Before the

FEDERAL TRADE COMMISSION

TELEMARKETING SALES RULE REGULATORY REVIEW 16 C.F.R. PART 310

Project No: R411001

COMMENTS OF THE BRAND ACTIVATION ASSOCIATION

COMMENTS OF:

Brand Activation Association,
a Division of the Association of National Advertisers
Edward M. Kabak
Chief Legal Officer
650 First Ave, Suite 2 SW
New York, NY 10016

Counsel of Record:

Linda A. Goldstein
Marc S. Roth
MANATT, PHELPS & PHILLIPS, LLP

I. Introduction

The Brand Activation Association ("BAA") respectfully submits these comments in connection with the Federal Trade Commission's ("FTC" or "Commission") review of the Telemarketing Sales Rule ("TSR" or "the Rule").[1]

The BAA, a division of the Association of National Advertisers, is one of the leading not-for-profit trade organizations serving the advertising and marketing industry. Formerly known as the Promotion Marketing Association, Inc., the BAA was established in 1911 as a resource for research, education and collaboration for marketing professionals. Although the BAA changed its name in 2012 to reflect the broader marketing activities of its members, it has remained unwavering in its mission to hold its members to the highest ethical and professional standards. Representing the over $1 trillion integrated marketing industry, the organization is comprised of Fortune 500 companies, top marketing agencies, law firms, retailers, service providers and academia, representing thousands of brands worldwide. Championing the highest standards of excellence and recognition in the promotion and integrated marketing industry globally, the BAA's objective is to foster a better understanding of promotion and integrated marketing and its role in the overall marketing process.

The BAA shares the FTC's goals and objectives in providing consumers with fair, truthful and ethical advertising. To that end, the BAA provides its members with various educational resources on the various laws and regulations governing marketing and advertising practices, including a regularly updated book, Promotions and Marketing Law, which is widely considered the foremost authority on promotions and marketing law. Moreover, since 1978, the BAA has hosted an annual law conference for over 670 legal and business professionals at which FTC commissioners, bureau directors and staff attorneys have participated as guest lecturers.

II. The FTC Should Not Revise the TSR

A. No Change to the Rule

The FTC should not revise the Rule given the absence of any evidence demonstrating that the Rule in its current form is inadequate to fight deceptive and abusive telemarketing practices. The Rule has proven quite effective for the FTC in combatting offensive behavior since its inception, and in the event that a particular sales practice may fall outside its four corners, the Commission has at its disposal, and has often used, its broader jurisdictional authority under Section 5 of the FTC Act to halt such practices.[2] Furthermore, the FTC's enforcement actions under the Rule have provided industry with adequate and predictable notice as to what practices the agency views as acceptable and unacceptable. As a result, the Rule in its current form provides the FTC with a robust and effective regulatory tool with which to investigate and prosecute offensive telemarketing activities without overburdening industry.

[1] 16 C.F.R. Part 310, promulgated pursuant to Telemarketing and Consumer Abuse Prevention Act, 15 U.S.C. §§ 6101-6108 (the "Telemarketing Act").Comments provided pursuant to 79 FR No. 154, 46732-46740 (August 11, 2014) (the "August 11 Notice").

[2] 15 U.S.C. § 45(a).

B. The Rule's "general media" advertising exemption should not be changed

In the August 11 Notice, the FTC questions the appropriateness and ongoing usefulness of the Rule's "general media" advertising exemption. Specifically, the August 11 Notice asks whether the TSR should be changed so that a consumer who places an inbound call in response to a general media advertisement must receive the same disclosures required by the TSR for an outbound telemarketing call. For the reasons set forth below, BAA recommends that this exemption remain undisturbed as there is no evidence of abuse or deception resulting from the exemption.

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

The Telemarketing Act authorizes the FTC to establish exemptions from the Rule's coverage. In the August 11 Notice, the FTC noted that "[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." [3]

In 1995, the FTC established an exemption for telephone calls initiated by a consumer or donor in response to an advertisement through any medium (subject to certain exceptions discussed below).[4] "In 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."[5]

This exemption is not, however, absolute. The exemption does not apply to direct mail solicitations for certain product categories which the FTC noted were prone to deception, such as "the sale of investment opportunities, specific credit-related programs, and recovery rooms," where "deceptive sellers or telemarketers use mass media or general advertising to entice their victims to call."[6]

(ii) Inbound Calls Generated by Advertisements Do Not Present the Same Concerns as Outbound Calls

Calls placed by consumers in response to general media advertising do not present the same concerns as outbound calls. As the latter are initiated by the seller, all disclosures regarding the offer are expected to be made on the call since the entire solicitation will occur at that time. On the other hand, consumers viewing a broadly distributed advertisement will have the luxury, time and discretion to decide whether to respond and will have the information they need to make an informed purchasing decision. These consumers will also have the ability to ask questions about the offer should they feel that any information is lacking. To require that all

[3] August 11 Notice at 46733, 16. C.F.R. §310.6.
[4] 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 16 C.F.R. §310.6(b)(5).
[5] 1995 Statement at 43860.
[6] Id.

disclosures be repeated on the call would be superfluous and simply extend the time of the call, resulting in increased costs to advertisers.

Just as important in this consideration are other concerns with outbound calls that do not exist for calls placed by consumers. For example, both the Congress and the FTC expressed concern with invasive calling times and unwanted calls when establishing calling time restrictions and the federal do not call registry.[7] These concerns do not exist with inbound calls placed by consumers who read and respond to advertisements on their own time.

As above, in the event that the Commission finds that consumers are not receiving the information they need to make an informed purchasing decision in either the advertisement or the during the call, it may, in its discretion, take action against the advertiser using its broad Section 5 enforcement powers.

(iii) The Consumer Fraud Report does not support changing the General Media Exemption

In support of its review and consideration of the general media exemption, the FTC cites to its third consumer fraud survey report ("Report").[8] While this Report demonstrates that frauds are increasingly being advertised in mass market media ("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."[9]), it fails to draw any correlation between such increase and use of the telephone to conduct such fraud. As such, the Report provides no support for either eliminating or in any way changing the mass media exemption, as there is no connection between such media and demonstrated telemarketing fraud. In that regard, BAA submits that the FTC should direct its focus on where fraud is actually occurring – in mass market media.

Further, the frauds discussed in the Report are those that are either already excepted from the general media exemption or are product categories in which the FTC has historically exercised significant enforcement scrutiny. For example, the Report highlights "fraudulent weight loss products, fraudulent prize promotions, (unordered) buyers club membership (and) Internet services, and fraudulent work-at-home programs" as topping the charts of consumer fraud.[10] Whether or not these products have been promoted in general media advertising and ultimately sold via telemarketing has not impacted or lessened the FTC's ability (and track record) in prosecuting fraudulent sellers. Of particular note are the numerous recent cases brought against sellers of weight loss products, bogus prize promotions, buyers clubs, Internet services, and work at home programs. In fact, buyer's clubs are expressly excepted from the general media exemption, so they are already covered by the TSR.[11] Other product categories

[7] 15 U.S.C. §6102(3)(A), (B); 16. C.F.R. §310.4(b), (c).
[8] 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*.
[9] Id, at (i).
[10] Id.
[11] 16. C.F.R. §310.6(b)(5).

highlighted in the Report, such as business opportunities and credit repair are similarly excepted from the exemption and also covered by specific statutes and regulations.[12]

III. CONCLUSION

The TSR does not need to be changed. It currently provides the FTC with sufficient enforcement authority to investigate and halt offensive telemarketing practices without placing undue burdens on industry. Consumers are currently protected against harmful telemarketing practices as evidenced by the scores of cases brought by the Commission since enactment of the Telemarketing Rule in 1995. To the extent that the TSR fails to address a particular practice which the FTC believes may be unfair, deceptive or abusive to consumers, it has at its disposal a potent weapon in the form of Section 5, with which it may combat such behavior. Further, in the absence of any credible evidence tying general media advertisements with telemarketing, the BAA respectfully submits that no changes to the exemption are warranted. Removing the exemption would only result in increased costs to sellers and possibly consumers.

[12] 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).