



November 13, 2014

Submitted at <https://public.commentworks.com/ftc/telemarketingsalesnprm>

Secretary Donald S. Clark  
Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW  
Suite CC-5610 (Annex B)  
Washington, DC 20580

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

Dear Secretary Clark:

The Direct Marketing Association (“DMA”) provides these comments in response to the Federal Trade Commission’s (“Commission” or “FTC”) request for public comment pertaining to the FTC’s review of the Telemarketing Sales Rule (the “Rule”) published on August 11, 2014.<sup>1</sup>

DMA is the world’s largest trade association dedicated to advancing and protecting responsible data-driven marketing in the United States and globally.<sup>2</sup> Founded in 1917, DMA represents thousands of companies and nonprofit organizations that use and support responsible data-driven marketing practices and techniques. DMA provides data-driven marketers the voice to shape policy and public opinion, the connections to grow members’ businesses, and the tools to ensure full compliance with responsible and best practices, as well as professional development.

DMA has long been a leader in establishing comprehensive self-regulation for industry, both commercial and nonprofit, on important issues related to telemarketing, among many other marketing techniques. Working with its members, DMA established and managed a Do-Not-Call (“DNC”) registry prior to any legislative mandate to do so, adopted and expanded robust guidelines for telemarketers as part of the *DMA Guidelines for Ethical Business Practice* (“*Guidelines*”),<sup>3</sup> and is an active participant in rulemakings before the Commission related to telemarketing. In addition, DMA, working with the FTC, has engaged in extensive consumer and business education regarding legal protections, requirements, and practices related to telemarketing.

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<sup>1</sup> Federal Trade Commission, Telemarketing Sales Rule, Rule Review, Request for Public Comment, 79 Fed. Reg. 46732 (August 11, 2014) (hereinafter *Request for Public Comment*).

<sup>2</sup> [www.thedma.org](http://www.thedma.org).

<sup>3</sup> Direct Marketing Association, *Guidelines for Ethical Business Practice* (Jan. 2014), available at [http://thedma.org/wp-content/uploads/DMA\\_Guidelines\\_January\\_2014.pdf](http://thedma.org/wp-content/uploads/DMA_Guidelines_January_2014.pdf) (hereinafter *Guidelines*).



In response to the Commission's request, we comment on the benefits of telemarketing to consumers, businesses, and the nation's economy; describe the existing regulation and consumer protection in telemarketing, including DMA's continued self-regulatory efforts in the space, and address several specific aspects of the Commission's request for comment as they relate to both commercial and charitable activity. As discussed in more detail below, we believe the current framework of laws, regulations, and industry self-regulation adequately covers telemarketing practices and that the current record does not support expanding the Rule.

## **I. Telemarketing Benefits**

DMA's membership includes many organizations that use telemarketing as part of their business or charitable activity. Such entities are an integral part of the economy, helping to connect consumers to products and services that may be of interest to them and fuel charitable causes. Not only does telemarketing help consumers, the industry directly employs hundreds of thousands of Americans while supporting the companies whose products they market. Additionally, charities and other nonprofit organizations use telemarketing to support their missions. They use the same telemarketing techniques as marketers to help reach audiences to support their cause. Telemarketing helps lower fundraising costs, freeing up donated funds to work on achieving the organization's societal mission. Any changes to the Rule could have adverse impacts on the industry and consumers alike as well as charitable organizations that rely on the efficiencies gained from telemarketing.

One of the major benefits of telemarketing is that it often gives consumers the opportunity to interact with businesses in a direct manner, and often to speak to a human about a product or purchase. This real-time feedback typically allows consumers to gain confidence in the offer being made, and to have any questions they may ask answered in an efficient manner. While many consumers shop on the Internet, a large group of consumers still seek the connection that telemarketing provides. In addition, some consumers rely on the telephone to engage in commerce because they lack access to the Internet.<sup>4</sup> For those that are without any, or limited, Internet connectivity, telephone marketing and sales are an important part of their everyday commercial activity.

Additionally, new technology has allowed marketers and nonprofit organizations to engage with consumers in more efficient and friendly ways. Marketers are able to automatically adjust their calls for different time zones and scrub their call lists with multiple DNC registries. These new technologies can also limit calls to voicemail and answering machines, meaning consumers receive fewer erroneous calls and sales representatives are able to focus their efforts on engaging with interested consumers.

The Rule currently provides an environment that fosters these significant benefits and protections for both consumers and companies, and that has allowed a vigorous industry to grow and operate in a responsible manner. Presently, consumers receive disclosures of material terms

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<sup>4</sup> Pew Research Center, *The Web at 25*, 4 (Feb. 2014) available at <http://www.pewinternet.org/2014/02/25/the-web-at-25-in-the-u-s> (finding that thirteen percent of Americans do not use the Internet).



of a telemarketing transaction, including the costs associated with the sale and how and when payments will be made.<sup>5</sup> As the Commission considers amendments to the Rule, DMA and its members urge the Commission to keep in mind the large number of workers, companies, and consumers that rely on the well-functioning nature of the current marketplace.

## **II. Consumers Receive Disclosures and Must Consent to Charges**

The current Rule provides adequate protection to consumers in both commercial and charitable telemarketing transactions. The Rule currently requires extensive disclosures be provided to consumers before a charge is applied to a consumer's account.<sup>6</sup> These disclosures include the cost of the purchase, restrictions or conditions of the purchase, the merchant's refund policy, and material terms of a negative option sale.<sup>7</sup> Importantly, these disclosures are made prior to the conclusion of any telemarketing transaction, which includes not only the initial sale, but any additional internal and external upsells.<sup>8</sup>

In addition to receiving disclosure of material terms of the offer each time a telemarketing transaction occurs, the express informed consent of the consumer is required before any payment may be charged to an account.<sup>9</sup> For the majority of sales involving preacquired account information, this consent requires a seller to identify the account to be charged with "sufficient specificity for the customer or donor to understand what account will be charged."<sup>10</sup> Therefore, through operation of the current Rule, a consumer learns of the offer and agrees to have a specific account charged for a sale. These requirements are not only contained in the Rule, but have been built into and expanded by a robust set of self-regulatory *Guidelines* promulgated and enforced by DMA.<sup>11</sup>

## **III. Self-Regulation is the Appropriate Approach**

Questions 28-30 of the request for comment ask for information regarding industry self-regulation. DMA has led the way in self-regulation of the telemarketing industry. DMA operated a national DNC list, before any federal mandate required such a list, and aided the Commission in educating consumers and industry on its function. To that end, our *Guidelines* include many provisions of the Rule, provided and enforced through a robust accountability program. DMA continues to play a central role in assuring that the industry functions in an ethical manner, most recently by updating our *Guidelines* in January 2014.

DMA is constantly working with the industry, nonprofits, and consumers to address potential issues that may arise, and amends the *Guidelines* to address those issues at a pace that government regulation cannot match. The DMA *Guidelines* are routinely updated to reflect

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<sup>5</sup> 16 C.F.R. § 310.3(a).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at § 310.3(a)(1)(i-vii).

<sup>8</sup> *Id.* at § 310.2(ee).

<sup>9</sup> 16 C.F.R. § 310.4(a)(7).

<sup>10</sup> *Id.* at § 310.4(a)(7)(C).

<sup>11</sup> *See Guidelines* at 8-11.



changes in technology and marketing practices. For example, in 2014 the DMA updated the *Guidelines* to reflect best practices regarding marketing to children, the use of mobile technologies, and reasonable data security practices.<sup>12</sup>

The updated *Guidelines* reflect industry and nonprofit best practices not only for the technical operation of telemarketing campaigns, but also for how best to provide consumers and donors with prompt and effective disclosures. For example, the *Guidelines* require telemarketers to transmit caller ID information that enables consumers to call back with questions or requests.<sup>13</sup> The *Guidelines* also state that marketers should use certain phone equipment that is designed to act in a specific manner to better achieve compliance with both the Rule and the *Guidelines*.<sup>14</sup> The Rule sets a baseline, which the *Guidelines* have incorporated and expanded on to build effective compliance services and efficient enforcement mechanisms through an industry led system.<sup>15</sup>

The *Guidelines*, like the Rule, specifically address negative option offers made via the telephone. The *Guidelines* require marketers to gain a consumer's "express informed consent" in order to enroll them in such an offer.<sup>16</sup> This consent must be gained before any charge is made, and after the material terms of the offer have been clearly and conspicuously disclosed. The DMA *Guidelines* go beyond the requirements of the Rule. When using preacquired account information, in combination with a free-to-pay conversion, the *Guidelines* require marketers to obtain the complete account number, obtain affirmative consent from the consumer, and, in the case of telephone sales, record the entire transaction.<sup>17</sup>

The *Guidelines* not only provide companies with information on how to properly operate a marketing campaign, they are enforced by DMA's Ethics Committee. From February 2012 to June 2013, DMA reviewed fifty-five cases and publicly disclosed twelve of those cases where companies failed to conform their practices to industry requirements. DMA processes tens of thousands of complaints annually, and takes action against members and nonmembers alike. DMA members have great interest in increasing consumer confidence in the industry, and have responded to the rapidly changing nature of the industry in a nimble fashion through enforceable self-regulation.

#### **IV. Requirements of the Restore Online Shopper's Confidence Act Should Not be Applied to Telemarketing**

DMA does not believe it is necessary to apply the requirements of the Restore Online Shopper's Confidence Act ("ROSCA") to telemarketing practices. ROSCA was enacted following an investigation initiated by Senator Jay Rockefeller (D-WV), Chairman of the Senate

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<sup>12</sup> *Guidelines* at 12-14; 26-28; 45-49.

<sup>13</sup> *Guidelines* at 40.

<sup>14</sup> *Id.* at 39-40.

<sup>15</sup> See 16 C.F.R. §§ 310.4(a)(8); 310.4(c).

<sup>16</sup> *Guidelines* at 8-9; accord 16 C.F.R. § 310.4(a)(7).

<sup>17</sup> *Id.* at 9-10.



Committee on Commerce, Science, and Transportation, to address an identifiable harm to consumers specific to the online environment.<sup>18</sup> The law was narrowly crafted to address specific practices occurring online – a context very different from telemarketing. ROSCA was designed to address unique consumer interactions that may occur in the online environment, such as alleged “aggressive” sales tactics and different consumer expectations, not the type of activity that may occur in the telemarketing environment covered by the Rule.<sup>19</sup> Thus, it would not be appropriate to apply the specific requirements of ROSCA to over-the-phone marketing.

Through several hearings and the issuance of multiple reports, Congress developed a record identifying the practices of “post-transaction marketing,” “data pass,” and “negative options” as activities that caused consumers to be reticent to participate in online commerce.<sup>20</sup> Congress crafted ROSCA specifically to target these concrete, identifiable consumer concerns. The record of identifiable consumer concerns in the online environment that led to ROSCA’s passage did not suggest a need for the new law to be applied in the telemarketing environment – a fact that should give the FTC caution in considering whether to import ROSCA’s requirements into the Rule.

Because ROSCA was developed to respond to concerns specific to the online marketplace, it is tailored to the unique aspects of transactions that take place in that environment. For example, because online transactions occur in the unique environment of the Internet, ROSCA requires that “express informed consent” be evidenced by a consumer “perform[ing] an additional affirmative action, such as clicking on a confirmation button or checking a box.”<sup>21</sup> In the telemarketing environment, consumers are informed of each new sale being offered during a telemarketing call, unlike the online environment, where Internet-based third-party sales may have occurred without clear consumer notification.<sup>22</sup> Given the different activities and marketing environments that the Rule and ROSCA address, importing ROSCA’s Internet-focused standards into the vastly different telemarketing context would not be appropriate.

As the Commission proceeds through its review of the Rule, it should measure any proposed changes against concrete and identifiable harms, not speculation about how a different regulatory regime may affect that market or other theoretical concerns. Congress chose to limit ROSCA’s application to online activity, and did not bring telemarketing into the scope of that legislation. One reason for not incorporating the specific requirements of ROSCA into the Rule is that the principles of ROSCA, namely consumer transparency and consent, are already applicable to telemarketing through the Rule and industry self-regulation. Given that there has not been a showing of consumer harm stemming from telemarketing activity not already covered by the Rule and related self-regulatory regimes, the Commission should not alter the Rule that effectively serves both companies and consumers in its current form.

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<sup>18</sup> 15 U.S.C. § 8401.

<sup>19</sup> *See generally* Senate Committee on Commerce, Science, and Transportation, Restore Online Shoppers’ Confidence Act, Report 111-240, 15-16, 19-21 (Aug. 2, 2010) (hereinafter *Report*).

<sup>20</sup> *Id.* at 1-2.

<sup>21</sup> 15 U.S.C. § 8402(a)(2)(B).

<sup>22</sup> *Id.* at § 8402.

## V. Use of Preacquired Account Information

The Commission's request for comment contains several questions regarding how the Rule should treat preacquired account information. Question 7.d asks whether the Rule should bar all transfers of account information between merchants to facilitate third-party sales or charitable donations. This issue is already adequately addressed via self-regulatory means. As the FTC notes, the major credit card brand operating rules already prohibit merchants from engaging in this activity.<sup>23</sup> Additionally, the *Guidelines* instruct DMA members not to transfer or exchange credit card numbers when a consumer has a reasonable expectation that the information will be kept confidential.<sup>24</sup> External sellers are already unable to gain access to a consumer's payment information from an initial seller, and therefore already must collect a consumer's full account information to conduct a sale. Adding additional regulatory burdens to limit activity that industry self-regulation has effectively addressed will unduly increase the cost of doing business, without providing any new consumer benefit. If, however, the Commission amends the rule to limit this activity it should assure that the new rule is consistent with industry standards in order to limit regulatory overlap and unnecessary compliance costs.

In question 7.e the Commission asks what, if any, additional consumer consent should be required for a merchant or charitable organization to retain a consumer's payment information following a transaction or donation. It is the experience of DMA members that no additional consent is necessary because consumers expect that a merchant will maintain his or her payment information on file. There are many consumer benefits to this practice, including that consumers are able to receive refunds faster for returned goods because the merchant can instruct its payment processor to credit the consumer's card. Moreover, consumers who frequently shop from the same retailers, or otherwise form trusted relationships with retailers, enjoy the convenience of making purchases when the merchant has card information on file. Merchants are also held to industry and card network security requirements to protect cardholder information as well as the data security provisions in the *DMA Guidelines*.<sup>25</sup> Consumer expectations are also informed by existing disclosure requirements for new sales.<sup>26</sup> Also, retention is different from charging a consumer's account. In order to charge an account, sellers must gain the express informed consent required by the Rule and the *DMA Guidelines*. These requirements and consumer expectations hold true for follow-on transactions, negative option sales, and other subsequent transactions between an initial seller and a consumer. No additional evidence of consent, beyond that already required by the Rule and the *DMA Guidelines*, should be required for a company to use and retain payment information previously provided to it by a consumer.<sup>27</sup>

Similarly, requiring a consumer to recite his or her full account information in instances where preacquired account information is used in connection with a free trial offer from a seller

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<sup>23</sup> *Request for Public Comment* at 46734-35.

<sup>24</sup> *Guidelines* at 22.

<sup>25</sup> *Guidelines* at 26-28.

<sup>26</sup> See 16 C.F.R. § 310.3(a)(1)(i-vii).

<sup>27</sup> See *Guidelines* at 8-9; 16 C.F.R. § 310.4(a)(7).



or nonprofit with an existing relationship with a consumer would not increase consumer transparency regarding the transaction. Instead, it would serve to increase the costs and time involved in completing a transaction. The Rule currently requires a merchant that uses preacquired account information to make a free trial type offer to obtain express informed consent to apply charges to an account. Industry, through both DMA and the card brand rules, already require marketers to obtain full account information from a consumer or donor before preacquired account information can be used to enroll in a free-to-pay conversion plan.<sup>28</sup> Additionally, when preacquired account information is used in any other marketing sale the seller is required to identify the account to be charged with specificity and obtain affirmative consent from the consumer to charge that account.<sup>29</sup> Protections already exist for consumers with respect to these types of sales and donations, and no expansion of the Rule is required.

The existing regime, through a combination of the Rule's disclosure requirements and those of the DMA *Guidelines*, adequately provides consumers with notice that their accounts will be charged and which account will be charged. However, should the Commission develop a record to expand the Rule, it should "grandfather" marketers and nonprofits that currently retain account information. No new consent requirements should be placed on marketers that already maintain a consumer's information, as such a requirement would lead to consumer confusion. This retention is in-line with consumer expectations, and imposing new requirements to existing accounts would unduly burden companies that already comply with the law.

## **VI. Exemptions**

Question 12.d-e asks if merchants should be required to repeat the disclosures mandated by the Rule in response to in-bound calls responding to general marketing material for negative option plans.<sup>30</sup> In many of these situations the marketing material to which a consumer is responding already contains disclosures similar to, if not identical to, those required by the Rule.<sup>31</sup> Because of this, DMA suggests that providing these disclosures again during an in-bound call would be duplicative, and would not benefit consumers in a material way. When a consumer has all of the material terms of an offer in hand, which would typically include a disclosure of any negative option features, there is no need to repeat the disclosures.

In its 2003 review of the Rule, the Commission addressed the "direct mail inbound call exception," and determined that the exemption should be retained in the rule, but that upsells stemming from an inbound call were not exempt from the Rule.<sup>32</sup> At that time, the Commission recognized when the consumer "has the time and the information necessary to make an informed decision whether to call and inquire further or make a purchase" the disclosure requirements of the Rule offer no extra benefit to the consumer.<sup>33</sup> This reasoning does not change simply

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<sup>28</sup> *Guidelines* at 9-10.

<sup>29</sup> *Id.*; 16 C.F.R. § 310.4(a)(7)(ii).

<sup>30</sup> *Request for Public Comment* at 46738.

<sup>31</sup> *See Guidelines* at 9-11 (outlining the requirements for all offers, regardless of marketing channel).

<sup>32</sup> Federal Trade Commission, Telemarketing Sales Rule; Final Rule, 69 Fed. Reg. 4580, 4659-60 (Jan. 29, 2003).

<sup>33</sup> *Id.* at 4660.



because the solicitation offers a negative option sale, and the Rule should not be expanded to require further disclosures.

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DMA appreciates the opportunity to submit these comments. Please do not hesitate to contact me with any questions at (202) 861-2420.

Sincerely,

A handwritten signature in blue ink, which appears to read 'Peggy Hudson', is positioned above the typed name.

Peggy Hudson  
Senior Vice President, Government Affairs  
Direct Marketing Association

Cc: Stu Ingis, Venable LLP  
Michael Signorelli, Venable LLP  
Rob Hartwell, Venable LLP