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

COMMENTS OF
REED ELSEVIER INC.

TELEMARKETING RULEMAKING—COMMENT
FTC File No. R411001

(Proposed Amendments to the Telemarketing Sales Rule)

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April 15, 2002

I. BACKGROUND/INTRODUCTION

Reed Elsevier Inc. ("Reed Elsevier") is one of the world's leading publisher and information companies employing over 35,000 people worldwide. REI provides "must have" information in both hard copy and electronic formats to the government, scientific, legal, educational and business communities. Much of the information and services we provide to our customers is delivered via Web-based interfaces. Therefore, the proposed rules would have a significant impact on how we communicate to our customers and how we make them aware of new products and services.

There are several Reed Elsevier businesses that would be impacted by the proposed rules:

- LexisNexis ("LN"), a leading electronic information provider to legal, corporate and government markets. LN delivers its answer sets and solutions to its customers via an online "dial up" system and Web-based interfaces.

- Martindale-Hubbell ("MH"), which publishes the leading directory of legal professionals. Some MH products and services are available on the Internet Web site it maintains.

- Elsevier Science, a leading publisher and disseminator of literature covering a broad spectrum of scientific endeavors, including such fields as medicine, computer, life, and environmental sciences, and mathematics. Elsevier Science affords customers with Web access to the full text of its science and medical journals.

- Matthew Bender & Company, Inc. ("Bender"), is a renowned publisher of books and CD-ROMs containing primary and secondary materials used by the legal market. Bender's books and CD-ROMs can be purchased through Internet Web sites, and its publications also are available to users of the LN services.

Reed Elsevier has a number of concerns about the Federal Trade Commission's (the "Commission") proposed amendments to the Telemarketing Sales Rule (the "Rule"), as set forth in the Notice of Proposed Rulemaking, 67 Fed. Reg. 4492 (the "NPRM"), including questions about the statutory interpretation, constitutionality and policy bases for the proposed expansion of the Rule's applicability. These particular concerns are more fully addressed by various commenters than in the instant submission, and Reed Elsevier will not repeat them here. Reed Elsevier submits these comments to focus the Commission's attention on two items of particular concern. Specifically, the Commission proposes to exclude from the business-to-business exemption in Section 310(g) of the existing Rule (the "B-to-B exemption") "telemarketers of Internet services or Web services." 67 Fed Reg. 4531. The Commission should not adopt this exception to the B-to-B exemption because it already has enforcement authority to address fraudulent sales activity of B-to-B Internet and Web services. At the very least, if the Commission does exclude Internet and Web services from the exemption, the Commission should greatly narrow the definitions of "Internet services" and "Web services" to avoid stifling the innovative ways in which legitimate Web-related services are, and may be in the future, offered to business. Second, the Commission should clarify that telemarketing calls to home offices fit within the B-to-B exemption.

II. The Exclusion from the B-to-B Exemption for Internet and Web Services is Unnecessary Given the Existing Authority of Government over Cramming and Other Internet Fraud.

In the NPRM, the Commission maintains that "the sale of Internet and Web services to small businesses has emerged as one of the leading sources of complaints about fraud by small businesses." 67 Fed. Reg. 4531. As support for applying the *entire* requirements of the Rule to providers of "Internet services" and "Web services," the Commission cites four cases in which it has pursued actions against Web site "crammers." 67 Fed. Reg. 4531 n.398. The Commission elsewhere has identified "cramming" as the practice of "claiming to provide free web design and hosting services" and "billing small businesses for services that were never authorized and have little value."[1] The Commission's expansive proposed definition of "Web services" in the NPRM is the "designing, building, creating, publishing, maintaining, providing or hosting a website on the Internet." 67 Fed. Reg. 4500.[2]

As it recognizes in its citation of enforcement proceedings, the Commission already has authority to prosecute cramming. Indeed, the Commission's authority and willingness to counter this and related fraudulent business practices has not been limited to the four cases cited in the NPRM. According to its own testimony to Congress, from 1998 to 1999, the Commission brought a total of nine federal court actions against 45 defendants, including those engaged in

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[1] See FTC Business Alert, Website Woes: Avoiding Web Service Scams, available at http://www.ftc.gov/bcp/conline/pubs/alerts/webalrt.htm. See also http://www.ftc.gov/bcp/conline/edcams/dotcon/cramming.htm.

[2] The equally broad proposed definition of "Internet service" is "the provision, by an Internet Service Provider, or another, of access to the Internet." Id.

Web site cramming.[3] This aggressive approach to cramming matches the Commission's historic zeal in combating Internet fraud generally.[4] The Commission has continued its aggressive enforcement actions against cramming since 1999.[5]

The government efforts to prosecute and raise awareness of cramming are not limited to those initiated by the Commission. For example, the Federal Communications Commission (the "FCC") held a workshop on April 22, 1998, at which local exchange carriers adopted a set of best practices to combat cramming.[6] Consumers and businesses may now file a complaint online through the FCC's Web site if they think they are the victim of cramming by telecommunications carriers.[7] On April 15, 1999, the FCC adopted a set of "truth-in-billing" rules designed to reduce telecommunications fraud, including cramming, by making telephone bills easier for customers to read and understand, thereby making such fraud easier to detect and report.[8] Further, the FCC has exhibited its willingness to crack down on cramming by telecommunications carriers, through which certain unscrupulous Web service firms bill

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[3] Prepared Statement of Jodie Bernstein, former Director of Bureau of Consumer Protection, the Federal Trade Commission on Web Site Cramming to the Committee on Small Business, U.S. Senate, October 25, 1999 ("Bernstein Statement") at 3.

[4] See id., at 3-4, describing the over 100 enforcement actions against over 280 defendants engaged in deceptive or unfair business practices related to the Internet.

[5] See, e.g., FTC v. Page Creators (D. Minn. filed March 26 2001); FTC v. Mercury Marketing of Delaware, et al., (E.D. Pa. filed June 28, 2000); FTC v. YP.Net, Inc., et al., Case No. 00-1210 PHX SMM (D. Ariz. filed June 26, 2000); FTC v. WebValley, Inc., et al., Case. No. 99-1071 DSD/JMM (D. Minn. filed July 14, 1999).

[6] The FCC also noted the "great deal of attention from federal and state legislators, regulatory agencies, and law enforcement agencies" that cramming has received. See http://www.fcc.gov/Bureaus/Common_Carrier/Other/cramming/cramming.html.

[7] Revised Wireline and Wireless Telephone Complaint Form Now Available Online for Consumers, DA 01-2337 (October 9, 2001).

[8] Truth-in-Billing and Billing Format, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492 (1999).

consumers for unauthorized services.[9] States also have vigorously pursued Web fraud; as the Commission indicated to Congress, as of 1999, over 60 actions had been brought against perpetrators of cramming and Internet fraud by state Attorneys General and consumer affairs agencies.[10]

In light of this array of existing governmental measures to combat cramming by Web service providers and Internet fraud generally, there is little rationale for the Commission's proposal to sweep the vast majority of *legitimate* B-to-B practices related to the Internet within the extensive and burdensome regulatory apparatus of the Rule. By proposing to exclude from the B-to-B exemption all providers of Web and Internet services (as those terms are expansively defined in the NPRM), the Commission improperly shifts the presumption contained in the current rule that the B-to-B context does not present the same risks of fraud and abuse that arguably are present in the consumer context. Indeed, the prevalence and efficacy of existing government efforts to fight cramming suggest that the current tools available to law enforcement are sufficient to address the narrow subset of businesses fraudulently offering Web services to businesses.

Negative consequences would result from excepting all Web-related services from the B-to-B exemption. As the Commission points out, small businesses are "eager to join the online revolution," and electronic commerce transactions are growing exponentially. 67 Fed. Reg. 4532. However, if all B-to-B providers of services "related to the Internet" were required to

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[9] See, e.g., Long Distance Direct: Apparent Liability for Forfeiture, 15 FCC Rcd 3297 (2000) (assessing a $2 million fine for cramming and slamming violations).

[10] Bernstein Statement at 3.

comply with the Rule's requirements, these costs would be passed through to the businesses purchasing Web services, even though the vast majority of the services purchased are non-fraudulent. Accordingly, the Commission's proposed action would have the perverse effect of increasing the cost to small businesses of establishing an online presence and hindering the development of electronic commerce.

Application of the Rule's many requirements to the still nascent and heterogeneous Web site industry illustrates the inefficiency of the Rule as an anti-cramming device and the lack of fit of the Rule's requirements to the B-to-B context. For example, it would make little sense to apply the time of day restrictions designed to protect consumers from late night calls in the B-to-B context. Similarly, the privacy rationales underlying the proposed do-not-call registry do not correlate to the B-to-B context, where the same person does not necessarily receive telemarketing calls, and in which the exchange is between two commercial entities.

III. If the Commission Excludes Internet and Web Services from the Exemption, It Should Narrow the Definitions of Those Terms to Target the Specific Activities of Concern in Order to Avoid Stifling Legitimate Businesses.

The inefficiency of the Rule as an anti-cramming device is exacerbated by the breadth of the Commission's proposed definitions of "Internet services" and "Web services." The Commission's explanation of the scope of Web services, as "any and all services related to the World Wide Web" is breathtaking in its scope. If this proposed definition is to be interpreted literally, the mere fact that a business offers its service *via* the Internet to another business would mean that it could be interpreted as providing a "Web service" for purposes of the rule. Accordingly, any business whose service is available through the Internet and which conducts telemarketing to businesses for that service—from the *Wall Street Journal* to United Airlines to

TheStreet.com—would have to comply with *all* the requirements of the Rule, including the time of day restrictions, the do-not-call list, and the recordkeeping requirements. Of course, this scenario would penalize both sides of a business-to-business transaction by providing a disincentive for businesses to offer B-to-B services if those services have anything to do with the Internet and a disincentive for businesses receiving assistance needed to "join the online revolution." Further, it would stifle businesses considering an innovative online counterpart for an existing offline product or service.

Such a regime is a far cry indeed from the limited instances of Web site cramming the Commission identifies in the NPRM and over which the Commission already has authority. Accordingly, at the very least, the Commission should substantially narrow its expansive definitions to limit application of the Rule to the specific instances giving rise to Web site cramming.

IV. The Commission Should Clarify that Telemarketing to Home Offices Are Within the B-to-B Exemption.

Reed Elsevier respectfully requests that the Commission clarify that telemarketing calls to an individual working out of a home office are within the B-to-B exemption (irrespective of the Commission's ultimate position on Internet and Web services discussed above). This issue is not addressed in the NPRM. However, that a business person has chosen to establish a business at home, rather than rent office space, and the fact that a business is a small one or two person operation should have no bearing on the applicability of a B-to-B exemption. The very same rationales underlying the B-to-B exemption apply to the business person working from a home office, and it would be arbitrary for the Commission to presume—absent any evidence—that a

home office is any less sophisticated or otherwise deserving of additional protection than other businesses. Indeed, very small businesses run out of home offices are likely not to have access to or receive information about the same array of products as larger businesses. Therefore, the Commission should not impede efforts to offer legitimate services through telemarketing to which these small businesses might otherwise not have access.

V. Conclusion

For the reasons stated above, the Commission should not exclude the sale of Internet and Web services from the B-to-B exemption from the Rule. If such an exception to the exemption is adopted, the Commission should greatly narrow the definitions of Web and Internet services to focus on the small class of conduct generating the concerns over B-to-B fraud. Finally, the Commission should clarify that calls to a home office are within the B-to-B exemption.

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