fax to: 615 741 5015
6 pages

To: David Waddell
Executive Secretary
Tennessee Regulatory Authority

Re: Docket No. 99-00645

On behalf of the 4,800 member companies of the Direct Marketing Association,[1] we write to request amendment of certain proposed telemarketing practice rules, 1220-4-11-.01 to 1220-4-11.15 (the "Rules"), that are being considered by the Tennessee Regulatory Authority ("the Authority").

The Rules identified below must be modified before they can work to best serve consumers and business. Compliance with certain Rules is technologically impossible, and economically impossible for smaller businesses. Finally, some of the Rules may actually harm consumers – the very class the Authority seeks to protect. As such, these Rules must be amended.

1. **Rule 1220-4-11-.02**

a. Sub-Section (4) Duplicates Existing Federal Regulations

Sub-section (4) of Rule 1220-4-11-.02 requires telemarketers to begin each call by stating the caller's name and business. It also requires telemarketers to provide the business's telephone number upon request.

FCC regulations already require telemarketers to identify the caller's name, organization and contact information during the call. See 47 C.F.R. § 64.1200(e)(2)(iv). Applicable federal law governs all interstate calls; sub-section (4) should be deleted.

b. Sub-Section (6) Imposes Requirements That Are Technologically And Economically Impossible

Sub-section (6) prohibits telephone companies from "providing any network service" that would "block" the display of the telemarketer's name and telephone number from

---

[1] Fifty-three of The Direct Marketing Association's member companies are headquartered in Tennessee, and an additional 29 have operations in Tennessee. Direct marketers employ 439,191 Tennessee citizens, and generate $25.7 billion in sales revenue for the State of Tennessee.

(6) Local exchange carriers and inter-exchange carriers are prohibited from providing any network service to telemarketing companies that would block the display of the telemarketer's name and telephone number on the called party's caller ID equipment.

The DMA supports prohibiting deliberate and deceptive concealment and alteration of caller ID information. The DMA requests clarification that sub-section (6) does not require carriers to accurately display the actual telephone number from which the call is being made.

This is technologically and economically infeasible. Caller ID service is based on the caller's billing account. For most telemarketers, a single billing account covers multiple telephone numbers. Many telemarketers also use "dedicated service lines," which are lines that offer no choice of long distance service. Under the present technology, there are only two ways of associating dedicated service lines with billing accounts. Unfortunately, both ways are extremely burdensome and cost-prohibitive.

The first method is to assign large blocks of telephone numbers to long distance carriers. Logically, this will result in fewer telephone numbers being available. As such, telephone prefixes will have to be changed, re-assigned and re-shuffled in large service areas (such as cities). Moreover, fewer available telephone numbers would hinder the entry of new telephone companies into the market. This would come at great cost to consumers, who have historically benefitted from competition between telephone companies.

The second way of associating dedicated service lines with billing accounts requires the caller to buy additional equipment known as SS7 nodes. This equipment costs millions of dollars; only the largest businesses could afford it. Small businesses will be unable to comply with sub-section (6), and will thus be prohibited from telemarketing. For the many small companies that earn most of their revenue through telemarketing, the inability to telemarket means the end of business.[2]

The Rule should be clear -- that deliberate and deceptive altering and concealing of the caller's name and telephone number — is prohibited.

2. Rule 1220-4-11-.10

a. Sub-Section (3) Refers To A Non-Existent Federal Database

Rule 1220-4-11-.10 requires the Authority to maintain a database of the names, telephone numbers and addresses of persons who do not wish to receive telephone solicitations. Sub-section (3) requires the database to include persons who have subscribed to "the Federal Communications Commission's Do Not Call Database." However, the FCC

[2] For a more detailed and technical explanation of the limitations of the present caller ID technology, please contact Dan Smith at (800) 890-5900.

has no such database. As such, sub-section (3) should be deleted.

b. Sub-Section (4) Wastes State Money And Resources

Sub-section (4) requires the Authority to update its do-not-call database frequently, "at the beginning of each month." Such frequency is unnecessary. Most people do not change their names, addresses or phone numbers every month. A more reasonable and sensible requirement would be to require the database to be updated *quarterly*. The "worst" that can happen is that a person receives an unwanted solicitation for three months rather than one month – a very slight burden to the consumer, when compared with the costs of monthly updating.

3. Rule 1220-4-11-.11

a. Sub-Section (2) Of Rule 1220-4-11-.11 Requires Updates That Are Too Frequent, And Fails To Include Necessary Entities Within The Database Distribution Network

Sub-section (2) requires businesses to have "the latest version" of the do-not-call database before making any telephone solicitations. Although it is far from clear, "the latest version" apparently refers to the version of the list as of the last monthly update. As discussed above, however, monthly updating is unnecessary. Updates should be required once per quarter.

Sub-section (2) also forgets to include an important group in the database distribution network: list managers. List managers are businesses that many marketers and telemarketers hire to manage and maintain their consumer marketing lists. In order for telemarketers to comply with Rule 1220-4-11-.11, federal law and an industry maintained list, they depend upon list managers to manage their lists. The present sub-section (2) does not clearly allow for this. Although it allows telemarketers to share the database with their "independent telemarketing contractors," this term does not clearly include list managers. "Independent telemarketing contractor" is defined as a person or entity "employed" by a telemarketer "for the purpose of soliciting or disseminating information over the telephone . . . ." List managers, however, are arguably not "employed" by telemarketers. Nor are list managers used to solicit or disseminate information. Rather, they are hired to manage and maintain marketing lists. Because of the necessary role of list managers in telemarketing, sub-section (2) of Rule 1220-4-11-.11 should be amended to include them in the database "sharing" network.

b. Rule 1220-4-11-.11 Denies Businesses Due Process By Attempting To Limit Client Bases

Sub-section (4) allows independent telemarketing contractors to apply for a reduced annual fee of $250, but permits only five contractors per company. Furthermore, it gives Tennessee the authority to determine a contractor's "status."

In so doing, sub-section (4) unconstitutionally dictates how many clients with whom

a business may associate. Freedom to associate "is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." NAACP v. Alabama, 357 U.S. 449, 460 (1958). Such freedom is guaranteed to not only political and religious groups, but economic alliances. State regulations that curtail association are subject to "the closest scrutiny," and will be struck down if they do not further a "compelling" state interest. Id. at 460-1; Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

The only apparent reason for the five-contractor limit is to allow the Authority to charge the full $500 annual fee (rather than the discounted $250) for contractors in excess of five. This does not constitute a "compelling" interest capable of withstanding constitutional scrutiny.

4. **Rule 1220-4-11-.12**

Sub-Section (1)(b) Proposes An Unreasonably Long Time For Consumers To Remain In The Do-Not-Call Database

Sub-section (1)(b) of Rule 1220-4-11-.12 provides that residential subscribers will remain on the do-not-call list "until he/she requests the Authority remove their name." Because people are almost certain to forget that they are on the list after a relatively short time, this Rule effectively keeps persons on the list for their lifetime.

It is an understatement to say that a lifetime is unreasonably long. Many people may change their mind about wanting to receive telephonic commercial offers, and, because they will have forgotten that they are on the do-not-call list, they will not know why they no longer receive such offers. Moreover, people move and change their telephone numbers (and even change their names, especially in the case of marriage or divorce) several times during their lifetime. Not providing for a renewal will ensure that the list is hopelessly inaccurate.

A much shorter time period is warranted, as federal law, private authorities and other states have recognized. Under federal law, a no-solicitation request must be honored for ten years, after which time it may be renewed. See 47 C.F.R. § 64.1200(e). Under the Telephone Preference Service, which maintains do-not-call lists free of charge, the period is five years. States such as Georgia and Florida provide for a one-year period. We ask Tennessee to follow these states and provide for a renewable one-year time period.

Providing for a one-year renewable period would also avoid the "purging" scheme proposed under sub-section (1)(c). That sub-section directs the Authority to "purge" the do-not-call list "periodically in order to ensure accuracy." Once the list is purged, it will have to be compiled all over again – even for persons who requested inclusion on the list a very short time before the purging. Tennessee can avoid this purging scheme simply by providing for annual renewal.

A more equitable alternative is to inform consumers of free protections that already

exist. The Telephone Preference Service, mentioned above, will, upon request, remove a consumer's name and telephone number from national solicitation lists free of charge. Federal law requires a marketer to maintain a do-not-call list.

5. Rule 1220-4-11-.14

The Penalties Set Forth In Sub-Sections (2) And (4) Are Excessive, And The Manner Of Calculation Is Vague And Inequitable

Sub-section (2) of Rule 1220-4-11-.14 provides for civil penalties of $2,000 for each violation of the do-not-call regulations. Sub-section (4) requires penalties to be calculated "in a liberal manner."

The $2,000 per-violation fine is excessive and disproportionate to any "harm" created. This amount is many times greater than, for example, a moving traffic violation, which presents a risk to human life. The worst result of violating the do-not-call program is receipt of an unwanted or unneeded commercial offer. There is no risk of bodily or personal injury. Moreover, the consumer himself can easily remedy do-not-call violations by simply hanging up or asking the business to stop calling. In light of the virtual absence of harm, the $2,000 penalty is extreme and must be significantly reduced or clearly directed to those who fail to implement procedures to comply with the law.

Additionally, sub-section (4) of Rule 1220-4-11-.14 provides no meaningful guidance on how to calculate penalties. The term "liberal manner" is meaningless, and effectively licenses the decisionmaker to adjust the penalty based on his or her personal biases. Meaningful standards must be established to provide guidance and avoid inequitable results.

6. Rule 1220-4-11-.15 Unconstitutionally Authorizes Suspicionless Searches

Finally, we address sub-section (1) of Rule 1220-4-11-.15. This sub-section permits the Authority to investigate any Tennessee telemarketing company on nothing more than the "recommendation" of an "interested person." Probable cause – or even suspicion of unlawful activity – is not required. In short, Rule 1220-4-11-.15 authorizes suspicionless searches of businesses for any reason or no reason at all.

Such searches violate the Fourth Amendment to the federal Constitution. Suspicionless administrative searches are constitutionally permissible only "in certain limited circumstances." National Treasury Employees Union v. Von Raab, 489 U.S. 656, 668 (1989). They are allowed to detect and prevent hazardous public health conditions, see Camara v. Municipal Court, 387 U.S. 523, 535-6 (1967) (searches by health department), to maintain national safety, see Von Raab, 489 U.S. at 668-9 (customs searches for drugs), or when the opportunity for detection is so temporally limited that requiring individual suspicion would be impractical. See U.S. v. Martinez-Fuerte, 428 U.S. 543, 557 (1976) (border searches for illegal immigrants).

No special circumstances are present here. Telemarketing poses no health hazards,

nor does it threaten national safety. Additionally, requiring suspicion would not be impractical. This is not a situation where, like border control, thousands of potential violators pass by every day and might never be located if searches are not conducted immediately. Rather, telemarketers are incorporated and licensed businesses that can be easily located by public authorities. There is simply no reason – and no constitutional justification – for allowing suspicionless searches.

7. Conclusion

The above Rules must be considered and revised to accomplish their goal. Accordingly, we urge the Tennessee Regulatory Authority to amend the above Rules in cooperation with legitimate industry representatives.

Respectfully submitted by: Jack Fosbinder
615 259 1440

FILE