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To: "tsr@ftc.gov" <tsr@ftc.gov>
Date: Mon, Apr 15, 2002 12:16 PM
Subject: SIIA Comments: Telemarketing Rulemaking (FTC File No. R411001)

April 15, 2002

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Telemarketing Rulemaking (FTC File No. R411001)

Dear Secretary Clark:

(1) On behalf of the Software & Information Industry Association (SIIA), we submit the following comments to the Federal Trade Commission (FTC) Notice of Proposed Rulemaking (NPRM) regarding the Telemarketing Sales Rule (TSR), 16 CFR Part 310.

(2) SIIA is the principal trade association for the software and digital content industry. SIIA provides global services in government relations, business development, corporate education and intellectual property protection to more than 800 leading software and information companies.

(3) We have carefully considered the objective and underlying needs that have prompted the proposed changes to the TSR. However, we outline below a number of significant concerns regarding the potential unnecessary and inappropriate burden that will be placed on businesses by the proposed changes. While these comments do not comprehensively address the myriad details encompassed within the proposed rulemaking, we have focused on the areas specifically pertaining to the potential impact on the digital code and content industry, consistent with our expertise regarding this sector of the business community.

(4) In summary, we are concerned that the proposed changes to the TSR present a number of potential threats to business, particularly discriminating against software and digital content businesses. Our comments are intended to help focus FTC efforts on fraudulent practices, rather than implementing new rules that could present an undue burden on business and legitimate business practices. As a follow-on to these comments, we look forward to participating in the public forum to further explore the potential impact of these proposed changes on the software and digital content industry.

Proposed Exception for Internet and Web Services from the Business-to-Business (B2B) Exemptions

(5) The NPRM would eliminate "Internet Services" and "Web Services" from the list of B2B exemptions to the TSR. A careful scrutiny of the NPRM's analysis, however, points to concerns with "Web Site Cramming," rather than with "Internet Services" and "Web Services." While the stated objective of

excepting Web and Internet services from the B2B exemption is intended to protect small businesses from Web site cramming, these businesses could very well be the most disadvantaged if these changes are implemented. That is, rather than enabling successful ongoing efforts to combat fraud in this area, excepting these services from the B2B exemption is a very broad action that would shut-off small-business access to a legitimate, flourishing technology business model-effectively punishing small business customers and responsible vendors to prevent bad actors.

(6) The way that software is developed, distributed, implemented, purchased and utilized is presently undergoing one of the most profound changes since the advent of mass-produced software 1. Software is quickly transforming into a service, run over a network and provided to a customer via the Internet. The new Internet-based service model is particularly desirable to businesses because it enables software solutions to be efficiently customized, maintained and delivered. For small businesses, Internet-based software services present a significant cost savings by reducing reliance on in-house information technology infrastructure and support system. In many cases, Internet-based services enable small businesses to afford new products not previously affordable.

(7) Similarly, the way that content is published, disseminated and accessed is also undergoing a significant transformation brought about by the Internet. Over the last five years, we have seen a dramatic shift from printed literature and publications to literature and publications delivered via the Internet. For example, a periodical that was obtained by a business in hard-copy form several years ago, is now very likely to be available via Web or Internet subscription services-services that often provide more efficient and cost effective delivery. Therefore, the proposed exception would effectively discriminate against the marketing of Internet-based digital content products, despite their increasing popularity among consumers.

(8) Given that the fundamental change in product/service platform is being brought about by the growing importance of Internet and Web services, the method by which such innovative services are increasingly offered, the B2B exemption for Internet and Web services would thwart the continued development and promotion of a burgeoning business-model for delivery of software and digital content. Also, the proposed elimination of "Internet Services" and "Web Services" from the B2B exemption appears unwarranted in light of the specific enforcement actions that the FTC has been able to undertake as described in the NPRM.

(9) Therefore, we recommend that the FTC not pursue the proposed exception for Internet and Web Services. However, if this approach is pursued, changes in definition(s) should be made to specifically limit the exception to Web site cramming, as to not unfairly prohibit the development of a dramatic transformation in services.

Pre-Established Business Relationship

(10) Secondly, the disregard for existing, pre-established commercial relationships in the proposed changes to the TSR would serve to limit consumer choice by stripping the power of informed consumers-potentially in certain cases where consumers have explicitly requested to receive notification of new opportunities. Under the proposed changes, vendors

would be required to obtain "express verifiable authorization" prior to calling a customer who has registered on the national do not call registry. At the same time, customers would not likely realize that their presence on a national do-not-call list would prohibit business with pre-established relationships from contacting them under the same circumstances.

(11) As the Commission continues to explore changes to the TSR, it should take into consideration the ability of a business to communicate with individuals with whom they have a pre-established commercial relationship, even those that have registered on a potential do-not-call list. If not, the Commission risks undermining the rights and abilities of informed consumers who enjoy being presented with opportunities from vendors that they know and trust. Therefore, we recommend that the Commission consider an exception for existing relationships.

Proposed Change in "Outbound" Calls and "Upselling"

(12) The Commission's proposal to change the definition of an "outbound" call would effectively convert an "inbound" call to an "outbound" call for purposes of the TSR. As a result, the disclosure requirements under the TSR would be triggered in such third party up-sell situations and additional obligations and restrictions would be applied accordingly.

(13) This proposed change could have the undesirable affect of discouraging good customer service by prohibiting company representatives from referring interested customers to a different destination, regardless of customer desire. Particularly when combined with the proposed disregard for existing business relationships, as discussed above, this proposed change would most definitely lead to inferior customer service, and sometimes prevent customers from obtaining cheaper, more appropriate products or services.

(14) The NPRM explains that the objective for expansion of the definition seeks to ensure that consumers receive material disclosures in such situations. However, this objective could best be accomplished in such situations through specifically requiring the relevant disclosures, rather than incorporating them into a definition of "outbound" call. Therefore, we recommend that the commission explore the use of appropriate, relevant disclosures, rather than requiring a change in classification of the call.

Conclusion

(15) The changes identified above present serious concerns independently, and when combined, could have a debilitating affect on the software and digital content industry. We therefore strongly urge the Commission to reconsider these proposed changes to the TSR.

(16) Finally, we recommend that implementation of a national do-not-call registry be established as a preemption to existing and pending state laws and do-not-call lists. Although preemption is not within the jurisdiction of the FTC, myriad state laws and do-not-call lists would create an undue burden, potentially complicating compliance to the result of decreasing effectiveness. We look forward to FTC consideration of these comments, and to the ensuing discussion at the June workshop.

(17) If you have any further questions, please contact Mark Bohannon, General Counsel and Senior Vice President Public Policy (202-789-4471), or

David LeDuc, Director of Public Policy, (202-789-4443).

Thank you.

Sincerely,

Ken Wasch
President

1 - Industry Leaders' Plans for Web Services: What Does it Mean for ISVS?
An Analysis of Next Generation Software Platforms; SIIA; 2002.