IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STONEBRIDGE LIFE
INSURANCE COMPANY,
a Vermont corporation,
520 Park Avenue
Baltimore, MD 21201-4500,

Plaintiff,

v.

FEDERAL TRADE COMMISSION,
600 Pennsylvania Avenue, N.W.
Washington, DC 20580,

Defendant.

CASE NUMBER 1:03CV00739

JUDGE: Richard J. Leon

DECK TYPE: TRO/Preliminary Injunction

DATE STAMP: 03/21/2003

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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Stonebridge Life Insurance Company ("Stonebridge" or "plaintiff"), by and through counsel, hereby files this action for declaratory and injunctive relief against defendant Federal Trade Commission ("FTC"). In this action for declaratory and injunctive relief, plaintiff seeks a ruling that, with respect to Stonebridge and other similarly situated entities in the insurance industry, the FTC's amendments to its Telemarketing Sales Rule ("Amended TSR"), 16 C.F.R. Part 310, exceed the agency's statutory authority, are not in accordance with law, are arbitrary and capricious under the Administrative Procedure Act ("APA"), and violate the First and Fifth Amendments to the U.S. Constitution.

Congress adopted the Telemarketing Consumer Fraud and Abuse Prevention Act (the "Telemarketing Act") to authorize the FTC to regulate telemarketing by companies within its jurisdictional ambit. However, though the FTC acknowledged that some entities engaged in

telemarketing do not fall under its statutory authority, it paid only lip service to the exemption in the McCarran-Ferguson Act, 15 U.S.C. § 1012, that removes the "business of insurance" from FTC jurisdiction. The FTC completely ignored that, unlike other entities that may be outside the FTC's jurisdiction, the insurance industry enjoys an exemption not just for insurance providers, but for the business of insurance as a whole. Due to the FTC's scant analysis and misapplication of the law, it enacted changes to the TSR that impermissibly regulate the business of insurance, and which are riddled with statutory exemptions and exclusions. As a result, the FTC exceeded its jurisdictional bounds, and identically-situated telemarketers are subject to radically disparate requirements, such that the speech of callers in categories disfavored by the government is substantially – and unconstitutionally – restricted.

I. JURISDICTION AND VENUE

1. This case arises under the Constitution and laws of the United States and presents a federal question within this Court's jurisdiction under Article III of the Constitution and 28 U.S.C. § 1331.

2. Plaintiffs' right to judicial review of the challenged action is secured by the Administrative Procedure Act. 5 U.S.C. §§ 702, 704.

3. Venue is proper under 5 U.S.C. § 703 and 28 U.S.C. § 1391(e) because the defendant is an agency of the United States located in Washington, D.C.

4. This Court has authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, and the APA. 5 U.S.C. §§ 703, 706.

5. This Court has authority to grant injunctive relief pursuant to the APA. 5 U.S.C. §§ 705-706.

II. PLAINTIFF

6. Plaintiff Stonebridge Life Insurance Company, formerly known as J. C. Penney Life Insurance Company, is a Vermont corporation that is authorized to transact and does transact insurance business nationally with sales in each state. The address of its principal place of business is 520 Park Avenue, Baltimore, MD 21201-4500. Stonebridge sells a variety of insurance products and services, including life insurance and accidental death and disability insurance, through multiple marketing mechanisms.

7. Approximately seventy percent of Stonebridge's insurance sales come from outbound telemarketing. These sales arise from approximately 80 million calls per year made on Stonebridge's behalf. All told, telemarketing campaigns account for approximately $150 million in premiums per year for Stonebridge.

8. Stonebridge relies upon third-party telemarketers in most cases to conduct its telemarketing campaigns through a two-tiered approach. Where it relies upon such third-party telemarketing, Stonebridge contracts with such telemarketers rather than conducting "in-house" telemarketing itself, because using third-parties is significantly more cost-effective given the rate of sales that can be expected and costs that are incurred in telemarketing campaigns. However, even using third-party contractors, the cost-effectiveness of a telemarketing campaign is highly dependent upon the duration of the calls during which a sale is made and those in which no sale is made, and the ability to complete a transaction without unduly inconveniencing prospective customers.

9. When Stonebridge contracts with a telemarketing firm, it provides scripts to which callers must strictly adhere. Calls are initiated by telephone services representatives, who are not licensed insurance agents, to determine if a potential customer is interested in

Stonebridge's products or services. If there is interest in the insurance product, the call is transferred to a licensed insurance agent who obtains necessary information, makes any required disclosures, and enrolls the customer in the appropriate insurance plan. The initial inquiries are made in strict compliance with prescripts in the Insurance Model Advertising Regulation, which has been adopted by the National Association of Insurance Commissioners and adopted by most states. Under this regime, the function of non-agent telephone sales representatives is to inquire whether consumers have any interest in purchasing the life insurance products and, if there is interest or prospective customers have questions about coverage, to transfer the call to licensed insurance agents.

10. Stonebridge markets primarily to existing credit card customers of major banks, oil companies and retailers (hereinafter referred to as "business partners"). Stonebridge pre-acquires encrypted customer name, address, telephone number, and account information from these business partners in order to facilitate telemarketing campaigns carried out on its behalf. Plaintiff uses this information solely to complete direct marketing insurance sales, including telemarketing, and in all cases secures the informed consent of all customers before they are charged for the transaction.

11. A significant part of Stonebridge's sales efforts, and of its telemarketing in particular, is a "bonus marketing approach." Under this model, customers receive initial coverage for a specified term at no charge, and pay a premium only if they do not cancel the policy before the specified term expires. Because insurance companies are prohibited by state insurance regulations from giving away "free" insurance, the initial premium during the bonus period is paid for by Stonebridge's business partners.

12. Stonebridge's insurance activities, including its marketing practices, are extensively regulated by state authorities in each state where Stonebridge engages in the business of insurance. The insurance agents who make the insurance sales on behalf of Stonebridge are licensed as insurance agents in their home states and in those states into which calls are placed. The states also regulate Stonebridge's telemarketing scripts used by both unlicensed telephone service representatives and by licensed insurance agents during sales calls. In some cases, Stonebridge has entered into consent decrees with state insurance authorities, or reached consensus opinions with them, regarding the content and delivery of its telemarketing scripts.

III. DEFENDANT

13. Defendant FTC is an agency of the federal government and is responsible, in part, for enforcing a variety of consumer protection laws, including the Telemarketing Act. As part of that responsibility, the FTC promulgates rules interpreting laws within the bounds of its jurisdiction under rulemaking authority conferred upon it by Congress.

IV. STATUTORY AND REGULATORY BACKGROUND

A. The Telemarketing Act

14. In 1994, Congress adopted the Telemarketing and Consumer Fraud and Abuse Prevention Act (the "Telemarketing Act") to empower the FTC to regulate telemarketing fraud and certain other abusive practices. The primary focus of the law was to combat illegal activities, not to restrict honest telemarketing practices. As such, the Telemarketing Act sought to strike "an equitable balance between the interest of stopping deceptive (including fraudulent) and abusive telemarketing activities and not unduly burdening legitimate businesses." H.Rep. No. 103-20, at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1626, 1629.

15. The Telemarketing Act was codified as part of the Federal Trade Commission Act ("FTC Act"), *see* 15 U.S.C. §§ 6101-6108, and empowered the FTC to enforce rules adopted under the Telemarketing Act "in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. § 41 *et seq.*) were incorporated[.]" *Id.* § 6105(b).

16. The FTC is empowered to enforce the rules it adopts pursuant to the Telemarketing Act. *Id.* § 6102(c). In addition to FTC enforcement, state attorneys general or other state officials may bring civil actions on behalf of its residents for violations of any rule established by the FTC. *Id.* §§ 6103(a), 6103(f). Finally, any private person adversely affected by a pattern or practice of telemarketing that violates any FTC rule may bring a civil action against the alleged violator. *Id.* § 6104(a).

17. The Telemarketing Act specifies that "no activity which is outside the jurisdiction of [the FTC Act] shall be affected" by the passage of the Telemarketing Act. *Id.* § 6105(a). Therefore, the FTC has no authority to regulate the telemarketing activities of banks, savings associations, federal credit unions, regulated common carriers, and the business of insurance. In addition, the FTC has no authority to regulate telemarketing activities conducted by non-profit entities, or calls made by on or behalf of political parties, campaigns, or candidates.

18. With respect to the insurance industry, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, exempts the "business of insurance" from the FTC Act, and by extension the Telemarketing Act. Section 1012 states that "[t]he business of insurance . . . shall be subject to the laws of the several States which relate to the regulation . . . of such business," and that "[n]o act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance . . . provided that . . . the Federal

Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by state law." *Id.* § 1012.

19. The text of the Telemarketing Act and of the McCarran-Ferguson Act is attached hereto as Exhibit A and incorporated herein by reference.

B. FTC Regulations Under the Telemarketing Act

20. Pursuant to the Telemarketing Act, the FTC adopted the Telemarketing Sales Rule ("TSR") on August 16, 1995. *Telemarketing Sales Rule; 16 C.F.R. Part 310*, 60 Fed. Reg. 43842 (1995) ("*TSR Order*"). The TSR became effective December 31, 1995.

21. Initial FTC rules implementing the Telemarketing Act included basic material disclosure requirements, a prohibition against credit card laundering, and a requirement that sellers and telemarketers obtain verifiable authorization, using any one of several options listed in the rules, before submitting any check, draft or other negotiable instrument for payment in a telemarketing transaction. *See* 16 C.F.R. § 310.3. The rules also targeted abusive telemarketing practices by prohibiting threatening calls, regulating offers to repair or secure credit or to obtain refunds, mandating certain oral disclosures for telemarketing transactions, and prohibiting patterns of repetitive or continuous calls made with the intent to annoy, abuse or harass. *Id.* § 310.4. In addition, the initial rules included regulations mirroring those adopted four years earlier by the Federal Communications Commission ("FCC") regarding the time of day telemarketing calls may be made, and requiring each company to maintain and adhere to a list of consumers who have indicated they do not wish to be telemarketed by the company. The FTC's initial rules implementing the Telemarketing Act also imposed requirements for recordkeeping and record retention to facilitate compliance with the substantive rules adopted. *Id.* § 310.5.

22. In adopting the initial rules, the FTC acknowledged jurisdictional limits it faced under Section 6105 of the Telemarketing Act. 60 Fed. Reg. at 43843. Though it deleted a provision from the proposed initial rules that would have codified the jurisdictional limitation in Section 6105 into the TSR, the FTC specifically noted that in adopting telemarketing rules it "does not intend to expand or contract its jurisdiction or the scope of the Rule's coverage." *Id.* The FTC expressly acknowledged the fact that its initial rules implementing the Telemarketing Act "do[ ] not apply to the business of insurance to the extent that such business is regulated by State law." *Id.* (citing "Section 2 of the McCarran-Ferguson Act, 15 U.S.C. 1012(b)").

23. At the same time, however, the FTC declined to adopt exemptions of parties acting on behalf of exempt organizations, where such a company would be subject to the FTC Act, but rather held that agents of exempt companies would be subject to the TSR as well. *Id.* By way of illustration, the FTC offered the example of banks and airlines, which are not subject to the rules "because they are exempt under section 5 of the FTC Act," while "a nonbank company that contracts with a bank to provide services on behalf of the bank, and a non-airline company that contracts with an airline to provide services on behalf of the airline, are not exempt from the FTC Act" or the rules implementing it. *Id.* The FTC did not examine the extent to which this implementation of the Telemarketing Act and the FTC Act's jurisdictional limitations applied to the "business of insurance," or whether the exemption for the "business of insurance" differed in any way from exemptions for other entities that are not within the FTC's jurisdiction.

24. Under the Telemarketing Act, the FTC was required to review the TSR five years after adoption and to report its findings to Congress. *See* 15 U.S.C. § 6108. Testimony was presented to Congress on the FTC's behalf on several occasions in the intervening five years. *See, e.g., The Know Your Caller Act of 1999 and the Telemarketing*

Victim Protection Act of 1999: Hearing on H.R. 3100 and H.R. 3180 Before the House Comm. on Commerce Subcomm. on Telecomms., Trade and Consumer Prot., 106th Cong. 27 (2000) (statement of Eileen Harrington). Ultimately, on January 30, 2002, the FTC issued a *sua sponte* Notice of Proposed Rulemaking that set forth sweeping revisions to the TSR. *FTC Notice*, 67 Fed. Reg. 4492 (Jan. 30, 2002).

25. Trade associations that represent Stonebridge actively participated in the FTC proceeding. The American Teleservices Association ("ATA") filed extensive comments and participated in proceedings that led to the adoption of the Amended TSR. The National Association of Insurance & Financial Advisors also filed comments in the proceeding.

26. On December 18, 2002, the FTC issued its Statement of Basis and Purpose and the final Amended TSR. *See Telemarketing Sales Rule; 16 C.F.R. Part 310*, 68 Fed. Reg. 4580 (Jan. 29, 2003) ("*Amended TSR Order*"). The *Amended TSR Order* adopted a range of new and revised telemarketing rules.

27. The new rules impose significantly greater restrictions on legitimate telemarketing practices, and they regulate in much greater detail the transactions that arise from telemarketing campaigns.

28. The Amended TSR adds extensive new disclosure requirements, exhaustive regulation of "negative option" transactions, and verification rules that include mandatory audio recording of all credit card sales. 16 C.F.R. § 310.3.

29. The Amended TSR forbids disclosure or receipt of unencrypted consumer account numbers for consideration. It also imposes informed consent rules for all telemarketing sales, including special rules for transactions involving preacquired account information generally, and additional requirements for "free-to-pay" offers such that an audio recording of

the entire transaction must be made, and customers must recite the last four digits of their credit card, even though the caller may already lawfully possesses the information. *Id.* § 304. The FTC's focus in regulating preacquired account information was not the sharing of billing information in anticipation of telemarketing, but rather, ensuring that consumers provide their informed consent before their billing information is submitted for payment. *See id.* §§ 310.4(a)(5)-(6). *See also Amended TSR Order*, 68 Fed. Reg. at 4588, 4603, 4618-23.

30. The Amended TSR for the first time also regulates "upselling" over the telephone. 16 C.F.R. § 310.4. In addition, the FTC entered the arena of regulating telemarketing equipment by adopting rules mandating the pass-through of caller identification data, and restricting the use of "predictive dialers" by making all "abandoned calls" an abusive telemarketing practice. *Id.* The FTC also veered into an area previously considered but rejected by the FCC by adopting a national "do-not-call" registry and rules prohibiting telemarketers under the FTC's jurisdiction, other than those with whom the called party has an established business relationship, from calling consumers on the registry.

31. As with its initial rules, the FTC recognized that its Amended TSR would not reach all telemarketing activity given the jurisdictional exclusions of the FTC Act. *Amended TSR Order* at 4586-87. Once again, however, the FTC's analysis was quite sparse, the thrust of which being that "jurisdiction for purposes of the TSR is conterminous with its jurisdiction under the FTC Act, and therefore" there is no need for "an express statement of this fact in the Rule." *Id.* at 4586.

32. As to the exemption provided for the business of insurance by the McCarran-Ferguson Act, the FTC offered only the terse statement that the FTC Act's "jurisdictional limitations regarding the business of insurance are clear," *id.* at 4587, and that the agency

had already "made it very clear that the Rule does not apply to entities or activities that fall outside the Commission's authority under the FTC Act, such as . . . the business of insurance." *Id.* at 4598 (citing *TSR Order*, 60 Fed. Reg. at 43843). In fact, the FTC essentially recapitulated its finding from five years before, reiterating its conclusion that "the exemption enjoyed by [some] entities does not extend to any third-party telemarketers who may make or receive calls on behalf of those exempt entities." *Id.* As such, "when an exempt . . . institution . . . conducts its telemarketing campaign using a third-party telemarketer not exempt from the Rule, then that campaign is subject to the provisions of the TSR." *Id.* at 4587.

33. Thus, under the Amended TSR, the FTC has asserted jurisdiction over all for-profit call centers even if they provide telemarketing services for entities that are otherwise beyond the FTC's jurisdiction. However, an exempt business can avoid application of the Amended TSR to its telemarketing activities by making the calls itself and not using a for-profit call center. Given the inherent limitations on the FTC's jurisdiction and specific exemptions created by the FTC, the Amended TSR therefore categorizes telemarketing carried out on behalf of insurance providers into two distinct classes. First, all telemarketing that insurance providers conduct "in-house," using their own employees, equipment, etc., is completely exempt from the Amended TSR and any enforcement of the rules. The second category, comprised of all telemarketing for which insurance providers employ third-party telemarketers, is fully subject to each and every provision of the Amended TSR, and enforcement of them.

34. The FTC made no findings to support any distinction between exempt and non-exempt callers with respect to the impact on the FTC's objectives in adopting new rules.

35. The Amended TSR will become effective March 31, 2003. *Amended TSR Order*, 68 Fed. Reg. at 4664. Full compliance with the "do-not-call" provisions will be required

approximately seven months from the date a contract is awarded for creation of the national "do-not-call" registry. *Id.* The caller identification requirements take effect January 29, 2004. *Id.*

36. Both ATA and the Direct Marketing Association ("DMA") challenged the FTC's adoption of the Amended TSR and filed motions for preliminary injunctive relief. *See Mainstream Marketing Servs., Inc. v. FTC*, Civil Action No. 03-N-0184 (MJW) (D. Col. filed Jan. 29, 2003); *U.S. Security v. FTC*, CIV 03-122-W (W.D. Okla. filed Jan. 29, 2003). Both also filed petitions for review in the United States Court of Appeals for the Tenth Circuit. *Mainstream Marketing Servs., Inc. v. FTC*, No. 03-9512 (10th Cir. filed Jan. 29, 2003); *U.S. Security v. FTC*, 03-9513 (10th Cir. filed Feb. 3, 2003).

37. In addition, both ATA and DMA filed separate requests with the FTC asking the agency to stay the effective date of the new rules. ATA requested the FTC to stay the March 31, 2003, effective date of the Amended TSR as a whole pending judicial review of the new rules, or at least until the FCC finishes reviewing its telemarketing rules. DMA requested that that the FTC either forebear from enforcing, or stay the effectiveness of, the Amended TSR provisions regulating abandoned calls and mandating audio-taping of transactions that involve preacquired account information and free-to-pay offers. *See Final Amended Telemarketing Sales Rule*, File No. R411001 (FTC filed Feb. 27, 2003).

38. The FTC granted a partial stay, suspending the effective date of one provision of the safe harbor provided in the Amended TSR's abandoned call rules until October 1, 2003, and otherwise denying ATA's and DMA's requests. *See* Letter from Donald S. Clark, Secretary, FTC, to Robert Corn-Revere, Counsel, ATA, March 14, 2003 (available at www.ftc.gov/os/2003/03/030314ataletter.htm); Letter from Donald S. Clark, Secretary, FTC, to Douglas H. Green, Counsel, DMA, March 14, 2003 (available at

www.ftc.gov/os/2003/03/030314dmaletter.htm). Notably, in denying DMA's stay request, the FTC noted that, where telemarketers subject to the Amended TSR lack the necessary capacity to tape entire transactions, they must either cease relying on preacquired account information, or forego the ability to engage in free-to-pay conversion offer marketing.

39. Persons or entities that violate any provision of the Amended TSR will be subject to enforcement action by the FTC, civil action by any attorney general or other state officer on behalf of the state's residents, and/or civil action by private persons adversely affected by a rule violation. 15 U.S.C. §§ 6102(c), 6103(a), 6103(f), & 6104(a).

40. The text of the Amended TSR is attached hereto as Exhibit B and incorporated herein by reference.

V. PLAINTIFF WILL SUFFER IRREPARABLE INJURY FROM ENFORCEMENT OF THE AMENDED TSR

41. The FTC has stated that the Amended TSR applies to, and may be enforced against, third-party telemarketers employed by insurance providers. The Amended TSR will apply even though third-party telemarketers utilized by insurance providers are engaged in the business of insurance regulated by state agencies. If this application of the Amended TSR is not enjoined, it will significantly impede plaintiff's ability, and that of similarly situated insurance providers, to communicate with existing and potential customers.

42. If the Amended TSR applies to and is enforced against third-party telemarketers utilized by insurance providers, plaintiff will suffer immediate and irreparable injury. Under the Amended TSR, plaintiff essentially faces two choices. It may bring its telemarketing "in-house" to avoid the impact of the Amended TSR, though from a called party's perspective, the telemarketing will be conducted in precisely the same fashion as by current

outside telemarketers. Alternatively, plaintiff can shoulder the burden of the Amended TSR's impact on all the insurance business it obtains via telemarketing.

43. With respect to the first option – conducting all telemarketing internally to avoid the Amended TSR – Plaintiff would encounter significant and likely insurmountable difficulties making such a sweeping change in how it conducts business. As a threshold matter, it would be impossible to implement this change by the Amended TSR's March 31, 2003, effective date. Approximately 80 million telemarketing calls per year are made on plaintiff's behalf. There is no way to hire enough qualified in-house employees to take the place of the many third-party telemarketers currently working on plaintiff's behalf, or to sufficiently train the new employees in advance of the Amended TSR compliance deadline. Plaintiff would also have to research and purchase the necessary equipment to do its own telemarketing rather than relying on that already owned by third-party contractors. In this regard Plaintiff notes that one of the reasons DMA sought a stay of the Amended TSR effective date was that telemarketers, despite their best efforts, face difficulties in timely obtaining new equipment that facilitates compliance with the Amended TSR, and the FTC acknowledged as much in granting a partial stay.

44. Even if it were feasible for plaintiff to bring all its telemarketing in-house to avoid the onerous impact of the Amended TSR, plaintiff would incur significant additional overhead costs it does not face when using third-party telemarketers. Plaintiff will have to invest in and maintain equipment unrelated to its core business that it would not otherwise have to acquire. Plaintiff will also have to incur all of the costs associated with having its own employees conduct telemarketing rather than relying on third-parties employed by an external contractor.

45. As a result of these practical problems, Plaintiff is uncertain if it is even viable to conduct its telemarketing in-house in lieu of using third-party telemarketers. Notably,

Plaintiff would lose the efficiencies third-party telemarketers offer by focusing solely on telemarketing services provided to multiple businesses. This includes defraying the significant costs of telemarketing equipment and personnel among multiple companies rather than each company shouldering that burden itself. Given the margins under which plaintiff's telemarketing operates, it is possible that being forced to bring its telemarketing in-house would be tantamount to being forced to forsake telemarketing as a sales tool.

46. The second option – having third-party telemarketers comply with the Amended TSR – would also cause irreparable harm. Plaintiff has assessed the impact of compliance with the new rules in telemarketing campaigns carried out on its behalf by third-party contractors and found that both its contacts-per-hour and sales-per-contact drop precipitously under the new procedures.

47. Plaintiff found in particular that its sales-per-contact declined significantly when consumers were forced to provide unnecessarily (but for the Amended TSR requirement) the last four digits of their credit card numbers. *See* 16 C.F.R. § 310.4(a)(6)(i). Successful sales calls took longer to complete, particularly those where interested potential customers had to search for their credit cards in order to read the last four numbers. Plaintiff also found that it lost sales due to typical consumer aversion to reading any portion of a credit card number over the telephone, and where consumers otherwise interested in plaintiff's products or services were unable or unwilling to track down their credit cards. Plaintiff similarly experienced a significant drop in its sales-per-contact rate when it attempted to abandon its bonus marketing approach so as to avoid the onerous impact of the Amended TSR's "free-to-pay" conversion rules.

48. The significant loss of productivity and sales that plaintiff realized during its compliance tests reinforced the fact that the Amended TSR places plaintiff at a significant

competitive disadvantage compared to insurers who conduct their telemarketing in-house and thus need not comply with the new rules. All told, each test by plaintiff to modify its procedures to comply with the Amended TSR resulted in such a significant decrease in its sales-per-contact rate that it effectively eliminated any efficiencies that can be gained via telemarketing.

49. The significant problems plaintiff faces in either being forced to bring its telemarketing in-house or to bring its third-party telemarketing into compliance with the Amended TSR underscores that manner in which the new rules single out certain categories of telemarketers for distinctly unfavorable treatment compared to other callers by restricting their ability to communicate with potential customers and clients.

50. Enforcement of the provisions of the Amended TSR will punish plaintiffs and others who are similarly situated for exercising their rights, privileges, and immunities guaranteed by the First and Fifth Amendments to the United States Constitution.

51. Any restriction on First and Fifth Amendment rights is irreparable injury per se.

52. There is an actual, justiciable controversy among the parties as to the Amended TSR.

53. The plaintiffs will suffer loss of constitutional rights and other irreparable harm, absent prompt declaratory and injunctive relief against the enforcement of the Amended TSR.

VI. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Application of the Amended TSR to Third-Party Telemarketers Employed by Insurance Providers Exceeds the FTC's Statutory Authority)

54. The FTC's intent to apply the Amended TSR to third-party telemarketers employed by insurance providers exceeds the statutory authority conferred under the Telemarketing Act, the FTC Act and the McCarran-Ferguson Act.

55. The Telemarketing Act is part of the FTC Act, and it empowers the FTC only to enforce rules adopted under the Telemarketing Act "in the same manner, by the same means, and with the same jurisdiction, powers, and duties" as under the FTC Act. 15 U.S.C. § 6105(b). The Telemarketing Act specifies that no activity outside the jurisdiction of the FTC Act is affected by the Telemarketing Act. *Id.* § 6105(a).

56. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, exempts the "business of insurance" from the FTC Act, and by extension the Telemarketing Act. Section 1012 renders the FTC Act inapplicable to the business of insurance where such business is regulated by state law. *Id.* § 1012.

57. Plaintiff's utilization of third-party telemarketers to sell insurance products and services constitutes the business of insurance regulated by state law. These insurance sales are made pursuant to licensing regimes imposed by the states, and the states regulate the marketing of insurance products and services, including how they may be telemarketed.

58. The FTC's application of the Amended TSR to third-party telemarketers employed by insurance providers is therefore outside its statutory authority.

59. As a result of the actions complained of herein, the plaintiffs will suffer immediate and irreparable injury.

<u>SECOND CLAIM FOR RELIEF</u>

(Application of the Amended TSR to Third-Party Telemarketers Employed by Insurance Providers is Not in Accordance With Law)

60. Plaintiff restates and reincorporates above paragraphs 1 through 59 as if fully set forth herein.

61. The FTC's intent to apply the Amended TSR to third-party telemarketers employed by insurance providers conflicts with the McCarran-Ferguson Act and is therefore not in accordance with law.

62. The McCarran-Ferguson Act exempts not just insurance providers, but rather the "business of insurance," from the FTC Act, which includes all provisions of the Telemarketing Act. *See* 15 U.S.C. § 1012.

63. Plaintiff's utilization of third-party telemarketers to sell insurance products and services constitutes the business of insurance. These activities are regulated by state authorities in each state where telemarketers make sales on plaintiff's behalf. As such, plaintiff's utilization of third-party telemarketers is exempt from the FTC Act and the Telemarketing Act under the McCarran-Ferguson Act.

64. The FTC's application of the Amended TSR to contract telemarketers employed by insurance providers is therefore not in accordance with law.

65. As a result of the actions complained of herein, the plaintiffs will suffer immediate and irreparable injury.

<u>THIRD CLAIM FOR RELIEF</u>

(Application of the Amended TSR to Third-Party Telemarketers Employed by Insurance Providers is Arbitrary and Capricious in Violation of the APA)

66. Plaintiff restates and reincorporate above paragraphs 1 through 65 as if fully set forth herein.

67. The Amended TSR is arbitrary and capricious and inconsistent with law in violation of the APA. 5 U.S.C. § 706(2)(A). Specifically, the FTC undertook no analysis, nor addressed comments in the record, regarding the breadth of the exemption of the business of insurance from the FTC Act generally, or from the Telemarketing Act.

68. The record does not support the FTC's conclusion that the utilization of third-party telemarketers by insurance providers does not constitute the "business of insurance" which is exempt from the FTC Act and the Telemarketing Act.

69. The FTC's exemptions from the Amended TSR requirements are arbitrary and bear no relation to the purported purpose of the Amended TSR. There is no difference between exempt and non-exempt telemarketing calls on behalf of insurance providers in terms of their impact on the FTC's objectives in adopting the Amended TSR, or in whether they fall within the McCarran-Ferguson Act.

70. In view of these failings, the FTC has acted in an arbitrary and capricious manner and, as such, the Amended TSR should be set aside in accordance with Section § 706(2)(A) of the APA .

71. As a result of the actions complained of herein, the plaintiffs will suffer immediate and irreparable injury.

FOURTH CLAIM FOR RELIEF

(The Amended TSR Violates the Equal Protection Clause of the Fifth Amendment to the United States Constitution)

72. Plaintiff restates and reincorporates above paragraphs 1 through 71 as if fully set forth herein.

73. The Fifth Amendment to the United States Constitution requires the government to treat similarly situated parties equally. Where the government's classification

affects the exercise of fundamental rights, as it does here, any distinctions in the law are subject to strict constitutional scrutiny.

74. Even where fundamental rights are not implicated, the Fifth Amendment requires regulatory classifications made by the federal government to be rationally related to the purpose of the regulation. Any such classification must be reasonable, not arbitrary, and must rest upon some difference having a rational relationship to the object of the regulation.

75. The Amended TSR creates two distinct categories of unsolicited callers within the insurance industry through its exclusions and exemptions, and it regulates the speech of each category differently. Telemarketing calls made by insurance providers themselves "in house" rather than through third party telemarketers are completely exempt from the Amended TSR. They do not have to comply with the rules regulating preacquired account information and free-to-pay conversions, nor do they have to contend with the Amended TSR's abandoned call or caller identification requirements, or abide by the new national "do-not-call" registry. Meanwhile, insurance companies that currently rely on third-party telemarketers, who are fully subject to the Amended TSR, face significantly increased burdens and costs associated with their telemarketing, even though they are engaged in the same "business of insurance," and offer the same kinds of products and services, as insurance providers who are exempt from the Amended TSR.

76. The FTC did not demonstrate any rational relationship between the different levels of regulation imposed under the Amended TSR and the stated goals of protecting consumer privacy and protecting consumers from fraudulent and abusive telemarketing practices.

77. The effect on the FTC's objectives in adopting the Amended TSR of calls placed by in-house by insurance providers is precisely the same as calls placed on behalf of insurance providers by third-party telemarketers that must comply with the Amended TSR.

78. There is no essential nexus between the use of a third-party call center by insurance providers and the FTC's objectives.

79. The Amended TSR thus violates the Equal Protection Clause under either strict scrutiny or rational basis scrutiny.

80. As a result of the actions complained of herein, the plaintiffs will suffer immediate and irreparable injury.

FIFTH CLAIM FOR RELIEF

(The Amended TSR Violates the First Amendment to the United States Constitution by Imposing Discriminatory Restrictions on Protected Speech)

81. Plaintiff restates and reincorporates above paragraphs 1 through 80 as if fully set forth herein.

82. The Amended TSR strictly regulates the speech and other activities of third-party telemarketers acting on behalf of insurance providers. Telemarketing calls made by third-party contractors on behalf of insurance providers must comply with not only the Amended TSR's disclosure requirements, but also its rules affecting transactions that involve preacquired account information and free-to-pay offers, negative options, and upselling; its mandate on audio recording credit card sales and the pass-through of caller identification data; and its prohibitions on "abandoned calls" and calls to consumers on the forthcoming national "do-not-call" registry.

83. The Amended TSR exempts from each of these requirements all insurance providers who conduct telemarketing themselves "in house" rather than through third party telemarketers.

84. Speakers and organizations not excluded or exempted from the Amended TSR are restricted in their ability to communicate with their audience even though there is no material distinction between exempt and non-exempt speakers or their message.

85. The First Amendment prohibits discrimination based on the content of speech or the identity of the speaker.

86. As a result of the actions complained of herein, the plaintiffs will suffer immediate and irreparable injury.

SIXTH CLAIM FOR RELIEF

(The Amended TSR Violates Protections for Commercial Speech Under the First Amendment to the United States Constitution)

87. Plaintiff restates and reincorporates above paragraphs 1 through 86 as if fully set forth herein.

88. The First Amendment to the United States Constitution extends significant protection for commercial speech.

89. Telemarketing calls made by the plaintiff and other members of the insurance industry, and on their behalf by third-party telemarketers involve truthful and non-misleading commercial speech.

90. Under the First Amendment, the government may not restrict truthful and non-misleading commercial speech unless it can prove the restriction is necessary to serve a substantial government interest, that the restriction substantially and materially advances that interest, and that the restriction is no greater than necessary to serve the articulated interest. It is of no consequence that a party speaks through another, or that a party is paid to speak, either on its own or another's behalf.

91. The FTC has not demonstrated that the Amended TSR is necessary to serve a substantial governmental interest.

92. The Amended TSR does not directly or materially advance the government's asserted purpose of balancing privacy rights and commercial speech due to the

Amended TSR's exclusions and exemptions, including that provided to insurance providers engaged in "in-house" telemarketing, but not to those who rely on third-party telemarketers. Given the significant gaps in its jurisdiction under the FTC Act, the Telemarketing Act and the McCarran-Ferguson Act, and in its implementation thereof, the FTC does not know what proportion of unsolicited calls will be affected by its rules, nor did it find that the Amended TSR will block calls that consumers find most annoying.

93. The Amended TSR will restrict the manner in which plaintiff and similarly situated insurance providers speak through third-party telemarketers.

94. In adopting the Amended TSR, the government failed to show the new restrictions would advance its objectives and that they were no greater than necessary to serve the FTC's asserted interest.

95. As a result of the actions complained of herein, the plaintiffs will suffer immediate and irreparable injury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief and judgment as follows:

(1) that the Court invalidate application of the Amended TSR, 16 C.F.R. Part 310, to third-party telemarketing on behalf of insurance providers on the grounds that the FTC exceeded the statutory authority given it in the Act;

(2) that the Court invalidate application of the Amended TSR to third-party telemarketing on behalf of insurance providers on grounds that it is not in accordance with law in that it violates the McCarran-Ferguson Act;

(3) that the Court invalidate application of the Amended TSR to third-party telemarketing on behalf of insurance providers on the grounds that the FTC acted in an arbitrary and capricious manner;

(4) that the Court declare that the Amended TSR violates the United States Constitution and is unenforceable;

(5) that the Court prohibit by way of restraining order, preliminary or permanent injunction, enforcement of the Amended TSR;

(6) that the Court award plaintiffs their full costs incurred in the bringing of this action; and

(7) for such other and further relief as this Court deems just and proper.

Respectfully submitted this 21st day of March, 2003.

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