Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

COMMENTS

OF THE

AMERICAN TELESERVICES ASSOCIATION

TSR Prerecorded Call Prohibition
and Call Abandonment Standard Modification,

Project No. R411001

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I. Introduction.

The American Teleservices Association ("ATA") submits these comments in response to the Commission's Notice of Proposed Rulemaking[1] ("NPRM") to amend the Telemarketing Sales Rule ("TSR") by revising the standard used to measure the maximum abandonment rate for qualification for the TSR's safe harbor defense.[2] The proposed standard permits sellers and telemarketers to abandon up to three percent of all calls per calling campaign, measured over a thirty (30) day period.

While ATA encourages the Commission to amend its rules to permit sellers and telemarketers to measure the maximum abandonment rate for qualification for the safe harbor defense over a thirty (30) day period, ATA strongly suggests that the measurement be taken across all calling campaigns, rather than on a *per calling campaign* basis.

ATA is the only national trade association dedicated *exclusively* to the teleservices industry. ATA's membership produces over $500 billion in annual sales and represents all facets of the industry. The membership is comprised of Fortune 500 companies and small and minority-owned businesses that operate call centers or contract for their services, as well as entities that provide compliance, training and equipment solutions.

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

[2] The Commission also seeks comment on whether it should add a flat-out prohibition on the use of prerecorded messages to the Telemarketing Sales Rule, despite the fact that the call abandonment provisions effectively bar the practice. ATA acknowledges that certain businesses deem their use to be an effective mode of communication with individuals with whom they have an established business relationship. In an effort to promote regulatory harmony and certain, ATA encourages the Commission to makes its regulations consistent with those implemented by the Federal Communications Commission (47 C.F.R. §64.1200), thereby authorizing the use of prerecorded messages in limited circumstances.

II. Background

When the Commission published its amended Telemarketing Sales Rule in December 2002, it created a flat-out prohibition on "abandoned calls."[3] The Commission defined an "abandoned call" as a call that is not connected to a live sales representative within two (2) seconds of the called party's completed greeting.[4] The Commission did, however, create a four-pronged safe harbor defense which eliminates a telemarketer's liability provided that all prongs are satisfied.[5] The prong at issue provides that a seller or telemarketer will not be liable for abandoning telemarketing calls if they employ technology that ensures abandonment of no more than three percent (3%) of all calls answered by a person measured *per day, per calling campaign*.[6]

In July 2003, the Federal Communications Commission amended its rules implementing the Telephone Consumer Protection Act of 1991.[7] In doing so, the FCC prohibited the abandonment of more than three percent (3%) of all telemarketing calls that are answered by a live person.[8] However, the FCC's measuring standard differs from that of the Commission in that the FCC measures the three percent (3%) rate over a thirty day period across all calling campaigns.[9]

Over the past two (2) years, sellers and telemarketers have struggled to adhere to these two conflicting regulatory standards. Certainly, those sellers and telemarketers who are subject to the jurisdiction of both commissions must comply with the Commission's more restrictive

[3] 16 C.F.R. §310.4(b)(1)(iv).
[4] *Id.*
[5] *See*: 16 C.F.R. §310.4(b)(4)(i)-(iv).
[6] *See:* 16 C.F.R. §310.4(b)(4)(i).
[7] 68 Fed. Reg. 44144 (July 25, 2003).
[8] 47 C.F.R. §64.1200(a)(6).
[9] *Id.*

measuring standard. Given the dual standards and the confusion that the conflicting standards have generated, the NPRM seeks comment on whether it should amend the TSR's formula to permit sellers and telemarketers to abandon up to three percent of all calls answered by a person measured over the duration of a single calling campaign, if less than thirty days, or separately over each successive thirty day period or portion thereof that the campaign continues.[10]

Specifically, the Commission requested comments addressing the following issues: 1) Any elaboration on the problems telemarketers who are running multiple campaigns at the same time face in attempting to comply with the current requirement; 2) any information demonstrating that telemarketers who make a relatively small number of calls per day may be differentially disadvantaged by the current requirements; and 3) information demonstrating that it is unlikely that, if additional flexibility were provided, telemarketers would intentionally set the abandonment rates above three percent for some campaigns or calls directed to certain consumers.

The standard proposed by the Commission is clearly similar to the FCC's, though with one glaring difference: The FCC's standard measures the abandonment rate over a thirty (30) day period *across all calling campaigns,* while the Commission proposes to measure its standard over a thirty (30) day period on a *per campaign basis*.

Although ATA recognizes the benefit that the Commission's proposed measuring standard will provide to its members, ATA suggests that the Commission adopt a measuring standard that is not based upon *calling campaigns*. ATA is unaware of any guidance or interpretation the Commission has provided for this term in any rulemaking or other proceeding. Industry members often assign different meanings to the term based upon the underlying purpose of the calls. The regulatory use of such an amorphous term has generated confusion amongst

[10] 71 Fed. Reg. at 58730.

sellers and telemarketers. By proposing a measuring standard that flirts with, but does not embrace, the FCC's measuring standard, the Commission fails to achieve regulatory uniformity and the articulated benefits for the industry and consumers associated therewith. Adopting a standard that measures abandoned calls over a thirty (30) day basis across all calling campaigns removes the effects of this ambiguity and promotes the regulatory consistency that the industry has craved for years.

III. Telemarketers Running Multiple Campaigns At The Same Time As Well As Telemarketers Running Few Campaigns Are Challenged in Complying With The Current Requirement.

Measuring the abandonment rate utilizing the Commission's current standard presents call center management with significantly greater compliance obstacles and higher cost structures than those associated with meeting the FCC's measuring standard: An abandonment rate measured on a per day, per calling campaign basis fails to take into account that sales and telephone contacts cannot be predicted accurately on a daily basis across different programs. At the beginning of a calling campaign, management must increase staffing on all calling campaigns to accommodate the likelihood of higher contact rates on some programs since these telephone numbers have not been dialed previously. Call centers see a dramatic decrease in contact rates as campaigns continue over time since prospective consumers are unavailable to speak with agents for a variety of different reasons.

As it becomes more difficult for call centers to contact individuals across different programs, it also becomes more difficult for management to staff their centers. To ensure that there are always enough agents to meet the Commission's current stringent three percent measuring standard, management is forced to overstaff on a daily basis across all programs without regard to where the programs are in a calling cycle. Management's labor cost multiply exponentially the more calling campaigns operating out of a single center, as management must ensure that enough agents are available on each day in a calling cycle. This practice dramatically increases the telemarketer's costs, decreases profitability, and adversely affects the costs to sellers and/or the wages paid to the individual telephone agents.

Alternatively, call center management may attempt to protect itself from these higher expenses by decreasing staffing to accommodate smaller calling files later in programs. However, this practice also increases management's costs since the wide fluctuation in working hours available to telephone agents results in an unreliable source of steady income to agents. Management must then incur direct and indirect costs associated with hiring and training new personnel to replace the agents who left the centers' employment in search of more reliable income streams. The more campaigns operating out of a single center, the greater the center's attrition rate.

Staffing levels (and, hence, abandonment rates) can be managed significantly more effectively over a longer period of time as calling files become more predictable. Permitting call center managers to measure abandonment rates over a thirty (30) day period provides them with a flexible standard which will allow them to effectively monitor and adjust abandonment rates and staffing capacities later in the program based upon the realized contact rate earlier in the program.

The Commission is correct to point out that telemarketers that initiate a small number of calls each day may be disadvantaged differently by the current measuring standards than their larger counterparts.[11] In fact, the current daily measuring standard results in significantly higher costs, either in wages or attrition rates.

As illustrated in the previous discussion, as a calling campaign proceeds over a thirty day period, the number of live contacts decrease resulting in decreased staffing requirements. Telemarketers that operate several programs out of a single center have the luxury of moving agents from campaigns late in a thirty day cycle (i.e., campaigns that have well penetrated their targeted calling lists) to other campaigns – either for the same seller/client or another – that are at the very beginning of the cycle and require higher staffing rates.

Telemarketers running relatively few programs and who initiate relatively few telemarketing calls do not have this luxury. When calling programs are late in their cycle, the number of contacts are low and staffing requirements are greatly reduced. These telemarketers must either compensate their agents for nonproductive time or furlough agents until the beginning of the next calling cycle. This economic reality for relatively small telemarketers will vastly improve by allowing them to measure abandonment rates on a thirty day basis, as higher abandonment rates realized at the beginning of a calling campaign early in a month will be offset by the realities of low abandonment rates later in the calling campaign at the end of the month.

Clearly, industry members incur significant costs by implementing a *per day, per calling campaign* standard. ATA respectfully suggests that these costs significantly outweigh the benefits derived by consumers from a daily measuring standard.

[11] Many telemarketers that initiate few outbound telemarketing calls do not utilize predictive dialers.

IV. It Is Unlikely That, If Additional Flexibility Were Provided, Telemarketers Would Intentionally Set The Abandonment Rates Above Three Percent For Some Campaigns Or Calls Directed To Certain Consumers.

In its Proposed Rules, the Commission acknowledged that it devised the current measurement standard based upon what it perceived as a potential for telemarketers to manipulate a thirty day measuring standard to enable them to target call abandonments at certain less valued groups of consumers. The theory is that telemarketers could then offset a high abandonment rate in low income zip codes and make up the difference by abandoning no calls in affluent ones.

The Commission's concern, while noble, is unfounded. The Commission must keep in mind that sellers and telemarketers call to only three categories of consumers: i) Consumers who expressly requested to be contacted by or on behalf of the seller; ii) Consumers with whom the seller has an established business relationship; or iii) Consumers who have no previous relationship with the seller and whose telephone numbers are not on the national Do-Not-Call Registry.

Sellers and telemarketers have no motive to abandon calls to individuals who expressly requested to be contacted by or on behalf of the seller or to individuals with whom the seller has an established business relationship. Accepting the Commission's premise that consumers do not like abandoned calls, this practice risks alienating those consumers who are most likely to purchase the offered product or service.

The Commission's concern regarding calls to individuals with whom the seller has no previous relationship is similarly unfounded. The vast majority of sellers and telemarketers purchase lists of consumers to call. These lists are compiled of consumers whose purchasing patterns, credit history, family income, demographics, etc., are most likely to purchase the offered products or services. As a result, telemarketers are not likely to initiate calls to low income consumers to offer luxury consumer goods, nor will they call high income consumers to offer products or services that they are statistically unlikely to purchase. These calling practices would be a waste of resources both for sellers who compensate their telemarketers on an hourly basis and for telemarketers who are only compensated for completed sales. Instead, every consumer to be called on a particular telemarketing campaign is selected due to a perceived relatively high likelihood of purchasing the offered product or service. Sellers and telemarketers have no incentive to abandon calls at different rates to different demographics within a particular program.

V. Conclusion

ATA supports the Commission's determination to modify the abandonment rate measuring standard to a monthly basis from its current daily basis. However, ATA strongly urges the Commission to adopt the measuring standard implemented by the FCC in 2003 that does not measure the standard on a *per campaign basis.*

Respectfully submitted,

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