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April 4, 2003

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

**Re: Request for Advisory Opinion:
Business of Insurance Exemption from
the Amended Telemarketing Sales Rule**

Dear Mr. Clark:

Pursuant to Section 1.1 of the Commission's rules, 16 C.F.R. § 1.1, Stonebridge Life Insurance Company ("Stonebridge"), hereby requests an advisory opinion to clarify the application of the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, to situations in which a third-party telemarketing company engages in the "business of insurance" subject to state regulation. This question arose after the Commission adopted amendments to the TSR that raised questions about the exception from FTC rules and the Federal Trade Commission Act ("FTC Act") provided by the McCarran-Ferguson Act, 15 U.S.C. § 1012, for the "business of insurance" regulated by the states. Stonebridge respectfully submits that the advisory opinion requested by this letter involves a substantial question of law on which there is no clear Commission or court precedent and that it also is an issue of significant public interest.

Stonebridge raised this question in *Stonebridge Life Insurance Company v. FTC*, No. CA 03-739 (D.D.C. filed Mar. 21, 2003), which seeks a declaratory ruling that the use of third-party call centers to make outbound telemarketing calls as part of the business of insurance falls within the McCarran-Ferguson exemption. Stonebridge and members of the telemarketing industry are concerned that the Commission's discussion of the McCarran-Ferguson Act exemption in the Statement of Basis and Purpose for the Amended TSR ("*Amended TSR Order*") does not make the FTC's interpretation of the law clear, and that the text of the order suggests the



Amended TSR applies to all third-party call centers, whether or not engaged in the business of insurance. Because the FTC's response in litigation asserts that the industry's concern is unfounded, Stonebridge respectfully requests an advisory opinion that makes the Commission's position clear with respect to application of the McCarran-Ferguson Act to telemarketing.

BACKGROUND

Stonebridge sells insurance through multiple marketing mechanisms, including outbound telemarketing. It is authorized to transact business nationally, is licensed to do so by the insurance departments in all fifty states and the District of Columbia, and has sales in each state. Stonebridge's telemarketing calls are made primarily by third-party call centers with whom Stonebridge contracts rather than conducting telemarketing "in-house." All of Stonebridge's insurance activities, including its marketing practices, are actively regulated by state authorities in each state where it makes sales. This includes oversight of the telemarketing scripts utilized by the third-party call centers that make calls on Stonebridge's behalf.

The Telemarketing Sales Rule

When the Commission first adopted the TSR, it acknowledged that the Telemarketing Act, under which the TSR was adopted, 15 U.S.C. § 6101, *et seq.*, and the TSR itself do not apply to the "business of insurance" to the extent that it is regulated by State law. *Telemarketing Sales Rule; 16 C.F.R. Part 310*, 60 Fed. Reg. 43842, 43843 (1995) (citing 15 U.S.C. 1012(b)). At the same time, however, the Commission did not exempt from the rules parties that act on behalf of an exempt organization if those parties themselves are subject to the FTC Act. *Id.* Instead, it held that agents of exempt companies would be subject to the TSR. *Id.* Its explanation on this point was very brief, stating only that:

[F]or example, banks and airlines would not be subject to the Final Rule, because they are exempt under section 5 of the FTC Act. Similarly, section 4 of the FTC Act exempts corporations that are not acting for their profit or that of their members. However, 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. Similarly, a company that is acting for profit would be subject to the FTC Act even when providing services to a nonprofit corporation. The Commission is not aware of any reason why the [TSR] should create a special exemption for such companies where the FTC Act does not do so. Accordingly, the [TSR] does not include special provisions regarding exemptions of parties acting on behalf of exempt organizations; where such a company would be subject to the FTC Act, it would be subject to the Final Rule as well.

Id. (citations omitted). The Commission did not explain how this interaction between exempt entities and third-party call centers would work in the context of the “business of insurance.” It also did not acknowledge that the examples it gave were for status-based exemptions, which apply based on whether an entity itself satisfies a certain definition, whereas the exemption in the McCarran-Ferguson Act for the “business of insurance” is a functional exemption that focuses on the activities in which an entity engages.

When the Commission revised the TSR late last year, it adopted the same approach for exempt entities and telemarketing carried out on their behalf by third-party call centers. See *Telemarketing Sales Rule; 16 C.F.R. Part 310*, 68 Fed. Reg. 4580 (2003). It reiterated that “the rule does not apply to entities or activities that fall outside the Commission’s authority under the FTC Act, such as banks, savings associations and federal credit unions, regulated common carriers and the business of insurance.” *Id.* at 4598. It also restated that “the exemption enjoyed by those entities does not extend to any third-party telemarketers who may make or receive calls on behalf of those exempt entities.” *Id.* The Commission stressed that it “can reach telemarketing activity conducted by non-exempt entities on behalf of exempt entities.” *Id.* at 4587.

The Commission has never discussed how the McCarran-Ferguson Act “business of insurance” exemption applies any differently from other exemptions. It has stated only that “from the inception of the [TSR], the Commission has asserted that parties acting on behalf of exempt organizations are not thereby exempt from the FTC Act” or by extension the TSR, and that “[t]his reading is consistent with the Commission’s long-standing interpretation ... of its authority.” *Id.* at 4586. This generalized statement is not restricted to some exempt organizations but not others, nor does it distinguish between the statutory provisions that result in exemptions for, variously, banks, savings associations, federal credit unions, and regulated common carriers, as compared to the exemption in the McCarran-Ferguson Act for the business of insurance. In this regard, the Commission has never explained the difference between a status-based exemption from its jurisdiction and a functional exemption. Indeed, although the Commission has suggested the scope of the TSR exemptions is “clear,” *id.* at 4586, the *Amended TSR Order* lumps together its discussion of status-based and functional exemptions, suggesting that activities of third-party call centers shall be regulated in all cases:

The Commission has 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 banks, savings associations and federal credit unions; regulated common carriers, and the business of insurance. *However, the Commission has also made it very clear that the exemption enjoyed by those entities does not extend to any third-party telemarketers who may make or receive calls on behalf of those exempt entities.*



Id. at 4598 (emphasis added). This perception is reinforced elsewhere in the *Amended TSR Order*, where the Commission cites with approval the regulation of entities that sell insurance. *See id.* at 4620 & nn.457-458.

The FTC's treatment of the McCarran-Ferguson issue in its *Amended TSR Order* suggests to Stonebridge – and to every insurance company with which it has consulted – that insurance providers conducting their own telemarketing “in house” enjoy a blanket exemption from the TSR, while identical calls conducted by third-party call centers on behalf of insurance companies are subject to the rule. We do not believe that such an interpretation comports with the McCarran-Ferguson Act, because a telemarketing sale of an insurance product constitutes the business of insurance regardless of whether calls are made by an insurance company or by a call center calling on its behalf.

Declaratory Ruling Action

To seek clarification of the FTC's jurisdiction, Stonebridge filed suit in federal district court, after unsuccessfully seeking informal guidance from the agency. Notably, the FTC's opposition to Stonebridge's motion for a temporary restraining order seemed to modify or expand its analysis of the McCarran-Ferguson exemption as set forth in the *Amended TSR Order*. At page 9 of the opposition brief (copy attached), FTC counsel states that “the status of the entity that engages in practices prohibited by the Rules is not dispositive of the McCarran-Ferguson Act restriction.” The opposition brief for the first time seeks to explain the distinction between exemptions provided based on an entity's status (*i.e.*, bank, common carrier, etc.) and the “functional” exemption provided for entities engaged in the business of insurance. *Id.* (citing *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 271 (1979)). This suggests that the dichotomy between in-house and third-party telemarketing of insurance implied by the TSR orders does not accurately portray the Commission's interpretation of the McCarran-Ferguson Act. Indeed, based on the agency's litigation position, the FTC seems to agree that determining the extent to which the McCarran-Ferguson Act exemption may apply depends on whether an entity is engaged in the “business of insurance,” regardless of its status as an insurance company or a telemarketing call center.

At oral argument on Stonebridge's motion for a temporary restraining order, FTC counsel reinforced the view that application of the TSR to the insurance industry does not depend on the status of the caller (in-house versus third-party telemarketers) as the TSR orders seem to indicate. Counsel stated that “with respect to activities that are protected by the McCarran-Ferguson Act, they are protected *whether they are engaged in by insurance companies or those telemarketing on behalf of insurance companies.*” *Stonebridge Life Ins. Co. v. FTC*, No. 03-739, Tr. at 17 (D.D.C. Mar. 28, 2003) (emphasis added) (copy attached). Stonebridge agrees with the position of FTC's counsel as it was articulated in the opposition and at oral argument.



REQUEST FOR ADVISORY OPINION

By this request, Stonebridge seeks an advisory opinion that sets forth with greater clarity the FTC's position on the application of the McCarran-Ferguson Act in the context of the agency's Telemarketing Sales Rule. Specifically, Stonebridge requests that the Commission clarify that the TSR does not apply to telemarketing of insurance products by third-party call centers simply because the insurance company does not make the calls itself but rather contracts with an outside vendor to call on its behalf. The Commission should clarify that this activity is entitled to exemption from the FTC Act because of McCarran-Ferguson.

Stonebridge submits that the application of the McCarran-Ferguson Act exemption for the business of insurance in the context of the TSR is a substantial question of law on which there is no direct precedent, and on which prior Commission statements have left substantial room for doubt. This issue is of significant public interest in that the scope of the TSR should be clear and unambiguous, both to avoid unnecessarily inhibiting or burdening industry and to ensure consumers are not denied the benefits of the rule due to confusion regarding how the rules apply. Moreover, because private citizens and state attorneys general or other state officials can seek relief under the TSR, *see* 15 U.S.C. §§ 6103(a), (f), 6104(a), a clear pronouncement by the FTC on whether and how its rules apply is of critical importance. We note that this request for advisory opinion does not ask that the Commission prejudge any particular practice with respect to telemarketing insurance products. Rather, it seeks a general statement that reaffirms FTC counsel's representation at oral argument that "with respect to activities that are protected by the McCarran-Ferguson Act, they are protected whether they are engaged in by insurance companies or those telemarketing on behalf of insurance companies."

Respectfully submitted,

Davis Wright Tremaine LLP

A handwritten signature in blue ink that reads "Robert Corn-Revere". The signature is stylized and cursive.

Robert Corn-Revere
Counsel for Stonebridge
Life Insurance Company