UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In The Matter Of Telemarketing Rulemaking -

FTC File No. R411001

SUPPLEMENTAL COMMENTS OF THE AMERICAN TELESERVICES ASSOCIATION ON THE PROPOSED REVISIONS TO THE TELEMARKETING SALES RULE

INTRODUCTION

The American Teleservices Association (the "ATA"), respectfully submits these supplemental comments to the Federal Trade Commission's (the "Commission") proposed revisions to the Telemarketing Sales Rule ("Rule"), which implements the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 (the "Act"). These supplemental comments are submitted pursuant to the Notice of Proposed Rulemaking ("NPRM" or "proposed Rule") issued by the Commission on January 30, 2002 at 67 Fed. Reg. 4492 and are designed to provide information not contained in the ATA's original comments and to respond to specific requests made by the Commission during the Telemarketing Sales Rule Forum held in Washington, D.C. on June 5-7, 2002.

The ATA is the trade association dedicated to the teleservices industry, representing the providers and users of teleservices in the United States and around the globe. The

ATA was founded in 1983 to provide leadership and education in the legal, professional and ethical use of the telephone, to increase service effectiveness, enhance customer satisfaction and improve decision making. Today, the ATA has more than 2,500 member companies representing all segments of the industry, including telemarketing service agencies, consultants, customer service trainers, providers of telephone and Internet systems, and the users of teleservices, such as advertisers, non-profit organizations, retailers, catalogers, manufacturers, financial service providers, and others, (a copy of our membership list was attached to our original submission).

Without amending, revising or reversing any of the positions taken by the ATA in its initial submission of comments, the ATA feels compelled to respond to several matters that were (1) discussed during the Telemarketing Sales Rule Forum and new proposals were offered, or (2) raised for the first time during the Telemarketing Sales Rule Forum. Therefore these supplemental comments should be read as a response to such matters. The ATA's willingness to discuss these matters, including but not limited to, certain specific provisions related to the national Do-Not-Call registry, in no way signals or implies that the ATA believes the Commission has the necessary authority to create such a registry or that the creation of such registry is in the public interest. Even with some of the modifications offered by the Commission during the Telemarketing Sales Rule Forum, it is still the position of the ATA that in its proposed form, the scope of activities covered by the Rule are so broad, and certain provisions are so onerous and unwieldy, that legitimate telemarketing activities will be severely impaired and certain widely used industry practices will become effectively banned with little or no benefit to consumers.

Despite recent comments by some representatives of the Commission that suggest the contrary, the ATA's commitment to encouraging and conducting legitimate and honest telmarketing programs and the commitment of the overwhelming majority of ATA members to adopt such programs is without question. It is with that background that we submit the following supplemental comments regarding the proposed revisions to the Rule.

I. *SPECIFIC PROVISIONS OF THE PROPOSED RULE*

A. The Commission Should Not Amend The Definition Of "Outbound Telephone Call" To Include Upsells & Cross-sells.

It was clear from the discussion at the Telemarketing Sales Rule Forum, that amending the definition of "Outbound Telephone Call" as proposed by the Commission would raise a myriad of unintended consequences for consumers and business alike. In addition to the obvious troubles caused by such an amendment, including the calling time restrictions and the Do-Not-Call problems, it was pointed out by ATA and others, that many legitimate activities offered by business as a convenience to consumers would be impacted as well. The most glaring example involved the use of a direct mail piece or an e-mail that invited consumers to call an airline to purchase tickets for travel. Under the definition of "outbound telephone call," that airline may not be able to offer the consumer the assistance of booking hotel or car rental reservations without first walking through the litany of disclosures mandate by the Rule, some of which may be appropriate and others which may simply be confusing or annoying to the consumer.

As was noted in the ATA's initial comments, ATA supports the concept of appropriate disclosures and authorization prior to engaging in upselling and cross-selling.

To that end, the ATA would urge the Commission to recognize a separate business practice that is upselling or cross-selling and define these activities as such. Once these practices are defined, the Commission should require certain disclosures that would apply only in the limited context of these activities.

Such disclosures should be limited to those that ensure that the consumer is aware that they are beginning to engage in a separate transaction, the identity of the parties involved in this new transaction and the material terms and conditions of the new transaction. In particular, the ATA would support revising the Rule to require the disclosures contained in Sections 310.4(d)(1), 310.4(d)(3) and 310.4(d)(4) of the Rule, if such information is different than that contained in the original transaction. In other words, ATA would support requiring the disclosure of the identity of the seller, the nature of the goods or services being offered and the relevant prize promotion disclosures, should any of that information be different than that which the consumer has from the initial call. In an inbound situation, if the seller that prompted the consumer to call in the first place is the same seller in the upsell or cross-sell, then that seller should not be forced to repeat the name of the company again. Such disclosure would be annoying to most consumers and provide no benefit to any party. However, if the seller offering the upsell or cross-sell is different than the initial seller, then obviously the identity of the new seller should be disclosed prior to the beginning of the new sales presentation. ATA believes that the disclosure required by Section 310.4(d)(2) would be unnecessary also. In an outbound call, it is already clear to the consumer from the initial transaction that the purpose of the call is to sell goods or services. There is no valid reason for requiring that disclosure again. Such reasoning holds true especially in an inbound situation. The

consumer who is responding to an advertisement and calling ostensibly to purchase goods or services is already aware that the call is to sell goods or services. There is no point in making such a disclosure again.

Once these initial disclosures have been made, the ATA would support the same disclosures required in Section 310.3(a)(1) of the Rule. The only distinction that needs to be made here is the requirement that these disclosures be made before the "customer pays for goods or services". Since in most upselling and cross-selling transactions, the consumer has already "paid" for the initial goods or services, it is a technical impossibility for the seller to make these second disclosures prior to the customer paying. Under the circumstances, the ATA would support a requirement that mandates these disclosures simply be made before the consumer agrees to purchase the goods or services.

Up-sells and cross-sells in and of themselves are not deceptive or abusive. Therefore the Commission should refrain from redefining "Outbound Telephone Call" and should revise the Rule to provide an additional disclosure and consent requirement for transferring customers from one seller to the next.

B. Special Regulation Of Preacquired Account Information Is Unwarranted

Like upselling and cross-selling, there is nothing inherently fraudulent, abusive or deceitful in using preacquired account information to provide a shorter, easier transaction for consumers. In fact, it is a practice used by much of the legitimate business world in both telemarketing and non-telemarketing transactions. A ban on the use of preacquired account information in telemarketing transaction would again result in unintended consequences that would far exceed the congressional mandate and the stated goals of the Commission. Using the example that was cited above (and also used at the

Telemarketing Sales Rule Forum) regarding the airline program, the proposed revisions to the Rule would ban the ability of the airlines to offer additional travel related options to their customers. Accordingly, any regulations adopted by the Commission should appropriately target only the fraudulent and abusive conduct of the boilerrooms , while preserving the ability of legitimate telemarketers to employ this legal and ethical business practice. Given the examples that were noted during the Telemarketing Sales Rule Forum of entirely ethical business practices that would be impacted by the Commission's proposed ban on the use of preacquired account information, it is clear that a modified position is appropriate.

From the comments made by the representatives of the Commission and others at the Telemarketing Sales Rule Forum, it appears that it is the unknowing transfer of such information that is the primary concern raised by the use of this business practice. The ATA supports any revision to the Rule that would prohibit the transfer of consumer account information to another marketer without the consent of the consumer. To that end, the ATA supports the proposal submitted by the Electronic Retailing Association in its "Additional Comments Of The Electronic Retailing Association Regarding The Commission's Notice Of Proposed Rulemaking To Attend The Telemarketing Sales Rule." ATA believes that the Commission could strike the required balance between consumer protection and legitimate marketing practices by revising the Rule, in situations where a single seller offers the products or services of another or where a second seller offers their own goods or services after an initial solicitation, to require:

(1) Clear and conspicuous disclosure that there is an additional seller offering goods or services, the identity of that new seller and the purpose of the new offer;

(2) Clear and conspicuous disclosure of all material billing information prior to obtaining the consumer's consent to the offer, including in certain situations, the account that will be charged for the purchase; and
(3) Express verifiable consent to the transaction through one of the four listed methods.

These disclosures would not be required when the additional offer is made by the same seller, selling its own goods or services, nor would these disclosures be required by an affiliate of the original seller, using the definition of affiliate provided by ERA.

In those transaction where the marketer is truly operating with "preacquired account information" as it is known to the industry (where the seller has the consumer's account information prior to having any contact with the consumer and without the consent of the consumer) ATA would support a ban on marketing with such information.

C. National Do-Not-Call Registry Exceeds The Commission's Authority And Is Unnecessary Under The Existing Structure of Federal, State And Industry Regulation.

This is the primary area in which the ATA seeks to address specific issues raised by the Commission, while disagreeing with the need to even discuss these issues. The ATA maintains its position that the proposed registry is unconstitutional. The ATA also maintains that a truly valid registry must contain an annual renewal provision and require a nominal fee to ensure registrant identity. In addition, the ATA reiterates its position that the proposed registry is a prime example of government trying to offer simple solutions to complex problems and the result is, as usual, bad public policy. With that background, the ATA is committed to working with the Commission to ensure that all of the interested parties have a clear understanding of the issues involved with the registry and the consequences associated with this proposal.

1. **The Proposed Registry Must Include An Exemption For Calls Made To Consumer's With An "Established Business Relationship."**

As noted in the ATA's earlier comments and during the Telemarketing Sales Rule Forum, the ATA believes that an exemption for established business relationship is appropriate. A consumer who has purchased or inquired about a purchase from a particular business, has obviously indicated some interest in the particular products or services offered by that business and such calls should not be lumped with cold calls to consumers. This fact has been recognized over and over again by various state and federal regulatory bodies. The FCC has acknowledged that calls made to consumers with an established business relationship are outside the scope of the TCPA's do-not-call scheme. Of the 26 states that have enacted their own do-not-call registries, 25 have provided for an established business relationship exemption. Clearly this is an option that has been reviewed and overwhelmingly supported. Consumers do not view contact with the companies they do business with as infringing on their privacy. Thus ATA would support an exemption for an "established business relationship" and such term should be defined as:

> "A prior or existing relationship formed within the previous 24 month period by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party."

This definition, which is similar but a little more restrictive than the definition adopted by the FCC, strikes the appropriate balance between consumer expectations and legitimate

business practices. While this exemption does allow certain companies to place calls to consumers who have placed their number on the registry, the proposed definition still allows those consumers to maintain their rights to terminate this relationship under the existing company specific do-not-call requirements and prohibit all such calls in the future.

2. It Is Virtually Impossible For The Commission To Separate The Administration Of The List From The Enforcement Of The List, And Thus The Proposed Harmonization Of The Commission Registry And The State Lists Will Not Work Without Standard Terms And Enforcement

The ATA was encouraged by the Commission's acknowledgement during the Telemarketing Sales Rule Forum that the cumulative burden on business and the potential for confusion and frustration among consumers with the patchwork collection of state and federal do-not-call poses a problem. The ATA certainly understands the herculean task facing the Commission if it chooses to proceed with the national registry. However, just "harmonizing" the lists by allowing the states to forward their registrants to the Commission registry will not alleviate these problems. This simple harmonization will cause even greater confusion among consumers and industry alike. What happens to the Texas consumer who signs up for his/her state list? The Texas state list contains certain exemptions which may or may not conform with the exemptions established by a Commission registry. If Texas forwards that consumer's name to the Commission, and a particular business acquires the Commission list with that listing, what is a business to do? It is entirely possible that the relevant business would be exempt from the do-not-call requirements of Texas, but may not be exempt from the Commission requirements.

Given that the ATA and its members believe that Texas has no authority to enforce its statute against companies making interstate calls, the question gets muddied even further.

Another potential problem exists in those states that charge a fee to be included in the state registry. If I am a consumer and I have paid to have my name included on my state registry, and my neighbor was able to place his/her telephone number on the Commission registry for free and these result in essentially the same standard of limiting calls, I am going to be very upset with my state administering agency that forced me to pay for the list. Likewise those states that have differing time periods. Some states require annual registration, while others keep registrants on the list for up to five years. It is irrelevant whether the Commission adopts a certain time frame or not. Even a perpetual listing in the Commission's registry will treat people from the same state differently just because they chose differing avenues to have their name placed on the national registry. What will result is utter chaos. Businesses and consumers will spend more time and money assessing what the various rules require or permit, and less time on the purported goal of the program, which is to avoid unwanted calls.

The only really effective solution to this problem is, as the ATA stated in its previous comments, a complete preemption of all state do-not-call programs. Then and only then will consumers and business have a clear understanding of their rights and responsibilities. Short of complete preemption, the Commission may be able to fashion an alternative program where the various states agree to adopt uniform exemptions, registry structures and enforcement provisions. That however, is obviously a monumental undertaking and one that would take a considerable amount of time to achieve.

The only thing that is clear, is that this issue still requires substantial discussion and review. It cannot be accomplished by the simple stroke of a pen. The Commission must hold additional hearings and provide all interested parties with an additional comment periods if anything short of preemption is proposed.

V.) *REQUESTS FOR COMMENT*

A.) A Zero Abandonment Rate Should Not Be Imposed On The Use of Predictive Dialers

Predictive dialer technology has resulted in an exponential increase in productivity for the telemarketing industry. The predictive algorithm forecasts how many numbers to dial to ensure a live operator is available when a consumer answers the phone. As with any system that uses averages, the situation inevitably occurs when more consumers answer than live operators are available. This creates a "dead air" call and, if the call is terminated without consumer and operator making contact, an abandoned call results. This byproduct of predictive dialer technology has become a consumer issue. To answer the phone to find no one on the line purportedly creates anxiety for some consumers (although no data has been provided to substantiate this claim and the record contains nothing but anecdotal evidence) and has created pressure to develop solutions to the problem.

Giving the benefit of the doubt to those that claim that predictive dialers pose a problem for consumers, the ATA believes the most desirable solution to this situation is to ensure the identity of the caller is disclosed to the consumer. If a live operator is not available to take the call when a consumer answers, the playing of a recorded identity message will assure the consumer that the call is not sinister in nature. A survey of ATA members indicates nearly 75% of dialers in use have the capability to play a recorded

message. While no definitive information exists, many of the remaining users believe software upgrades would provide that capability.

The major impediment to adopting this logical and practical solution is a provision in the Telephone Consumer Protection Act (TCPA) which prohibits using recorded messages for solicitation purposes. The practice that this provision was intended to deal with when the statute was passed in 1991 no longer exists. At that time, earlier generation autodialing machines played recorded messages. When uninterested consumers hung up, the connection was not terminated immediately and the message played to completion. If the consumer subsequently picked up to make another call, they might find the line still connected to the recording. In addition to the inconvenience, a legitimate concern was that tying up the line carried safety consequences if the consumer tried to place an emergency call. That old autodialer technology has been replaced by predictive dialer systems that clear the line immediately when the caller or the consumer terminates the call. The TCPA provision, however, remains in effect and has now become a law of unintended consequences.

It would seem reasonable that industry and the Federal Communications Commission (FCC), which has oversight of the TCPA, could work together to develop a ruling resolving the dead air call problem while preserving the intent and integrity of the original provision. Opposition to this solution seems founded in a fear that industry would use this option for solicitation purposes. ATA is confident that language can be crafted to restrict the playing of messages to purposes of identification only, thus preserving the TCPA intent of prohibiting prerecorded solicitations.

Other solutions advanced include restricting the number of abandoned calls that can be made. While this may provide some reduction in the number of such calls, it cannot eliminate all. The number of callers not subject to the TSR is considerable. If no identification recording is played, the alleged problem of consumer anxiety would remain.

The primary feature of this alternative is placing a percentage restriction on the number of abandoned calls. The Commission requested information related to the impact of such percentage restrictions on the industry. A major challenge in assessing such impact and devising an appropriate remedy lies in agreement on what constitutes an abandoned call and how it would be measured. To do so requires common understanding of terms between industry and regulators. ATA regrets that attempts to clarify this important issue with the FTC staff during the Telemarketing Sales Rule Forum were not successful.

The first step in developing a universal industry standard lies in determining what constitutes an abandoned call. Simply saying that it occurs when a live operator is not available when a consumer answers the phone belies the complexity of the issue. Most definitions stipulate that a connection must be made and subsequently terminated. Several considerations enter into this scenario. What constitutes a connection? An answered or "off hook" phone call may actually be to an answering machine or other electronic device, not a live person. This should not be considered a connection for abandoned call purposes.

When a phone is answered, the dialer makes a determination whether a live person or electronic device is on the line. The dialer consumes a degree of time to make this

determination. Dialers typically have a "hold time" programmed into the system to allow for the dialer to make this determination and allow a reasonable time for an operator to become available to handle the call. If a consumer answers the phone and no operator is available, they may not wait the entire hold time before terminating the call. In this common scenario it is important to note that it is the consumer, not the dialer, that abandons the call. This should not be considered an abandoned call for record keeping purposes.

How long is a reasonable hold time before a live operator comes on the line? Practices vary, some as little as two seconds, others five seconds and longer. To make allowances for the dialer to determine whether a live person or a machine is on the line, ATA suggests any proposed standard allow four seconds before the call is abandoned. In summary, an abandoned call should, at a minimum, be one in which a live consumer answers and a live operator does not come on line within four seconds. Any call in which a live consumer does not answer cannot be considered to be an abandoned call. Any call in which the consumer terminates a call, not the dialer, cannot be considered to be an abandoned call.

What should be an acceptable abandoned call rate? ATA has historically declined to set a specific percentage standard for abandoned calls, for fear that this may appear to encourage those companies that operate below 5% to increase their abandonment rate. Instead, ATA recommends that call centers adhere to the lowest possible number that still allows them to operate with efficiency while avoiding unduly burdening consumers with dead air calls. This recognizes that optimum efficiency will vary according to the time of day, day of the week, product being marketed, and target audience.

As noted above, the vast majority of ATA members operate at 5% or less. 94% advise they could operate effectively if a 5% standard were imposed on the industry. That number drops precipitously to 60% if the standard were set at 3%. Most respondents indicated significant deterioration in efficiency and productivity sets in at this level. Based on their experiences, most indicated any standard below 3% would be unworkable and would negate the productivity advantages of predictive dialer technology. ATA therefore recommends that a 5% standard represents an optimum balance between the interests of business and the concerns of consumers.

How would compliance with any standard be measured? While most call centers measure rates as a percentage of calls answered, there are a limited number that measure a percentage of calls dialed. For standardization purposes, ATA believes a percentage of calls answered by a live consumer should be the universal standard for measurement.

This is another area that the ATA believes a mutually satisfactory resolution can be established, but to achieve such a solution will require considerably more information from the Commission and probably additional hearings or comment periods. Such a solution must include a combination of the use of recorded identification messages and reasonable abandoned call standards which will preserves the productivity advantages of predictive dialer technology while answering the legitimate concerns of consumers. The ATA respectfully urges the Commission to review the information contained in the study prepared by the Consumer Choice Coalition and to use that as a basis for these further discussions.

B.) Additional Information And Review Is Necessary Before An Appropriate Regulation Of Caller ID Can Be Established

Among the uses of Caller ID services is the ability of consumers to preview incoming calls to make a determination whether to answer or not. Concern has been expressed in some quarters that unscrupulous marketers deliberately block their Caller ID signal to deny consumers the knowledge to make an informed decision. ATA has long maintained that no ethical marketer would deliberately block their Caller ID signal. On the contrary, mainstream marketers want the consumer to know who is calling, knowing that name brand recognition is among their strongest marketing advantages. This is particularly important to independent call centers with multiple clients. In such instances, marketers would want to ensure identification data for each separate campaign is displayed to consumers. Calls on behalf of a national known producer of outdoor clothing, for example, would want that identification displayed rather than the information for XYZ Call Center Company. Consumers are far more likely to respond to a name they recognize than the unfamiliar name of a third party agent.

It is important to understand that, under current law, blocking the Caller ID signal is perfectly legal. It was, in fact, a capability the FCC required when approving such systems for the marketplace to ensure the privacy and safety of consumers. A review of the legislative history reveals, for example, concern that residents of battered women shelters be able to make calls without disclosing their locations to those that may seek to harm them. Typically, any user can block the Caller ID signal by dialing a 2-digit number before dialing the regular number.

Congress has introduced legislation, however, that would prohibit telemarketers from intentionally blocking this signal. H.R. 90, the Know Your Caller Act, would make it illegal to engage in this practice for purposes of deception. H.R. 90 has passed the House

and is now pending in the Senate. ATA has testified before the House Commerce Committee in support of this bill.

There is an additional facet to the concern over Caller ID issues. There is a movement in some circles to go beyond a prohibition against deliberate interference and mandate that Caller ID signals display a minimum standard of information in all cases. Such proposals display a uniform lack of knowledge regarding the technology issues involved. The premise seems to be that simply mandating that information be displayed would cause the data to magically appear, that telemarketers must be doing something to prevent it from displaying.

In fact, the failure to display Caller ID information that has not been blocked is due to limitations in the equipment capability of the nation's common carrier system. It has nothing to do with the equipment unique to the telemarketing industry. The signal containing the Calling Party Number (CPN) is generated by dialers in a call center automatically, just as it is in every other commercial and private application. Whether the signal is conveyed over the common carrier system is dependent upon the capability and compatibility of a multitude of different switches and trunk lines across the country from Point A to Point B. There are some 2,000 local phone companies across the United States. The signal generated by telemarketing equipment is no different from that of any other business using these same systems.

An exhaustive treatment of the technology issues involved is beyond the scope of these brief comments. We would urge a review of the transcript of the July 2000 TSR Review forum on the Commission web site that devotes some 50 pages to a discussion of the technology issues by a telecommunications engineer. As an engineer who

participated in the Telemarketing Sales Rule Forum advised, while some advances in the nation's common carrier system have taken place in the intervening two years, the system is still not capable of universal display of Caller ID information. There are still areas of the country where ANI technology is not available. There are still areas of the country operating on 3 and 4 member party lines. An informal survey of phone companies indicates it will be at least a decade before universal display capability exists, if then. Existence of technological capability is not the same as availability. The complexity of these issues is a major factor in ATA support of H.R. 90 which calls for a national study by the FCC of the technology issues involved, the feasibility of a universal display capability as well as the financial impact of such a capability.

ATA notes the example of one major call center company at the Telemarketing Sales Rule Forum which is able to successfully display its information. This company, however, is one of the nation's largest call center businesses in the country with state of the art technology and centers in virtually every state. This greatly reduces the switch/trunk line compatibility problems faced by the rest of the industry. Few companies can afford the technological expenditure or the nationwide physical presence of this company. The experience of one large company cannot be extrapolated to the industry as a whole.

ATA supports the proposed prohibition against the deliberate blocking of Caller ID signals. ATA supports the Congressional call for an FCC study of the technology issues involved. ATA opposes any proposal to mandate display of Caller ID information. Given the state of the nation's common carrier capability, now and in the foreseeable future, such a proposal would be unwarranted and unworkable.

Conclusion

While these supplemental comments highlight significant concerns that the ATA feels were not addressed in our initial comments, the ATA still believe that the proposed Rule can be amended to reach a satisfactory balance. The ATA, its Board of Directors and many of its individual members have a long standing commitment of cooperation with the Commission, and the ATA looks forward to continuing this relationship and working with the Commission to remedy these problems.

Respectfully Submitted:

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