May 30, 2000

Office of the Secretary
Federal Trade Commission
Room 159
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
(Filed electronically in Word format at tsr@ftc.gov)

RE: Telemarketing Review – Comment. FTC File No. P994414

Dear Sirs:

The North American Securities Administrators Association (NASAA)[1] appreciates the opportunity to comment on the Telemarketing Sales Rule (TSR), which was mandated by Congress in the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 (Act).

NASAA has always been concerned with the sales practices of those entities that solicit products and investments through the vehicle of telemarketing. NASAA's primary mission is to protect the small investor who is most likely to be considered a prospective customer by the telemarketers.

In September 1997, prompted by abuses in this area, NASAA published a "Cold Calling Alert" in cooperation with the Securities and Exchange Commission that mirrored not only the Act's cold-calling rules but also highlighted the warning signs of telemarketing fraud. NASAA felt the need to communicate this information to the public based on our research that many securities related frauds such as "boiler rooms" sold micro-cap/penny stock investments using high pressure telemarketing techniques to peddle their wares to an unsuspecting public.

It is in this light, that NASAA comments on the TSR as an effective regulatory device to ensure that those who use the telephone as a sales tool do so within the confines of investor protection. We therefore kindly submit the following remarks:

[1] The oldest international organization devoted to investor protection, the North American Securities Administrators Association, Inc., was organized in 1919. Its membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico and Puerto Rico. NASAA is the voice of securities agencies responsible for grass-roots protection and efficient capital formation.

Abusive Acts or Practices

Restricting Hours of Solicitation
Section 310.4(c) prohibits telemarketers from calling consumers at any time except between the hours of 8 a.m. and 9 p.m. This restricts the time of day and night telemarketers may make unsolicited calls to consumers.

NASAA supports this provision which has also been adopted by the National Association of Securities Dealers (NASD) in their Telemarketing Conduct Rule 2211(a).

NASAA strongly believes that restrictions on the time telemarketers can call prospective customers at home unsolicited is at the heart of preventing and limiting abusive and high pressured sales practices. Changing or eliminating this provision would have disturbing consequences for the consumers. The absence of stated calling time parameters might create an environment whereby unscrupulous telemarketers would solicit customers at home at all hours of day and night and only relent when the customer agrees to a purchase. Therefore, NASAA continues to support this provision as a necessary prerequisite for consumer protection without placing an undue burden on the legitimate telemarketing industry.

Prohibition on High Pressure Solicitation
Section 310.4(b)(1)(i) prohibits telemarketers or sellers from causing the telephone to ring, or engaging a person in telephone conversation, repeatedly with intent to annoy, abuse, or harass. This provision prohibits the telemarketers from undertaking a pattern of unsolicited telephone calls that a reasonable consumer would consider coercive or abusive of such consumer's right to privacy.

NASAA strongly supports this provision which prevents the customer from becoming the victim of the fraudulent telemarketer and strikes at the heart of the manipulative techniques that are used to coerce and browbeat individuals into reluctantly purchasing products.

NASAA has advised investors of the "warning signs of trouble" associated with being called unsolicited by telemarketers. One such "warning sign" is the "three-call" technique that has been employed successfully by fraudulent sellers of securities. The technique is executed by calling the client three times; first by setting the stage for the investment, secondly by "whetting" their appetite by fraudulently overstating the quality of the investment and third by employing high pressure and harassing techniques to close the deal and sell the product or investment.

NASAA supports this provision of the TSR that not only prevents the systematic calling of a customer but also prohibits the use of obscene language or threats of bodily injury. This provision inhibits the ability of the fraudulent telemarketer to operate without burdening those who provide services, products or investments legitimately.

Disclosure Requirements

Section 310.4(d) requires telemarketers to promptly and clearly disclose in all sales calls to consumers that the purpose of the call is to sell goods and services, and to make other disclosures the Commission deems appropriate, including the nature and prices of the goods and services sold.

NASAA supports this provision which has also been adopted by the NASD in their Telemarketing Conduct Rule 2211(b). Under this rule, the telemarketer (who is also required to be NASD registered and qualified as a Registered Representative to solicit the sale of securities) is required to (1) identify themselves and their member firm; (2) the telephone number or address at which the caller may be contacted; and (3) that the purpose of the call is to solicit the purchase of securities or related services.

NASAA believes that full disclosure by the telemarketer of the products and services being presented is an important factor in combating and stemming the tide against fraud. NASAA has advised investors that another potential "warning sign of trouble" is the "bait and switch" technique used by the telephone fraudster. The lack of substantial and material disclosure promotes the growth of this fraudulent practice where, for example, dishonest stockbrokers lure new customers by encouraging them to purchase well known, widely traded "blue chip" stocks. After the customer takes the "bait," the broker pressures him or her to invest in small, unknown companies with little or no earnings. These stocks tend to be very risky and thinly traded, leaving the investor with losses rather than profits.

NASAA suggests that this provision could be strengthened by adopting the language found in NASD Telemarketing Conduct Rule 2211(b)(2) which requires the caller (telemarketer) to disclose the telephone number or address at which the caller (telemarketer) may be contacted. If this language were added to section 310.4(d)(1), it would expand the definition of the "identity of the seller" and not only provide the customer with important information regarding the background of the telemarketer but also may provide an avenue for redress if the customer becomes aggrieved. That is, the aggrieved customer might find relief by contacting the firm that employs the telemarketer in lieu of contacting regulatory agencies first. Providing this additional disclosure information would not be an undue burden for the legitimate telemarketing firms.

Do-Not-Call Requirements

Section 310.4(b)(2) limits the liability of the seller or telemarketer for violating the "do-not-call" provisions in the Rule as long as the seller or telemarketer has instituted certain procedures designed to prevent calls to consumers who have asked not to be called.

NASAA supports the provision and believes that limiting liability does promote good public policy in the telemarketing industry. By rewarding those firms that have been proactive in establishing and implementing written procedures, training personnel, and keeping and maintaining "do-not-call" lists in accordance with the spirit of the TSR, this provision promulgates the "best practices" for the telemarketing industry. There should be no strict liability standard imposed where a telemarketer has made a good faith effort to comply with the TSR. NASAA recognizes that occasional mistakes can occur in an environment where a telemarketer is required to comply with requirements of federal, state and possibly Self-Regulatory Organizations (SROs') like the NASD.

The NASD under its Conduct Rule 3110(g) imposes upon its members the requirement to make and maintain a centralized "do-not-call" list of persons who do not wish to receive telephone solicitations. Violations of this rule are sanctionable under NASD Conduct Rule 2110 that sets forth standards of commercial honor and principles of trade. Monetary fines between $2,500 and $20,000 and suspension from the industry for up to three months are stated for telemarketing violations.[2]

These sanction guidelines should be noted since NASAA strongly supports aggressive punitive measures against those persons who willfully violate the telemarketing rules. NASAA firmly believes that civil and criminal penalties including injunctive relief and incarceration should be available to prosecutors to use against those who willfully and intentionally violate the telemarketing rules.

Government Regulation

NASAA's & State Educational Initiatives

NASAA has always recognized that in the struggle against telemarketing fraud both educational and enforcement initiatives can serve as weapons. One of NASAA's stated missions is to promote investor educational initiatives through the publishing and distribution of free materials on a wide range of topics including telemarketing fraud.

For example, state securities regulators have identified "Today's Top Ten Investment Frauds,"[3] which includes telemarketing fraud. NASAA recognizes that "boiler rooms" or high-pressure telephone sales operations conduct business across the country, some selling illegal and fraudulent investment products. NASAA advises investors to say no to high-pressure "cold callers" by just hanging up. In addition, NASAA has made available an investor's notepad; "When Your Broker Calls, Take Notes!"[4] which is a tool for investors to document their conversations and transactions with their broker. The notepad also exhorts the investor that "if you don't know the broker, feel free to hang up!"

As previously mentioned, NASAA has also published jointly with the Securities and Exchange Commission, a "Cold Calling Alert" [5] which not only sets forth the rules that cold callers must follow but also illustrates the warning "signs of trouble" investors should watch for when being called at home unsolicited.

[2] NASD Sanction Guidelines, National Association of Securities Dealers Regulation, Inc., p. 84 (1998).
[3] NASAA's "Today's Top Ten Investment Frauds" is available at: www.nasaa.org/investoredu/topten.html.
[4] This investor's notepad is available at: www.nasaa.org/whoweare/media/Notepad.html.
[5] The "Cold Calling Alert" is available at: www.nasaa.org/investoredu/coldcalling.html.

NASAA and our members will continue educational initiatives in the area of telemarketing fraud in an effort to protect investors from those who chose to use the telephone as their means to commit investment fraud.

NASAA's & State Enforcement Initiatives

Educational initiatives have complemented the more traditional enforcement actions NASAA and the states have taken in the telemarketing area to protect investors.

On July 2, 1997, securities agencies from twenty-one states, two Canadian provinces and the Federal Trade Commission executed 61 law-enforcement actions as part of "Project Field of Schemes." This joint enforcement sweep was six months in the making and was designed to cut down the expanding field of investment fraud that is outpacing the combined amount defrauded from consumers in all other kinds of telemarketing scams.

This project is a model for further joint cooperative enforcement efforts between the states and their federal law enforcement and regulatory counterparts. Every day, investigators from securities departments in the states and provinces of North America are on the front lines of the battle to protect and inform the small investor.

Conclusion

NASAA appreciates the opportunity, presently, as well as in the future, to provide guidance and comments in this area of great investor protection concern and importance. If I can be of further assistance, please contact me directly at (317) 232-6695 or Myles Edwards at 202-737-0900. Thank you.

Sincerely,

Bradley W. Skolnik
NASAA President
Indiana Securities Commissioner