

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

**COMMENTS
of**

CAREER EDUCATION CORPORATION

Responding to the Notice of Proposed Rulemaking

TSR Prerecorded Call Prohibition and Call Abandonment Standard Modification,

Project No. R411001

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I. INTRODUCTION AND SUMMARY

Career Education Corporation (“CEC”) appreciates the opportunity to comment on the Federal Trade Commission’s proposed amendment to the Telemarketing Sales Rule (“TSR”), which would prohibit the use of prerecorded telemarketing calls to consumers absent express prior written consent from the consumer.

CEC urges the Commission to consider fashioning an alternative rule that would require sellers that place prerecorded telemarketing calls within an existing business relationship (“EBR”) to: (1) provide a clear notice and a quick, automated opt-out mechanism near the beginning of a call; (2) place no more than one such prerecorded call every thirty days to a customer; and (3) maintain accurate records that chronicle and document compliance. This alternative would solve the problem of “coercive” or “abusive” telemarketing calls that the Commission is seeking to eradicate.

Should the Commission ultimately adopt a rule requiring express prior consent to receive prerecorded calls, we urge the Commission to allow express oral consent in addition to express written consent where consumers are communicating by phone or orally with a marketer.

Founded in 1994, CEC is the world’s largest on-campus provider of private, for-profit postsecondary education. CEC offers doctoral, master’s, bachelor’s, and associate degrees, as well as diploma and certificate programs, to approximately 90,000 students at over eighty campuses located throughout the United States, Canada, France, the United Kingdom, and the United Arab Emirates.

II. BACKGROUND REGARDING OUR USE OF PRERECORDED CALLS

CEC employs prerecorded telephone calls as a cost-effective and well-received means to maintain contact with prospective and existing students who have already affirmatively contacted us to express interest in the educational services we offer.

Deciding which post-secondary school to attend is a long process that requires extensive counseling and repeated contact with prospective students. For example, after students sign an enrollment agreement and pay an application fee to enroll in our schools, it is necessary for them to complete a student financial aid form in order to be considered for such aid. For this reason, we must make repeated contacts with prospective students, and prerecorded calls are very important to that process. Our prospective and existing students receive valuable information through prerecorded calls, including information about financial aid opportunities, class registration deadlines, orientation dates, and employer forums.

We find that prerecorded calls are the most effective way to reach prospective students. The response rates we obtain from prerecorded calls (expressions of interest in receiving more information from us) are *more than twice* as high as for communications by mail and *ten times higher* than for communications by email.

In most instances, prospective students contact us in response to a television, newspaper, website, or direct mail advertisement. In each instance, prospective students are voluntarily contacting us to request information and providing personal information so that we may contact them. Students also express interest in CEC educational opportunities through presentations at high schools and through our website.

When prospective students contact us by phone in response to a television or newspaper ad, we believe that verbal consent would be viable. However, we believe that requiring these prospective students to engage in a further, out of band communication, such as visiting a website, would cause a dramatic drop in consents and make use of prerecorded calls unviable. We believe that our prospective and current students are less likely to have dedicated Internet access or e-mail accounts to be able to consent online to future contacts.

The proposed rule did not appear until October of 2006, more than a month into the 2006 school year. CEC had already received significant numbers of inquiries from students requesting information from CEC prior to the issuance of the NPRM.

CEC opposes the proposed rule, which would make it substantially more difficult for us to communicate in an effective manner to students who have affirmatively reached out to ask for information about our schools. The proposed rule would work to the detriment of these prospective students, as many would be deprived of valuable information that they *expect* to receive through prerecorded calls.

III. PRERECORDED CALLS CAN PROTECT CONSUMER PRIVACY AND FOSTER CONSUMER CHOICE

The proposed rule would prohibit prerecorded telemarketing calls within an EBR absent an “express prior written agreement” by the recipient to receive such calls. 71 Fed. Reg. at 58726.

CEC believes that requiring initiators of prerecorded calls to provide clear notice and an automated, IVR opt-out mechanism that consumers could exercise shortly after the commencement of the call would eliminate the problem of “coercive” or “abusive” prerecorded calls. *See* 15 U.S.C. § 6102(a)(3)(A). Such prerecorded calls could not be construed as “coercive,” since consumers would be afforded the opportunity to opt-out conveniently from current and future calls shortly after the commencement of the call. A further requirement that sellers: (1) place no more than one call every 30 days to the same phone number; and (2) maintain records documenting the frequency of such calls would ensure that such prerecorded calls never become “abusive”, and avoid fears several commenters expressed about a substantial increase in such calls in the future. 71 Fed. Reg. at 58723.

IV. THE WRITTEN CONSENT REQUIREMENT WOULD NEEDLESSLY IMPOSE LARGE COSTS UPON CEC

While a prior written agreement may be an appropriate way to obtain express consent when customers mail in a postcard or fill out a form on the Internet requesting information from

us, it would materially harm us and other businesses if written consent were required in all circumstances.

Requiring written consent where customers are communicating with us over the phone would effectively require EBR customers to *opt-in twice* in order receive a prerecorded call by waiting for a piece of paper in the mail or filling out a form online and returning it to CEC.

Based upon our knowledge of our market, we believe that this added burden on our EBR customers would result in the overwhelming majority of them not responding a second time and therefore being contactable by phone only through live operator calls. While we are convinced that this would be true of consumers as a whole, it is particularly true of our prospective student population, despite the fact that these individuals may be genuinely interested in a CEC school.

Where a prospective student has already expressed interest in one of our schools, response rates to further contacts from CEC are significantly higher when we employ prerecorded calls. The response rate for prerecorded calls vastly exceeds--by more than tenfold--the response rates engendered by e-mail, and is more than twice the response rate for postcards. Based on our lead generation data, it is abundantly clear that a prerecorded call is the most effective mechanism that we employ to communicate with prospective students who have already expressed interest in a CEC school. Unlike live operator calls, prerecorded calls are delivered to all consumers with identical language and with an identical inflection. Delivered properly, prerecorded calls can be a superior mechanism for providing important consumer disclosures, since the universe of consumers contacted would hear an identical message communicated in an identical fashion.

Given the large amount of information our prospective students need in deciding whether to enroll, and the much greater effectiveness of phone contacts, CEC would have no choice but to continue to call students. The express prior written consent requirement envisioned by the proposed rule would compel CEC to employ significant numbers of live operators in order to comply with the TSR. The use of live operators, however, would be extremely expensive. Based on an estimate from one of the vendors with whom we do business, we estimate that our marketing costs would increase by *\$3.58 million per year* should the Commission implement its proposed rule, a 220% increase over current costs.

The proposed rule would largely foreclose the most effective marketing tool we employ to maintain contact with prospective students who have already affirmatively expressed interest in a CEC school. Moreover, it is unclear whether the response rates we would receive from live operator calls would be comparable to prerecorded calls. While we are certain that prerecorded calls are effective, we have no evidence to suggest that the substantial investment required to utilize live operators would yield similar response rates.

V. IF IT ADOPTS AN OPT-IN CONSENT REQUIREMENT, THE COMMISSION SHOULD SPECIFICALLY PERMIT EXPRESS ORAL CONSENT TO RECEIVE PRERECORDED CALLS

Should the Commission decide to adopt the proposed rule, CEC respectfully urges the Commission to modify the “express prior written agreement” requirement for consent to account for other ways that consumers communicate with sellers.

While the “express written consent” standard in § 310.4(b)(iii)(B)(i) may be an appropriate requirement for overriding a consumer’s decision to place his or her name on the national do not call list, this precedent does not make sense in the context of an EBR, where the seller can demonstrate that a consumer has given verbal affirmative consent to receive prerecorded calls.

Imposing this sort of one-size-fits-all method of obtaining express consent from customers ignores the diverse ways in which consumers interact with businesses such as ours, and imposes an artificial burden on the many EBR customers who contact us by phone to *opt-in a second time* to receive prerecorded calls *in a different communications medium*. In fact, because these customers have chosen the phone as their preferred means of communication, permitting, instead of ignoring, consent by phone would be more respectful of consumer choice.

Enforcement of a verbal consent requirement need not present any greater enforcement difficulties than does a written consent requirement. A business that claims to have obtained express oral consent from a consumer should rightly bear the burden of demonstrating the existence of such consent. Express oral consent, however, can be effectively captured and recorded in the course of an inbound telephone call placed by a consumer. Provided sellers employ a mechanism that effectively and genuinely memorializes a consumer’s express consent, the Commission should permit sellers to obtain the consent specified by the proposed amendment through oral means.

VI. IF THE COMMISSION IMPOSES ANY DISCLOSURE REQUIREMENTS FOR EXPRESS CONSENT, IT SHOULD EXPRESSLY AUTHORIZE CONSENTS OBTAINED IN RESPONSE TO CLEAR, SHORT STATEMENTS

If CEC were required to obtain express consent to communicate with EBR customers by means of prerecorded calls, it would do so in response to the following sort of short, clear statement:

“To provide you additional information about our schools, we may call you, including the use of prerecorded messages.”

The NPRM asks in Question B. 4 whether the Commission should require any specific disclosures when obtaining consent and if so, what those disclosures should be. 71 Fed. Reg. at 58733.

If the Commission imposes any sort of notice requirement in connection with an express consent requirement, we urge it to authorize this sort of clear, simple, plain language disclosure. This sort of consent is eminently understandable by customers and neither sugarcoats nor implicitly disparages what the customer is agreeing to.

VII. CONSENTS OBTAINED PRIOR TO THE PUBLICATION OF THE FINAL RULE SHOULD BE VALID

There is often nearly a year time lapse between the time a prospective student contacts us to express interest in an educational program and the actual enrollment of the student. As a result, a prospective student often receives informational prerecorded messages that provide guidance in enrollment, financial aid, and other procedures related to the particular school in which the prospective student has expressed interest. Were the Commission to require businesses to obtain consent through an express prior written agreement upon the publication of its final rule, many prospective and existing students would be deprived of prerecorded calls that convey this critical information.

The proposed rule did not appear until October of 2006, more than a month into the 2006 school year. CEC had already received significant numbers of inquiries from students requesting information from us prior to the issuance of the NPRM. It would be highly burdensome and would create significant confusion in our ongoing educational marketing campaigns if we were required to contact these existing customers to request consent for use of prerecorded calls.

Furthermore, at this juncture, sellers such as CEC do not know what will be required to obtain valid consent under the final rule.

For these reasons, we urge the Commission to (1) exempt prerecorded calls, initiated as part of a marketing campaign, that predate the announcement of the Commission's proposed rule on October 4, 2006, until October 4, 2007 and (2) exempt prerecorded calls to customers from whom consent was obtained prior to the final rule, regardless of whether the method of consent conforms to the Commission's final rule.

Alternatively, CEC asks the Commission to continue its policy of non-enforcement until six months after the announcement of the final rule.

VIII. CONCLUSION

CEC urges the Commission to continue to permit prerecorded calls to EBR consumers, provided that: (1) such calls afford consumers clear notice and an opportunity to opt-out via a push of a button near the beginning of the call and (2) the seller can document that they are delivered to customers no more than once in a thirty day timeframe.

Should the Commission require express consent prior to the initiation of prerecorded calls, CEC urges that the Commission amend the proposed rule to allow express oral consent as a satisfactory means for obtaining consent. In so doing, the Commission should require that

entities who obtain express oral consent capture and memorialize a consumer's express oral consent to ensure compliance with the rule.

Finally, the Commission should exempt from the new requirements: (1) marketing campaigns that were initiated prior to the issuance of the NPRM; and (2) prerecorded calls for which some sort of consent was obtained prior to the announcement of the new rule, or, in the alternative, delay enforcement of the final rule until 6 months after its publication.

Respectfully submitted,

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