Comments to the Federal Trade Commission
regarding the
Telemarketing Sales Rule Regulatory Review
16 CFR Part 310
Project No. R411001
79 Fed. Reg. 46732 (Aug. 11, 2014)
79 Fed. Reg. 61267 (Oct. 10, 2014)

submitted by

Consumer Federation of America,
National Consumer Law Center (on behalf of its low-income clients),
Americans for Financial Reform, Consumers Union, Consumer Action, Consumer Federation of California, The Maryland Consumer Rights Coalition, National Association of Consumer Advocates, U.S. PIRG, Virginia Citizens Consumer Council, and Consumer Assistance Council, Inc. of Cape Cod and the Islands

November 13, 2014

The Telemarketing Sales Rule (TSR) provides important protections for consumers and clear rules of the road for the telemarketing industry. As business practices change, new scams emerge, and the technology that facilitates telemarketing evolves, it is important for the Federal Trade Commission (FTC) to review the TSR to determine whether changes are necessary to ensure that its provisions are relevant and effectively curb abuses.

These comments are filed by the Consumer Federation of America;[1] the National Consumer Law Center (on behalf of its low-income clients);[2] Americans for Financial Reform,[3] Consumers Union, the public policy and advocacy division of Consumer Reports;[4] Consumer Action,[5] Consumer Federation of California,[6] The Maryland Consumer Rights Coalition,[7] the National Association of Consumer Advocates,[8] U.S. PIRG,[9] Virginia Citizens Consumer Council, and Consumer Assistance Council, Inc. of Cape Cod and the Islands.[10]

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[1] The **Consumer Federation of America** is an association of nearly 300 nonprofit consumer groups that was established in 1968 to advance the consumer interest through research, advocacy and education.

[2] Since 1969, the nonprofit **National Consumer Law Center®** (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

[3] **Americans for Financial Reform** is an unprecedented coalition of over 250 national, state and local groups who have come together to reform the financial industry. Members of our coalition include consumer, civil rights, investor, retiree, community, labor, faith based and business groups.

[4] **Consumers Union** is the public policy and advocacy division of Consumer Reports. Consumers Union works for telecommunications reform, health reform, food and product safety, financial reform, and other consumer issues. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

[5] **Consumer Action** has been a champion of underrepresented consumers nationwide since 1971. A nonprofit 501(c)3 organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change. By providing financial education materials in multiple languages, a free national hotline and regular financial product surveys, Consumer Action helps consumers assert their rights in the marketplace and make financially savvy choices. More than 8,000 community and grassroots organizations benefit annually from its extensive outreach programs, training materials, and support.

[6] The **Consumer Federation of California** (CFC) is a non-profit advocacy organization. Since 1960, CFC has been a powerful voice for consumer rights by campaigning for state and federal laws that place consumer protection ahead of corporate profit. Each year, we testify before the California legislature on dozens of bills that affect millions of our state's consumers. We also appear before state agencies in support of consumer regulations.

[7] The **Maryland Consumer Rights Coalition** (MCRC) is a statewide coalition of individuals and organizations that advances fairness and justice for Maryland consumers through research, education, and advocacy. Our 7,000 members include consumer advocates, practitioners, and low-income and working families throughout Maryland.

[8] The **National Association of Consumer Advocates** (NACA) is a nonprofit association of more than 1,500 consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent,

In 2013, many of our groups submitted comments[11] to the FTC in support of a proposal[12] to amend the TSR to stop the abuse of certain payment methods in telemarketing and clarify some provisions. Those comments included suggestions for additional reforms that are needed. In the comments we are submitting today we will reiterate our views on those issues and address some specific questions that the FTC has posed.

Pre-acquired Account Information

We strongly urge the FTC to prohibit the disclosure, exchange and use of pre-acquired account information in all telemarketing covered by the TSR. Pre-acquired account information, which enables a marketer to have a consumer's account billed without obtaining the account information directly from the consumer, exposes consumers to the danger of unauthorized charges or debits and is not necessary for the conduct of legitimate business. As the FTC notes, a 2009 Senate investigation into the use of "data pass," an online marketing practice involving pre-acquired account information, found that it can lead to unexpected charges for transactions that consumers never agreed to make or for which they did not realize there would be a charge.[13] In 2010, Congress enacted the Restore Online Shoppers Confidence Act,[14] which prohibits the initial online merchant from disclosing a consumer's billing information to any "post-transaction third-party seller" for purposes of charging the consumer's account. The FTC also points out that the three major credit card associations now prohibit the disclosure, exchange or use of pre-acquired credit card information by and among any of their merchants, not just those that sell online.

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abusive and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

[9] **U.S. Public Interest Research Group** (U.S. PIRG) serves as the Federation of State PIRGs, which are non-profit, non-partisan public interest advocacy organizations that take on powerful interests on behalf of their members. For years, U.S. PIRG's consumer program has designated a fair financial marketplace as a priority. Our advocacy work has focused on issues including credit and debit cards, deposit accounts, payday lending, student loans, credit report accuracy, privacy of customer information (including data breaches) and, generally, any unfair and deceptive practices.

[10] The **Consumer Assistance Council, Inc. of Cape Cod and the Islands** (CAC) works in cooperation with the Massachusetts Attorney General's office and offers a free, voluntary mediation program aimed at resolving consumer complaints. CAC provides services to Cape Cod and the Islands consumers, visitors, businesses and consumers who have complaints with a Cape Cod or Islands business. CAC also operates an information hotline staffed with trained volunteers who answer questions concerning consumer rights.

[11] http://www.regulations.gov/#!documentDetail;D=FFIEC-2014-0001-0029

[12] Notice of proposed rulemaking, Federal Register, Volume 78, No. 131, July 9, 2013, at 41200, available at http://www.ftc.gov/sites/default/files/documents/federal_register_notices/2013/07/130709tsrfrn.pdf

[13] *Aggressive Sales Tactics on the Internet and Their Impact on American Consumers*, hearing before the Senate Committee on Commerce and Transportation, November 17, 2009, available at http://www.gpo.gov/fdsys/pkg/CHRG-111shrg54917/pdf/CHRG-111shrg54917.pdf, see also supplemental report at http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=439184c5-0965-4bb9-aa98-4a114b00a42e.

[14] 15 U.S.C. 8401.

What little benefit pre-acquired account information provides to consumers in terms of convenience is far outweighed by the risks. Small recurring charges can escape consumers' notice and add up to large amounts. Unauthorized debits from consumers' bank accounts can cause other payments to bounce, and many consumers can ill afford to be without access to the funds pending resolution of their disputes. Furthermore, it can be difficult for consumers to identify and dispute unauthorized charges with certain payment methods, such as charges that telemarketers have caused to be placed on their telephone bills or which have been debited from prepaid telephone plans or certain types of prepaid card accounts.[15] If voluntary protections are offered, they may be limited.

The risks posed by pre-acquired account information are unavoidable because consumers have no reasonable expectation that the account information they have given one seller may be shared with other sellers and no way to stop that from happening. Furthermore, the risks are the same regardless of whether the consumer receives an outbound telemarketing sales call or makes a call in response to mail solicitation or an advertisement in the general media. For example, in the case of online lead generators, a consumer's personal and financial information, including social security number and bank account information, is collected through an online application.[16] In some circumstances, borrowers are contacted by telephone to complete their credit application or are asked to place a telephone call to verify application information or provide additional information. However, consumers are often unaware that this information is provided to one or more third parties for the purpose of a marketing a wide range of credit products, often well outside the range of the amount requested in the initial application for credit.[17]

A 2010 article[18] by University of Minnesota Law School professor and former state assistant attorney general, Prentiss Cox, describes the different telemarketing scenarios in which what he calls "pre-acquired account marketing" are used in outbound and inbound calls.[19] We agree with his analysis that:

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[15] *See* Michelle Jun, Consumers Union, *Mobile Pay or Mobile Mess: Closing the Gap Between Mobile Payment Systems and Consumer Protections* (June 2011), available at http://consumersunion.org/pdf/Mobile-Pay-or-Mobile-Mess.pdf.

[16] See, for example, "Money Mutual, LLC," October 8, 2014. https://moneymutual.com/deposit-info/.

[17] Fessler, Pam. "I Applied For An Online Payday Loan. Here's What Happened Next." *Planet Money*, November 6, 2013. http://www.npr.org/blogs/money/2013/11/06/242351534/i-applied-for-an-online-payday-loan-heres-what-happened-next.

[18] Prentiss Cox, *The Invisible Hand of Pre-acquired Account Marketing*, Harvard Journal of Legislation, Vol. 47 (2010), http://www3.law.harvard.edu/journals/jol/files/2013/10/Cox-Article.pdf.

[19] As an example of its use in inbound calls, Cox cites upselling for membership programs by Vertrue, Inc. when consumers call financial institutions, retailers and others with which the marketer has partnered, *Id.* at page 435. A legal action by the state of Iowa against Vertrue is described on the next page of these comments.

> Pre-acquired marketing flips the power dynamic in the solicitation process by shifting the burden to the consumer to stop the seller from accessing her account, rather than requiring the seller to ask the consumer for her account information before her account can be charged. A consumer normally provides her account number only after becoming assured that she understands the transaction. Pre-acquired marketing bypasses this gate-keeping by the consumer.[20]

Cox calls for completely forbidding this type of marketing and observes that:

> Prohibiting this form of marketing is conceptually less difficult than many other areas of consumer protection regulation because the regulatory costs in this situation are almost non-existent. There is little to no discernible benefit to consumers in allowing a seller access to their accounts without the consumers providing their account information. Any seller can avoid having to comply with the regulation simply by acquiring the consumer's account information from the consumer, a task all other types of sellers must accomplish. The real burden of this last step, of course, is that the seller must actually reach an understanding with the consumer that the consumer wants to pay for the merchandise.[21]

He also notes that there have been no persuasive arguments from industry about the benefits to sellers or telemarketers from the use of pre-acquired account information.[22]

An Iowa Supreme Court decision details the enormous potential for abuse that data passes allow. In State *ex rel*. Miller v. Vertrue, Inc.,[23] the telemarketer's strategy was to call consumers who had just made a purchase from an unrelated business. Its script ran:

> To thank you, we're sending you a voucher for a free $25 gift card to The Home Depot with a risk-free 30–day trial membership in Home Works Plus. Offered by Major Savings, this service offers you hundreds of dollars in savings at stores like The Home Depot, Kmart, Circuit City, Linens and Things, Macy's and more of your favorite stores through their gift card program. You can also save up to 40% on name brand furniture, appliances, electronics and more through the Home Works Plus discount

[20] *Id*. at page 426
[21] *Id*. at page 427
[22] *Id.* at page 470
[23] 834 N.W.2d 12 (Iowa 2013).

> shopping service. Now if you want to cancel, just call the toll free number in your welcome package in the first 30 days and you won't be charged. And with your OK today, if you decide not to cancel, after the 30 day trial the service is automatically extended to a full year for just $139.95, charged as Home Works Plus to the credit card you provided today and the free $25 gift card to The Home Depot is yours to claim just for trying the program, OK?[24]

As the court noted, this script "fosters the misleading impression that the new interaction is somehow related to the initial transaction," leading consumers to believe that the business they had just knowingly patronized was offering a $25 gift card to encourage future patronage.[25] In actuality, the offer was a free-to-pay conversion sale of membership programs. The telemarketer's scheme was wildly successful, enrolling 863,970 Iowans in membership programs and reaping over $22 million, even though most consumers never used the programs and survey evidence showed that most were unaware they had purchased it.[26] This scheme would probably have never gotten off the ground if there had been stricter limits in the TSR on the use of pre-acquired account information.

An unfair practice is one that is "likely to cause **substantial injury** to consumers which is **not reasonably avoidable** by consumers themselves and **not outweighed by countervailing benefits** to consumers or to competition."[27] The disclosure, exchange and use of pre-acquired account information squarely meet the test for unfairness. The FTC should exercise its authority to prohibit these practices in the TSR.

<u>Sellers Retaining and Reusing Account Information</u>

Professor Cox makes a distinction between pre-acquired account marketing, where the seller has obtained the consumer's account information from another source, and the seller retaining account information that the consumer has provided to it directly for one transaction and using it for another.[28] We agree that these are different situations. In the latter case, the consumer knows that the seller has the account information and would probably not be surprised that it is retained, as it might be needed for purposes such as canceling the transaction and crediting the consumer's

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[24] *Id.* at 35.
[25] *Id.*
[26] *Id.* at 19-20, 36.
[27] http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority.
[28] Cox, *supra* at 475.

account. Since the consumer might not realize that this information could be reused for a new transaction, however, it is imperative to implement adequate protections.

Cox notes that there is one scenario where using account information retained from a previous transaction should *not* be allowed to be used for a new one: free trial offers in which the consumers will be charged at the end of the trial period unless they cancel. He suggests that in this situation consumers should be asked for their full account number, even if the seller already has it, because the act of providing it would help to reinforce their understanding that this is a new transaction and their account could be charged at the end of the trial period. We agree, and urge the FTC to go further by prohibiting account information that was previously obtained by the seller from the consumer for a transaction from being reused for *any* subsequent transaction that is covered by the TSR in which the consumer's silence or lack of affirmative action can be interpreted as acceptance of the offer.

In situations where consumers' account information is allowed to be retained and used for a subsequent transaction that is covered by the TSR, certain safeguards must be required:

- At the time of the initial transaction, consumers should be asked if their account numbers can be retained for future use in new telemarketing transactions, and the seller should obtain their express verifiable consent to do so.
- In telemarketing transactions where retained account numbers will be used, the seller should inform consumers and ask them to confirm the last four digits. In cases where the accounts have expiration dates, consumers should also be asked to confirm that information, as it may have changed.
- Consumers should have the right to revoke consent to retain their account numbers for use in telemarketing transactions at any time.
- Consumers should also be able to use different accounts for new telemarketing transactions covered by TSR than the accounts they previously provided to the seller if they wish.

Both outbound calls and inbound calls in response to general media advertisements and direct mail should be covered in any provisions in this regard in the TSR, as the potential risks are the same. Furthermore, these provisions should apply regardless of whether the account information was previously obtained from the consumer via telemarketing or other means. For instance, if the consumer initially provided the account information in the course of an online or in-person transaction, the TSR should bar its use in a subsequent telemarketing transaction that is covered by the TSR unless the seller complies with these provisions.

Free to Pay Conversions

Offers to try a product or service for free for a specific period of time, at the end of which consumers will be charged unless they have notified the sellers that they wish to cancel, have become a popular marketing tool. These types of solicitations, often referred to as "free trial offers," have also become a frequent subject of complaints. Common problems include enrolling consumers in trial offers without their knowledge or consent, failing to adequately disclose or misleading consumers about the terms of the offers, making it difficult for consumers to cancel, charging consumers even though they never received the products or services during the trial period, and charging consumers despite the fact that they have notified the sellers that they wish to cancel.[29]

Amending the TSR to prohibit pre-acquired account information and to bar account numbers previously provided by consumers for other transactions from being reused in negative option situations would help to prevent some of the abuses that are common in these types of telemarketing offers. Even if consumers have provided their financial account information directly to the sellers, however, they may still encounter problems: they may have provided their account information to pay for shipping and handling, not realizing that there could be further charges; they may have relied on misleading or incomplete information about the nature of the products or services; they may have been led to believe that there would be a one-time charge at the end of the free trial, only to find that they are being charged on a recurring basis; they may never have received the products or services; they may not have been provided with clear information about how to cancel, tried unsuccessfully to cancel, or thought that they had cancelled but were still charged; or they may have forgotten that they needed to take action to avoid being charged.

As with pre-acquired account marketing, free trial offers that require consumers to provide their financial information upfront and cancel at the end to avoid being charged flip the dynamics in the transactions and unfairly place the burden on consumers to stop the sellers

[29] See, for example, FTC vs. INC21.com, in which telemarketers misled some consumers and small businesses into believing that they would receive a free trial of the company's services but failed to inform them that they would be charged if they did not cancel, press release at http://www.ftc.gov/news-events/press-releases/2010/03/ftc-halts-massive-cramming-operation-illegally-billed-thousands; FTC vs. FTN Promotions, Inc. d/b/a Suntasia, Inc., in which telemarketers offered consumers free trial memberships in the company's programs and later debited the consumers' banks accounts without their authorization by creating demand drafts, press release available at http://www.ftc.gov/news-events/press-releases/2010/01/victims-suntasia-telemarketing-scam-being-reimbursed-141-million.

from putting the charges through. And as with pre-acquired account marketing, the risks to consumers outweigh the benefits. While it may be useful to try products or services before paying for them, these are often not products or services that consumers were seeking anyway or that provide value commensurate with their cost.

The best way to protect consumers in free trial offers covered by the TSR would be to prohibit the sellers from requesting any financial account information until the end of the trial period and require them to obtain the consumer's express, verifiable consent at that point to continue on a paid basis. This would enable consumers to assess the products and services and then make a *conscious* decision about whether to buy them. It also would help to mitigate the problems that we have described.

If the FTC does not adopt this change in the TSR, at the very least it should amend section 310.3 to require sellers to remind consumers no more than six but no less than three days before the free trial will end about the date by which they must cancel a free trial offer if they wish to avoid charges and how to do so. We believe that a reminder is necessary because consumers may have only received information about the terms orally; there is currently no obligation to send them written information confirming that they have agreed to these offers and reiterating the terms. If the initial solicitations were made by direct mail or in the general media, they may not have provided complete information about the terms or consumers may not have retained that information. If the terms of free-to-pay conversions were not made clear during the calls, consumers may not realize that they must take affirmative action to avoid being charged or know how to do so. And, as we have pointed out, consumers may simply forget to take action in time or be unable to recall how to cancel. Furthermore, if consumers have been enrolled in free trial offers without having agreed, they have no reason to believe that they must take any action, nor any idea of how to do so.

A requirement for timely reminders in free-to-pay conversion situations would help consumers avoid unwanted charges and benefit sellers by reducing the potential for disputed charges. Even if sellers send a "welcome packet" to consumers at the time that the trial periods begin, the "just in time" nature of reminders that are made three to six days before the end would help to ensure that consumers have the information they need in order to cancel if they wish. We do not believe that it would be burdensome to provide these reminders. It could be done by phone, mail, or email.

Section 310.3 should also be amended to require sellers to provide an easy means for consumers to cancel by telephone. The telephone number provided for this purpose should be toll-free and available 24 hours a day, and should allow the consumer to cancel without speaking to a person. The FTC should require the reminder notice to list the cancellation telephone number prominently. Other cancelation methods could be allowed, but only in *addition* to the telephone.

In addition, section 310.4 should be amended to prohibit sellers from requiring consumers to provide written notice to cancel a free trial offer that is covered by the TSR or from imposing any other conditions that would make it difficult or unduly burdensome for consumers to cancel. It should also be an abusive practice not to honor a consumer's properly-made request to cancel. Furthermore, if the reminder was not conveyed within the time period required, the consumer's ability to cancel without cost should continue until three days after the reminder is ultimately conveyed.

<u>Recordkeeping</u>

We believe that it would be appropriate and useful to require records to be kept of all outbound telemarketing calls covered by the TSR. The FTC points out that this information is vital for investigations about calls being made to numbers on the National Do Not Call Registry. We would think that this information would also be important in investigating other possible violations of the TSR involving prerecorded calls, caller ID spoofing, and patterns of calls. Given the changes in the telecommunications industry, with an increasing number of telecommunications providers, some located out of the country, and the fact that the FTC has found that it can be difficult and time-consuming to obtain the call records that it needs from these companies, it is logical to require the telemarketers themselves to retain that information and make it available to law enforcement agencies. The records should include not only the dates and times of calls and the numbers that were called, but the number and identity of the caller that was provided and whether the call was "live" or prerecorded. The FTC should determine a reasonable retention period.

Indeed, the FTC should consider requiring telemarketers to record the entire call for all telemarketing calls. The FTC has established the principle that the "overall net impression" of a representation must be examined to determine if it is unfair or deceptive.[30] It will be impossible to determine the overall net impression from only part of the call. For example, it will be clear only from a full recording that the consumer was badgered or misled, or misunderstood the nature of the proposed transaction, or rejected it in a portion of the conversation that was not recorded. The actual recording will also reveal issues such as pace and intelligibility.[31]

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[30] See, e.g., Fed. Trade Comm'n v. Stefanchik, 559 F.3d 924, 928 (9th Cir. 2009).
[31] See, e.g., State *ex rel*. Miller v. Vertrue, Inc., 834 N.W.2d 12, 38 (Iowa 2013) (telemarketer spoke in a heavy accent at a very fast pace, "rendering much of the pitch unintelligible").

Robocalls and Caller ID Spoofing

As the FTC acknowledged in testimony to the Senate earlier this year, technology has made phone fraud easier and investigating it more difficult.[32] Using Voice over Internet Protocol (VoIP) technology, "it is not only much cheaper to send fraudulent calls; it is also easier to hide one's identity while doing so."[33] Technology that allows callers to manipulate caller ID information (caller ID spoofing) "allows scammers to deceive consumers by pretending to be an entity with a local phone number or a trusted institution such as a bank or government agency."[34]

Technology also enables callers to send prerecorded messages, commonly known as "robocalls," to consumers. As the FTC noted in 2013 testimony to the Senate, despite the 2008 prohibition of unauthorized robocalls and the agency's vigorous enforcement action, complaints in this regard have been increasing, from 63,000 per month in the fourth quarter of 2009 to 200,000 per month in the fourth quarter of 2012.[35] When Consumers Union recently invited people to share their experiences with harassing or fraudulent robocalls, more than 4,000 responded within a week.[36] Ultimately, more than 107,000 consumers took action urging regulators to put an end to the overwhelming number of robocalls, which many consumers stated were practically impossible to stop, which tied up phone lines, and often involved caller ID spoofing.[37] Consumer Action has also received numerous complaints to its complaint hotline about chronic robocalls and violations of consumers' Do Not Call rights for offers to lower credit card interest rates, useless services to senior citizens, inaccurate debt collection calls and bogus offers to remove callers from the call list (Press 2 to opt-out).

In a survey conducted by Consumer Federation of America and the North American Consumer Protection Investigators about consumer complaints received by state and local government consumer protection agencies in 2013, the top fastest-growing complaints were

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[32] Testimony of Lois Greisman, Associate Director of the Division of Marketing Practices, FTC Bureau of Consumer Protection, before the Senate Special Committee on Aging, July 16, 2014, on "Hanging Up the Phone Scams; Progress and Potential Solutions to this Scourge," available at http://www.ftc.gov/system/files/documents/public_statements/569041/140716phonescamstestimony.pdf.

[33] *Id.* at 12.

[34] *Id.* at 13.

[35] Testimony of Lois Greisman, Associate Director of the Division of Marketing Practices, FTC Bureau of Consumer Protection, before the Senate Committee on Commerce, Science and Transportation Subcommittee on Consumer Protection, Product Safety, and Insurance, July 10, 2013, on "Stopping Fraudulent Robocall Scams: Can More Be Done?," page 9, available at http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-entitled-%E2%80%9Cstopping-fraudulent-robocall-scams-can-more-be/130710robocallstatement.pdf.

[36] *Id.*

[37] Letter from Delara Derakhshani to Marlene Dortch, Secretary of the FCC, Re: Notice of Ex Parte Presentation CG Docket No. 02-278, April 16, 2014.

about violations of consumers' do-not-call rights and other telemarketing abuses.[38] When asked what accounted for this trend, technology was cited as a major factor.

We applaud the FTC and the Department of Justice for taking action against companies that facilitate violations of consumers' do-not-call rights and other telemarketing abuses. The actions announced earlier this year against Sonkei Communications and the company's head for providing services that enabled telemarketers to make illegal robocalls and block their identities is good example of what can already be done to stop these types of abuses.[39] Enforcement action is by its very nature "after the fact," however, and we appreciate that the FTC recognizes that more needs to be done proactively to prevent these abuses.

The Department of Justice has described the growing problem of caller ID spoofing[40] and made recommendations in 2011 directed specifically at the FCC for addressing these problems. The DOJ urged the FCC to impose obligations on entities that provide caller ID services to the public, such as requiring them to verify that users have the authority to use the substituted numbers. The DOJ also suggested that the FCC could adopt standards that would permit call recipients to determine whether caller ID information has been altered and that would enable law enforcement to trace such calls to the true originating phone numbers. To the extent that its jurisdiction allows, the FTC should consider adding such requirements to the TSR and should work with the FCC to ensure that there are no regulatory gaps in this regard.

In a 2011 law journal article,[41] Alicia Hatfield describes the growing problem of caller ID spoofing. She notes the DOJ's recommendations and adds that the FCC could protect telephone numbers from being abused by imposters by requiring entities that provide caller ID services to create and maintain a "Do Not Spoof" list.[42] This is another interesting idea that the FTC should explore in its efforts to ensure that caller ID manipulation is not used for deceptive marketing calls.

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[38] See report, http://www.consumerfed.org/pdfs/2013-consumer-survey-report.pdf, pages 4, 5 and 7.

[39] See FTC press release, available at http://www.ftc.gov/news-events/press-releases/2014/04/marketer-robocalling-services-banned-telemarketing.

[40] Comments of the U.S. Department of Justice before the FCC, "In the Matter of Rules and Regulations Implementing the Truth-in-Caller-ID Act of 2009," WC Docket No. 11-399, filed April 18, 2011, available at http://apps.fcc.gov/ecfs/comment/view?id=6016376556.

[41] Alicia Hatfield, *Note and Comment: Phoney Business: Successful Caller ID Spoofing Regulation Requires more Than the Truth in Caller ID Act*, Journal of Law and Policy, 19 J.L. & Pol'y 827, 2011, http://practicum.brooklaw.edu/sites/default/files/print/pdfs/journals/journal-law-and-policy/volume-19/issue-2/jlp_v19ii_5.pdf.

[42] *Id.* page 864.

Others[43] have argued that some telephone consumer protections, such as those pertaining to caller ID, are being intentionally flouted and must be adapted to the challenges of modern technology. To address the problem of caller ID spoofing, they suggest that carriers should be required to collect a significant bond from customers who wish to manipulate their caller ID.[44] They also suggest increasing logging requirements for those carriers and requiring them to verify that a manipulated caller ID is actually a registered phone number.[45] While their recommendations are directed at the FCC and Congress, the FTC should consider what it might be able to do within its jurisdiction and work with the FCC and lawmakers as needed to strengthen consumer protections in this area.

On the problem of illegal robocalls, the FTC has brought many enforcement actions and used innovative approaches such as initiating a contest for the best technical solutions to block these calls,[46] but this is not enough to stem the tidal wave of abuse. Part of the problem is that these technologies are not available to all consumers. For instance, one of the contest-winning services, Nomorobo, works well for consumers who have Internet-enabled phone service, but in order for this cloud-based technology to work for those consumers who still have telephone service provided over traditional copper wires, carriers would need to make changes to their legacy systems, an investment that they may be reluctant to make as they focus on transitioning to all-IP service. This transition is expected to take many years, however, and in the meantime consumers will receive a deluge of robocalls on traditional landlines and cell phones.

Carriers can do more. At the very least, they should offer the ability to block *all* robocalls made for sales purposes (currently consumers have only very limited robocall blocking options through their carriers). The FTC should work with the FCC to demand that industry provide more effective protection against robocall abuses. Perhaps the FTC could place certain obligations on companies that provide robocalling services for telemarketing – for instance, to require bonding and to monitor their customers' activities to ensure that they are not making illegal robocalls.

Ultimately, that the best solution would be to prohibit robocalls from being used for sales purposes (except for very narrow circumstances such as prescription renewals). We are hard-pressed to think of any real benefits that robocalls for telemarketing solicitations provide

[43] Spencer Weber Waller, Daniel B. Heidtke, Jessica Stewart, *The Telephone Consumer Protection Act of 1991: Adapting Consumer protection to Changing Technology,* 26 Loyola Consumer Law Review, 343, 2014. http://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1937&context=lclr.

[44] *Id.* page 423.

[45] *Id.* pages 423 and 424.

[46] See "Robocall Challenge: And the Winner Is…," April 2, 2013, available at http://www.consumer.ftc.gov/blog/robocall-challenge-and-winner.

to consumers, and the potential for abuse is great. We recognize that the FTC and FCC share jurisdiction over the issue of unwanted robocalls and appreciate their continued willingness to work together to put an end to these calls.

Third Party Liability

Despite the TSR, telemarketing fraud remains a serious problem, causing significant harm to vulnerable consumers.[47] Telemarketing fraud requires the cooperation of many players to succeed. Lead generators, payment processors, financial institutions, manufacturers, shippers, credit card lenders, and advertisers have all played roles in telemarketing fraud.[48] These entities would not facilitate telemarketing fraud if it were not profitable to them. Stopping their ability to profit from telemarketing fraud is a critical part of deterring it: if third parties have the ability to retain telemarketing fraud profits, these market incentives will drive fraud. These potential profits also undermine the incentives for third parties to institute strong controls against fraud, as scammers will shop for the banks, payment processors, and other third parties who have the weakest controls.[49]

The TSR currently provides that it is a deceptive telemarketing act or practice for a person to provide substantial assistance or support to a seller or telemarketer when that person “knows or consciously avoids knowing” that the seller or telemarketer is committing an abusive or deceptive telemarketing act.[50] We strongly support this imposition of liability on third parties who facilitate telemarketing fraud. Without such a provision, the rule would have little effect, as fraudsters would funnel their ill-gotten gains to third parties and then go out of business if they were sued.

However, we believe that the TSR rule does not go far enough. The rule should impose liability on any third party that provides substantial assistance or support to what it “knows or has reason to know” is a telemarketer’s abusive or deceptive practice. This change would go far in helping to ensure that these third parties are appropriately vigilant on behalf of the consumers they are serving and from whose business they are profiting.

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[47] See, e.g., Federal Trade Comm’n, Press Release, “FTC Stops Mass Telemarketing Scam That Defrauded U.S. Seniors and Others Out of Millions of Dollars” (Mar. 31, 2014), available at http://www.ftc.gov/news-events/press-releases/2014/03/ftc-stops-mass-telemarketing-scam-defrauded-us-seniors-others-out.

[48] See, e.g., Jessica Silver-Greenberg, New York Time, “Banks Seen as Aid in Fraud Against Older Consumers” (June 10, 2013), available at http://www.nytimes.com/2013/06/11/business/fraud-against-seniors-often-is-routed-through-banks.html?pagewanted=all&_r=0.

[49] *Id.* Also see written testimony of Howard Langer (July 15, 2014), available at http://www.nclc.org/images/pdf/banking_and_payment_systems/payment-fraud/letter-howard-lange-bachus-johnson.pdf (after an enforcement action against Wachovia, scammers moved their business to Zions Bank, which allowed it to continue despite spotting suspicious activity).

[50] 16 C.F.R. § 310.3(b).

Remotely Created Checks and Related Payment Methods

In 2013, the FTC proposed amending the TSR to ban telemarketers and sellers from using remotely created checks (RCCs) and remotely created payment orders (RCPOs).[51] These payment mechanisms escape the fraud controls that apply to other payment methods such as credit cards, and are prime vehicles for unauthorized withdrawals of consumers' funds. Legitimate businesses have no need to use these payment mechanisms. In our comments in response to the proposal, we urged the FTC to adopt the proposed rule, and to strengthen the standards for holding originating banks and payment processors liable for processing these payment types. We also urged the FTC to adopt its proposed restrictions on cash-to-cash money transfers and prepaid card reload packs.

We strongly urge the FTC to finalize the 2013 rulemaking without delay. Banning RCCs and RCPOs in telemarketing transactions is especially important now because scammers are likely to migrate to these payment mechanisms as Operation Chokepoint makes banks more vigilant about fraudulent payments flowing through their systems.

Abusive Mandatory Arbitration Clauses and Class Action Waivers

Pursuant to its authority to issue rules prohibiting "abusive telemarketing acts or practices,"[52] the FTC should prohibit telemarketers from including mandatory, pre-dispute arbitration clauses and class action waivers in their form contracts. Fraudulent businesses use these clauses as a way of making themselves virtually immune from claims by the consumers they defraud. This virtual immunity allows fraud to thrive and enables the fraudulent businesses to attract other participants such as banks and payment processors.

Mandatory, pre-dispute arbitration clauses—or "forced arbitration" clauses—are central features of abusive and unfair marketing schemes because they insulate businesses from liability by making private lawsuits by consumers virtually impossible. In December 2013, the Consumer Financial Protection Bureau (CFPB) issued the preliminary findings of its statutorily-mandated study of forced arbitration clauses.[53] The CFPB concluded that arbitration clauses are exceptionally common in many consumer financial product agreements, but that consumers almost never file claims in arbitration. Between 2010 and 2012, on average, just over 400 consumer arbitrations relating to credit cards, checking accounts, and payday loans were filed

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[51] 78 Fed. Reg. 41,200 (July 9, 2013).

[52] 15 U.S.C. § 6102(a)(1)

[53] *Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date*, Consumer Financial Protection Bureau, Dec. 12, 2013 ("CFPB Study"), *available at* http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

with the American Arbitration Association (AAA) per year.[54] According to the report, "[p]lainly, the number of arbitrations was low relative to the total populations using these products."[55]

The dearth of consumer claims arises in part from the pervasiveness of "class action waivers" that prevent consumers from combining small-dollar claims. According to the CFPB's report, around 90 percent of the forced arbitration clauses studied included such class action waiver clauses.[56] Since 2011, when the Supreme Court endorsed the enforceability of these provisions, class action waivers have reportedly blocked 140 viable consumer and employment class actions—often in cases that are impossible or very difficult to bring on an individual basis.[57]

Moreover, arbitration agreements frequently make even individual arbitration more burdensome and costly than filing in court—thus suppressing individual claims as well—by, among other things, requiring consumers to pay thousands of dollars in arbitration costs, prohibiting the award of remedies that would otherwise be available, drastically limiting discovery, requiring consumers to arbitrate in far-off places, and shortening statutes of limitation that impose hard deadlines on consumer claims. Many of these agreements "delegate" the question of enforceability to the arbitrator, preventing consumers from going to court even to establish that the arbitration agreement is unlawfully unfair and unconscionable.[58]

For many consumers, forced arbitration clauses present, not a different mechanism for dispute resolution, but a barrier to bringing a claim in any forum. Consumers facing arbitration clauses cannot protect themselves from wrongdoing or serve their important role as private attorneys general to hold fraudulent businesses accountable.

The pervasiveness of forced arbitration clauses in contracts with debt settlement companies is just one illustration. Courts in many cases have forced consumers into arbitration

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[54] *Id.* at 62.

[55] *Id.* at 63.

[56] *Id.* at 13.

[57] *Cases that Would Have Been: Three Years after* AT&T v. Concepcion*, cases of corporate wrongdoing continue to pile up*, National Association of Consumer Advocates & Public Citizen, May 1, 2014, *available at* http://www.citizen.org/concepcion-third-anniversary-corporate-wrongdoing-forced-arbitration-report.

[58] *See* Rent-A-Center West, Inc. v. Jackson, 130 S. Ct. 2772 (2010) (holding that parties can delegate questions of validity to the arbitrator); *see also* Duran v. J. Hass Grp.*, L.L.C.*, 531 F. App'x 146, 147 (2d Cir. 2013) (summary order) (in case against debt settlement company, compelling New York plaintiff to arbitrate in Arizona her argument that the arbitration clause's requirement that she arbitrate in Arizona was unconscionable).

even when the consumers alleged that the debt settlement provider received payment without providing any (or providing very few) promised services.[59]

Many telemarketers operate without even purporting to reach a written contract with the consumer. However, to the extent that telemarketers obtain written contracts with consumers, the FTC should prohibit them from including forced arbitration clauses or class action waivers.

The FTC would not be alone among federal agencies if it addressed the abusive uses of arbitration. Other relevant federal action includes the following:

- The Consumer Financial Protection Bureau: Congress has required the CFPB to conduct a study and report to Congress concerning the use of pre-dispute arbitration clauses in consumer finance contracts[60] and, thereafter, if the CFPB finds that a "prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers," issue regulations prohibiting or restricting the use of pre-dispute arbitration clauses in consumer finance contracts.[61] In December 2013, the CFPB published the "Preliminary Results" of its study,[62] describing its preliminary findings regarding the pervasiveness and use of forced arbitration clauses and class action waivers in contracts for credit cards, checking accounts, payday loans, and pre-paid cards.
- The Department of Defense: Pursuant to its authority under the Servicemembers Civil Relief Act, The Department of Defense recently proposed a rule broadening the existing ban on forced arbitration clauses covering certain consumer financial products offered to active servicemembers and their families to cover significantly more credit products.[63]

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[59] *See, e.g.*, Duran v. J. Hass Grp., L.L.C., 531 F. App'x 146, 147 (2d Cir. 2013) (affirming grant of motion to compel arbitration even though arbitration clause required low-income, New York plaintiff to arbitrate her dispute in Arizona); Day v. Persels & Associates, LLC, 729 F.3d 1309 (11th Cir. 2013) (referring to prior district court order compelling arbitration over consumer claims); Willis v. Nationwide Debt Settlement Grp., 2013 WL 1900998 (D. Or. May 7, 2013) (referring to prior order compelling consumer to arbitrate claims); Tanksley v. Bay View Law Grp. P.C., 2012 WL 5193680 (D. Kan. Oct. 15, 2012) (compelling arbitration of consumer claims); Smith v. Legal Helpers Debt Resolution LLC, 2012 WL 2118132 (D.N.J. June 11, 2012) (compelling arbitration of consumer claims); Guidotti v. Legal Helpers Debt Resolution, *L.L.C.,* 866 F.Supp.2d 315, 329 (D.N.J.2011) (compelling arbitration of claims against debt adjusters); Penso Holdings, Inc. v. Cleveland, 749 S.E.2d 821 (Ga. Ct. of App. 2013) (compelling arbitration of consumer claims).

[60] 12 U.S.C. § 5518(a) (added by Pub. L. No. 111-203, § 1028, 124 Stat. 1376 (2010))

[61] *Id.* § 5518(b).

[62] Arbitration Study Preliminary Results, Section 1028(a) Results to Date, Dec. 12 2013, *available at* http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

[63] *See* Enhancement of Protections on Consumer Credit for Members of the Armed Forces and Their Dependents, 79 Fed. Reg. 58601 (proposed Sept. 29, 2014) (to be codified at 32 C.F.R. 232).

- The Equal Employment Opportunity Commission: In 2014, the Equal Employment Opportunity Commission (EEOC) filed a complaint in federal court against an employer who requires its employees to submit to binding arbitration instead of filing discrimination claims with the EEOC. The EEOC alleges that this practice violates Title VII because it deprives employees of a right provided by the statute.[64]

Prohibiting mandatory arbitration clauses and class action waivers in telemarketing contracts would also be consistent with other initiatives by the FTC, most notably its groundbreaking rule on Preservation of Consumers' Claims and Defenses (the "Holder Rule").[65] That rule prevents sellers and creditors from including waiver of defense clauses in consumer contracts as a way of insulating assignees from consumer claims arising out of the transaction.

In adopting that rule, the FTC recognized that allowing assignees to escape consumer claims arising out of fraudulent transactions would create market incentives that would fuel fraud. Forced arbitration clauses and class action waivers serve similar purposes for fraudulent businesses today as waiver of defense clauses served in 1975 when the FTC adopted the Holder Rule. The FTC should take the same approach as it did in 1975, and declare these clauses unfair and deceptive in telemarketing sales.

Debt Relief Services

The provisions of the TSR concerning debt relief services have been very beneficial to consumers. They are intended to ensure that consumers only pay for services that they have actually received and that have delivered the promised results. While the advance fee ban has caused many unscrupulous debt settlement companies to leave the industry, there are still problems, which the Center for Responsible Lending (CRL) details in its comments in this matter.

Citing widespread abuses in the use of attorneys to attempt to evade the debt relief service provisions of the TSR, CRL suggests that the FTC consider releasing additional guidance reiterating that attorneys are not exempted from the rule, and clarifying the scope and application of the face-to-face meeting exception.

CRL urges the FTC to amend the compensation aspects of the debt relief service provisions in order to better align the incentives of providers with the interests of consumers. Noting that there is evidence that debt relief services are negotiating installment settlements more frequently, enabling them to front-load their revenues since the TSR allows them to

[64] EEOC Sues Doherty Enterprises Over Mandatory Arbitration Agreement, Sept. 9, 2014, available at http://www.eeoc.gov/eeoc/newsroom/release/9-19-14b.cfm.
[65] 16 C.F.R. pt. 433.

collect the full amount of the fee for a debt account at the point at which the consumer has made at least one payment pursuant to the settlement agreement, and citing concerns that lengthy installment settlements may put financially strained consumers at risk of not being able to sustain them, CRL recommends that fees should be paid either proportionately with the installments or once the settlement is finally paid in full. CRL also suggests that an additional provision should be added that if a settlement is not completed the provider is not entitled to a fee, in order to provide a disincentive to negotiating unsustainable or overly lengthy installment plans.

CRL further recommends that the fees should be calculated based on the amount of savings achieved, comparing the settlement amount with the amount of the debt at enrollment, rather than on the percentage of the debt enrolled. CRL argues that calculating the fees on the percentage of enrolled debt creates perverse incentives because the providers are guaranteed set fees regardless of the quality of the settlements, and under the current structure the fees can actually be higher than the savings to consumers from the settlements.

We fully support CRL's analysis of the debt relief service problems and its recommendations for addressing them.

Conclusion

The TSR is an important tool to protect consumers from abuse and provide guidance to legitimate telemarketers. As explained above, we urge that it be updated to reflect changes in technology and business practices, and strengthened to provide more effective consumer protection.