



Wiley Rein & Fielding LLP

1776 K STREET NW  
WASHINGTON, DC 20006  
PHONE 202.719.7000  
FAX 202.719.7049

Virginia Office  
7925 JONES BRANCH DRIVE  
SUITE 6200  
McLEAN, VA 22102  
PHONE 703.905.2800  
FAX 703.905.2820

www.wrf.com

November 14, 2003

William B. Baker  
202.719.7255  
wbaker@wrf.com

Mr. Allen W. Hile  
Assistant Director  
Marketing Practices Division  
Bureau of Consumer Protection  
U.S. Federal Trade Commission  
Room 230  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: *Telemarketing Sales Rule, Prerecorded Voice Messaging*

Dear Mr. Hile:

On behalf of Voice Mail Broadcasting Corporation, I respectfully write to provide further background on the issue we discussed recently, and to explore solutions to the uncertainty regarding the effect of the Telemarketing Sales Rule on voice mail messaging.

Voice Mail Broadcasting Corporation ("VMBC") is one of a small number of businesses in the United States that offer voice mail messaging services as a service for large enterprises. VMBC believes itself to be the largest provider of voice mail broadcast services, measured by the number of messages delivered. VMBC's clients include political campaigns, non-profit organizations, and commercial enterprises. VMBC's commercial enterprise clients are required to have an established business relationship or prior authorization to deliver telemarketing messages to consumers.

The purpose of this letter is to provide quantitative and qualitative information that will demonstrate that voice mail messaging within an established business relationship provides a self-limiting and valuable customer centric communication channel that is consistent with the purpose of the Telemarketing Sales Rule. We think that you will agree that the voice mail messages that are the subject of this letter are consumer-friendly and that the Commission would want to enable them to occur.

#### **Customer-Centric voice mail messaging**

For these purposes, the term "voice mail messaging" means the delivery of prerecorded customer-relationship messages to residential customers with whom the advertiser has an established business relationship. Before the uncertainty described

Mr. Allen W. Hile  
November 14, 2003  
Page 2

below arose, typical users of voice mail messaging services were entities such as banks, retailers, Fortune 500 companies, medical services providers, and others. Such users relied on voice mail messaging to deliver customer-relationship messages to their customers in a targeted, cost-effective manner. VMBC, for example, would deliver calls to residents with whom the sellers had what the FTC and FCC have defined as "established business relationships." A typical call would remind/notify the customers of an upcoming event, or that it is time to schedule an appointment, or convey a similar relationship message. For example, a healthcare or an auto service facility may call to remind a customer of the need to schedule an appointment. Other messages might remind holders of a retailer's credit card of an upcoming sales event for which cardholders receive special discounts, or notify bank customers of an impending overdraft and the availability of overdraft protection.

All of these prerecorded messages would provide the identity of the seller and provide the called party with an opportunity to speak to a representative either by immediately pressing a button on the keypad or by a provided toll-free number. At the toll-free number, either an automated system or a live representative can place the called party on the seller specific do-not-call list. Any persons on the seller specific do-not-call list would no longer be contacted.

A voice mail messaging call would not contain a sales transaction. An interactive prerecorded message would play if a live person answered. In the event of an answering machine, a message would be left with a toll-free number for the seller. Some sellers would prefer that calls be placed during times of day when consumers are unlikely to be home, so that the message could be left unobtrusively on an answering machine.

Since its inception in 1997, Voice Mail Broadcasting has delivered hundreds of millions of customer-centric voice mail messages of the type described herein, with very positive consumer response and no regulatory actions. These calls were delivered on behalf of clients seeking to enhance their customer relationships. These clients wanted to be identified by name in each message, knowing that the message is customer-centric. Often a celebrity would record the message and customers will express their pleasure at having been "called" by that celebrity. VMBC's clients carefully track consumer feedback and response to the calls. They advise us that, in general, VMBC's calls have resulted in an increase in customer

Mr. Allen W. Hile  
November 14, 2003  
Page 3

participation of 20-40% in the events/appointments that are the subject of the calls, while less than 2/100ths of 1% opt-out of receiving more calls.

As noted, VMBC's voice mail messaging calls allow a called party to opt-out of future calls. In fact, the opt-out rate is one of the most important factors that VMBC clients have used in determining whether customers value the messages. The results of a major retailer's customer appreciation event call were typical of a VMBC client's opt-out rate. Within that campaign, approximately 5.8 million messages were delivered during the week preceding the sales event to existing credit card customers of the retailer. Analysis of the event participation indicated that customers who got the voice mail message invitation participated in the event at a rate 29% higher than those who did not get the message. Over an extended period after the messages were delivered, 1,159 customers opted-out of receiving additional messages. This reflects 0.02 of 1% of the messages delivered. The 29% increase in event participation combined with the 0.02% opt-out rate evidences that customers value and appreciate these messages. VMBC can provide many additional examples similar to this one.

However, the conflict, described below, between the FTC's TSR and the FCC regulations implementing the Telephone Consumer Protection Act, has caused numerous entities to put their voice mail message customer reminder programs on hold or postpone their implementation altogether. This is having a dramatically negative effect on VMBC, its clients, and consumers. If VMBC's retail clients are unable to run numerous campaigns planned during the holiday season, those retailers can reasonably anticipate revenue shortfalls from delayed campaigns in excess of \$140 million. This revenue shortfall is largely attributable to lessened awareness of customer appreciation events, which in turn reduces customer participation. This, in turn, can contribute to employee layoffs or fewer holiday jobs.

For the financial services industry, hundreds of thousands of consumers will not receive notifications of opportunities to refinance at a lower rate or to prevent bank overdrafts through overdraft protection. Reminder appointments for tens of thousands of consumers for auto service and other professional services will have to be delayed. A great many of these parties, if forced to get express prior consent, can be expected to abandon these customer-centric campaigns due to the cost of obtaining the consent, which some have told VMBC would be greater than the value of two years worth of reminder messages.

Mr. Allen W. Hile  
November 14, 2003  
Page 4

### *Conflict Between TSR and FCC TCPA Regulations*

As noted by both the FTC and the Federal Communications Commission, the recent amendments to the TSR and the regulations promulgated by the FCC implementing the Telephone Consumer Protection Act conflict regarding the continued legality of the voice mail broadcasting practices just described.

Under the TCPA, prerecorded messages placed using an automated dialing machine/predictive dialer to residential consumers are prohibited unless exempted by the FCC. The FCC has recognized an exemption for such calls where placed to persons with whom there is an "established business relationship." 47 C.F.R. § 64.1200(a)(2)(iv). Accordingly, under FCC regulations, such calls would be exempted from the prohibition against prerecorded voice messages to residential customers.

The client's calls are also lawful under the FCC's call abandonment rules. The FCC's Report and Order (at ¶ 155) states that information in the prerecorded message (beyond name, telephone number, and that the call is for telemarketing purposes) would constitute an unlawful "unsolicited advertisement" if not exempt under 47 C.F.R. § 64.1200(a)(2); however, as just discussed that provision exempts calls where an established business relationship exists.

In contrast, where FTC jurisdiction exists, voice mail messaging (at least insofar as it contains a "solicitation") is prohibited by the Telemarketing Sales Rule. Page 175 of the FTC's Statement of Basis and Purpose amending the TSR, addressing the call abandonment "safe harbor," states:

Clearly, telemarketers cannot avoid liability by connecting calls to a recorded solicitation message rather than a sales representative. The Rule distinguishes between calls handled by a sales representative and those handled by an automated dialing-announcing device. The Rule specifies that telemarketers must connect calls to a sales representative rather than a recorded message.

(emphasis supplied; footnotes omitted).

Mr. Allen W. Hile  
November 14, 2003  
Page 5

Similarly, the FTC's online compliance guide states:

Under the Rule's definition, an outbound telephone call is "abandoned" if a person answers it and the telemarketer does not connect the call to a sales representative within two seconds of the person's completed greeting. The use of pre-recorded message telemarketing, where a sales pitch begins with or is made entirely by a pre-recorded message, violates the TSR because the telemarketer is not connecting the call to a sales representative within two seconds of the person's completed greeting.

<http://www.ftc.gov/bcp/online/pubs/buspubs/tsrcomp.htm#aband> (accessed Sept. 23, 2003). Accordingly, a conflict exists between the FCC's TCPA rules, which allow voice mail messaging where an established business relationship exists, and the TSR, which prohibits voice mail messaging as abandoned calls.

Both the FCC's Report on Regulatory Coordination (released on September 8, 2003 on designated authority), and the FTC's *Report to Congress Pursuant to the Do Not Call Implementation Act on Regulatory Coordination in Federal Telemarketing Laws* recognize this inconsistency. The FCC's Report states (at ¶ 24):

The FCC's rules expressly permit telemarketers to send prerecorded messages to customers with whom they have an established business relationship or who have given their express consent to receive such calls. The FTC's rules prohibit such messages as abandoned calls. Telemarketers who deliver such messages lawfully under the FCC rules could be in violation of the FTC's call abandonment rules.

Accordingly, providers of voice mail messaging face a situation in which their service is lawful under FCC regulations but could violate the FTC's TSR if provided on an interstate basis. This presents an unacceptable risk to both the providers of the service and the businesses that have used voice mail messaging in the past to reach their customers.

Mr. Allen W. Hile  
November 14, 2003  
Page 6

### *Proposed Solution*

The FTC's TSR expressly provides that its call abandonment "safe harbor" rule "does not affect a seller or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA." FTC Order, page 254, n.7. Consistent with this, it would be reasonable for the FTC's TSR not to forbid activity that is lawful under the TCPA, including the FCC's implementation of that law.

Indeed, the FTC's online compliance guide already does so in part, noting:

***What about situations where a consumer agrees to receive pre-recorded message telemarketing calls?*** FTC staff do not anticipate enforcing this provision against sellers and telemarketers who have the prior consent of a called consumer. For example, a dry cleaner in Kansas City, doing business in both Missouri and Kansas, gets permission from its customers to call them with pre-recorded messages about the schedule for pick-up and delivery. The dry cleaner does not risk a law enforcement action from the FTC for violating the call abandonment prohibition, because a pre-recorded message call, made with the prior permission of the called party, is not an abandoned call.

<http://www.ftc.gov/bcp/online/pubs/buspubs/tsrcomp.htm#aband> (accessed Sept. 23, 2003). While some businesses fortuitously may have "prior consent" to deliver prerecorded messages, the vast majority of businesses probably do not because, until now, they have had little reason to take the extra step, time and considerable expense of obtaining, tracking and monitoring such consent.

The concerns that the FTC sought to address in the call abandonment rules is not implicated by prerecorded relationship calls to established customers. First, there is no more "dead air" than is allowed by the TSR's safe harbor, which does authorize a very limited prerecorded message.

Second, the risk of abuse is small. As the FTC's Report to Congress acknowledges, calls to customers with whom an established business relationship exists should present less of a concern of abuse. Sellers have a strong incentive to protect the goodwill of customers by sending only prerecorded relationship messages that are relevant and desired. If the messages did not benefit the customer and create a positive consumer response justifying the reminder campaigns expense, then the seller would cease the program.

Mr. Allen W. Hile  
November 14, 2003  
Page 7

For these reasons, Voice Mail Broadcasting Corporation respectfully requests further guidance to the industry regarding the risk of enforcement by the FTC of the TSR against voice mail messaging calls to residents with whom an established business relationship exists, as described herein. We recognize that it is not possible for the FTC to make substantive changes to its rules outside a formal rulemaking proceeding and we do not asking for such at this time. However, any formal or informal public statement by the FTC would be very useful in clarifying the situation for the industry and others.

We support the already stated intention of the FTC and FCC to use their significant enforcement discretion to avoid substantive differences in the application of the TSR and TCPA. A letter to us outlining the FTC's enforcement priorities would be very helpful. As noted above, the FTC has already signaled its enforcement stance in comparable areas through its developing guidance on its website and other means, and this might be an appropriate subject for similar action.

Thank your very much for your attention to this matter. As always, please do not hesitate to contact us if you have any questions.

Best regards.

Very truly yours,



William B. Baker  
Attorney for Voice Mail  
Broadcasting Corporation