601 E Street, NW | Washington, DC 20049
202-434-2277 | 1-888-OUR-AARP | 1-888-687-2277 | TTY: 1-877-434-7598
www.aarp.org | twitter: @aarp | facebook.com/aarp | youtube.com/aarp

November 12, 2014

Federal Trade Commission
Telemarketing Sales Rule Review
16 CFR Part 310
Project No. R411001

Submitted via *http://www.ftc.gov/os/publiccomments.shtm.*

AARP[1] is pleased to provide the following comment in response to the FTC's review of the Telemarketing Sales Rule. Telemarketing fraud poses a serious threat to the financial security of older people. Even those who are informed about telemarketing fraud and take efforts to protect themselves are at risk because telemarketers are increasingly sophisticated and it has become too easy to access bank accounts electronically. AARP has consistently advocated for stronger protection against practices that endanger older people's financial security, including strengthening the Telemarketing Sales Rule.

Older People Are Often Targets of Telemarketing Fraud

Diminished capacity, dependency on others, and social isolation combined with the fact that people age 50 and older have wealth accumulated over the course of their lifetimes make older people targets for financial exploitation. While they are not the only ones susceptible to telemarketing fraud, older people are likely to have many of the characteristics that make a person particularly susceptible to it:[2]

- Mild cognitive impairment
- Social isolation, boredom, loneliness
- Enjoyment of the attention and perceived companionship of telemarketers

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[1] AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse.

[2] *See Off The Hook: Reducing Participation in Telemarketing Fraud*, AARP Foundation, A-18 (2003), *available at* http://assets.aarp.org/rgcenter/consume/d17812_fraud.pdf.

- Socialization to be trusting, polite, not to lie, and to expect the same from others (including telemarketers and law enforcement personnel)
- Respect for authority
- Distrust of the government
- Desire to keep financial activities hidden from scrutiny by family members or government agencies
- Resentment of anyone questioning their behavior
- Need not to appear foolish or stupid
- Need for financial security

AARP studies have confirmed that education alone will not protect older people from telemarketing fraud.[3] Indeed, "there is always a hard core of victims whose behavior cannot be changed by messages."[4]

> It is not so much that victims are stupid or have a particular "victim profile." In fact, con artists prefer intelligent people because they are more likely to have money and because they think they are too smart to get scammed. It may be more that the good fraudulent telemarketer is effective in weaving a plausible pitch designed to match the idiosyncrasies revealed by the particular victim. Good con artists invest a lot of time figuring out which kinds of people are most vulnerable to which kinds of scams. They learn their trade by seeing how much information they can get out of any individual and maneuvering their pitches in response.

Id. In light of this reality, AARP strongly agrees that there is a continuing need for the Telemarketing Sales Rule, and also supports the changes previously proposed to the Rule, which prohibit the use of novel payment methods against which it is hard for older people to protect themselves. AARP also recommends that the FTC expand consumer protections in the Telemarketing Sales Rule by enacting the same protection from sharing preacquired account information with third parties as required by the Restore Online Shopper's Confidence Act (ROSCA), strengthening negative option marketing protections, and requiring telemarketers to record and retain the entirety of the telemarketing call.

<u>The FTC Should Adopt the Proposed Rule Changes that Prohibit the Use of Novel Payments in Telemarketing Calls.</u>

[3] *See* Robert N. Mayer, *Defending Your Financial Privacy: The Benefits and Limits of Self-Help*, AARP Pub. Pol. Inst. (2006), *available at* http://assets.aarp.org/rgcenter/consume/2006_06_privacy.pdf.

[4] Off the Hook at A-21.

The Telemarketing Sales Rule continues to be essential to protect consumers. In particular, AARP strongly supports the rule and the outstanding proposals to enhancements it by:

- prohibiting telemarketers and sellers in both inbound and outbound telemarketing calls from accepting or requesting remotely created checks, remotely created payment orders, money transfers, and cash reload mechanisms as payment;
- expanding the scope of the advance fee ban on recovery services (now limited to recovery of losses sustained in prior telemarketing transactions) to include recovery of losses in *any* previous transaction;
- requiring more extensive disclosure regarding a consumer's express verifiable authorization.

Indeed, the Telemarketing Sales Rule could be further strengthened to ensure that telemarketers are not taking advantage of consumers and that consumers have knowledge of what they are purchasing and from whom they are purchasing it.

Consumers Should Have The Same Protection From Unauthorized Transactions Arising Out Of The Sharing Of Preacquired Account Information With Third Parties As They Do For Online Transactions Covered By ROSCA

Congress took action to protect consumers online after investigating online marketing schemes that allowed third parties to sign-up consumers for products and services after they had entered their account information, but without express disclosure to the consumers, by enacting the Restore Online Shopper's Confidence Act (ROSCA).[5] ROSCA prohibits initial merchants from sharing billing information with third parties unless the consumer consented after a clear and conspicuous disclosure, prohibits the use of negative option marketing without the consumer's informed consent, and requires that third party seller's acquire account billing information directly from the consumer.[6]

Telemarketers are not currently subject to these same restrictions, although the FTC has proposed a rule that would make some of these protections applicable.[7] The proposed rules would bar telemarketers from accepting remotely created checks, payment orders, or cash-to-cash money transfers for transactions; expands the advance fee ban on recovery services; and requires recording of a consumer's express verifiable authorization of the purchase, among other revisions to the rule.[8] As stated in

[5] Telemarketing Sales Rule Review, 79 Fed. Reg. 46732, 46734 (August 11, 2014).

[6] 15 U.S.C. § 8401(7).

[7] Proposed Telemarketing Sales Rule, 78 Fed. Reg. 41200 (Jul. 9, 2013).

[8] *Id.*

previously filed comments with the FTC, AARP strongly supports these proposed changes.

Unlike ROSCA, however, the proposed rules do not outright prohibit the sharing of preacquired account information with third parties.[9] It is important that consumers targeted over the phone are protected in addition to those targeted online. It would be easy for a telemarketing company to contract with a third party for unrelated services and products and share billing information or other private consumer information with these parties. While obtaining consumer consent to share information is not as easy for telemarketing as with an online pop-up box, it is still a burden that is greatly outweighted by the tremendous benefit it would provide to consumers. This is because companies are already required to record consumer's descriptions of the goods and services. They could easily also record consumers agreements to sharing their payment information with third parties. Such a disclosure should include the names of any party the information would be shared with and the product or service provided by such third party. Additionally, third party sellers should be required to obtain the consumer's billing information directly from the consumer. Allowing telemarketers to share information with third parties without consent creates a large loophole that will allow data collectors and lead generators to continue operation and harm consumers by signing them up for products and services they never intended to purchase or hassling them with unwanted telephone calls.

The 2003 Amendments to the Telemarketing Sales Rule Protects Consumers from Negative Option Marketing And Is Still Needed

In 2003, the FTC added important protections against negative option marketing in the form of requirements to disclose specific terms and conditions as well as protections for consumers from unauthorized charges due to purchases made using preacquired account information.[10] ROSCA adopted the definition and disclosure procedures from the Telemarketing Sales Rule.[11] These protections are vital to ensuring consumers do not end up with unwanted services or products simply because they were unaware of some action they needed to take to opt-out of making continuing purchases. While disclosure is important, the FTC should continue to monitor negative option marketing for unfair and deceptive acts that unduly burden consumers who want to opt-out of the purchase by making it difficult to opt-out or having long free-trial periods. Companies should also be required to send a reminder to the consumer and receive confirmation the consumer still wants to purchase the service or product before billing for a transaction that includes negative option billing. The same requirements should also cover products and services that start as free and become subject to a fee.

[9] Telemarketing Sales Rule Review, 79 Fed. Reg. 46732, 46735 (August 11, 2014).

[10] *Id.*

[11] *Id.*

Telemarketing Companies Should be Required to Keep a Recording of the Entirety of All Calls to Consumers.

The number of complaints filed with the FTC and the FCC has risen significantly in the past couple of years, due in part to the low cost and easily obtained technology for robocalls.[12] A rise in complaints means more need for enforcement. One way to improve enforcement capability is to ensure that telemarketing companies are documenting and retaining a record of consumer transactions. Requiring telemarketers to retain a recording of all calls would ease the burden on federal and state enforcers as well as make it easier for citizens to bring private cases. Technology for recording and maintaining records of calls has also dropped in cost, reducing the burden on companies.

Although the proposed rules require companies to record consumer's express verifiable authorization of the purchase, including the description of the goods or services, AARP also urges the FTC to require that the entire call be recorded because people who are susceptible to telemarketing fraud are more likely to be interested in persuasion statements used by conmen and sales people. For this reason, they will have been susceptible to statements made earlier in the phone call, which may neutralize statements made in the formal disclosures, or the sales person may downplay the importance of the formal disclosures prior to recording. It is necessary to record the full call in order to discern whether such tactics are being used to commit telemarketing fraud. The record of the call could also be used to document expressly verifiable consent to share account information with disclosed third parties.

Conclusion:

The Telemarketing Sales Rule changes are vitally needed to help combat fraud targeted disproportionately at older people. AARP strongly supports adoption of the proposed rule changes, and urges the FTC to prohibit the sharing of preacquired account information with third parties and require that telemarketing calls be recorded and kept in their entirety.

For further information, please feel free to contact Cristina Martin-Firvida at 202-434-6194.

Sincerely,

David Certner
Legislative Counsel and Legislative Policy Director
Government Affairs

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[12] Institute for Consumer Antitrust Studies at Loyola University School of Law, "The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology," Fall 2013, *available at* http://www.luc.edu/media/lucedu/law/centers/antitrust/pdfs/publications/tcpa_report.pdf.