AMERICAN ASSOCIATION for JUSTICE
Formerly the Association of Trial Lawyers of America (ATLA®)

November 13, 2014

Donald S. Clark
Secretary of the Commission
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, N.W., Suite 5610
Washington, DC 20024

RE: Telemarketing Sales Rule Regulatory Review, 16 CFR Part 310, Project No. R411001

Dear Secretary Clark:

The American Association for Justice (AAJ), formerly the Association of Trial Lawyers of America (ATLA), hereby submits the organization's response to the Federal Trade Commission's (FTC) review and request for comments regarding the Telemarketing Sales Rule (TSR).[1]

AAJ, with members in the United States, Canada and abroad, is the world's largest trial bar. It was established in 1946 to safeguard victims' rights, strengthen the civil justice system, and protect access to the courts. The TSR is designed to protect consumers from unauthorized charges and unwanted calls and AAJ supports its re-evaluation by the FTC for both effectiveness and benefits. In revisiting this rulemaking, we urge the Commission to expand the scope of the TSR to increase benefits to consumers, namely, banning the use of forced arbitration clauses between consumers and telemarketers.

For example, debt collection agencies who engage in abusive telemarketing tactics are often protected by forced arbitration clauses when consumers seek relief from excessive calls or harassment. In other situations, debt settlement companies use telemarketing to target potential customers by promising help for credit card or other forms of debt without disclosing important information such as the cost of the service or the length of time that it will take to resolve the debt. When consumers later seek to bring actions against unscrupulous companies, they may be frustrated by an arbitration clause buried in the fine print of an existing agreement. These arbitration clauses, forced on consumers before a dispute even arises, typically increase costs and deny the benefits of the rule of law to consumers. The FTC should ban the use of pre-dispute arbitration clauses in order to more fully protect consumers from harmful telemarketing behaviors.

[1] 79 Fed. Reg. 46732.

www.justice.org 777 6th Street, NW • Suite 200 Washington, DC 20001 • 202-965-3500

Companies that use telemarketing are known to require consumers to sign away their legal rights and commit to forced binding arbitration before a dispute even arises. While arbitration that is agreed to by both parties after a dispute arises may be a reasonable option for dispute resolution, any time a company requires a customer to give up their rights entirely, those customers lose out. Consumers and small businesses not only have no choice but to enter into arbitration in the event of dispute, but face costly arbitration fees that can place a chilling effect on consumers' willingness to enter the dispute resolution process altogether. Specifically, consumers must often pay both filing fees and the arbitrators' costs which can amount to thousands of dollars. These upfront costs and ongoing fees can be prohibitive. Moreover, to further "stack the deck" against consumers, companies are often allowed to choose the location of the arbitration. This means that regardless of how inconvenient and costly travel to an arbitration venue may be for consumers, companies routinely select venues that force investors to travel thousands of miles on their own dime.

Furthermore, the arbitration process places consumers at an inherent disadvantage due to the problem of biased arbitrators. This is because companies name specific arbitrators with whom they have contracted with in arbitration clauses and thus, the arbitrators have a financial incentive to side with the companies who are "repeat players" in the cases they handle. Thus, the more favorably an arbitrator decides for the companies that employ them, the more likely it is that the companies will continue to use their services. This scenario has been born out in a 2008 civil action filed by the city of San Francisco which found that out of 18,000 arbitrations conducted by the National Arbitration Forum, arbitrators ruled in favor of consumers in just 30 cases, or less than 0.2 percent of all cases.[2]

Despite the fact that in private arbitration, arbitrators are not required to have legal training nor are they required to follow the rules of evidence and procedure which are intended to level the playing field between parties in court, results reached in the arbitration process are nevertheless final and generally not reviewable by a court of law. This means that consumers are not able to appeal arbitration decisions if he or she is unsatisfied with the outcome or alleges that the arbitrator exhibited bias during the proceedings. Without the absolute right to an appeal granted in a state or federal lawsuit, consumers may be hesitant to enter the arbitration process at all. A recent study released by the Consumer Financial Protection Bureau found that although millions of consumers are subject to contracts and agreements that contain arbitration clauses, fewer than 300 disputes were filed over a two year period with the leading arbitration association.[3]

Lastly, since arbitration decisions are not official court proceedings, they hinder the development of the law itself as the growth of a body of law in the common law system requires the evolution of case law. Instead of contributing to the doctrine of *stare decisis*, arbitration decisions are akin to a "dead end" in that future judicial decisions cannot rely on arbitration outcomes regardless of the factual or policy similarities between cases.

---

[2] National Arbitration Forum Case, City and County of San Francisco, Office of the City Attorney, *available at* http://www.sfcityattorney.org/index.aspx?page=178.

[3] "CFPB Finds Few Consumers File Arbitration Cases," Consumer Financial Protection Bureau Release, *available at* http://www.consumerfinance.gov/newsroom/the-cfpb-finds-few-consumers-file-arbitration-cases/.

Additionally, society benefits from an open legal process that exposes bad actors, yet forced arbitration operates in total secret. There is no publicly available information on forced arbitration so the public is never able to learn about a corporation's actions. One of the most important benefits of civil lawsuits is the discovery process, which often uncovers negligent or harmful corporate practices that lead to financial or even physical injury to the public. Forced arbitration, on the other hand, restricts the public's ability to obtain such information and keeps abusive practices hidden. Because the FTC cannot prosecute every violation of the TSR, in banning forced arbitration, the Commission should ensure the rule's continued effectiveness by expanding avenues for consumers to expose wrongdoers as well as to obtain relief for the violations.

I. Other Federal Agencies are Moving Toward Restricting Arbitration

In the aftermath of the 2008 financial crisis, Congress created the Consumer Financial Protection Bureau (CFPB) to address the obvious and overdue need for greater transparency and accountability from America's powerful financial institutions. Congress recognized that forced arbitration was among the leading threats to consumer protection and explicitly empowered the bureau to ban or limit the use of forced arbitration in financial services or products through the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).[4] Before issuing a rule, the CFPB was required to study the use of forced arbitration against consumers in disputes over financial services and products, and to provide a report to Congress on its findings. The first part of the study was released in December 2013 and confirmed what consumer advocates have long known: forced arbitration suppresses consumer claims and allows corporate entities to completely evade consumer protection laws.

Similar to Dodd-Frank's empowerment of the CFPB to ban the use of forced arbitration, the law also changed arbitration agreements in the securities industry, signaling a shift away from federal policy favoring arbitration of securities disputes.[5] The passage of Dodd-Frank in 2010 signaled a pushback against forced arbitration and specifically, section 921 of the Act prohibits pre-dispute arbitration agreements between customers and brokers, dealers, or investment advisors that arise under the federal securities laws or the rules of a self-regulatory organization such as FINRA.[6] Should the Securities and Exchange Commission (SEC) limit the enforcement of arbitration agreements, investors will have greater access to the court system which, unlike arbitration, allows for discovery, the use of juries, precedent, and judicial review.

II. Conclusion

As the FTC engages in review of the TSR in light of changes to industry and the legal landscape since 2003 when the last significant amendments took place, AAJ urges the Commission to also consider including specific language in the rule that bans the use of forced arbitration. This change would significantly enhance the likelihood that consumers prevail in fighting fraudulent activities by telemarketing companies, increasing the overall benefits and utility of the rule.

[4] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, H.R. 4173, 111th Cong. §1028(b).
[5] *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987).
[6] *See* Dodd-Frank at § 921.

AAJ appreciates this opportunity to submit comments in response to the FTC's request for comments in response to its review of the TSR regulation. If you have any questions or comments, please contact Ivanna Yang, AAJ's Assistant Regulatory Counsel at (202) 944-2806.

Sincerely,

Lisa Blue Baron
President
American Association for Justice