

**FEDERAL TRADE COMMISSION**

**16 CFR Part 310**

**RIN: 3084-0098**

**Telemarketing Sales Rule**

**AGENCY:** Federal Trade Commission

**ACTION:** Extension beyond January 2, 2007, of the previously announced forbearance policy in enforcement of the prohibition of prerecorded calls in the Telemarketing Sales Rule (“TSR”).

**SUMMARY:** In a Federal Register notice published on October 4, 2006, 71 FR 58716, the FTC denied a request for creation of a new safe harbor in the TSR for prerecorded calls by sellers and their telemarketers to consumers with whom the seller has an “established business relationship,” and proposed an amendment to the TSR that would make explicit the prohibition on prerecorded calls that is now implicit in the TSR’s call abandonment provisions. The Commission accordingly also announced the revocation of a previously announced policy of forbearing from enforcement of the TSR’s call abandonment prohibition effective January 2, 2007. In response to a request for an extension of the forbearance policy, the Commission has determined that the forbearance policy should remain in effect until the conclusion of the prerecorded call amendment proceeding.

**DATES:** Effective January 2, 2007, the Commission will continue its previously announced policy of forbearing from enforcing the prohibition of prerecorded calls in the TSR’s call abandonment provisions, until the conclusion of the prerecorded call amendment proceeding.

**FOR FURTHER INFORMATION CONTACT:** Craig Tregillus, (202) 326-2970, Division of Marketing Practices, Bureau of Consumer Protection, Room H-288, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

**SUPPLEMENTARY INFORMATION**

In a Federal Register notice published on October 4, 2006, 71 FR 58716, the FTC denied a request for creation of a new safe harbor in the TSR for prerecorded calls by sellers and their telemarketers to consumers with whom the seller has an “established business relationship,” and proposed an amendment to the TSR that would make explicit the prohibition on prerecorded calls that is now implicit in the TSR’s call abandonment provisions. The Commission accordingly also announced the revocation of a previously announced policy of forbearing from enforcement of the TSR’s call abandonment prohibition effective January 2, 2007.

On November 29, 2006, the Direct Marketing Association (“DMA”) filed a petition seeking an extension of the Commission’s enforcement forbearance policy on prerecorded calls beyond the announced revocation date of January 2, 2007. A petition filed by medSage Technologies LLC on November 30, and petitions filed by Minutepoll, LLC (“Minutepoll

petition”) and jointly by Silverlink Communications Inc. and the Eliza Corporation (“Silverlink petition”) on December 1, also requested extensions of the revocation date. Both the DMA and Silverlink petitions ask for an extension until the conclusion of the rulemaking proceeding, while the medSage and Minutepoll petitions seek an extension until six months after the conclusion of the rulemaking to allow companies sufficient time to comply.<sup>1</sup>

DMA argues that, if the policy were revoked as announced effective January 2, 2007, even prerecorded messages that consumers “affirmatively requested would need to be discontinued” because businesses would not have had sufficient time during their busy holiday season “to obtain the proposed prior written consents.”<sup>2</sup> Moreover, DMA believes that because the TSR’s present call abandonment provisions, unlike the proposed amendment, lack any express provision allowing prerecorded calls to established customers who have given their written consent, that failure to extend the forbearance policy would have the effect of “a flat prohibition on prerecorded messages.”<sup>3</sup>

DMA advances two additional reasons for extending the forbearance policy until completion of the amendment proceeding. The first is that failure to continue the forbearance policy “effectively prejudices the outcome of the proceeding,” contrary to the intended statutory purpose “of the Notice and Comment process.”<sup>4</sup> The second is that an extension will maintain the status quo for consumers who have listed their numbers on the Do Not Call Registry because it simply continues the existing forbearance policy.<sup>5</sup>

The Minutepoll petition emphasizes the “irreparable harm smaller businesses” engaged in telemarketing would incur unless the forbearance policy is extended.<sup>6</sup> Minutepoll says that it and many other small telemarketers that place prerecorded calls otherwise would be forced to shut down their operations on January 2, 2007, since they cannot be “cost competitive” with large call centers in placing live telemarketing calls.<sup>7</sup>

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<sup>1</sup> The Commission believes that the medSage and Minutepoll requests for additional time after a final rule is promulgated for businesses to bring themselves into compliance is premature, since this issue can be addressed best when the final rule is issued.

<sup>2</sup> DMA petition at 1-2.

<sup>3</sup> *Id.* at 1.

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> Minutepoll petition at 2.

<sup>7</sup> *Id.*

The medSage and Silverlink petitions come from companies under contract with HMO's and other health care providers, pursuant to regulations issued by the Department of Health and Human Services under the Health Insurance Portability and Accountability Act of 1996, to place interactive "reminder" calls to the providers' medical patients urging them to get flu shots, childhood immunizations, routine mammograms and colonoscopies, prescription refills, and the like.<sup>8</sup> Both petitions argue that there is insufficient time before January 2 for the providers they serve to obtain written consent from the 10 to 20 million patients the Silverlink petition estimates receive such calls annually.<sup>9</sup>

Thus, the medSage petition contends that the company would be faced with "a Hobson's choice" of violating the TSR or failing to deliver "medically necessary prerecorded messages," and that "[n]either choice makes any sense."<sup>10</sup> Similarly, the Silverlink petition argues that if an extension is not granted, patients would be deprived of calls that improve healthcare services and patient outcomes.<sup>11</sup>

The Commission rejects DMA's argument that revoking its previously announced non-enforcement policy can reasonably be seen as in any way prejudging the outcome of the amendment proceeding. Nevertheless, in recognition of the reasons presented by the petitions and in order to preserve the *status quo*, the Commission has determined that, pending completion of this proceeding, the Commission will continue "to forbear from bringing any enforcement action for violation of the TSR's call abandonment prohibition, 16 CFR 310.4(b)(1)(iv), against a seller or telemarketer that places telephone calls to deliver prerecorded telemarketing messages to consumers with whom the seller on whose behalf the telemarketing call is placed has an established business relationship, as defined in the TSR, provided the seller or telemarketer conducts this activity in conformity with the [following] terms:"<sup>12</sup>

"(i) The seller or telemarketer, for each such telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

"(ii) Within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a prerecorded message that:

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<sup>8</sup> These calls are "telemarketing" calls covered by the TSR because they induce the purchase of medical goods or services.

<sup>9</sup> Silverlink petition at 2; medSage petition at 3.

<sup>10</sup> medSage petition at 4.

<sup>11</sup> Silverlink petition at 6-7 & nn.14-16.

<sup>12</sup> 69 FR 67287, 67290 (Nov. 17, 2004).

“(A) Presents an opportunity to assert an entity-specific Do Not Call request pursuant to § 310.4(b)(1)(iii)(A) at the outset of the message, with only the prompt disclosures required by § 310.4(d) or (e) preceding such opportunity; and

“(B) Complies with all other requirements of this Part [16 CFR Part 310] and other applicable federal and state laws.”<sup>13</sup>

The Commission has stated its belief that, as the foregoing criteria indicate, “an interactive feature (pressing a button during the message to connect to a sales representative or an automated system to make a Do Not Call request) would be ideal . . .to protect consumers’ Do Not Call rights under the TSR.”<sup>14</sup> The Commission emphasizes that its forbearance policy applies only to prerecorded telemarketing calls that comply completely with all of the foregoing criteria.

By direction of the Commission.

Donald S. Clark  
Secretary

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<sup>13</sup> 69 FR at 67294 (noting that “This provision does not affect any seller’s or telemarketer’s obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.”)

<sup>14</sup> 69 FR 67289.