

Before the
FEDERAL TRADE COMMISSION
TELEMARKETING SALES RULE REGULATORY REVIEW 16 C.F.R. PART 310
Project No: R411001
COMMENTS OF THE ELECTRONIC RETAILING ASSOCIATION

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I. The ERA

The Electronic Retailing Association (“ERA”) respectfully submits these Comments in response to the request by the Federal Trade Commission (“FTC” or “Commission”) in connection with its current review of the Telemarketing Sales Rule (“TSR” or “the Rule”)¹. The ERA is the leading international trade association representing the interests of companies engaged in the \$350 billion direct-to-consumer retail marketplace. ERA proudly represents more than 450 companies, from start-ups to Fortune 500 firms, in 45 countries that provide consumers with the ability and convenience to shop at home through television, radio and on online.

The ERA shares the FTC’s goals and objectives in providing consumers with fair, truthful and ethical advertising. To that end, ERA works with the Council of Better Business Bureaus to sponsor the Electronic Retailing Self-Regulation Program (“ERSP”), an important self-regulatory program that provides a quick and effective mechanism for evaluating, investigating, analyzing, and resolving inquiries regarding the truthfulness and accuracy of advertising claims communicated in direct response advertising.

II. ERA’S Comments

A. The FTC Should Not Revise the TSR

The ERA respectfully submits that no revisions to the TSR are warranted, as it currently strikes a fair and appropriate balance of providing the FTC with the tools it needs to prosecute offensive telemarketing behavior without unduly burdening industry and consumers. Since the implementation of the Rule in 1994, pursuant to the Telemarketing and Consumer Abuse Prevention Act², the FTC has had at its disposal a strong and effective tool with which to protect consumers from deceptive or abusive telemarketers. The over eighty cases involving the TSR that the FTC has brought and settled since 2001 demonstrate the FTC’s broad and effective enforcement power. These cases have addressed offensive practices in virtually every industry subject to the Rule.³ For practices that fall outside the TSR, the FTC has often used its more general Section 5⁴ authority to “fill in the gaps.” In fact, it is not uncommon for the FTC to include Section 5 allegations in TSR matters.

For example, in its most recent telemarketing case, the FTC alleged that various defendants located in the United States and Canada violated both the TSR and the FTC Act by engaging in unfair and deceptive practices against seniors and others, by failing to make material disclosures, billing credit and debit accounts without authorization, and misrepresenting their affiliation with the U.S. government.⁵ The complaint in this case alleged both specific violations of the TSR and other, more general violations under Section 5. This and numerous other similar

¹ 16 C.F.R. Part 310. 79 FR No. 154, 46732-46740 (August 11, 2014) (the “August 11 Notice”).

² 15 U.S.C. §§ 6101-6108 (the “Telemarketing Act”).

³ <http://www.business.ftc.gov/legal-resources/1193/35>

⁴ 15 U.S.C. § 45(a)

⁵ First Consumers, LLC, Standard American Marketing Inc, PowerPlay Industries, LLC, 1166519075 Québec Inc., d/b/a Landshark Holdings Inc., 1164047236 Québec Inc., d/b/a Madicom Inc., Ari Tietolman, Marc Ferry, Charles W. Borie, and Robert Barczai. FTC Matter/File No. 132-3291. (March 18, 2014 Civ. Action No.: 4 1608 JCJ).

cases evidence the FTC's ability to bring cases against companies that engage in activity that violates not only the specific provisions of the TSR, but also Section 5.

B. The FTC should not change the “general media” advertising exemption

While the ERA does not believe that any changes to the TSR are warranted, the ERA feels compelled to address one area of particular interest to its members. In its August 11 Notice, the FTC questions whether the exemption for “general media” advertising is still appropriate and if not, whether the exemption should be changed.⁶ The notice also asks whether the Rule should require that consumers who place inbound calls to a seller or telemarketer in response to a general media advertisement for a negative option product or service must receive the same disclosures required by the TSR for a similar offer made in an outbound telemarketing call.⁷ Similarly, the notice asks whether the Rule should be changed to prohibit sellers from misrepresenting any material aspect of a negative option feature on an inbound call.⁸ The ERA respectfully submits that no changes are warranted as the FTC currently has at its disposal sufficient regulatory authority under the TSR and Section 5 to prosecute offensive behavior in these areas.

(i) FTC Authority to Exempt Certain Calls from the TSR

As noted in the August 11 Notice, the TSR exempts certain types of calls from its coverage.⁹ In its 1995 Statement of Basis and Purpose to the TSR, the FTC noted that it was vested by the Telemarketing Act to establish certain exemptions from the Rule's coverage, and “[i]n exercising that discretion, the Commission has decided that narrowly tailored exemptions are necessary to prevent an undue burden on legitimate businesses and sales transactions. Section 310.6 of the TSR enumerates these exemptions.”¹⁰ With certain exceptions, one of these exemptions applies to telephone calls initiated by a customer or donor in response to an advertisement through any medium, other than through direct mail solicitations.¹¹

Commonly referred to as the “general media” exemption, this carve out from the Rule's coverage resulted from the FTC's acknowledgment that “[i]n the Commission's experience, calls responding to general media advertising (television commercials, infomercials, home shopping programs, magazine and newspaper advertisements, and other forms of mass media advertising and solicitations) do not typically involve the forms of deception and abuse the [Telemarketing] Act seeks to stem.”¹²

This exemption is not, however, absolute. The FTC recognized that in its experience, certain product categories were prone to deception, such as “the sale of investment opportunities,

⁶ August 11 Notice at 46738.

⁷ Id.

⁸ Id.

⁹ August 11 Notice at 46733, 16 C.F.R. §310.6.

¹⁰ 60 FR No. 163, 43842-43877(August 23, 1995) (the “1995 Statement”), at 43859. This exemption originally appeared at §310.6(e), but was subsequently renumbered in the 2008 amendments (73 FR No. 169, 51164-51203 (August 29, 2008) to the current §310.6(b)(5).

¹¹ 16 C.F.R. §310.6(b)(5).

¹² 1995 Statement at 43860.

specific credit-related programs, and recovery rooms,” where “deceptive sellers or telemarketers use mass media or general advertising to entice their victims to call.”¹³ Therefore, the FTC chose to exclude these product categories from the general media exemption given the history of abuses in these areas.

(ii) Distinction Between Inbound and Outbound Calls

The significant differences between outbound telemarketing calls and upsells and inbound calls generated in response to general media advertising remain equally valid today. In the case of an outbound telemarketing call or upsell, the solicitation is initiated by the seller and the consumer receiving the call has no advance information about the product or service. As the entire solicitation occurs during the telephone call, it is critical that all material terms and conditions are disclosed during the course of that call, as the consumer’s decision to purchase will be based entirely on the information communicated at that time. In contrast, consumers who respond to advertisements disseminated in general media decide to respond based on the information contained in the advertisement and have made a conscious decision to respond how and when they choose. To the extent that the advertising contains all material information relating to the product or service being offered, there is no need to require the marketer to repeat that information during the call. Such a requirement would not only be redundant but would increase the costs of the call to the marketer thereby resulting in increased time and costs to consumers.

For example, should the general media exemption be repealed or changed, a company that advertises a product with a lengthy and detailed return policy would incur significant costs in complying with Section 310.3(a)(1)(iii), which would extend the time of a call to describe its policies, rather than simply referring the consumer to the seller’s advertisement, or online product description or return policy web page, for such information.

Furthermore, inbound calls initiated by consumers in response to general media advertising do not involve or trigger other abusive concerns expressed by Congress when enacting the Telemarketing Act, or by the Commission when establishing the TSR, such as inopportune calling times and do not call requests.¹⁴ As noted above, a consumer who reads a general media advertisement will call the advertiser on her own time with the intention and expectation of buying or seeking additional information about the advertised product or service. Thus, she will be provided with the terms of the offer necessary to make an informed purchasing decision, and will not be taken by surprise by an outbound call or an upsell for an unexpected product or service. To the extent that the FTC believes that neither the advertisement nor the call imparts sufficient material information about the offer for a consumer to make an informed purchasing decision, it may, as noted above, take action against the advertiser using its existing Section 5 enforcement powers.

(iii) Changing the TSR to Apply Rules for Negative Option Offers made in Outbound Calls to Inbound Calls is Unnecessary

¹³ Id.

¹⁴ 15 U.S.C. §6102(3)(A), (B), 16. C.F.R. §310.4(b), (c).

As noted above, the FTC asks whether the Rule should be changed to adopt disclosure obligations and prohibitions that currently apply to negative option offers made on outbound calls to inbound calls made in response to general advertising. The ERA does not believe that such changes are necessary or warranted as the FTC's ability to prosecute offensive activity occurring on inbound calls has not been hampered by the absence of such specific authority in the TSR. Indeed, the FTC notes in the August 11 Notice several actions it has brought against marketers of negative option offers advertised in general media.¹⁵ These cases demonstrate the FTC's current ability to halt violative behavior even without the need for new regulation.

(iv) Fraud Survey

In its August 11 Notice, the FTC cites to its third Consumer Fraud Survey as support for its review of the general media exemption ("Fraud Survey").¹⁶ This report notes the FTC, "suggests that more than half of all frauds are now mass-marketed via radio, television, newspapers, magazines, and additional kinds of general media advertising other than direct mail, including web pages and email."¹⁷ But a careful look at the Fraud Survey reveals that the identified "frauds" are those that are either already excepted from the general media exemption or are product categories in which the FTC is already capable of investigating (and often does) without impacting the exemption. Furthermore, the FTC's reliance on the Fraud Survey to support its review of the general advertising exemption is misplaced and flawed, as the survey simply highlights the increase in mass media advertising to promote fraud, but does not necessarily tie such advertising to telemarketing.

(1) The Types of Frauds Identified in The Fraud Survey are Already Covered by the TSR

The Executive Summary of the Fraud Survey indicates that the top frauds reported by survey participants included "fraudulent weight loss products, fraudulent prize promotions, (unordered) buyers club membership (and) Internet services, and fraudulent work-at-home programs."¹⁸ All of these categories have traditionally been and are currently areas in which FTC has demonstrated significant enforcement activity, regardless of the general media exemption. For example, in the weight loss area, which the Fraud Survey cites as having the most victims, the FTC has brought dozens of cases in just the past few years. Clearly, the FTC is not lacking for regulatory authority to pursue these cases.

Similarly, the FTC has been extremely aggressive in investigating prize promotions, buyers clubs, Internet services, and work at home programs. Buyer's clubs, which are typically sold via an upsell, are expressly excepted from the general media exemption, so they are already covered by the TSR.¹⁹ Many other categories identified by the Fraud Survey, such as business

¹⁵ See August 11 Notice, FN 45 at 46735.

¹⁶ August 11 Notice, FN 44. Keith B. Anderson, *Consumer Fraud in the United States: The Third FTC Survey* (April 2013) available at http://www.ftc.gov/sites/default/files/documents/reports/consumer-fraud-united-states-2011-third-ftc-survey/130419fraudsurvey_0.pdf.

¹⁷ Fraud Survey, at (i).

¹⁸ Id.

¹⁹ 16. C.F.R. §310.6(b)(5).

opportunities and credit repair are similarly excepted from the exemption and also covered by specific statutes and regulations.²⁰

(2) **There is No Correlation between the Increase in Fraudulent Advertisements and Telemarketing**

The Fraud Survey does not support the Commission's conclusion that telemarketing fraud originates with general media advertising. Notably, while the Fraud Survey indicates "[t]he Internet was the most common way victims first learned of offers that turned out to be fraudulent",²¹ it neither concludes nor draws any inference that such offers led consumers to respond to the offer by telephone. In fact, the Fraud Survey notes that the proportion of fraud cases involving the Internet increased by 20 percentage points as compared to a similar survey conducted in 2005, whereas "the percentage of incidents in which the purchase was made by telephone was largely unchanged from 2005."²²

In sum, the FTC currently possesses significant investigative authority under the TSR, Section 5 and various other rules in the event it determines that certain sales and advertising practices are unfair or deceptive to consumers. Changing or repealing the mass media exemption without evidence of actual harm or deception would likely place additional and unnecessary costs and burdens on legitimate firms that use mass media to advertise their products and services, which may ultimately result in increased costs for consumers.

C. Industry Self-Regulation Plays An Important Role in Protecting Consumers.

Question 29 of the August 11 Notice asks for comments regarding the role that industry self-regulation has played in addressing problems with telemarketing. ERA continues to be an active participant in important self-regulatory efforts to ensure that telemarketing is conducted truthfully and fairly. These efforts further demonstrate that there is no need for modification to the TSR.

ERA has worked with the Advertising Self-Regulatory Council and the Council of Better Business Bureaus to form ERSP. ERSP's mission is to enhance consumer confidence in electronic retailing. ERSP provides a quick and effective mechanism for evaluating, investigating, analyzing and resolving inquiries regarding the truthfulness and accuracy of the primary or core efficacy or performance claims communicated in national direct response advertising including telemarketing. ERSP cases originate from inquiries brought by competitors and consumers, as well as through ERSP's ongoing monitoring program. ERSP offers the direct response industry an expeditious system for review of advertising that contains egregious and unsubstantiated claims, and demonstrates the strong commitment of the industry to meaningful and effective self-regulation. ERSP refers companies that refuse to participate in the self-regulatory process to the FTC.

²⁰ See, e.g., FTC Business Opportunity Rule, 16 C.F.R. §437, *et seq*; Credit Repair Organizations Act, Pub. L. No. 104-208, § 2451, 110 Stat. 3009-455 (Sept. 30, 1996).

²¹ Fraud Survey, p.33.

²² *Id.*

The marketing of “coaching and mentoring” services has been an area of on-going concern to the FTC. To address those concerns, ERSP created a coaching and mentoring program that consists of two self-regulatory components:

- a review of telemarketing practices of participating companies which includes a random sampling of telesales phone calls, a review of telemarketing scripts, and written assessments of the telemarketing practices; and
- a review of coaching and mentoring and lead generation advertising associated with participating companies including print, broadcast and online advertising and written assessments of the advertising practices.

ERSP’s review of telemarketing calls provides an important and effective tool to help companies that market via telephone to do so in a compliant manner. ERA submits that increased industry self-regulation provides a balanced and less burdensome means of ensuring that companies engaged in telemarketing do so in a compliant manner than law enforcement. ERA asks that the FTC continue to encourage and support such efforts.

III. CONCLUSION

The TSR currently provides the FTC with the enforcement tools it needs to combat unfair and deceptive acts and practices while providing industry with the flexibility and predictability needed to conduct legitimate business. As a result, ERA respectfully recommends that the TSR remain unchanged. To the extent that the FTC believes it needs additional regulatory authority to combat bad acts, ERA submits that the Commission’s authority under Section 5 of the FTC Act has proven sufficient to fill such gaps. By implementing any changes to the TSR, the FTC would effectively place unnecessary burdens on legitimate firms, which would likely result in increased compliance costs, and in turn possible increased costs for consumers. Those changes, however, would provide little additional benefit or protection to consumers given the tools the FTC already possesses. The balance tips decisively towards leaving the TSR as is.