

ELECTRONIC PRIVACY INFORMATION CENTER

Before the
Federal Trade Commission
Washington, D.C. 20580

In the Matter of)
) FTC File No. R411001
Telemarketing Sales Rule)
Prerecorded Message EBR Telemarketing)

To: The Commission

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER, COMMERCIAL ALERT, CONSUMER ACTION, PRIVACY TIMES, PRIVACY RIGHTS NOW COALITION, CONSUMER TASK FORCE FOR AUTOMOTIVE ISSUES, PRIVACYACTIVISM, PRIVACY JOURNAL, PRIVATE CITIZEN, PROFESSOR CEM KANER, ASSOCIATION OF INFORMATION TECHNOLOGY PROFESSIONALS, PRIVACY RIGHTS CLEARINGHOUSE, AND DR. PETER NEUMANN ON PRERECORDED MESSAGE EBR TELEMARKEING.

January 10, 2005

Pursuant to the notice¹ published by the Federal Trade Commission on November 17, 2004 regarding the notice of proposed rulemaking on the Telemarketing Sales Rule, the Electronic Privacy Information Center, Consumer Action, Privacy Times, Privacy Rights Now Coalition, Consumer Task Force for Automotive Issues, PrivacyActivism, Privacy Journal, Private Citizen, Professor Cem Kaner, Association of Information Technology Professionals, Privacy Rights Clearinghouse, and Dr. Peter Neumann, submit the following comments.

I. Introduction

In this proposed rulemaking, the Commission is considering whether to create a loophole to the Do-Not-Call Registry. The loophole would allow telemarketers to deliver prerecorded voice messages to their existing customers. The Commission has additionally proposed that, if this type of telemarketing is permitted under the Telemarketing Sales Rule, a safe harbor will be provided for telemarketers to implement prerecorded voice telemarketing. Finally, the

¹ Telemarketing Sales Rule, 69 Fed. Reg. 67287 (Nov. 17, 2004)(to be codified at 16 C.F.R. Part 310).

Commission is considering a change to the number of "abandoned" phone calls that a telemarketer can make over a given period.

We urge the commission to reject all three proposals. The prerecorded voice message loophole is not minor: it opens the door to millions of unwanted solicitations based on the most attenuated of business relationships. This loophole, combined with business practices and calling technology that allow easier and cheaper telemarketing, has the potential to invalidate the many benefits of the Telemarketing Sales Rule. Furthermore, people who want to receive prerecorded telemarketing messages can always opt-in or affirmatively consent to that form of marketing. The safe harbor proposed will turn back the clock on protections against telemarketing, causing a return to a situation where consumers were required to opt out from each company making calls. The record shows that company-specific opt out doesn't work, and the Commission should not reestablish that failed practice. Finally, we argue below that the current rule for call abandonment should be kept in place. Monthly averaging would give far too much latitude to conceal systemic errors or deliberately aggressive individual campaigns within a large center handling many campaigns.

It is troubling that the Commission is considering diluting the protections of the Do-Not-Call Registry. Registration now exceeds 80 million numbers.² This represents a resounding rejection of unsolicited outbound telemarketing. In light of this level of enrollment, the priorities of the Commission should be focused on heightening protections against invasions of privacy. For instance, the success of the Telemarketing Do-Not-Call Registry could be expanded into a tool to that would allow individuals to opt out of prescreened offers of credit and non-affiliate financial information sharing, or to shield against junk mail. The Registry could become a platform that would allow people to opt out under many different privacy laws at the same time.

The fact that the Commission has proposed to harmonize protections downward rather than seek enhancements to the Telemarketing Sales Rule suggests that the agency is deviating from its consumer protection mission.

² FEDERAL TRADE COMMISSION, TELEMARETERS REQUIRED TO "SCRUB" THEIR CALL LISTS EVERY 31 DAYS BEGINNING JANUARY 1, 2005, Dec. 20, 2004, available at <http://www.ftc.gov/opa/2004/12/dnc31day.htm>.

II. The Commission Should Not Weaken the Do-Not-Call Registry By Allowing Prerecorded Messages to Established Customers

A. Congress Intended to Provide Broad Protections Against Prerecorded Calls

Congress intended to shield both consumers and businesses from the nuisances of prerecorded message calls. In passing the Telephone Consumer Protection Act of 1991, Congress found:

(5) Unrestricted telemarketing...can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

(6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

[...]

(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

[...]

(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.

(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls

to businesses as well as to the home, consistent with the constitutional protections of free speech.³

Congress set a strong default rule against prerecorded telemarketing. It prohibited such telemarketing unless the recipient consented to the call.⁴ It only allowed such telemarketing in case of an emergency, or where the Federal Communications Commission, after engaging in analysis to consider whether the calls invade privacy and do not include unsolicited advertisements, exempted the calls from the ban.⁵ Unfortunately, years ago, the FCC misinterpreted the statute, allowing calls from businesses to customers with "established business relationships."⁶ As we explain below in section C, such calls do invade privacy because individuals constantly create business relationships, but they do not expect telemarketing to arise from them; because new technologies have made it less expensive to engage in automated telemarketing; and because businesses are more effective in identifying individuals, even when the consumer doesn't leave a phone number with the store.

B. The FTC Has the Authority to Prohibit Abusive Telemarketing

In 1994, Congress again strengthened consumer protections against telemarketing. In the 1994 Telemarketing Act, Congress specified that the Federal Trade Commission could promulgate rules to protect against telemarketing that is "coercive or abusive of such consumer's right to privacy:"

(1) The Commission shall prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.

[...]

(2) The Commission shall include in such rules respecting deceptive telemarketing acts or practices a definition of deceptive telemarketing acts or practices which may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering.

³ Telephone Consumer Protection Act of 1991, 102 P.L. 243, 105 Stat. 2394 (1991).

⁴ 47 U.S.C. 227 (b)(1)(B).

⁵ 47 U.S.C. 227 (b)(1)(B), (b)(2)(B)(ii). See Petition for Reconsideration of Robert Biggerstaff, FCC CG Docket No. 02-278.

⁶ 47 C.F.R. 64.1200 (a)(2)(iv).

(3) The Commission shall include in such rules respecting other abusive telemarketing acts or practices--

(A) 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...⁷

Prerecorded telemarketing is a coercive and abusive form of marketing. It is coercive because individuals have no way to avoid it, except by simply not participating in modern commerce. It is abusive because prerecorded telemarketing messages can be delivered automatically to millions of individuals in an automated fashion. A very small number of businesses engaging in this practice could make Americans' phones start ringing again at pre-Registry levels. Therefore, the 1994 Act allows the FTC to address prerecorded message telemarketing.

C. The Negative Effects of the Proposed Loophole Will Be Exacerbated by the Broad Definition of "Established Business Relationship," the Advent of New Calling Technology, and the Ability of Businesses to Identify Consumers

It is critical to view the Commission's proposal to allow prerecorded telemarketing messages in the context of three forces. First, the established business relationship exemption is too broad. It recognizes relationships where no consumer would reasonably expect or want telemarketing. Second, new technologies, such as Voice over Internet Protocol ("VoIP" or "internet telephony"), allow telemarketers to generate automated, inexpensive calls with ordinary computers. Third, business' ability to identify customers is sophisticated and outside the reasonable expectation of ordinary shoppers. Combined, these three forces could create an unwanted barrage of prerecorded voice telemarketing.

1. The Established Business Relationship Exemption Is Too Broad

The established business relationship exemption is entirely too broad. Under it, any purchase gives a business the opportunity to telemarket for 18 months. A mere inquiry allows telemarketing for three. We think that the contact necessary to create the exemption is too low. Under the definition, a consumer may have thousands of business relationships. In a majority of

⁷ Telemarketing and Consumer Fraud and Abuse Prevention Act, 103 P.L. 297, 108 Stat. 1545 (1994).

these cases, the consumer will have no expectation that telemarketing will arise from them. But under the rule, a gift bought on vacation, a purchase of a cup of coffee, or even a ride in a taxi could create an exemption to the Do-Not-Call Registry's protections.

2. New Technologies Can Enable A Dramatic Increase in the Volume of Telemarketing

According to a 2001 profile of the petitioner for the prerecorded telemarketing exemption, "Voice Mail Broadcasting Corporation," the company could deliver 200,000 answering machine messages per hour.⁸ A 1999 article reports that Voice Mail Broadcasting Corporation can make 1.5 million calls a day.⁹ That is, using 1999 technology, this single company could leave messages with 1% of the U.S. population over a two-day period.

But even more could be contacted when VMBC's technology is linked with Voice over Internet Protocol ("VoIP" or "Internet telephony"). VoIP allows individuals to initiate calls to others on the Internet or on the standard telephone network. Business VoIP plans are available for unlimited US and Canada calling at very low rates. This means that telemarketers could have fewer costs and expand their calling operations greatly, at the expense of individuals' privacy.

3. Businesses' Identification Techniques are Subtle and Sophisticated

A third force that the FTC should consider when weighing this loophole is the ability of businesses to collect identification information from individuals. Often, individuals are not aware of these techniques, or believe that providing information is necessary for the transaction being made.

Personal contact information can be obtained in subtle ways, often without the informed consent of the individual. First, "enhancement" or list "appendage" is the practice of buying more personal information on a consumer based on data collected at point of sale. For instance, a retailer may ask for a consumer's phone number, and then use the number to purchase the consumer's address or other information about the consumer. By merely giving a name to a retailer, the store can buy address and phone information from a data broker such as Acxiom.

Second, data is collected through "ANI," or Automatic Number Identification. ANI is similar to Caller ID, but the caller cannot disable ANI. ANI reveals the name, address, and phone

⁸ Kathryn Balint, *Ringling Endorsements*, SAN DIEGO UNION TRIB., May 6, 2001.

⁹ Jesse Slome, *Telemarketing Media Targets Answering Machines, Voicemail*, LOS ANGELES BUSINESS JOURNAL, Nov. 1, 1999.

number of the telephone subscriber when the line is used to call a toll-free (800, 888), charge (900, 976), or police phone number (911). Companies can collect ANI and use it to add to its personal information databases.

Third, some companies have sold linkage products that allow a retailer to obtain a name and address based on the consumer's credit card number. For instance, a Federal Trade Commission investigation into Trans Union revealed that the company sold a product called "TransLink" that provided merchants with the names and addresses of persons who used a bank card.

Last, it is important to understand that there is a culture of secrecy surrounding data collection. Companies risk "creeping out" their customers by revealing their identification and data aggregation tactics. For instance, a casino profiled recently by the Wall Street Journal trains its operators not to tell customers that they have been automatically identified and categorized by their profiling system. "That would be too creepy," said the company official in charge of the system.¹⁰

D. People Don't Want More Telemarketing

The level of enrollment in the Do-Not-Call Registry, which recently exceeded 80 million, speaks for itself. Americans want less telemarketing in their lives.

In many previous filings, we have submitted consumer survey information showing broad general support for privacy protection. Those surveys are available for review online at EPIC's Privacy and Public Opinion page at <http://www.epic.org/privacy/survey/>.

In this filing, we wish to highlight an April 2004 Yankelovich Monitor Report. Yankelovich Partners found that individuals have a growing frustration with invasive marketing.¹¹ In a "recontact survey" of 601 respondents from February 20-29, 2004, Yankelovich found that: 53% of consumers polled reported that spam had made them likely to ignore all marketing and advertising; 53% said that for the most part, marketing and advertising does not help them shop better; 59% feel that most marketing and advertising has very little relevance to them; 65% think there should be more limits and regulations on marketing and advertising; 69% are interested in products and services that would help them skip or block

¹⁰ Christina Binkley, *Numbers Game, Taking Retailers' Cues, Harrah's Taps Into Science of Gambling*, WALL STREET JOURNAL, Nov. 22, 2004, available at <http://online.wsj.com/article/0,,SB110107789091980299,00.html>.

¹¹ YANKELOVICH MONITOR, Apr. 2004 (*Consumer Resistance to Marketing Reaches All-Time High*, Yankelovich Press Release, Apr. 15, 2004).

marketing; 33% would be willing to have a slightly lower standard of living to live in a society without marketing and advertising; 65% feel they are constantly bombarded with too much marketing and advertising ; 61% feel that the amount of marketing and advertising is out of control; and 60% have a much more negative opinion of marketing and advertising now than a few years ago.

The Yankelovich study shows that a clear majority of Americans want more insulation from irrelevant interruption.

Individuals are likely to find prerecorded EBR marketing distasteful. A 1999 article describing the activities of the petitioner, Voice Mail Broadcasting Corporation, explains that the company deliberately abandoned callers when a live person answers the phone:

VMBC's technology utilizes a proprietary algorithm to determine whether a machine or a human is on the other end of the line. If a live person is detected, the system generates a busy signal or just politely hangs up. Because business-targeted calls are placed between 6:00 p.m. and 7:00 a.m., and consumer-targeted calls between 9:00 a.m. and 4:00 p.m., only a small percentage of voice mail broadcast calls actually get answered by warm bodies.¹²

What is labeled as "polite" in the article is actually a nuisance—abandoned calls. The TSR prohibits such calls.

Finally, consumers are likely to find the business tactics of prerecorded markers condescending, as Voice Mail Broadcasting Corporation admits that it deliberately dumbs down messages in order to manipulate the call recipient. In a way, the Commission by considering this loophole, is passing on a form of deceptive advertising that is designed to trick the recipient:

One of the experts in delivering results with this new medium is Bill Hillestad, president of NextGen Marketing in Austin, Texas: "Because consumers are jaded by hype-filled sales messages, we specifically coach our clients to sound folksy -- as if they were personally leaving a message for the individual." He insists on injecting "ums" and "ahs" into messages to make them sound more natural and inviting to the listener. "Even though the messages are pre-recorded, we can still create the feeling that someone has personally called the recipient," Hillestad says. The personal touch translates to increased responses.¹³

¹² Jesse Slome, *Telemarketing Media Targets Answering Machines, Voicemail*, LOS ANGELES BUSINESS JOURNAL, Nov. 1, 1999.

¹³ *Id.* "...Voice Mail Broadcasting's machine recordings have "ums" and "ers" built into them - so listeners can be fooled into thinking they are hearing a live operator. After all, most of us don't want to build a lasting relationship

III. The Safe Harbor Reverses the Primary Benefit of the Do-Not-Call Registry: The Requirement that Consumers Opt-Out from Each Telemarketing Company

A primary justification for the Do-Not-Call Registry was that telemarketing companies routinely ignored company-specific opt-out requests. The proposed safe harbor would return consumers to a pre-Registry era, one where telemarketers ignored or otherwise frustrated attempts to opt out.

A. The Records Shows that Telemarketers Abuse the Per-Company Opt-Out System

We urge the FTC to reconsider its own docket and FCC docket 02-278, as these resources indicate that company specific opt-out systems do not work. In fact, they were a primary factor in the move to a centralized Do-Not-Call Registry. The following comments were filed on those dockets:

"I have been contacted by 1-954-382-1736 Priority Health and have asked them twice to remove me from their calling list. I have been hung up on each time and when I have called back to speak to a supervisor I was told there were no supervisors there. I told them to take me off the list a third time and the woman I was speaking to replied, "Don't raise your voice at me, bitch" and hung up again."¹⁴

"I have requested numerous times to be placed on the Do Not Call list and am still being harassed by this company. Key Financial (727)734-3498 is what comes up on my caller ID...they call every night...and the rep on the phone would not listen to my very polite reminder that I requested numerous times not to be called by them and that I am being harassed. He kept saying the same thing about the low rates and refused to acknowledge my request not to be called."¹⁵

"[I] receive phone calls up to three times a day from 1-800-379-8414. [I] have been called at inappropriate times. [I] repeatedly asked them to stop calling. [They] state they are the 'Fraternal

with a machine." Larry Riggs, *Telemarketing: Is There Anyone Out There?*, DIRECT MAG, Sept. 30, 1999, available at http://www.directmag.com/mag/marketing_telemarketing_anyone/

¹⁴ Comment of Lori Thompson in FCC docket 02-278, Dec. 16, 2004, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516885375.

¹⁵ Comment of Sarah Bearor in FCC docket 02-278, Dec. 12, 2004, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516885078.

order of the brotherhood of police.' The frequency and timing of the calls are beginning to feel harassing and slightly threatening."¹⁶

"This is the third in a series of repeated calls...after the second series, a call actually came through and I asked them to remove my name from their list. This time there were five calls in the last three days."¹⁷

"I have received numerous phone calls from Teletron Marketing Group...Each time I have received a telemarketing phone call on my cell phone and each time I request to be taken off their calling list. They have not done so."¹⁸

"The company Risk Management Alternative in Ohio...keeps calling my home. I have asked them several times to discontinue the calls. They say they will, but the calls continue."¹⁹

"I have tried on numerous occasions to get mortgage investors to stop making harassing calls to my home. As recently as 27 Oct I told two of their solicitors that I was not now nor would I ever be interested in doing business with them. I then called them back at 877-733-4642 and supposedly spoke with a supervisor (Chris Jones) and told him that I did not want to see this number on my called ID ever again...Someone from this same number called my house again the very next day and evening."²⁰

"I have received countless phone calls from telemarketer Xentel Corporation after I have contacted them directly and asked to be removed from their calling lists. The number 1-800-914-7345 calls my residence numerous times a day. It is harassing and annoying. This company has taken no action to abide by the law and should be cited for irresponsible business practices."²¹

¹⁶ Comment of Madelyn Catob in FCC docket 02-278, Nov. 1, 2004, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516792268.

¹⁷ Comment of Shirley J. Young in FCC docket 02-278, Aug. 25, 2004, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516482099.

¹⁸ Comment of Andrew Feldman in FCC docket 02-278, May 10, 2004, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516183839.

¹⁹ Comment of William A. Taylor in FCC docket 02-278, Feb. 23, 2004, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515783108.

²⁰ Comment of Evelyn A. Modlin in FCC docket 02-278, Oct. 29, 2003, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515287689.

²¹ Comment of Kevin Brandt in FCC docket 02-278, Sept. 22, 2003, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515083024.

"As things stand today, I presently receive on average 5 telemarketing calls each night. Every time I receive a call I inform the caller that I do not wish to be called, and to please remove my name from their list. The past 2 weeks I have received a call every night from the same company at about the same time telling me I've won a Walt Disney Vacation...Every night I tell the person that I am not interested in talking to them and don't want them to call me."²²

"My wife and I receive on average 6-10 calls from telemarketers Monday through Friday between the hours of 5:00 PM EST and 10:00 PM EST. On Saturday and Sunday telemarketers usually begin calling around 8:00 AM EST and call periodically throughout the day until about 9:00 PM EST...in the beginning we used to answer the calls and ask to be removed from that organization's list. The volume has gotten to the point where we're so overwhelmed that we don't even answer our phone if we don't recognize the number. We have also asked to be removed from lists, but it seems like once we're removed from one we're added to at least two others."²³

"I receive several telemarketing calls per day. Some are hang-ups on my answering machine, some are pre-recorded and some are individuals. I have become horribly frustrated inside my own home with telemarketers calling non stop. Within the last few months I would estimate that calls to my home have at least doubled. I always request to be removed from calling lists, I never give out my home number (I use my work's) and I have opted out of every list I can."²⁴

"Telemarketers call me repeatedly at work, home, and cell phone. The same people call back even though I tell them repeatedly to 'place on your do not call list.' That program is not working in Pennsylvania."²⁵

²² Comment of Joseph Heath in FCC docket 02-278, Oct. 28, 2002, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513298376.

²³ Comment of Jonathan Parziale in FCC docket 02-278, Oct. 28, 2002, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513298372.

²⁴ Comment of Kari Afschar in FCC docket 02-278, Oct. 22, 2002, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513297401.

²⁵ Comment of Jim Leake in FTC docket R411001, Jan. 24, 2002, <http://www.ftc.gov/bcp/rulemaking/tsr/dnc/comments/leakejim.htm>.

"I regularly receive telemarketing calls from the same source, have to ask repeatedly for a name and company representation, and I always open my comment with 'place me on your no-call list.' The callers do 'spook' however when I point out that they are the second or third call from their company and they had been explicitly told to 'place me on the no-call list.' They usually hang up – with no evidence that my wish has been compiled with. Others call back to initiate a 'social telephone contact' (not sales related)."²⁶

"Telling [telemarketers] to put you on their no call list does no good. Often I have had the same company call twice in one day. I also have had them call back and hang up on me."²⁷

"I have consistently told telemarketers that I wish to be placed on their 'do not call' list. One would think that that would result in a decrease in the calls I get but in fact they have multiplied by geometric proportions. Although I know that individuals must ID themselves and what they are selling they often do not and become argumentative and abrasive. The immediate personal solution is to hang up. This however does not affect a long term resolution. Even when a company agrees to put me on their 'do not call' list they frequently call again under a changed name but with the same pitch. Also, since companies hire different marketing operations the consumer is bombarded with calls."²⁸

"Every telemarketer that calls me gets my standard line TAKE ME OFF YOUR LIST. The calls NEVER STOP. I know people who change their answering machine messages or just turn them off. These are unsolicited calls."²⁹

²⁶ Comment of Salvo Arione or Debra Maggiora in FTC docket R411001, Jan. 24, 2002, <http://www.ftc.gov/bcp/rulemaking/tsr/dnc/comments/arionesalvo.htm>.

²⁷ Comment of Rich Mathews in FTC docket R411001, Jan. 25, 2002, <http://www.ftc.gov/bcp/rulemaking/tsr/dnc/comments/mathewsrich.htm>.

²⁸ Comment of Linda Moskowitz in FTC docket R411001, Jan. 24, 2002, <http://www.ftc.gov/bcp/rulemaking/tsr/dnc/comments/moskowitzlinda.htm>.

²⁹ Comment of Jim Paolucci in FTC docket R411001, Jan. 25, 2002, <http://www.ftc.gov/bcp/rulemaking/tsr/dnc/comments/paolucci.htm>.

"Simply telling each telemarketer who calls to remove your name has not been successful and puts the burden repetitively on the consumer."³⁰

"I actively request that my name be taken off calling lists whenever I receive a telemarketing call. Sometimes this works, but most often it does not. Usually, the telemarketer informs me that I need to call a number in another state (on my own dime, of course). When I call these numbers, more often than not they ask me for personal information besides my phone number.

"I'm told it is necessary in order to remove me. I have no idea what they do with this information."³¹

B. If Adopted, the Safe Harbor Should Require A One-Button Opt-Out Method

The FTC's proposed safe harbor would require a sender of prerecorded EBR telemarketing to provide a toll-free opt out number or give the call recipient an opportunity to press a button on the keypad to opt out. If the FTC chooses to create a loophole for prerecorded EBR telemarketing, the safe harbor should not require individuals to write down and manually dial a phone number to opt out. Instead, individuals should be able to press a single button to opt out without having to engage in a conversation with a telemarketer. A single button opt out will be easier for consumers, and it could create a record that could be verified by the FTC or other independent party.

Furthermore, we think the record of problems with company-specific opt out systems justifies regular auditing of telemarketers. For each complaint on the docket, there could be tens or even hundreds more affected by non-compliance with the law who lack the time or do not know how to navigate the FCC and FTC's complaint systems. We encourage the FTC to explore ways in which independent third parties could verify compliance with consumers' requests to opt out.

³⁰ Comment of Cheryl A. Parks in FTC docket R411001, Jan. 24, 2002, <http://www.ftc.gov/bcp/rulemaking/tsr/dnc/comments/parkscheryla.htm>.

³¹ Comment of Ann Petit in FTC docket R411001, Jan. 24, 2002, <http://www.ftc.gov/bcp/rulemaking/tsr/dnc/comments/petitann.htm>.

C. A Less Invasive Alternatives Exists

If individuals really want prerecorded telemarketing messages, they can expressly opt in to receive the pitches. The FTC should not be promoting opt-out approaches to this form of marketing, especially in light of the level of enrollment in the Do-Not-Call Registry. The appropriate, and less invasive standard to the consumer is opt in.

IV. The Commission Should Reject the Call Abandonment Rate Proposal

We see no justification for altering the call abandonment rate. Monthly averaging would give far too much latitude to conceal systemic errors or deliberately aggressive individual campaigns within a large center handling many campaigns.

V. Conclusion

We urge the commission to reject all three proposals considered in the NPRM. The prerecorded voice message loophole opens the door to millions of unwanted solicitations based on the most attenuated of business relationships. The loophole must be viewed in light of EBR exception, business identification practices, and calling technology, all of which will promote many more calls than consumers desire. The safe harbor will reverse one of the great benefits of the Do-Not-Call Registry, and again place the consumer in the position where she has to opt out of many different calls.

People who want to receive prerecorded telemarketing messages can always opt-in or affirmatively consent to that form of marketing.

The current rule for call abandonment should be kept in place. Monthly averaging would give far too much latitude to conceal systemic errors or deliberately aggressive individual campaigns within a large center handling many campaigns.

Respectfully submitted,

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