



January 7, 2005

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

Re: Prerecorded Message EBR Telemarketing, Project No. R411001

Dear Commissioners:

Thank you for the opportunity to comment on your recent proposal to create an additional call abandonment safe harbor, and your proposal to amend the Telemarketing Sales Rule (“TSR”) call abandonment safe harbor provision. This comment letter is submitted on behalf of West Corporation and its affiliates, including West Business Services, LP; West Telemarketing, LP; and West Interactive Corporation (collectively, “West”). West supports an amendment to the TSR to allow prerecorded telemarketing calls pursuant to the established business relationship (“EBR”) exemption. Below, we address the questions set forth in the notice of proposed rulemaking (“NPRM”) dated November 17, 2004.

### **Prerecorded Message Calls to Established Business Relationships**

The NPRM sets forth multiple questions concerning the proposed amendments to the TSR. For the sake of brevity, we have not repeated the questions here but identify them by number as numbered in the NPRM Section B, Questions on Proposed Specific Provisions.

1. The two harms that prompted the adoption of the current call abandonment provisions are “hang-up” calls and “dead air.” Dead air is not likely to occur with prerecorded message calls made by an automated dialing and announcing device (“ADAD”). ADAD prerecorded message calls use the same piece of equipment to dial and interact with the caller so there is no gap between when the call is answered and the system connecting the caller to a live agent.

A predictive dialer uses the system to dial the caller and a live agent to interact with the caller. In this case, the potential for dead air is present. However, the proposed safe harbor for prerecorded message calls requires the message to be played within two seconds of the called person’s completed greeting. This is similar to the existing abandoned call safe harbor. Both safe harbors are designed to eliminate dead air whether the caller plays a prerecorded solicitation message or the message required under the current abandoned call safe harbor.

The potential for hang-up calls is present in prerecorded message calls made by either an ADAD or a predictive dialer. This issue is addressed by the existing and proposed safe harbors requiring the seller or telemarketer to allow the phone to ring at least four times or fifteen seconds before disconnecting an unanswered call. No additional restrictions are necessary.

2. The use of prerecorded message telemarketing calls is more efficient and less costly than telemarketing calls made by live agents. As such, a company can spend less on marketing through the use of prerecorded message calls. At times, these savings may be passed on to consumers through lower product or service costs. We cannot comment on whether consumers will receive more telemarketing calls under the proposed new safe harbor. The use of prerecorded message calls is less costly than live sales representative calls, so it is possible more sellers will take advantage of the proposed safe harbor and use prerecorded message calls to reach their established business relationships. At the current time, we have no data as to how many consumers choose to act on the telemarketing calls they receive via prerecorded messages. We ceased making such calls to established business relationships upon implementation of the amended TSR in March 2003.

3. Obtaining established business relationships' consents before contacting them using prerecorded telemarketing messages would be a burdensome and costly task. Many consumers form their relationships with sellers via the telephone or have established the relationship in a retail setting over a long period of time. While sellers likely send materials via mail about the products or services consumers order, it is less likely the consumers are sending material back to the sellers. Our experience has shown that requesting consumers to return written materials is generally unsuccessful, so obtaining written consent would be a very limiting requirement. Obtaining consent by telephone would be more feasible, but would add to the length of calls and add cost to the sellers' marketing and administration efforts.

4. We cannot provide any data at this time as to how many consumers choose to opt out of prerecorded telemarketing calls currently or what mechanisms are used to allow an opt out. We ceased making such calls to established business relationships upon implementation of the amended TSR in March 2003.

5. The technology currently used for prerecorded message calls is capable of detecting a person's greeting or an answering machine within 2 seconds of the completed greeting, but is not able to detect the difference in less than 2 seconds. As such, a requirement to play the prerecorded message in less than two seconds after completion of the answering consumer's greeting would not be feasible.

6. Currently, under the TCPA Rules, telemarketers are required to pass a telephone number on Caller ID that accepts Do Not Call requests. For all consumers, those with or without Caller ID, we would prefer a requirement that the seller's or telemarketer's customer service telephone number be disclosed during the prerecorded message where Do Not Call requests can be accepted without prompting the consumers to enter such requests. We currently do not prompt consumers on live calls to enter Do Not Call requests. We believe it to be overly burdensome to require sellers and telemarketers to prompt consumers to enter Do Not Call Requests. Our goal

is to promote commerce and prompting consumers to enter Do Not Call requests stifles commerce by eliminating one avenue of marketing.

Should the FTC choose to implement a requirement that the seller or telemarketer present an opportunity for the called party to assert an entity-specific Do Not Call request, we recommend either having the called party press a number on the keypad, or provide a toll-free number the call recipient could call to assert a Do Not Call request. The capability to allow the called party to press or state aloud the wish not to receive future calls would require additional speech recognition technology and, therefore, expense.

7. Should the FTC choose to implement a requirement that the seller or telemarketer present an opportunity to assert an entity-specific Do Not Call request, we recommend, based on the technology, the opportunity be presented sometime after the 12<sup>th</sup> second of the message.

8. The proposed safe harbor is clear about which prerecorded message calls would be permissible. Please see comment 11 concerning proposed § 310.4(b)(5)(ii)(B).

9. The proposed safe harbor would not complicate enforcement efforts against a seller or telemarketer who falsely claims it has an established business relationship with called consumers. The burden of proof of such relationship should be on the seller.

10. The proposed safe harbor that the seller or telemarketer must allow the telephone to ring for at least fifteen seconds or four rings before disconnecting an unanswered call is appropriate. The ring time is based on six-second increments as measured by the telemarketing equipment.

11. The proposed safe harbor requirement that the seller or telemarketer comply with all other requirements of the TSR and other applicable federal and state laws is not appropriate. The laws surrounding telemarketing calls and prerecorded message calls are numerous. While most sellers and telemarketers make every attempt to comply with all applicable laws, an inadvertent error which results in failure to comply should not prevent a seller or telemarketer from the safe harbor protections. This requirement also increases the need for discovery and adds additional complexity and cost to any enforcement action.

West appreciates the opportunity to comment on these proposed amendments to the TSR. Should you have any questions about our comments, please do not hesitate to call me at (402) 965-7113. Thank you.

Sincerely,

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