Federal Register

Friday,
August 29, 2008

Part V

Federal Trade Commission

16 CFR Part 310

Telemarketing Sales Rule (“TSR”); Final Rule Amendments

FEDERAL TRADE COMMISSION

16 CFR Part 310

RIN: 3084–AA98

Telemarketing Sales Rule (''TSR'')

AGENCY: Federal Trade Commission
ACTION: Final Rule Amendments

SUMMARY: The Commission adopts two final amendments to the TSR. The first is an amendment making explicit a prohibition in the TSR on telemarketing calls that deliver prerecorded messages without a consumer's express written agreement to receive such calls. This amendment also requires that all prerecorded telemarketing calls provide specified opt-out mechanisms so that consumers can opt out of future calls. The amendment is necessary because the reasonable consumer would consider prerecorded telemarketing messages to be coercive or abusive of such consumer's right to privacy.

The second amendment modifies the method for measuring the maximum call abandonment rate prescribed by the TSR's call abandonment safe harbor. The new method will permit sellers and telemarketers to calculate call abandonment rates for a live calling campaign over a thirty-day period, or any part thereof. This amendment is necessary because the current ''per day'' standard effectively precludes the use of predictive dialers with small calling lists.

DATES: The amendments are effective October 1, 2008. Compliance with 16 CFR 310.4(b)(4)(i) is required beginning October 1, 2008. Compliance with 16 CFR 310.4(b)(1)(v) is required beginning December 1, 2008, except that compliance with 16 CFR 310.4(b)(1)(v)(A) is not required until September 1, 2009.

ADDRESSES: Requests for copies of these amendments to the TSR and this Statement of Basis and Purpose (''SBP'') should be sent to: Public Reference Branch, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580. The complete record of this proceeding is also available at that address. Relevant portions of the proceeding, including the final amendments to the TSR and SBP, are available at *www.ftc.gov.*

FOR FURTHER INFORMATION CONTACT: Craig Tregillus, (202) 326–2970, Division of Marketing Practices, Room 286, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION:

I. Overview and Background

A. Overview

This document states the basis and purpose for the Commission's decision to adopt two proposed amendments to the TSR[1] that were published for public comment on October 4, 2006.[2] After careful review and consideration of the entire record of more than 14,000 comments amassed on the issues presented in this rulemaking proceeding, the Commission has decided to adopt, with several modifications suggested by the public comments, an amendment making explicit a prohibition on prerecorded telemarketing calls without a consumer's express written agreement to receive such calls. The prerecorded call amendment will take effect in two stages. The requirement that prerecorded calls provide an automated interactive keypress or voice-activated opt-out mechanism will take effect on December 1, 2008, but the prohibition on placing calls that deliver prerecorded messages without the prior express written agreement of the recipient to receive such calls will not take effect until September 1, 2009.

In adopting the amendment explicitly prohibiting prerecorded calls delivered to consumers who have not agreed to receive them, the Commission has modified the proposed amendment in several respects as suggested by the public comments. The most significant revisions will: (1) Require sellers and telemarketers to provide a keypress or voice-activated opt-out mechanism promptly at the outset of any prerecorded message call that could be answered by a consumer as of December 1, 2008; (2) Make the amendment applicable to prerecorded messages left on answering machines and voicemail services, requiring that any prerecorded message call that could be answered by such a device promptly disclose at the outset a toll-free number that a consumer may use to assert a request not to receive such calls; and (3) Permit sellers to obtain the consumer's signed, written agreement to receive calls delivering prerecorded messages in any manner permitted by the Electronic Signatures In Global and National Commerce Act (''E–SIGN Act'' or ''E–SIGN'').[3]

Beginning on December 1, 2008, sellers and telemarketers will be required to comply with the new requirement to include an automated interactive opt-out mechanism pursuant to Section 310.4(b)(1)(v)(B). This requirement applies to calls delivering prerecorded messages, whether answered by the recipient in person, or answered by an answering machine or voicemail service.

In addition, as of December 1, 2008, the Commission will terminate its previously announced policy of forbearing from bringing enforcement actions against sellers and telemarketers who, in accordance with a safe harbor that was proposed in November 2004, make calls that deliver prerecorded messages to consumers with whom the seller has an established business relationship (''EBR''). Nevertheless, the Commission has determined that sellers and telemarketers may continue to place calls that deliver prerecorded messages to consumers with whom they have an EBR, provided they do so in compliance with the new requirement in § 310.4(b)(1)(v)(B), that prerecorded message calls include an automated interactive keypress or voice-activated opt-out mechanism. As of September 1, 2009, calls that deliver prerecorded messages will no longer be permitted to be placed based solely on the existence of an EBR, and calls that deliver prerecorded messages will be permitted to be placed only to consumers who have given their prior express written agreement to receive such calls.

The Commission also has decided to adopt two exemptions from the requirements of the prerecorded call amendment that commenters strongly advocated. First, all healthcare-related calls subject to the Health Insurance Portability and Accountability Act of 1996 (''HIPAA'')[4] will be exempt from all of the requirements of the amendment. Second, charitable fundraising calls made by for-profit telemarketers to members of, or previous donors to, a non-profit charitable organization on whose behalf the calls are placed will be exempt from the requirement to obtain prior consent, but will be required to provide an automated keypress or voice-activated opt-out mechanism and prohibited from calling consumers who use the mechanism to opt out.

In addition, the Commission is adopting, without modification, an amendment proposed in response to a petition from the Direct Marketing Association (''DMA'') to change the method for measuring the maximum call abandonment rate prescribed by the TSR's call abandonment safe harbor. The new method will permit sellers and

[1] 16 CFR 310.

[2] 71 FR 58716 (Oct. 4, 2006).

[3] Pub. L. No. 106–229, 114 Stat. 464 (2000) (*codified at* 15 USC 7001 *et seq.*).

[4] Pub. L. No. 104–191, 110 Stat. 1936 (1996) (*codified, as amended,* at 42 USC 1320 *et seq.*).

telemarketers to calculate call abandonment rates for a calling campaign over a thirty-day period, or any part thereof. This amendment will take effect on October 1, 2008.

B. Background

The issues under consideration in this proceeding arise under the ''call abandonment'' provisions of the TSR. These issues were first presented by two industry petitions. The first was a request from Voice-Mail Broadcasting Corporation (''VMBC'')[5] for modification of the amended TSR's ''call abandonment'' provisions to allow telemarketing calls that deliver prerecorded messages to consumers with whom the seller has an EBR if they allow consumers to opt out and meet certain other requirements.[6] The second, also involving the TSR's call abandonment provisions, was a petition from the DMA for modification of the method for calculating the maximum call abandonment rate permitted under the TSR.

On November 17, 2004, the Commission published a Notice of Proposed Rulemaking (''NPRM'') to amend the TSR to create the safe harbor requested by VMBC, and sought public comment on that proposal and the DMA petition.[7] The notice also announced that the Commission would forebear from bringing enforcement actions against sellers and telemarketers using EBR-based prerecorded telemarketing messages that comply with the proposed safe harbor during the pendency of the rulemaking proceeding.

Section 310.4(b)(1)(iv) of the TSR prohibits telemarketers from abandoning calls. An outbound telemarketing call is ''abandoned'' if the telemarketer does not connect the call to a sales representative within two seconds of the completed greeting of the person who answers. Call abandonment is an unavoidable consequence of the use of ''predictive dialers''—telemarketing equipment that increases the productivity of telemarketers by placing multiple calls for each available sales representative. Predictive dialers maximize the amount of time representatives spend speaking with consumers and minimize the time they spend waiting to speak with a prospective customer. An inevitable side effect of this functionality, however, is that the dialer will sometimes reach more consumers than can be connected to available sales representatives. In these situations, the dialer either disconnects the call (resulting in a ''hang-up'' call) or keeps the consumer connected with no one on the other end of the line in case a sales representative becomes available (resulting in ''dead air''). The call abandonment prohibition, added to the TSR pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act (''Telemarketing Act''),[8] is designed to remedy these abusive practices.[9]

Notwithstanding the prohibition on call abandonment, § 310.4(b)(4) of the TSR contains a safe harbor designed to preserve telemarketers' ability to use predictive dialers, subject to four conditions. The safe harbor is available if the telemarketer or seller: (1) Abandons no more than three percent of all calls answered by a person (as opposed to an answering machine); (2) Allows the telephone to ring for fifteen seconds or four rings; (3) Plays a prerecorded message stating the name and telephone number of the seller on whose behalf the call was placed whenever a sales representative is unavailable within two seconds of the completed greeting of the person answering the call; and (4) Maintains records documenting compliance.[10] Because consumers who receive a prerecorded message would never be connected to a sales representative, a telemarketing campaign that consists solely of prerecorded messages would violate § 310.4(b)(1)(iv) and would not meet the safe harbor requirements in § 310.4(b)(4).

In a **Federal Register** notice published on October 4, 2006, the Commission reviewed and analyzed the nearly 13,600 comments submitted in response to the NPRM. Based on that review, the Commission: (1) Denied the VMBC request for creation of a safe harbor for prerecorded telemarketing calls; (2) Proposed an amendment to the TSR to make explicit the prohibition on prerecorded telemarketing calls that is implicit in the TSR's call abandonment provisions; and (3) Proposed an additional amendment modifying the method for measuring the maximum allowable call abandonment rate prescribed by the TSR's call abandonment safe harbor. The notice set forth the text of the proposed amendments and posed a series of questions on which the Commission sought public comment during a 30-day comment period, which the Commission subsequently extended an additional 40 days in response to a DMA petition seeking additional time, until December 18, 2006.[11] More than 600 additional comments were submitted during the comment period.[12]

In view of the denial of the proposed amendment to create a safe harbor for EBR-based prerecorded telemarketing calls, the notice also announced that the Commission would terminate its policy of forbearing from bringing enforcement actions against sellers and telemarketers using prerecorded telemarketing calls (''forbearance policy'') effective January 2, 2007. In response to four petitions seeking an extension of the forbearance policy, however, the Commission announced in a **Federal Register** notice published on December 27, 2006, that in order to preserve the *status quo*, it would extend its forbearance policy at least until the conclusion of the rulemaking proceeding.[13]

II. The Proposed Amendment Regarding Calls That Deliver a Prerecorded Message

The Commission has decided to adopt the proposed amendment with modifications suggested by commenters. As proposed, the final amendment will permit prerecorded message calls by or on behalf of a seller only to a consumer who has signed an express written agreement authorizing the seller to place such calls to his or her designated telephone number. However, the amendments will permit a seller to obtain agreements from consumers by any electronic means authorized by the E–SIGN Act. Moreover, the amendment will apply not only to calls answered by a person as proposed, but also to prerecorded messages left on an answering machine or voicemail system.

[5] Starz Encore Group, The Spoken Hub, Copilevitz & Canter, and SoundBite Communications also submitted similar requests for a prerecorded call safe harbor.

[6] *See* note 49, *infra.*

[7] 69 FR 67287 (Nov. 17, 2004).

[8] 15 USC 6101 *et seq.* This and other amendments to the original TSR resulting from a rule review mandated by the Telemarketing Act, 15 USC 6108, took effect on March 31, 2003. TSR Statement of Basis and Purpose (''TSR SBP''), 68 FR 4580 (Jan. 29, 2003).

[9] TSR SBP, 68 FR at 4641—45. The Telemarketing Act directed the Commission to prescribe rules prohibiting deceptive and abusive telemarketing acts or practices, including ''a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy.'' 15 USC 6102(a)(3)(A).

[10] 16 CFR 310.4(b)(4)(i)—(iv).

[11] 71 FR 65762 (Nov. 9, 2006).

[12] The list of comments, including links to each comment submitted, is available at: (*http://www.ftc.gov/os/comments/tsrrevisedcallabandon/index.htm.*) Although the list indicates that 630 additional comments were submitted, a few are duplicate submissions. *E.g.*, Chodelski, No. 196 and Chodelle, No. 197; Call Command, Inc., Nos. 608, 610; PolyMedica Corp., Nos. 604, 609.

[13] 71 FR 77634 (Dec. 27, 2006). Two of the petitions came from healthcare-related businesses that use prerecorded calls as permitted by regulations issued by the Department of Health and Human Services (''HHS'') pursuant to HIPAA.

The final amendment will require that any permitted call delivering a prerecorded message must: (1) Allow the consumer's telephone to ring for at least 15 seconds or 4 rings before an unanswered call is disconnected; (2) Begin the prerecorded message within 2 seconds of the completed greeting of the person called; (3) Disclose promptly at the outset of the call the means by which the person called may assert a Do Not Call request at any time during the message; (4) If the call could be answered in person, promptly make an automated interactive voice and/or keypress-activated opt-out mechanism available at all times during the message that automatically adds the telephone number called to the seller's entity-specific Do Not Call list and that thereafter immediately terminates the call; (5) If the call could be answered by an answering machine or voicemail service, promptly provide a toll-free telephone number that also allows the person called to connect directly to an automated voice and/or keypress-activated opt-out mechanism that is accessible at any time after receipt of the message; and (6) Comply with all other requirements of the TSR and applicable federal and state laws.

In order to reduce initial compliance costs and burdens, the Commission will defer the effective date of the requirement that prerecorded calls provide an automated interactive opt-out mechanism for three months, and the express written agreement requirement for twelve months, to ensure that the industry will have adequate time to prepare to comply. This will permit sellers and telemarketers to continue placing prerecorded calls to consumers with whom the seller has an EBR until the written agreement requirement takes effect.

In addition, healthcare-related calls subject to HIPAA will be exempt from the amendment, and calls placed by for-profit telemarketers on behalf of non-profit entities will be exempt from the written agreement requirement of the amendment but subject to the opt-out requirements.

The Commission's decision to adopt the proposed amendment is based on a careful review, consideration, and analysis of the entire record,[14] including the alternatives proposed by the public comments and the supporting evidence submitted, as well as the Commission's law enforcement experience.[15]

A. Comments Supporting the Proposed Amendment

More than 13,000 consumer comments previously submitted in this proceeding opposed the creation of a safe harbor for prerecorded telemarketing calls.[16] In response to the current proposal to prohibit such calls except those where a consumer has given his or her express written agreement to receive such calls, the Commission received comments from 9 consumer organizations, a state attorney general, and some 220 consumers endorsing the proposed amendment.[17] Four clear themes emerge from these comments: (1) Sellers' self interest in retaining established customers is not enough to prevent abuse through excessive pre-recorded message telemarketing; (2) Prerecorded message calls are coercive and abusive invasions of consumer privacy; (3) Prerecorded messages impose costs and burdens on consumers; and (4) Opt-out approaches may not adequately protect consumers.

1. Companies' Reputational Interest Alone Does Not Prevent Abuses From Excessive Prerecorded Message Telemarketing

Citing their personal experience, a number of the consumers who support the proposed amendment place little faith in industry assurances ''that they will self regulate and not abuse their customers.''[18] One commenter reports receiving ''one particular pre-recorded satellite TV message EVERY day, and usually several,'' from a well-established provider.[19] A second reports receiving prerecorded calls ''every 10 days or so . . . for many months'' from a major credit card service business.[20] A third is ''deluged with pre-recorded calls, urging me to subscribe to cable, satellite, mortgage terms, credit card offers and other services.''[21]

In light of this type of experience on the part of individual consumers, consumer advocates do ''not accept the argument that companies will not abuse the EBRs that they have with consumers,'' contending that there is ''no guarantee of self-restraint and every

[14] The record includes not only the comments submitted in response to the Commission's request for public comment issued on October 4, 2006, 71 FR at 58716, 58732–33, but also the comments submitted in response to the Commission's prior proposal to create a safe harbor for prerecorded calls, which raised essentially the same issues. 69 FR 67287 (Nov. 17, 2004).

[15] *E.g., FTC v. Voice-Mail Broad. Corp.*, No. 2:08-cv-00521 (C.D. Cal. Feb. 8, 2008) ($3 million civil penalty, with all but $180,000 suspended due to inability to pay, for abandoning over 46 million calls, 11 million of which were directed to numbers on the Do Not Call Registry, and providing no opt-out option to consumers who answered); *United States v. Star Satellite, Inc.*, No. 2:08–00797 (D. Nev. June 19, 2008) ($4 million civil penalty, with all but $75,000 suspended due to inability to pay, for 80 million abandoned calls from prerecorded message blasting); *United States v. Guardian Commc'n., Inc.*, No. 4:07–04070 (C.D. Ill. Nov. 15, 2007) ($7.8 million civil penalty, with all but $150,000 suspended due to inability to pay, for automated prerecorded message blasting to up to 20 million numbers a day, many of which were placed to numbers on the Registry without an EBR, for abandoning calls answered by a person, and for failure to transmit Caller ID information); *United States v. Craftmatic Indus., Inc.*, No. 07–4652 (E.D. Pa. Nov. 8, 2007) ($4.4 million civil penalty for hundreds of thousands of calls to numbers on the Registry, for abandoning millions of calls by failing to connect to a live operator, and for repeat calls to consumers who asked to be placed on the entity-specific Do Not Call list); *United States v. Broad. Team, Inc.*, No. 6:05–1920 (M.D. Fla. Feb. 2, 2007) ($2.8 million civil penalty, with $1.8 million suspended due to inability to pay, for over 64 million abandoned calls, and 1 million calls to numbers on the Registry); *United States v. Global Mort. Funding, Inc.*, No. 07–1275 (C.D. Cal. filed Oct. 30, 2007) (complaint alleging hundreds of thousands of calls to numbers on the Registry without an EBR, failing to transmit required Caller ID information, and abandoning calls by failing to connect to a sales agent); *United States v. FMFG, Inc.*, No. 3:05–00711 (D. Nev. May 23, 2007) ($900,000 civil penalty for abandoned calls and calls to numbers on the Registry); *United States v. Conversion Mktn'g., Inc.*, No. 8:06–00256 (C.D. Cal. Mar. 10, 2006) ($580,000 civil penalty for abandoned calls and calls to numbers on the Registry); *United States v. DIRECTV, Inc.*, No. 05–1211 (C.D. Cal. Dec. 14, 2005) ($5.3 million civil penalty for abandoned calls and calls to numbers on the Registry); *United States v. Braglia Mktg. Group*, No. 04–1209 (D. Nev. Mar. 1, 2005)/*United States v. Flagship Resort Dev. Corp.*, No. 1:2005–981 (D.N.J. Feb. 22, 2005) ($1.26 million civil penalty for calls to hundreds of thousands of consumers without an EBR, and abandoned calls). *See also* 71 FR at 58724 n.90.

[16] These comments can be found at (*http://www.ftc.gov/os/comments/tsrcallabandon.*) *See* 71 FR at 58718 n.23.

[17] Attorney General of the State of Connecticut (''CTAG''), No. 585, at 2; Privacy Rights Clearinghouse (''PRC''), No. 552, at 3; AARP, No. 593, at 3; National Consumers League (''NCL''), No. 529, at 1. NCL states that its comment is filed on its own behalf and on that of the following consumer advocacy groups: Consumer Action, Consumer Federal of America, the Electronic Privacy Information Center, Junkbusters, Private Citizen, Inc., and the Privacy Rights Clearinghouse. NCL at 1. An additional 101 consumer comments appear to support the proposed amendment, but do not specifically refer to ''prerecorded'' calls.

[18] Barker, No. 633, at 2; *see* Lardner no. 168 (''I am on both the national and state Do Not Call lists and STILL get these obnoxious robo calls all the time.''); Gradwohl, No. 227 (''The pre-recorded, computer generated methods being used by telemarketers presently, has had the effect of making the [Do Not Call] list meaningless'').

[19] Perrone, No. 555 (emphasis in original).

[20] Corgard, No. 596.

[21] Williams, No. 376; *cf.* Miller, No. 528 (''We are elderly, handicapped, solvent and rational. We don't need storm windows, [satellite TV], refinancing, lower interest rates, 'free' trips to golf resorts—or hangup calls invading our privacy 24–7''). *See also*, Wall, No. 377 (receives the same prerecorded message from a large loan company that ''repeats, repeats and repeats, month after month . . . that states I am approved for a loan that I don't want and have never sought''); Matthews, No. 152 (''regularly'' receives a call asking for a renewal of a major newspaper he ordered for one month two years ago); Davies, No. 242 (gets ''3–4 calls per week'' from a Visa card issuer that has submitted a comment in this proceeding).

reason to believe that the economic incentives for using prerecorded sales calls will lead to an increase from the current level of sales calls'' because ''[n]ew entrants in the marketplace will be motivated to use this technology to reach as many consumers as possible and established companies will use it to try to retain their market share.''[22] They point out that the savings in labor costs that can be realized by substituting prerecorded calls for sales agent calls are not simply theoretical. They argue that the potential for these real savings suggests prerecorded calls likely will increase if they are permitted. As NCL put it, ''if [prerecorded message telemarketing] wasn't so attractive, the telemarketing industry would not be pressing so vigorously for its use to be sanctioned.''[23] Another advocate concludes that ''[c]onsumer comments, when combined with the Commission's record of enforcement actions, confirm that the telemarketing industry is not one that can effectively police itself.''[24] Two consumer groups therefore urge the Commission to go further than the proposed amendment does and completely ban all prerecorded calls.[25]

2. Prerecorded Calls Are Coercive and Abusive Privacy Invasions

Consumers are adamant that prerecorded calls are abusive of their privacy. A typical expression of this view is that, ''I consider myself to be a 'reasonable' consumer and I do consider prerecorded telemarketing sales calls abusive to my privacy rights.''[26] A number of comments object that prerecorded calls are uninvited and unwanted abusive invasions into the private sanctuary of consumers' homes.[27]

Other consumers find prerecorded calls not only abusive, but coercive,[28] and therefore support the proposed amendment.[29] Several consider prerecorded calls as manipulative attempts to trick them into making a purchase.[30] Others express concern that prerecorded calls confuse and mislead vulnerable populations such as the elderly and young children.[31] Consumer groups warn that there is a ''potential for large numbers of consumers to be victimized'' by coercive marketing pitches ''given the trend toward negative-option marketing and the use of preacquired account numbers,'' because prerecorded calls ''are by their very nature one-sided conversations,'' and ''if there is no opportunity for consumers to ask questions,'' offers ''may not be sufficiently clear for consumers to make informed choices'' before pressing a button or saying ''yes'' to make a purchase.[32]

Consumer groups assert that consumers find EBR-based prerecorded messages ''coercive or abusive'' of their privacy because ''[f]or years and at every opportunity, consumers have weighed in against all manner of unwanted telemarketing calls, whether from 'live' callers, prerecorded messages or [abandoned call] hang-ups.''[33] They emphasize that the record contains overwhelming evidence of consumer aversion to prerecorded message calls, citing the more than 13,000 consumer comments previously received,[34] and the number of telephones listed in the National Do Not Call Registry (now more than 150 million) as evidence of continuing public outrage over unwanted calls and consumers' desire to preserve their privacy.[35]

Two of the consumer group comments also stress that the value to consumers of prerecorded sales calls is ''minimal'' or ''negligible'' compared to the harm such calls inflict on their privacy.[36] While acknowledging that some consumers ''might find it easier to hang up on recorded sales calls than live ones,'' NCL points out that ''they would still have to answer when their phones ring, and it is likely that they would be running to answer their phones much more frequently.''[37]

3. Prerecorded Messages Impose Costs and Burdens on Consumers

Comments that support the proposed amendment cite both direct and indirect costs consumers incur from the receipt of prerecorded messages—wholly apart from their loss of privacy and consumers' subsidization of such calls through payments for their telephone service. NCL notes that with ''the ubiquitous use of cell phones'' the cost to consumers of listening to unwanted prerecorded sales messages on their cell phones ''would put consumers at an economic disadvantage'' when they access their voicemail or answering machines remotely or forward landline

[22] NCL at 5–6.

[23] NCL at 2; *cf.* AARP at 4 (asserting that ''permitting prerecorded calls with prior written consent will increase the volume of telemarketing calls'').

[24] PRC at 2.

[25] *Id.* at 3; AARP at 4–5.

[26] Wong, No. 236; *see also, e.g.*, Donohue, No. 30; Calderon, No. 301; Cook, No. 320; Steans, No. 351; Whitley, No. 262; Pearson, No. 442.

[27] *E.g.*, Brick, No. 309 (''This reasonable consumer considers that *all* unsolicited calls are abusive of my right of privacy''); Macdonald, No. 232 (''Please. Stop the home invasions''); Benson, No. 516; Donohue, No. 300; Mathes, No. 449; Seabrook, No. 74; Smith, No. 174; Young, No. 330; Wibbens, No. 157; Weintraub, No. 202; Will, No. 318 (''[W]e are left with a feeling like the aftermath of rape, that we had no choice when a stranger accosted us in [our] sanctuary''). Some consumers regard prerecorded calls as a repeated harassment that is abusive. *E.g.*, Steans, No. 351; Cook, No. 320; Whitley, No. 262; Shaw, No. 399; Wall, No. 377. Several comments say that such calls are abusive because they create an inconvenient or disruptive disturbance of the peace and quiet at home. *E.g.*, Lillie, No. 269; Lilly, No. 522; Thomas, No. 386; Walsh, No. 369. Others view prerecorded calls as abusive because they are a ''waste of time,'' *e.g.*, Williams, No. 376; Sanders, No. 385; Casabona, No. 559; Weintraub, No. 202; or a nuisance. *E.g.*, Linam, No. 298; Lilly, No. 522;Wall, No. 377; *cf.* Perrone, No. 555 (''Deliver me from pre-recorded marketers'').

[28] Hui, No. 119, at 1; Abramson, No. 122 at 1.

[29] *E.g.*, Stump, No. 200. (''[T]he FTC should outlaw all prerecorded messages unless I give my written consent for such calls''); Blanchard, No. 83; Chodelski, No. 196; Haagen, No. 64; Jaujoks, No. 398; Martin, No. 25; Seabrook, No. 74.

[30] *E.g.*, Smith, No. 174 (''My experience is these [prerecorded] calls are often attempts to fool me with some type of SCAM!''); *see* Weintraub, No. 202 (prerecorded messages contain ''manipulative tacky advertising''); Mathes, No. 449 (prerecorded calls ''try to coerce me into buying something'').

[31] *E.g.*, Young, No. 330 (asserting that ''these [prerecorded] calls are especially confusing and often misleading and abusive for vulnerable populations such as the frail elderly''); Seabrook, No. 74 (concerned ''about the possibility of minor children taking telephone calls from marketing bots and being unable to assess that the call is an unsolicited attempt at marketing''); Wall, No. 377 (worried that repeated calls he receives stating he has been approved for a loan could be accepted by a child by ''simply pressing a certain number on the dial'').

[32] NCL at 4–5. NCL observes that while ''prerecorded calls today generally require the consumer to call back and speak to a live salesperson to make a transaction,'' there is nothing to prevent the use of fully automated prerecorded calls ''in the not-too-distant future.'' *See also*, Wibbens, No. 157 (''Allowing pre-recorded telemarketing calls that require the consumer to follow certain prompts in order to indicate the 'Do Not Call' status may increase the frequency of people being victimized by marketing schemes'').

[33] PRC at 2; *see* NCL at 2; AARP at 4.

[34] PRC at 2; NCL at 2.

[35] PRC at 2; NCL at 1; AARP at 2. AARP notes that 62 percent of the respondents in a 2005 survey it conducted of consumers with telephone numbers listed on the Registry said they received more telemarketing calls than they would like, whereas only 2 percent received fewer than they would like. AARP at 3, 4. AARP also reports that when asked to respond to the question, ''[o]verall, which phrase best describes telemarketing,'' a total of ''84 percent [of the respondents] said it was either '''irritating' (62%) or 'invades my privacy' (32%)'' whereas ''less than 1% of the respondents (0.4%) responded that telemarketing 'is a great way to hear about new products and services.''' AARP at 5–6.

[36] NCL at 5; AARP at 5. Neither of the other two consumer advocates suggests that prerecorded calls provide more than a minimal consumer benefit. CTAG at 2; NCL at 5.

[37] NCL at 5 (adding that ''the surge of prerecorded political messages that many of us endured during the recent election cycle is only a preview of the deluge that is likely to be unleashed if prerecorded sales calls are allowed''). Although political calls are not placed for the purpose of inducing purchases of goods or services, and therefore are not ''telemarketing'' within the meaning of the TSR, 16 CFR 310.2(cc), or the Telemarketing Act, 15 USC 6106(4), some 30 consumer comments complained about prerecorded political calls received during the 2006 election. *E.g.*, Baldwin, No. 434; Hetsko, No. 326; Pless, No. 139.

calls to their cell phones.[38] One consumer says that she often forwards calls when away from home to her cellular telephone, and ends up ''paying airtime for unwanted calls'' when she receives a prerecorded message.[39] Another notes that while traveling on business, he depends on his home message machine to record important calls, but that ''[o]n any given trip, 10% of the space is taken up by those useless [prerecorded] calls.''[40]

A number of consumers object to prerecorded and other telemarketing calls taking a ''free ride'' on the telephone service they pay for, and interfering with its intended use. They contend that they pay for a telephone to provide a ''communication device for my family, friends and work,''[41] and object to the hijacking of their telephone service to transmit unsolicited advertisements, particularly when they receive no compensation in return.[42] Several comments also suggest that prerecorded calls may be frustrating the original purpose of telephone service, and diminishing its value to consumers.[43]

Finally, several comments cite potential indirect safety costs. A police detective asserts that the fact that prerecorded calls do not disconnect ''creates a serious problem should you need immediate access to your phone for a 9–1–1 call.''[44] Similarly, a consumer reports that after he hangs up on a prerecorded message from a company that calls at least once a month, ''the recording sometimes continues, and occasionally calls me right back to finish the message.''[45]

4. Opt-out Approaches May Not Adequately Protect Consumers

In anticipation of industry arguments that prerecorded calls with automated keypress opt-out mechanisms should be allowed, AARP, NCL, and individual consumers highlight the problems of opting out from prerecorded sales calls. AARP emphasizes that under the proposed amendment, seniors and others will be harmed if they ''initially determine [prerecorded sales] calls would be of interest'' and agree to receive them, because ''if a consumer subsequently decides to change their 'opt-in' with the seller it will be confusing, and possibly difficult . . . [to retract it] without a live person to speak with.''[46] AARP also notes that it will be more difficult for consumers to ''just hang up'' when they receive prerecorded sales calls, because they first will need to determine whether the call is one they have agreed to receive.[47]

NCL argues that interactive opt-out technologies provide no guarantee that consumers will be able to halt repeated prerecorded calls that are abusive. NCL emphasizes that ''if the opt-out is automatic,'' consumers will be unable to ''ask questions about why they have received the call'' or to obtain information ''that would help them determine whether the call may have violated their rights'' so that they can report the violation for law enforcement action.[48]

Several comments from individual consumers assert that the opt-out options in the prerecorded messages they have experienced are burdensome and ineffective.[49] Consumers report problems with both live and automated opt-out mechanisms.[50] Some cite individual company policies that have prevented them from adding their number to a Do Not Call list, or that they find objectionable.[51] One comment observes that the ''deluge'' of prerecorded calls renders interactive opt-out options ineffective because it makes ''consumers impatient, and they hang up before they can hear how to get on the 'do not call' list, even if instructions on how to do so are left at the beginning of the message.''[52]

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[38] NCL at 4. Although FCC regulations promulgated under the TCPA prohibit both live and prerecorded calls made to cell phones, pagers, and fax machines, where the called party will be charged for the call, 47 CFR 64.1200(a)(1)(iii), (a)(3), NCL limits its argument to situations where consumers incur costs from forwarding landline calls to a cell phone or from calling long distance while traveling to listen to messages on their home voicemail or answering machine.

[39] Farrow, No. 365; NCL at 4; *cf.* Hooper, No. 331; Khitsun, No. 546; Munoz, No. 612.

[40] Scott, No. 362. This commenter does not indicate whether he incurs long-distance charges to retrieve the prerecorded messages from his answering machine.

[41] Pohl, No. 389; *see* House, No. 424 (''I have a phone so I can keep in touch with friends and family. . . . I do not want to pay for phone service so companies can use it for their convenience in their marketing efforts''); Casabona, No. 559; Mathes, No. 449; Scott, No. 362.

[42] Walker, No. 52 (''I think folks that agree to receive telemarketing calls should be compensated for their time. That would be similar to Pay-Per-Click advertising.''); Barnes, No. 560; *see* Khitsun, No. 546 (''Who would like to buy a product from someone who calls them at their own expense?'').

[43] Snell, No. 210 (noting that merchants will be unable to contact him by telephone with important information, such as safety recalls, because prerecorded calls have ''forced me to either not give out my phone number or to provide a false number'' when making purchases); Lepeska, No. 412 (relating that her 86-year-old mother frequently does not answer her prepaid calling card calls, which identify her as an ''unknown caller,'' because her mother ''thinks it might be a sales call''); *cf.* Robertson, No. 264 (''I have family who use prepaid calling cards and so must answer calls from numbers I do not recognize, as they may be family'').

[44] Palicki, No. 260 (''Your husband goes down with a heart attack and you can't get the recording to disconnect. These are actual issues''); *see* Casabona, No. 559 (Prerecorded calls ''frequently result in one being unable to clear the line until the recording is over (you can hang up and pick up and the recording is still there)''). Two of the comments from consumer advocates also express concern that prerecorded messages may prevent access to a telephone line in an emergency. CTAG at 2; NCL at 5. The Commission has acknowledged that this ''creates legitimate cause for concern.'' 71 FR at 58723.

[45] Haddox, No. 549.

[46] AARP at 4. AARP is correct in implying that, as proposed, the amendment did not provide expressly that an agreement to receive prerecorded messages, once given, would remain subject to the company-specific opt-out requirements of the TSR, and also did not require an effective keypress opt-out mechanism for consumers who agree to receive such messages but subsequently change their mind.

[47] AARP at 5.

[48] NCL at 4; *cf.* Thomas, No. 386 (reporting that after receiving over 20 prerecorded solicitations in 30 days, she had to pay her telephone company ''over $1.50 per trace'' in order to identify the offending telemarketer). NCL also notes that keypress technology ''would obviously not work for people who still have rotary dials, and that ''if the opt-out request requires talking to a live company representative,'' there is ''no assurance that one will be readily available.'' NCL at 4.

[49] Pursuant to a non-enforcement policy announced by the Commission when it proposed the safe harbor requested by VMBC in its petition, sellers and telemarketers placing calls in compliance with the proposed safe harbor to deliver prerecorded messages to consumers with whom the seller has an EBR have not risked enforcement action. 69 FR at 67290; 71 FR at 77635 (extending the policy in response to several industry requests). Under that policy, prerecorded calls have been permitted if, among other things, a keypress opt-out mechanism or other means is provided at the outset of the call for consumers to add their telephone number to the seller's company-specific Do Not Call list.

[50] Lardner, No. 168 (''It is not enough to have an opt-out feature (which many robo callers do not offer)'' because ''[w]hen I try to speak to a human to get me off the calling list, the person just hangs up on me''); Corgard, No. 596 (a prerecorded call ''will give you the option of being deleted from their list by pressing a certain number,'' but ''[t]his never works'' because ''the recording said it is an incorrect prompt,'' and ''[i]f you press the key to talk to a representative, before you can finish explaining that you are on the federal list, they simply hang up on you''); Anonymous, No. 222 (''I also keep getting pre-recorded calls where the phone number given in the messages is not the same as the Caller ID phone number. When I call the Caller ID phone # to complain, I never reach a person. When I call the phone # from the pre-recorded message, I get a sales person who 'can't' put me on the company's internal Do not Call/Mail, etc lists''); Abramson, No. 122, at 2.

[51] Cook, No. 320 (''I consistently receive . . . prerecorded messages that are for another person . . . every day'' and they ''do not allow me to opt out of the calling list because they are calling the wrong person''); *see* Johnson, No. 532; Thomas, No. 386 (''Even if you do choose to opt out, it takes weeks for it to go into effect, when it should be immediate''); Bankston, No. 382 (''[W]ith ID theft out there I should not have to identify who I am to be removed from their call list''); *but see* Rosato, No. 156 (arguing that ''authentication'' of the opt-out requestor is necessary to prevent others in his household from ''inadvertently'' opting him out).

[52] Byrne, No. 158 (''deluge'' of prerecorded calls makes consumers so ''impatient'' that they hang up before hearing opt-out options, even if they are provided at the outset of a message).

B. Comments Opposing the Proposed Amendment

Comments from 73 telemarketers, businesses that use prerecorded calls, their trade associations and technology providers overwhelmingly opposed the proposed amendment, as did 187 of the consumer comments.[53] These comments primarily follow three lines of argument: (1) They question the reliability of the thousands of comments received earlier in this proceeding as indicative of consumer aversion to telemarketing calls that deliver a prerecorded message; (2) They point to surveys that purportedly show that some portion of the consuming public welcomes telemarketing calls that deliver prerecorded messages; and (3) They rely on data concerning consumer responses when opt-outs are provided in prerecorded message telemarketing calls.

1. Previous Comments Inaccurately Reflect Consumer Attitudes

One industry comment argues that ''a substantial number'' of the 13,000 consumer comments opposing a prerecorded call safe harbor should be disregarded because they express dissatisfaction over ''the fact that some telemarketing calls continue to be permitted at all'' or over the breadth of the EBR definition.[54] Other industry comments argue that complaints about calls from companies with which the consumer has no EBR, company-specific Do Not Call mechanisms that do not work, and non-compliance with the Commission enforcement forbearance policy should be addressed by aggressive enforcement, not tighter rules that might limit legitimate EBR-based prerecorded telemarketing messages.[55]

Yet other industry comments contend that the Commission should disregard consumer comments that indiscriminately lump EBR-based telemarketing calls delivering a prerecorded message together in the same hated category as ''cold call'' message blasting.[56] Some of these comments see an indication of some level of consumer support for an EBR exemption because a handful of earlier consumer comments do distinguish between voice blasting and EBR-based prerecorded message calls, and do not object to the latter.[57]

A few industry comments assert that consumers who previously opposed prerecorded telemarketing were responding largely to their experience with ''indiscriminate 'blast' telemarketing'' calls that lacked the type of interactive opt-out mechanisms available now.[58] According to one of these comments, ''to the extent [it] may have been the case in 2004'' that consumers felt ''powerless to make themselves heard'' by a prerecorded message, ''it is not the case today.''[59]

2. The Proposed Amendment Would Burden Sellers and Consumers

Several comments protest that requiring an agreement in writing to receive calls delivering prerecorded messages would be confusing to consumers who are used to receiving these messages.[60] According to these commenters, the requirement would be a major inconvenience for consumers.[61] Others argue that the express written agreement requirement would not be in the best interests of consumers who may not realize the importance of making the extra effort to opt in to receive important messages in the distant future,[62] consumers who change phone numbers,[63] and consumers who must make a ''double opt-in'' when they call for information to authorize a follow-up return call with the information requested.[64]

Other industry comments cite the burden and cost of contacting each person in existing EBR customer databases to obtain their agreement to receive prerecorded calls.[65] Several comments also emphasize the continuing costs of obtaining consent from new customers after the proposed

[53] Combined with the 77 consumer comments arguably supporting a safe harbor for prerecorded calls received in the prior proceeding, 71 FR at 58721 & n.57, these comments represent less than 2 percent of the 14,000 consumer comments in the record.

[54] Consumer Bankers Association (''CBA''), No. 587, at 2. Another contends that ''[n]one of the comments objects *per se* to *all* calls from businesses with which the consumer has an existing business relationship,'' and concludes that the record does not support the elimination of EBR-based prerecorded calls, but would support a narrowing of the EBR definition for such calls. Voxeo Corp. (''Voxeo''), No. 621, at 8,10 (emphasis in original). In a similar vein, some industry comments urge that consumer comments that ''focus on calls already prohibited'' by the TSR should be disregarded. DMA, No. 589, at 5; IAC/Interactive Corp. and HSN LLC (''IAC''), No. 600, at 4; Call Command, Inc. (''Call Command''), Nos. 608, 610 at 4. Other industry comments assert that the 13,000 consumer comments opposing a safe harbor for telemarketing calls delivering prerecorded messages to established customers should be discounted because they ''do not fully or accurately describe the marketplace.'' DMA at 5; VMBC, No. 583, at 1–2 (record not a ''fair representation'' of all consumers).

[55] Soundbite Communications, Inc. (''Soundbite''), No. 575, at 16–17; DMA at 5; IAC at 4; Valley Technology Consultants (Monion) (''Valley''), No. 39, at 1; Interactive Agent Association (''IAA''), No. 568, at 11; MP Marketing Services, Inc. (''MP''), No. 562 at 2; SmartReply, Inc. (''SmartReply''), No. 105, at 5–6; MinutePoll, LLC (''MinutePoll''), No. 540, at 7; Xpedite Systems, LLC (''Xpedite''), No. 595, at 4.

[56] Soundbite at 4–5; IAA at 2, 4; IAC at 4; *cf.* CBA at 2 (urging disregard of prior consumer comments ''not directed at the proposal to create an EBR-based safe harbor for prerecorded telemarketing calls''). *See also*, Chrysalis Software, Inc. (Ramsay), No. 79 (''[T]he focus of [FTC] attention should be calls generated from companies unknown to the callee, such as those that have purchased a phone directory''); Zucker at 1 (Proposed amendment intended to stop ''voice blasting'' by ''phone spammers'' goes too far in covering EBR-based prerecorded calls).

[57] IAA at 4 n.4. *See, e.g.*, Castellon, No. 471; Castro-Arellano, No. 472; Manley, No. 112.

[58] Soundbite at 5, 10–11. *See also* VMBC at 1; DMA at 5; IAC at 3 (noting that it still may be true that ''consumers generally have had only limited experience with prerecorded messages that provide a simple opt-out mechanism'').

[59] Soundbite at 6.

[60] IAA at 6; *cf.* Xpedite at 5 (asserting that because of differences between the FCC rule permitting prerecorded calls to EBR customers and the proposed amendment, consumers will have ''no clear picture of when and for whom an EBR permits a prerecorded telemarketing call, and when and for whom it does not''); DMA at 6.

[61] VMBC at 2; Capelouto Termite & Pest Control, Inc. (''Capelouto''), No. 131, at 1; National Newspaper Association (''NNA''), No. 578, at 4 (providing consent more burdensome than receipt of a prerecorded reminder message about an expired subscription); SmartReply at 17; IAC at 9 & n.15; IAA at 5 n.5; *see* DMA at 5. Consumers who oppose the proposed amendment also criticize the requirement of an express written agreement as burdensome, *e.g.*, Kelly, No. 457; Maruca, No. 602; Schmitz, No. 520; a ''pain,'' *e.g.*, Carnes, No. 451; Rososer, No. 426, or ''a waste of time.'' *E.g.*, Lemkin, No. 31; *see* Martin, No. 437 (''big burden on my time'').

[62] CenterPost Communications (''CenterPost''), No. 591, at 1.

[63] Soundbite at 9; SmartReply at 18. This problem may be minimized by FCC regulations requiring Local Number Portability and Wireless Number Portability.

[64] MP at 2; Career Education Corp. (''Career''), No. 580, at 3. Other comments, apparently not considering the flexibility ensured by E–SIGN, incorrectly argued that this requirement would be ''impractical'' or would not work when consumers call for information. DMA at 5; MinutePoll at 1, 9; Soundbite at 9; IAC at 9; MP at 2; Bernhardt at 1.

[65] These comments also assume that the required written agreement must be obtained on paper. IAC at 9–10 (a direct mail piece to obtain a written agreement from HSN's ''millions'' of EBR customers on a postage paid postcard would cost $.75 to $1.75 per customer and ''will be a lengthy, resource-intensive endeavor''). *See also* SmartReply at 17–19 (estimating a cost of $9,350,000 for a ''Top 100 Retailer'' in the ''Fortune 500'' with a database of 15 million customers to obtain such agreements via direct mail, a cost of $360,000 to $600,000 to revise and reprint 3–5 million credit card and loyalty applications, with ''at best'' a reduction in EBR customer databases of ''90% or more''); DMA at 5. Individual commenters opposed to the proposed amendment cite the burden on business of complying. *E.g.*, Cook, No. 631; Hunley, No. 644; Simmons, No. 507.

amendment takes effect,[66] and other costs they believe will be significant.[67]

The industry comments stress that prerecorded message telemarketing costs significantly less, and is more effective than the only alternatives that are available—direct mail,[68] live calls,[69] and email.[70] Three comments insist that there simply ''is no other cost-effective communication method'' available for businesses for which the timeliness of delivery of high-volume messages to customers is critical.[71] Other comments assert that prerecorded messages are the only affordable option for businesses to communicate with their customers.[72]

Several comments point out that the higher cost of using such alternative marketing methods will be passed on to consumers if, as they fear, businesses are unable to obtain the consent of a significant number of their customers to receive prerecorded messages.[73] One comment doubts that obtaining enough consents is likely, and accordingly asserts that the ''practical effect'' of the proposed amendment would be that ''telemarketers could not communicate with [their] customers through prerecorded messages.''[74] Moreover, a number of industry comments argue that the proposed amendment will disproportionately harm small business telemarketers,[75] and the small businesses that are their clients.[76] Some small telemarketers assert that the proposed amendment ''would reduce our revenue by 85%,'' and that continuation in business ''would require the termination of most of our existing employees'' and an effort to ''outsource the vast majority of our labor force to call centers in foreign countries.''[77]

Finally, some comments that oppose the proposed amendment argue that by lumping sophisticated interactive message systems that may include advanced voice recognition together with non-interactive systems, the proposed amendment would ''stifle the advancement of potentially beneficial media.''[78] Accordingly, many favor application of the written agreement requirement only to non-interactive prerecorded calls.[79]

3. Survey Evidence of Consumers' Attitudes Toward Telemarketing Calls that Deliver Prerecorded Messages

Industry commenters submitted three online consumer preference surveys as indicative of consumer support for telemarketing calls that deliver a prerecorded message with a prompt opt-out.[80]

Minutepoll submitted a survey of 388 consumers and advanced it as evidence that there is a ''significant minority'' of consumers who prefer prerecorded calls to live calls. Most of these survey respondents—82 percent—said they had placed their phone numbers on the National Do Not Call Registry. When asked in the abstract, 70.1 percent stated that they would prefer ''live operator'' calls, whereas 29.9 percent said they would prefer a prerecorded message.[81] When given the choice of a prerecorded call with a ''quick option to get on the calling company's 'Do not Call list,''' or a live operator call that ''would not be required to do this,'' 68.3 percent said they would prefer the prerecorded message and only 31.7 percent said they would prefer the live call.[82] In

[66] IAC at 9 n.17 (contending that ''even if companies design systems to seek and obtain consent in a compliant manner when consumers place orders by telephone, such systems also involve significant costs,'' and that ''[i]n addition to design, recordation and retention costs, each customer contact would take more time,'' necessitating the ''need to employ additional personnel or risk dropped calls''); Career at 3 (costs would increase by $3.58 million a year); SmartReply at 41 (on-going costs would not be *de minimis* because National Retail Federation research shows that ''retail companies face a customer attrition rate of between 33% and 50% per year''). *See also* IAA at 5–6); NNA at 4; Call Command at 5; MinutePoll at 9; *cf.* Nolte, No. 429 (objecting that the cost of obtaining consent would be ''a waste of time and money that could go to passing on additional savings to me''). Two individual comments also doubt that it would be practical for businesses to keep the required written agreements on file. Bender, No. 62; Haas, No. 76.

[67] SmartReply at 20–21(loss of revenue from need to use less efficient marketing alternatives than current $10.00 gross return for every dollar of prerecorded message marketing, loss of brand value and customer ''goodwill'' that would devalue stock prices of publicly traded retailers); MinutePoll at 9 (cost of retrieving paper records now ordinarily destroyed after entry of information in EBR database would be especially burdensome and expensive); National Newspaper Association (''NAA''), No. 578, at 10–11 (noting that 20 percent of the newspaper industry has its own prerecorded call equipment that would be of limited use given difficulty of obtaining consumer consent).

[68] SmartReply at 17 (Interactive message calls ''run about 20% of the cost of the next best medium—direct mail''); Call Command at 3–4 (Direct mail costs are ''ten times higher''); Career at 1 (Prerecorded call response rates are ''*more than twice* as high as for communications by mail'') (emphasis in original); IAC at 5; Compton (''Vontoo CEO''), No. 47, at 1; MinutePoll at 10. *See also* SmartReply, Inc., ''Measuring and Deducing Consumer Acceptance of Live Pre-recorded Calls with Prompt Opt-Out Mechanisms Across Ten Companies over Eight Months'' (''SmartReply Study''), No. 106, at 11 (stating that a comparison of 82 client campaigns shows similar response rates for direct mail and prerecorded calls, but customers responding to the calls out-spent those responding to direct mail ''by 175%'').

[69] IAA at 1 n.2 (a prerecorded call ''costs about $0.25,'' whereas industry surveys show that the cost of a live call to a consumer ''is from $3.75 to $5.30''); MinutePoll at 8, 10 (would have to charge clients ''ten times our current rates per lead'' for live calls); IAC at 5.

[70] Career at 1 (prerecorded call response rates are ''*ten times higher* than for communications by email'') (emphasis in original); MinutePoll at 8; IAC at 5 (email messages are ''less effective than telephone messages'' because many consumers ''check their voicemail but not their home email daily''); IAA at 5–6 (email messages may not ''get past spam filters''); Vontoo CEO at 1 (retirees ''often do not have email'').

[71] IAC at 2 and 5: SmartReply at 39; Messagebroadcast.com (''Message''), No. 599, at 6.

[72] NNA at 4 (small community newspapers); *cf.* Career at 3 (''no choice'' but to use live operators at a much higher cost); MinutePoll at 7 (proposed amendment ''will result in a substantial increase in live operator calls''); *see, e.g.*, Metcalf, No. 482 (''more live calls will make a lot of consumers a lot more miserable'').

[73] IAA at 2; MinutePoll at 8; SmartReply at 17; Vontoo, LLC (''Vontoo'') at 3. Several consumers opposed to the amendment also worry that businesses will not be able to obtain enough written agreements from consumers to continue providing messages they value. Shaw, No. 650; *see* Long, No. 629; Christianson, No. 27.

[74] IAA at 1; *cf.* IAC at 5 n.9 (cost likely to be so great that not all sellers may be able to afford it, thus depriving consumers of messages they want); IAA at 10 (''[e]conomics dictates that prerecorded messages are less likely to be available to consumers''); Message at 6; *cf.* NNA at 3 (community newspapers ''struggle to create sufficient work for call centers to cover basic overhead costs'' which is why ''voice messaging options have become more popular'' because ''the revenue driven by them also can pay for heightened customer service''). Consumers opposing the amendment also express concern about the continued availability of information and offers they value. *E.g.*, Ashroff, No. 627; Noack, No. 642; Szczepanik, No. 646.

[75] MinutePoll at 8 (amendment ''would have a severe, disproportionate effect'' on small telemarketers that lack ''resources from other lines of business to offset the loss of revenue'' and ''sufficient scale to operate a large cost-effective live call center,'' with ''likely effect'' of ''industry consolidation''); Vontoo at 2 (''disproportionately severe'' impact on small businesses''); SmartReply at 24 (businesses that provide prerecorded message services ''are generally small businesses [with] less than $10 million in revenue'').

[76] MinutePoll at 1 (''proposed rule would drive up marketing costs for small businesses''); SmartReply at 24; *but cf.* MP at 2 (amendment ''would force our clients to go to other vendors who already offer direct mail and live telemarketing'').

[77] MinutePoll at 8; TCIM Services, Inc. (''TCIM''), No. 15, at 1–2; Valley at 1. Many of the consumers who oppose the proposed amendment express concern that ''thousands'' of American jobs will be lost to foreign call centers. *E.g.*, Catalan, No. 480; Vivanco, No. 501.

[78] *E.g.*, Maxwell, No. 20; Auburn, No. 129; Runyan, No. 61; Wetzel, No. 95.

[79] *E.g.*, Direct Mail Express, Inc., No. 138; Zucker, No. 164, at 1; Duke, No. 54; Lane, No. 53.

[80] The Commission notes, however, that none of these surveys allowed respondents to state a preference for receiving prerecorded calls only from sellers to whom they had given their prior written agreement to accept such calls pursuant to the proposed amendment. Thus, these survey results cannot purport to reflect consumer attitudes toward the proposed amendment, and are not probative of the extent to which consumers might prefer consent-based prerecorded calls over prerecorded calls with a prompt opt-out mechanism.

[81] MinutePoll, Exh. A, at 1. The MinutePoll survey reports a margin of error of 5 percent.

[82] MinutePoll, Exh. A, at 2. While taking care to articulate that the TSR does not require sales agents to disclose affirmatively that consumers can ask to be placed on the seller's do not call list, this survey omits any reference to the TSR requirement that sales agents honor a consumer's assertion of a do

responses to open-ended questions, however, 54 percent of those who said they preferred prerecorded messages generally or on some occasions indicated that a reason for this preference was simply because they would be ''[a]ble to hang up.''[83]

A second online survey of 5,328 consumers conducted by Forrester Research for VMBC purports to show that consumers prefer prerecorded over live calls ''on average at a rate of two to one, across different age, income, geographic, and technological groups.''[84] The survey reports that when given a choice between a recorded message that ''electronically provides me with the opportunity to either be removed from future calls, be transferred to a live representative, or end the call'' or ''[a] call from a live telephone representative who begins talking without providing [those options],'' from 57 percent to 71 percent of the Internet users surveyed, depending on ''age, income, geographic and technographic groups,'' stated that they would prefer the recorded message, with an average of 63 percent across all groups.[85]

The findings of a third online survey of some 470 Internet users, 78 percent of whom had received an ''automated'' call within the past 12 months,[86] raise unanswered questions about the consumer preferences elicited in the MinutePoll and VMBC surveys. This survey, conducted for Silverlink by the Zoomerang Online Survey Service, was submitted to show that consumers are willing to receive prerecorded healthcare-related calls.[87] The survey shows, however, that consumers may be far less willing to receive commercial prerecorded telemarketing calls than the other two surveys might appear to suggest. The Silverlink Survey reports that 91 percent of the participants said they would be unwilling to listen to a prerecorded telemarketing call from their financial services company offering a new credit card at a discounted rate, that 87 percent would be unwilling to listen to a prerecorded telemarketing call from their travel agent offering a discounted vacation package, and that 41 percent would even be unwilling to listen to a health-related prerecorded telemarketing call.[88]

4. Indirect Evidence Regarding Consumers' Attitudes Toward Telemarketing Calls that Deliver Prerecorded Messages

A number of industry comments cite indirect evidence of consumer acceptance of prerecorded message calls that incorporate an interactive opt-out mechanism. Summing up this line of argument, DMA asserts that ''over the past two years, companies that use the prompt opt-out as mandated by the safe harbor have found that the opt-out rate is fairly low,'' and that this shows ''that consumers often welcome prerecorded messages from entities with which they have [an EBR].''[89] While several comments from telemarketers claim opt-out rate percentages that may appear to support this contention,[90] only two—Global[91] and SmartReply[92]—provide the information necessary to evaluate the claims. However, their results—less than 2 percent for Global and 0.4 percent for SmartReply—are based on

not call request. It is a violation of the TSR to deny or interfere ''in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls established to comply with §310.4(b)(1)(iii),'' 16 CFR 310.4(b)(1)(ii), or to initiate ''any outbound telephone call to a person when that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered.'' 16 CFR 310.4(b)(1)(iii)(A).

[83] MinutePoll, Exh. A, at 1–2. Similarly, of the 68.3 percent who preferred prerecorded messages with a quick ''DNC opt-out,'' 33 percent indicated they made that choice to ''[g]et them to stop calling/get off the list'' and 16 percent did so to be able to ''hang up easier/without guilt.'' *Id.*

[84] VMBC at 1, *citing* Forrester Research's Consumer Technographics, NACTAS Q3 2006 Omnibus Online Survey (''VMBC Survey''), No. 584. The survey reports a margin of error of ± 1.3 percent. VMBC Survey at 1.

[85] VMBC Survey at 1.

[86] Survey respondents were told that an ''automated'' call means ''a call made to your home in which you *interact* with a recorded voice rather than a live caller.'' Silverlink Communications, Inc. (Rubin) (''Silverlink Survey''), No. 217, Attach. A, at 2 (emphasis added). The Silverlink Survey reports a margin of error of ''just above 4%.'' Silverlink (Rubin), Attach. B, at 1.

[87] The survey indicates that 45 percent of those surveyed ''would like'' or ''would not mind'' having their health plan or pharmacy deliver automated message reminders of routine screenings or tests recommended by their doctor, immunization reminders for themselves or their children, or prescription refill reminders. Silverlink Survey at 4.

[88] Silverlink Survey at 7. Thirty-six percent of survey respondents indicated they would find a prescription refill reminder helpful, compared to 45 percent who would not; 42 percent indicated they would find an automated reminder of doctor-recommended routine screenings or tests helpful, compared to 36 percent who would not; and 30 percent would find an automated immunization reminder helpful, compared to 51 percent who would not. Silverlink Survey, Attach. A, at 2.

[89] DMA at 4; NNA at 3 (newspapers' company-specific do not call lists are ''typically small and in some cases nonexistent''); IAA at 10 (''low opt-out rates experienced by members' clients'' are ''consistent with'' low opt-out rates reported in original VMBC petition); Soundbite at 6 n. 13 (''usually in the low single digits''); Protocol Integrated Direct Marketing, No. 535, at 1(citing unspecified ''low opt-out rates''). Some comments also contend that anecdotal evidence of few complaints shows consumer acceptance of prerecorded messages. NNA at 3 (no complaints to community newspapers); Snoozester, Inc., No. 49, at 1 (only 4 complaints out of ''hundreds of thousands of calls my company has made''); Capeluto Termite & Pest Control, Inc. (''Capeluto''), No. 131, at 1 (2 complaints out of 50,000 calls).

[90] Most of these comments fail to provide any underlying data necessary to evaluate the claims. Two indicate that the stated opt-out rates combined data from calls where the opt-out mechanism was a keypress option and calls where they provided a toll-free number requiring a return call that consumers may be less inclined to take the time to make. MP at 1–2 (9–11 percent opt-out rate with interactive messages ''for *most* of our programs'') (emphasis added); CenterPost at 2 (0.7 percent opt-out rate for prescription refill and insurance policy renewal calls where ''75 percent of all calls'' had ''in-call opt-out included''). Others do not state whether the percentage was calculated based only on the number of opt-outs when the prerecorded message was actually answered by a consumer (as opposed to the number of opt-outs for all calls placed, which may include messages left on answering machines, calls that go unanswered by a person or machine, and busy signals). MinutePoll at 4 (8–10 percent opt-out rate with up-front keypress opt-out, but no indication if based only on live answers); VMBC at 2 (3.1 percent opt-out rate with ''easy'' up-front opt-out); *cf.* Xpedite at 4 n.11 (1 percent opt-out rate for calls providing opt-out telephone number); Countrywide Home Loans, Inc. (''Countrywide''), No. 592, at 2 (''less than 1%'' opt-out rate for messages left only on voicemail and answering machines). Two comments provide none of this information, Call Command at 2 (1.14 percent opt-out rate with no indication of type of opt-out or how computed); Vontoo at 2 (50 of 12,000 ''persons called'' (0.4 percent) in a single campaign opted out), and two others indicate they did not provide the opt-out option until the end of the call, when it may have been less likely to be used (*e.g.*, if the consumer had already hung-up); Message at 1 (0.38 percent opt-out rate where calls provided a keypress option at the end of the message); Draper's and Damon's (''Draper's''), No. 108, at 1 (less than 1.36 percent opt-out rate where a keypress option was provided at the end of the message).

[91] Global Connect Strategic Broadcasting (''Global''), No. 620, at 5, 19–20 (less than 2 percent opt-out rates with keypress opt-out for messages offering casino/hotel discount promotions answered by a live person).

[92] SmartReply Study at 3 (0.4 percent opt-out rate for messages offering discount promotions from 10 of top 15 ''Fortune 500'' retailer clients). SmartReply asserts that the low opt-out rate reported shows ''that some [prerecorded] calls are more relevant [to consumers] than others,'' and that the existing EBR requirements ''sufficiently guarantee that most of these calls will be relevant enough that a significant majority of consumers will listen to the call month after month, even when given an easy, free and immediate mechanism to opt out of future calls.'' *Id.* Although the data shows that 148,516 of the 4,894,950 customers who answered the first call (3 percent) also answered and listened to some or all of each of the seven subsequent monthly messages, consumers who failed to pick up and answer any one of the calls were excluded from further study, even if they subsequently answered a call. SmartReply also contends that consumers must find the monthly calls ''relevant and non-intrusive,'' because the data indicates that 90 percent of the customers who answered all eight calls listened to the prompt opt-out option, and on average, 67 percent continued to listen to three quarters or more of the message. *Id* at 6–7. SmartReply further compares opt-out rates for prerecorded calls that were answered with those for messages left on answering machines with a toll-free opt-out number, and concludes that customers are ''300% more likely'' to make use of the interactive opt-out mechanism than the toll-free number. *Id.* at 10–11.

campaigns for unique clients. Moreover, to the extent that Global provides data on the number of consumers who ''opted out'' simply by hanging up the telephone, the results indicate that a significant percentage of consumers may not welcome such calls.[93] Thus, the low opt-out rates reported do not tell the whole story and do not necessarily reflect typical consumer acceptance of prerecorded calls with a prompt opt-out mechanism, or provide a reliable measure of consumer acceptance of such calls.

A few comments also assert that affirmative actions taken by consumers in response to interactive opt-out prerecorded messages manifest consumer satisfaction with such calls.[94] One comment claims that ''66–82% of customers renew a policy or prescription . . . ; 33–48% of customers select additional products or services along with the renewal; and 5–13% of customers renew policies prior to lapse.''[95] Another notes that a major entertainment retailer that ''realized a 6% response to their direct mail offer'' obtained an ''11.5% response when it supplemented the direct mail offer with a prerecorded message campaign.[96] Similarly, a third asserts that a study of 82 client campaigns showed that consumer spending in response to prerecorded messages was 175 percent greater than spending in response to a direct mail campaign.[97]

A number of comments contend that this evidence of the existence of a ''subset'' of consumers who may want and ''expect to receive'' at least some prerecorded telemarketing messages rebuts any possible contention that prerecorded telemarketing messages are ''coercive or abusive,''[98] and undercuts support for the proposed amendment.[99]

5. Alternatives to the Proposed Amendment

Some of the industry comments continue to urge the Commission to conform the TSR to FCC regulations that permit calls delivering prerecorded messages if a seller has an EBR with the called consumer. A few recommend reconsideration and adoption of the safe harbor for prerecorded message calls that the Commission had originally proposed in response to the VMBC request. Most, however, advocate one or more refinements of the original VMBC safe harbor proposal in an effort to reduce the likelihood that prerecorded calls would be ''coercive or abusive.''

a. Comments Arguing that the EBR Exemption Should be the Only Limit on Placing Calls that Deliver Prerecorded Messages, and that the Original Safe Harbor Proposal Should be Adopted

Some industry comments continue to insist that the TSR's existing EBR exemption from the prohibition against calls to numbers listed on the National Do Not Call Registry should apply equally to live calls and prerecorded calls.[100] They argue that the EBR exemption properly effectuates the purpose of the TSR and the Telemarketing Act by protecting consumers from unwanted cold calls and is critical to businesses.[101] They also reiterate previous assertions that the exemption should apply to prerecorded calls to minimize inconsistency between the TSR and parallel FCC regulations.[102] These contentions, however, were considered and rejected by the Commission when it considered adopting a prerecorded call safe harbor, and there is nothing new in the more recent comments that would warrant reconsideration of the Commission's previous conclusions.

A few industry comments ask the Commission to revisit creation of the EBR-based safe harbor for prerecorded messages it previously proposed in response to the VMBC request.[103] One reiterates the view previously advanced by many in the industry that the safe harbor proposal would protect consumers and ''was supported by the record and constituted a useful step in the direction of harmonizing the Commission's regulations with those of the FCC.''[104]

Several comments question some of the concerns the Commission expressed in rejecting its original safe harbor proposal. One contends that the evidence in the record that prerecorded messages could pose a health and safety threat is ''anecdotal,'' and that ''any concerns about isolated instances of prerecorded calls tying up a phone line so that emergency calls cannot get through would be completely avoided'' by provision of an automated interactive opt-out mechanism.[105] A few industry comments also opined that the Commission is unduly concerned about

[93] Global at 19 (showing hang-up rates before the opt-out message of from 23–68 percent, with a mean of 46 percent and a median of 48 percent, in 13 separate sets of calls).

[94] *E.g.*, Message at 2–3 (citing increased customer response rates in client campaigns). None of these comments provided underlying data that would permit an independent assessment of the claims.

[95] CenterPost at 1. This comment is unclear as to whether the percentages provided refer only to prerecorded message calls that are answered. CenterPost also reports that in two voluntary health-related surveys it conducted that invited consumers to answer a single question assessing their satisfaction with an interactive prerecorded message offering prescription refill reminders and information, 89.4 percent indicated they found the ''notification'' to be ''useful'' in one survey and 94 percent were ''extremely'' or ''highly'' satisfied in the other. *Id.* at 1–2. Because these two surveys apparently were conducted after the refill offer was made, the satisfaction percentages necessarily excluded consumers who may have chosen to hang up on the call or opt out from future calls.

[96] VMBC at 2.

[97] SmartReply Study at 11–12.

[98] *See* Smith, No. 544 (does not find prerecorded messages coercive or abusive). Other consumers who oppose the proposed amendment say prerecorded messages are ''not a problem,'' *e.g.,* Arce, No. 469; Marquez, No. 507; Yanes, No. 485; are ''less intrusive and coercive,''" or simply ''less invasive'' than live calls, *e.g.,* Azcurra, No. 467; Hernandez, No. 475; Torres, No. 496; because they find it easier to hang up on a recording, *e.g.,* Boricean, No. 470; Kheriaty, No. 44; Shimko, No. 127; they prefer not having to deal with ''pushy telemarketers,'' *e.g.,* Castellon, No. 471; Morales, No. 505; Villasenor, No. 500; and find prerecorded messages easier to understand than a script read by a disinterested telemarketer, *e.g.,* Christianson, No. 27; Lemkin, No. 31; Wiggen, No. 28, or an offshore telemarketer with a foreign accent. Auburn, No. 129; Zucker, No. 164, at 1.

[99] MinutePoll at 6; SmartReply at 25–26; *cf.* Message at 6 (asserting the prerecorded messages that comply with the law are not coercive or abusive); Superior Communications and Consulting (''Superior''), No. 632, at 2 (arguing that an EBR-based prerecorded message that ''results in a sale of goods or services'' is not ''unwanted or abusive''). Two comments also protest that ''there has been no study proving that prerecorded calls are inherently abusive.'' Vontoo at 2; Message at 6.

[100] DMA at 1, 3 (the same public policies apply equally to live and prerecorded calls); Xpedite at 4.

[101] DMA at 4; IAA at 3–4, *citing* House Report No. 103–20, 1994 U.S. Code Cong. & Admin. News, at 1626. Two cite a December 2005 Harris poll conducted for the FTC in which 92 percent of adults with numbers on the Registry reported receiving fewer telemarketing calls as evidence that the EBR exemption ''strikes the appropriate balance'' between protecting consumers from unwanted calls and allowing businesses to use a variety of methods including prerecorded messages to transmit marketing offers to their customers. Verizon, No. 588, at 1; Superior at 2.

[102] DMA at 6; Verizon at 6–7; Bank of America (''BoA''), No. 572, at 3; National Association of Realtors (''NAR''), No. 101, at 1; TCIM at 1; Commerce Energy Group, Inc., No. 598, at 1. Two comments object that ''there normally is no question of 'call abandonment' regarding prerecorded message calls,'' and therefore that ''[*a*]*ll* prerecorded message calls should be exempted from the call abandonment requirement, or found compliant if the message starts within two seconds.'' Verizon, Attach. A, at 4–5 (basing the objection on the lack of ''hang-ups'' and ''dead air'' with prerecorded messages, but conceding that there may be a ''separate policy reason'' for restricting such messages); Beautyrock, Inc. (Body) (''Beautyrock''), No. 12, at 1.

[103] CBA at 1; Message at 5; *cf.* NAR at 1–2 (suggesting that the FTC require, as in the safe harbor proposal, a ''toll-free number or other means to opt out'').

[104] CBA at 8–9. The Commission disagrees that it is obliged to conform its Do Not Call requirements to the parallel requirements of the FCC. *See* 71 FR at 58719–20, 58724–25.

[105] MinutePoll at 7. The comment also argues that ''the record does not indicate that prerecorded calls last any longer or occur any more frequently than live operator calls,'' and thus pose no greater threat to health or safety. *Id.*

the likelihood that a safe harbor for low-cost prerecorded messages could ''substantially increase the volume of telemarketing calls,'' and that any such concern is ''speculative.''[106] Others criticize the NPRM for giving ''inadequate consideration'' to sellers' ''strong incentives to avoid alienating existing customers with excessive reliance on prerecorded messages.''[107] At least one comment argues that the low cost of Voice over Internet Protocol (''VoIP'') calling ''will not engender a significant increase in call volume over today's levels'' because ''long distance rates for high-volume users are already extremely low.''[108]

Nevertheless, two industry comments oppose any reconsideration of the original safe harbor proposal. One contends that the FTC was right to reject the proposal as ''too unreliable or too burdensome for the consumer,'' criticizing its contemplated reliance on live operators to implement company-specific opt-outs in particular.[109] One industry comment goes even further, contending that mainstream interactive message technologies *are* ''coercive and abusive,'' ''[a]s supported by the factual record compiled by the Commission,'' explaining:

> '[P]rerecorded message' telemarketing, as it currently exists, consists largely of one-way audio broadcasts designed to convey information to consumers. Such messages are nothing other than outbound streaming audio files which convert the telephone (traditionally an instrument of two-way communication) into a radio (an instrument for listening). These campaigns are widely regarded as a nuisance and a burden to consumers because consumers are powerless to interact with them.[110]

Considering this viewpoint and industry's previous opposition to the original safe harbor proposal, the Commission concludes that the prior safe harbor proposal should not be resuscitated. This conclusion is bolstered by the many divergent industry suggestions for modifying the proposal, discussed immediately below, and, of course, the strong consumer opposition to the original proposal and support for the current proposal.

b. A Modified Safe Harbor Should be Considered

The great majority of the industry comments ask the Commission to revisit and refine its prior safe harbor proposal, rather than adopt the proposed amendment. They argue that a safe harbor for prerecorded telemarketing messages with an interactive opt-out is necessary for businesses to provide many important and convenient messages to consumers who wish to receive them.[111] Although, as the Commission has emphasized, the TSR does not cover purely ''informational'' messages,[112] the current round of industry comments provides numerous examples of messages that fall within the purview of the TSR because they combine information with a direct or indirect solicitation.[113]

In urging the Commission to allow telemarketing calls that deliver prerecorded messages and require that they include an interactive opt-out mechanism,[114] many industry comments propose one or more modifications of the original EBR-based safe harbor proposal to reduce the likelihood that prerecorded calls would be ''coercive or abusive.'' Several of the comments acknowledge that industry opposition in 2004—on the basis that the required technology to implement the keypress opt-out mechanism would be ''costly, burdensome, and not widely available''—was a factor in the Commission's withdrawal of the original safe harbor proposal.[115] Many accordingly take pains to point out that interactive keypress and voice-activated technologies have become ''readily available'' and ''cost effective,''[116] and therefore contend that a mandatory interactive keypress opt-out requirement would now be ''feasible.''[117]

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[106] CBA at 3; DMA at 5–6 (acknowledging that ''it is theoretically possible that there will be a large number of prerecorded messages'' because of their lower cost than live calls, but contending, based on discussions with its members, that live calls will continue to exceed prerecorded messages, which are most ''useful in specific, targeted applications'').

[107] CBA at 3 (citing the low opt-out rate reported in VMBC's petition as evidence of this self-restraint, and arguing that start-ups and other companies in highly competitive lines of business share the same incentives); *see* IAA at 6 (prerecorded messages are most likely to be sent by established firms, with the strongest incentives for self-restraint, rather than start-ups or fly-by-nights). Two comments assert that ''more than 80% of consumers are on the national do not call list,'' and this fact deters abuse. MinutePoll at 6; IAC at 3. Another says market research shows that retailers face customer attrition rates of between 33 percent and 50 percent each year, and contends they devote their resources to ''targeted marketing that quickly abandons non-productive customers,'' rather than to efforts to minimize this attrition by means of low-cost prerecorded calls. SmartReply at 41–42.

[108] MinutePoll at 7 (arguing that equipment and facilities charges, ''not transmission expenses'' are a significant cost factor, but providing no evidence to support that contention); *cf.* Zucker at 1 (arguing that the cost of VoIP ''is not any different'' from the current cost of long distance service for high-volume users since the largest VoIP providers are all telephone companies ''for whom VoIP is replacing their regular [long distance] offering'').

[109] Voxeo at 5; *cf.* Global at 6 (also implicitly criticizing the lack of an automated opt-out requirement).

[110] Interactions Corp. (''Interactions''), No. 571, at 1 (adding that mainstream ''interactive voice response (IVR) systems [that] rely on either touch-tone input (which severely limits the consumer's ability to communicate or direct the interaction) or frustratingly ill-equipped voice recognition technologies (which require the consumer to talk using sound bites and keywords that can be recognized by the IVR and in the order and in the fashion dictated by the IVR)'' are ''generally considered more intrusive and more of an invasion of privacy'' primarily ''[b]ecause these forms of 'prerecorded messages' have no ability to listen to, understand or truly interact with consumers in a natural and conversational fashion'').

[111] The industry recognizes that informational messages that include a sales offer are ''telemarketing'' messages, but argues that such messages provide consumers with ''information they desire, in a format they prefer,'' DMA at 4; IAA at 2; Message at 6; *cf.* Soundbite at 5 (consumers would be ''frustrated'' by an ''incomplete'' message that omitted the sales component to ensure that the message was strictly informational); SmartReply at 39 (purely informational messages would be ''less relevant'' and consumers would be less happy to get them). At least one argues that a safe harbor is also necessary to prevent a ''chilling effect'' on informational calls in view of industry ''uncertainty as to the regulatory dividing line between informational and telemarketing calls.'' Xpedite at 5; *see also* Global at 9 (an up-front keypress opt-out option would ''alleviate any ambiguity between an informational message and a promotional message''); NAR at 1; Zucker at 1.

[112] 71 FR at 58719, 58725.

[113] The comments cite such examples as expiration and renewal reminders (*e.g.,* DMA at 4 (magazine subscription); NNA at 2 (newspaper subscriptions); Soundbite at 4; Capelouto at 1; Tiesenga, No. 651 (snow removal service); Wussler, No. 97 (termite inspection); Kelly, No. 457 (bank CD renewal)); airline flight upgrade and rebooking offers (*e.g.,* DMA at 4; IAA at 8–9; Beatty, No. 22; Romoser, No. 426); overdue payment notices with incentives to pay promptly (*e.g.,* DMA at 4; Xpedite at 1; Romoser (overdue mortgage payment offer)); bounced check and overdraft alerts with overdraft protection offers (*e.g.,* Soundbite at 4; Christianson, No. 27); insurance lapse warnings with renewal offers (*e.g.,* CenterPost at 1; Craig, No. 110; Rosato, No. 156); invitations to special retail sales and events (*e.g.,* Draper's at 1; SmartReply at 8; Long, No. 629; Tiesenga, No. 651); cell phone and wireless plan savings offers (*e.g.*, Soundbite at 4; Carnes, No. 451; Rankin, No. 136); reminders of prior-year purchases (*e.g.*, SmartReply at 14 (flowers for birthdays or anniversaries)); ticket offers for musical events (*e.g.,* Shaw, No. 650; Tiesenga, No. 651); car service reminders and lease and warranty expiration offers (*e.g.,* Minkoff, No. 183, at 1; AutoLoop, LLC (Anderson, Steve), Nos. 63, 184, at 1; Cronin, No. 655; VanHaaren, No. 623); lower interest rate offers (*e.g.,* Countrywide at 2 (refinancing); Geyerhahn, No. 153 (refinancing); Knoll, No. 162 (credit card)); time-sensitive sales notifications (*e.g.,* Agranovsky, No. 19 (eBay end-of-bidding alerts); Gutierrez, No. 82 (stock market alerts)); and local promotions (*e.g.,* Simmons, No. 648 (pre-order offer for school photos); Szczepanik, No. 646 (sports league paraphernalia offers)).

[114] *E.g.,* Bender, No. 62; Haas, No. 76; Kheriaty, No. 44.

[115] 71 FR at 58725. *E.g.,* Xpedite at 2–3; Voxeo at 6; DMA at 3.

[116] *E.g.,* IAC at 3; DMA at 3; Xpedite at 3; Global at 8; MinutePoll at 9.

[117] DMA at 3; Xpedite at 3. At least one industry comment argues that interactive prerecorded calls allow consumers to assert company-specific opt-outs even more ''quickly, effectively and efficiently'' than live calls. Schwartz, No. 640, at 3 (citing the test proposed by the Commission for approval of a safe harbor for prerecorded calls in 71 FR at 58718, 58725).

Most of the industry commenters now are willing to support a safe harbor for prerecorded calls to EBR customers that includes an interactive opt-out mechanism utilizing Interactive Voice Response (''IVR'') technology.[118] As summarized below, the industry proposals include recommendations for: (1) refinements in the prompt keypress opt-out requirement; (2) disclosure of the nature of the EBR that permits the call; (3) limitations on the permissible frequency and duration of prerecorded calls; and (4) restrictions narrowing the scope of permissible EBRs for prerecorded calls.

i. Prompt Keypress Opt-Out Option

The industry proposals for modifying the original safe harbor begin by suggesting that prerecorded messages be required to provide an interactive keypress or voice-activated mechanism that would allow consumers to make a company-specific opt-out request after the message informed consumers of this option at the outset of the call.[119] They appear to take for granted what only one comment explicitly advocates, that the keypress option should be active throughout the prerecorded message.[120]

Some comments assert that the simplicity of such a mechanism will make prerecorded messages convenient and efficient for consumers and businesses.[121] Two comments further submit that the prompt availability of such a convenient company-specific opt-out mechanism would prevent prerecorded calls from being ''coercive.''[122] One comment notes that such an option would at least alleviate concerns about consumers' inability to interrupt a prerecorded message to ask to be placed on the company's do not call list.[123] Another emphasizes that the requirement will create a powerful and ''immediate incentive to companies not to abuse prerecorded telemarketing by flooding consumers with a large number of calls of questionable value'' because once a consumer opts out, the company will be barred from placing *any* future calls, live or prerecorded, to the consumer.[124]

The comments differ, however, on the precise details of how a prompt keypress opt-out option should function.[125] Most recommend that a single keypress should trigger an automated opt-out, without the intervention of a live operator, so that a ''consumer knows with certainty that they have made the request.''[126] However, one comment argues that businesses should have the option of using customer service representatives to take opt-out requests, rather than an automated system,[127] while another seeks the flexibility to require a second keypress to confirm an opt-out request.[128] Likewise, one comment suggests that an automated opt-out keypress should lead directly to immediate termination of the call after a recorded brief acknowledgment of the request,[129] without requiring navigation of any intervening submenus, while another recommends a limit of two layers of submenus.[130] Finally, many of the comments appear to suggest that an automated opt-out request should take effect immediately to prevent any future calls (although most are silent on this point), but one comment recommends that companies be given 30-days to process the request, to allow sellers time to scrub their lists after receiving new opt-outs from third-party telemarketers.[131]

ii. Express Identification of the EBR

A number of the industry comments recommend adding a provision to a safe harbor for prerecorded message calls that would require an indication that the call is based on an EBR.[132] Two comments appear to contemplate only a brief indication that the consumer is a ''customer'' or ''made an inquiry,''[133] one would go further and disclose ''how the [consumer's] phone number was obtained.''[134] Another comment suggests that, in lieu of a mandatory disclosure, this information could be conveyed via a required keypress option that would trigger an explanation of why the consumer is receiving the message.[135]

iii. Call Frequency and Duration Limitations

Several comments indicate that limiting telemarketing to no more than one call a month is regarded, at least by some in the industry, as a ''best practice.''[136] Two comments accordingly recommend adding this limitation to a prerecorded call safe harbor, arguing that such a restriction would ensure that prerecorded calls would not be ''abusive.''[137] They contend that, in combination with a prompt keypress opt-out option designed to prevent prerecorded messages from being ''coercive,'' this additional restriction would prevent prerecorded calls from being either ''coercive or abusive,'' thereby obviating any need or justification for requiring a consumer's express written agreement to receive prerecorded telemarketing calls.

Two comments also suggest that limits on the length of prerecorded messages may be regarded as a ''best practice.'' One indicates that as a ''best practice, not only does it limit contact with its client's customers to once a month, but also limits the average

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[118] Although many of the industry proposals refer to IVR technology, *e.g.*, IAC at 3, this term may be a misnomer, to the extent it suggests that such systems are uniformly capable of responding to a consumer's voice commands. While some IVR systems may also have ''Automated Speech Recognition'' (''ASR'') capability that responds to a consumer's spoken words—the direction in which the technology appears to be evolving, *e.g.,* Voxeo at 6; Interactions at 1—many comments appear to use the term to describe a system limited to accepting a consumer's telephone keypad input to select a desired option.

[119] *E.g.*, DMA at 1; cccInteractive (Johnson, CJ), No. 159, at 1; Call Command at 4; NNA at 1–2, 6; IAA at 11; VMBC at 2; MP at 2; Xpedite at 2; Voxeo at 6; Zucker, No. 164, at 1. One comment suggests specifying that the opt-out disclosure be delivered within the first 20 seconds of the message. IAC at 7.

[120] Soundbite at 13; *see* IAC at 7.

[121] DMA at 3; IAA at 2; Superior at 2. Three comments note that voice recognition systems exist that can provide equally convenient opt-out functionality for users of rotary dial telephones. Voxeo at 6 & n.6.; Soundbite at 6 & n.15; Schwartz, No. 640, at 4. It is not clear, however, that these advanced systems are widely in use. *See* IAC at 7 (suggesting that a toll-free number be provided for users of rotary phones); *cf.* Global at 3 (suggesting a toll-free number for messages left on answering machines).

[122] Career at 2; MinutePoll at 1.

[123] Soundbite at 8. One telemarketer mentions that its prompt opt-out disclosure includes both a keypress option and a toll-free number (for consumers who receive the prerecorded message on their answering machines) that connects to the same automated system used for the keypress opt-out. SmartReply at 5.

[124] Soundbite at 13–14.

[125] For example, one comment recommends that a uniform opt-out keypress be required, such as two presses on the ''6'' key (which would spell ''NO'' on the keypad, so that the FTC could advise consumers to ''Just Press 'NO''''). Soundbite at 14. Other comments indicate, however, that different systems may be limited to the use of a single specific key for opt-out requests. *E.g.*, Global at 11(''7'' key); MinutePoll at 4 (''9'' key); IAC at 3 n.2 (''1'' key).

[126] DMA at 2; Soundbite at 13 (so consumers can be assured that opt-out is ''easy and effective''); Voxeo at 7; Global at 3; Xpedite at 3.

[127] IAC at 7 (noting that permissible hold times while waiting for an operator could be limited by the safe harbor).

[128] MinutePoll at 8.

[129] Soundbite at 13.

[130] IAC at 7.

[131] IAC at 3 nn.2–3. However, interactive technology apparently exists that allows telemarketers to automatically scrub call lists against recent additions to a seller's company-specific do not call list. *See* Global at 12.

[132] DMA at 1, 3; MinutePoll at 2; MP at 1; SmartReply at 5.

[133] DMA at 3; MinutePoll at 2 (''briefly identify the nature of the EBR'')

[134] MP at 1.

[135] SmartReply at 5.

[136] SmartReply at 7; *see* IAC at 3; Career at 1; MinutePoll at 1.

[137] MinutePoll at 1; Career at 1. *See* IAC at 6 (suggesting that the Commission could consider this or other limitations on the frequency of prerecorded calls).

message length to ''about 37 seconds.''[138] Another proposes that the FTC consider such a limitation, and suggests that it be 45 seconds.[139]

iv. EBR Limitations

Other industry comments propose one or more additional requirements that would restrict the scope of an EBR for prerecorded calls in answer to consumer objections about ''calls from sellers that use a one-time, insignificant purchase, or even a mere inquiry, as a license to bombard the consumer with solicitations relating to all aspects of the seller's business.''[140] Several suggest imposing restrictions on the source of the telephone numbers to which prerecorded calls may be placed.[141] Others advocate that the Commission consider limitations on the number of transactions between the seller and customer to confine the EBR to businesses with which consumers have regular dealings, or from which they would reasonably expect a follow-up to an inquiry or purchase.[142] Two comments also recommend that consideration be given to shortening the 18-month time period in the current EBR definition to 12 months for prerecorded calls.[143] Two other comments suggest that EBR-based prerecorded message calls might be limited to those that are made in response to prior purchases or existing contracts.[144] Finally, one additional comment asks the FTC to consider modifying the National Do Not Call Registry to permit consumers to opt out of all calls from businesses with which they have an EBR,[145] while another advocates a segregation of company-specific opt-out lists that would require consumers to opt out separately from prerecorded calls and live calls, so that businesses could continue to make live calls to EBR customers who only opt out of prerecorded calls.[146]

C. Discussion and Analysis of the Safe Harbor Modification Proposals

The question the Commission must consider in determining whether to adopt a revised safe harbor with any of the modifications proposed by the industry comments is whether such a safe harbor would serve the public policy interests articulated in the Telemarketing Act. In making that assessment, the Commission continues to employ the same analytical framework used in considering the prior prerecorded call safe harbor proposal:[147]

> [T]he Commission's analysis begins from the premise that a new safe harbor that treats prerecorded telemarketing calls to established customers differently from other prerecorded calls might be appropriate if: (1) The consumer aversion to prerecorded calls (which led to enactment of the TCPA ban on such calls) does not apply when such calls are made to established customers; (2) any harm to consumer privacy is outweighed by the value of prerecorded calls to established customers; or (3) there is something unique about the relationship between sellers and their established customers that gives sellers a sufficient incentive to self-regulate so that they would avoid prerecorded telemarketing campaigns that their customers would consider abusive.[148]

1. Are Consumers Averse to EBR-Based Prerecorded Messages?

We begin, therefore, with the first question for analysis: whether consumer aversion to prerecorded calls does not apply when the calls are made to EBR customers. As the Commission previously stated, if consumers have little or no aversion to prerecorded calls to EBR customers, the fact that such calls avoid the twin harms of ''hangups'' and ''dead air'' would weigh heavily in favor of the adoption of a new safe harbor.[149]

Almost all of the few consumer comments in the record that favored the prior safe harbor proposal for prerecorded calls confined their support for such calls to informational messages,[150] while the industry in effect took the position that the need for such informational messages required blanket approval of prerecorded telemarketing messages to EBR customers without an interactive opt-out mechanism.[151] The Commission therefore took pains to point out that purely informational messages are not ''telemarketing'' messages covered by the TSR.[152]

However, as previously noted, the comments opposing the proposed amendment now emphasize for the first time that the exclusion of purely informational reminder messages from TSR coverage still leaves many convenient prerecorded messages covered by the definition of ''telemarketing,'' because they are both informational and involve a direct or indirect solicitation.[153] Several industry comments argue that a safe harbor for prerecorded telemarketing messages with an interactive opt-out is necessary for businesses to provide these convenient messages to consumers who wish to receive them.

Industry commenters argue, moreover, that many of the consumer comments that oppose prerecorded calls should be discounted because they do not specifically state their opposition to prerecorded calls with the various interactive opt-out options that industry members now advocate. The industry would have the Commission parse out the more than 13,000 consumer comments, and ignore those which object to non-interactive prerecorded

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[138] SmartReply at 7; *but cf.* SmartReply Study at 7 (survey results noting that SmartReply recommends a 17 second message); *but see* CenterPost at 2 (reporting an ''average call length of over one minute'').

[139] IAC at 7; *but see* Global at 19–20 (showing message lengths of from 33 to 93 seconds).

[140] Voxeo at 7–8.

[141] VMBC at 2 (allowing prerecorded messages only to consumers who provide the seller with their contact information); Soundbite at 15–16 (allowing messages only where the seller obtains the consumer's number directly from the consumer, and prohibiting calls where the consumer's number is obtained from a directory, another company, or some other source); Chrysalis Software, Inc. (Ramsey, Greg), No. 79 (prohibiting use of purchased lists); Global at 9 (prohibiting calls to numbers collected in promotional or prize drawings, or obtained from affiliated companies); Valley at 1 (disallowing sale of customer lists to affiliate parties).

[142] IAC at 6 (suggesting that the EBR be limited to allow calls only to consumers who have purchased, rented or leased goods or services on two or more occasions within an 18 month period); Voxeo at 4 (proposing that EBR calls only be permitted if the consumer has engaged in ''a series of regular transactions'' with the seller or if the calls ''directly pertain'' to a prior transaction).

[143] SmartReply at 43 (noting that ''[i]n general, our clients only call customers that have transacted in the prior 12 months'' because messages ''lose relevance'' after that time, and that ''some states require a 6 month EBR.'' *Id.* at 11); IAC at 6; *but see* DMA at 3–4 (the same EBR parameters should exist for both live and prerecorded calls).

[144] VMBC at 1 (''a previous purchase or service agreement''); IAA at 11 (''contract renewals'' and ''proposed changes to existing contracts to address post-contract events and/or changed circumstances'').

[145] Call Command at 2 (suggesting that consumers who exercise this option could then consent to receive any EBR calls they wanted). Unfortunately, the significant cost of any such alteration to the Registry precludes that possibility.

[146] The Heritage Co. (''Heritage''), No. 581, at 3.

[147] None of the comments in the current round questions the Commission's analytical approach in evaluating the prior safe harbor proposal for prerecorded calls.

[148] 71 FR at 58723.

[149] *Id.* Some of the industry comments contend that the proposed amendment improperly treats prerecorded calls as ''abandoned,'' arguing that they are not ''abandoned'' because a message is delivered within two seconds of a live answer. Beautyrock at 1; Superior at 1; Verizon, Attach. A, at 5. However, these objections ignore the text of the prohibition, which defines a call as ''abandoned'' whenever ''a person answers it and the telemarketer *does not connect the call to a sales representative* within two (2) seconds of the person's completed greeting.'' 16 CFR 310.4(b)(iv) (emphasis added).

[150] 71 FR at 58720 & n.53.

[151] *See* 71 FR at 58719 & n.29.

[152] 71 FR at 58725.

[153] One consumer expresses concern that the industry may turn to the use of ''informational'' messages that include an option of ''finding out more'' about a sales offer. Hubbard, No. 115. Such calls would be covered by the TSR as ''telemarketing'' calls.

message blasting, those which object to receiving any telemarketing calls at all (including prerecorded calls), those which object to the breadth of the EBR definition, and those which object to violations of the TSR.

The industry comments appear to recognize, however, that the majority of consumer comments that oppose prerecorded calls cannot be placed into any of these categories because they do not provide sufficient information to permit such a classification. The industry presumes, instead, that because prerecorded messages with interactive opt-outs were not widely used at the time of the prior comment period, the comments from consumers at that time could not have been addressing them. For that reason, the industry contends that the majority of consumer comments that cannot be categorized could not have been objecting to prerecorded messages with an interactive opt-out, and should be disregarded.

The industry's critique of the consumer comments ignores the fact that a few prerecorded call telemarketers had been using interactive opt-out technology that consumers may have experienced before the Commission requested public comment on a prerecorded message safe harbor. Industry's advocacy also overlooks the clear majority of the most recent consumer comments that specifically object to receiving prerecorded calls with an interactive opt-out mechanism. Further, industry neglects to account for a fact not previously placed on the record—that the purportedly quick and easy opt-out provided by an interactive mechanism at most may be accessible by no more than 15 to 20 percent of the consumers who receive prerecorded messages, because at least 80 to 85 percent of these messages end up on consumers' answering machines, where consumers are powerless to avoid the greater burden of calling the seller in an effort to be placed on an entity-specific opt-out list.[154]

The Commission noted, when it denied the request for a safe harbor for prerecorded messages delivered to EBR customers, that the consumer comments in the record provided ''compelling evidence that consumer aversion to prerecorded message telemarketing—regardless of whether an established business relationship exists—has not diminished since enactment of the TCPA, which, in no small measure, was prompted by consumer outrage about the use of prerecorded messages.''[155] The Commission would therefore be hard pressed to ignore the scope and force of that consumer opposition to prerecorded telemarketing messages now—as the industry analysis does—absent compelling evidence that consumers affirmatively support and accept such messages when they provide an interactive opt-out mechanism. The consumer surveys and opt-out rate data submitted by the industry fall short in providing such evidence.

The Minutepoll survey shows that when asked in the abstract, 70 percent of the respondents said that they prefer live telemarketing calls, and only 30 percent said they prefer prerecorded calls.[156] Both the Minutepoll and Forrester surveys purport to show, however, that consumers really prefer prerecorded calls to live calls. For example, Minutepoll reports that when given a choice between a prerecorded call with a ''quick option to get on the calling company's Do Not Call list'' and a ''live operator call that would not be required to do this,'' 68 percent of the respondents said they preferred prerecorded calls and only 32 percent said they preferred live calls.[157] There is reason to doubt, however, that the surveys actually show that consumers affirmatively want to receive prerecorded sales calls. Of the 68 percent of consumers in the more in-depth MinutePoll survey who said they would prefer a prerecorded message with a ''quick DNC opt-out,'' 33 percent directly attributed that choice to their ability to stop future calls and 16 percent to their ability to hang up easier or without guilt. Thus, when forced to choose between an opt-out option with prerecorded calls and no such option with live calls, 33 percent of those who said they prefer prerecorded calls may have been misled by the survey to believe that accepting a prerecorded call was the only way to stop such calls and another 16 percent did not want to listen to the call at all.[158] Thus, neither the Minutepoll nor Forrester results convincingly demonstrate that consumers want prerecorded calls.

The Silverlink Survey appears to confirm what the other two surveys suggest—that at best a comparatively small minority of consumers affirmatively appreciate receiving prerecorded telemarketing calls.[159] More importantly, the Silverlink Survey, which was submitted to show greater consumer acceptance of prerecorded healthcare messages than of other telemarketing messages, demonstrates that consumer acceptance of prerecorded messages varies dramatically depending on the subject matter of the message. By overwhelming margins, survey participants said they would be unwilling to listen to a prerecorded credit card offer at discounted rates (91 percent) or an offer of discounted vacation travel packages (87 percent), whereas only 41 percent said they would be unwilling to listen to a healthcare-related prerecorded telemarketing call.[160]

Thus, far from providing compelling evidence of consumer acceptance of prerecorded telemarketing messages with an interactive opt-out option, the industry surveys manifest widespread consumer disaffection with such calls. With these surveys as background, the other evidence proffered by the industry to show consumer approval of prerecorded messages—opt-out rates and consumer actions in response to prerecorded messages—is not only indirect, but singularly unpersuasive.

As previously noted, most of the industry claims about low opt-out rates fail to provide sufficient information for an assessment of the claims, either because they combined rates for calls that had an interactive opt-out with those that did not, based the rate on

[154] *See* note 246, *infra*, and accompanying text. Although one industry member states that consumers who receive prerecorded messages on their answering machines and call the toll-free number provided are connected to the same automated opt-out mechanism as those who answer a call, none of the other industry comments indicates that the opt-out mechanism for recipients of answering machine messages would be equally convenient. *See* note 123, *supra,* and accompanying text.

[155] 71 FR at 58723.

[156] *See* note 81, *supra*, and accompanying text. The Commission notes that, by asking whether consumers would rather receive prerecorded message calls or calls from a sales agent, both the MinutePoll and Forester surveys may have led survey respondents to presume that they were being asked to choose between an equal number of prerecorded calls and sales agent calls. The choices of those who said they would prefer prerecorded calls might have changed if they understood they could receive a greater number of pre-recorded calls than sales agent calls.

[157] *See* note 82, *supra,* and accompanying text; *cf.* note 85, *supra*, and accompanying text (Forrester data).

[158] MinutePoll, Exh. A, at 2. Similarly, of the 30 percent of consumers who initially said they preferred prerecorded calls when asked ''in the abstract,'' more than half (54 percent) said the reason for this preference was that they could easily hang up on the prerecorded calls. This might indicate that at most 15 percent of the survey respondents may actually have wished to receive prerecorded calls. *Id.*

[159] It is noteworthy that 78 percent of the Silverlink Survey participants reported that they actually received an automated call within the preceding 12 months. Silverlink Survey, Attach. A at 2.

[160] Silverlink Survey at 5 & n.14. The fact that as many as 41 percent of the survey participants said they would be unwilling to listen to healthcare-related messages indicates that the high satisfaction rates (89–94 percent) reported in the CenterPost surveys can best be attributed to the fact that only customers who responded to the prerecorded call were surveyed.

calls that deferred the opt-out information until the end of the call, or failed to indicate whether the rate calculation was based only on calls that were actually answered.[161] The two that did provide sufficient information are exceptional cases, with one providing prerecorded calls offering casino discount promotions and the other notifying customers of special sales at ''Fortune 500'' retailers.[162] In contrast to the low rates cited in the industry comments, the Commission's law enforcement investigations suggest that interactive opt-out rates for prerecorded telemarketing calls correctly calculated as a percentage of the calls actually answered may range from 10 to 20 percent. The likely reason for the apparently low opt-out rates reported by the industry is that the great majority of consumers probably hang up on prerecorded calls without waiting for information on how to opt out.[163]

The fundamental problem with opt-out rates and other indirect measures of consumer acceptance of prerecorded calls is that consumers who do not wish to be bothered by prerecorded telemarketing messages, if they do not simply answer and hang up, may let the message roll over to an answering machine where they can delete it later.[164] The SmartReply study reporting that consumers are 300 percent less likely to call a toll-free number to opt out in response to an answering machine message than to use an interactive opt-out mechanism suggests that consumers are quite averse to non-interactive opt-out mechanisms.[165] It appears more than likely that the percentage who bother to assert an entity-specific opt-out is a small percentage of those who dislike prerecorded telemarketing messages. Similarly, while there is some evidence in the record that consumers who answer prerecorded message calls and listen to them actually make purchases, particularly of healthcare products,[166] this may occur only in a relatively small percentage of the prerecorded calls that are made.[167]

After a careful review of the record in its entirety, it is the Commission's considered opinion that the evidence shows that a substantial majority of consumers dislike telemarketing calls that deliver prerecorded messages, with or without an EBR or even an interactive opt-out mechanism, but that a comparatively small minority of consumers may, in fact, appreciate the convenience of EBR-based prerecorded calls when they provide an interactive opt-out mechanism, at least in some circumstances.[168] While a precise percentage cannot be determined from the information in the record, the record evidence suggests that at least 65 to 85 percent of consumers do not wish to receive prerecorded telemarketing calls.[169] In fact, these percentages would likely have been higher, perhaps significantly higher, if the MinutePoll survey had given participants the choice of receiving **no** prerecorded calls without their consent. Consequently, the first potential rationale for creating a new safe harbor for interactive prerecorded telemarketing calls is not supported by the record.

2. Is Harm to Privacy Outweighed by the Value of Prerecorded Calls?

The entire record in this proceeding is clear that an overwhelming number of consumers hate prerecorded calls, and consider them a gross invasion of their privacy at home. Although the record also now contains some limited evidence of consumer willingness to accept some telemarketing calls that deliver a prerecorded message and include an interactive opt-out mechanism, only a small minority of consumers say they want to receive such calls.[170] There is clear consumer support in the record for prerecorded informational messages that are not prohibited by the TSR—*i.e.*, messages that do not include a sales pitch or information about how to make a purchase. In contrast, there is scant consumer support for interactive prerecorded telemarketing messages that combine an informational component and a sales component, or provide only a sales pitch.

The relatively few consumers who want to receive interactive prerecorded telemarketing messages primarily say they value such messages because they find them a ''useful'' convenience in their busy lives, or because they regard them as less invasive than live conversations with a telemarketer. The greater majority who object to prerecorded telemarketing messages in general, or to interactive messages in particular, consider them an intrusive and disruptive invasion of their privacy at home that amounts to harassment.

Any argument that the harm of an invasion of privacy is outweighed by the value of prerecorded telemarketing messages as a ''useful'' convenience, or their value as a means of avoiding the possible discomfort of conversing with a telemarketer, would be untenable unless the privacy invasion were relatively minor. For the great majority of consumers, however, the ringing of the telephone is anything but a minor invasion of the privacy of their homes, particularly when the call they answer converts a two-way instrument of communication into a one-way broadcast of a prerecorded advertisement, even if that broadcast has some interactive features.

The Commission is satisfied that there is nothing new in the record that would warrant a different conclusion on this issue than it reached before in denying the VMBC request for a safe harbor for prerecorded messages with an interactive opt-out mechanism. The fact that the record now includes evidence that some consumers would find interactive prerecorded messages useful does not outweigh the significant harm to the privacy interests of consumers, as attested by the great majority of consumer comments in the record and by the survey data submitted. This argues for choice in this matter—to allow those consumers who want such calls to consent to receive them, while protecting the large majority who deplore them from having to receive and opt out, one by one, from each seller's

[161] *See* note 90, *supra*, and accompanying text.

[162] *See* note 91, *supra*. The brevity of the messages in the SmartReply study also may have contributed to the unusually low opt-out rates reported.

[163] *See* note 52, *supra*, and accompanying text.

[164] Only three percent of the customers in the SmartReply study answered the phone and listened to some or all of each of eight monthly calls. *See* note 92, *supra.*

[165] *See* note 92, *supra.*

[166] *See* note 95, *supra*, and accompanying text.

[167] None of the industry comments provides data showing both the number of prerecorded calls made and the number of sales resulting from those calls.

[168] At least three consumers opposed to the proposed amendment say that prerecorded messages benefit them because the same offers might get lost or go unread in the volume of junk mail they receive. Knoll, No. 162; Kelly, No. 457; DeSimone, No. 161; *see* Harvey, No. 186; *cf.* Beebe, No. 62. Other consumers equate prerecorded messages with the junk mail and spam they receive and believe that the volume of prerecorded calls will grow overwhelming unless restrictions are placed on such calls. *See* Wallace, No. 375 (gets ''way too much junk mail also''); Brady, No. 569 (already gets ''more than enough. . . junk mail and internet spam''); Leach, No. 311 (gets ''so much junk mail everyday, isn't that enough?'').

[169] *See* notes 156–158 *, supra,* and accompanying text. Although the 2005 AARP survey similarly indicated that 84 percent of sampled consumers with numbers on the Registry considered telemarketing calls ''irritating'' or invasive of ''my privacy,'' *see* note 35, *supra*, the Commission does not rely on that survey because it inquired about all ''telemarketing'' calls, not just prerecorded calls.

[170] *See* note 53, *supra* (2 percent of consumer comments oppose a written agreement requirement). If the previous consumer comments did not think to object specifically to calls from businesses with which the consumer has an EBR, *see* note 56, *supra*, and accompanying text, that oversight is hardly a reliable indication that the commenters would welcome EBR calls in some circumstances, as an industry comment asserts. *See* note 57, *supra*, and accompanying text.

call list. Thus, the second potential rationale for adoption of a safe harbor for interactive prerecorded telemarketing calls is not supported by the record. That fact, as the Commission previously noted, ''assumes particular importance in view of Supreme Court precedent that has long recognized the significant governmental interest in protecting residential privacy.''[171]

The Commission emphasizes that this conclusion is by no means solely the result of the relative percentages of consumers who say they oppose or support prerecorded telemarketing messages, or who do or do not perceive that their privacy at home is harmed by receiving them. The conclusion is influenced in no small part by the considerable value Congress clearly attached to preserving the privacy of citizens in their homes when it enacted the Telemarketing Act, and specifically directed the Commission to ''include in [the TSR] a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy.''[172]

3. Do Sellers Have a Strong Incentive to Avoid Abuses?

The third potential rationale for creation of a new safe harbor as indicated in the NPRM is that sellers might self-regulate the number of prerecorded messages they send in order to preserve the goodwill of established customers. The Commission determined that this consideration could not support such a safe harbor. Some industry comments submitted in response to the NPRM challenge this determination, but not persuasively. The Commission previously concluded that: (1) While well-established businesses with brand or name recognition may have incentives to exercise restraint, the same is not necessarily true for new entrants or small businesses in highly competitive markets; (2) A safe harbor for prerecorded calls would expose consumers to prerecorded calls from every seller from whom they had made a single purchase within the past 18 months; (3) Sellers would have less incentive to exercise self-restraint with respect to customers who make inquiries, because they would have no existing customers to lose, but only customers to gain; (4) The likelihood that industry-wide self-restraint would be effective requires consideration of the industry's record of compliance; (5) Although overall compliance is quite good, not all covered entities are complying, and that fact presents a particular problem with respect to consumer concerns about the breadth of the industry's interpretation of what constitutes an EBR; and (6) The significantly lower cost of prerecorded telemarketing calls, compared to live calls, will create economic incentives to increase the number of prerecorded telemarketing calls consumers receive in their homes.[173]

Some in the industry assert that the Commission gave ''inadequate consideration'' to the argument that sellers have strong incentives to avoid alienating existing customers, 80 percent of whose telephone numbers may be listed on the Registry. These comments argue that because the availability of an interactive opt-out mechanism could easily lead to the loss of the right to contact many EBR customers by telephone, sellers would exercise caution in using prerecorded messages.[174] The Commission believes it did give appropriate weight to these considerations, however, when it explicitly acknowledged that sellers with brand or name recognition may have sufficient incentives to exercise restraint in placing prerecorded telemarketing calls to their customers.[175]

Some industry comments further criticize the Commission's concern about whether new entrants and small businesses in highly competitive markets would have sufficient incentives to exercise the same self-restraint, contending that they share the same incentives and are less likely than established businesses to use prerecorded telemarketing calls.[176] This criticism ignores the powerful economic incentives for new entrants and small businesses to seek to grow their businesses. The Commission considers it noteworthy that none of the industry comments challenged its conclusion that sellers would have less incentive to exercise self-restraint with respect to consumers who make an inquiry that creates an EBR, and thus are potential customers, rather than existing customers.[177]

Based on the entire record and its enforcement experience, three considerations lead the Commission to conclude that, if anything, it may have overestimated the incentives for industry self-restraint in the use of prerecorded telemarketing messages. First, any such self-restraint is called into question by the more than 100 consumer complaints a month that the Commission has been receiving about prerecorded telemarketing calls—the fifth highest number of all TSR violation complaints.[178] Second, the Commission's recent law enforcement investigations and cases provide evidence that millions of prerecorded calls are being made to numbers on the Registry, and that many of these calls are abandoned if a consumer answers the telephone.[179] Third, two facts about which the Commission was not previously aware—an industry analysis showing that consumers are 300 percent less likely to opt out from an answering machine message that provides a toll-free number than from a prerecorded call that has an interactive opt-out mechanism,[180] and industry reports that between 80 and 85 percent of prerecorded messages end up on answering machines[181]—suggest that sellers may have little reason to be overly concerned about losing EBR customers from too frequent use of prerecorded telemarketing messages since most consumers do not bother to call back to opt out after retrieving such messages. This data also suggests that the relatively low opt-out rates reported in the industry comments may be more a function of the relatively small percentage of such calls answered by a

[171] 71 FR at 58723.

[172] 15 USC 6102(a)(3)(A). This directive appears consistent with the previously expressed intent of Congress, as stated in the preamble to the TCPA, that ''banning . . . automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call . . . is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.'' TCPA, Pub. L. No. 102—243, 105 Stat. 2394 (1991) at § 2(12).

[173] 71 FR at 58723–24.

[174] *See* note 107, *supra*, and accompanying text.

[175] 71 FR at 58723.

[176] *See* note 107, *supra*.

[177] 71 FR at 58723–24.

[178] Consumers filed more than 1200 complaints about prerecorded calls with the Commission from January 1 through December 31, 2007.

[179] *E.g., FTC v. Voice-Mail Broad. Corp.*, No. 2:08-cv-00521 (C.D. Cal. Feb. 8, 2008) ($3 million civil penalty for failing to comply with the FTC's enforcement forbearance policy in delivering prerecorded messages; *i.e.*, abandoning over 46 million calls, that provided no opt-out option to consumers who answered); *United States v. Guardian Commc'n., Inc.*, No. 4:07–04070 (C.D. Ill. Nov. 15, 2007) ($7.8 million civil penalty for automated prerecorded message blasting to up to 20 million numbers a day, many of which were placed to numbers on the Registry, and for abandoning calls answered by a person); *United States v. Craftmatic Indus., Inc.*, No. 07–4652 (E.D. Pa. Nov. 8, 2007) ($4.4 million civil penalty for hundreds of thousands of calls to numbers on the Registry and for abandoning millions of calls); Global Mort. Funding, Inc., No. 07–1275 (C.D. Cal. filed Oct. 30, 2007) (complaint alleging hundreds of thousands of calls to numbers on the Registry, and abandoning many calls answered by a consumer). *See also* note 15, *supra*.

[180] *See* note 92, *supra*.

[181] *See* note 246, *infra*, and accompanying text.

consumer rather than an answering machine. Thus, the supposed incentive for industry self-restraint created by the availability of an interactive opt-out mechanism is liable to be less effective than it previously appeared.[182]

A number of comments also object to the Commission's consideration of the industry's record of compliance with the TSR in assessing the likelihood that industry-wide self-restraint would be effective. They argue, in essence, that it is unfair to judge industry members who try to comply with the law by the actions of bad actors who are unlikely to comply with any TSR requirement unless brought to account by law enforcement action.[183] This argument would have greater force were it not for the fact that, as some in the industry have privately acknowledged, a few industry submissions show,[184] and the Commission's law enforcement experience demonstrates,[185] it was not until late in 2006 that many finally began to comply with a key requirement of the enforcement forbearance policy for prerecorded calls announced by the Commission in November 2004, by telling consumers how to opt out at the outset of the call, rather than at the end of the message.[186] The Commission's consideration of this issue has focused more narrowly, however, on the fact that the industry compliance record presents a particular problem with respect to consumer concerns about the breadth of the industry's interpretation of what constitutes an EBR, as the consumer comments and the Commission's enforcement experience have indicated.[187]

Finally, the industry challenges consumer and Commission concerns that industry-wide self-restraint would be unlikely to prevent an increase in prerecorded telemarketing calls as ''speculative'' and ''not supported by the record,'' notwithstanding an industry comment acknowledging that such an increase is ''theoretically possible.''[188] Even if it is true, as industry comments argue,[189] that VoIP is unlikely to reduce call transmission costs much below current long-distance rates for high volume users, industry cannot (and does not) dispute that prerecorded message telemarketing is significantly less expensive for sellers than live telemarketing conducted by sales agents. While any forecast of likely future events may be unavoidably ''speculative'' to some degree, it is only reasonable to expect that the prospect of labor cost savings would increasingly lead sellers to convert as much live telemarketing as possible to prerecorded calls.

Because the record does not provide persuasive support for any of the three potential justifications for according special treatment to interactive prerecorded telemarketing calls to EBR customers, there is no justification for creation of a safe harbor for such calls. Accordingly, the Commission has decided not to reconsider its previous denial of the VMBC request for a safe harbor.

D. The Proposed Amendment

As discussed earlier in this notice, the October 2006 NPRM proposed and sought public comment on an amendment to the TSR that would permit prerecorded telemarketing calls only to consumers who provided their express written agreement to receive them.[190] This proposal was based in large measure on the extensive record of strenuous consumer opposition to the VMBC request for a safe harbor for prerecorded calls. In proposing the amendment to make explicit the prohibition of calls delivering prerecorded telemarketing messages when answered by a consumer that is implicit in the TSR's call abandonment prohibition,[191] the Commission emphasized that the Telemarketing Act directs the FTC ''to include in [the TSR] a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy.''[192] The Commission further concluded that ''the present record supports a finding that a reasonable consumer would consider prerecorded telemarketing calls coercive or abusive of such consumer's right to privacy,''[193] but specifically requested public comment on that issue.[194]

1. Discussion and Analysis of the Proposed Amendment

Consumers find non-interactive prerecorded calls abusive because they are powerless to interact with a recording.[195] For this reason, most of the industry comments apparently accept that a reasonable consumer would consider non-interactive telemarketing message calls ''coercive or abusive of such consumer's right to privacy.''

The industry comments strongly contest, however, the Commission's authority to prohibit the delivery of prerecorded telemarketing messages that provide an *interactive* opt-out mechanism without a consumer's prior written agreement to receive them. They primarily argue that interactive messages are significantly different from non-interactive messages because consumers are not ''powerless'' to prevent privacy abuses from prerecorded message calls that provide an interactive opt-out mechanism. The industry comments therefore contend that it would be unreasonable for consumers to consider such messages abusive of their privacy.

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[182] The annual 33 to 50 percent customer attrition experienced by retailers, SmartReply at 41, would appear to provide a strong incentive to use prerecorded calls to make sales before the attrition occurs, whereas opt-out rates are so low as to provide little incentive for self restraint.

[183] *See* Charles Duhigg, *Bilking the Elderly with a Corporate Assist*, N.Y. Times, May 20, 2007, at A–1 (reporting that, since the start of 2006, ''federal agencies have filed lawsuits or injunctions against at least 68 telemarketing companies and individuals accused of stealing more than $622 million'').

[184] Message at 2–3 (message scripts with opt-out at end of call); Draper's and Damon's (message script with opt-out at end of call).

[185] *FTC v. Voice-Mail Broad. Corp.*, No. 2:08-cv-00521 (C.D. Cal. Feb. 8, 2008) ($3 million civil penalty, with all but $180,000 suspended due to inability to pay, for law violations including failure to provide consumers who answered prerecorded calls with an opportunity, at the outset of the message, to opt out). This violation was somewhat surprising since it was VMBC that first advocated a safe harbor for prerecorded messages with an interactive opt-out opportunity at the outset of the message.

[186] 69 FR at 67290 (requiring, *inter alia*, a disclosure of the opt-out mechanism provided at the *outset* of a prerecorded call) (emphasis added). The argument would also be more compelling if the record did not include consumer complaints about prerecorded calls from well-established businesses with brand or name recognition. *See* notes 19–21, *supra,* and accompanying text.

[187] 71 FR at 58724 & n.91, *citing United States v. Columbia House Co.*, No. 05C—4064 (N.D. Ill. filed July 14, 2005) ($300,000 civil penalty settlement for alleged calls to tens of thousands of numbers on the Registry to consumers who last made a purchase from the defendant far outside the prior 18-month period during which the EBR exemption would have applied). The Commission has no reason to believe that narrowing the EBR definition would succeed in protecting consumer privacy, and would eliminate the problems addressed by the proposed amendment. Such an approach would have the undesirable effect of reducing the ability of businesses to communicate with their EBR customers with live calls.

[188] *See* note 106, *supra*, and accompanying text. The Commission is not persuaded that it should ignore the basic economic principles which led to its concern, and rely instead on vague industry assurances, based on anecdotal evidence, that prerecorded calls ''are most useful in specific, targeted applications'' to conclude that an increase in prerecorded calls would not occur if a safe harbor were created.

[189] *See* note 108, *supra*, and accompanying text.

[190] 71 FR at 58726–27.

[191] 16 CFR 310.4(b)(1)(iv) (prohibiting call abandonment, and defining call abandonment as a failure to connect a call to a sales representative within two seconds of the completed greeting of the person who answers).

[192] 71 FR at 58726.

[193] *Id.*

[194] 71 FR at 58733.

[195] 71 FR at 58723.

The Commission does not find this argument persuasive. As the Commission noted when it amended the TSR to establish the Registry, ''the company-specific approach is seriously inadequate to protect consumers' privacy,'' not only from calls from a single telemarketer, but especially when the volume of telemarketing calls from multiple sources is so great that ''consumers find even an initial call from a telemarketer or seller to be abusive and invasive of privacy.''[196] Consequently, reasonable consumers may very well experience even telemarketing calls that deliver a prerecorded message but include an interactive entity-specific opt-out as coercive and abusive of their rights to be left alone in their own homes. Such a conclusion might be particularly justified if an overall increase in the number of such calls were anticipated because of their low cost; but it would not be unreasonable even if no such increase were anticipated, given the evidence in the record that interactive opt-out mechanisms do not always work,[197] and can be just as ineffective and burdensome for consumers as the entity-specific opt-out procedures criticized in the Commission's decision to create the Registry.[198]

Second, the industry argues that the record cannot support a finding that interactive prerecorded messages are ''coercive or abusive'' because the consumer comments submitted during the initial comment period in 2004 do not explicitly object to *interactive* messages. For the reasons previously discussed, the Commission finds this argument unpersuasive.[199] In this regard, the most telling evidence in the record is the industry survey results showing that a significant majority of consumers do not want to receive interactive prerecorded messages.[200] Thus, the Commission concludes that the preponderance of the evidence on the record as a whole supports adoption of the proposed amendment.[201]

Having reviewed the entire record, the Commission concludes that the reasonable consumer would consider interactive prerecorded telemarketing messages to be coercive or abusive of such consumer's right to privacy. The mere ringing of the telephone to initiate such a call may be disruptive; the intrusion of such a call on a consumer's right to privacy may be exacerbated immeasurably when there is no human being on the other end of the line. The Commission is inclined to agree that prerecorded telemarketing messages, whether interactive or non-interactive, convert the telephone from an instrument for two-way conversations into a one-way device for transmitting advertisements, as one industry comment notes. The Commission believes that the other narrowly focused industry arguments to the contrary disregard the intrusiveness and disruptiveness of calls delivering prerecorded messages, and seriously underestimate the very high value consumers place on their privacy at home.

In reaching this conclusion, the Commission remains mindful of industry concerns about the impact of this determination, and appreciates the potential consequences for law-abiding industry participants. For this reason—and out of consideration for the minority of consumers who may wish to receive prerecorded messages—the Commission declines to adopt the suggestion of two consumer groups that prerecorded telemarketing calls be banned completely.[202] Also for this reason, the Commission is adopting a number of provisions industry commenters have advocated to mitigate the burden of implementing the amendments the Commission is adopting, as discussed below.

The Commission is also mindful of the legitimate interests of both sellers and consumers in communicating immediately following a sale. The Commission therefore wishes to emphasize that prerecorded messages communicating delivery or service dates or times, and similar information, are informational calls that fall outside the ambit of the TSR's regulation of ''telemarketing.'' Thus, sellers may continue to use prerecorded messages for those purposes without restriction.

Finally, the Commission notes that it is aware that the technology used in making prerecorded messages interactive is rapidly evolving, and that affordable technological advances may eventually permit the widespread use of interactive messages that are essentially indistinguishable from conversing with a human being. Accordingly, nothing in this notice should be interpreted to foreclose the possibility of petitions seeking further amendment of the TSR or exemption from the provisions adopted here.

2. Commenters' Suggestions for Revisions to the Proposal

The public comments on the proposed amendment urge several revisions that the Commission has taken into consideration in refining it. The comments variously advocate: (1) modification of the requirement for a signed, written agreement to give sellers greater flexibility in obtaining consumer consent to receive prerecorded message calls; (2) clarification of what disclosures sellers must make when obtaining a written agreement from a consumer; (3) reconsideration of whether the amendment should apply to messages left on answering machines; and (4) other technical revisions.

a. Suggested Modifications of the ''Written Agreement'' Requirement

Several industry comments request modification of the ''written agreement'' requirement of the proposed amendment to mitigate compliance burdens. Because ''much commerce occurs over the Internet, by phone, and in other simple formats without writing and without a clear signature,''[203] several comments urge the Commission to modify the proposed amendment to give businesses greater flexibility in obtaining the required agreement from consumers to receive prerecorded message calls.[204] Specifically, several ask that the amendment be modified so that the agreement need not be in writing,[205] and so that an old-fashioned,

[196] 68 FR at 4629–30.

[197] *See* Section II.A.4, *supra*.

[198] 68 FR at 4629.

[199] *See* the discussion in Section II.B.1, *supra*.

[200] The Commission notes that the fact that a clear majority of consumers do not want to receive interactive prerecorded telemarketing messages does not necessarily compel a finding that a reasonable consumer would consider such messages ''coercive or abusive,'' any more than the fact that a minority may want to receive such messages would compel the opposite conclusion. The standard is an objective one, which requires the Commission to determine, from the perspective of a ''reasonable consumer,'' whether such a consumer ''would consider'' prerecorded telemarketing messages to be ''coercive or abusive.''

[201] Two additional industry arguments are based on a misunderstanding of the applicable evidentiary standard. According to these arguments, no conclusion can be drawn that reasonable consumers could consider such calls coercive or abusive of their right to privacy absent a study proving that interactive prerecorded message calls are abusive, or because there is a ''subset'' of consumers who say they want to receive such messages. *See* notes 98–99, *supra*, and accompanying text.

[202] AARP at 4; PRC at 5.

[203] DMA at 8; *cf.* Voxeo at 9 (''[W]ith the widespread use of the Internet and other platforms for electronic or long-distance shopping,'' many transactions never leave ''the confines of cyberspace'').

[204] DMA at 8; IAA at 11; IAC at 8; SmartReply at 23, 28 (seeking ''liberalizing'' of ''the definition of express consent'' so that it can be obtained ''with minimal effort and minimal commitment''); Call Command at 5 (requesting ''a less restrictive approach to obtaining a consumer's express consent'').

[205] *E.g.,* DMA at 9; IAA at 11; NNA at 5 (permit ''oral consent''); SmartReply at 28 (no ''burdensome document or contract''); SMG Group, LLC (Grossman, Steven), No. 613 at 1 (''a more reasonable measure would be to require verbal or even electronic consent'').

pen-to-paper signature not be required.[206] Another contends that the amendment should require no more than that the seller or telemarketer ''document a consumer's intent to be called.''[207]

Similarly, a number of comments request clarification that the E–SIGN Act applies not only to the signature requirement of the proposed amendment,[208] but also to the ''written agreement'' requirement.[209] Several comments assert that E–SIGN permits an on-line means via website or email of obtaining a consumer's agreement;[210] a telephone keypress authorization;[211] a recording of oral agreement given during a call;[212] or an oral agreement given during a call with third-party verification.[213] Other comments without reference to E–SIGN urge the Commission to permit a check-box on a return postcard without a signature,[214] an unsigned application on which a consumer provides his or her telephone number,[215] or an in-store disclosure by a consumer of his or her telephone number in response to a sales agent's request.[216]

It is clear from the comments that much of the industry's opposition to the proposed amendment centers on the requirement of a signed, written agreement to receive prerecorded calls, and the presumed cost and paperwork burden such a requirement would entail. The industry comments appear to overlook the fact that the TSR already expressly permits obtaining consumer signatures electronically as permitted by the E–SIGN Act in other provisions requiring signed written agreements from consumers:

> For purposes of this Rule, the term ''signature'' shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.[217]

Because it always has been the Commission's intention to minimize any paperwork cost or burden on businesses by permitting electronic signatures as evidence of compliance with the amendment, the Commission has added an identical footnote to the proposed amendment so that sellers can be assured that written agreements obtained in compliance with E–SIGN will satisfy the requirements of the amendment, such as, for example, agreements obtained via an email or website form, telephone keypress, or voice recording.[218] Any agreement obtained pursuant to E–SIGN must be sufficient to show that the consumer: (1) received clear and conspicuous disclosure of the consequences of providing the requested consent — *i.e.*, that the consumer will receive future calls that deliver prerecorded messages—and (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates.[219] The seller will have the burden of proof to demonstrate that a clear and conspicuous disclosure has been provided, and an unambiguous consent obtained.[220] The Commission will monitor E–SIGN compliance closely to ensure that consumers' privacy preferences are protected.

The amendment's written agreement and signature elements are essential, however, to ensure that consumers are adequately apprised of the nature of the request and the fact that they will receive prerecorded calls as a consequence of their agreement.[221] Return postcards or applications that are unsigned therefore will not suffice to demonstrate a consumer's agreement to receive prerecorded message calls. For the same reason, a consumer's oral response to an in-store request from a sales clerk for a home telephone contact number would not evidence the consumer's agreement to receive prerecorded calls, nor would an oral response to a sales clerk's express request for the consumer's agreement to receive prerecorded message calls.

Point-of-sale agreements can be obtained electronically on POS devices or on paper, at the seller's option, so long as consumers have a clear choice to receive, or not to receive, prerecorded message calls. Both ''Yes'' and ''No'' check boxes would serve that purpose when placed below a straightforward statement such as: ''I would like to receive telephone calls with prerecorded messages from ABC Co. that provide special sales offers such as _____ at this telephone number: _____.'' Other formulations may serve as well, and although there might be some efficiencies from mandating this language,[222] the Commission believes it preferable to allow industry some flexibility on this point, rather than to prescribe mandatory language.

b. Suggested Disclosure Requirements

A variety of suggestions were advanced as to the potential need for additional disclosures with regard to obtaining a consumer's written agreement. Two industry commenters, correctly noting that sellers will have the burden of proving that they have obtained a consumer's written agreement, urged that the Commission adopt limited disclosure requirements for obtaining the written agreements required by the amendment.[223] One of

[206] *E.g.,* DMA at 9; Schwartz at 5 (contending that the signature requirement is ''too burdensome for businesses to implement and will prevent [use of] interactive telemarketing calls''); *see* IAA at 4–5, 8.

[207] Call Command at 5.

[208] *E.g.*, SmartReply at 33; Countrywide at 2;Vontoo at 2; Voxeo at 9.

[209] Call Command at 6 (''With respect to consents obtained through e-mail and the Internet, it is assumed that the answer is straightforward—*i.e.*, such methods of consent are clearly considered written consents under the Federal E–SIGN Act'').

[210] *Id.*; Voxeo at 9; Call Command at 5–6; DMA at 9; Vontoo at 2; Third Party Verification, Inc. (''Verification''), No. 134, at 1; Draper's at 1; Booking Angel (McEvoy, Dean), No. 121, at 1; Healthcare Technology Systems (Mundt), No. 103 at 1; Zucker at 2. A few consumers who oppose the amendment agree. *E.g.,* Eapen, No. 57; Kaushik, No. 48; Shimko, No. 502.

[211] Countrywide at 2; Global at 11; Call Command at 5; SmartReply at 15; *see also, e.g.,* Brockbank, No. 96; Maruca, No. 602 ; Rosato, No. 156.

[212] DMA at 9 ; Career at 2; Call Command at 5, 6; NAA at 7 (noting that Sections 310.3(a)(3) and 310.4(a)(6) of the TSR already permit oral consent in different contexts); NNA at 5; NAA at 6; MinutePoll at 9.

[213] Verification at 1.

[214] DMA at 9.

[215] Call Command at 5; SmartReply at 15.

[216] SmartReply at 15 (with store signage disclosing the purpose of the telephone number request or an oral disclosure read from a point of sale system screen by a sales associate).

[217] 16 CFR 310.3(a)(3)(i) n.5 and 310.4(b)(1)(iii)(B)(i) n.6.

[218] The E–SIGN Act defines an ''electronic signature'' as ''an electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.'' 15 USC 7006(5). The Act further defines an ''electronic record'' as ''a contract or other record created, generated, sent, communicated, received, or stored by electronic means.'' 15 USC 7006(4).

[219] Thus, if a seller wishes to capture a consumer's telephone number via automated number identification (''ANI''), the consumer must have an opportunity to authorize calls to a number that is different from the number used to consent to receipt of prerecorded calls.

[220] Thus, disclosures hidden in lengthy end user license agreements or on the back of printed forms will not pass muster.

[221] Obtaining the required agreement need not prolong a conversation with a telephone sales agent, and either could precede or follow the conversation using an automated request and an interactive voice or keypress mechanism to document the response. *See* IAC at 9 n.17. In an incoming call, the request could be made during the ''hold'' time before the call is transferred to an agent. If no sales agent is immediately available, the amendment would not prevent a consumer from leaving a message or otherwise agreeing to receive a one-time automated return call when an agent ultimately becomes available. *See* Eckert, No. 90.

[222] *See* Dunlop, No. 118, at 1 (suggesting that the Commission prescribe ''explicit sample waiver language'' that would not only help sellers ''avoid attorney drafting costs and litigation costs'' but also ''save consumers reading time'').

[223] DMA at 9; Career at 4. One consumer similarly suggests that sellers only be required to retain ''proof'' that a consumer ''was informed that prerecorded messages would be used. *See also* Strang, No. 189, at 4 (recommending that in lieu of

Continued

these comments suggest that a ''clear and conspicuous'' disclosure be required.[224] Another requests that any disclosure requirement be a ''clear, simple, plain language disclosure'' that ''neither sugarcoats nor implicitly disparages what the customer is agreeing to.''[225]

Consumers who address the issue agree that the proposed amendment should specify what must be disclosed to consumers before they give their express written agreement to receive prerecorded calls, but take a more expansive view of the disclosures that are needed. One consumer advocate asks that the Commission ''propose specific rules to ensure the clarity and simplicity of a seller's invitation to consumers'' to provide their express written agreement, and publish the proposed rules for additional public comment.[226] The Commission disagrees that an additional notice and comment period is necessary for this purpose, given the thoughtful comments already provided on this issue.

Some consumers express concern that sellers' requests for their agreement to receive prerecorded calls might be hidden in contest entry or other forms,[227] or on the back of credit card receipts.[228] The Commission recognizes that these concerns are legitimate, based on its enforcement experience,[229] and accordingly has incorporated in the amendment a requirement that a seller's request for a consumer's agreement to receive prerecorded calls be ''clearly and conspicuously'' disclosed, as two industry comments also recommend.[230] Legal precedent established by the Commission's long use of this term of art will ensure that consumers are not deceived or confused by hidden ''agreements'' buried in fine print.[231]

One consumer comment recommends a disclosure that a consumer's agreement to receive prerecorded calls is not required as a condition of the purchase of any good or service.[232] The Commission agrees that the entire purpose of the amendment would be defeated if sellers could require consumers to agree to receive future calls delivering prerecorded messages as a condition of making a purchase. The Commission believes this point is well taken, and has incorporated in the amendment a prohibition that will prevent any such practice. The Commission does not agree, however, that an additional affirmative disclosure is necessary.

Two consumers also advocate a requirement to disclose whether the seller will sell consumers' contact information to third parties or share it with affiliates or other companies.[233] In this regard, the Commission emphasizes that a consumer's agreement with a seller to receive calls delivering prerecorded messages is non-transferable. Any party other than that particular seller must negotiate its own agreement with the consumer to accept calls delivering prerecorded messages. Prerecorded calls placed to a consumer on the National Do Not Call Registry by some third party that does not have its own agreement with the consumer would violate the TSR. Thus, because information sharing cannot be a shortcut for the required written agreement to receive prerecorded calls, the Commission sees no need to impose a disclosure about information sharing.

Suggestions that the Commission require disclosures about the risk that prerecorded calls could tie up a consumer's telephone line and pose a health or safety risk,[234] about how frequently the seller would make such calls,[235] and about whether a consumer can later opt out after agreeing to receive prerecorded calls[236] are unnecessary. The need for any such disclosure is obviated because the Commission has decided to incorporate in the amendment a requirement that all prerecorded calls promptly disclose and provide an automated interactive opt-out mechanism that immediately terminates the call after adding the called party's number to the seller's Do Not Call list.[237] Consequently, consumers who believe they are receiving an excessive number of calls from a seller or who otherwise wish to withdraw their agreement to receive such calls will be able to do so by utilizing the interactive mechanism. In addition, if a telephone line must be cleared quickly to handle an emergency, this requirement will ensure that consumers can terminate a message at any time. Similarly, a consumer request for a disclosure about whether prerecorded messages will be left on answering machines is unnecessary,[238] because, as discussed below, the Commission has decided to expand the coverage of the amendment to include prerecorded messages delivered to answering machines.[239]

The Commission is not persuaded of the need to require any of the other disclosures the consumer comments suggest. Disclosure of the times when prerecorded telemarketing calls may be made is unnecessary[240] because the TSR limits the times when telemarketing calls may be made.[241] Likewise, a disclosure that a consumer may not be able to speak to a sales representative, as advocated by one consumer,[242] would be unnecessary and redundant to a request to agree to receive ''prerecorded'' message calls.

c. Coverage of Calls That Deliver Prerecorded Messages to Answering Machines

The proposed amendment did not apply to prerecorded messages left on answering machines or voicemail systems, based on the assumption that consumer privacy interests would not be affected to the same degree when the consumer is not at home to answer the telephone and an answering machine or voicemail service picks up the message.[243] Nevertheless, the Commission specifically sought comment on whether this assumption is borne out in reality, and whether or not the amendment should apply to messages left on answering machines or voicemail systems.[244]

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an express written agreement requirement, sellers be required to maintain documentation that provides ''clear and convincing evidence'' of a consumer's consent to receive prerecorded calls, including ''the name of the party giving permission, the telephone number that the advertiser may call, proof that the recipient was informed that prerecorded messages would be used, and the date that permission was given'').

[224] DMA at 9. *See also*, Vontoo at 3 (also advocating a ''clear and conspicuous'' disclosure and adding that a ''non-deceptive'' disclosure should also be required).

[225] Career at 5.

[226] AARP at 6.

[227] Bashinsky, No. 123, at 1; Crider, No. 234 (agreement should ''not [be] hidden in other forms or paperwork'').

[228] Hui, No. 119.

[229] *E.g., United States v. Craftmatic Indus., Inc.*, *supra* n.15 (hundreds of thousands of calls to consumers whose telephone numbers were obtained from allegedly deceptive prize promotion entry forms).

[230] DMA at 9; Vontoo at 3 (adding that a ''non-deceptive'' disclosure should also be required).

[231] Two consumers suggest the Commission specify location and font size requirements. Bashinsky, No. 123, at 1; Crider, No. 234. The Commission believes that the ''clear and conspicuous'' standard provides sufficient guidance, and mandating more specific requirements is not necessary.

[232] Maddock, No. 137, at 3.

[233] Byrne, No. 158; Wibbens, No. 157, at 1.

[234] Hui, No. 119, at 1.

[235] Wibbens, No. 157, at 1.

[236] *Id.*

[237] *See* the discussion in Section II.E.2, *infra*.

[238] Wibbens, No. 157, at 1.

[239] *See* the discussion in Section II.D.2.c, *infra*.

[240] Byrne, No. 158.

[241] 16 CFR 310.4(c) (restricting permissible telemarketing calls to a residence to the hours of 8:00 a.m. until 9:00 p.m., local time).

[242] Byrne, No. 158.

[243] 71 FR at 58733 (limiting the proposed amendment to calls ''answered by a person'').

[244] 71 FR at 58726–27, 58733.

Industry comments uniformly oppose expanding the scope of the proposed amendment to apply to answering machine messages.[245] Two industry comments indicate that 80–85 percent of the messages in prerecorded telemarketing campaigns are not answered by a person and are left on an answering machine or voicemail.[246] One comment argues that the low opt-out rate by consumers who find messages on their answering machines indicates that they appreciate receiving the messages.[247] Another contends that messages left on a machine ''are less disruptive and intrusive because called parties can simply delete or skip messages'' that do not interest them.[248] Two industry comments assert that consumers will benefit from the proposed exemption for prerecorded messages on answering machines in the form of lower prices resulting from lower marketing costs.[249]

No fewer than 60 individual consumers and 4 consumer advocacy organizations, in contrast, unanimously urge extension of the coverage of the amendment to prerecorded messages left on answering machines and voicemail systems.[250] Several comments point out that because of the sheer number of telemarketing calls, there has been a significant shift in consumer behavior and many consumers now use their answering machines or Caller ID devices while they are at home to screen out telemarketing calls.[251] As one says, ''I listen to the messages as they are being left on my answering machine, and thereby decide if I should pick up the phone . . . . Thus, prerecorded telemarketing messages that are left on my answering machine are often just as disruptive to me as the prerecorded telemarketing messages that I pick up before my answering machine.''[252] For these consumers, as one asserts, a prerecorded answering machine ''message is no less coercive or abusive'' than a prerecorded message that is delivered when they answer a call in person.[253]

One consumer comment emphasizes that if the amendment were not modified to apply to prerecorded messages left on answering machines, ''nothing would prevent telemarketers from shifting to using **only** calls to answering machines in their campaigns, a strategy that would further increase the number of abandoned calls.''[254] The comment explains that ''[m]achines that use Answering Machine Detection ('AMD') are programmed to disconnect if an answering machine is not detected when the call is answered,'' and that ''if the telemarketer is trying to leave a message on an answering machine, it will abandon the call if a live person answers.''[255] The comment asserts that the use of AMD devices ''has shown a dramatic rise over the past few years that has resulted in an explosion of calls that are 'abandoned' and untraceable.''[256]

Several consumer commenters consider prerecorded messages left on answering machines as no less intrusive on their privacy than prerecorded calls they answer.[257] One regards the proposed amendment's inapplicability to answering machines as ''[a] monstrous loophole through which industry can continue to penetrate the serenity of the home'' because ''[a]t least when one is there to pick up the phone and receive such calls in person he or she can hang-up and end the intrusion almost immediately.''[258]

One consumer advocate points out that because consumers can forward landline calls to their cell phones, the cost of listening to prerecorded messages could put them at ''an economic disadvantage.''[259] Another similarly notes that consumers may incur costs to retrieve prerecorded messages when doing so by cell phone or over a long distance connection.[260]

Three consumer advocates argue that prerecorded messages may fill up the message capacity of consumers' answering machines and voicemail systems, thereby preventing consumers from receiving other more urgent messages.[261] AARP stresses that ''[f]or older Americans, this is of particular concern, given the importance of communications with health providers and loved ones.''[262] Several consumers agree that their homes are so bombarded by prerecorded messages that ''eat up

[245] NAA at 7; SmartReply at 29; Message at 7.

[246] Message at 5 (stating that the ''[t]ypical message left rate for voice marketing is 85%''); Draper's at 1 (reporting that the live answer rate for prerecorded messages is only 20 percent).

[247] SmartReply at 34 (contending that 99.7 percent of the consumers who receive such calls do not opt out).

[248] NAA at 11.

[249] SmartReply at 30; Message at 7.

[250] CTAG at 1, 3; PRC at 3; AARP at 4; NCL at 1, 6.

[251] *E.g.,* Harlach, No. 000 (''[T]he majority of people have an answering service —so that we can screen our calls and talk to the people we want''); Wagner, No. 353 (''The large number of prerecorded and abandoned calls we receive has forced us to change our habits such that we now screen all calls through our answering machine. But now we have to rush to answer when it is a 'valid' call''); Abramson, No. 122 at 1; Brick, No. 309; Linan, No. 298; McCloskey, No. 248; Strang, No. 529 at 2.

[252] Abramson, No. 122 at 1–2; *see* Brick, No. 309 (''The only difference between an answered call and a message left on my answering machine is that I do not usually get up and cross the room to retrieve messages from the machine''); Hui, No. 119 (''The fact that I may do it [delete messages] in one fell swoop, as opposed to interrupting what I'm doing and answering the phone each individual time is irrelevant'').

[253] Abramson, No. 122 at 2. Three of the consumer comments assert that the amendment as proposed is ''not consistent with the TCPA, which targets even the initiation, not just delivery of such calls, to address harms such as the ringing of the phone,'' Worsham, No. 283; Abramson, No. 122 at 2; Strang, No. 189, at 3; and that application of the amendment to prerecorded messages left on answering machines is necessary ''to maintain consistency with the FCC'' which ''has determined that prerecorded calls left on answering machines violate the TCPA.'' Strang, No. 189, at 3, *citing* Report and Order 03–153, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd 14014, 14107 ¶ 154, n. 544 (rel. July 3, 2003); *available at* (*http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC–03–153A1.pdf*) at p. 93; Worsham, No. 283.

[254] Strang, No. 189, at 2 (emphasis in original); *see* Bashinsky, No. 123, at 1 (Companies ''will presumably target more voicemail systems'' and this ''would have an effect of penalizing consumers who do not answer the phone when telemarketers call'').

[255] Strang, No. 189, at 2 & n.1. Such a strategy would violate § 310.4(b)(1)(iv) of the TSR for failure to connect the call to a sales representative if the resulting abandonment rate exceeds the three percent permitted by the call abandonment safe harbor. 16 CFR 310.4(b)(1)(iv) and 310.4(b)(4)(i).

[256] *Id.* at 1; *see also,* Haddox, No. 549 (receives ''many'' abandoned calls); Raqib, No. 439; Anderson, No. 354.

[257] *E.g.,* Popat, No. 120; Gray, No. 130; Racco, No. 124; *see* NCL at 4. Some comments similarly argue that deleting unwanted messages ''wastes a person's time.'' Popat, No. 120; Gold, No. 406; *see* Murphy, No. 332; Mathes, No. 252. One comment takes a more extreme position and cites having to listen to and delete unwanted prerecorded messages as a privacy infringement on the theory that ''[a]nything that requires me to exert effort that I wouldn't otherwise have had to exert that I did not ask for and from which I receive no benefit is very intrusive on my privacy.'' Hui, No. 119.

[258] Racco, No. 124; *see* Popat, No. 120; Gray, No. 130 (''A prerecorded message is intrusive no matter if it is received in person or on an answering device. Regardless of how the message is relayed to a person, the person will still have to listen''); Bashinsky, No. 123 (''A person can hang up on a recording'' but ''[t]he answering machine keeps recording and ties up the line even longer''); Maddock, No. 137; *see* Wang, No. 126 at 3 (suggesting that consumers may have a reasonable privacy expectation that messages left on their answering machines will be personal messages or messages they have requested).

[259] NCL at 4; *cf.* Swafford, No. 521 (''My biggest complaint is that solicitors are now calling my cell phone . . . & the same number keeps calling me & leaving me a voicemail which I have to delete'').

[260] CTAG at 2.

[261] AARP at 5; CTAG at 2; NCL at 3. NCL also expresses concern that message system limitations may result in ''information that is incomplete or too quickly spoken to be fully comprehended—the equivalent of the indecipherable fine print used in many advertisements.'' NCL at 3.

[262] AARP at 5; *cf.* NCL at 3 (contending that clogged message systems may prevent consumers from receiving important informational messages ''that are allowed by the TSR'' such as ''product recall alerts'' and implies that this harm is little different from a phone line that is tied up by a prerecorded message and unavailable for use in an emergency).

space''[263] on their answering machines that they cannot receive the important messages they need for ''lack of a functional answering machine.''[264] Some point out that an answering machine filled with prerecorded messages ''prevents important calls or emergency calls from sick family members from getting through.''[265]

In view of the comments, the Commission is now persuaded that privacy interests are implicated to a significant degree when prerecorded messages are delivered to answering machines, rather than to consumers who answer and listen to the messages. Taken as a whole, the comments make it clear that consumers now very often use answering machines not only to pick up messages when they are away, but also to screen out unwanted telemarketing calls when they are at home. The comments suggest that consumers may have adopted this strategy when they faced a deluge of telemarketing calls before the National Do Not Call Registry was established. At any rate, the comments indicate that consumers persist in using this strategy to deal not only with EBR-based calls, but also continuing charitable and political calls that are not subject to the Registry's restrictions. For consumers who are at home but choose not to answer a prerecorded call, the intrusion of the message as the answering machine records it is hardly less than when a message is delivered when they answer such a call. It is for this reason that the Commission now concludes that a reasonable consumer would consider prerecorded telemarketing messages left on an answering machine or voicemail service to be abusive of such consumer's right to privacy.[266]

The consumer comments also highlight a perceived increase in the number of calls that are abandoned when a consumer answers the telephone. The fact that the TSR's call abandonment prohibition does not apply to calls picked up by an answering machine may have created an inadvertent incentive for an increase in prerecorded calls targeting such devices. While calls targeting answering machines do not violate the TSR when sales agents are available to speak with consumers who answer in person, this detail of the call abandonment prohibition may have escaped the notice of some prerecorded call telemarketers. The Commission's decision to expand the scope of the amendment to include prerecorded messages left on answering machines consequently will have the added benefits of ending any such misunderstanding, and avoiding any similar incentive for targeting answering machines as a result of a difference in regulatory treatment. The Commission accordingly expects that the number of abandoned calls will diminish when the amendment takes effect.

d. Suggested Technical Modifications to the Amendment

Two industry comments request technical modifications to the amendment as first proposed. One asks that the reference to ''outbound telemarketing call'' in the amendment be replaced with ''outbound telephone call,'' the phrase used in the TSR's call abandonment provision,[267] in order to give businesses some assurance that the scope of the amendment is limited to prerecorded messages that include an offer to sell goods or services, or solicit a charitable contribution, and that a purely informational call ''made as part of a larger campaign'' will not be deemed to be part of a ''telemarketing'' campaign.[268] The Commission agrees that this change is appropriate, both for the sake of consistency with the call abandonment prohibition and to provide sellers and telemarketers with the assurance requested. Accordingly, the Commission has incorporated this revision into the final amendment.

The second request for a technical change seeks a revision of the call abandonment prohibition to clarify that it does not apply to calls to consumers who have provided the seller with a signed written agreement to receive prerecorded telemarketing calls, because no live operator will pick up such calls, as the call abandonment prohibition requires.[269] The Commission agrees that the TSR should expressly exclude prerecorded calls that comply with all applicable requirements of the amendment from the scope of the call abandonment prohibition, and has added a provision to the amendment to make that clear.[270]

E. The Final Amendment

Pursuant to its authority under the Telemarketing Act to include in the TSR a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy, the Commission has determined, after careful consideration of the record and for the reasons stated above, that it should adopt a new paragraph (v) to the ''Pattern of Calls'' prohibitions in Section 310.4(b)(1) of the TSR as follows:

(v) Initiating any outbound telephone call that delivers a prerecorded message, other than a prerecorded message permitted for compliance with the call abandonment safe harbor in § 310.4(b)(4)(iii), unless:

(A) in any such call to induce the purchase of any good or service, the seller has obtained from the recipient of the call an express agreement, in writing, that:

(i) the seller obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the seller to place prerecorded calls to such person;

(ii) the seller obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service;

(iii) evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of a specific seller; and

(iv) includes such person's telephone number and signature;[7] and

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[263] Stumpel, No. 392, Scott, No. 362; Antonelli, No. 281; Gray, No. 130.

[264] Wong, No. 146; *see* Byrne, No. 158; Khitsun, No. 546; Perrone, No. 555; Racco, No. 124; Bashinsky, No. 123 (''Recordings can fill up a voicemail system pretty fast . . . and by monopolizing the phone's functionality with unsolicited information, telemarketers are effectively depriving consumers of the use of their phone''); Riley, No. 402 (allowing ''prerecorded calls to be sent to my telephone answering machine'' is ''an unauthorized use of my property and akin to a trespass'').

[265] Woods, No. 328; Henderson, No. 182; Gray, No. 122. One comment even confesses that ''[w]e no longer have an answering machine on our home phone, as it was being filled with more canned messages than messages we wanted.'' Burr, No. 211 (reporting that ''[w]e use our cell phone voicemail as an answering machine thanks to the extra protection against telemarketers on cell phones,'' and arguing that ''prerecorded messages should be outlawed as they are a form of harassment that can not easily be dealt with'').

[266] The Commission accordingly need not determine whether the consumers who contend that this result is required for conformity with FCC restrictions on messages left on answering machines are correct in their interpretation of the FCC's position.

[267] 16 CFR 310.4(b)(1)(iv).

[268] DMA at 1, 7–8. A number of industry comments request clarification of whether particular calls will be regarded as ''informational'' calls not covered by the TSR and the proposed amendment. Countrywide at 2; Remindmecall (Barnett, Brian), No. 46, at 1; Call Command at 4–5; Draper's at 1; NAA at 2; CenterPost at 1; MinutePoll at 2. The proper forum for such inquiries, as the Commission has previously stated, 71 FR at 58725–26, is an advisory opinion request pursuant to the Commission's Rules of Practice. 16 CFR 1.1 - 1.4.

[269] Call Command at 2, 5.

[270] *See* Section 310.4(b)(1)(v)(C) of the final amendment.

[7] For purposes of this Rule, the term ''signature'' shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(B) in any such call to induce the purchase of any good or service, or to induce a charitable contribution from a member of, or previous donor to, a non-profit charitable organization on whose behalf the call is made, the seller or telemarketer:

(i) allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call; and

(ii) within two (2) seconds after the completed greeting of the person called, plays a prerecorded message that promptly provides the disclosures required by § 310.4(d) or (e), followed immediately by a disclosure of one or both of the following:

(A) in the case of a call that could be answered in person by a consumer, that the person called can use an automated interactive voice and/or keypress-activated opt-out mechanism to assert a Do Not Call request pursuant to § 310.4(b)(1)(iii)(A) at any time during the message. The mechanism must:

(1) automatically add the number called to the seller's entity-specific Do Not Call list;

(2) once invoked, immediately disconnect the call; and

(3) be available for use at any time during the message; and

(B) in the case of a call that could be answered by an answering machine or voicemail service, that the person called can use a toll-free telephone number to assert a Do Not Call request pursuant to § 310.4(b)(1)(iii)(A). The number provided must connect directly to an automated interactive voice or keypress-activated opt-out mechanism that:

(1) automatically adds the number called to the seller's entity-specific Do Not Call list;

(2) immediately thereafter disconnects the call; and

(3) is accessible at any time throughout the duration of the telemarketing campaign; and

(iii) Complies with all other requirements of this Part and other applicable federal and state laws.

(C) Any call that complies with all applicable requirements of this paragraph (v) shall not be deemed to violate § 310.4(b)(1)(iv) of this Part.

(D) This paragraph (v) shall not apply to any outbound telephone call that delivers a prerecorded healthcare message made by, or on behalf of, a covered entity or its business associate, as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

1. Overview of the Final Amendment

Subparagraph (A) of the final amendment incorporates the substance of the amendment as originally proposed, with the revisions discussed above. Subparagraph (B) makes two principal modifications to the original proposal. First, it requires sellers and telemarketers to provide an automated voice and/or keypress-activated interactive opt-out mechanism in their prerecorded messages so that consumers who have agreed to receive such messages will have the option of revoking their agreement and opting out of future messages as quickly, effectively, and efficiently as consumers who receive a live telemarketing call. Second, subparagraph (B) is partly based on, and incorporates elements of, the Commission's enforcement forbearance policy with which the industry has been required to comply since that policy took effect in 2004.

The requirement that sellers and telemarketers provide an automated voice and/or keypress-activated interactive opt-out mechanism is consistent with industry comments representing that interactive technology is now affordable and in widespread use. Based on these representations, the Commission has determined that non-interactive prerecorded messages no longer need be permitted, and the proposed amendment will have the effect of prohibiting them. The record is clear that consumers regard such messages as extremely invasive of their privacy because they are completely powerless to interact with them.

By requiring an automated interactive opt-out mechanism, the amendment will enable consumers who have agreed to receive prerecorded telemarketing calls from a seller to revoke that agreement if they no longer wish to receive such calls, or find the frequency of calls from the seller abusive of their privacy. The Commission intends the requirement for an automated interactive mechanism to make revoking an agreement to receive such messages as easy as opting out from a live telemarketing call.

The Commission has also added to subparagraph (B) the requirements it originally proposed for creation of a safe harbor for prerecorded calls, and incorporated in the enforcement forbearance policy announced in anticipation of the creation of such a safe harbor in 2004. When these requirements for the proposed safe harbor were published for public comment, the responses from the industry overwhelmingly opposed the safe harbor proposal, without focusing on the proposed compliance requirements. When the Commission proposed to terminate the forbearance policy after abandoning the safe harbor proposal, however, the industry petitioned for an extension of the policy to preserve the *status quo*, asserting that sellers and telemarketers had been relying on and complying with the policy in delivering their prerecorded messages. Based on that understanding, the Commission granted the extension.

By incorporating these requirements into the amendment, the Commission is adopting provisions on which the industry has had an opportunity to comment, and with which the industry asserts many industry members have been complying for some time.[271] Now that the Commission has determined to permit the use of prerecorded messages where the consumer has expressly agreed to receive calls delivering such messages, these requirements are essential to the effective implementation of an interactive opt-out regime.

The most significant difference between the requirements of the Commission's forbearance policy and the requirements of subparagraph (B) is the elimination of the option under the forbearance policy for sellers and telemarketers to provide a telephone number consumers could call to opt out as the sole and exclusive opt-out mechanism. That option was necessary to permit the continued use of prerecorded messages when the forbearance policy was announced in 2004 because, as many in the industry argued at that time, interactive technology was ''costly, burdensome, and not widely available.''[272] Now that the industry comments uniformly represent that interactive technology is affordable and widely available, it would be inconsistent with the interactive opt-out requirement of the final amendment to permit sellers and telemarketers to require consumers who answer a prerecorded call in person to place a separate call to a specified telephone number in order to opt out. The final amendment further modifies this element of the forbearance policy, as discussed below, to clarify that a toll-free telephone number that connects to an automated interactive opt-out mechanism must be provided whenever a prerecorded message may be delivered to an answering machine or voicemail service, so that consumers who receive such messages will have an easy and effective opt-out option.

2. Analysis of Revisions to the Final Amendment

The introductory language in Section 310.4(b)(1)(v) revises the proposed amendment in five respects. The most significant is the deletion of the phrase,

[271] *See* Section II.B.5.b.i, *supra.*

[272] 71 FR at 58725.

''when answered by a person,'' to expand the coverage of the amendment to include prerecorded messages left on answering machines and voicemail services for the reasons previously discussed in Section II.D.2.c above. The revised language also replaces the phrase ''outbound telemarketing call'' with ''outbound telephone call'' for the reasons discussed in Section II.D.2.d above. In addition, the revised introduction incorporates the proviso that appeared at the end of the original proposal, with no change in substance, to make it clear that the requirements of the amendment do not apply to prerecorded messages used to comply with the call abandonment safe harbor pursuant to Section §310.4(b)(4)(iii).

Section 310.4(b)(1)(v)(A)(*i*) adds to the substance of the amendment as proposed a requirement that sellers obtain the written agreement necessary to place prerecorded calls only after ''clearly and conspicuously'' disclosing that the purpose of the agreement is to authorize the seller to place such calls to the consumer, as discussed in Section II.D.2.b above. Section 310.4(b)(1)(v)(A)(*ii*) further specifies that a seller may not condition the purchase of any good or service on a consumer's agreement to authorize prerecorded calls, as previously discussed in Section II.D.2.b.

Section 310.4(b)(1)(v)(A)(*iii*) contains the written agreement requirement of the amendment as proposed. The only change from the original language is the substitution of the words ''specific seller'' in place of the words ''specific party'' in the proposed amendment to make it clear that prerecorded calls may be placed only by or on behalf of the specific seller identified in the agreement. It is the Commission's intention that agreements authorizing prerecorded calls be limited to the specific seller identified in the agreement, and not be transferable to any other party. The only new element in Section 301.4(b)(1)(v)(A)(*iv*), which retains the requirement of a signature and telephone number that a seller or telemarketer is authorized to call, is the addition of a footnote that is intended to eliminate any ambiguity regarding the Commission's intention that any electronic signature permitted by the E–SIGN Act may be used to formalize the required written agreement, which may itself be an electronic agreement made pursuant to that Act, as discussed in Section II.D.2.a above.

Unlike Section 310.4(b)(1)(v)(A), which applies only to outbound telephone calls ''to induce the purchase of any good or service,'' Section 310.4(b)(1)(v)(B) additionally covers outbound telephone calls by for-profit telefunders ''to induce a charitable contribution from a member of, or previous donor to, a non-profit charitable organization on whose behalf the call is made,'' pursuant to a partial exemption the Commission is granting for the reasons discussed in Section II.G.3 below. Neither Section 310.4(b)(1)(v)(A) nor Section 310.4(b)(1)(v)(B) applies to a non-profit charity that places its own prerecorded calls, because the Commission lacks jurisdiction over not-for-profit entities.

Section 310.4(b)(1)(v)(B) adopts the four interactive opt-out requirements the Commission proposed for a prerecorded call safe harbor, and accordingly incorporated in its enforcement forbearance policy. Section 310.4(b)(1)(v)(B)(*i*) incorporates the first provision of the proposed safe harbor and forbearance policy, which requires sellers and telemarketers to allow the telephone to ring for at least fifteen seconds or four rings so that consumers have a reasonable opportunity to answer.[273] Section 310.4(b)(1)(v)(B)(*ii*) copies the second provision of the proposed safe harbor and forbearance policy, requiring that the message begin playing within two seconds of the called party's completed greeting.[274] The requirement in Section 310.4(b)(1)(v)(B)(*ii*)(A) that prerecorded calls provide an up-front disclosure of how to opt out of future calls adopts the third requirement of the proposed safe harbor and enforcement forbearance policy.[275] Finally, Section 310.4(b)(1)(B)(*iii*) tracks the fourth requirement of the proposed safe harbor and forbearance policy, which mandates that sellers and telemarketers comply with all other requirements of the TSR and federal and state law.[276]

Sections 310.4(b)(1)(v)(B)(*ii*)(A) and (B) expand on the third requirement of the proposed safe harbor and forbearance policy by clarifying that prerecorded calls must present an opportunity to assert an entity-specific Do Not Call request if the call ''could be answered in person by a consumer'' [subparagraph (A)], or if the call could be answered ''by an answering machine or voicemail service'' [subparagraph (B)].[277] Two separate provisions are necessitated in the interest of minimizing the disclosures required. If a seller or telemarketer provides both voice and keypress-activated opt-out mechanisms, and is able to determine whether a call is answered by a person or by an answering machine or voicemail service, it may tailor the message to include the appropriate opt-out message and mechanism.

Section 310.4(b)(1)(v)(B)(*ii*)(A) specifies that, if there is any possibility that a call could be answered in person by a consumer, an automated interactive opt-out mechanism must be available throughout the call. The provision permits either a voice or keypress-activated opt-out mechanism to be used, or both in combination. The provision further requires that, once invoked, the interactive mechanism must automatically add the number called to the seller's entity-specific Do Not Call list, and must then promptly terminate the call, as recommended by some industry comments.[278] As the Commission has previously stated, the inability of some consumers to use their telephone in an emergency because a prerecorded message cannot be disconnected simply by hanging up ''creates legitimate cause for concern.''[279] To ensure that all consumers can quickly disconnect a prerecorded call in an emergency, it is necessary to require, as this provision does, that sellers and telemarketers use an opt-out mechanism that automatically records the number called

[273] This provision tracks Section 310.4(b)(5)(i) of the proposed amendment to create a safe harbor for prerecorded calls and the first requirement of the forbearance policy. *Compare* 69 FR at 67294 *with* 71 FR at 77635. This part of the proposed amendment in turn mirrored Section 310.4(b)(4)(*ii*) of the TSR's call abandonment safe harbor. 16 CFR 310.4(b)(4)(ii).

[274] This requirement duplicates Section 310.4(b)(5)(ii) of the proposed amendment to create a prerecorded call safe harbor and the second requirement of the forbearance policy. *Compare* 69 FR at 67294 *with* 71 FR at 77635. This part of the proposed amendment in turn was based on Section 310.4(b)(4)(iii) of the TSR's call abandonment safe harbor.

[275] This provision mirrors Section 310.4(b)(5)(ii)(A) of the proposed safe harbor amendment and the third requirement of the forbearance policy. *Compare* 69 FR at 67294 *with* 71 FR at 77635.

[276] This requirement replicates Section 310.4(b)(5)(ii)(B) of the proposed amendment to create a prerecorded call safe harbor and the fourth requirement of the forbearance policy. *Compare* 69 FR at 67294 *with* 71 FR at 77635.

[277] *Id.* The NPRM for the proposed safe harbor contemplated either the provision of a toll-free number for opt-out requests or an interactive mechanism that would connect to an operator or automatically record an opt-out request. 71 FR at 77635 (the forbearance policy provision); *see also* 67 FR at 67289 at nn.13–14, and accompanying text (proposed safe harbor).

[278] *See* note 126, *supra*, and accompanying text. The Commission intends the requirement that the mechanism ''promptly disconnect'' the call to permit a very brief automated acknowledgment that the telephone number of the person called has been added to the seller's entity-specific Do Not Call list.

[279] 71 FR at 58723. For analogous policy reasons, the FCC prohibits prerecorded calls ''[t]o any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency.'' 47 CFR 64.1200(a)(1)(i).

on the entity's Do Not Call list, as interactive systems now in use permit,[280] rather than allow the potential delays of connecting the call to an operator or sales agent to add the number to the list.[281]

Section 310.4(b)(1)(v)(B)(*ii*)(B), in turn, details what is required if there is any possibility that a prerecorded call could be answered by an answering machine or voicemail service. Like the proposed safe harbor, which permitted sellers and telemarketers to provide a toll-free number consumers could call to opt out, this provision requires that such a number be provided and disclosed promptly at the outset of the call because industry data shows that 80–85 percent of all prerecorded calls are delivered to answering machines and voicemail services. The provision further requires that the number connect directly to an automated interactive opt-out mechanism that is accessible at any time throughout the duration of the telemarketing campaign. This is necessary to ensure that consumers can easily and immediately assert their opt-out rights, regardless of the time of day when they listen to their messages, without the additional burden of having to wait to opt out until the next business day during regular business hours when an operator would be available to record the opt-out request.

Section 310.4(b)(1)(v)(C) provides a clarification requested by the industry. It specifies that ''any call that complies with all applicable requirements'' of the amendment will not violate the call abandonment prohibition in Section 310.4(b)(1)(iv) of the TSR. This provision is intended to provide assurance that a fully compliant prerecorded call will not violate the call abandonment prohibition solely because the person who answers is connected within two seconds to a recording, rather than to a telemarketer, as the call abandonment prohibition requires.

Finally, Section 310.4(b)(1)(v)(D) provides an exemption from all the requirements of the amendment for certain prerecorded healthcare calls. For the reasons discussed in Section II.G.2 below, the Commission is exempting outbound telephone calls made by or on behalf of a covered entity or its business associate, as those terms are defined in the HIPAA Privacy Rule.

F. Implementation Issues

A number of industry comments urged two related implementation measures. First, many industry comments ask that their databases of current EBR customers be ''grandfathered,'' either temporarily or permanently, to ease the transition to the written agreement requirement. Second, these and other industry comments also request that the Commission provide an adequate ''phase-in'' period to allow time for industry education efforts and preparation of systems to comply.

1. Requests for ''Grandfathering'' Existing Customer Databases

Several comments urged that the Commission allow sellers to continue placing prerecorded message calls to established customers without requiring those customers' agreement to continue receiving them. Two industry comments seek permanent ''grandfathering,'' whereby they would have no obligation to obtain consent from their established customers, and would need to seek consent only from new customers acquired after the written agreement requirement takes effect.[282] Others seek a more limited type of ''grandfathering.''[283] One advocates treating established customers who have been given an interactive opportunity to opt out of prerecorded messages calls, but have not done so, as having given express consent.[284] Another asks that existing EBR customers be ''grandfathered'' where ''policies are in place to gradually convert willing customers'' into ''customers who have provided consent,'' because this would give businesses an ''incentive to comply immediately, and time to migrate so that their business does not suffer'' the harm of a firm deadline for the conversion.[285]

Finally, one comment argues that companies should be permitted to obtain consent from established customers with a telephone keypress mechanism.[286]

The industry comments that advocate some form of ''grandfathering'' of sellers' EBR customers argue that it will be costly and time-consuming for sellers to seek agreements to receive prerecorded messages from every EBR customer. The Commission is keenly aware of this concern, and accordingly has decided to defer the effective date of the written agreement requirement for a full year during which sellers and telemarketers may continue to place prerecorded calls to the seller's existing and new EBR customers, as part of the phase-in of the amendment's requirements discussed below.

2. Requests for a ''Phase-In'' Period

Many of the industry comments request that the Commission defer the effective date of the proposed amendment for some period of time after it is issued in order to give businesses time to prepare to comply.[287] One comment explains that, depending on the form of consent required, it will take time for businesses to redesign web sites, revise telemarketing scripts, and prepare and print new credit card and loyalty program applications and response cards to obtain consent from new customers, as well as to use up existing supplies of these materials and create new record-keeping systems and procedures to store and access the new consents they obtain.[288] Another adds that small business telemarketers will need time, given a 9–12 month development and sales cycle, to find new business options to replace anticipated revenue losses from reductions in prerecorded messaging.[289] A third comment points out that time will also be needed for industry education efforts.[290]

These requests from the industry comments for a ''phase in'' period before the amendment takes effect range from 3 to 18 months. In order to ensure that there is sufficient time for industry to conduct needed training on the new requirements and to transition to

[280] MinutePoll at 8; Global at 11; *see* DMA at 2 (noting that a keypress ''is unambiguous, and the consumer knows with certainty that they have made the request'').

[281] Consumer advocates make the point that rotary dial telephone users will be unable to assert opt-out requests in recorded messages with only keypress opt-out mechanisms. *See* note 48, *supra*. The record contains nothing, however, indicating that any appreciable number of households still use such antiquated equipment, and it is reasonable to conclude that few remain. The record does suggest, in contrast, that the industry's use of voice recognition systems is growing and is likely to increase. The Commission therefore believes that it is not necessary for the amendment to mandate inclusion of potentially costly voice recognition capability in the required interactive opt-out mechanism.

[282] NAA at 3 (Newspapers ''have more than 40 million existing residential subscribers, and to require newspaper circulation departments to contact each of these subscribers to obtain written consent would be exceptionally unreasonable and burdensome''); NNA at 5 (''[T]he burden of contacting a large database to obtain written consent would far outweigh any benefit specific express consent may provide'').

[283] *E.g.*, Draper's at 1; Message at 5.

[284] Message at 6.

[285] SmartReply at 6, 22–23. SmartReply notes that many ''top 100'' retailers have EBR customer databases of from 15–30 million customers. SmartReply at 18.

[286] Global at 11. *See* the discussion in Section II.D.2.a, *supra*.

[287] Soundbite at 19 (a ''reasonable period''); Countrywide at 3 (3 months); DMA at 2 (6 months); MP at 3 (6 months); Xpedite at 5 (6 months); Career at 5–6 (at least 6 months); MinutePoll at 10 (at least 6 months); IAC at 2, 10 (at least 6 months); VMBC at 2 (6–8 months); SmartReply at 15 (18 months for ''Top 100'' Fortune 500 retailers with 15 million customers in their databases).

[288] DMA at 9.

[289] MinutePoll at 10.

[290] NAA at 9–10.

revised contracts, web pages and systems and procedures needed to preserve evidence of customer agreements to receive prerecorded calls after the effective date, the Commission has decided to provide a one-year phase-in period from the date of publication of the final amendment in the **Federal Register** for the express written agreement provisions added to Section 310.4(b)(1)(v)(A) of the TSR by the final amendment.

There is no evident reason, however, to provide an equally prolonged phase-in period for the automated interactive opt-out provisions of the amendment. Because sellers and telemarketers assert they are already complying with the Commission's forbearance policy, and many already are using systems with automated interactive keypress or voice-activated opt-out capabilities,[291] the Commission has no reason to believe that a great deal of time will be needed for implementation of these requirements. Accordingly, the Commission has determined that the automated interactive opt-out provisions should take effect on December 1, 2008.

Thus, beginning on December 1, 2008, prerecorded messages, whether delivered by sellers and telemarketers to consumers who answer the telephone or to answering machines or voicemail services, will be required to comply with the new automated interactive opt-out requirements added to the TSR as Section 310.4(b)(1)(v)(B) by the amendment. Although the Commission's previously announced enforcement forbearance policy will be revoked on that date because it is inconsistent with the amendment's automated interactive opt-out requirements, the Commission will continue to permit sellers to place prerecorded calls to both existing and new EBR customers for an additional nine months, until September 1, 2009, except to an EBR customer who uses the required automated interactive mechanism to opt out or whose EBR has expired. Thereafter, sellers and telemarketers may place prerecorded calls only to consumers from whom they have obtained signed, written agreements to receive such calls. Thus, after the amendment takes complete effect on September 1, 2009, the written agreement requirement will replace the EBR requirement as the sole authorization for continuing to place prerecorded message calls to numbers on the Registry, although an EBR will continue to serve as authorization for placing live telemarketing calls to consumers.

[291] *See* Section II.B.5(b)(i), *supra*.

G. Exemptions

Several industry comments seek exemptions from the requirements of the proposed amendment. These comments urge exemptions for healthcare-related calls governed by HHS regulations issued pursuant to HIPAA,[292] or by Medicare requirements for enrolled durable medical equipment (''DME'') suppliers;[293] for non-profit entities that use third-party telefunders to deliver prerecorded solicitations;[294] for small businesses as defined by Small Business Administration regulations;[295] and for prerecorded messages offering contract renewals or changes to existing contracts addressing post-contract events or changed circumstances.[296] Other comments urge either an exemption or non-enforcement policy statement that would permit entities that are not themselves subject to FTC jurisdiction to employ third-party telemarketers (over which the FTC does have jurisdiction) to deliver prerecorded messages without the express written agreement of their EBR customers, as they themselves may do under FCC rules.[297]

[292] Silverlink Communications, Inc. and Eliza Corp. (Winslow) (''Silverlink/Eliza''), No. 586, at 16; medSage Technologies, LLC (''medSage''), No. 606, at 8; PolyMedica Corp. (''PolyMedica''), Nos. 594, 609, at 4–5. Two comments seek only an extension of the Commission's enforcement forbearance policy, PMSI–Tmesys, No. 215, at 2; Gorman Health Group, No. 102, at 2; while another asks only that prescription refill reminders be considered ''informational'' calls that are not covered by the proposed amendment. National Association of Chain Drug Stores, No. 634, at 2. *See also, e.g.,* Sliwa, No. 113 (consumer urging an ''exception'' for ''lifemarketing'' healthcare calls); Merrow, No. 94 (objecting to any restriction on healthcare calls); Conway, No. 81; Erwin, No. 133; Genter, No. 68; Lopez, No. 73; Pace, No. 104.

[293] medSage at 8; PolyMedica at 4–5; Access Diabetic Supply LLC (''Access''), No. 630, at 12.

[294] DMA at 6–7; *cf.* Heritage at 2 (citing First Amendment cases). One consumer comment also supports an exemption for charities. Maddock, No. 137, at 1–2.

[295] NNA at 5. The 13 brief comments received from small and medium sized community newspapers generally express their opposition to any restriction on their ability to use prerecorded telemarketing messages to contact established customers, but do not request an exemption. Thomasville Times-Enterprise, No. 175; Stillwater News Press, No. 176; Joplin Globe, No. 177; The News and Tribune, No. 178; The Tribune-Democrat, No. 179; Effingham Daily News, No. 180; Eagle-Tribune Publishing Co., No. 181; Clinton Herald, No. 187; CNHI - Terre Haute Tribune Star, No. 190; Pharos-Tribune, No. 191; Eagle Tribune, No. 214; Ada Evening News, No. 445; and Community Newspaper Holdings, Inc., No. 464.

[296] IAA at 11.

[297] CBA at 4 (requesting an express exemption); Wells Fargo & Co., No. 573, at 2 (seeking either an exemption or non-enforcement policy statement); Visa U.S.A., Inc., No. 597, at 2 (advocating a non-enforcement policy statement). Although CBA advances an argument that the requested exemption is required by the Telemarketing Act, based on the *status* of exempt entities, the argument does not address the *activity* basis for the Commission's assertion of jurisdiction over third-party telemarketers that are employed by exempt entities. Commission Advisory Opinion, Stonebridge Life Insurance Co. (Aug. 19, 2003), *available at* (*http://www.ftc.gov/os/2003/08/tsradvopinion.htm*).

1. Legal Authority for Granting Exemptions

In adopting the original TSR in 1995, the Commission incorporated a number of exemptions. At that time, the Commission stated:

> The Commission has concluded that it is vested by the Telemarketing Act with discretion both in determining what constitutes ''telemarketing'' under the Act and in defining deceptive and abusive practices. In exercising that discretion, the Commission has decided that narrowly-tailored exemptions are necessary to prevent an undue burden on legitimate businesses and sales transactions. Section 310.6 enumerates these exemptions. The Commission determined the advisability of each exemption after examining the Act and considering the following factors: (1) Whether Congress intended that a certain type of sales activity be exempt under the Rule; (2) Whether the conduct or business in question already is regulated extensively by Federal or State law; (3) Whether, based on the Commission's enforcement experience, the conduct or business lends itself easily to the forms of deception or abuse that the Act is intended to address; and (4) Whether requiring businesses to comply with the Rule would be unduly burdensome when weighed against the likelihood that sellers or telemarketers engaged in fraud would use an exemption to circumvent Rule coverage.[298]

[298] 60 FR 43842, 43859 (Aug. 23, 1995). In addition, the Telemarketing Act expressly empowers the Commission to prevent violations of the TSR ''in the same manner, by the same means, and with the same jurisdiction, *powers*, and duties as though all applicable terms and provisions of the Federal Trade Commission Act ('FTC Act'), 15 USC 41 *et seq.*, were incorporated into and made a part of this chapter.'' 15 USC 6105(b) (emphasis added). Among the powers conferred by the FTC Act, and thus by the Telemarketing Act, is authority to grant exemptions, pursuant to a petition or on the Commission's own motion, if ''the Commission finds that the application of a rule . . . to any person or class of persons is not necessary to prevent the unfair or deceptive act or practice to which the rule relates.'' 15 USC 57a(g)(2). Section 553 of the Administrative Procedure Act (''APA''), 5 USC 553, which governs any such exemption action, requires a notice and comment proceeding *except* ''when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest.'' 5 USC 553(b)(3)(B) (emphasis added). The Commission has determined that there is good cause to adopt the two exemptions discussed below. No further notice and comment is necessary or appropriate because the position of all interested parties on the relevant issues has been adequately developed in this proceeding, and no public interest purpose would be served by protracting this proceeding further.

The Commission has determined that, for different reasons, it is appropriate to incorporate into the amendments adopted herein two suggested exemptions: one for healthcare-related prerecorded message calls subject to HIPAA and one for prerecorded message charitable fundraising calls by third-party telemarketers.[299]

2. Exemption for Healthcare-Related Prerecorded Calls Subject to HIPAA

Healthcare-related prerecorded message calls subject to HIPAA include not only calls by medical providers and their third-party telemarketers, but also calls by DME suppliers and by Medicare Part D providers and their third-party telemarketers. The purpose of the HIPAA regulations is to maintain the privacy of personally identifiable medical information, whereas the purpose of the amendment is to protect consumers' privacy in their homes. Nonetheless, the Commission is persuaded by certain of the commenters' arguments that these purposes are related and intertwined and, moreover, that the placing of such calls ''already is regulated extensively by Federal . . . law.''[300] Further, the Commission's law enforcement experience does not suggest that the placing of healthcare-related prerecorded message calls subject to HIPAA ''lends itself easily to the forms of deception or abuse that the [Telemarketing] Act is intended to address.''[301] Therefore, the Commission has determined that an exemption—similar to several original exemptions incorporated into the Rule in 1995[302]—is warranted for healthcare-related prerecorded message calls subject to HIPAA.

a. Arguments Advanced for an Exemption

Unlike the other exemption requests, the comments seeking exemption of healthcare-related prerecorded calls governed by HIPAA and by Medicare requirements for enrolled DME suppliers provide extensive and specific information about the industry and practices for which an exemption is sought, detailed rationales, and draft language for an exemption. An exemption is necessary, the commenters contend, because many important healthcare-related calls might be considered ''telemarketing'' calls, rather than ''informational'' calls not covered by the TSR, because they are arguably part of ''a plan, program, or campaign conducted to induce the purchase of goods or services.''[303] These prerecorded calls include flu shot and other immunization reminders, prescription refill reminders, health screening reminders; calls to obtain permission to contact doctors for renewal of medication or medical supply orders; calls to obtain documentation needed for billing health plans; calls by home health agencies to follow-up on patients for six months after discharge; calls monitoring patient compliance with prescribed medical therapies; and calls encouraging enrollment in disease management or treatment programs, and in migration from branded to generic drugs, and from retail to mail order pharmacies.[304] Commenters fear that such calls may not be considered to be strictly ''informational'' because they can result in a payment or co-pay for medication, durable medical equipment, or medical services.[305]

At any rate, the crux of the arguments seeking exemption is the contention that Congress, in the case of DME suppliers, and HHS, in the case of HIPAA, has already considered and prescribed rules based on important public policy considerations that govern healthcare-related calls that might be subject to the proposed amendment under the TSR's definition of ''telemarketing.'' If these requirements have not occupied the field, the comments urge the Commission to consider the weight that the Congressional and administrative determinations have given to the improvement of healthcare on a cost-efficient basis, and exempt these healthcare-related calls from any restriction in the TSR on prerecorded telemarketing calls.

i. DME Supplier Telephone Solicitation Restrictions

Two commenters emphasize that calls from DME suppliers—permitted by statute and by HHS regulations—provide measurable public benefits in the treatment of patients by reducing the taxpayer-supported costs of the Medicare and Medicaid programs and by measurably improving patient compliance rates with home treatment regimens. This results in improved clinical outcomes and a reduction in costly complications.[306] The use of prerecorded messages, one commenter asserts, is necessary not just to control costs, but to ensure that elderly and chronically ill patients receive uniform, clear messages they can understand and, with the aid of interactive technology, to enable DME suppliers to obtain patient responses that provide documentation required by Medicare rules.[307]

These calls are subject to significant federal regulation similar in purpose to the prerecorded call amendment. As two of the comments point out,[308] Congress has expressly prohibited DME suppliers and their agents by statute from unfettered telephone solicitation of Medicare patients. The statute states that a DME supplier ''may not contact an individual enrolled under this part by telephone'' except in three specific circumstances: (1) ''The individual has given written permission to the supplier to make contact by telephone regarding the furnishing of the covered item;'' (2) ''The supplier has furnished a covered item to the individual and the supplier is contacting the individual only regarding the furnishing of the covered

[299] *See* 16 CFR 1.25. The other industry requests for relief, for small businesses, for contract renewals and modifications, and for third-party telemarketers covered by the TSR that are employed by businesses not subject to FTC jurisdiction, do not make a persuasive case for exemption under the exemption criteria discussed above.

[300] 60 FR 43842 at 43859 (Aug. 23, 1995).

[301] *Id.*

[302] *See, e.g.*, 16 CFR 310.6(b)(1) (partial exemption for sale of pay-per call services subject to the Telephone Disclosure and Dispute Resolution Act); 16 CFR 310.6(b)(2) (partial exemption for sale of franchises subject to the Franchise Rule); 16 CFR 310.6(b)(7) (full exemption for telephone calls between a telemarketer and any business).

[303] 16 CFR 310.2(cc).

[304] Silverlink/Eliza at 3–5; medSage at 2; *see* Access at 2; PolyMedica at 2; PMSI–Tmesys, at 2.

[305] For calls to be covered under the TSR, they must be part of a ''plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call.'' 16 CFR 310.2(cc). The commenters addressing the need for an exemption for health-related HIPAA-covered calls largely assume, but do not methodically analyze, whether the calls in question meet each element of the definition. While prerecorded calls to induce consumers to make an initial selection of a particular healthcare plan or provider would meet the definition, these calls by a plan or provider previously selected—which are, for the most part, in the nature of medical treatment and prevention reminders—arguably do not constitute a ''plan, program, or campaign which is conducted to induce'' purchases. The October 4, 2006, **Federal Register** notice drew a careful distinction between commercial telemarketing calls and purely ''informational'' calls. The notice made it clear that the Commission considers calls ''such as notifications of flight cancellations, reminders of medical appointments and overdue payments, and notices of dates and times for delivery of goods or service appointments'' as informational in nature, and not for the purpose of conveying a sales message. ''Such strictly informational calls . . . whether live or prerecorded, have never been covered by the TSR.'' 71 Fed. Reg. at 58719.

[306] medSage at 5; Access at 10.

[307] Access at 11–12. DME suppliers are required, for example, to document the frequency with which a patient is actually using diabetic supplies, and of the replacement of nebulizer accessories, such as respiratory supplies, *Id.,* and are prohibited from shipping many replacement supplies, particularly diabetic testing supplies, on a regular basis unless the patient has nearly exhausted a prior supply. *Id.* at 2–3.

[308] Access at 8; medSage at 3.

item;''[309] and (3) ''If the contact is regarding the furnishing of a covered item other than a covered item already furnished to the individual, the supplier has furnished at least 1 covered item to the individual during the 15-month period preceding the date on which the supplier makes such contact.''[310]

Other subsections of this provision, enforced by the HHS Inspector General, prohibit Medicare payment for any items furnished to an individual by a supplier that knowingly violates the telemarketing prohibition,[311] and, in the case of a pattern of unlawful telephone solicitations, exclusion from participation in the DME supplier program.[312] In addition, HHS Medicare regulations provide for civil penalties of up to $12,000 for any DME supplier that fails to make a refund to a Medicare beneficiary for a covered service for which payment is precluded due to a violation of the telephone solicitation prohibition.[313]

The commenters add that to be enrolled as a DME supplier eligible to receive payments for an item covered by Medicare under the Social Security Act, a company must submit an application for billing privileges, and receive approval from the Centers for Medicare and Medicaid Services (''CMS''). The application requires DME suppliers to meet (and continue to meet as a condition of receiving payments) certain quality standards that serve to provide further protection for consumers. They include requirements that the DME supplier operate its business in compliance with all federal and state licensing requirements from a physical facility that can be inspected by CMS (and not a mere postal box), and maintain liability insurance and a customer complaint process.[314] This ''detailed and protective'' regulatory scheme, as one commenter notes, operates ''to screen [out] scofflaws'' and ''to protect patients from, *inter alia*, abusive telemarketing.''[315]

ii. HIPAA Marketing Restrictions

Silverlink/Eliza note that when Congress enacted HIPAA in 1996, one of its stated goals was to ''improve . . . the efficiency and effectiveness of the health care system by encouraging . . . the electronic transmission of certain health information.''[316] In enacting HIPAA to set standards under which the healthcare sector could share and use health information and communicate with patients, Congress recognized that the use of advanced communications technology could compromise an individual's privacy interests, and accordingly, directed HHS to promulgate rules that would appropriately balance patient interests in protecting the privacy of their healthcare information with the Congressional ''objective of reducing the administrative costs of providing and paying for healthcare.''[317]

Another comment points out that the HIPAA Privacy Rule[318] issued by HHS as directed by Congress, prohibits a ''covered entity''[319] and its ''business associate''[320] from using or disclosing ''protected health information''—information relating to a patient's medical condition or treatment—for purposes of marketing, without specific, written authorization from the patient.[321] The commenter emphasizes that this prohibition covers not only written communications, but ''*any* form of telephonic communication, whether through a live caller or a prerecorded message, regardless of whether there is a pre-existing business relationship,'' and in this regard, ''is far broader than'' the prerecorded call amendment.[322]

Two of the commenters point out that although HHS ''originally proposed privacy rules that would not have excluded healthcare communications from their patient authorization requirement,'' HHS ultimately concluded, after two full notice and comment rulemaking proceedings, that such a restriction on healthcare communications ''would materially affect the quality and efficiency of healthcare.''[323] Thus, in order to allow ''the flow of health information needed to provide and promote high quality health care and to protect the public health and well being,''[324] the final HIPAA Privacy Rule exempts only healthcare-related communications from the requirement of prior authorization by patients.[325] The requirements of the Privacy Rule and its exemptions are enforced by the Office of Civil Rights in HHS, with violations subject to both civil and criminal penalties, and therefore, according to one comment, ''the 'cost' of violating HIPAA can be enormous.''[326]

iii. Improved Healthcare Outcomes

The comments advocating an exemption for healthcare-related prerecorded message calls subject to HIPAA emphasize that the ''opt-in'' requirement of the proposed amendment would jeopardize the progress that interactive prerecorded messages have made in improving patient outcomes and helping control healthcare costs.[327] As one comment

[309] HHS implementing regulations specify that this provision is limited to arranging delivery of the item. 42 CFR 424.57(c)(11).

[310] 42 USC 1395m(a)(17)(A).

[311] 42 USC 1395m(a)(17)(B).

[312] 42 USC 1395m(a)(17)(C).

[313] medSage at 4.

[314] 42 CFR 424.57(c). DME suppliers that violate the terms of their certification are subject to adverse regulatory action by HHS. *E.g.*, *Medisource Corp. v. CMS*, Docket No. A–05–112 (HHS Department Appeals Board, Jan. 31, 2006).

[315] medSage at 4.

[316] Silverlink/Eliza at 9, citing HIPAA, Pub. L. No. 104–191, § 261, 110 Stat. 1936 (1996) (*codified, as amended,* at 42 USC 1320d).

[317] *Id.* at § 1172(b) (*codified, as amended,* at 42 USC 1320d-1(b)).

[318] Standards for Privacy of Individually Identifiable Health Information, 45 CFR Parts 160 and 164.

[319] A ''covered entity'' is defined as ''(1) A health plan; (2) A health care clearinghouse; and (3) A health care provider who transmits any health information in electronic form . . . .'' 45 CFR 160.103. One comment explains that health insurers, home healthcare providers that bill electronically, and billing services are therefore ''covered entities.'' medSage at 5 n.7.

[320] Businesses that make prerecorded calls on behalf of a ''covered entity'' are ''business associates'' of the covered entity, as are Medicare suppliers and pharmacies. *See* 45 CFR 160.103.

[321] medSage at 5. *See* 45 CFR 164.508(a)(3)(i) (''a covered entity must obtain an authorization [from the patient] for any use or disclosure of protected health information for marketing'').

[322] *Id. See also* 45 CFR 164.501 (''Marketing'' definition specifically prohibiting (in § (2)) a covered entity from disclosing, without patient consent, protected health information to another entity that would enable the other entity (or its affiliates) to communicate with patients of the covered entity to market the other entity's products or services); 67 FR 53182, 53188–89 (Aug. 14, 2002) (announcing the addition of ''a new provision to the definition of 'marketing' [45 CFR 164.501(2)] to prevent situations in which a covered entity could take advantage of the business associate relationship to sell protected health information to another entity for that entity's commercial marketing purposes'').

[323] Silverlink/Eliza at 9–10; medSage at 6.

[324] Access at 6.

[325] The final Privacy Rule permits only the following types of communications with patients without their prior authorization:

(i) To describe a health-related product or service . . . that is provided by, or included in a plan of benefits of, the covered entity making the communication . . .; (ii) For treatment of the individual; or (iii) For case management or care coordination for the individual, or to direct or recommend alternative treatments, therapies, health care providers, or settings of care to the individual.

45 CFR 164.501. One comment quotes HIPAA guidance that '''many services, such as [prescription] refill reminders or the provision of nursing assistance through a telephone service, are considered treatment activities if performed by or on behalf of a health care provider, such as a pharmacist.''' PolyMedica at 3.

[326] medSage at 5 & n.6.

[327] The comments emphasize that available alternatives to the use of interactive prerecorded messages are more expensive, less efficient or less successful in communicating with patients, Silverlink/Eliza at 5; medSage at 5; and would strain the ability of the healthcare system to comply without passing on significant cost increases. PolyMedica at 3 (a switch to live calls would be cost prohibitive); Access at 2–3 (DME suppliers work on ''very small profit margins'' and the cost of new communication systems would detract from ability to serve patients).

explains, while proactive patients who are attentive to their healthcare may be likely to provide a written agreement to authorize prerecorded messages from their healthcare providers, such reminder and other communications are most needed by the patients who are least attentive to their healthcare—those who ''frequently procrastinate or make ill-informed decisions''—and therefore are least likely to get around to responding to requests for authorization to receive such calls.[328] Thus, for example, as one commenter reports, ''up to 70% of patients with long-term prescriptions fall off therapy'' in the absence of prescription refill reminders, with resulting costly adverse impacts, including increased ''hospitalization, morbidity and mortality rates.''[329] Two of the comments cite independent statistics and studies, including a report by the Government Accountability Office, as evidence of measurable health benefits from the use of interactive prerecorded messages in patient care.[330]

iv. No Record of Coercive or Abusive Healthcare Calls

Two commenters who advocate an exemption for healthcare-related prerecorded message calls subject to HIPAA contend that the record shows no history of conduct by those who place such calls that is ''coercive or abusive.''[331] Both cite the Silverlink Survey, discussed above,[332] where 45 percent of the respondents indicated they ''would like'' or ''would not mind'' automated healthcare reminder calls, as evidence showing ''to a 'statistically significant' degree''[333] that consumers are more tolerant of healthcare-related calls than other types of calls.[334] One emphasizes that ''[i]n fact, the level of consumer support for automated health-related calls is similar to the level of consumer support for the established business relationship exemption the FTC already granted for telemarketing calls that use sales representatives.''[335]

The comments also cite other evidence of consumer acceptance of prerecorded healthcare calls. One asserts that low opt-out rates show consumer approval,[336] as does the percentage of consumers who respond to healthcare messages left on answering machines or with another household member.[337] The comment adds that interaction rates also demonstrate consumer acceptance of automated healthcare calls, noting that the percentage of recipients who answer and respond to the first question without hanging up ''typically exceeds 75%,'' whereas ''interaction rates for other calls are much lower, 17% for financial services and 2% interaction rate for utility services.''[338] Other comments point to affirmative patient action as evidence of acceptance of prerecorded healthcare calls. One reports that in its 4 million calls annually to 500,000 clients for prescription refills or medical supply reorders, ''better than 50%'' have reordered on average, and reorders have sometimes ''exceeded 67%,'' with fewer ''than 1% complaints'' about the calls, and ''very few'' opt-out requests.[339]

The exemption advocates also argue that there is no justification for application of the proposed amendment to healthcare-related calls, because the benefits of healthcare calls ''far outweigh any intrusion on privacy interests.''[340] One comment adds that given the potential civil and criminal penalties for violations of the restrictions on healthcare related calls, patients will be protected from abusive marketing calls, and that consequently there is no need for the additional protection of the proposed amendment.[341]

b. Discussion and Conclusion

As the comments make clear, in addition to generating demonstrable improvements in patient outcomes, the use of inexpensive prerecorded calls plays an important cost-containment role in the provision of medical services, many of them publicly funded, and in facilitating the record-keeping that governmental healthcare reimbursement regulations require. Requiring the prior written agreement of patients to receive prerecorded calls subject to HIPAA quite obviously could burden or jeopardize the improved medical outcomes that such calls have made possible by enabling healthcare providers to achieve higher rates of patient compliance with treatment regimens at low cost. Government Accountability Office reports and other studies have shown that the prior low rates of patient compliance contributed to significantly higher than necessary national healthcare costs because they resulted in increased hospitalizations, morbidity and mortality rates.[342] Quite apart from the risk that some patients might decline to agree to receive such calls, requiring written agreements from current patients would be inconsistent with the healthcare system's cost-containment mandate.

The Commission has given careful consideration to the possibility of exempting healthcare calls from the express written agreement requirement of the amendment, while requiring that they comply with its opt-out provisions. The difficulty with such a partial exemption in the healthcare context, as some of the commenters argue, is that a partial exemption may create a health or safety risk. The patients who most need healthcare calls may be confused as a result of age or other health-related conditions, and might opt out of the calls, thereby preventing their healthcare provider from contacting them even with a live call to check on their condition without violating the TSR. For this reason, the Commission is persuaded that a complete exemption from the amendment for healthcare-related calls is necessary.

[328] Silverlink/Eliza at 2; *see also* Silverlink /Eliza Corp., Petition Requesting That the FTC Maintain its Current Enforcement Policy Permitting the Use of Prerecorded Messages (When There Is an Established Business Relationship) for the Narrow Subset of Health-Related Calls Made by Entities Regulated under HIPAA (''Silverlink Petition''), *available at* (*http://www.ftc.gov/os/comments/telemarketingrulefees/061130ftcPetition.pdf*), at 6 n.14; *cf.* Access at 5 (elderly and chronically ill patients not likely to respond quickly to request for written permission for use of prerecorded messages).

[329] Silverlink/Eliza at 3.

[330] Silverlink/Eliza at 3–4, 6; medSage at 5; *see also* Silverlink Petition at 6–7.

[331] Silverlink/Eliza at 8, 11; Access at 7, 9–10.

[332] *See* note 86, *supra*, and accompanying text.

[333] Silverlink Survey at 5.

[334] Silverlink/Eliza at 7–8 & n.4; Access at 8.

[335] Silverlink Survey at 1. *See* 68 FR 4580, 4593 (Jan. 29, 2003) (40 percent of consumers who commented favored an EBR exemption to the TSR).

[336] Silverlink/Eliza at 8 (noting that only 50 of 140,000 patients who received an automated prescription refill call opted out, and that only 10 of 60,000 Medicaid members who received an automated interactive call opted out); Silverlink Petition at 7 (reporting that only 25 of 100,000 Medicaid members who received interactive automated calls opted out). Because it is not clear when or whether an opt-out option was provided in these calls, and the number of live answers is not provided, the Commission does not rely on this and similar reports of low rates of complaints and opt-outs for healthcare calls.

[337] Silverlink/Eliza at 8 (citing a 20 percent response rate).

[338] *Id.* at 7.

[339] PMSI–Tmesys at 1–2. *See also* CenterPost at 1 (reporting that ''66–82% of customers renew a policy or prescription in an automated call''); *cf.* PolyMedica at 2 (asserting that its interactive calls are ''generally welcomed by patients'' and noting that of its 913,000 patients, 25,000 refilled prescriptions in response to interactive calls in November 2006, and that it expected an additional 29,000 to do so in December 2006).

[340] Silverlink/Eliza at 12; medSage at 6–7.

[341] medSage at 4. In addition, one request argues that the Commission provided inadequate notice of the proposed amendment to the healthcare industry, and that the rulemaking should be reopened so that their requests can be considered, if an exemption is not granted. Silverlink/Eliza at 12–13.

[342] *See* notes 329–330, *supra*, and accompanying text.

Significantly, unlike other telemarketing calls, the number of healthcare-related calls subject to HIPAA is limited by the nature of the calls, depends on the patient's health and medical condition, and would not expose consumers to an unlimited number of sellers seeking to generate sales.[343] For healthy consumers, the calls would be limited to infrequent annual reminders of check-ups, immunizations, or health screenings. For consumers with a medical condition, the calls would continue periodically only for so long as prescribed medicine, medical equipment or supplies, or home healthcare follow-up continue to be medically necessary.[344] In either case, the calls would come from a limited number of providers, and would be limited in their frequency by the medical needs of the patient.

In summary, the Commission has determined to exempt healthcare-related prerecorded message calls subject to HIPAA from the prerecorded call amendment. This determination is based on six primary considerations, first among them the fact that delivery of healthcare-related prerecorded calls subject to HIPAA already is regulated extensively at the federal level. Second, coverage of such calls by the amendment could frustrate the Congressional intent embodied in HIPAA, as well as other federal statutes governing healthcare-related programs. The third basis for the exemption is that the number of healthcare providers who might call a patient is inherently quite limited—as is the scope of the resulting potential privacy infringement—in sharp contrast to the virtually limitless number of businesses conducting commercial telemarketing campaigns. Fourth, there is no incentive, and no likely medical basis, for providers who place healthcare-related prerecorded calls to attempt to boost sales through an ever-increasing frequency or volume of calls. Fifth, the existing record does not persuade the Commission that it should find that ''the reasonable consumer'' would consider prerecorded healthcare calls coercive or abusive.[345] Finally, FTC law enforcement experience does not suggest that healthcare-related calls have been the focus of the type of privacy abuses the amendment is intended to remedy. For these reasons, the Commission has determined, pursuant to both its authority under the Telemarketing Act and its authority under the FTC Act, that healthcare-related prerecorded message calls subject to HIPAA should be exempt, because application of the amendment to such calls ''is not necessary to prevent the unfair or deceptive act or practice [that harms consumer privacy] to which the [amendment] relates.''[346]

Accordingly, the Commission has exempted from the requirements of 16 CFR 310.4(b)(1)(v) any outbound telephone call that delivers a prerecorded healthcare message made by, or on behalf of, a covered entity or its business associate, as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.[347]

3. Exemption for Calls Made by For-Profit Telemarketers to Deliver Prerecorded Charitable Solicitation Messages on Behalf of Non-Profit Organizations

Concerned that for-profit telemarketers using prerecorded messages to solicit contributions on behalf of non-profit charities otherwise would be subject to the requirements of the amendment, when prerecorded message calls placed by the charities themselves are not covered because the Commission lacks jurisdiction over non-profit entities, DMA and Heritage urge that such calls be exempted.[348]

a. Comments Advocating an Exemption

Both commenters who address this issue seek, at a minimum, an exemption for such calls made to those with whom the charity has an existing relationship, ''which in most cases would include donors or members of [the] charity.''[349] They also argue that the Commission should go further, and grant for-profit telemarketers a blanket exemption from any of the requirements of the amendment when soliciting charitable contributions.

DMA emphasizes that analogous FCC regulations implementing the TCPA permit the use of prerecorded message calls without the called party's consent when a call is made ''by or on behalf of a tax-exempt nonprofit organization.''[350] DMA further notes that:

> The Commission has crafted different rules in the Do Not Call area in the past for

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[343] An argument could be made that Congress did not intend DME suppliers in particular, and perhaps healthcare providers in general, to be subject to the Telemarketing Act, because the restrictions on telephone solicitations by DME suppliers in 42 USC 1395m(a)(17)(A), which include an exemption similar to an EBR, were added to the Social Security Act on October 31, 1994, just over two months after passage of the Telemarketing Act on August 16, 1994. Pub. L. No. 103–432 § 132(a). Because DME suppliers, like other healthcare providers, are subject to the HIPAA Privacy Rule, an exemption based on that Rule will also exempt DME suppliers.

[344] The exemption would not apply to sales of over-the-counter medications and dietary supplements unless prescribed by a covered entity as part of a plan of treatment.

[345] The record contains survey evidence indicating that some 45 percent of consumers ''would like'' or ''would not mind,'' getting prerecorded healthcare calls. Silverlink Survey, Attach. A, at 2. A separate survey question demonstrates that consumers are much less willing to listen to pure sales calls than to health-related calls: When asked how willing they were to listen to different kinds of prerecorded calls, 34 percent rated their willingness to listen to prerecorded health calls at ''4'' or ''5''on a 5-point scale, compared to only 3 percent who were equally willing to listen to calls for discounted rate credit cards, and only 5 percent to discount vacation package calls. *Id.*, Attach. A, at 3 (using a 5-point scale with ''5'' being the most willing). This evidence is confounded by the fact that the survey also shows that 12 percent of consumers would be ''upset'' if they received a prerecorded call from their healthcare company, and that an additional 29 percent would ''prefer not to be contacted in this way.'' *Id.*, Attach. A, at 2. Nonetheless, considering all of the evidence, the Commission is not persuaded that it should find that ''the reasonable consumer would consider [such calls] coercive or abusive of such consumer's right to privacy.'' 15 USC 6102(a)(3)(A). Absent such a finding, the Commission lacks authority under the Telemarketing Act to apply the prerecorded call amendment to healthcare-related calls governed by the HIPAA Privacy Rule.

[346] 15 USC 57a(g)(2). *See* note 298, *supra*.

[347] Because the amendment makes explicit the prohibition against such prerecorded messages that is implicit in 16 CFR 310.4(b)(1)(iv), the effect of the exemption is also to shield calls within the scope of the exemption from violation of that provision.

[348] The Commission notes that prior to this amendment, for-profit telemarketers calling to solicit charitable contributions on behalf of non-profit organizations—like telemarketers placing sales calls—have been subject to the TSR's call abandonment prohibition, which prohibits the use of prerecorded messages in all calls answered in person by a consumer (except the 3 percent permitted under the call abandonment safe harbor). For-profit telemarketers calling to solicit charitable contributions on behalf of non-profit organizations could not use prerecorded messages pursuant to the non-enforcement policy, announced in November 2004, because that policy was limited to prerecorded message calls placed to consumers with whom a *seller* had an EBR. An EBR, by definition, is based on a commercial transaction, not a charitable contribution. Thus, as compared to the status quo, this amendment substantially reduces restrictions on for-profit telemarketers that make calls to solicit charitable contributions on behalf of non-profit organizations.

[349] DMA at 6,7; *see* Heritage, No. 581, at 2. As indicated in note 334, *supra*, the TSR's defined term, ''established business relationship,'' 16 CFR 410.2(n), has no applicability to charitable solicitations or the activities of those who perform them. Rather, the term establishes the parameters of an exemption to the Do Not Call Registry provisions, which reach neither charities nor the for-profit telemarketers that place solicitation calls on their behalf. *See* 16 CFR 310.6(a) (''Solicitations to induce charitable contributions via outbound telephone calls are not covered by §310.4(b)(1)(iii)(B) [the Do Not Call Registry provisions] of this Rule''). Where commenters use the term ''established business relationship'' in the context of charitable solicitations, the Commission interprets it to mean ''previous donors to or members of the non-profit charitable organization.'' The Commission construes ''members'' broadly to include volunteers, whether or not they have a formal membership in the charity. *See* 68 FR at 4634 & n.660.

[350] DMA at 6, *citing* 47 CFR 64.1200(a)(2)(v).

charities, and should continue to recognize the enhanced First Amendment protections given to charitable speech and the lower concern for abuse. . . . [T]he Commission [should] exclude calls made to induce a charitable contribution from the scope of the [contemplated amendment] . . . . This would afford charities the same right to contact donors as they were afforded by Congress under the TCPA.[351]

Similarly, Heritage asserts that under relevant Supreme Court decisions ''charities enjoy protected free speech rights beyond that provided to commercial speech.'' Heritage also asserts that restrictions on for-profit telefunders will not enhance consumer privacy because these restrictions, due to limits on the FTC's jurisdiction, cannot reach non-profit charities that own and operate their own equipment for making calls that deliver prerecorded fundraising messages.[352]

b. Discussion and Conclusion

The Commission has given careful consideration to the impact of the prerecorded call amendment on charities that use for-profit telefunders to solicit contributions. It has also given careful consideration to the impact on the privacy of potential donors in their homes.

It is important to note at the outset that there is a significant factual difference between this exemption request and the exemption for prerecorded healthcare-related calls governed by the HIPAA Privacy Rule that bears directly on the governmental interest in protecting the privacy of consumers in their homes. As previously noted, the number of healthcare calls is inherently limited by the fact that HIPAA regulations specify that ''marketing'' calls unrelated to medical treatment can only be made with the prior consent of the patient, and permit periodic treatment-related calls only by the patient's healthcare provider and its business associates. The limited number and frequency of potential healthcare calls governed by HIPAA stands in sharp contrast to the large number of charities that inevitably compete with each other for donations, and the tide of low-cost prerecorded charitable solicitation calls consumers would likely receive from telefunders.[353] Thus, while coverage under these amendments of prerecorded healthcare message calls governed by the HIPAA Privacy Rule is not necessary to prevent the acts or practices to which the amendment relates, the same cannot be said for prerecorded message calls placed by for-profit telemarketers to solicit charitable contributions on behalf of non-profit organizations.

The challenge for the Commission is to achieve the appropriate balance between the strongly-protected right of non-profit organizations to reach donors through telefunding, and the privacy rights of those potential donors to be free, in their own homes, of prerecorded message calls that they do not want. To achieve what it believes is the best balance in this regard, the Commission has decided to permit telefunders to place prerecorded messages calls to those with whom the charity has an existing relationship—*i.e.*, members of, or previous donors to the non-profit organization on whose behalf the calls are made—without first obtaining the call recipients' consent, so long as the messages enable the recipients of the calls to opt out from the calls they do not wish to continue to receive.[354]

Balancing the competing bedrock rights at issue must be achieved within the framework of relevant First Amendment principles. As the Commission noted in the SBP for the Amended Rule, the framework for First Amendment analysis is more stringent with respect to telemarketing that solicits charitable contributions than it is for commercial telemarketing for the purpose of inducing purchases of goods or services.[355]

The analytical framework for determining the constitutionality of a regulation of commercial speech that is not misleading and does not otherwise involve illegal activity is set forth in *Central Hudson Gas & Elec. v. Pub Serv. Comm. of N.Y.*[356] Under that framework, the regulation (1) must serve a substantial governmental interest; (2) must directly advance this interest; and (3) may extend only as far as the interest it serves[357]—that is, there must be ''a 'fit' between the legislative ends and the means chosen to accomplish those ends . . . a fit that is not necessarily perfect, but reasonable . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.''[358]

With regard to the first of these criteria, protecting the privacy of consumers from unwanted commercial telemarketing calls delivering prerecorded messages is a substantial governmental interest. ''Individuals are not required to welcome unwanted speech into their own homes and the government may protect this freedom.''[359]The amendment is designed to advance the privacy rights of consumers by providing them with an effective way to limit prerecorded message calls, and to make known to sellers their wishes not to receive such calls. The amendment requires consumers' prior agreement to receive prerecorded calls, and must provide an interactive opt-out mechanism at the outset of the message to enable a call recipient to withdraw consent and avoid receiving any more prerecorded calls. Thus, the amendment directly advances the privacy interest at issue, and the second *Central Hudson* criterion is met. Finally, with respect to the third criterion, the prerecorded message amendment comprises a mechanism closely and exclusively fitted to the purpose of protecting consumers from prerecorded telemarketing calls that a reasonable consumer would find abusive of his or her privacy.

In considering the more stringent analysis that pertains to charitable fundraising, the Commission notes, preliminarily, that application of the prerecorded message amendment to charitable solicitation telemarketing would be content-neutral. ''Laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.''[360] The prerecorded message amendment applies equally to all for-profit solicitors, regardless of whether they are seeking sales of goods or services or charitable contributions, and regardless of what may be expressed in the solicitation calls themselves or the viewpoints of the organizations on whose behalf the solicitation calls are made.

[351] DMA at 7.

[352] Heritage at 2.

[353] The Combined Federal Campaign of the National Capital Area (''CFCNCA'') alone supported more than 3,400 local, national and international charities in 2006–2007. *See* CFCNCA, Stewardship Report to the Federal Community 2006–2007, p.4, *available at* (*http://www.cfcnca.org/?pastcampaignresults*).

[354] This means that telefunders would be covered by subparagraph (B) of the amendment, but not subparagraph (A).

[355] 68 FR 4636 (Jan. 29, 2003).

[356] 447 U.S. 557 (1980).

[357] *Id.* at 566.

[358] *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

[359] *Frisby v. Schultz,* 487 US 474, 485 (1988).

[360] *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 648 (1994). ''[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.'' *Turner* at 642, *citingClark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (''[The] principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys''). *See also Am. Target Adver. v. Giani,* 199 F.3d 1241 (10th Cir.), *cert. denied*, 531 U.S. 811 (2000) (applying this principle in the context of solicitation).

As in the case of commercial speech, the analysis applicable to charitable solicitations also inquires into the nature of the governmental interest that the regulation seeks to advance. The case law indicates that with respect to the higher level of scrutiny applicable to charitable solicitations, privacy protection is a sufficiently strong governmental interest to support a regulation that touches on protected speech.[361] However, the case law also indicates that, in the case of charitable solicitation, greater care must be taken to ensure that the governmental interest is actually advanced by the regulatory remedy, and that the regulation is tailored narrowly so as to minimize its impact on First Amendment rights. In *Riley* v. *Nat'l Fed. of the Blind,*[362] and *Schaumburg* v. *Citizens for Better Env't,*[363] the Court rigorously examined laws that regulated the percentage of charitable contributions raised by a professional fundraiser that could be retained as the fundraiser's fee. The Court struck down the laws because there was, in the Court's view, at best an extremely tenuous correlation between charity fraud and the percentage of funds paid as a professional fundraiser's fee; the laws therefore were unlikely to achieve their intended purposes of preventing fraud and protecting charities. The Court also found that these laws were not drawn narrowly enough to minimize the impact on the charities' First Amendment rights.

In contrast, a close nexus exists between the government's legitimate interest in protecting consumers' privacy from unwanted prerecorded telemarketing calls from telefunders and the requirement that such calls give call recipients an opportunity to opt out. This nexus does not rely on an attenuated theoretical connection between fraud and the percentage of funds raised that a telefunder may take as its fee. Rather, there is a direct correlation between the governmental interest and the regulatory means employed to advance that interest: The consumer indicates his or her preference not to receive such a call again, and the regulation requires the telefunder to record and honor that request in the future.

As noted in the SBP for the Amended TSR, the Commission approaches with extreme care the issue of tailoring the TSR privacy provisions narrowly to advance the Commission's legitimate governmental interest, yet minimize the impact on the First Amendment rights of charitable organizations and the for-profit telemarketers who solicit on their behalf.[364] The Commission is concerned that subjecting charitable solicitation telemarketing to the same prior written agreement requirement that applies to commercial telemarketing for the purpose of soliciting sales of goods and services may sweep too broadly, and inadvertently act as an impermissible prior restraint, given the difficulties charitable organizations say they have in securing donors' agreements to receive charitable solicitation calls.[365]

After careful consideration, the Commission has determined that the best approach to achieve a narrow tailoring of the prerecorded message amendment is to exempt solicitations by telefunders to induce charitable contributions via outbound telephone calls from the prior written agreement requirement of the amendment, and instead require only that such calls, like charitable solicitation calls that are placed by live representatives, enable the recipients of the calls to opt out of receiving such calls in the future, if they so desire.

Limiting telefunders' use of prerecorded messages to those calls placed to members of, or previous donors to, the non-profit organization on whose behalf the calls are placed serves two important purposes. First, it will prevent a likely tide of low-cost charitable solicitation calls to potential donors made by telefunders on behalf of a virtually infinite array of non-profit organizations seeking to boost donations. There are consumer complaints about charitable solicitations in the record,[366] and the record suggests—and common sense confirms—that the abuse of consumer privacy intensifies as the number and frequency of telemarketing calls, including prerecorded calls, increases. Second, there is evidence in the record that the abuse of consumer privacy is greatly compounded by prerecorded calls from entities with which consumers have no prior relationship. Permitting telefunders to make impersonal prerecorded cold calls on behalf of charities that have no prior relationship with the call recipients, therefore, would defeat the amendment's purpose of protecting consumers' privacy.[367] Thus, permitting the use of prerecorded messages to calls made by telefunders to members of, or previous donors to, a charitable organization is a limiting principle that makes good practical and policy sense. This is an alternative supported by the two industry commenters who addressed the issue of an exemption for charitable solicitation calls.

The Commission notes that the provision requiring for-profit telefunders to honor entity-specific Do Not Call requests, which this amendment implements for prerecorded calls, has been challenged and upheld.[368] It is instructive to note that, in analyzing whether this provision is tailored narrowly enough to pass First Amendment scrutiny, the Fourth Circuit compared the TSR's regulatory scheme to a federal statute challenged in *Rowan* v. *U.S. Post Office Dep't.*[369] That statute empowered a homeowner to bar mailings from specific senders by notifying the Postmaster General that she wished to receive no further mailings from that sender. The Fourth Circuit stated:

> The parallels between the law at issue in *Rowan* and the do-not-call list in this case are unmistakable. If consumers are constitutionally permitted to opt out of receiving mail which can be discarded or ignored, then surely they are permitted to opt out of receiving phone calls that are more likely to disturb their peace. In this way, a do-not-call list is more narrowly tailored to protecting privacy than was the law in *Rowan.*

[361] ''The Village argues that three interests are served by its ordinance: the prevention of fraud, the prevention of crime, and the protection of residents' privacy. We have no difficulty concluding, in light of our precedent, that these are important interests that the village may seek to safeguard through some form of regulation of solicitation activity.'' *Watchtower Bible & Tract Soc'y* v. *Vill. of Stanton,* 536 U.S. 150, 164–65 (2002); *Schaumburg* v. *Citizens for Better Env't,* 444 U.S. 620, 637 (1980) (protecting the public from fraud, crime, and undue annoyance are indeed substantial interests); *Nat'l Fed. of the Blind* v. *FTC,* 420 F.3d 331 (4th Cir.), *cert. denied,* 547 U.S. 1128 (2006) (prevention of fraud and the protection of privacy in the home are sufficiently substantial governmental interests to justify a narrowly tailored regulation).

[362] 487 U.S. 781 (1988).

[363] 444 U.S. 620, 637 (1980).

[364] 68 FR 4636 (Jan. 30, 2003).

[365] The Commission notes that, in a slightly different context, non-profit organizations uniformly condemned a proposal in the NPRM for the Amended TSR that they would be able to obtain consent to place charitable solicitation calls to persons who had placed their phone numbers on the National Do Not Call Registry and thereby preserve their right to call those persons. Non-profit organizations asserted that it would be too costly for them to obtain prospective donors' express permission to call, and too difficult for consumers to exercise their right to hear from them. 68 FR 4636 (Jan. 30, 2003).

[366] *E.g.*, Bashinksy, No. 123, at 1; Harlach, No. 000; Popat, No. 120, at 1; *but see* Maddock, No. 137, at 1–2.

[367] Cold calls prospecting for new donors are also far less likely to induce financial support than calls to prior donors and members. *See* 68 FR at 4634 (citing comments contending that ''it is axiomatic that persons who have already contributed to a nonprofit or charitable organization are much more likely to contribute than are persons who have never done so'').

[368] *Nat'l Fed. of the Blind v. FTC,* 420 F.3d 331 (4th Cir.), *cert. denied,* 547 U.S. 1128 (2006).

[369] 397 U.S. 728 (1970).

> Moreover, this particular restriction seems even more reasonable given the fact that the FTC has only subjected telefunders to a charity specific list. Under this procedure, a consumer cannot report to a central authority that he wishes not to be called by any telemarketers generally; he must instead repeat his request as to each caller individually. This charity-specific alternative to a national list is an option that the *Mainstream Marketing* court called ''extremely burdensome to consumers.'' 358 F.3d at 1244. In light of this, we have no trouble finding the charity-specific restriction on speech to be a permissibly narrow means of protecting the home environment.[370]

The purpose and effect of this exemption is to allow for-profit telefunders to make use of prerecorded messages while maintaining the Rule's privacy protections for consumers. The amendment ensures the same privacy protection for recipients of prerecorded message calls soliciting a charitable contribution that the Rule currently affords recipients of calls from live representatives soliciting a charitable contribution.[371] To paraphrase the Fourth Circuit, if consumers are constitutionally permitted to opt out of receiving phone calls from live telefunding representatives, then surely they are permitted to opt out of receiving calls that are more likely to disturb their peace because they deliver no live human voice, but only a prerecorded message.

Accordingly, the Commission has modified the prerecorded call amendment to make it clear that only the opt-out requirements in 16 CFR 310.4(b)(1)(v)(B) apply to prerecorded calls ''to induce a charitable contribution from a member of, or previous donor to, a non-profit charitable organization on whose behalf the call is made.''

III. Proposed Abandoned Call Measurement Standard Revision

The second proposed amendment would revise the TSR's standard for measuring the permissible call abandonment rate. Section 310.4(b)(4)(i) of the TSR now requires that a seller or telemarketer employ ''technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured *per day per calling campaign*.''[372] The proposed amendment would revise the standard to permit sellers and telemarketers to measure the abandonment rate ''*over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues*.''[373]

The Commission proposed the revision because the ''record shows that particular problems arise in connection with the use of smaller, segmented lists that are the most economical for small businesses and the most useful in targeting only those consumers most likely to be interested in a particular sales offer.''[374] This occurs because the predictive dialers used to place live telemarketing calls use statistical projections, based on continuous sampling of the number of calls that are answered in person, to determine the rate at which to place calls for the sales representatives that are available to take them. As with all such statistical models, small samples produce large standard deviations, a fact which manifests itself, in the case of predictive dialers, in decreased accuracy for smaller calling lists and unexpected spikes in call abandonment rates. Consequently, the current ''per day per calling campaign'' call abandonment standard effectively precludes the use of predictive dialers with smaller calling lists because of the likelihood that call abandonments will exceed the three percent daily maximum permitted.

Some 144 consumers, 9 consumer advocates, and 12 industry members and trade associations commented on the proposed amendment. All of the consumer advocacy comments and nearly all of the individual consumer comments oppose any change that might increase the number of abandoned calls consumers receive, with many consumers insisting that all abandoned calls are ''abusive'' and should be prohibited. The industry comments generally applaud the proposed amendment, but most argue that its ''per campaign'' limitation still makes it unduly restrictive compared to the FCC standard, which permits telemarketers to compute a single abandonment rate for all the campaigns they conduct during a 30-day period.[375]

A. Consumer Comments

All of the comments from consumer advocates oppose the proposed amendment, as do nearly all of the individual consumers who refer to it, most of whom specifically object to ''abandoned'' or ''dead air'' calls.[376] Twelve consumer comments ask in particular that the present ''3 percent per day'' standard be retained,[377] while only four clearly voice any support for the proposed amendment.[378]

The consumer advocates and individual consumers make five basic arguments against the proposed amendment: (1) Abandoned calls are harassing and an invasion of privacy; (2) Abandoned calls should be banned to protect consumers; (3) Any change in the current standard will further harm consumers; (4) The record does not support any change in the current standard; and (5) The ''per campaign'' standard should be retained.

1. Abandoned Calls are Harassing and an Invasion of Privacy

More than 35 consumers say abandoned calls are ''annoying.''[379]

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[370] *Nat'l Fed. of the Blind v. FTC,* 420 F.3d at 342.

[371] With respect to the underinclusiveness objections raised by both DMA and Heritage to the effect that the amendment's coverage only of for-profit telefunding, but not telephonic fundraising conducted in-house by non-profit organizations, the Commission notes that the Fourth Circuit, in *Nat'l Fed. of the Blind*, held that:

> When an agency regulates to the extent of its jurisdiction it will unavoidably leave out some speakers and some speech that is beyond its authority to regulate. But, in such circumstances, the danger of governmental overreaching—which cases such as *Discovery Network* aim to prevent—is removed. Unlike in those cases, here it does not make sense to see this unavoidable distinction as a red flag indicating First Amendment problems. Any underinclusiveness that appellants have identified is not the result of the FTC attempting to favor one side of a public debate over another, or pursuing an illegitimate governmental interest, or not genuinely serving the interest it purports to seek. Rather, such underinclusiveness results from the simple fact that the PATRIOT Act designated ''charitable solicitations'' as being within the type of behavior the FTC could regulate, but it left speech by charities outside the agency's jurisdiction.
>
> The agency's jurisdictional boundary, therefore, serves as the 'neutral justification' for the distinction that was missing in Discovery Network. While plaintiffs complain that the regulation also fails to cover some commercial, political, and intrastate speech, this fact too is explained by the FTC's assiduous attention to its own jurisdiction.

420 F.3d at 348 (citations omitted).

[372] 16 CFR 310.4(b)(4)(i) (emphasis added).

[373] 71 FR at 58734 (emphasis added).

[374] 71 FR at 58730.

[375] 47 CFR 64.1200(a)(6) (Prohibiting abandonment ''of all telemarketing calls that are answered live by a person, measured over a 30 day period'').

[376] Six of the comments refer to calls that are ''auto-dialed,'' ''auto call,'' ''computer generated,''or ''machine calls,'' Eng, No. 277; Schell, No. 430; Herman, No. 305; Reeves, No. 355; Block, No. 226; Anderson, No. 395; and two cite ''automatic dialers'' or ''automated systems.'' Griffiths, No. 319; Warsaw, No. 388. One objects to ''any expansion in the rights of telemarketers to call my phone numbers,'' Bergman, No. 302, and another considers ''the proposed amendments to be vital'' but does not ''wish to be disturbed.'' Murphy, No. 332.

[377] *E.g.*, Chastain, No. 518; Hamilton, No. 219; Ryan, No. 645; Woods, No. 328; ; *but see* Parlante, No. 216 (would prefer only ''1% per day'').

[378] Bashinski, No. 123, at 1; Byrne, No. 158, at 2; Popat, No. 120, at 3; McDaniel, No. 557; *cf.* Dunlop, No. 118, at 3 (''The rule should be amended to allow a four or five percent dropped call rate 'per day' instead of three percent 'per 30 days'").

[379] *E.g.,* Bernardy, No. 307 (''[T]here is NOTHING more annoying than running to the phone and finding dead air !!! I detest these calls'') (emphasis in original); Sanders (It is ''very annoying'' when

Continued

Others find them ''frustrating,''[380] ''irritating,''[381] and a ''nuisance.''[382] Ten cite the inconvenience of being interrupted in what they are doing for no reason,[383] be it working outside,[384] sitting in a comfortable chair to read or relax,[385] or preparing or eating a meal.[386] Several consumers say they consider the repeated interruptions of their home life by abandoned calls a form of harassment.[387] While two consumers say they have learned to cope with abandoned calls by screening calls before they answer them,[388] several say, like PRC, that they consider abandoned calls an invasion or violation of their right to privacy in their home.[389]

2. Abandoned Calls Should Be Banned To Protect Consumers

One consumer advocacy group and at least 14 individual consumers assert that ''the only acceptable rate for abandoned or dead-air calls is a zero tolerance.''[390] Similarly, NCL's joint comment for itself and six other consumer advocacy groups, as well as several comments from individual consumers, contend that the only ''acceptable level for abandoned calls is zero.''[391] PRC argues that abandoned calls should be banned completely because ''any tolerance for 'dead-air' calls denies consumers the opportunity to complain about abusive calls'' for the simple reason that ''[e]ven when the consumer's phone has Caller ID, the display usually shows only 'private caller' or 'out of area.'''[392] Six consumer comments confirm that they have no way to identify the source of the abandoned calls they receive, and therefore ''no way of knowing what company to call to have the calls stop.''[393]

NCL adds two additional justifications for a total ban. The first is that, ''[u]nlike airlines, which are permitted to overbook but must then compensate consumers for being bumped, consumers receive no compensation for being subjected to abandoned calls.''[394] NCL's second rationale is that abandoned calls cause ''anger and fear among a certain percentage of consumers for the sake of commercial efficiency,'' and ''this is not a fair trade-off.''[395]

3. Any Change in the Current Standard Will Further Harm Consumers

Both AARP and PRC stress the fear abandoned calls create for consumers as a ground for their opposition to the proposed amendment. AARP and several consumer comments point out that ''[f]or mid-life and older Americans these calls are more than just a nuisance,'' because ''[i]n addition to the inconvenience and risk associated with rushing to answer the telephone, there is the uncertainty and concern for the consumer, especially for women living alone.''[396] PRC adds that receiving an abandoned call ''needlessly increases anxiety for stalking victims'' and for ''[c]onsumers whose homes have been burglarized or who live in a neighborhood where home burglaries have occurred.''[397] A comment from a police detective attests that ''[o]ur residents who get numerous hang-ups (dead air calls) make police reports thinking these are from a 'specific' person who is harassing them,'' and that ''these calls create additional work for law enforcement throughout the country as well as create a harmful atmosphere for the receiving person.''[398]

PRC also asserts that the proposed amendment ''does nothing to promote consumer interests.''[399] The Connecticut Attorney General agrees, opposing the proposed amendment both because abandoned calls ''represent a substantial intrusion into consumers' lives'' and because ''the telemarketing industry's comments acknowledge that it can

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''[y]ou rush to the phone and it's a recording or no one is there''); Steep, No. 422 (''Dead air' calls'' are ''particularly'' annoying); *see also, e.g.,* Anderson, No. 354; Brown, No. 350; Donohue, No. 300; Kelm, No. 271; Paradise, No. 241; No. 415; Redwine, No. 324.

380 Adams, No. 169 (''I cannot tell you how frustrating it is to pick up the phone after it has rang two times only to hear a 'click' on the other end''); Fulleylove-Krause, No. 423.

381 Churchwell, No.381(''Nothing is more irritating than to pick up the phone and no one is on the other end''); Roberson, No. 264 (I ''want to be protected from . . . those automatic calls that have no message, just silence. Those are just as irritating and unwanted''); Shell, No. 430; *cf.* Lindo, No. 310 (''I despise the 'dead' telephone line that results from call abandonment''); Saloiye, No. 554(''[V]ery aggravated by calls'' where ''no one is on the line'').

382 Griffith, No. 524 (''Abandoned calls are a great nuisance and should be strictly prohibited''); Gwinn, No. 553 (''Abandoned calls are a major nuisance''); Lilly, No. 522; *cf.* Haddox, No. 549 (''I find it such a waste of my time—especially when no one is on the end of the line'').

383 Aston, No. 551 (''Rushing to answer the phone only to find nobody there constitutes an unacceptable interruption as well as a waste of the victim's valuable time''); Gwinn, No. 553 (''I quit what I am doing—go to the phone—and silence! I see no justification for that annoying business practice''); Sawyer, No. 517 (''This allowance [for call abandonment] simply enables telemarketers to do the damage of interrupting what I am doing'').

384 Flanagan, No. 347 (''As a farm family dead air time is a real problem when working outside. You dash in the barn thinking it is the tractor dealer and you get this dead air phone call''); Schmidt, No. 450 (''I want this to stop, as many times I am busy outside, and must run in to a dead phone'').

385 Fielding, No. 267 (''The 'do not call' concept becomes a joke when companies are allowed to call and make you get up from your reading chair to answer a non-existent phone call''); Hall, No. 618 (''I don't want to get out of my chair every 10 minutes to answer'' telemarketers' ''dead silence computer calls'').

386 Adams, No. 321 (''I race to answer the phone and there's no one there. It undoubtedly happens when I am preparing a meal, or when I have just sat down to enjoy it''); Hooper, No. 331 (''Abandoned calls are especially annoying when I get up from a meal or run from another task to answer the phone and there is no one there'').

387 Casabona, No. 559 (''The use of equipment to dial more numbers than the telemarketers can possibly answer amounts to harassment. This practice is worse than a prankster ringing your line constantly and then hanging up when you answer''); Steans, No. 351 (''It's like being harassed in your own home.'') Citizen, No. 396 (I consider them [abandoned calls] a form of harassment, and you should too''); Burr, No. 211; Leuba, No. 466; *see* Harlach, No. 000 (''Telemarketers ''hang up leaving no message at all, only to call again the same day; sometimes within the same hour'').

388 Swafford, No. 521 (using Caller ID); Wagner, No. 353 (using an answering machine).

389 PRC at 4; *see also, e.g.,* Budnitz, No. 282; Hockaday, No. 255; Miller, No. 528.

390 PRC at 4; *see also, e.g.*, Chester, No. 208; McCleery, No. 218; Parlante, No. 216; Snell, No. 210.

391 NCL at 6; *see also,* Calderon, No. 301; Citizen, No. 396; Smallwood, No. 303; *cf.* Proctor, No. 403 (''I also support tightening of the method for measuring the maximum allowable abandonment rate''); Young, No. 330 (''Please STRENGTHEN rather than weaken any regulations about . . . methods for measuring the maximum allowable call abandonment rate'') (emphasis in original); Casabona, No. 559 (''Computer dialing of numbers for telemarketers who cannot possibly attend to them should be banned''); Warsaw, No. 388 (''I would like these systems banned and be considered wire fraud upon the public'').

392 PRC at 4 (Contending that ''[w]ithout the FTC's ability to conduct compliance audits and without consumers' ability to complain, the only enforcement mechanism is a telemarketer's requirement to keep records of abandoned call rates,'' and that measures to ensure more effective enforcement should be pursued, ''either through rulemaking or, if appropriate, seeking an amendment to the law itself'').

393 Cooper, No. 285; *accord*, Palicki, No. 260 (Police detective attesting that when consumers attempt to obtain the numbers from which abandoned calls are placed, they ''show out of area''); Strang, No. 189, at 4–5 (citing calls to ''my residential phone line'' where ''the majority of the 'hangup' calls'' provided ''no Caller ID information as required by FCC rules''); Kostenko, No. 417; Sawyer, No. 517; Warsaw, No. 388.

394 NCL at 6; *see* Gorman, No. 387 (''Now they want to increase the Abandon Rate of their calls? They should not be calling us anyway unless they are going to pay for our phone service'').

395 *Id.* at 7.

396 AARP at 7; Anderson, No. 354 (''I work with seniors and it makes them feel very uncomfortable''); Baker, No. 201 (''Frequent afternoon and evening dead-air calls are a worry when you are alone as I am''); Hardesty, No. 543 (''I receive at least seven abandoned calls daily at my home. Not only is this a concern for me, but it is a worry for my elderly mother''); Leuba, No. 466 (''At least I hope they were robo calls, there is a possibility that they were predators, looking for a woman at home''); Matulis, No. 410 (''Too many seniors become alarmed when they receive dead air calls''); May, No. 333; *cf.* Johnson, No. 532 (Abandoned calls leave me ''wondering if a family member is in trouble'').

397 PRC at 4.

398 Palicki, No. 260.

399 PRC at 4.

configure dialers to comply with the current standards.''[400] NCL also sees no reason to relax the per-day standard because it ''forces telemarketers to monitor and adjust their use of predictive dialing closely,'' and ''[if] it requires them to switch to manual dialing at times, we think that is a good thing, because manual dialing does not result in abandoned calls.''[401] Moreover, NCL doubts that any change would be a change for the better. NCL observes that ''[i]f changing the standard . . . would actually reduce the number of consumers who receive [abandoned calls], and telemarketers can ensure that certain groups of consumers are not disproportionately subjected to such calls, it might be an improvement over the current situation,'' but notes that it is ''not confident, however, that that will be the result.''[402]

The few consumers willing to contemplate anything but a complete ban on abandoned calls also argue that the 'per day' standard should be retained because it ''limits the numbers of abandoned calls that consumers receive'' compared to the proposed amendment.[403] One argues that the 30-day standard of the proposed amendment ''will inevitably harm consumers'' and ''benefits firms at the expense of consumers.''[404] Another believes that the proposed ''30-day standard . . . makes it too easy for an irresponsible marketer to violate the laws with impunity for a whole month.''[405]

4. The Record Does Not Support Any Change in the Current Standard

PRC further contends that the industry ''has shown no good reason why this [proposed amendment] should be granted or that consumers have anything to gain by changing the calculation.''[406] A consumer comment more specifically argues that the ''industry has not demonstrated a clear and convincing need'' for the change, noting that while the industry's arguments ''are certainly plausible . . . little empirical evidence is offered to support them.''[407] This comment expresses particular doubt about the industry argument that a 30-day standard is necessary to permit the use of small, segmented lists that are most likely to ensure that telemarketing offers are made to the consumers who are most likely to be interested in them. ''Given the consumer response to the prior NPRM,'' the comment observes, ''it seems safe to say that very few telemarketing offers reach interested consumers.''[408]

A second industry rationale, that there is ''no evidence that telemarketers will abuse a 30-day standard,'' is challenged by another consumer comment as ''a nice sound bite'' but one that ''may be lacking in candor.''[409] The comment argues that ''[t]he telemarketing industry is known for bending, and for flat out ignoring, telemarketing rules,'' and that because ''no one has ever studied the problem . . . there is also no evidence to suggest the industry will not abuse a 30-day standard.''[410]

Finally, AARP finds fault with the industry ''argument that consumers can address their concerns [about abandoned calls] by using Caller ID to identify the names of telemarketers abandoning calls to their telephone numbers.''[411] AARP argues that ''[t]his suggested solution incorrectly places the burden and expense on the consumer to remedy this practice,'' and contends that ''consumers who cannot afford the extra cost of a Caller ID service . . . will be unable to check on the identity of an incoming call.''[412]

5. The ''Per Campaign'' Standard Should be Retained

In anticipation of industry arguments to the contrary,[413] the Connecticut Attorney General affirms the importance of the requirement in the amendment, as proposed, that the abandonment ''rate be measured during *each* campaign to reduce potential discriminatory treatment of disfavored groups.'' He argues that ''[a] thirty-day (30) standard, including any and all campaigns, would make less valued consumers the target of a disproportionate share of abandoned calls.''[414] The Attorney General notes that without this ''safeguard, consumers can only rely on the good faith of the industry that it will not engage in such practices, which directly conflicts with its financial incentive to do otherwise.''[415] Several consumer comments concur in this view.[416]

B. Industry Comments

Ten telemarketers, trade associations and businesses that use live telemarketing calls submitted comments on the proposed amendment to the current ''per day per calling campaign'' standard for measuring call abandonment. The industry comments are generally supportive of the proposed amendment, but most argue that it does not go far enough, and should eliminate the ''per campaign'' limitation. The comments provide information intended to show that: (1) The current ''per day'' standard inhibits small, targeted campaigns; (2) The continued ''per campaign'' limitation creates compliance issues; and (3) Discriminatory call abandonments need not be a concern.

1. The Current ''Per Day'' Standard Inhibits Small, Targeted Campaigns

All but two of the industry comments support the proposed amendment because it will reduce the costs and enhance the efficiency of live telemarketing.[417] Two of the comments urge the Commission to adopt the proposed amendment in its present form,[418] while the remainder argue that the proposed amendment's ''per campaign'' limitation is unnecessary.

Several of the comments take pains to point out how the current ''per day'' standard for measuring call abandonment rates adversely affects the efficiency of the predictive dialers used in live telemarketing.[419] The comments acknowledge that the Commission is correct in its understanding that the biggest problem arises from ''the limitations of predictive dialers in adjusting to unexpected spikes in

[400] CTAG at 3.

[401] NCL at 7.

[402] *Id.* at 6–7.

[403] Hui, No. 119, at 2

[404] Dunlop, No. 118, at 2, 3.

[405] Byrne, No. 158, at 2.

[406] PRC at 4.

[407] Platt, No. 11, at 1, 2.

[408] *Id.* at 1–2.

[409] Strang, No. 189, at 5–6.

[410] *Id.*

[411] AARP at 7–8.

[412] *Id.* (Noting that ''[p]revious AARP comments have recommended that abandoned calls include some identifying information: calls using predictive dialers should provide a taped message in lieu of hanging up''). In fact, section 310.4(b)(4)(iii) of the TSR's call abandonment safe harbor includes such a requirement. 16 CFR 310.4(b)(4)(iii).

[413] *See* Section III.B.2 *infra.*

[414] CTAG at 3 (emphasis in original).

[415] *Id.* at 4.

[416] Popat, No. 120, at 3 (''[A]veraging the campaigns within a period will lead to an increase in discriminatory abandonment''); Bashinski, No. 123, at 2 (Averaging across all of a telemarketer's campaigns ''would also allow some campaigns to have a much higher rate of call abandonment''); Hui, No. 119, at 2 (''Averaging out across campaigns comes at the expense of at least one group of consumers''); Wang, No. 126, at 3 (''It should not cover all campaigns because this would allow discriminatory treatment of campaigns'').

[417] DMA at 2, 10; ATA at 2; NAA at 4; Verizon at 6; Heritage, No. 80, at 1; Countrywide at 1; Verizon at 2, 6; ccc Interactive at 1; *but see* BoA at 1 (Noting, with approval, ''the Commission's willingness to take an approach similar to that taken by'' the FCC, but not endorsing the proposed amendment); TCIM, at 1 (Recommending only that the FTC adopt the FCC's standard for measuring call abandonment).

[418] Countrywide at 3 (''Countrywide urges the Commission to make this proposed rule change final without any additional amendment''); ccc Interactive at 1.

[419] ATA at 5–7; NAA at 12; Verizon at 3–4; Heritage at 3.

average call abandonment rates.''[420] They confirm that ''if the call abandonment rate is calculated daily, the telemarketer may not have a sufficient amount of time to recover . . ., particularly if one of those spikes occurs near the end of the day.[421]

As two comments note, ''[t]his effect is exacerbated in the case of targeted telemarketing campaigns directed to small groups of consumers'' because ''[b]asic principles of statistics indicate that when the group of consumers to be called is smaller, the deviation from expected answer rates—and expected abandonment rates—is greater.''[422] This adversely affects small businesses such as ''smaller community newspapers'' that are ''hampered the most because their telemarketing universe is small (calling lists less than 5000).''[423] It also impacts larger companies that ''use market research and data research . . . to focus individual telemarketing campaigns on those consumers most likely to be interested.''[424] Such ''segmented'' or ''targeted'' marketing ''means that consumers are most likely to receive those offers that are relevant to them, and less likely to receive telemarketing calls . . . that are not,'' and allows businesses ''to focus on smaller groups of consumers, which lowers marketing costs,'' permitting the cost savings to be ''passed on to consumers in the form of lower prices.''[425]

To ensure compliance with the per day standard, companies conducting such small or targeted campaigns ''may abandon predictive dialers altogether, relying instead on more expensive manual dialing,'' or ''program the dialer with a substantially lower abandonment rate [than 3 percent],'' thereby ''slowing the rate of outgoing calls'' and increasing costs by ''increasing operators' down-time between calls.''[426] These inefficiencies may lead companies to expand their campaigns to larger groups of consumers to minimize the effect of variations in the abandonment rate, with the result that ''consumers receive *more*, rather than fewer, telephone solicitations in which they have no interest.''[427]

One comment also highlights a second effect of the per day standard: that call centers require more telemarketers at the beginning of a calling campaign than toward the end because they ''see a dramatic decrease in contact rates as campaigns continue over time.''[428] This means either that ''management is forced to overstaff on a daily basis,'' or to adjust by ''decreasing staffing to accommodate smaller calling files later in programs.''[429] The problem with the latter approach is that new personnel must be hired and trained at no little cost because of turnover caused by the lack of a steady income. Thus, either strategy required by the per day standard increases costs that ultimately may be passed on to consumers.

The comment points out that small business telemarketers are particularly disadvantaged by the high staffing costs they incur under the ''per day'' standard, and that ''many'' of them ''do not utilize predictive dialers'' for that reason.[430] Unlike large telemarketers that operate several campaigns from a single call center, who can move agents from one calling campaign to another, small telemarketers who run ''relatively few programs and who initiate relatively few telemarketing calls do not have this luxury.''[431] The comment contends that the ''economic reality for relatively small telemarketers will vastly improve'' if the proposed amendment is adopted because they will no longer be burdened by ''significantly higher costs, either in wages or attrition rates.''[432]

2. The Continued ''Per Campaign'' Limitation Creates Compliance Issues

Many of the industry comments urge the Commission to revise the proposed amendment to eliminate the ''per campaign'' limitation retained from the current standard, and permit call abandonment rates to be averaged across multiple campaigns.[433] The industry comments contend that retention of the ''per campaign'' limitation will create several compliance difficulties. First, DMA asserts, without further explanation, that ''[f]or small campaigns, the efficiencies are achieved by allowing one predictive dialer to operate on multiple campaigns with a combined three-percent rate over 30 days.''[434]

Second, DMA notes that the Commission's effort to reduce the obstacles to the use of small, segmented calling lists is impeded by the fact that ''the rule as proposed still requires those small and targeted campaigns that last less than 30 days be calculated over the life of the campaign.''[435] Another comment explains ''that the 'per campaign' limitation will either result in marketers continuing to call on a particular program to solve for an abandonment rate issue, which is inefficient and provides little appreciable consumer benefit, or continuing to use the more restrictive 'per day, per campaign' standard,'' thereby negating the advantage that telemarketing gives a marketer—the ability ''to limit its expenses in campaigns that are producing lower than expected results and [to] move resources to more productive programs very quickly.''[436]

Finally, several comments criticize the use of the term, ''campaign,'' on the ground that it leaves sellers and telemarketers ''uncertain as to whether they are in compliance with the safe harbor'' in the absence of official guidance on its meaning.[437] One comment asserts that ''[i]ndustry members often assign different meanings to the term based upon the underlying purpose of the calls,'' and that the ''regulatory use of such an amorphous term has generated confusion amongst sellers and telemarketers.''[438] One comment contends that it is ''this uncertainty'' that ''is likely to reduce efficiency in the use of predictive dialers for many businesses.''[439]

3. Discriminatory Call Abandonments Need Not be a Concern

Aware of the Commission's concern that eliminating the ''per campaign'' limitation might allow telemarketers to

[420] DMA at 9, *citing* 71 FR 58730.

[421] Verizon at 3; *see* Heritage at 3 (The proposed amendment ''would remove the necessity of managing the abandonment rate by the hour, which is essentially what the per-day rule requires us to do'').

[422] *Id.* at 3, 4; *see* NAA at 12 (''When calling a small list, the balance between the algorithm used by the dialer and the number of sales representatives available at any particular time (due to length of previous call, bathroom breaks, etc.) is easily upset'').

[423] NAA at 12.

[424] Verizon at 3.

[425] *Id.* at 4.

[426] *Id.* at 4; *see* Heritage at 2.

[427] *Id.* at 5 (emphasis in original).

[428] ATA at 5.

[429] *Id.*

[430] *Id.* at 7 n.11.

[431] *Id.* at 7.

[432] *Id.* Although ATA's comment does not specify why this is so, the most likely explanation appears to be that small telemarketers will be able to reduce their staffing requirements at the outset of new calling campaigns, since they will be able to average the abandonment rate over a 30-day period.

[433] DMA at 9–10; ATA at 4–5; NAA at 12–13; Verizon at 5; BoA at 2–3;

[434] DMA at 10. While it is not entirely clear from the comment, DMA appears to be arguing that it is not economical to use more than one predictive dialer for a number of small, targeted campaigns, not that the costs of additional equipment, time and labor needed to ensure that ''systems track all calling campaigns individually'' make the per campaign requirement unduly burdensome, as another comment argues. Heritage at 1–2.

[435] *Id.*; *see* NAA at 13 (''Measuring call abandonment over the duration of the campaign instead of over a 30-day period provides little relief when applied to small, tailored campaigns typical of small business sellers and telemarketers'').

[436] BoA at 2.

[437] ATA at 4–5; NAA at 13; BoA at 2.

[438] ATA at 4–5.

[439] BoA at 2–3.

target less valued consumers with a disproportionate share of abandoned calls, several industry comments contend that this concern, ''while noble, is unfounded.''[440] One comment asserts that ''it is questionable whether there are 'less valued' consumers in telemarketing campaigns'' because ''[t]elemarketers generally strive to target their calls to consumers who are most likely to be interested,'' and ''[t]here is a substantial economic incentive to structure call campaigns in this fashion.''[441] The comment emphasizes that targeting less valued consumers with a disproportionate share of call abandonments is unlikely for this reason, and emphasizes that it doubts ''that marketers operate in this manner,'' and that it ''did not see evidence in the record to that effect.''[442]

A second comment endeavors to explain why discriminatory call abandonments are unlikely. It contends that sellers and telemarketers ''have no motive'' to abandon calls to any of the three categories of consumers they call: (1) consumers who have asked for information; (2) consumers with whom the seller has an EBR; and (3) consumers who have no previous relationship with the seller.[443] The comment asserts that sellers and telemarketers would not want to risk ''alienating those consumers who are most likely to purchase'' by abandoning calls to consumers in either of the first two categories.[444] Concern about calls to consumers in the third category ''is similarly unfounded,'' according to the comment, because ''the vast majority of sellers and telemarketers purchase lists of consumers to call'' that are compiled from ''purchasing patterns, credit history, family income, demographics, etc.'' that indicate they are also ''most like to purchase the offered products or services.''[445] There is no incentive, the comment argues, ''to abandon calls at different rates to different demographics within a particular program'' because it would be a ''waste of resources'' to select consumers for a particular campaign for any reason other than ''a perceived relatively high likelihood of purchasing.''[446]

Finally, a third comment emphasizes that averaging abandonment ''rates from a number of small, highly targeted campaigns'' can be done ''without resulting harm to consumers'' because ''small and targeted campaigns are the ones likely to yield results for callers, which makes it unlikely that the caller would use a high abandonment rate.''[447] The comment adds that ''it is simply not mathematically possible to combine a relatively low abandonment rate for a small campaign with a high abandonment rate for a large campaign and reach the three percent requirement.''[448]

C. Discussion and Analysis

The abandoned and unidentified ''hang-up'' calls about which many consumers rightly complain are a cause for concern, but not necessarily a reason to forego adoption of the proposed amendment. These ''hang-up'' calls—which consumers understandably consider a form of harassment and an invasion of privacy because they have no way to identify the caller to stop future calls—violate two distinct requirements of the TSR. Section 310.4(a)(7) of the TSR requires all telemarketers to transmit the telephone number of the seller or telemarketer responsible for the call and, if the carrier's technology permits, the name of the seller or telemarketer.[449] In addition, Section 310.4(b)(4)(iii) requires a telemarketer to play a recorded message that states the name and telephone number of the seller on whose behalf the call is placed if no salesperson is available within two seconds of a consumer's completed greeting upon answering the call.[450]

The fact that the consumer comments suggest there may be too many ill-informed or rogue telemarketers who routinely violate these two TSR requirements provides no basis in policy for abandoning a carefully considered amendment that would benefit businesses that are attempting to comply with the law. The well-founded consumer complaints in the record about abandoned calls instead indicate that the Commission may need to redouble its industry education and law enforcement efforts. The Commission does not agree with the consumer groups and consumers who believe effective enforcement will be impossible without a complete ban on abandoned calls. Moreover, violators who are now intentionally ignoring the TSR's requirements are just as likely to violate a total ban on abandoned calls.

Likewise, the continued opposition of consumer advocates and consumers to any safe harbor that allows a small percentage of abandoned calls in order that industry and consumers may benefit from the cost savings permitted by the efficiencies of predictive dialers simply seeks a reconsideration of the Commission's careful balancing of the competing interests during the TSR amendment proceeding.[451] It also ignores the fact that the Commission endeavored to minimize the harms of abandoned calls at that time by adding the Caller ID and recorded message requirements to the TSR, precisely so that consumers would not be frightened by hang-ups from unidentified callers, and would be able to make company-specific Do Not Call requests.[452]

Moreover, opponents of the proposed amendment object, in effect, to allowing sellers and telemarketers the full three percent abandonment rate previously set by the Commission. They focus not on the fact that sellers and telemarketers still would be required to maintain no more than a three percent abandonment rate, but on the fact that there may be some modest increase in the number of abandoned calls because the industry would no longer be forced by the current ''per day'' standard to hold their abandonment rates below three percent, so that unexpected spikes in abandonment rates that occur late in the day do not violate the TSR.

Opponents contend that the proposed amendment must fail because the record lacks ''clear and convincing evidence.'' Nevertheless, the Commission concludes that the preponderance of the evidence on the record as a whole supports adoption of the proposed amendment. The factual basis for the proposed amendment does not necessarily require ''empirical evidence,'' and in this case demands only a rudimentary understanding of statistical theory and standard deviation. The Commission is more than

[440] ATA at 8; *see* DMA at 10; BoA at 2.

[441] BoA at 2;

[442] *Id.*; *see* Heritage at 2 (''Put simply, we would not want to set an abandonment rate above three percent for one ''lower-value'' group and one below three percent for a ''higher value'' group because *all* of our donor groups are vital to the success of our campaigns'') (emphasis in original).

[443] ATA at 8.

[444] *Id.*

[445] *Id.*; *see* Heritage at 2 (Similarly acknowledging that ''it may take ten calls to non-donors to gain one pledge of support while calling previous donors may result in a pledge in three of every four calls,'' but asserting that there are ''no donor groups whom we deem of more or less value'').

[446] *Id.*

[447] DMA at 10 & n.23.

[448] *Id.* at n.24.

[449] 16 CFR 310.4(a)(7).

[450] 16 CFR 310.4(b)(4)(iii). Nothing in this provision limits its application only to calls placed by predictive dialers. It applies with equal force to calls placed by automated dialers, which also must play a recording if an operator is unavailable when a call is answered.

[451] 68 FR 4580, 4642 (Jan. 29, 2003).

[452] One purpose of the requirement that telemarketers play a recorded message identifying the source of an abandoned call is to ensure that consumers without Caller ID can still assert a company-specific Do Not Call request, without the burden of the costs of that service about which AARP expresses concern. *See* note 412, *infra*, and accompanying text.

satisfied that the reasons it set forth when it proposed the amendment and those stated here meet the applicable standard.[453]

The industry, for its part, primarily criticizes the proposed amendment for retaining the ''per campaign'' standard in the current call abandonment requirement. The industry expresses particular concern that the ''per campaign'' limitation may create inefficiencies if sellers cannot switch their resources from underperforming campaigns of less than 30 days duration solely because the abandonment rate for the campaign at that point is more than three percent. This concern, as well as industry uncertainty about the meaning of the term, ''campaign,'' may be alleviated by an explanation of the term. The Commission intends the term ''campaign'' to refer to the offer of the same good or service for the same seller. As long as the same good or service is being offered for the same seller, the Commission will regard the offer as part of a single campaign, without regard to whether there are changes in the terms of the offer or the wording of any telemarketing script or scripts used to convey the offer.

The Commission recognizes that the amendment will not eliminate every possible inefficiency in the use of predictive dialers that may arise from the TSR's call abandonment prohibition. However, industry arguments that telemarketers are unlikely to target less-valued customers with a disproportionate share of abandoned calls in the absence of a ''per campaign'' limitation remain unpersuasive, because removal of that requirement would leave consumers to rely on the industry's good faith that it would not engage in such practices, despite obvious economic incentives to do otherwise.[454] Even if the ''vast majority'' of cold calls are based on purchased calling lists, not all are, and telemarketers would have a greater financial incentive to keep abandonment rates low in wealthier zip codes than in middle or low-income zip codes.[455]

D. The Final Amendment

For the foregoing reasons, after careful consideration of the entire record, the Commission has determined that it should adopt the amendment as proposed, and amend paragraph (i) of the ''Pattern of Calls'' prohibitions in Section 310.4(b)(4) of the TSR, as follows:

> (i) The seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.

The Commission has further determined that the amendment should take effect on October 1, 2008.

IV. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (''PRA''), as amended,[456] the Commission staff is seeking OMB approval of the final rule amendments to the TSR under OMB Control No. 3084–0097.

V. Regulatory Analysis and Regulatory Flexibility Act Requirements

Under section 22 of the FTC Act, the Commission must issue a regulatory analysis for a proceeding to amend a rule only when it: (1) estimates that the amendment will have an annual effect on the national economy of $100,000,000 or more; (2) estimates that the amendment will cause a substantial change in the cost or price of certain categories of goods or services; or (3) otherwise determines that the amendment will have a significant effect upon covered entities or upon consumers.

In general, the comments opposing the prerecorded call amendment asserted that sellers might be unable as a result of the amendment to use low-cost prerecorded messages, and thus would not be able to pass on the resulting savings to consumers. Many also argued that the cost of obtaining the consumers' agreements to receive prerecorded messages as required by the amendment would not be insignificant, but this argument was based on the mistaken assumption that the amendment would not permit the use of electronic signatures and records allowed by the E–SIGN Act, and would necessitate the use of paper records, with their attendant printing and storage costs. Finally, many comments predicted, based on the same mistaken assumption, that the costs and burdens imposed by such an amendment would reduce the number of consumers who could be called to such an extent that it would no longer be economically feasible for telemarketers to provide prerecorded message services, and telemarketers specializing in such services would not be able to remain in business.[457] Only one comment attempted to quantify the cost of the prerecorded call amendment,[458] but neither it nor any of the other comments indicated, except as noted, that the amendment would have an annual impact of more than $100,000,000, cause substantial change in the cost of goods or services, or otherwise have a significant effect upon covered entities or consumers.

To the extent, if any, that either of the two final rule amendments adopted by the Commission will have such effects,[459] the Commission has explained above the need for, and the objectives of, the final amendments; the regulatory alternatives that the Commission has considered; the projected benefits and adverse economic or other effects, if any, of the amendments; the reasons that the final amendments will attain their intended objectives in a manner consistent with applicable law; the reasons for the particular amendments that the agency has adopted; and the significant issues raised by public comments, including the Commission's assessment of and response to those comments.

The Regulatory Flexibility Act (''RFA'')[460] requires that the agency conduct an analysis of the anticipated economic impact of proposed rule amendments on small businesses. The purpose of a regulatory flexibility analysis is to ensure that the agency considers the impact on small entities and examines regulatory alternatives that could achieve the regulatory purpose while minimizing burdens on small entities. Section 605 of the RFA provides that such an analysis is not required if the agency head certifies that

[453] 71 FR at 58728–30.

[454] While it may not be mathematically possible to reduce a high abandonment rate for a large campaign enough to meet the three percent requirement by averaging it with a low abandonment rate for a small campaign, as one industry comment asserts, *see* note 448, *supra*, and accompanying text, it *would* be possible to reduce a high abandonment rate in a small campaign by averaging it with a low rate from a large campaign.

[455] *See* note 445, *supra.* Just as the need for the proposed amendment is supported by an understanding of statistics, rather than empirical evidence, an understanding of economics supports the ''per campaign'' limitation. *See* note 453, *supra,* and accompanying text.

[456] 44 USC 3501–3521.

[457] Although similar gloomy forecasts were provided in industry comments on the Commission's proposal to establish the National Do Not Call Registry, the telemarketing industry has subsequently flourished. The Commission has no more reason to believe that these doomsday scenarios are more likely to occur as a result of the prerecorded call amendment than as a result of the creation of the Registry.

[458] SmartReply at 18–21. This comment appears to assume that the amendment would *not* permit sellers to obtain the required consumer agreements to receive prerecorded calls electronically pursuant to the E–SIGN Act.

[459] None of the comments on the amendment revising the method for measuring the permissible call abandonment rate provided any such data, or indicated that the amendment would have any of these effects.

[460] 5 USC 601–612.

the regulatory action will not have a significant economic impact on a substantial number of small entities.[461]

The Commission believes that the two amendments to the TSR that it is adopting are not likely to have a significant impact on small business for several reasons. By their nature, most small businesses serve local customers, develop personal relationships with their clientele, and are therefore likely to be able to obtain their customers' agreements to receive useful prerecorded telemarketing messages. Moreover, purely informational prerecorded messages are not covered by the TSR, and the use of such messages to schedule service calls, delivery times, and the like therefore will not be subject to the written agreement requirement. In addition, to the extent that, in this Internet age, small businesses may no longer be strictly local businesses, the option provided by the amendment to obtain written agreements to receive prerecorded message calls pursuant to E–SIGN will place them on an equal footing with other businesses. Finally, as a result of the Commission's decision to defer the effective date of the written agreement requirement for twelve months, small businesses with annual service or other contracts with their customers will have ample time to revise their contracts and seek their customers' permission to receive prerecorded telemarketing messages.

For these same reasons, the Commission believes that small business telemarketers providing prerecorded call services to such small business sellers are unlikely to be significantly affected by the prerecorded call amendment. In addition, for more than two years, small and large telemarketers alike, as well as sellers that conduct their own telemarketing, have been governed by the Commission's enforcement forbearance policy for prerecorded messages answered by a consumer, which has mandated an up-front disclosure to consumers of how to opt out, and encouraged the use of an interactive opt-out mechanism. During that time, according to the comments, many of which came from small business telemarketers, the industry has transitioned to automated interactive message systems that are now affordable and widely available. Consequently, the Commission has no reason to believe that the 90 days it is allowing for sellers and telemarketers to provide automated interactive opt-out mechanisms will disadvantage either small or large business telemarketers or sellers. Although prerecorded message calls placed on answering machines or voicemail services were not subject to the Commission's enforcement forbearance policy, there is nothing in the record to suggest that application of the requirement of an automated interactive opt-out mechanism to such calls could not be accomplished within the phase-in period, or would disadvantage either small or large business telemarketers or sellers.

The Commission also believes that the amendment adjusting the method for measuring the permissible call abandonment rate by predictive dialers in live telemarketing campaigns is not likely to have a significant impact on small business. If anything, the change in the standard from a ''per day'' to a per-30-day calculation should lead to a reduction in the cost of live telemarketing campaigns for both small and large businesses, for the reasons previously stated, and will likely encourage the use of such calls to EBR customers by small and large businesses alike. In fact, small business sellers and telemarketers are likely to derive the greatest benefit from the amendment because the smaller size of their calling lists has prevented full realization of the efficiencies of predictive dialers under the existing measurement standard, an unintended consequence that the amendment will correct.

Accordingly, the Commission concludes that the two amendments to the TSR will not have a significant or disproportionate impact on the costs of small business. Based on the information in the record, therefore, the Commission certifies that the two amendments published in this document will not have a significant economic impact on a substantial number of small businesses.

Nonetheless, to ensure that no such impact has been overlooked, the Commission has conducted the following final regulatory flexibility analysis, as summarized below:

A. Need for and Objective of the Amendments

As previously discussed, the Commission is issuing the prerecorded call amendment to make explicit the prohibition on such calls implicit in the TSR's call abandonment provision, while expressly permitting prerecorded calls made by or on behalf of sellers to consumers who have given the seller a written agreement to receive such calls. The proposed explicit prohibition of all prerecorded telemarketing calls without the consumer's express prior written agreement implements the Telemarketing Act requirement that the Commission prohibit a pattern of unsolicited telephone calls that ''the reasonable consumer would consider coercive or abusive of such consumer's right to privacy,'' and effectuates the apparent intent of Congress in the TCPA to prohibit prerecorded telemarketing calls, regardless of whether they are answered in person or by an answering machine or voicemail service.[462]

The Commission is also issuing an amendment that will modify the existing safe harbor to allow sellers and telemarketers to measure the three percent maximum call abandonment rate prescribed in § 310.4(b)(4)(i) for a single calling campaign over a 30-day period, rather than on a daily basis, as is currently required. This amendment, also made pursuant to the Telemarketing Act, will enhance the efficiency of the predictive dialers used in live telemarketing campaigns, allowing businesses to focus their telemarketing on smaller groups of consumers, which will lower marketing costs and make live campaigns more affordable for small businesses. The amendment will also permit more narrowly targeted telemarketing to smaller groups of consumers who are the most likely to be interested in a particular offer.

B. Significant Issues Raised by Public Comment; Summary of the Agency's Assessment of these Issues; and Changes, if any, Made in Response to Such Comments

As discussed in Section III above, the principal issues raised by the industry comments relate to the potential costs and burdens of the requirement for obtaining consumers' express written agreement to receive prerecorded telemarketing calls, and concerns about economic hardship for telemarketers that specialize in prerecorded telemarketing and their customers if too few consumers agree to receive such calls.[463]

As previously noted, most of the industry comments that objected to the cost and burden of obtaining written agreements from consumers to receive prerecorded calls mistakenly assumed that the amendment would not permit the use of agreements obtained

[461] 5 USC 605.

[462] Although the call abandonment prohibition applies only to calls ''answered by a person,'' the Commission has determined, pursuant to the Telemarketing Act, that the amendment should also apply to prerecorded calls picked up by answering machines and voicemail services.

[463] None of the comments on the amendment revising the method for measuring the maximum permissible call abandonment rate challenged the Commission's analysis of the issue or proposed an alternative solution.

electronically pursuant to the E–SIGN Act, notwithstanding express statements in comparable provisions of the TSR permitting such agreements.[464] The Commission has accordingly added a comparable footnote to the final amendment to make it clear that the required agreements may be obtained electronically pursuant to E–SIGN in order to minimize compliance costs and burdens.

Many comments also requested that the Commission provide adequate time for preparations to comply with the written agreement requirement by deferring its effective date for six months or longer, and permitting all affected entities to continue calling EBR customers until the requirement takes effect. Although the Commission previously had stated that it did not believe that a delayed effective date would necessarily reduce compliance burdens for small entities,[465] the Commission has been persuaded by the comments to defer the effective date of the written agreement requirement for twelve months.

The Commission has also been persuaded by the comments to defer the effective date of the requirement in the amendment that sellers and telemarketers provide an automated interactive opt-out mechanism until December 1, 2008, even though the comments, many of which came from small business telemarketers that currently use such mechanisms, assert that this technology is now affordable and widely available.

A number of comments from industry and consumers who oppose the amendment expressed concern that the written agreement requirement would create economic hardships for entities specializing in prerecorded telemarketing and their customers if too few customers agree to receive such calls. However, many in the industry contended, on the contrary, that there are a significant number of consumers who wish to receive prerecorded telemarketing messages. The Commission believes that the prerecorded call amendment will enhance consumer choice, and permit those consumers who wish to receive prerecorded messages to sign up to receive them while protecting the privacy of those who do not wish to be disturbed. Having received industry comments asserting that a National Do Not Call Registry would result in the demise of the telemarketing industry, when it has subsequently flourished, the Commission doubts that the amendment will have the predicted negative effect.[466]

C. Description and Estimate of Number of Small Entities Subject to the Final Amendments or Explanation Why no Estimate is Available

Each of the proposed rule amendments will affect sellers and telemarketers that make interstate telephone calls to consumers (outbound calls) as part of a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution.[467] For the majority of entities subject to the proposed rule, a small business is defined by the Small Business Administration as one whose average annual receipts do not exceed $6 million or that has fewer than 500 employees.[468]

Prior to the October 2006 request for comment, the Commission had not previously sought comment on an explicit prohibition of prerecorded telemarketing calls without the consumer's express prior written agreement. Although the Commission specifically requested information or comment on the number of small entities that would be subject to the proposed prerecorded call amendment, none of the comments provided this information. Based on the absence of available data in this and related proceedings, the Commission believes that a precise estimate of the number of small entities that would be subject to the prerecorded call amendment is not currently feasible.

For example, in the proceedings to amend the TSR in 2002, the Commission sought public comment and information on the number of small business sellers and telemarketers that would be impacted by amendment of the standard for measuring the three percent call abandonment rate. In its request, the Commission noted the lack of publicly available data regarding the number of small entities that might be impacted by the proposed Rule.[469] The Commission received no information in response to its request.[470]

Likewise, neither the original petition to amend the call abandonment safe harbor to expand the period over which the three percent call abandonment ceiling for live telemarketing calls is calculated,[471] nor the industry comments on that issue,[472] provided any data regarding the number of small entities that may be affected by the Commission's ultimate determination.[473] Although the Commission subsequently renewed its request for this information in the most recent request for comment,[474] none of the comments on the amendment addressed the issue. Based on the absence of available data in this and related proceedings, the Commission believes that a precise estimate of the number of small entities that fall under the amendment of the method for measuring the maximum permissible call abandonment rate is not currently feasible.

D. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Amendments, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Amendments and the Type of Professional Skills That Will Be Necessary to Comply

The rule amendment explicitly prohibiting prerecorded telemarketing calls unless the consumer has agreed in writing to accept such calls will affect the TSR's recordkeeping requirements insofar as it would compel regulated entities to keep records of such agreements under the general recordkeeping requirements of the existing rule.[475] It appears, however, that there should be no significant change in this burden since regulated entities, regardless of size, already are required to maintain electronic or other

[464] 16 CFR 310.3(a)(3)(i) n.5; 310.4(b)(1)(iii)(B)(i) n.6.

[465] 71 FR at 58732.

[466] For example, the use by government and private sector entities of purely informational prerecorded messages that are not subject to the amendment appears to be increasing.

[467] Thus, the amendments will not apply to purely ''informational'' outbound calls that do not induce the purchase of goods or services or a charitable contribution.

[468] These numbers represent the size standards for most retail and service industries ($6 million total receipts) and manufacturing industries (500 employees). A list of the SBA's size standards for all industries can be found at (*http://www.sba.gov/size/summary-whatis.html*).

[469] *See* TSR SBP, 68 FR at 4667 (noting that Census data on small entities conducting telemarketing does not distinguish between those entities that conduct exempt calling, such as survey calling, those that receive inbound calls, and those that conduct outbound calling campaigns. Moreover, sellers who act as their own telemarketers are not accounted for in the Census data).

[470] *Id.*; *see also* 68 FR 45134, 45143 (July 31, 2003) (noting that comment was requested, but not received, regarding the number of small entities subject to the National Do Not Call Registry provisions of the amended TSR).

[471] *See* DMA petition, *available at* (*http://www.ftc.gov/os/2004/10/041019dmapetition.pdf*).

[472] 71 FR at 58731.

[473] Although industry comments have argued that the proposed revision would remove an obstacle to small business compliance with the call abandonment safe harbor, as discussed in Section III, *supra,* none of the comments has addressed the number of small businesses that might benefit from revision of the current standard.

[474] 71 FR at 58731.

[475] *See* 16 CFR 310.5(a)(5).

records of the existence of an EBR in the ordinary course of business in order to demonstrate compliance with existing FTC and FCC restrictions on prerecorded calls. The only difference is that, instead of keeping records of EBR relationships as a precondition for placing prerecorded calls, the amendment instead will require sellers to maintain records of consumers' agreements to receive such calls. Since the Commission has emphasized that these agreements may be obtained pursuant to E–SIGN, minimal additional recordkeeping should be necessary. For these reasons, the prerecorded call amendment would not impose or affect any new or existing reporting, recordkeeping or third- party disclosure requirements within the meaning of the PRA.

In addition, the Commission does not believe that the amendment to expand the period over which the three percent call abandonment ceiling for live telemarketing calls is calculated will create any new burden on sellers or telemarketers, because the existing ''per day per campaign'' standard of the TSR already requires them to establish recordkeeping systems to demonstrate their compliance. The Commission also does not believe that this modification of the Rule will materially increase any existing compliance costs, and may in fact reduce them for small entities that are able to take advantage of the revised safe harbor requirement.

E. Identification of Other Duplicative, Overlapping, or Conflicting Federal Rules

The FTC is mindful that the amendment explicitly prohibiting all prerecorded telemarketing calls without the consumer's express prior written agreement differs from the FCC's regulations and some State laws, which permit sellers to place such calls to consumers who have given their prior express consent or to consumers with whom the seller has an ''established business relationship.''[476] However, the Commission does not believe that an explicit prohibition would conflict with the FCC regulations or similar State laws, because compliance with the TSR's present prohibition does not violate those more permissive standards.

With respect to the amendment revising the method for measuring the maximum permissible call abandonment rate, the FTC has not identified any other Federal or State statutes, rules, or policies that would overlap or conflict with this amendment, except as indicated below. The amendment would help to reduce the differences on this issue between the TSR and the FCC's TCPA rules, as well as similar state requirements.[477] As the Commission has reiterated, compliance with the FTC's more precise standard would constitute acceptable compliance with the FCC rule and similar state requirements, so there is no conflict between these regulations.[478]

F. Steps the Agency Has Taken to Minimize Any Significant Economic Impact on Small Entities, Consistent with the Stated Objectives of the Applicable Statutes, Including the Factual Policy, and Legal Reasons for Selecting the Alternatives Finally Adopted, and Why Each of the Significant Alternatives, If Any, Were Rejected.

The amendment adding an explicit prohibition of prerecorded telemarketing calls without a consumer's express prior written agreement implements the requirement in the Telemarketing Act that the Commission prescribe rules that include a prohibition against ''a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy.'' Since the Commission has previously rejected a safe harbor to permit EBR-based prerecorded calls, the only workable alternatives to this explicit prohibition would be to retain the present implicit prohibition of such calls in § 310.4(b)(4)(i) (the call abandonment provision), or to limit the prohibition on prerecorded calls except with a consumer's prior written agreement only to calls that are answered in person, rather than by an answering machine or voicemail service. After careful consideration, the Commission has rejected each of these alternatives as inconsistent with the mandate of the Telemarketing Act, based on the record in this proceeding and its enforcement experience.

The amendment of the existing call abandonment safe harbor replaces the present requirement that the three percent maximum call abandonment rate be measured ''per day per campaign,'' with a revised requirement that the maximum be measured ''over the duration of the campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.'' Other regulatory options considered by the Commission included retaining the present ''per day per campaign'' standard or requiring that the maximum call abandonment rate be measured over a 30-day period for all of a telemarketer's campaigns. The Commission does not believe, however, that the present standard should be retained, or that a standard that lacks a ''per campaign'' limitation would be adequate to protect disfavored consumers from receiving a disproportionate share of abandoned calls.

The amendments explicitly prohibiting prerecorded calls without consumers' express agreement to receive them and revising the method for measuring the maximum permissible call abandonment rate are intended to apply to all entities subject to the amendments. The Commission has carefully considered industry comments requesting a sufficient phase-in period to minimize the costs and burdens of complying with the prerecorded call amendment, and for these reasons has decided to defer the effective date of the amendment's written agreement requirement for twelve months for all entities, including small businesses. Although the industry comments, including comments from small business telemarketers, indicated that automated interactive opt-out mechanisms are now affordable and widely available, the Commission is also deferring the effective date of the interactive opt-out requirements of the amendment until December 1, 2008, to ensure that all affected entities will have sufficient time to prepare to comply. Although the Commission will revoke its enforcement forbearance policy for prerecorded telemarketing calls when the interactive opt-out requirements take effect because of inconsistencies in their requirements, the Commission has decided to permit sellers to continue making prerecorded calls to existing and new EBR customers who do not opt out until the written agreement requirement takes effect.

None of the comments on the amendment of the method for measuring the maximum permissible call abandonment rate similarly requested any delay to give affected entities sufficient time to prepare to comply. Since this amendment will benefit all small and large entities making live telemarketing calls, there is no apparent reason to delay its implementation. Accordingly, the Commission has determined that the

[476] 47 CFR 64.1200(a)(2)(iv). *See also, e.g.*, Ariz. Rev. Stat., § 44—1278(B)(4) (permitting prerecorded calls with called party's ''prior express consent''); Ind. Code, § 24—5—14—5 (permitting prerecorded calls where there is a ''current business or personal relationship'').

[477] *See, e.g.*, Cal. Pub. Util. Comm'n, Decision 03— 03—038 (Mar. 13, 2003), at 19 (adopting the FCC's 30-day standard for measuring call abandonment rates).

[478] 69 FR at 67291 & n.19; 71 FR at 58727.

amendment should take effect on October 1, 2008.

VI. Final Amendments

List of Subjects in 16 CFR Part 310

Telemarketing, Trade practices.

■ For the reasons discussed in the preamble, the Federal Trade Commission amends 16 CFR part 310 as follows:

PART 310—TELEMARKETING SALES RULE

■ 1. The authority citation for part 310 continues to read as follows:

Authority: 15 USC 6101—6108.

■ 2. In § 310.5, redesignate footnote 8 as 9.

■ 3. In § 310.4, redesignate footnote 7 as 8.

■ 4. Amend § 310.4 by adding new paragraph (b)(1)(v), and revising paragraph (b)(4)(i) to read as follows:

§ 310.4 Abusive telemarketing acts or practices.

* * * * *

(b) * * *

(1) * * *

(v) Initiating any outbound telephone call that delivers a prerecorded message, other than a prerecorded message permitted for compliance with the call abandonment safe harbor in § 310.4(b)(4)(iii), unless:

(A) in any such call to induce the purchase of any good or service, the seller has obtained from the recipient of the call an express agreement, in writing, that:

(i) the seller obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the seller to place prerecorded calls to such person;

(ii) the seller obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service;

(iii) evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of a specific seller; and

(iv) includes such person's telephone number and signature;[7] and

(B) in any such call to induce the purchase of any good or service, or to induce a charitable contribution from a member of, or previous donor to, a non-profit charitable organization on whose behalf the call is made, the seller or telemarketer:

(i) allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call; and

(ii) within two (2) seconds after the completed greeting of the person called, plays a prerecorded message that promptly provides the disclosures required by § 310.4(d) or (e), followed immediately by a disclosure of one or both of the following:

(A) in the case of a call that could be answered in person by a consumer, that the person called can use an automated interactive voice and/or keypress-activated opt-out mechanism to assert a Do Not Call request pursuant to § 310.4(b)(1)(iii)(A) at any time during the message. The mechanism must:

(1) automatically add the number called to the seller's entity-specific Do Not Call list;

(2) once invoked, immediately disconnect the call; and

(3) be available for use at any time during the message; and

(B) in the case of a call that could be answered by an answering machine or voicemail service, that the person called can use a toll-free telephone number to assert a Do Not Call request pursuant to § 310.4(b)(1)(iii)(A). The number provided must connect directly to an automated interactive voice or keypress-activated opt-out mechanism that:

(1) automatically adds the number called to the seller's entity-specific Do Not Call list;

(2) immediately thereafter disconnects the call; and (3) is accessible at any time throughout the duration of the telemarketing campaign; and

(iii) Complies with all other requirements of this Part and other applicable federal and state laws.

(C) Any call that complies with all applicable requirements of this paragraph (v) shall not be deemed to violate § 310.4(b)(1)(iv) of this Part.

(D) This paragraph (v) shall not apply to any outbound telephone call that delivers a prerecorded healthcare message made by, or on behalf of, a covered entity or its business associate, as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

* * * * *

(4)

(i) The seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.

* * * * *

By direction of the Commission.

Donald S. Clark

Secretary.

[FR Doc. E8–20253 Filed 8–28–08; 8:45 am]

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[7] For purposes of this Rule, the term ''signature'' shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.