

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In The Matter Of Telemarketing Review -

FTC File No. P994414

**COMMENTS OF
MAGAZINE PUBLISHERS OF AMERICA, INC.
ON THE REVIEW OF THE
TELEMARKETING SALES RULE**

INTRODUCTION

On behalf of the membership of Magazine Publishers of America, Inc. (“MPA”) we are pleased to be able to participate in this Rule review process. As part of the initial rulemaking group that convened in Chicago in 1995, we welcome the opportunity to continue the dialogue we have maintained with the Federal Trade Commission (the “Commission”) during the past five years. MPA is the national trade association for consumer magazine publishers. Its membership includes approximately 240 domestic magazine publishing companies that publish more than 1,500 individual magazine titles, more than 100 international magazine publishers, and more than 120 associate members who are suppliers to the magazine publishing industry. Our member magazines range from well-known, nationally distributed publications such as Time, The Reader’s Digest, and National Geographic to smaller-circulation and local publications such as Harvard Business Review, The Net and Milwaukee magazines.

MPA has a long-standing interest in promoting business practices that are respectful of our subscribers and readers. For many years, we have recommended the Direct Marketing Association's (DMA) Guidelines for Ethical Business Practices to our members as an appropriate way to enhance customer relations. We have kept our members apprised as DMA and other trade organizations have developed additional publications dealing with specific marketing practices, such as Guidelines for Marketing by Telephone and Guidelines for Mailing List Practices. As we will discuss in more detail later in these comments, MPA has also worked very closely with the Commission to identify areas of concern in the marketing and sale of magazine subscriptions and in developing an industry self-regulatory model that addresses those concerns. Since its inception, the MPA has understood the importance of advancing self-regulation in an effort to ensure the best ethical business practices of its members.

Part of the MPA's commitment to these best practices can be found in the products our members sell. Magazines, like newspapers, are purchased by consumers primarily for their news and educational content and provide many hours of entertainment for readers of all ages, economic classes and education levels. Virtually everyone reads a magazine at some point during the week. The importance of magazines as a vehicle for conveying information to individuals and businesses in a society that places a premium value on a "free press" is undisputed.

The magazine industry is somewhat unique in that approximately 60% of initial subscriptions are generated by independent contractors. These contractors use a variety of marketing techniques, including telemarketing. Very few, if any, of our members actually cold-call consumers directly for subscriptions. Our members do, however, engage in telemarketing to their existing subscriber base in an attempt to secure renewals. The economics of this industry are such that a profitable customer is one who remains

with the magazine for an extended period of time. Thus, a substantial premium is placed on retaining subscribers through multiple subscription periods.

Consumers who subscribe to our members' publications do so with the expectation that they will receive timely and uninterrupted service over the full term of their subscriptions. Therefore, sound business practice demands that magazines ensure the satisfaction of their subscribers. Unhappy subscribers are unlikely to renew a subscription when their current order expires, thus costing the publisher money. As the majority of our members' revenue is both directly (subscription sales) and indirectly (advertising rates) predicated on subscription volume, it is crucial that our subscribers understand their purchase and enjoy their magazines. If not, a consumer's failure or refusal to pay for an existing order, or failure to renew that subscription will be extremely costly to the publisher. Clearly, magazines sold properly, with consumers' full understanding of what they are purchasing and the total costs of that purchase greatly increase the likelihood that particular consumers will renew their subscription at the appropriate time.

As a result, MPA supports measures designed to ensure that consumers are making informed purchases. To that end, we submit the following specific comments in support of the existing provisions of the Telemarketing Sales Rule. As our comments do not address every topic listed by the Commission in its Request For Public Comment, the numbered paragraphs in this comment correspond with those in the Request For Public Comment.

Section F. Questions and Issues for Comment Pursuant To Regulatory Review of the Rule.

I. *General Questions For Comment*

1. Is There A Continuing Need For The TSR?

As noted previously, MPA believes that there is a very basic reason for continuing to regulate telemarketing practices via the Telemarketing Sales Rule. In short: “It Works.” It is obvious that the Rule has been beneficial for companies, law enforcement agencies and consumers. The core of the Rule mandates that purchases consummated by telemarketing are now made by informed consumers who are aware of exactly what they are purchasing, how much it will cost to complete that purchase and how much of a particular product or service they are purchasing. That has clearly led to a more educated consumer who is more able to distinguish between real and fraudulent offers, while giving law enforcement agencies tremendous power and influence if the necessary disclosures are not made clear to the public.

While the consumer benefits of the Rule are clear, there is another aspect of the Rule that provides further evidence that “It Works.” When MPA participated in the Chicago Workshop that brought industry and law enforcement together to craft the Rule, one of the consistent themes and goals for the Rule was to create a framework that made it easier for law enforcement to distinguish legitimate business practices from deceptive and abusive tactics used by fraudulent operators. It was recognized that criminals are very proficient at copying legitimate sales programs and appearing to be reputable to the unsuspecting consumer. One of the goals of the Rule was to find those practices that separated the fraudulent operators from the “good guys.” After five years, we think it is indisputable that the Rule has done just that. Given the significant number of enforcement actions brought both by the Commission itself and by state Attorneys General enforcing the provisions of the Rule against fraudulent businesses and individuals, it would be difficult for anyone to claim that the Rule has not succeeded in this area.

The Rule has also achieved an additional goal of clarifying the standards for telemarketers. Prior to the inception of the Rule, there were many schools of thought on what constituted full disclosure. Companies that wanted to do the right thing sometimes differed in their interpretation of the amount of information that should be given to the consumer. These companies tried to find the correct balance between providing too much information that could overwhelm the consumer and drown out the truly pertinent information related to the material terms and conditions of the sale versus providing too little information to adequately convey an accurate description of the purchase. With the implementation of the Rule, industry now has a clear understanding of what information should be provided to a consumer to ensure that the consumer makes an informed purchase. Not only has the Rule raised standards for the entire industry, but it has also assisted consumers by establishing a more uniform sales presentation within the industry, which allows consumers to more easily distinguish between legitimate magazine offers and fraudulent pitches. Consumers now know what information needs to be disclosed and any sales presentation that neglects to provide the required information may quickly be dismissed by a consumer.

The Rule has also been a benefit to law enforcement. The list of boiler room operations that have been shut down by the Commission, state Attorneys General and other law enforcement groups is still more proof that the purpose of the law has been achieved in the Rule's current format. That these enforcement agencies have been able to identify fraudulent operators, locate their boiler rooms and prosecute them is one of the clearest examples of the Rule's effectiveness.

The Rule has served as a valuable tool for consumers, law enforcement and the legitimate members of the telemarketing industry, all the while serving as a deterrent to those who may contemplate using the telephone to perpetrate their fraudulent activity. Quite simply, "It Works."

Of particular interest for the magazine industry is the empirical evidence that the Rule is effective. In 1995, when MPA participated in the rulemaking process, it was often cited to us that complaints about the sales of magazines was high on the list of complaints received by the Commission. We heard and shared the Commission's concern. The message also hit home when the very first enforcement actions brought under the Rule were aimed at certain independent magazine subscription agencies that transmit orders to our members. While these actions were aimed primarily at the billing practices of those independent companies, our members clearly understood the significance of those enforcement actions. Since the inception of the Rule, our members have made compliance with the Rule a primary focus of their compliance programs for the independent contractors. Our members have taken steps in an attempt to ensure that all of the independent contractors selling magazine subscriptions do so using the same high standards that MPA members themselves have subscribed to for years. The need to ensure that all segments of the industry were in full compliance with the Rule was so important to our members that MPA revised its guidelines on the use of independent subscription sellers. These guidelines describe the appropriate methods for tracking compliance throughout the independent seller network.

According to the information we have received, it appears that the combined efforts of our members in educating sellers about the Rule and the revised MPA guidelines have had a positive impact. It is our understanding that complaints about magazine sales have dropped since the Rule went into effect. That decrease is even more impressive when it is combined with the substantial increase in sales through telemarketing experienced by our members. It makes our commitment to compliance that much more significant. In 1995, telemarketing sales accounted for approximately 5-7% of all new subscriptions sold by our members. In 1999, roughly 10-11% of our members' new subscription sales were generated by

telemarketing. That substantial growth in sales coupled with the decrease in consumer complaints paints a clear picture of the positive impact the Rule has had on consumers and the industry.

The following outlines MPA's belief in the benefits of each specific provision of the Rule:

Section 310.3(a)

This Section of the Rule, outlining deceptive and prohibited telemarketing practices, requires companies to provide certain material information regarding the particular goods or services for sale and prohibits those same companies from making any misrepresentations regarding such material information. MPA firmly believes that the material information which must be conveyed is key to allowing consumers to make informed purchasing decisions.

(1) 310.3(a)(1) - By requiring the disclosure of (a) the total cost and quantity of the goods or services purchased, (2) all material restrictions, limitations or conditions on the purchase, (3) all material aspects of a refund policy, if it is otherwise mentioned during the sales presentation, or the disclosure of a "no refunds" policy, and (4) material information related to prize promotions, prior to the consumer being asked to "pay" for the goods or services, the Commission has established an important standard for industry and consumers alike. These requirements provide a bright line distinction between those in the industry who do it right and those who do not. Consumers will know right up front that this is a company they don't want to buy from if the required information is not provided.

(2) 310.3(a)(2) - By prohibiting sellers from making any false or misleading statements to induce a consumer to pay for goods or services, the Commission has set a standard that the MPA wholeheartedly supports. Sales made through misleading calls and misrepresentations will only result in unhappy customers. Based on their unsatisfying experience, unhappy customers from

one telemarketing call are unlikely to become customers of another company who sells via the telephone. Thus, it is in the best interest of the industry as a whole that all calls be made with full and accurate disclosure. That is the only way the industry will continue to grow.

(3) 310.3(a)(3) - The use of demand drafts without “express verifiable” authorization was a practice that obviously had received significant attention from the Commission. MPA believes that the current requirement allows telemarketers to compete fairly with other point-of-sale providers, while adequately ensuring that companies will not have unauthorized access to consumer checking accounts.

(4) 310.3(a)(4) - As with the previous sections that prohibit false or misleading statements, this section’s prohibition on such statements to induce payment for goods or services, provides appropriate flexibility. It does not make reference to specific types of payment systems, but rather provides law enforcement the flexibility to address fraud regardless of the method of payment used by the consumer, including payment methods that may not even exist with today’s technology, but may be developed in the future.

Section 310.3(b)

The “Assisting and Facilitating” section was one the most debated sections of the Rule during the drafting phase in 1995. MPA believes that the final standard drafted by Commission struck exactly the right balance. This section of the Rule, which prohibits a party from providing substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller is engaged in any act or practice that violates the Rule, provides a means for law enforcement to identify and prosecute those who have actually been involved with fraudulent activity. At the same time, it does

not penalize those companies that were unknowing or inadvertent contributors to the fraudulent schemes of others.

Section 310.3(c)

Prohibiting companies from accessing the credit card account system through another company's merchant account, also addresses activities that are unique to fraudulent schemes. A company that is unable to satisfy the requirements of the credit card companies (which are extremely stringent in their own right), and thus cannot obtain a merchant account, provides a clear picture of a company that is operating in a unethical manner. Again, rules that strictly target the bad actors provide a benefit to all impacted parties -- law enforcement, consumers and telemarketers.

Section 310.4

MPA fully supports both the goals and the specifics of this section. Those practices that are listed in detail as "abusive" clearly fall outside the practices of mainstream legitimate companies. We will discuss the "do-not-call" requirements of this section in greater detail below, yet MPA believes it is important to reiterate its support for the current do-not-call provisions found in the Rule.

(1) 310.4(d) - The required oral disclosures provided for in this section are another means for the consumer to identify legitimate telemarketing calls. A company that calls a consumer and does not promptly (1) provide the consumer with the identity of the seller, (2) disclose that the purpose of the call is to sell goods or services, (3) describe the nature of the goods or services, and (4) state that no purchase or payment is necessary to win if a prize promotion is offered, should be the consumer's first clue that the offer may not be everything the seller says it is.

These simple up-front disclosures are an invaluable tool for consumers to protect themselves from fraud, for law enforcement to track fraud; and for industry to prevent fraud. In addition, we

are well aware of the various opinions regarding the disclosure of the information “promptly.”

MPA fully supports the term as defined by the Rule and believes that this standard has struck the appropriate balance.

Section 310.5

MPA supports the recordkeeping requirements of this section. This is as much for the protection of individual companies as it is for the protection of individual consumers. Companies know exactly how long they will be required to keep and produce records of their activities and exactly which records must be kept. The Commission’s requirement that sellers keep all “substantially different” advertising and marketing records also strikes a sound balance for the administrative side of the business. As the Commission is well aware, many companies’ marketing materials are very fluid documents with minor changes made weekly. Not having to save copies of every minor change relieves a potentially significant administrative and financial burden for industry.

Section 310.6

Significant legal and public policy concerns with the Rule were addressed by this section. Narrowly tailored exemptions provided for by the Commission in 1995 avoided an undue burden on some legitimate businesses and sales transactions. The exemptions provided for in the Rule all have at least some claim that (1) Congress did not intend the Rule to cover such specific business activity, (2) they are already regulated extensively by Federal or state law, (3) the particular business activity does not lend itself to fraud or abuse, or (4) the likelihood that a business would use an exemption to engage in fraudulent activity was outweighed by the regulatory burden compliance with the Rule would place on such business. MPA believes that the Commission has collected enough empirical data during the past five years to determine the proper balance for these exemptions and adjust them if appropriate.

Section 310.7

The enforcement provisions of the Rule are one of the most critical components. The ability of the state Attorneys General to pursue fraudulent operators across state lines and enforce a uniform set of rules provides a great benefit to the industry. No longer can criminals simply run from state to state to avoid prosecution. Providing law enforcement with the tools and the means to identify, investigate and prosecute criminals, again, is beneficial to consumers and business alike.

Section 310.8

As noted in our prior comments on this Rule and with regard to other legislative and regulatory matters, MPA strongly believes that State law should be preempted when a national disclosure standard is adopted. One of the keys to the success of the Rule is that it provides a consistent framework of regulation that allows consumers to rely on a uniform style of telemarketing that makes them more aware of their rights under the law, and companies to develop consistent training and sales methods. MPA believes that the Commission should be concerned about the potentially ruinous cumulative effects of a patchwork of 50 state statutes and regulations governing telemarketing. It is a significant burden on the industry to have to (1) research all of the different state requirements; (2) design compliance programs that will satisfy all these different state requirements; (3) implement these diverse compliance programs; and (4) train salespeople to understand and recognize the differences in these programs. As the Commission has supported Federal preemption of State law in other matters, including online privacy, it would seem consistent for the Commission to take such a position with regard to telemarketing.

The past five years have shown that the Rule strikes an appropriate balance between allowing legitimate businesses to sell goods and services, and providing law enforcement and consumers with the

necessary tools to identify and stop fraud. A national standard based on the Rule will support our members' ability to continue to offer the valuable goods and services our customers have come to expect.

Section G. Questions and Comments Regarding the Past and Future of the Telemarketing Industry

III. Self-Regulatory Efforts

The Commission is no doubt familiar with the self regulatory efforts of the MPA as we have developed our self-regulatory efforts directly in conjunction with the Commission staff.

Guidelines

Although many publishers promote subscription sales through their own direct mail marketing and other methods, there is also a large network of independent "agents" who market subscriptions using direct mail, face-to-face, and telemarketing sales methods. While these companies are generally called "agents" by the industry, these are not legally agents but rather are independent businesses that have no direct dealings with the publishers except for the submission of orders for approval and fulfillment.

In 1998, MPA revised its guidelines for publisher relations with subscription agents (the "Guidelines"). These Guidelines represent a significant revision from past practices, to deal more directly with subscription agents, and particularly telemarketing agents, to address concerns expressed by the Commission staff regarding the level of consumer complaints relating to magazine subscription telemarketing sales.

Under the MPA Guidelines, publishers enter into written agreements with agents retained to sell or "clear" their magazines. Small agents customarily process or "sell" their orders through another agent who has been specifically authorized by the publisher to sell orders. Publishers typically authorize only a limited

number of larger agents to directly remit orders, and those agents commonly also process orders received from subagents. Because there are many small agents, it is common for orders to be sold through several agents before reaching the publisher or its independent fulfillment house (which processes the orders and prepares subscriber lists and mailing lists). In the past, relationships between publishers, agents, and subagents had been informal, but Sections 1(a) and 2(a)(ii) of the Guidelines now provide for written contracts, which specify that the agents/subagents will abide by the Guidelines and all applicable laws. The Guidelines further establish a system of controls for the monitoring of compliance with its substantive requirements.

The Guidelines provide that agents agree that they will "prevent the use of false or deceptive selling methods to solicit magazine subscription orders," and that they will undertake to ensure that all solicitations conducted by them by direct mail, telemarketing, electronic solicitation or through their salespersons are carried out in accordance with all applicable laws and regulations, and that they will diligently monitor the activities of their salespersons. The Guidelines provide that agents will take reasonable steps to ensure that salespersons follow ten specific rules, which are intended to generally paraphrase the key provisions of the Rule. Thus, for example, agents are obliged to take reasonable measures to ensure that salespersons "promptly and truthfully disclose to consumers the name of the seller and the purpose of the contact," and "use sales scripts presentations and written materials that clearly and truthfully disclose all material terms of the subscription offer including the publications being offered or ordered, their frequency and duration, the cost (including any extra charges) to the consumer, the payment terms, and if required by law, the sellers' cancellation and refund policies." The Guidelines also provide basic rules for supervision of salespersons, including appropriate training, verification of sample orders, and routine monitoring of telemarketers.

The Guidelines are an attempt to establish a system for control of subagents. Because small subscription agents typically process orders through other agents, the identity of the agents who initially solicited each order is usually lost, and thus the publisher or authorized agent loses its ability to effectively monitor or police those agents. The Guidelines therefore provide that every agent, subagent, or sub-subagent be identified by name and federal E.I.N. or social security number, which must be submitted to the publisher, and the publisher has the right to direct that any agent be dropped from the list. The publisher's fulfillment house must pre-screen all orders and reject any order that bears a federal E.I.N. number that is not on the publisher's own list. Every publisher has the ability to approve or disapprove its own list of agents and the names of the agents that it excludes is deemed confidential. There is to be no industry "blacklist." This system allows a publisher, for the first time, to identify who is selling its magazines, and to influence each seller's sales practices through the publishers' newfound ability to remove agents from its "approved" list. It is MPA's belief that such a system creates an incentive for the agents to comply with the selling practice rules and gives the publishers some ability to enforce them. Mindful of the possibility of being dropped from a publisher's approved list, the Guidelines serve to encourage agents to investigate all complaints and terminate any salesperson or subagent who generates a pattern of valid consumer complaints. The end result of all of this has been a system that allows MPA members to know where new subscriptions are coming from. The Guidelines have added a level of accountability to the process that establishes a system where independent agents are unable to claim "It wasn't me" or "I didn't know." In the past several years we have received reports of independent agents who follow the Guidelines, using these procedures to track specific sub-agents who have strayed from the Rule and then terminating all relationship with those sub-agents. This is a clear example of the Rule providing a guideline for the industry and improving the overall experience for consumers and businesses alike.

Education

While the revised Guidelines were an important step in promoting compliance with the Rule, widespread dissemination of their requirements is necessary to obtain the maximum impact for our members. Thus, MPA has undertaken a series of educational programs in which we have provided seminars and other training sessions for the independent agents and others who sell our products over the telephone.

To supplement the Guidelines, MPA has, in conjunction with the staff of the Commission, helped to prepare a plain-language brochure, “Guidelines for Managers of Telemarketing Enterprises Who Sell Magazine Subscriptions” that outlines the key provisions of the Rule for businesses. This guide is now available to our members on the MPA Website, which is accessible to anyone who visits, not just our membership. Our Website is being increasingly used as an educational tool for all segments of the magazine supply chain.

MPA remains committed to educating our members and our suppliers regarding consumer protection issues. We look forward to working with the Commission and other government agencies to successfully educate the industry about effective self-regulation that balances consumer protection and market development needs.

IV. Government Regulation

In the Request for Comments, the Commission asked industry to describe any additional regulatory efforts undertaken by the states and to relate any problems that these additional regulatory efforts have created. As noted above, this is one of the most difficult issues now facing the industry. While the Rule has clearly had the right impact on the industry (sales have increased while complaints have decreased) the

proliferation of state legislative activity jeopardizes this benefit. Of particular concern for both consumers and telemarketers is the proliferation of state administered Do-Not-Call lists.

Do-Not-Call Regulation

Twice in the 1990s, in 1992 with the FCC's rules implementing the Telephone Consumer Protection Act and again in 1995, when the Commission was developing the Telemarketing Sales Rule, government bodies devoted considerable time to studying the do-not-call issue. On both occasions, the relevant governmental agency concluded that a company-by company approach made sense. The "company-specific" do-not-call regulations gives consumers the power to determine which calls they will accept and which ones they will reject. Unlike some state do-not-call statutes that require a consumer to make an all-or-nothing choice, Federal rules empower consumers to make their own informed decisions.

The efficacy of the Federal approach is borne out by the latest available public information, which suggests that in excess of \$500 billion dollars of business is done via telemarketing each year, including more than 25 million magazine subscriptions that are sold annually. It is clear that the public has a level of comfort with the current do-not-call mechanism that should be recognized. A national do-not-call database is not necessary.

Nor is it necessary to mandate that companies inform each consumer that they have the right to be placed on the company's do-not-call list. The fact that telemarketing companies have seen their internal do-not-call databases grow significantly over the past five years suggests that most consumers are very aware of their rights to be placed on a company's do-not-call list. In Chicago, in 1995, the Commission made a point of telling the industry that the Commission was not in the business of "script writing." The Commission was not going to tell companies precisely what they had to say to remain in compliance with

the Rule. That position is as valid today as it was in 1995. Again, evidence shows that the Rule is working, as is, and that additional rules and regulations are just not necessary.

Conclusion

We again thank the Commission for the opportunity to provide these comments on behalf of our membership. We remain committed to the highest ethical practices and are willing to work with the Commission in any way possible to further that goal among our industry. If you have any questions or concerns about these comments or any other aspects of the MPA, please feel free to contact us.

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