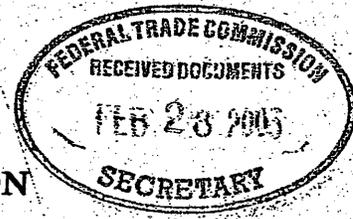


Before the
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580



In the Matter of)
)
Final Amended Telemarketing) File No. R411001
Sales Rule)
)
)

REQUEST FOR STAY

**AMERICAN TELESERVICES
ASSOCIATION**

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February 27, 2003

the effective date of the Amended TSR until all necessary components of the regulatory structure are in place and its legality can be reviewed.

I. IMMEDIATE IMPLEMENTATION OF THE AMENDED TSR WOULD IRREPARABLY HARM ATA'S MEMBERS

The FTC has taken the first step towards establishing a national framework for regulating telemarketing practices by substantially amending its Telemarketing Sales Rule. As the FTC recognizes, the plan it has conceived cannot be fully implemented without significant inter-agency coordination and "harmonization" of state telemarketing regulations. See Statement of Basis and Purpose and Final Amended Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4631, 4638, 4641 (Jan 29, 2003). However, many of the FTC's regulations are scheduled to become effective on March 31, before the necessary coordination and "harmonization" will be achieved. Among the regulations scheduled to take effect on March 31, are restrictions on the use of predictive dialers, new disclosure obligations, rules governing upselling transactions, and amendments extending many of the rule's requirements to reach charitable solicitations. To comply with these requirements, ATA's members must make fundamental and costly changes to their business operations before the entire framework under which they will ultimately be regulated is established and its legality is certain. Thus instead of imposing much needed uniformity on the universe of regulations telemarketers face, if the FTC's rules take immediate effect, telemarketers must comply with an additional body of changing and/or conflicting regulations.

It will be extremely difficult, if not impossible, for ATA's members to comply with the Amended TSR's abandoned call regulations by their effective date. Because any attempt to prevent all abandoned calls would be cost-prohibitive and ultimately futile, ATA's members must dedicate substantial time and considerable human and financial resources to satisfying the safe harbor requirements. Affidavit of Steve Brubaker ¶¶ 4-5 ("Brubaker Aff."); Affidavit of Andrew C. Jacobs ¶¶ 3-7, 10 ("Jacobs Aff."); Affidavit of Larry Rathbone ¶¶ 7-9 ("Rathbone Aff."). Despite their aggressive compliance efforts, however, ATA's members are concerned they may be unable to secure safe harbor protection by March 31, 2003. Brubaker Aff. ¶¶ 6, 8; Jacobs Aff. ¶¶ 3, 9-10, 10; Rathbone ¶¶ 7-9. *See also* Letter from Interactive Intelligence, to Billy Tauzin, Chairman, Energy and Commerce Committee, U.S. House of Representatives 2 (Feb. 7, 2003). ATA's members must not only acquire and successfully implement necessary soft- and hardware upgrades to their call center platforms on a radically expedited basis, they must also substantially retrain their employees to operate the reconfigured systems. Brubaker Aff. ¶¶ 5-6, 8; Jacobs Aff. *Passim*; Rathbone ¶¶ 7-9. Those ATA members who will be unable to secure safe harbor before March 31, 2003, may be forced to shut their doors until they will be to do so, because they face severe penalties for abandoning calls. Brubaker Aff. ¶¶ 4, 6; Jacobs Aff. ¶¶ 5, 11; Rathbone ¶ 11.

Assuming ATA's members are capable of achieving full compliance with the FTC's abandoned call safe harbor requirements by their current effective date, they will likely do so at their peril. If the rules take effect on March 31 as

planned, ATA's members will face conflicting federal regulations with which they cannot simultaneously comply. To avoid liability under the FTC's new rules, ATA's members must choose to violate the TCPA. *Brubaker Aff.* ¶ 7; *Jacobs Aff.* ¶ 8; *Rathbone* ¶ 10. ATA's members will thus suffer substantial harm despite their strong showing that they will ultimately succeed on the merits of their legal challenge to the abandoned call regulations.

II. ATA IS LIKELY TO SUCCEED ON THE MERITS OF ITS CHALLENGE TO THE AMENDED TSR

Significant constitutional and statutory problems hang over the Amended TSR. The FTC's analysis of the rule fails to maintain the necessary constitutional balance required under the Act. Additionally, the FTC overstepped its rulemaking authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act ("TCFAPA") by promulgating regulations affecting telemarketers' use of predictive dialing equipment. Congress conferred on the FCC the exclusive authority to regulate customer premises equipment ("CPE"). The FTC's abandoned call requirements also exemplify arbitrary and capricious agency decision-making.

A. The Amended TSR Raises Significant Constitutional Problems

Immediate implementation of the Amended TSR is incompatible with the congressional command that any new regulations respect telemarketers' First Amendment rights. *See, e.g.,* Section 2(9), Pub. L. No. 102-243. The FTC noted that in the Telemarketing Act, "Congress recognized telemarketers' right to free speech is in tension with consumers' right to privacy within the sanctity of their homes, but

that a balance must be struck between the two that meshes with consumers' expectations while not unduly burdening industry." SBP, 68 Fed. Reg. at 4613. By implementing the Amended TSR with its heightened restrictions on telemarketing, and by doing so in a piecemeal way, the FTC disrupts this necessary balance.

The FTC asserts that the Amended TSR is consistent with the First Amendment because it satisfies the test for regulating commercial speech in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), and because any regulation of telemarketing in the name of residential privacy is constitutional under *Rowan v. Post Office Dept.*, 397 U.S. 728, 731 (1970), in that it effectuates individual homeowner preferences. SBP, 68 Fed. Reg. at 4635-36. Neither claim is correct; the Amended TSR, along with its blanket "do-not-call" registry, has the effect of supplanting, rather than respecting, individual preferences, and the FTC's analysis of the *Central Hudson* factors is seriously defective.

The FTC concluded that its previous company-specific "do-not-call" requirement was inadequate because it requires consumers to make their "do-not-call" preferences known to each telemarketer. SBP, 68 Fed. Reg. at 4629, 4635. And, invoking *Rowan*, the agency concluded that a national "do-not-call" registry would be more efficient because it would preemptively block calls without the need to express a preference to individual telemarketers. *Id.* at 4635-36. However, the principle articulated in *Rowan* required *precisely* the kind of individualized showing that the FTC now describes as "burdensome." *Rowan*, 397 U.S. at 737. *See Martin v. City of Struthers*, 319 U.S. 141, 144-145 (1943). In fact, the law upheld in *Rowan*

operates almost exactly like the company-specific "do-not-call" requirements, and has almost nothing in common with the rules for a national registry, in which the government establishes favored and disfavored categories of calls to be blocked. More "efficient" rules that were intended to serve the same interest – e.g., to block unsolicited mailings but which allowed the government to define the restricted categories – have been invalidated. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 69 n.18 (1983).

It is insufficient for the FTC merely to assert that the Amended TSR is constitutional to the extent it reduces the number of unwanted calls generally. SBP, 68 Fed. Reg. at 4631. The Supreme Court has affirmed "simply and emphatically that the First Amendment does not permit the [government] to sacrifice speech for efficiency." *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 795 (1988). In particular, the government cannot claim that it is addressing the "privacy" problem by asserting it will reduce the total number of solicitations where it employs regulations that are not based on individual privacy preferences. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 638-639 (1980). Here, by proposing to divorce the types (and number) of calls that will be blocked from individual "do-not-call" requests, the Commission commits two significant errors: It will block more calls than does the company-specific approach, and it bases the decision on which calls to block on categories chosen by the government, not the individual.

Despite its adoption of a national registry requirement in the Amended TSR, the FTC found that “consumers preferred a ‘nuanced approach’ to the ‘do-not-call’ issue, wanting to limit some calls to their household, but not all calls.” SBP, 68 Fed. Reg. at 4593. Yet its new rules emphatically avoided “nuance” and made no attempt to match consumer preferences. ^{1/} The FTC’s findings demonstrate vividly that the “all-or-nothing” choice presented by a national registry will sacrifice speech for efficiency. This point was further illustrated by the FTC’s decision to subject charitable solicitations only to company-specific “do-not-call” requirements, and not to the rigors of the national registry. The Commission expressed concern that subjecting charitable solicitation telemarketing to the national “do-not-call” registry requirements may “prompt some consumers to accept the blocking of charitable solicitation calls . . . as an undesired but unavoidable side-effect resulting from signing up for the registry to stop sales solicitation calls.” ^{2/} However, the rationale for applying a more forgiving First Amendment standard to commercial speech restrictions loses its force where, as here, the limitation on communication “bears no relationship *whatsoever*” to any purported difference between commercial versus noncommercial telemarketing calls. ^{3/} Since there is no essential nexus between

^{1/} SBP, 68 Fed. Reg. at 4593 & n.142.

^{2/} *Id.* at 4636.

^{3/} See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 424 (1993) (emphasis in original).

the commercial nature of the telemarketing calls and the government's privacy concerns, the distinction is unconstitutional. 4/

Provisions of the Amended TSR also violate the First Amendment under the *Central Hudson* standard that applies to commercial speech, particularly in light of the piecemeal implementation schedule. The FTC cannot meet its burden to demonstrate that the regulation advances the intended interest in a direct and material way, *See Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1070 (10th Cir. 2001), by "mere speculation and conjecture." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). Reviewing courts will not sustain a restriction on commercial speech that provides "only ineffective or remote support for the government's purpose." *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 188 (1999). *See Utah Licensed Beverage Ass'n*, 256 F.3d at 1071.

Uneven or inconsistent restrictions on commercial speech are especially suspect. *Rubin*, 514 U.S. at 488. *See Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 189. The Amended TSR is constitutionally deficient on many levels, but for purposes of this request it is sufficient to focus on this aspect of *Central Hudson*. In this case, the FTC is waiting for the conclusion of the FCC's TCPA rulemaking to determine whether its sister agency will act to fill out the gaps in its jurisdiction. Only then will the agencies be able to determine which

4/ In *Schaumburg*, the Supreme Court struck down an ordinance that restricted how much money a charity could devote to administrative costs, reasoning that there was no connection between the asserted privacy interests and the percentage limit. 444 U.S. at 638-639. Here, there is no connection between the asserted privacy interests and the commercial/non-commercial distinction.

telemarketing calls are fully covered by the rules, and what steps are needed to coordinate the various regulations. To the extent the agencies cannot conduct the necessary analysis until after the FCC acts, it is not yet possible for the FTC to demonstrate that the Amended TSR will serve its goals in a direct and material way.

Such jurisdictional gaps have persuaded some courts to enjoin and/or invalidate various telemarketing restrictions. For example, in *Lysaght v. New Jersey*, 837 F. Supp. 646 (D. N.J. 1993), the district court enjoined a New Jersey law that prohibited the delivery of prerecorded commercial messages by telephone without the prior consent of the called party, while exempting noncommercial messages. See also *Missouri v. American Blast Fax, Inc.*, 196 F. Supp.2d 920 (E.D. Mo. 2002). The court found that the distinction between commercial and noncommercial messages "bears no relationship to the interest of protecting residents from unwanted intrusions at home." *Lysaght*, 837 F. Supp. at 651.

B. The FTC Infringed on the Exclusive Authority of the FCC Over Costumer Premises Equipment

As the FTC has noted, the practical effect of the abandoned call requirements is to "closely govern the use of predictive dialers." SBP, 68 Fed. Reg. at 4642. In the Communications Act, however, Congress conferred exclusive jurisdiction over CPE on the FCC. ^{5/} Congress defined "costumer premises

^{5/} See, e.g., *Essential Communications Sys., Inc. v. AT&T*, 610 F.2d 1114, 1116 (3d Cir. 1979) ("in 1974, the FCC asserted exclusive jurisdiction over regulation of the interconnection of customer-provided terminal equipment [and was] sustained by the Fourth Circuit Court of Appeals") (citing *Telerent Leasing Corp.*, 45 FCC.2d 204 (1974) *aff'd sub nom. North Carolina Util. Comm'n. v. FCC*, 537 F.2d 787 (4th

equipment” to mean “equipment employed on the premises of a person (other than a carrier) to originate, route or terminate telecommunications.” 47 U.S.C. § 153(14). Predictive dialing equipment is undoubtedly included within the definition of CPE because it resides at businesses’ or teleservices providers’ premises and is used exclusively to originate, route or terminate telecommunications traffic. Consequently, it is within the sole authority of the FCC to regulate predictive dialing equipment.

The fact that the FTC’s regulations of abandoned calls conflict with the Telephone Consumer Protection Act (“TCPA”) further illustrates that Congress never meant for the FTC to regulate telemarketers’ use of predictive dialing equipment. In the view of the House Committee on Energy and Commerce, legislation may be necessary to reconcile the FTC’s recorded message requirement with the TCPA because “under the TCPA, Congress by statute prohibited telemarketers from leaving recorded messages.” H.R. REP. NO. 108-8, at 4 (2003). In the meantime, however, the House Committee “encourages the FTC and FCC to take the necessary steps to make their rules as consistent and compatible as possible.” *Id.*

C. The FTC Acted Arbitrarily and Capriciously When it Adopted its Abandoned Call Requirements

ATA will likely succeed on the merits of its challenge to the Amended TSR’s abandoned call requirements as contrary to the APA, because they are

Cir.), *cert. denied*, 429 U.S. 1027 (1976), *recon. denied*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977)).

irrational and internally inconsistent.^{6/} For example, the FTC requires ATA's members to violate federal law in order to escape liability under the Amended TSR for abandoning a telemarketing call. Despite the FTC's recognition that its safe harbor provision requiring telemarketers to play recorded messages to answered calls conflicts with the TCPA's prohibition on initiation of such calls, it failed to explain how telemarketers would be able to simultaneously comply with both rules. *See* SBP, 68 Fed. Reg. at 4645.

The FTC also failed to adequately explain how its rule requiring telemarketers to let each telephone call they place ring for four rings or fifteen seconds before they disconnect, 16 C.F.R. § 310.4(b)(4)(ii), protects consumers from the intrusive ring of the telephone. SBP, 68 Fed. Reg. at 4642. The FTC's unlikely explanation that its rule gives consumers "a reasonable opportunity to answer telemarketing calls while preventing the undesirable result of consumers' privacy being disrupted by ringing phones" does not satisfy the APA's requirement of rational agency decision-making. *Id.* at 4644. Therefore, ATA has demonstrated that it will likely prevail on its legal challenge to the Amended TSR's abandoned call requirements.

III. ATA SATISFIES THE TRADITIONAL REQUIREMENTS FOR GRANT OF A STAY

ATA's request meets the four elements considered by the FTC in determining whether to grant a stay: (1) ATA's members are likely to prevail on the

^{6/} Under section 706 of the APA, a reviewing court will hold unlawful and set aside agency actions deemed arbitrary, capricious, and contrary to law. 5 U.S.C. § 706(2)(A).

merits of their legal challenge to the Amended TSR's abandoned call requirements; (2) ATA's members will suffer irreparable harm absent a stay of the Amended TSR's effective date; (3) no party will suffer harm as the result of grant of a stay; and (4) a stay will serve the public interest. ^{7/} As demonstrated above, ATA will likely succeed on the merits of its legal challenge to the Amended TSR's abandoned call regulations and absent a stay of the Amended TSR ATA's members will suffer "irreparable injury [that] is . . . actual and not theoretical, and that harm will in fact occur." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (internal quotation omitted). Additionally, postponing the effective date of the Amended TSR will not harm any party, because telephone subscribers have in no way come to rely on its potential benefits. ^{8/} Lastly, it does not serve the public interest to give immediate effect to piecemeal and potentially conflicting regulations. As the House Commerce Committee pointed out, "it is *impossible* for the FCC to adopt rules identical to the FTC's TSR." H. Rep. 108-8 at 4 (emphasis added). The report noted "areas in which the FTC do-not-call rule is in conflict with the TCPA, such as the FTC's rule providing for a safe harbor from the call 'abandonment' requirements." *Id.* ("Congress by statute prohibited telemarketers from leaving recorded messages"). While Congress directed the agencies to "maximize consistency," it also recognized that legislative action is necessary. *Id.* But even if it were not, and the

^{7/} See *Trade Regulation Rule: Labeling and Advertising of Home Insulation; Partial Stay for Mobile Home*, 45 Fed. Reg. 69927 (Oct. 17, 1980).

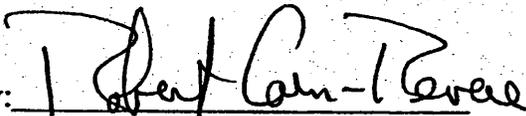
^{8/} The denial of such benefits to telephone subscribers falls well below the degree of harm required to bar grant of a stay. See, e.g., *Iowa Utils. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996) (subsequent history omitted).

agencies could resolve inconsistencies at the end of the FCC's rulemaking proceeding, the public interest will not support implementation of the Amended TSR under the current timetable. Therefore, ATA respectfully requests the FTC to preserve the *status quo ante* and stay the March 31, 2003, effective date of the Amended TSR pending judicial review.

CONCLUSION

For the foregoing reasons, ATA requests the FTC to stay the March 31, 2003, effective date of the Amended TSR until judicial review of the rule is complete or, at the very least, until the FCC has finished reviewing its regulations under the TCPA.

Respectfully submitted,

By: 

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Counsel for American Teleservices Association

February 27, 2003

3. Telemarketing is a profession and lifetime career at InfoCision.

Our Communicators have come to us for any number of reasons and from all walks of life. Many of them end up staying here longer than they ever expected. InfoCision offers competitive pay, benefits, and flexible hours. More importantly, however, many of our employees stay because they love their jobs—the work they do is personally rewarding. However, the national do-not-call list approach currently mandated by the FTC may make lay-offs unavoidable. A national do-not-call all-or-nothing list will affect many more legitimate businesses than do the various company-specific do-not-call regulations combined because consumers' desire not to hear from specific callers will lead them to opt entirely out of all calls from a diverse range of callers. The few companies who abuse telemarketing as a legitimate marketing tool will thus unnecessarily foreclose use of the practice for many, many others.

4. Complying with the Amended Telemarketing Sales Rule's ("Amended TSR") regulations of abandoned calls by their March 31, 2003, effective date will severely burden InfoCision. As an initial matter, it is absurd for InfoCision to even attempt to comply with the FTC's prohibition on abandoning even a single telemarketing call because any effort we could make in this regard would effectively put us out of business. To comply with this restriction we would essentially need to replace our predictive dialing equipment with an army of agents to dial each telemarketing call manually. Of course, such a move would not be cost-effective, and importantly, would not even save us from violating the rule. Even

under a completely manual dialing regime, human errors are inevitable, and each one would come with an \$11,000 penalty.

5. InfoCision must therefore make every effort to meet the Amended TSR's safe harbor requirements. In order to comply with these requirements, InfoCision must make significant investments in technology, including new soft- and hardware. Furthermore, once all call center platforms are upgraded, InfoCision must substantially retrain its agents to operate the reconfigured systems. We anticipate that it will cost us in excess of several hundred thousand dollars to bring each of our 22 call centers into compliance with the new abandoned call safe harbor requirements.

6. InfoCision is concerned it will not be able to successfully implement all necessary changes before the safe harbor requirements become effective. The technological upgrades needed to bring all of InfoCision's call centers into compliance require significant testing and refining before they are ready for deployment in the field. These types of call center infrastructure changes are typically brought online over the course of an entire year. The FTC's March 31 deadline does not afford InfoCision sufficient time to ensure its systems function properly before they must be put into operation. InfoCision worries its rushed compliance effort will ultimately lead to system problems that will prevent it from being able to comply with the safe harbor requirements by March 31, 2003. If such technical problems occur, InfoCision will be forced to close its doors until it can

ensure compliance with the safe harbor requirements, because even a single calling mistake will trigger a severe penalty.

7. InfoCision is worried that it must violate federal law to satisfy the requirements of the Amended TSR abandoned call safe harbor. InfoCision cannot simultaneously comply with the FTC's requirement to play prerecorded messages whenever an agent is unavailable to take an answered call within two seconds of the called party's completed greeting and the Telephone Consumer Protection Act's prohibition on initiating such prerecorded message calls.

8. InfoCision is also concerned that despite its aggressive compliance effort it will not be able to meet its record-keeping obligation under the Amended TSR's safe harbor by March 31, 2003. InfoCision's technology vendors have indicated they may be unable to provide the necessary record-keeping abilities in time. Even if InfoCision can obtain the required technology, it will impose a severe burden on InfoCision to deploy it by March 31, 2003. Once required technological upgrades are in place, an entire call center system must undergo substantial testing and refinement to ensure it functions properly. It will thus take substantial time and energy to perfect the record-keeping regime the FTC has required. Furthermore, even if we are able to resolve all the complex technical issues involved in developing such a record-keeping regime by the March 31, 2003, deadline, we are not certain, based on the Amended TSR, about which data will satisfactorily demonstrate compliance with the safe harbor provisions.

Dated: 2-26-03

Steve Brubaker
Steve Brubaker

District of Columbia)
STATE OF OHIO)
) ss
COUNTY OF _____)

Subscribed and sworn to before me this 26th day of February 2003.

Carol L. Hedgpeth
Notary Public
555 - 15th Street, NW
Washington DC 20004
Address

My commission expires: _____

CAROL L. HEDGPETH
Notary Public District of Columbia
My Commission Expires December 14, 2006

individual products and services in financial services, insurance, publishing, telecommunications and business products.

3. It will be extremely difficult for Interactive Teleservices to comply with the abandoned call requirements of the FTC's Amended Telemarketing Sales Rule ("Amended TSR") by March 31, 2003. The FTC's rules require fundamental changes to Interactive Teleservices' technology infrastructure and business operations and require compliance within a very short time from the publication of the rules. To the extent compliance by such date is possible at all, it will create severe financial, management and operational hardship on the company. In addition, we will be forced to make decisions fundamental to the future of the company based solely on what we can accomplish by the FTC's unreasonable deadline.

4. The changes required to comply with the abandoned call requirements of the Amended TSR require significant, unbudgeted capital expenditures on new, untested software and hardware and more time to implement properly than the FTC has allowed. Interactive Teleservices' vendors are also predicting shortages in necessary technical components. Even if all hurdles to making the necessary changes to the technical infrastructure of Interactive Teleservices' call centers can be surmounted in time, we will still have to retrain our employees at every level for the organization to successfully adapt to the new regulatory environment. Interactive Teleservices will essentially need to revolutionize its call processing equipment and its compliance procedures in order

to ensure and prove daily compliance with the FTC's abandoned call requirements – all in less than 45 days.

5. Compliance with the zero percent abandonment rate that is set out in the Amended TSR cannot be done as a practical matter. Zero abandoned calls essentially renders predictive dialers, on which the company has spent millions of dollars, useless and makes outbound sales calling extremely inefficient and therefore expensive to the point of impracticality. In short, we would be out of business. Interactive Teleservices' only way to survive is to comply with the safe harbor provisions, which allow for a more feasible abandonment rate.

6. However, complying with the safe harbor requirement to play recorded messages whenever an agent is unavailable to take an answered call within two seconds of the called party's completed greeting will impose an especially severe burden on Interactive Teleservices. In order to comply, Interactive Teleservices will need to purchase very costly new, and as yet untested, technological upgrades to its call center platform. The software purchase process alone typically takes a substantial amount of time to complete because extensive testing of the reconfigured system is required to ensure that it functions properly. We are concerned that the expedited basis on which our limited technology staff is required by the FTC to implement these significant upgrades will force us to bring our reconfigured call center platform online without performing all necessary system testing. Consequently, not only may we be unable to provide our clients the high quality services to which they are accustomed by March 31, 2003, but we risk

non-compliance because of errors and mistakes that are the inevitably by-product of unreasonable haste in product selection, purchasing, integration and implementation. We will also be forced to bear the inevitable waste of financial and human resources that occurs whenever massive projects are not properly planned.

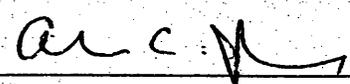
7. Interactive Teleservices will have to take additional time-consuming and labor-intensive steps aside from implementing technical system upgrades to comply with the FTC's safe harbor requirement to play prerecorded messages to connected calls. Once Interactive Teleservices' new system is operational, we will have to obtain and upload distinct prerecorded messages for each seller on whose behalf we place calls. Interactive Teleservices' and its clients' lawyers must review the contents of these messages to ensure they comply with the Amended TSR. Furthermore, Interactive Teleservices' agents will need to undergo a substantial amount of retraining to learn to operate our reconfigured call center system. This process will require the preparation of new training materials, as well as extensive hands-on training.

8. Interactive Teleservices is also worried that it must violate the Telephone Consumer Protection Act's ("TCPA") prohibition on initiating prerecorded message calls to seek protection under the FTC's safe harbor provisions. Interactive Teleservices cannot simultaneously comply with the FTC's requirement to play prerecorded messages to connected calls whenever an agent is unavailable and the TCPA's prohibition on initiating such prerecorded message calls.

9. Interactive Teleservices is also concerned that it will be unable to comply with its obligation to demonstrate compliance with the safe harbor provisions by March 31, 2003. We currently do not have the ability to capture and store all the data the FTC requires. We are doubtful we will be able to devise an adequate methodology to capture the necessary information, as well as obtain the necessary storage space in which to maintain it, by March 31, 2003. Even if we are able to resolve all the complex technical issues involved in developing such a record-keeping regime by the March 31, 2003, deadline, we are not certain, based on the Amended TSR, about which data will satisfactorily demonstrate compliance with the safe harbor provisions.

10. Interactive Teleservices will also suffer a severe burden by having to comply by March 31, 2003, with the safe harbor provision requiring telemarketers to allow all calls to ring for 15 seconds or four rings. Ultimately, despite its genuine compliance effort, Interactive Teleservices will likely be unable to satisfy this requirement by its effective date. In order to preserve our current calling volume while complying with this requirement, we will need to obtain a significant additional amount of telecommunications capacity and purchase and integrate new dialing equipment. Aside from the substantial additional investment this requires, the provisioning of additional telecommunications capacity typically takes over 60 days. Additionally, Interactive Teleservices will have to guess at the additional capacity and equipment needed to maintain its current calling volumes,

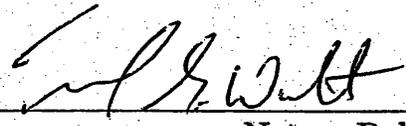
Dated: Feb. 26, 2003



Andrew C. Jacobs

STATE OF OHIO)
) ss
COUNTY OF Franklin)

Subscribed and sworn to before me this 26 day of February 2003.



Notary Public

My commission expires: _____

FRANCK GEORG WOBST, Attorney At Law

NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.

Section 147.03 R.C.

Address

3. American Exteriors has been engaged in the business of providing replacement windows and vinyl siding to homeowners since 1994.

4. One of the methods of advertising American Exteriors uses to generate business is telephone solicitation of the general public. Because telephone solicitation is the most targeted, productive, and cost-effective method of advertising and business generation, American Exteriors relied on telephone solicitation to break into the market and continues to rely heavily on telephone solicitation today to advertise and generate business leads. Indeed, approximately 95% of the company's nationwide gross revenues in 2001 were attributable to telephone solicitation calls to individuals with no previous business relationship with American Exteriors.

5. American Exteriors does not telephone random consumers. Instead, American Exteriors purchases from a data compiler lists of phone numbers belonging to owners of single-family homes. By using a list of single-family homes, American Exteriors narrows the pool of people it calls to those who might have a need for its products. We then narrow that list to homes that fit in a specific target group based on the year they were built and their value. By using this scientific data mining process, American Exteriors narrows the pool of people it calls to those who possess a high probability of having a need for its products.

6. To conduct telephone solicitations, American Exteriors relies on a predictive dialing software package, which includes software for database administration, answering machine detection ("AMD"), and predictive dialing

("predictive dialer"). The predictive dialer uses intelligent algorithms to determine the number of calls it must dial from the list of American Exteriors' prospective customers so that, when each sales agent finishes a call, the dialer will have reached a potential customer to transfer to that available agent. This prediction is based on a number of factors, including the number of available telephone lines, the number of sales agents on duty, the average number of calls that do not reach a live person (*i.e.*, no answers, busy signals or answering machines), and the average length of each call once connected.

7. The March 31, 2003 effective date of the Amended Telemarketing Sales Rule's ("Amended TSR") new abandoned call requirements imposes a heavy burden on American Exteriors. It essentially requires American Exterior's marketing department to direct all of its time and resources away from marketing its products towards ensuring compliance. Nevertheless, this full-time compliance effort will likely fall short.

8. Complying with the prerecorded message requirement of the Amended TSR's abandoned call safe harbor provision will impose an especially severe burden on American Exteriors. Our \$50,000 call center software platform is incapable of delivering a prerecorded message to a connected call. I am currently unaware of the existence of any technological upgrade compatible with our software platform that allows for the playing of prerecorded messages to connected calls.

9. To satisfy the safe harbor requirements, I must therefore locate and purchase costly new technology that enables our predictive dialing system to

play prerecorded messages when an agent is unavailable to take an answered call. Assuming such technology exists, once it is installed on our software platform it must be extensively tested prior to actual field use to ensure that it functions properly. Additionally, our sixty call center agents will have to be substantially retrained to operate the reconfigured call center software suite. It will be exceedingly onerous, if not impossible, to complete all of these necessary steps by March 31.

10. American Exteriors will be unable to simultaneously comply with the FTC's abandoned call safe harbor requirement to play a recorded message whenever an agent is unavailable to take an answered call and the Telephone Consumer Protection Act's prohibition on such artificial or prerecorded calls. I worry that in order for American Exteriors to secure safe harbor under the FTC's rules, it will be forced to violate federal law.

11. If American Exteriors is unable to secure safe harbor protection under the Amended TSR, it may have to end its telemarketing operations entirely. Consequently, American Exteriors may be forced to lay-off its entire marketing staff and I may have to find another career. Any effort American Exteriors could make to comply with the FTC's prohibition on abandoning even a single telemarketing call would be financially unsound and ultimately prove futile. To comply with the FTC's prohibition on abandoned calls, American Exteriors would have to replace its \$50,000 call center platform with an untold number of agents to manually dial each marketing call. An attempt to deploy a massive labor force to approximate the

