

December 7, 2006

Paul D. Rubin
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Federal Trade Commission
Office of the Secretary, Room H-159 (Annex K)
600 Pennsylvania Ave, NW
Washington, DC 20580

Re: **Consumer Survey Data and Analysis in Response to the TSR Prerecorded Call Prohibition and Call Abandonment Standard Modification, Project No. R411001**

Dear Sir or Madam:

On behalf of our client, Silverlink Communications Inc. (“Silverlink”), we respectfully submit these comments - including the attached consumer survey data and expert analysis - to the Federal Trade Commission (“FTC”) in response to the proposed revisions to the Telemarketing Sales Rule (“TSR”) published in the *Federal Register* of October 4, 2006 (“Proposed Rule”),¹ and as a supplement to Silverlink’s November 30, 2006 petition requesting the FTC to maintain its current enforcement policy permitting the use of prerecorded messages for the narrow subset of health-related calls made by entities regulated under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). The attached consumer data (and expert analysis of the data), which were unavailable at the time Silverlink’s petition was submitted to the FTC, reveal that consumers are not widely opposed to receiving all automated prerecorded messages.

More specifically, these data are extremely powerful in that they show significant consumer support for health-related automated telemarketing calls - in complete contrast to the widespread consumer opposition to typical prerecorded telemarketing calls documented in the administrative record. In fact, the level of consumer support for automated health-related calls is similar to the level of consumer support for the established business relationship exemption the FTC already granted for telemarketing calls that use sales representatives.

In light of these new data, which are discussed in greater detail below, we respectfully request that the FTC maintain the *status quo* and continue to forbear from bringing any enforcement actions

¹ 71 Fed. Reg. 58716 (October 4, 2006).

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against the narrow-class of health-related calls delivered by entities subject to regulation under HIPAA. We further request that the FTC announce the extension of this forbearance policy well in advance of the anticipated January 2, 2007 enforcement date.

Please note that Silverlink will submit additional and more comprehensive comments to the FTC on the Proposed Rule prior to the close of the comment period on December 18, 2006. We are submitting the attached consumer data on health-related prerecorded messages separately, and in advance of the December 18, 2006 comment deadline, in order to provide the FTC with additional time to review the data prior to the expiration date of its enforcement forbearance policy.

I. Background

Silverlink is a leading provider of automated voice solutions for the healthcare industry. Its services enable health enterprises, including health plans, pharmacy benefit managers (“PBMs”), specialty pharmacies, and disease management companies to deliver personalized, interactive, and HIPAA-compliant phone messages to millions of healthcare consumers – including elderly and chronically ill consumers who rely upon such messages for their health care needs.

Silverlink’s prerecorded, privacy-protected messages delivered to individual healthcare consumers have been highly successful in driving positive health outcomes and generally lowering health care costs. The types of calls made by Silverlink and other parties as well as calls placed by PBMs, health plans, and other HIPAA-regulated entities, include but are not limited to: health screening reminders including mammogram reminders and colonoscopy reminders, prescription drug refill reminders, brand to generic drug conversions, flu shot reminders, child immunization reminders, benefit plan selection reminders, and disease management plan reminders.

These prerecorded messages are valued by consumers, are expressly permitted under HIPAA, and have been expressly permitted by the FTC pursuant to the enforcement policy announced by the FTC in its November 17, 2004 *Federal Register* notice.² The FTC announced in its October 4, 2006 Proposed Rule, however, that the FTC will abandon its current enforcement policy and begin enforcing against such calls beginning January 2, 2007.³

The rationale applied by the FTC in determining that prerecorded telemarketing calls should be prohibited does not apply to health-related calls made by HIPAA-regulated entities. In the

² 69 Fed. Reg. 67287 (November 17, 2004).

³ 71 Fed. Reg. at 58716.

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preamble to the proposed rule, the FTC concluded that it should prohibit prerecorded telemarketing calls largely because it determined that the administrative record showed widespread consumer opposition to prerecorded calls even when the calls are made to established customers.⁴

New consumer survey data, however, show that consumers view health-related automated telemarketing calls differently from other telemarketing calls, and that a significant number of consumers appreciate receiving such calls.

II. Consumer Survey Data Reveal That Consumers Are Far More Tolerant of Health-Related Automated Telemarketing Calls Than Other Kinds of Automated Calls

Silverlink and other vendors' experience in health-related calls has shown that recipients appreciate receiving health-related prerecorded calls and want to continue receiving them. This real-world experience is supported by consumer survey data. In December, 2006, Silverlink retained the Zoomerang Online Survey Service (that has conducted millions of online consumer surveys for thousands of organizations) to conduct a consumer survey on automated telemarketing calls. The survey was conducted on 470 consumers who were unaffiliated with Silverlink and may never have received an automated health-related call. In fact, no exclusions were placed on the population and the resulting sample represented a wide diversity of subgroups.

In order to ensure the validity of the study, Silverlink retained Dr. James McQuivey, Assistant Professor of Survey Research at Boston University, to help design the survey and analyze the survey results. According to Dr. McQuivey, the Zoomerang survey revealed that:

- Consumer reaction to health-related automated telemarketing calls is not nearly as negative as initially assumed;
- Consumers are far more tolerant of health-related automated telemarketing calls than they are of other kinds of automated calls; and
- Consumers perceive as much or more value from health-related automated telemarketing calls as they do from health-related automated informational calls.⁵

⁴ 71 Fed. Reg. at 58723.

⁵ A copy of the survey results is provided as Attachment A, and a December 5, 2006 letter from Dr. James McQuivey analyzing the survey results is provided as Attachment B.

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Dr. McQuivey also emphasized that the survey “results may have more positively shown consumer preference for health-related automated calls had the survey population been more targeted.”⁶

Despite the fact that the survey population was extremely broad, consumer responses to the survey questions revealed that consumers are not opposed to receiving health-related automated telemarketing calls. For example, question seven of the survey asks “If your healthcare company (your health plan or your pharmacy) wanted to contact you with a reminder to refill your prescription, a reminder to schedule a routine screen or test recommended by your doctor, or a reminder to get an immunization for you or your child, how would you feel if the health plan delivered the information with an automated call?” In response, 45 percent of the surveyed population indicated that they “would like” or “would not mind” having their healthcare company contact them in this way.⁷ Only 12 percent of the surveyed population indicated that they “would be upset” if their healthcare company contacted them in this way.⁸ This consumer reaction to health-related automated telemarketing calls is in sharp contrast to the comments previously received by the FTC in which less than one percent of consumer comments expressed support for prerecorded messages.

In the preamble to the Proposed Rule, the FTC noted that:

“[t]he widespread opposition expressed in this record to the infringement on personal privacy through prerecorded telemarketing calls to home telephones stands in sharp contrast to the consumer support in the record of the TSR amendment proceeding for including an established business relationship exemption for telemarketing using sales representatives. In that proceeding, the Commission provided such an exemption from the Do Not Call provisions after 40 percent of the consumers who commented supported the exemption. Here, only 15 consumer comments--a scant tenth of one percent of the more than 13,000 consumer comments that addressed the proposed amendment--expressed unambiguous support for the proposed safe harbor for prerecorded message telemarketing to established customers.”⁹

⁶ See Attachment B, at 3.

⁷ See Attachment A, Question 7.

⁸ *Id.*

⁹ 71 Fed. Reg. at 58720-58721 (emphasis added).

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Instead of “widespread opposition,” the Zoomerang survey reveals that consumers support certain automated health-related messages at a rate (45 percent) similar to the rate at which consumers supported an established business relationship exemption for telemarketing using sales representatives (40 percent). These data would support an FTC decision to exempt health-related automated telemarketing calls from the general prohibition on prerecorded telemarketing messages.¹⁰

In addition, data reveal that consumers are more tolerant of health-related telemarketing calls than other types of automated calls to a “statistically significant” degree.¹¹ For example, although 91 percent of the surveyed consumers indicated that they would be unwilling to listen to an automated call from their financial services company offering a new credit card at a discounted rate,¹² and 87 percent indicated that they would be unwilling to listen to an automated call from their travel agent offering a discounted vacation package,¹³ only 41 percent were unwilling to listen to health-related automated calls.¹⁴

Moreover, data indicate that consumers perceive as much value or more value from health-related automated telemarketing calls as they do from health-related automated informational calls, which are exempt from the TSR. For example, at least a third of the respondents indicated that they would find different types of health-related automated telemarketing calls to be somewhat or very helpful,¹⁵ while 23 percent indicated that they would find an automated

¹⁰ Since we are only requesting a continuation of the enforcement forbearance policy, we do not believe any First Amendment issues would preclude the FTC from taking this action.

¹¹ See Attachment B, at 2.

¹² See Attachment A, Question 9 (total number of consumers who checked categories 1 (“I am unwilling to listen to these kinds of calls”) and 2 when asked for their opinion on “An offer from your financial services company of a new credit card at a discounted rate”).

¹³ See Attachment A, Question 9 (total number of consumers who checked categories 1 (“I am unwilling to listen to these kinds of calls”) and 2 when asked for their opinion on “An offer from your travel agent of a discounted vacation package”).

¹⁴ See Attachment A, Question 9 (total number of consumers who checked categories 1 (“I am unwilling to listen to these kinds of calls”) and 2 when asked for their opinion on “A health-related call from your health care company”).

¹⁵ See Attachment A, Question 6 (total number of consumers who checked categories 4 and 5 (“I would find this call very helpful”) with respect to a call reminding them to refill a prescription, a call reminding them to get a routine screening or test recommended by their doctor, and a call reminding them to get an immunization for their child).

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reminder of a past due payment from their healthcare company to be somewhat helpful or very helpful,¹⁶ and 29 percent indicated they would find an automated call with information about a disease or condition they or someone in their family has to be somewhat or very helpful.¹⁷

These survey results are particularly persuasive since the consumers surveyed may have had no experience in receiving the types of calls delivered by Silverlink and other HIPAA-regulated entities. If the survey had included only respondents who received or are likely to receive Silverlink calls (for example, those who chronically take medications), the results may have shown even greater support for health-related automated calls. As noted above, Dr. McQuivey recognized that "the results may have more positively shown consumer preference for health-related automated calls had the survey population been more targeted."¹⁸

III. Conclusion

In light of the consumer data, we request that the FTC maintain the *status quo* and continue to forbear from bringing any enforcement actions against the narrow-class of health-related calls delivered by entities subject to regulation under HIPAA. We further request that the FTC announce the extension of this forbearance policy well in advance of the anticipated January 2, 2007 enforcement date. As previously noted, Silverlink will be submitting more extensive comments on the Proposed Rule prior to the close of the comment period.

Sincerely,

Paul D. Rubin

¹⁶ See Attachment A, Question 6 (total number of consumers who checked categories 4 and 5 ("I would find this call very helpful") with respect to a call reminding them of a past due payment).

¹⁷ See Attachment A, Question 6 (total number of consumers who checked categories 4 and 5 ("I would find this call very helpful") with respect to a call with information about a condition or disease).

¹⁸ See Attachment B, at 3.

ATTACHMENT A

Silverlink Consumer Survey - health focus Results Overview



Date: 12/5/2006 8:52 AM PST
Responses: Completes
Filter: No filter applied

We'd like to ask you a few questions about how your healthcare companies communicate with you. Thank you for taking time to answer these questions. Your input is very important.

1. Do you currently have health insurance coverage? (including insurance through an employer, Medicare, Medicaid, or privately purchased insurance?)

Yes		456	96%
No		17	4%
I don't know		0	0%
Total		473	100%

2. Do you currently have children living at home?

Yes		145	31%
No		328	69%
Total		473	100%

3. In the past year, how many medications has your doctor prescribed for you?

0		88	19%
1-2		163	34%
3-5		144	30%
6-10		52	11%
More than 10		24	5%
I don't know		2	0%
Total		473	100%

4. Of the medications you were prescribed, how many were medications that needed to be refilled at least once?

0		36	9%
1-2		157	41%
3-5		132	34%
6-10		40	10%
More than 10		19	5%
I don't know		1	0%
Total		385	100%

5. In the past year, how many times have you been to visit a doctor?






0		50	11%
1		67	14%
2		104	22%
3-5		151	32%
More than 5		98	21%
I don't know		2	0%

Total		472	100%
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6. How would you feel if your health care company sent you an automated phone call of the following types. By automated, we mean a call made to your home in which you interact with a recorded voice rather than a live caller.

Top number is the count of respondents selecting the option. Bottom % is percent of total respondents selecting the option.	I would not find this call at all helpful	2	3	4	I would find this call very helpful
A call reminding you to refill a prescription.	161 34%	52 11%	90 19%	75 16%	95 20%
A call reminding you to get a routine screening or test recommended by your doctor.	117 25%	53 11%	104 22%	91 19%	108 23%
A call reminding you to get an immunization for you or your child.	200 42%	44 9%	84 18%	58 12%	87 18%
A call reminding you of a past due payment.	217 46%	51 11%	100 21%	50 11%	55 12%
A call with information about a condition or disease you or someone in your family has.	175 37%	62 13%	98 21%	63 13%	75 16%

7. If your healthcare company (your health plan or your pharmacy) wanted to contact you with a reminder to refill a prescription, a reminder to schedule a routine screen or test recommended by your doctor, or a reminder to get an immunization for you or your child, how would you feel if the health plan delivered the information with an automated call?

I would like to have my health care company contact me in this way.		52	11%
I would not mind my healthcare company contacting me in this way.		160	34%
I don't have an opinion about being contacted by my health care company in this way.		69	15%
I would prefer not to be contacted in this way by my health care company.		135	29%
I would be upset if my healthcare company contacted me in this way.		55	12%
Total		471	100%



8. Have you received an automated phone call in the past 12 months?







Yes		367	78%
No		92	19%
I don't know		14	3%
Total		473	100%





9. Please provide your opinion of the following types of automated calls:

Top number is the count of respondents selecting the option.				

the option. Bottom % is percent of total respondents selecting the option.	I am unwilling to listen to these kinds of calls.	2	3	4	I am willing to listen to these kinds of calls.
An offer from your financial services company of a new credit card at a discounted rate.	412 87%	21 4%	23 5%	7 1%	10 2%
An offer from your travel agent of a discounted vacation package.	360 76%	50 11%	39 8%	11 2%	13 3%
A call from a political party or political candidate encouraging you to vote in a certain way.	382 81%	26 5%	33 7%	19 4%	13 3%
A call from an airline updating you on the status of a flight you're taking.	122 26%	14 3%	48 10%	74 16%	215 45%
A health related call from your health care company.	132 28%	61 13%	122 26%	94 20%	64 14%

10. What is your gender?			
Female		206	44%
Male		267	56%
Total		473	100%

11. What is your age?			
18 - 24		1	0%
25 - 34		69	15%
35 - 44		96	20%
45 - 54		121	26%
55 - 64		118	25%
65 - 74		55	12%
75+		13	3%
Total		473	100%

12. What time zone is your primary residence in?			
Pacific		75	16%
Mountain		25	5%
Central		140	30%
Eastern		229	48%
Alaska		1	0%
Hawaii		2	0%
Other, please specify		1	0%
Total		473	100%

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ATTACHMENT B

James McQuivey
Assistant Professor
College of Communication
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Boston, MA 02215
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December 5th, 2006

To Whom It May Concern,

Silverlink Communications recently engaged me in a consultative role to assist in designing, deploying and analyzing a survey they authorized regarding consumer opinions of automated phone calls. By way of background, I am currently a professor at Boston University's College of Communication where I teach survey research. I came to this position from a post as vice president at an independent technology market research firm Forrester Research in Cambridge, Mass. where I directed a multimillion dollar survey research business. I have also previously been subpoenaed to provide a deposition before a court in the state of Texas regarding consumer protection issues where consumer survey research was evaluated as a form of evidence.

Silverlink asked me to review its survey process and design for validity. I provided significant counsel regarding changes to the questionnaire prior to fielding the study and then advised the company through the analysis process. Based on my direct experience, I believe the Silverlink team conducted this study in an honest and professional manner. Silverlink deployed the survey using Zoomerang, a company with whom I have no professional affiliation but have used with success for my own research efforts in the past. Zoomerang conducts surveys via the internet and has deployed over 100 million consumer surveys for thousands of organizations including 70 of the Fortune 100. I have specifically used it to provide insight to clients in the public television system, for example. The sample used for Silverlink's study was drawn at random from Zoomerang's more than two million members who voluntarily participate in online surveys in order to accrue rewards points. This approach has historically been shown to generate valid survey results. No exclusions were placed on the population and the resulting sample represents a wide diversity of subgroups. The survey's sample size of 470 represents a statistically significant population. The theoretical margin of error on a sample this size is just above 4%.

Three important conclusions can be drawn from this study:

- 1. Consumer reaction to health related automated telemarketing calls is not nearly as negative as initial assumptions suggested.**
- 2. Consumers are far more tolerant of health related automated "telemarketing" calls than they are of other kinds of automated calls.**

3. **Consumers perceive as much or more value from health related automated “telemarketing calls” as they do from health related automated “informational” calls.**

Analysis leading to these conclusions is as follows:

In response to the question: “If your healthcare company wanted to contact you with a reminder to refill a prescription, a reminder to schedule a routine screen or test recommended by your doctor, or a reminder to get an immunization for you or your child¹, how would you feel if the health plan delivered the information with an automated call?”, 45% of the survey population indicated that they would like or wouldn’t mind this kind of contact while only 12% indicated that this kind of contact would upset them. The remaining 43% had no opinion (15%) or indicated they would prefer not to be contacted in that way (29%).

This represents a stark contrast to comments received by the FTC in response to a Notice of Proposed Rulemaking (“NPRM”) published in the Federal Register on November 17, 2004. In those comments “Well over 13,000 of the 13,550 consumer comments in the record clearly opposed allowing prerecorded telemarketing messages, with no more than 77 of the comments indicating arguable support for the proposed amendment.” In other words, 96% of those consumers had a clearly negative response to automated telemarketing calls with only .57% showing support for these calls. This indicates that **consumer reaction to health related automated telemarketing calls is not nearly as negative as initial assumptions suggested**. It also justifies conducting this independent research since it is well understood that self-motivated consumer comments are always biased in the direction of extreme sentiment, compared to properly surveyed responses such as those obtained in this research effort.

Further evidence to support the objectivity of this research is that there was sufficient opposition towards other types of automated telemarketing calls – this wasn’t simply a biased group of people inclined to provide positive responses. For example, 91% of the respondents indicated that they would not be willing to listen to an automated call from their financial services company offering a new credit card at a discounted rate. Nearly the same number, 87%, indicated that they would not be willing to listen to an automated call from their travel agent offering a discounted vacation package or to listen to an automated call from a political party or political candidate encouraging them to vote in a certain way. This is a statistically significant difference compared to the much smaller 41% who were unwilling to listen to healthcare related automated calls and a strong indication that **consumers are, in fact, far more tolerant of health related automated “telemarketing” calls than they are of other kinds of automated calls**.

Also, at least a third of respondents indicated that they would find different types of health related automated “telemarketing calls” somewhat or very helpful (36% for refill reminders, 42% for screening reminders, and 30% for immunization reminders). In contrast, 22% indicated they

¹ Each of these call types encourages the recipient to purchase a good or service and could therefore be considered telemarketing meaning they would no longer be allowed after January 2nd according to the FTC’s proposed rule.

would find an automated reminder of a past due payment from their healthcare company to be somewhat or very helpful and 29% indicated they would find an automated call with information about a condition or disease they or someone in their family has to be somewhat or very helpful. **This indicates consumers perceive as much value or more value from health related automated “telemarketing calls” (which would be prohibited as a result of the FTC’s current rule) as they do from health related automated “information calls” (which will continue to be allowed).**

Interestingly, the number of people who would be willing or would like to receive automated calls from their healthcare company is surprisingly high compared to other new communication technologies (see Table 1 below).

Table 1: Percent adoption or use of new communication technology services and products²

<u>Product or service</u>	<u>Percent</u>
<i>Would not mind receiving or would like to receive automated health-related phone calls</i>	45%
Have a broadband internet connection	41%
Have a laptop computer	32%
Own an MP3 player (e.g. iPod)	23%
Visit local newspaper websites	17%
Read blogs online	12%

Many of us assume that these outlets for receiving information (broadband, ipods, news websites, blogs) are widely adopted yet compared to willingness to receive automated health-rated phone calls, they actually trail.

Beyond this analysis, I have identified several methodological factors about the survey population and question design that are worth noting:

1. **Results may have more positively shown consumer preference for health related automated calls had the survey population been more targeted.** In an effort to secure a random sample, no filters (i.e. exclusion and inclusion criteria) were imposed. Clearly if Silverlink had chosen to only include respondents who would be likely to receive a Silverlink call (those who chronically take medication, have children, or have an otherwise heightened focus on healthcare for example), the results would have shown an even greater willingness to listen to health related automated phone calls and a greater recognition of the helpful nature of those calls. While it was correct to gather all of these opinions to have as clear a picture of consumer sentiment as possible, it is also likely that many respondents to this survey have little or no need for healthcare phone calls, so their response to the questions about whether such calls would be helpful or not

² Source: Forrester Research 2006 Consumer Technographics North American Benchmark Study, n=66,707

do not necessarily reflect animosity towards them but a recognition that their lives do not require such advice.

2. **Though generally appropriate elsewhere, random digit dial telephone surveying would not have yielded more valid results.** Though it is the gold standard of survey research and generally what I recommend, a random digit dial (RDD) telephone survey would not have yielded more reliable results in this particular case because the people most likely to pick up the phone in response to a phone based survey are also more likely to approve of other phone calls.
3. **The survey response base is biased towards easterners.** Because the survey was fielded early in the day, it attracted more people in the eastern and central regions of the country and underrepresented people in the mountain and pacific regions. While this is a fact, it does not undermine the value of the results. From my experience in surveying national and international audiences, Easterners are the most likely to bring a critical eye to any survey questionnaire, regardless of topic. It probably didn't have a pronounced effect outside the margin of error, but if it did, it would mean that the current results are probably conservative estimates of automated health-related phone call approval.

I would be happy to discuss these conclusions further if the commission would find this helpful.

Sincerely,

James McQuivey