

March 29, 2002

Mr. Don Clark
Office of the Secretary
Federal Trade Commission
Room 159
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

RE: Telemarketing Sales Rule -- Comment. 16 CFR Part 310*

Dear Mr. Clark:

AARP appreciates this opportunity to comment on the Federal Trade Commission's (FTC) Notice of Proposed Rulemaking to amend the Telemarketing Sales Rule (the Rule). AARP's interest in the Telemarketing Sales Rule and concerns about telemarketing abuses are long-standing. Seven years ago we were active participants in the original rulemaking proceeding. Since the adoption of the Rule in 1995, AARP has dedicated significant resources to educating consumers about telemarketing fraud and to working with federal, state and local law enforcement agencies to combat it. We have also worked with state legislatures to enact state telemarketing legislation. The existing Rule has helped to support these efforts and we believe that the Commission's recommended additions to the Rule will strengthen that support.

Today our comments will focus primarily on the three major recommended additions to the Rule: the establishment of a national Do-Not-Call Registry, the prohibition on blocking caller identification information, and the elimination of the practice of transferring preacquired account information to a third party for use in telemarketing.

In our discussion of the three areas listed above, AARP will address issues raised in the Commission's notice. Additionally, we will offer suggested changes to the Telemarketing Sales Rule in such areas as the timing of disclosures, revised scienter requirements, courier pick-ups, and predictive dialers. We anticipate expanding further upon many of the FTC's inquiries during the Public Workshop scheduled for June 5-7 of this year.

Importance of the Rule

AARP is a strong supporter of the Telemarketing Sales Rule. Our views on this issue are well documented within the Commission by virtue of our filed comments and participation in FTC-led workshops and hearings on the Telemarketing Sales Rule and its various subparts. The Rule has served as a foundation from which AARP has been able to mount education and awareness campaigns. Our advocacy efforts have built upon the Rule's provisions regarding disclosures, prohibitions, and enforcement mechanisms as well. We have also conducted research related to the Rule, some of which will be described later in these comments.

The Rule has also empowered law enforcement agencies to prosecute unlawful telemarketers and helped legitimate telemarketers to establish standards of conduct. The existence of the Telemarketing Sales Rule has enabled federal, state, and local law enforcement officials to take action against telemarketing firms. The ability to point to specific violations of the Rule has led to prosecutions and, in some cases, remuneration for victims.

Finally, the Rule has provided the states with a floor of consumer protection -- and many have been successful in raising that floor. Close to thirty states have expanded upon the Rule's protections and prohibitions in developing state-specific laws and regulations that better protect consumers. At least eleven of the states have enacted laws using provisions from an AARP model law building upon the Rule, and additional states are in the process of considering comprehensive telemarketing legislation. In fact, recent AARP surveys conducted in New Jersey, Minnesota and Michigan found that an overwhelming percentage of survey participants favor additional state laws to prevent unfair, misleading, or deceptive telemarketing practices.¹

AARP has made continuing efforts to educate its membership about what constitutes legal and illegal telemarketing behavior by explaining provisions in the Rule that

- require telemarketers to make specific disclosures of material information;
- prohibit misrepresentations;
- set limits on the times telemarketers may call consumers;
- prohibit calls to a consumer who has asked not to be called again; and
- set payment restrictions for the sale of certain goods and services.

National Do-Not-Call Registry

The Commission is to be commended for its decision to introduce a national Do-Not-Call registry (the registry). AARP supports the registry with the strong caveat that it not preempt states' efforts to establish stronger protections for consumers.

As proposed, the national Do-Not-Call registry would enable a consumer to call a toll-free number to place his or her phone number on a national list. Telemarketers would then be required to access the FTC's list, removing the numbers of all consumers whose numbers appeared on the registry.

The Commission's proposal is a well-reasoned approach to address the concern AARP's members have expressed regarding their inability to stem the volume of telemarketing calls, particularly in states that currently lack Do-Not-Call laws. What follows is our response to some of the Commission's inquiries regarding the registry proposal.

Provided it is properly implemented, the benefit to consumers of the establishment of the registry should be substantial. A national Do-Not-Call listing that is used only for the purposes of complying with the Rule will supply consumers with a sense of comfort along with a return of control over the telephone.

As a means to assuage consumers' concerns that they will have to resubscribe every year or

risk the resumption of calls, AARP supports the requirement that names placed on the registry remain for a ten-year period. This period of time is consistent with the rules the Federal Communications Commission imposes on common carriers that maintain Do-Not-Call lists. It would go a long way toward carrying out the wishes of the consumer who takes the time to place his or her name on the registry. Therefore, we urge the Commission to reconsider imposing a two-year trial period on the registry. We would prefer that the Commission not set a firm “sunset” date, but rather conduct periodic reviews after which the system can be modified, but not terminated.

Recognizing that our society is a mobile one, we support a measure that deletes phone numbers from the list once they are reassigned, unless a consumer tells the carrier during the origination of service that he or she would like the number placed on the registry.

The ability to place a number on the registry should be available to both the named line subscriber and his or her spouse. AARP sees no reason to exclude a spouse from being allowed to call and place the household’s number on the registry. We are hard pressed to think of a situation where telemarketing calls are regarded as a nuisance by one member of the household and welcomed by another. The importance of including spouses, particularly for older persons, was demonstrated several years ago. The FBI’s sting operation resulted in a fraudulent telemarketer testifying about how he identified and then targeted consumers with Alzheimer’s disease.

Abuse of the system and unauthorized placement on the registry could be prevented by requiring that the call be placed from a phone located in the household that is seeking to have its number included. For instance, consumers who wished to prevent unwanted telemarketing calls from coming to their home would access the registry from their home phone. The number would be captured and entered into the database. Again, we can think of few situations where a visitor would enter the home and place a call to the registry without authority from the homeowner to do so. Consumers could verify that their number had been successfully added to the registry by calling back and choosing a verification option from the menu. Problems could be handled through separate private correspondence by phone, e-mail or regular mail to an office within the Commission.

Some members of the telemarketing community have expressed concerns that participation in the registry will prevent consumers from receiving calls promoting goods and services that the consumer is interested in. To address these concerns, we recommend that calls to the registry provide consumers with options. By following a series of prompts, consumers would be able to identify the days and times of day when they would be willing to accept calls – if at all. Additionally, consumers should be given the option of determining what type of calls they choose to take. Providing this type of option would increase the likelihood from a telemarketer’s standpoint that their call will be met with interest.

It should be made clear, however, that unless a consumer specifies that calls are allowed, inclusion in the registry would prohibit telemarketing calls from being made to that number. That prohibition applies to all calls within the jurisdiction of the Commission, including calls

soliciting charitable contributions initiated by for-profit entities. The expanded jurisdiction accorded the FTC through enactment of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) amendments is welcome. It now prevents questionable organizations soliciting on behalf of sound-alike charities from calling consumers, while allowing the local church, fire department, and fraternal organizations to continue their legitimate fundraising appeals.

The establishment of the national Do-Not-Call registry would complement existing state Do-Not-Call lists. AARP has been an active participant across the country on behalf of state Do-Not-Call lists. The continued ability of the states to protect their residents and to enforce their rules is a strong reason not to preempt them with the establishment of the registry. In fact, to quote the Commission, “state requirements should be preempted only to the extent that the national Do-Not-Call registry would provide more protection to consumers.” This statement is consistent with AARP principles that federal consumer protections should serve as a floor, not a ceiling. While the registry will provide much needed relief to consumers across the country, some states will offer consumers even more.

Clearly, consumers have expressed convincing support for state Do-Not-Call lists. In a presentation to the Kentucky Senate, Eileen Harrington, the FTC’s Associate Director of Marketing Practices within the Consumer Protection Bureau stated that “more than 1 million New York households had signed up for the state Do-Not-Call list by the time it took effect... and more than 332,000 phone lines were listed on Missouri’s Do-Not-Call list within a short time of its passage.”²²

Additionally, while the Commission has chosen to exercise jurisdiction over a larger segment of the telemarketing industry, there are still some holes that need to be filled. In many cases, the states can provide that additional layer of protection. The ability of states to regulate the insurance industry, banking industry, common carriers and purely intrastate calls makes the federal-state Do-Not-Call partnership a “win-win” for consumers.

State Do-Not-Call laws are imperative for meaningful consumer protection, as enforcement and oversight are needed at a state level. Several states have already prosecuted telemarketers for making calls to consumers in violation of the state Do-Not-Call list. The numerous enforcement actions against Do-Not-Call law violations of the state level demonstrate the essential role states play in ensuring these laws are effective.

As stated above, AARP would support a measure that deletes phone numbers from the list once they are reassigned. We believe that the carriers could easily supply this information in the course of doing business. In today’s telecommunications environment, voice and data that travel over phone lines are controlled electronically. Software could be installed and switching hardware put in place that would enable information regarding changes in phone numbers to be corrected automatically. This same technology might be used to ensure that if area code changes are made, the phone number will not be taken off of the registry.

The proposed Rule also includes a provision that would allow charitable organizations to

continue to telemarket individuals if the consumer has provided express verifiable authorization to that entity. Provided that this form of authorization requires something in writing from the consumer to the telemarketer, AARP supports the addition to the Rule. AARP does not believe that oral authorization can be sufficiently verified to protect consumers against possible abuses.

Finally, AARP urges the Commission to offer information regarding the registry and the telephone prompts to subscribe to the service in Spanish as well as English. A bi-lingual approach will facilitate use of the registry by a larger audience.

Call Blocking

AARP fully supports the Commission's efforts to prohibit the blocking of caller identification (Caller ID) information. The proposed changes to the Rule that will require the disclosure of a caller's or organization's actual name and telephone number is to be applauded.

AARP has been at the forefront of seeking this change in business practices. In previous comments, both written and oral, at the Commission and in support for legislation in both the House and the Senate, we have been advocates for this type of requirement. We believe that consumers who spend money on Caller ID services should be able to use the product for its intended purpose. Increasingly, consumers are asked to "take responsibility" and "make the best choice," and become "empowered." Inasmuch as consumers purchase Caller ID services to become empowered and screen telemarketers, they should be able to use these services for this purpose. Why would legitimate telemarketers want their name/phone number concealed, effectively rejecting a free advertisement? The existing environment that allows telemarketers to block their identifiers places consumers at a disadvantage. Not only are consumers unable to identify who is calling as the call arrives, but also they cannot return a call because the number is unavailable. Adoption of the call blocking provision of the Rule will return control of the telephone where it belongs, in the hands of the consumer.

The benefits of adopting this revision to the Rule clearly outweigh the costs involved. Over the years we have heard from a reluctant industry that the transition would be nearly impossible and cost-prohibitive to implement. Those claims are less credible today than they were two and three years ago. Telecommunications systems being installed today have the capability to carry caller identification information. This is true irrespective of whether the transmission is carried over a trunk line or not. Additionally, older systems can be upgraded to display the same characteristics as the newer systems. Admittedly, these changes will cost money, but not nearly as much as had been projected in previous proceedings. In fact, we have been told that technology exists today that can be introduced at the switching stations at a fraction of the previous cost.

The Commission asks if the information transmitted to the consumer should be that of the telemarketer or the charitable organization that is the ultimate recipient of the donation. AARP understands that there is a limit to the amount of information you can transmit over a Caller ID box. Therefore, a requirement that a telemarketer transmit information regarding the name and number of the telemarketer as well as the charitable organization on whose behalf they are calling may be unwieldy and could serve to confuse the consumer.

AARP recommends that the name of the charitable organization with a verifiable phone number of the organization appear on the display. This would provide consumers with the information necessary to decide if they want to pick up the call. It also supplies the consumer with a phone number to call to verify that the telemarketer is indeed calling on behalf of the organization and gives the consumer a direct link to the charity if questions arise. Further, this approach empowers consumers to contact government agencies such as the Better Business Bureau or state Attorney General to verify the legitimacy of the organization, and helps prevent consumers from becoming victims.

Such a requirement would likely benefit the legitimate telemarketers as well, since a consumer is more likely to pick up a call from the American Cancer Society than from a telemarketing firm. However, improper alteration of the information that is intended to confuse or mislead a consumer should not be tolerated. AARP is particularly concerned about a practice in which the telemarketer intentionally hangs up the phone before the consumer can pick up the receiver. In doing so, what remains is a message on the Caller ID display that reads “Free Money” or some other deceptive inducement. We ask the Commission to address this growing problem.

It would be in the best interests of all concerned if the Commission settled on a date by which all telemarketers would be required to transmit the name of their organization and their phone number to Caller ID displays. AARP recommends that a two-year window be allowed from the date of enactment of the revised Rule. This timetable is consistent with the one in H.R. 90, the Know Your Caller Act, which was approved by the House of Representatives late last year and is awaiting action in the Senate.

Preacquired Account Information

AARP strongly supports the proposed revision to the Telemarketing Sales Rule that prohibits the practice of receiving any consumer’s billing information from any third party for use in telemarketing, or disclosing any consumer’s billing information to any third party for use in telemarketing.

A telemarketer’s ability to use preacquired account information without the approval of the consumer is a major concern. Historically, use of preacquired account information has been used in conjunction with free trial offers that end up being paid subscriptions, and complimentary memberships in travel clubs that show up at the consumer’s doorstep as negative option solicitations, with dues or membership fees assessed for inaction. In these cases, not only did consumers honestly believe that they were agreeing to a free-of-charge service, they clearly were unaware of the fact that the telemarketer was already in possession of billing information. Over and over we hear from consumers that they had no idea that money could be taken from their account without their providing an account number. This is a deceptive, unfair, and abusive practice that should be prohibited.

Therefore, the Commission’s proposal to prohibit such sharing is necessary. Additionally, the expanded definition of “billing information,” is broad enough so as not to leave any doubt in the

mind of the telemarketer regarding what can and cannot be shared.

In an effort to further strengthen consumer protections, AARP is asking the Commission to reassess its position on express written authorization. We believe that the definition of “express verifiable authorization” should require that the authorization be in writing. Only after express *written* authorization is obtained should a consumer’s bank account be accessed. As the legislative history behind the Telemarketing and Consumer Fraud and Abuse Prevention Act indicates,³ the practice of obtaining payment by debiting a consumer’s bank account can often be abusive, or even fraudulent. Once a telemarketer has a consumer’s bank account information, it is possible for the account to be drained, with essentially no recourse for the consumer. Although the majority of telemarketers using this practice are not fraudulent, this practice should not be legal. How can consumers determine whether they are giving their bank account information to a legitimate telemarketer, or a boiler room? Once this information is given over the telephone, they have lost control over how this information is used.

A written authorization requirement would not only keep control over this information with the consumer, but would document the exact amount of money involved and the conditions under which the money could be withdrawn. Further, banks could require that written authorization be shown before the money was debited from an account; with taped, oral authorizations, banks are under no obligation to listen to the recording before releasing the money. Again, once the money is debited under the current system, the consumer has no recourse against the bank if the debit is improper or depletes the consumer’s account.

Finally, consumers overwhelmingly support a written authorization requirement. In studies commissioned by AARP’s Public Policy Institute in Minnesota and New Jersey last year, 92% of consumers surveyed strongly supported a law that would require telemarketers to obtain written authorization before gaining access to a bank account.

Additional Recommended Changes

In addition to the three major proposed rule changes, AARP believes that there are several other areas where the Telemarketing Sales Rule can be significantly strengthened. Specifically, AARP recommends changes in the timing of disclosures, the scienter requirement, predictive dialers, and courier pickups.

Timing of Disclosures

AARP strongly believes material terms and conditions regarding telemarketing sales should be disclosed *before* any payment is requested. Telemarketing calls are unsolicited sales pitches from potentially unknown sellers, and require the consumer to agree to a purchase without seeing (or seeing demonstrated) the goods or services offered. Therefore, consumers should be made aware of the terms of the sale, the total costs, restrictions, limitations, and conditions before payment is *requested*, not simply before payment is *collected*, as the Rule currently allows. This is also true for disclosures regarding a telemarketer’s refund, cancellation, exchange, or repurchase policies; in fact, it may be even more important for a consumer to know these terms up-front.

The current Rule permits telemarketers to make such disclosures long after the consumer has agreed to the sale, sometimes simply in a package insert. This is inadequate consumer protection. Such information is key to making truly informed buying decisions, particularly because the consumer is not in a position to “comparison shop” when agreeing to the telemarketing sales pitch. If a consumer changes his or her mind about a purchase once these disclosures are made, the cost and inconvenience of returning the goods or canceling the services (if permitted) falls entirely on the consumer. Not making these disclosures before the sale is “closed” is misleading at best, and deceptive or fraudulent at worst.

Scienter Requirement

Consistent with our comments in the past, AARP is asking the Commission to change the existing scienter requirements in the assisting and facilitating provision of the Rule. We continue to believe that the “knew or consciously avoided” standard places an extremely difficult burden of proof on law enforcement officials who must show an affirmative act of disregard by the person assisting or facilitating the fraud.

A burden of proof that requires that an individual “knew or should have known,” is well established and would serve to remove the shackles from federal, state, and local law enforcement officials attempting to enforce the law and prevent the abhorrent practice of selling victim or “mooch” lists.

Predictive Dialers

In its Notice of Proposed Rulemaking, the Commission has done an excellent job in describing the problems consumers face by virtue of predictive dialing. Predictive dialers automatically dial consumers’ telephone numbers in the hope that a consumer will answer and that a telemarketing representative will be available to speak with the consumer. Unfortunately, in far too many cases, the consumer rushes to pick up the phone only to hear dead air, or a click as the phone hangs up.

For many mid-life to older Americans, these calls are more than just a nuisance. In addition to the inconvenience and risk associated with rushing to pick up the phone, there is the uncertainty that envelops the consumer, especially for women living alone. When no one is on the other end of the line, a number of different scenarios begin to play out in the mind of the consumer. They wonder if their activities are being monitored or if it is just someone playing games. Is this someone waiting to get into my home when I’m away, or scarier yet, as a single female, determining when I’m home alone. This invasion of privacy is unreasonable and the use of predictive dialing is a business practice that needs to be reformed.

Therefore, AARP is pleased that the Commission has determined that calls abandoned through the use of predictive dialers are to be considered violations of the Rule. This should provide some impetus to curtail the problem. Additionally, the Commission, in conjunction with its initiative to eliminate caller identification blocking, should require that calls made from

predictive dialing devices display the information necessary for a consumer to return the call.

AARP recognizes that it is in the best interest of telemarketing firms to practice efficiency in their operations. Therefore, in addition to providing the identifying information, calls using predictive dialers should provide a taped message in lieu of hanging up. This will at least remove some of the uncertainty, described above, that currently exists when older persons answer abandoned calls.

Finally, while we would advocate for a zero abandonment rate, if the combination of the measures the Commission has included and the ones we have suggested are adopted, setting an abandoned call rate is not as critical because consumers will have some knowledge of who is calling and recourse to address wrongs.

Courier Pick-ups

Once again, AARP is asking the Commission to review the provision in the Rule allowing courier pick-ups. We suggest that in conjunction with the other positive changes the Commission is recommending, a prohibition on courier pick-ups will further strengthen the Telemarketing Sales Rule. At the FTC workshop on the initial Rule held in Chicago in September of 1995, the Commission recognized that courier pick-ups are disproportionately associated with fraudulent telemarketing.⁴ Courier pickups are so commonly used by fraudulent sweepstakes or prize promotions that FedEx trained its couriers how to spot potential telemarketing fraud victims, so that these consumers could be warned that they might be the targets of a telemarketing scam (and therefore, could refrain from sending a check to a fraudulent telemarketer through the courier service).

According to the National Association of Attorneys General (NAAG),⁵ courier pick-ups are commonly used in conjunction with telemarketing fraud, not only because couriers collect payments before consumers have a chance to change their minds, but also because it makes the contest seem more “official” if a “bonded courier” is coming to pick up the check. In fact, legitimate companies use courier pick-ups for similar reasons: to make it more difficult for consumers to change their minds if their nonrefundable “deposit” for goods or services has already been collected and to avoid the federal oversight of the U.S. Postal Service. Businesses that target low-income consumers often use courier pick-ups, recognizing that these people cannot afford to cancel a purchase and lose their deposit in the process. This practice, which effectively removes any “cooling off” period for consumers, is simply unfair, and often fraudulent. Courier pick-ups should not be permitted unless the consumer has an opportunity to inspect any goods that are the subject of the sale before payment is collected. Without the opportunity for inspection, there is no justification for courier pickups.

Miscellaneous Suggestions

As with any rule or regulation, enforcement of the Telemarketing Sales Rule is critical. Equally important is the disclosure of information regarding enforcement actions. AARP is very concerned that there is a lack of national statistics regarding enforcement actions, the

effectiveness of the Rule or even the amount of money that is being spent on telemarketing. Absent this type of information, it is extremely difficult to measure the success of various education efforts and enforcement partnerships, including those of AARP. Collecting national telemarketing data that is accessible to the general public would prove beneficial to all interested parties.

Finally, while AARP supports additional provisions to strengthen the Telemarketing Sales Rule, we are firm in our belief that any provisions contained in the Rule should not preempt the states. As we have noted, many states have chosen to expand upon the current Rule, to the benefit of consumers in their state. As a result, consumers can look forward to both federal oversight and traditionally more rigorous state enforcement.

Conclusion

The Federal Trade Commission is to be commended for the issuance of this Notice of Rule Review. In the seven years since the institution of the Telemarketing Sales Rule, AARP and other organizations have worked hard to ensure its effectiveness. Much progress has been made, but more needs to be done.

We look forward to working with Commission staff and others in the ensuing months to address many of the concerns outlined today. We urge the Commission to adopt the revised rule while incorporating the changes we have advocated. If you have any questions, please feel free to contact me or call Jeff Kramer of the Federal Affairs staff at 202/434-3800. Thank you.

Sincerely,

David Certner
Acting Director
Federal Affairs

* The *Richmond Journal of Law & Technology* has not verified the accuracy of these remarks.

¹ AARP NJ Telemarketing and “Do Not Call” List Survey (January 2002); AARP Michigan Telemarketing and “Do Not Call” List Survey (April 2002); AARP Minnesota Telemarketing and “Do Not Call” List: An AARP Survey (December 2001).

² Proposed Amendment of the Telemarketing Sales Rule to Establish a National Do-Not-Call Registry; Eileen Harrington –FTC; Judiciary Committee of the Senate of the Commonwealth of Kentucky, 2/6/02.

³ Innovation in Telemarketing Frauds and Scams: Joint Hearing Before the Subcommittee on Regulation, Business Opportunities and Energy of the Committee on Small business and the Subcommittee on Health and Long-Term Care of the Special Committee on Aging, 102nd Congress, 1st Session, 1991.

⁴ Comments of the Federal Trade Commission, Public Hearing on the Telemarketing Sales Rule, Chicago, Illinois, April, 1995.

⁵ Comments and Recommendations of the Telemarketing Fraud Task Force of the Consumer Protection Committee of the National Association of Attorneys General In the Matter of the Proposed Telemarketing Sales Rule. FTC File No. R411001 (1995). Pp. 18-19.