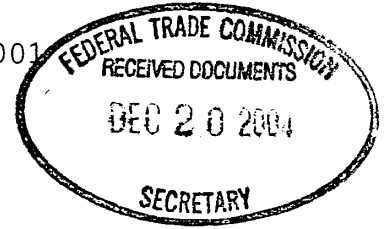


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Before the Federal Trade Commission)
Prerecorded Message EBR Telemarketing)
Project No. R411001)
Comment Submission by:)
Stanley Protigal)
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Public Document

R411001



December 17, 2004

Secretary of the Commission
Federal Trade Commission/
Office of the Secretary
Room H-159 (Annex K)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

To the Honorable Secretary of the Commission:

Prior Document

This comment supersedes electronic response OL-103628 dated 11/28/2004. The earlier comment can be disregarded or alternatively considered as an attachment.

Response

Both proposals reach to calls made with putative consent by the targeted individual. In most cases, consent is either not knowingly given or is tied to another transaction.

The "safe harbor" provisions can be clarified by requiring "*specific consent*" for all "safe harbor" calls. Consent to recorded calls (and to telemarketing calls in general) should be "*specific consent*". "*Specific consent*" is either an unambiguous request unrelated to another transaction. If the "request" is on a document for a different transaction or purpose, consent should be separately initialed (or another active selection performed by

the targeted individual) solely granting consent. There is no other way the business can ascertain true customer consent. "*Specific consent*" cannot be conditional or "tied in" with any other transaction, and cannot be specific if special action is required of the targeted individual to avoid consent.

Any change in the Federal Telemarketing Rule related to exemptions should require "*specific consent*" by the targeted individual. This should particularly apply to automated recorded calls because of the perniciousness of such calls.

A. General Questions for Comment

1. What is the effect (including any benefits and costs), if any, on consumers?

Targeted individuals would be subject to a large volume of calls under this proposal. This would not be a benefit.

The proposal has a potential of causing significant damage to targeted individuals to the extent that they did not wish to "consent" to such calls.

A requirement for "*specific consent*" to recorded calls will benefit targeted individuals by letting them know at the time of consent that they are requesting a call of a type which they would likely find objectionable had they not in effect requested the call.

2. What is the impact (including any benefits and costs), if any, on individual firms that must comply with the Rule?

The FTC proposal cannot result in costs to industry because it is proposed as an exception to prior rules. The only reason for costs to industry is if they engage in sending

automated recorded calls. The industry is requesting the change. The way to avoid the costs is to not participate.

If the costs of implementing the exception are excessive, then don't implement the exception.

If "*specific consent*" is used to formulate the calling lists, there would be no adverse impact. This would restrict opportunities to prepare lists targeting people who do not wish to receive automated recorded calls. A requirement for "*specific consent*" would further ease the costs because it would eliminate a competitive incentive for generating more elaborate targeted lists. The straightforward approach of only calling those who request calls is the least expensive.

3. What is the impact (including any benefits and costs), if any, on industry, including those who may be affected by these proposals but not obligated to comply with the Rule?

Any adverse effect on industry from the Federal "Do Not Call" List is not from the List itself. The List only includes approximately 1/3 of residential numbers -- the 1/3 who are least likely to desire telemarketing calls. The problem is that the client businesses have second thoughts concerning their own past compliance with company-specific "do not call" requests. The Federal List places these businesses in a position of not being able to use "innocent mistake" excuses. If the telemarketing industry had been diligent about following the law in the past, such compliance issues would not exist!

4. What changes, if any, should be made to the proposed Rule to minimize any cost to industry, individual firms that must comply with the Rule, or consumers?

The rule should clarify how an individual consents to such calls; again "*specific consent*".

5. How would each suggested change affect the benefits that might be provided by the proposed Rule to industry, individual firms that must comply with the Rule, or consumers?

Any change which limits automated recorded calls to those who request the calls would only affect those who make such requests. A change which permits calling those who have not requested such calls would clearly affect the targeted individuals.

The overwhelming response to the Federal "Do Not Call" List is a clear indication of where citizens stand on this issue.

6. How would the proposed Rule affect small business entities with respect to costs, profitability, competitiveness, and employment?

Creating an exception would not have a significant effect on small business. Specifying "*specific consent*" for any "business relationship" calls would allow small businesses to fairly compete with larger entities.

B. Questions on Proposed Specific Provisions

1. Are "hang-up" calls and "dead air" -- the two harms that prompted adoption of the current call abandonment provisions -- likely to arise from telemarketing calls that deliver a prerecorded message to consumers with whom the seller has an established business relationship? Are there other consumer harms that may result from such calls, and if so, what are they? Could the proposed safe harbor be crafted to eliminate such harms, and if so, how? If not, why not?

The issues of "hang up calls" and "dead air" are an inappropriate standard because recorded calls, by their nature, do not connect to a live person. The telemarketing

industry and other businesses do not require a rule change to use pre-recorded announcements if their *bona fide* customers have granted specific permission for these calls.

2. What are the costs and benefits to consumers of receiving telemarketing calls from companies with whom they have an established business relationship via prerecorded messages as opposed to live sales representatives? Is there any data as to how many consumers choose to act on the telemarketing calls that they receive via prerecorded messages? Is it likely that consumers will receive more telemarketing calls under this proposed new safe harbor in §310.4(b)(5)? Is it likely that consumers will receive more unwanted telemarketing calls under this proposed new safe harbor?

Consent should be "*specific consent*". No affirmative act must be required of the targeted individual to *not* consent.

A change in the rule would clearly result in more unwanted calls because:

- 1) A rule change would only affect people who have not already specifically consented to such calls; and
- 2) Previous data from the FTC and FCC determined that people generally do not want such calls. The public should not be required to prove this again.

3. What are the costs and benefits of obtaining consumers' prior consent before contacting them with prerecorded telemarketing messages?

The costs would be nearly nil for businesses seeking to do this for *bona fide* customer communication purposes because prior "*specific consent*" is a mere safeguard. Consent would not alter a legitimate business practice.

Requiring a targeted individual's prior "*specific consent*" would assure that the "prior business relationship" is not abused by using data collected for purposes unrelated to

automated message calls, often when the client business does not have a *bona fide* personal business relationship with the targeted individual.

In addition, the targeted individual's prior "*specific consent*" would be necessary for businesses to indicate to which phone number a customer with multiple numbers wishes to receive recorded messages.

An "opt out" procedure would encourage abuse by telemarketers, who would have an incentive to use the "opt out" procedure for a variety of purposes, including collection of additional data and intimidation of individuals targeted by their calls.

An "opt out" procedure imposes an undue burden on targeted individuals who have not specifically consented to the calls in the first instance.

4. Is there any data as to how many consumers choose to opt out of prerecorded telemarketing calls currently? What mechanisms are used to allow consumers to opt out of prerecorded telemarketing messages? At what point in the course of the message are consumers given the opportunity to opt out? Does the industry follow a standard practice as to when in the call a consumer must be given the opportunity to opt out?

It is likely that percentage of targeted individuals "opting out" would be close to zero because of the difficulty in executing "opt out" procedures by unsuspecting individuals. An "opt out" procedure could only be achieved by:

- 1) Listening to and understanding instructions included in the commercial message, followed by an understanding of the correct implementation;

- 2) Correctly writing down an "opt out" number provided at a beginning part of the commercial message, followed by correct execution of the "opt out" request;
- 3) Having a live person supervise the call and execute an "opt out" request.

All of this is either more difficult or impossible if the recorded message is transmitted to a telephone answering device (TAD).

"Opt out" procedures should only be required in cases where the call was placed as a bona fide error by the calling party.

Any "opt out" or corrective procedures would necessarily require human intervention to determine whether a call was received by a TAD or live individual. On my own machine, since the implementation of the Federal "Do Not Call" List, received numerous calls by people attempting to hold a conversation with my answering machine.

5. [no response]

6. What would be the costs to industry of requiring that each prerecorded message include a mechanism that would enable the consumer receiving the call to assert a Do Not Call request during the call, for example, by pressing a number on the keypad, or by stating aloud the wish not to receive future calls? Specifically, what would be the incremental expense of such a requirement? What would be the overall costs and benefits to consumers of such a requirement? What would be the comparative costs and benefits to industry and consumers of providing a toll-free number in a prerecorded message that call recipients could call to assert a Do Not Call request? Are there other alternative means of preserving the consumer's ability to assert a Do Not Call request that would strike a better balance of costs and benefits than requiring an opportunity during the prerecorded message to assert a Do Not Call request?

The cost is irrelevant because any failure of the equipment would create an undue imposition on those targeted by such calls received without their prior consent.

A requirement for automated responders places an increased burden on those least likely to harass people who have not consented. Therefore, the most logical approach would be to require "*specific consent*" to such calls.

A number should also be provided, should the automated mechanism fail. This covers the cases where:

- 1) a predictive dialer fails to detect a TAD;
- 2) an autoresponder fails to respond to the person called.

An automated mechanism should be responsive to voice regardless of DTMF function.

7. Is it appropriate that the proposed new safe harbor in §310.4(b)(5) specifies that the seller or telemarketer must use a prerecorded message that presents an opportunity to assert an entity-specific Do Not Call request at the outset of the message, with only the prompt disclosures required by §310.4(d) or (e) preceding it? Why or why not? What are the costs and benefits of this approach? In the alternative, would it be better to specify that the information about how to assert an entity-specific Do Not Call request be given within a certain length of time after the beginning of the pre-recorded message? If so, how much time should be allowed before the information must be given? What are the costs and benefits of this approach?

All telemarketing calls should include such information prior to the beginning of the call. The only reason to

avoid this would be to circumvent the individual's ability to make such a request prior to the sales pitch.

Preliminary messages are a trivial issue for calls made with the actual informed consent of the targeted individual. Regardless of consent, it is unlikely such preliminary messages would be objected to by targeted individuals. Therefore preliminary messages should be required on all telemarketing calls.

I expect the telemarketing industry to strongly object to preliminary messages because if automated recorded calls are used in an abusive manner, the victims will be inclined to dismiss all such calls during the preliminary messages.

8. Does the proposed new safe harbor in §310.4(b)(5) provide industry with sufficient guidance as to the circumstances under which prerecorded message telemarketing calls would be permissible? If not, how could the provision be crafted to accomplish that purpose more effectively?

At present, the definition of "established business relationship" is sufficiently vague to permit spurious contacts to be claimed as "business relationships". These include such things as contest forms, data collected for customer tracking cards and the like.

The "safe harbor" exceptions relating to an "established business relationship" should be narrowly construed to limit this exception to *bona fide* personal business relationships, in which "specific consent" to telemarketing calls was granted by the consumer.

9. Would the proposed new safe harbor in §310.4(b)(5) complicate enforcement efforts against a seller or telemarketer who violates the TSR and claims falsely that it has an established business relationship with called consumers?

The "established business relationship" should be clarified to avoid rampant abuse by businesses. This should not include enquiries, "over the counter" sales of shelf items, survey data, contests, and other obvious ruses. An "established business relationship" should be limited to *bona fide* business communication need, such as implied by ongoing discussions or other personal business relationship. Such communication is easily confirmed by direct, unambiguous consent (i.e., the "*specific consent*" described above). Permitting customer tracking data, contests and the like to fall under the §310.4(b)(5) safe harbor exception defeats the purpose of the exception.

It is further pointed out that any difficulty in obtaining "*specific consent*" from willing consumers would emanate from a lack of a *bona fide* personal business relationship.

10. [no response]

11. Is it appropriate that the proposed new safe harbor in §310.4(b)(5) specifies that the seller or telemarketer must comply with all other requirements of the TSR and other applicable federal and state laws? If not, why not?

In order to meet "safe harbor" requirements, the telemarketer should be required to have "clean hands". The "safe harbor" requirements should be for the purpose of meeting the requirements in a reasonable fashion; not to provide an escape clause from enforcement.

12. Is the burden on telemarketers in meeting the three percent maximum abandoned call level per day per telemarketing campaign outweighed by benefits to consumers in having call abandonment distributed evenly at a uniformly low level to all called consumers? What, if any, characteristics of the telemarketing equipment currently in use might make compliance with the "per day per campaign" standard problematic?

What, if any, costs would result from having the equipment adjusted or replaced to eliminate problems?

The "per day per campaign" was implemented to prevent abusive abandonment practices by telemarketers. The standard should remain on that "per day per campaign" basis.

13. According to DMA, "marketers who use predictive dialing technology are having difficulty configuring their software to comply with the FTC's per day, per calling campaign 3% [maximum abandoned call] standard."

Is this statement accurate? If so, why? And if so, how widespread is this difficulty? If this statement is not accurate, why not? Were similar problems encountered in meeting the DMA's former guideline of no more than five percent of calls abandoned per day per telemarketing campaign? Why or why not?

The only difficulty is finding someone willing to program their predictive dialers to limit abandonments. It's a matter of the telemarketers' time being more valuable than that of the targeted individuals.

14. If the three percent maximum call abandonment rate were measured over a 30-day period, instead of per day per telemarketing campaign, what effect, if any, would this change have on actual call abandonment rates?

What would prevent a telemarketer from targeting call abandonments at certain less valued groups of consumers, resulting in their receipt of more than their share of abandoned calls? What would prevent setting predictive dialers to abandon calls at a higher rate to one subset of the population and a lower rate to another subset of the population? Is it appropriate that some segments of the population should be subjected to a higher rate of call abandonment than other segments of the population?

If so, why?

The simplest approach is a continuous duty to reduce abandonments. Extending the limits over long periods of time encourages abuse in the form of when abandonments are permitted.

15. Can telemarketing equipment be programmed to dynamically maintain a steady level of no more than three percent call abandonment for all calls being placed? What, specifically, is the equipment that has that capacity to be programmed in such a manner, if any? What are the costs associated with this equipment?

This is a direct function of the predictive dialer's programming. Predictive dialing equipment must detect abandoned calls as part of its call progress detection function. Therefore the device knows when a call is completed and when a call is abandoned. This equipment cannot function without control of abandonments. Telemarketing businesses operate predictive dialers to control multiple banks of 24 lines (or a similar arrangement). Therefore they inherently have direct control of abandonments of either their entire operation, or of segments of their operations statistically large enough to provide accurate abandonment control.

Respectfully Submitted,



Stanley N. Protigal

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Stanley N. Protigal