Regulatory Counsel