

**RESPONSE TO REQUEST FOR PUBLIC COMMENTS, FEDERAL TRADE COMMISSION (FTC
or "the Commission") PROPOSED TELEMARKETING SALES RULE CHANGES PROJECT
NUMBER R411001**

Introduction

1. I would like to thank the Commission for the opportunity to comment on the proposed changes to the Telemarketing Sales Rule (TSR). I am a typical consumer who receives telemarketing calls and abandoned calls that are more than likely telemarketing calls. I say "more than likely" because the vast majority of telemarketers refuse to follow the rules set forth by the FTC and those promulgated by the Federal Communications Commission (FCC) under the Telephone Consumer Protection Act of 1991 (TCPA) as amended, and thus are impossible to identify.

2. With very few exceptions, telemarketers do not identify themselves either in the opening script they use, or by transmitting unblocked and unaltered Caller ID (CID) information. Further, the use of prerecorded advertisements and Answering Machine Detection (AMD), one of the areas the Commission seeks to address, has shown a dramatic rise over the past few years that has resulted in an explosion of calls that are "abandoned" and untraceable.

3. My comments are based on my personal experience, and the anecdotal experience of others. In addition, my years of dealing with telemarketers violating the TCPA allow me to comment on what behavior I believe telemarketers will exhibit should the proposed regulation go into effect. My comments are arranged beginning with what I consider to be the most important item.

Prerecorded Advertisements and Answering Machines

LEAVING ADVERTISEMENTS ON ANSWERING MACHINES IS AS ABUSIVE AS DELIVERING THE MESSAGE TO A LIVE PERSON.

4. The Commission's proposed rule uses the phrase, "...when answered by a person..." thus allowing telemarketers to invade our privacy by leaving messages on our answering machines. Having to listen to these messages when we get home is not only annoying, it's maddening. Further, should the Commission adopt this position, nothing would prevent telemarketers from shifting to using **only** calls to answering machines in their campaigns, a strategy that would further increase the number of abandoned calls.¹

5. Many people use the answering machine to screen incoming calls. The answering machine in effect, serves as a substitute for Caller ID service. Should the Commission allow this practice it will undermine the already small effect that the FTC and FCC rules now have. It is my belief that the use of Answering Machine Detection (AMD) will increase. AMD allows a telemarketer to determine whether a call is answered by a live party or an answering machine. If the telemarketer is trying to leave a message on an answering machine, it will abandon the call if a live person answers. If the telemarketer is trying to speak with a live person, the device will disconnect when it detects an answering machine at the distant end. In either event, this constitutes the abusive practice that the Commission has been directed to address.

¹ Machines that use Answering Machine Detection are programmed to disconnect if an answering machine is not detected when the call is answered.

THE COMMISSION SHOULD ADOPT THE FCC'S POSITION ON PRERECORDED
ADVERTISEMENTS LEFT ON ANSWERING MACHINES

9. The FCC has determined that prerecorded calls left on answering machines violate the TCPA². Although The Do-Not-Call Implementation Act³ requires that the FCC, "...maximize consistency with the rule promulgated by the Federal Trade Commission (16 CFR 310.4(b)).", in this case the FTC should modify its proposal to maintain consistency with the FCC. The Commission should make absolutely clear that this is a forbidden practice. Because they FCC hasn't made this point absolutely clear within their rules, telemarketers frequently use a "we're not liable because we left the message on an answering machine" defense.⁴

THE COMMISSION SHOULD EXEMPT PRECORDED MESSAGES THAT ARE **EXPRESSLY**
AGREED TO BY THE CONTACTED PARTY, BUT SHOULD NOT REQUIRE WRITTEN
PERMISSION

10. Consistent with the Telephone Consumer Protection Act (TCPA) and the FCC's interpretation, the Commission should not require written permission to make prerecorded advertising calls. However, telemarketers and sellers must be required to maintain documentation

² See FCC Report and Order 03-153, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Note 544: "We reiterate that under the TCPA, it is unlawful to initiate any telephone call to any residential line using a prerecorded message without the prior express of the called party, absent an emergency or an exemption by Commission rule or order. Delivery of a message to an answering machine does not render the call lawful. See 47 U.S.C. § 227(b)(1)(B)."

³ PL 108-110, The Do Not Call Implementation Act, §3

⁴ The FCC clarified this point by using a footnote (544) in Report and Order 03-153. The note states, "Delivery of a message to an answering machine does not render the call lawful."

that proves **with clear and convincing evidence** that consent was given prior to the call being placed. Such permission **must** include the name of the party giving permission, the telephone number that the advertiser may call, proof that the recipient was informed that prerecorded messages would be used, and the date that permission was given. The Commission should make clear that if **all** of the required elements are not met, there is no express permission.

11. The Commission should also require that the **advertiser** must document prior express permission to transmit prerecorded advertisements. It should be stressed that the telemarketer **may** also maintain this documentation, but it is the advertiser that **must** do so.

12. The new regulation should be amended to read: "(v) Initiating any outbound telemarketing call that delivers **or is intended to deliver** a prerecorded message unless the seller has the express permission of the contacted party. **Such permission must be documented by the advertised entity, and must include the name of the person giving permission, the telephone number which the caller may use to disseminate a prerecorded advertising message to that party, and the date permission was given. The documentation must also prove that the entity giving permission was informed that prerecorded advertisements would be used. Failure to provide any of these elements for any reason negates any claim of express permission.**"

"Safe Harbor" Provisions for Abandoned Calls

THE COMMISSION SHOULD USE CARE IN IMPLEMENTING ANY MODIFIED TIME CONSTRAINTS FOR DETERMINING ABANDON RATES

13. The telemarketing industry is known for bending, and for flat out ignoring, telemarketing rules. For example, the attached log from my

fax machine shows a number of calls to my residential telephone line.⁵ As the Commission will note, the majority of the "hangup" calls listed provided no Caller ID information as required by FCC rules⁶. Those that at least provided a telephone number, do not give any identification information when answering a call to that number. The Commission should also note that two calls from Equity One, Inc. (a mortgage broker) were abandoned calls.⁷

THE INDUSTRY WILL NOT HESITATE TO BEND THE DATA TO FIT ANY
RELAXED GUIDELINE

14. The industry has proven time and again that they will not hesitate to bend or ignore the rules. One only has to look as far as The Do-Not-Call-Act to prove the point. In spite of the fact that the TSR and TCPA had been in force for more than a decade, Congress found it necessary to enact specific instructions directing the establishment of the national do-not-call database due to widespread disregard of existing laws and regulations. The TCPA itself was necessitated by telemarketers evading state legislation by calling from outside of the target state.

15. The Commission should take great care in crafting any change to the abandonment rule. Telemarketers will find any loophole inadvertently created and take full advantage of it. The industry's assurance that "no evidence that telemarketers will abuse a 30-day

⁵ Some numbers have been redacted for privacy concerns. It is also acknowledge that one or two of these calls may be legitimate "wrong number" calls.

⁶ 47 CFR 64.1601(e). In the instances where the data is missing, the evidence suggests that the information was not provided by the original calling party. CID information does transit area code boundaries as evidenced by the Equity One calls. My machine logs calls from outside my area code that do not include CID number information as "Out of Area".

⁷ I received several other abandoned calls from this same entity subsequent to October 12, 2006. The chances that these calls do **not** constitute a violation of the abandonment rule are miniscule.

standard"⁸ is a nice sound bite, but may be lacking in candor. To my knowledge, no one has ever studied the problem, so there is also no evidence to suggest the industry will **not** abuse a 30-day standard.

16. Should the Commission choose to implement the proposed standard spot checks of the compiled data should be conducted after the first year and regularly thereafter. It is suggested that that the Commission include many of the lesser known telemarketing firms its enforcement efforts.

Summary

17. The telemarketing industry has long been noted as a thorn in the side of the American public. They refuse to act as good neighbors, even when told that by law they must do so. Any relaxation of the requirements of the TSR should be implemented with due care to avoid misinterpretation whether intentional or inadvertent.

The FTC should make calls to answering machines subject to the same regulations as those placed to a live person. No written permission need be required, but the advertiser must maintain clear and convincing evidence that permission was given.

In implementing any change to the abandoned call rule, the Commission must take care to insure that no loopholes are left open for telemarketing concerns to exploit. Sufficient historical evidence exists to demonstrate that a significant number of telemarketers choose to stretch the law as far as they can, some to the point where they are blatantly in violation.

⁸ Request for Public Comments page 47, note 131 citing Infocision, the DMA and the U.S. Chamber of Commerce.