

Comments to the Federal Trade Commission

“Prerecorded Message EBR Telemarketing”
Project No. R411001

Notice of Proposed Rulemaking
Telemarketing Sales Rule
RIN 3084-0098

Submitted by
Privacy Rights Clearinghouse
Utility Consumers’ Action Network

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

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To the Commission:

The Privacy Rights Clearinghouse (PRC)¹ and the Utility Consumers’ Action Network (UCAN)² strongly oppose the Federal Trade Commission’s (FTC or Commission) proposal to amend the Telemarketing Sales Rule (TSR) to permit prerecorded messages to consumers based on an “established business relation” (EBR) as defined by the Commission.

Similarly, we oppose the Commission’s plan to forego enforcement action for violations of the TSR’s call abandonment rule.

¹ The Privacy Rights Clearinghouse (PRC) is a nonprofit consumer education and advocacy organization based in San Diego, CA, and established in 1992. The PRC advises consumers on a variety of informational privacy issues, including financial privacy, medical privacy and identity theft, through a series of fact sheets as well as individual counseling available via telephone and email. It represents consumers’ interests in legislative and regulatory proceedings on the state and federal levels. www.privacyrights.org

² The Utility Consumers’ Action Network (UCAN) is a nonprofit consumer education and advocacy organization protecting consumers in the areas of essential energy, utility and telecommunications services. It is located in San Diego, CA, and was established in 1984. UCAN maintains a consumer hotline to help its more than 30,000 consumer members. www.ucan.org

The Commission also seeks comment on the Direct Marketing Association (DMA) petition to amend the TSR's call abandonment safe harbor provision. The Commission should deny the DMA's petition and maintain its current daily measure of abandonment rate rather than adopting a 30-day measure advocated by the DMA.

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1. Background and Introduction

For years intrusive, privacy invasive telemarketing calls have been a major source of consumer outrage. Both the PRC and UCAN know first hand of the inconvenience, annoyance, and frustration consumers experience in having their home telephone and at times cell phone ring repeatedly with sales calls. Both organizations operate hotlines and invite individuals' questions and complaints, both by telephone and email. Telemarketing complaints have consistently been in the top five complaint categories since the PRC's inception in 1992. A further indication of the animosity consumers hold toward unsolicited sales calls is the millions of dollars individuals have spent on caller identification services and various devices to thwart telemarketers.

Consumers were given considerable relief when the FTC and the Federal Communications Commission (FCC) set up the national Do Not Call (DNC) Registry. To date, approximately 81 million telephone numbers have been registered with the DNC Registry.³

Clearly, the success of the DNC Registry shows consumers want relief from unwanted telemarketing calls. The Commission's proposal to allow increased telemarketing with pre-recorded sales messages threatens to erode the modicum of peace and control over private

³ Federal Trade Commission, "Telemarketers Required to Scrub Their Call Lists Every 31 Days Beginning January 1, 2005," <http://www.ftc.gov/opa/2004/12/dnc31day.htm>.

telephones and cell phones that the DNC Registry provides. We urge the Commission not to renege on its commitment to protect consumers' privacy.

2. Telemarketers Routinely Skirt the Laws for Prerecorded Messages

We do not believe the business models presented by Voice Mail Broadcasting Corporation (VMBC) and others represent reality in the telemarketing industry.

For example, in California, a long-standing state law requires that prerecorded messages be introduced with a "live" speaker before the recorded message can be played. Compliance with this law has been nil.

California Civil Code 1770 states that the following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

(22) (A) Disseminating an unsolicited prerecorded message by telephone without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or the telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message.

Yet, consumer complaints to both PRC and UCAN indicate that this California law is flagrantly violated by telemarketers who use prerecorded messages. In considering whether to create an exemption so that companies can contact customers with EBRs using prerecorded messages, the Commission needs to take into consideration tactics historically employed by those in the direct marketing industry to avoid telemarketing laws.

3. Consumers Consider Prerecorded Calls *and* Abandoned Calls to be a Nuisance

Calls made by so-called "predictive" dialers -- automatic dialing that allows a telemarketer to call multiple households at one time -- have been a significant consumer complaint. Such calls are intrusive, invade the privacy of one's home, and result in great annoyance when one races to answer the phone to find only dead air or a hang-up on the other end of the line. Predictive dialer calls are particularly troublesome and potentially dangerous for the elderly and the disabled.

VMBC and other commercial entities seek to change the Commission's previous definition of "abandoned calls" to allow prerecorded messages to consumers with whom the seller has an established business relationship (EBR) as the term is defined by the TSR.⁴

⁴ Under the Commission's existing definition of "abandoned calls," a call must be answered at least 97% of time by a live sales representative. This means, according to FTC rules, that a telemarketing campaign that consists solely of prerecorded messages would violate TSR Sect 310.4(b)(1)(iv)

The companies go to great lengths to distinguish the intrusions caused by predictive dialer calls that result in a “hang-up” or “dead air” from prerecorded messages. Unfortunately, the Commission seems to have accepted these distinctions as an adequate reason to amend the TSR. VMBC’s comments, however, completely miss the point. It’s not that consumers are only frustrated with receiving “hang-up” or “dead air” calls. They do not want to receive commercial telephone solicitations in general unless it is a call they have already agreed to accept.

4. Consumers Report Difficulties in Opting Out

The PRC and UCAN have received many complaints from consumers who have been treated rudely, have been subject to abusive language, and have been routinely disconnected when questions are asked. The following are actual quotes from individuals who have contacted us by email to complain about unwanted telemarketing calls and to express their frustrations in attempting to opt-out:

- I had responded to a prerecorded message before and pushed the number on the keypad to speak to a representative because I wanted to opt-out. Today, I was called by a male saying he is from Mortgage Concepts. He asked if I was interested in a mortgage, and I said I wanted some information starting with their phone number. He gave me "800-453-6337." I asked for his name, and he told me "Mike" and again offered me a mortgage. I asked where his company was located and he hung up on me. I tried to call the number he gave, but it appears to be bogus, as I get a non-working number message.
- All weekend I have been besieged with calls, the kind that is made from computers that dial many numbers at the same time. The lucky winner is the one that answers their phone first. You must bust your rear to get to the phone, only to hear nothing, then a few seconds later is a busy signal. Caller I.D. does not help identifying who is calling. I've been disturbed thru dinner, up and thru 9:00 p.m. from 7:30 a.m. Something has to be done to save our sanity. You tell these telemarketers you're not interested, and they continue to call. I am near going crazy, they are driving me nuts. I have asked in the past where I might contact them back, and I'm always told "they don't have a phone number that I can call." Then, when I ask again for the name of the company, they refuse to give it to me, that's the ones I'm able to communicate with.
- I started receiving phone calls on my cell phone. During the day while at work I set my ringer off. I noticed I was getting one missed call everyday! After about one week of seeing this phone number on my cell phone I decided to call it and to request that they take me off their phone list. They happily said that they would process my request. The next day there was another call on my cell phone. I called them again a second time. Again the women said she would take care of it and she

also apologized and said that she would make sure it doesn't happen again. The next few days it was great -- no phone call from them. Until today, and yes I called them again, this time I was upset. The person on the other end was very rude and he laughed at me which made me even more upset. I ended up hanging up on him. I would like to report this company and to finally stop them from calling me.

- The United Marketing Association - not listed with BBB - called my private cell phone number (no idea how they got the number) 6/10 @ 10:18 a.m., 6/12 @ 4:13 p.m., 6/14 @ 1:21 p.m., 6/14 @ 5:08 p.m., 6/14 @ 6:37 p.m., 6/14 @ 6:57 p.m. After I asked him to remove my name from the call back list and never call this number again. He called right back...showing his incredible attainment of professionalism.
- During the Month of April, the auto dialing computer generated dialer called my home phone between 2 to 5 times a day. I finally e-mailed AT&T consumer contact to complain and told them to stop. They acknowledged and apologized for their actions and promised to stop. But the next day, calls continued, 2 to 5 times a day and continued for about a week or two, about 16 calls total. I have every thing in writing and records of the calls, which I took pictures from my caller ID. I did try answering the call, but no one would answer it. When I call back a message will tell me a new program will be offered, but never identifies what department of AT&T or what kind of program they are promoting. I do have an AT&T credit card. I could not relate that at the time. The frequency of calls I would consider as harassment.
- This is the fifth or sixth call I've received from this person/company. I have called back the number listed and always get a recording to leave a message. I have, on two occasions, called back and left my name and phone number telling them to remove my name and number from their lists and to put me on their do not call list effective immediately. Obviously it didn't work because I continue to get the same exact calls.

These examples illustrate the problems that we believe will not only continue, but increase, if prerecorded messages are sent to consumers with EBRs.

5. Number Portability and Custom Phone Features Will Result in Prerecorded Messages to Cell Phones and other Handheld Communications Devices

Another factor that needs to be taken into consideration in making the decision whether or not to allow telemarketers to more frequently send prerecorded messages is the number of consumers who have taken advantage of number portability. Consumers can now “port” their landline number to a cell phone. By liberalizing EBR calls, telemarketers are likely to reach cell phones with prerecorded messages.

According to a recent *Business Week* article,⁵ “About 8% of Americans have dumped their traditional phones and gone completely mobile. That's expected to jump to 25% within a decade, says Craig Mathias, founder of Farpoint Group, a consulting firm in Ashland, Mass., that specializes in wireless technology.” Thus, there is good reason to believe that prerecorded messages will undoubtedly be placed to cell phones causing the wireless user to incur incoming call charges.

Similarly, many consumers take advantage of additional services provided by their local phone carrier such as the ability to forward landline calls to a cell phone. Such custom services will undoubtedly cause cell phone customers to incur incoming call charges if telemarketers are allowed to place prerecorded messages to those with an EBR.

Further, new technologies continue to be developed that blend cell phone technology with email, text messaging, and faxes. We are concerned that as such new technologies are integrated into handheld devices, the opportunities for sending unsolicited sales messages to wireless communications devices will increase. And if telemarketers are able to expand their sales calls to individuals with EBRs, prerecorded messages to handheld wireless devices will likely explode.

6. Pressing Keypad Buttons to Opt-out Does Not Work, Especially with Messages Left on Voice Mail

The Commission’s proposal and VMBC’s petition explain that consumers can opt-out by “simply” pressing a button to be connected to a sales representative who will then take the consumer’s opt-out election. The simplicity of this is pure fantasy, and has no relationship to the real world of telemarketing sales calls. Consumers who have contacted us complain:

- Telemarketers call with a recording-- I tried to hit buttons to get to a customer "service rep" and then the recording hung up.
- [From our log file] Caller is receiving recorded calls for a Visa credit card promotion. The calls are repeatedly dialing every 30 seconds. She has pushed #1 and listened to number 1 and asked to talk to someone, but whenever she reaches someone, they hang up.

In addition, the PRC has heard from individuals who, when listening to prerecorded messages, have dutifully followed the instructions and pushed the keypad in order to let the company know that they would like a “live” representative to call them back. But these individuals report that no return calls were received. They had wanted to talk with the live person in order to request to be placed on the company’s do not call list. If the Commission allows the rule regarding prerecorded messages for EBRs to go forward, it must require that all prerecorded messages include a working toll-free phone number that consumers can call to place a do-not-call request. Without this provision, and based on complaints we have received from many individuals, we believe that opting out will be virtually impossible.

⁵ “Fear Not the Cell Phone Directory,” *Business Week*,
http://www.businessweek.com/technology/content/dec2004/tc20041213_3541_tc119.htm

The following are complaints from our hotline that illustrates these points:

- I am getting as many as FOUR calls a day from this company. The calls are recorded telemarketing calls with no possibility of speaking to actual human being to have them take my phone number off their telemarketing list. These three to FOUR calls a day have been going on for over a month now. The same exact recording over and over, sometimes only minutes apart. There is no 1-800 listing for this company and no way to talk to a human being about it. I filed a "No telemarketing" before the deadline. I cannot reach this company to stop these calls. The Loan Center telephone number does not come up on my ID Caller. It only says "Unavailable number" on ID Caller. I do not know how to contact these people."
- Initially, I received a call with blocked caller ID and a recorded message offering me a new mortgage, asking me to select to be contacted by a later phone call. I have a confirmed registration with the do-not-call registry. There was no phone number offered, and with the caller ID blocked there was absolutely no way for me to complain about the violation to the do-not-call list without having them call me back to get more information, so I selected to be called back.
- [Transcript of prerecorded telemarketing call.] "Hi, It's 30 percent or more on the health insurance premium. For a free, no obligation quote, dial 1 now. To be added to our do not call list, dial 9 now. Once again, for a free, no obligation quote, dial 1 now." The individual who provided our organization with this transcript reported that the word "unknown" was displayed on the recipient's caller ID screen.

The Commission has failed to take into consideration the large number of prerecorded sales messages that are now and will be left on voice mail machines and services. When an individual returns home after a day at work and listens to the messages on the voice mail machine, it is impossible for him or her to opt-out by pressing a number on the keypad because that call is no longer connected to the entity making the call. Thus, requiring prerecorded messages to provide a keypad mechanism for opting out is largely meaningless.

Our observation, based on the large number of complaints our organizations have received about telemarketing practices, is that many in the industry actually prefer to place prerecorded messages on people's voice mail and answering machines rather than playing them for the consumer directly. In this way, rather than having a live person immediately hang up, messages have a better chance of being heard in their entirety. If this is indeed the case, offering a keypad option is simply a calculated strategy to ensure that customers are actually unable to opt-out of future calls.

We recommend that whether a message allows a consumer to push a button on a keypad or not, all prerecorded messages must provide a *toll-free* phone number and must display a legitimate

phone number on Caller ID that a consumer can call to make a DNC request. Though the telemarketing industry believes that allowing a keypad option to connect to a representative assists consumers because they do not need to take down a phone number with pen and paper, the option simply does not work when prerecorded messages are recorded on voice mail rather than being answered in real time. Prerecorded messages that *only* provide a keypad option for opting out should not be allowed. A working phone number for opting out must also be required.

7. Advances in Telephony Could Significantly Increase the Number of Prerecorded Messages

An unwanted telemarketing call is intrusive and offensive to consumers when the telephone rings and there is no one on the other end of the line with whom the individual can speak. That the consumer hears a prerecorded message is just as aggravating. In fact, given the ongoing advances in technology, we can expect significant increases in the number of prerecorded sales calls as well as unwanted messages left on voice mail services and answering machines.

Voice over Internet Protocol (VoIP) and Internet telephony in general are considered the next generation of predictive dialers. Such new technologies could easily lead to a veritable deluge of unwanted messages to consumer telephones.

According to an August 10, 2004, CNET article about VoIP,⁶ “Telemarketers can send messages to thousands of addresses at a time, rather than tying up a single phone line to make one call.” The article continues, “Consider software from Frederick, Mass.-based Qovia, which seeks out the IP addresses assigned to phones, then sends each a 30-second recording. Its pace -- 1,000 synthetic calls every five seconds -- is a quantum leap from the automated ‘Demon Box’ dialers that telemarketers use now.”

The Commission seems to adopt the FCC’s reason for allowing prerecorded messages, that is, while the messages may be intrusive such messages do not impose the same costs on the recipient as unsolicited facsimile messages. This, too, not only misses the point but overlooks the recipient’s cost in time taken to answer the call or delete unwanted messages from an answering machine. No doubt this will result in development of even more devices and phone company services to block prerecorded calls, meaning still more millions in out-of-pocket costs to consumers. Our organizations believe that consumers should not have to incur such expenses to deter sales calls that are not wanted in the first place.

8. “Established Business Relationship” Is too Broadly Defined

Consumers can take no comfort in the Commission’s proposal to limit prerecorded messages to those with whom the seller has an established business relationship. The definition of EBR is so broad as to encompass nearly *any* consumer contact with *any* business.

Furthermore, the restrictions the Commission proposes to place on prerecorded calls when the seller has an EBR are virtually unenforceable. The Commission proposes to place all the burdens

⁶ CNET, “Net Phone Customers Brace for ‘VoIP Spam,’” (August 10, 2004), http://news.com.com/Net+phone+customers+brace+for+VoIP+spam/2100-7352_3-5302988.html?tag=nefd.lede

on the consumer. The consumer must take the initiative to opt-out. The consumer must prove that he or she had no EBR with the seller that left the prerecorded message. Given the broad definition of EBR, one could rarely prove that he or she *did not* have an EBR. The following complaint to our hotline offers insight into the problems consumers will experience. It would be very difficult for this individual to prove otherwise:

- I have received automated voice messages from Carnival Cruise lines. I do not have an established business relationship with Carnival, nor did I request information.

These days virtually any business transaction a person conducts has the potential to record a phone number. Whenever individuals provide a phone number to a company for any reason, such as for pizza delivery or for a car repair, they are opening themselves up to sales calls without having given consent or having expressed interest in receiving them.

Similarly, calling a toll-free number to inquire about a product or service can result in the caller's number being captured by ANI technology (automatic number identification). It is not possible to block one's number when making toll-free calls. Under the Commission's broad definition of EBR, these situations could also lead to individuals receiving unwanted prerecorded messages.

If the Commission is intent on relaxing its rule on prerecorded messages, it should also narrow the definition of "established business relation."⁷ To allow prerecorded sales calls based simply on a consumer's inquiry for three months should be eliminated. We know of no other context in which a business relationship can be established by simply making an inquiry.

The VMBC indicates that "using prerecorded messages to consumers with whom the seller has an established business relationship would enable a telemarketer to preclude completely some of the odious side effects of predictive dialers." Unfortunately, this statement implies that just because a person has inquired or applied for or has actually purchased a product or service from a company, that they therefore want to receive sales calls from same. On the contrary, we have learned over our many years of receiving complaints from individuals nationwide that when people purchase a product or service, they do not necessarily want to receive sales calls from that same entity.

The fairest way to determine whether a person indeed wants to receive prerecorded messages once they have an EBR is to allow customers to give express permission and *opt in* to receiving sales calls *at the time* they meet the EBR requirement. Rather than providing consumers with the ability to assert a DNC request when they receive a prerecorded telemarketing call, businesses should instead be required to obtain consent when the EBR is first created. Allowing prerecorded messages to those who have only applied for or inquired about a service should not be allowed.

⁷ TSR, 16 CFR 310.2(n), defines an established business relationship as relationship based on:

- (1) The consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or
- (2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

9. The Inconsistency between the FTC's Proposal and the FCC's Rules Is Immaterial

Both the Commission and VMBC point out that FCC telemarketing rules under the Telephone Consumer Protection Act (TCPA) permit prerecorded messages if there is an EBR. That the two agencies have different rules on this should not be a factor in allowing prerecorded messages under the FTC's TSR. Lowering the benchmark to the weaker of the two Commissions' standards is a decision that will ultimately harm consumers.

The FTC and the FCC have very different missions, and the rules established by each agency should independently follow that agency's mandate from Congress. The FCC is an industry regulator, charged with setting minimum standards for the industry it oversees. The FTC, on the other hand, is a consumer protection agency, charged by Congress with protecting consumer interests.

Furthermore, in discussing the DMA's petition to amend the abandoned call rate to establish a 30-day rather than daily measure, the FTC is not persuaded by the inconsistency. The DMA's petition notes the FTC rule's inconsistency with both the FCC and the California Public Utilities Commission, both of which measure abandoned calls on a 30-day basis. About the inconsistency here, the FTC (Commission) states:

The Commission does not believe these factors are sufficient to require the requested change in the TSR. It is not impossible for entities subject to both the TSR and either the FCC's TCPA rules or the California Public Utilities Commission's rules to comply with both; compliance with the FTC's more precise standard would constitute acceptable compliance with either or both of those other sets of regulations.

The Commission should follow this same reasoning and decide not to amend the TSR rule.

10. DMA's Petition Should be Rejected

The DMA in its petition to amend the call abandonment rate asks the Commission to allow a 30-day measure rather than the daily measure now required. We urge the Commission to reject the DMA's petition. We share the same concerns expressed by the Commission, namely:

- A 30-day approach could enable telemarketers to target call abandonment at certain less valued groups of consumers.
- Predictive dialers could be set to a higher rate to one subset of the population.

That the FTC's daily measure differs from other agencies that set abandonment standards should not be a factor. As discussed previously, the FTC's mission is consumer protection. Denial of the DMA's petition for the reasons cited by the Commission is in keeping with the FTC's Congressional mandate.

11. Additional Customer Complaints Underscore Our Recommendations that the Commission Reject All Proposed Rules

The Commission's proposal seeks information on consumer complaints. As a starting point, the Commission should consider the 81 million phone numbers that have been registered on the FTC's Do Not Call Registry. It can be argued that this astounding number reflects that many complaints.

In addition to the comments we've received from consumers over the years and that have been included in our comments above, we include the following comments. These are from individuals who contacted the PRC recently with their specific concerns about the proposed weakening of the TSR regarding prerecorded telemarketing calls:

- My home has been much nicer since the telemarketers have been prohibited from leaving unsolicited messages on my machine. Do whatever you can to further the cause of defending us against this type of telemarketing invasion.
- As a former legitimate telemarketing salesman, I object completely to ANY relaxation of National Do Not Call regulations, especially in regard to prerecorded messages that may block a user from using their own phone line for normal or emergency communications. There are one or more deaths on record Nationally that were precipitated by a prerecorded message that would not cede the line it was on, even though the receiving party had hung up ! Compromise is not acceptable. Strict compliance is.
- I am concerned about being contacted by telemarketers, especially if they were to contact me on my cell phone. By doing so, they are using up my minutes which are limited. I am paying for those minutes and find it outrageous to have to pay for something I did not request or want! Please do not make it easy for telemarketers to contact the consumers, especially when the consumer has to pick up the tab for unwanted calls!!!!!!

We appreciate the opportunity to comment on this proposal. Again, on behalf of consumers, we strongly oppose a new loophole to allow an expansion of prerecorded telemarketing messages. The Commission should reject all of the changes proposed in R411001.

Sincerely,

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