

Before the
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

In the Matter of)
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Rules and Regulations Implementing the) TSR Prerecorded Call Prohibition and Call
) Abandonment Standard Modification
) Project No. R411001
Telemarketing Sales Rule)
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The Heritage Company, located at 2402 Wildwood Avenue, Suite 500, Sherwood, Arkansas 72120, hereby submits comments to the Federal Trade Commission (FTC) on the matter of TSR Prerecorded Call Prohibition and Call Abandonment Standard Modification Project No. R411001. The specific aspect of the Telemarketing Sales Rule (TSR) addressed by these comments is the prohibition against prerecorded sales calls to consumers with whom a company has an existing business relationship (EBR).

We support the Commission’s decision to treat the request from Voice Mail Broadcasting Corporation (VMBC) as a petition to amend the TSR. We support the position that telemarketers (and telefundraisers—Heritage conducts telefundraising campaigns for over 180 nonprofit agencies)—should be able to place prerecorded calls to customers with whom they have an existing business relationship (EBR) for reasons described below:

1. Prerecorded calls are more efficient than those conducted by live agents for the simple reason that the calling entity does not have to pay the labor costs of having multiple agents making live calls. In our niche of nonprofit telefundraising, when we are more efficient, we are better able to turn over a larger portion of the funds we raise to our nonprofit partners. Thus, this rule change would benefit both for-profit companies like ours and also charities for whom we work.
2. Another aspect of prerecorded messages that benefits nonprofits is its efficiency in terms of speed. It is faster for a computerized system to deliver calls to tens of thousands of consumers than for an affordable-sized team of live agents to do so, especially in the nonprofit realm. There are numerous emergency situations in which nonprofits such as the Red Cross or the Salvation Army need immediate assistance and funds to address a crisis, such as natural disasters (hurricanes, floods, etc.) or terrorist actions (e.g., the 9/11 attacks). Prerecorded messages have the capability of raising those funds and volunteers in a brief period, the result of which could be saved lives and direct services to victims.

3. The TSR requirements regarding prerecorded messages on behalf of a nonprofit when the dialing equipment is owned by a third-party vendor fail to provide the consumer protection intended by the abandoned call rule. The fact that a vendor owns the equipment, rather than a nonprofit organization, has no impact on consumer privacy—aside from preventing them from being able to easily learn about and support a favored nonprofit. The free speech rights of nonprofits should not be limited based upon the ownership of the dialing equipment or the fact that a message is prerecorded instead of from a live agent.
4. The fact that political organizations and candidates may deploy prerecorded messages to raise funds and advance efforts to gain votes while nonprofits are not afforded the same First Amendment¹ protections also lacks a consumer-oriented basis. Indeed, a scheme that prohibits such calls by nonprofits unnecessarily drives up their costs of fundraising and operation—simultaneously depriving them of funds needed to achieve their mission and needed volunteers as well.
5. Allowing prerecorded calls to customers with whom a company has an EBR would not place additional costs or requirements upon consumers. Indeed, consumers are less burdened by an automated call than they are by one made by a live agent because they can quickly hang up on an unwanted automated call without the concern of being rude to a live caller (as automated political calling has demonstrated).
6. Consumers have been granted the ability to make entity-specific do not call requests which supersede the EBR safe harbor. Indeed, the entity-specific do not call authority predates the National Do Not Call Registry (NDNCR) by several years. Prerecorded messages should be subject to the same Caller ID and opt-out requirements that apply to calls made by live agents.²
7. The Supreme Court has held in four cases in the last 26 years (*Village of Schaumburg v. Citizens for a Better Environment*, (1980); *Secretary of State of Maryland v. J.H. Munson Company, Inc.*, (1984); *Riley v. National Federation of the Blind*, (1988), and *Illinois ex rel. Madigan, Attorney General of Illinois v. Telemarketing Associates, Inc. et al.* (2003)) that charities enjoy protected free speech rights beyond that provided to commercial speech. As the Tenth Circuit Court of Appeals made clear in its 2004 *Mainstream Marketing v. FTC* decision (which was allowed to stand by the Supreme Court, effectively upholding that decision), the federal government has the authority to regulate commercial speech, most prominently through the NDNCR. That decision explicitly did not take a position regarding the constitutional status of a do not call registry that included political and charitable calls. However, since the Commission chose to exempt calls for charities from the NDNCR, there is precedent for recognizing and protecting the free speech rights of charities in the area of prerecorded solicitations.

¹ The First Amendment issue regarding this rule will be addressed in section 7.

² Those requirements include the Caller ID display of the name and phone number of the seller or marketer and the abandoned call messages that provide the name of the seller, marketer, purpose of the call, and a phone number which can be called during regular business hours to be placed on an entity-specific do not call list.

8. Industry research demonstrates that consumers think more favorably about charitable fundraising calls than they do commercial calls. Similarly, there is at least anecdotal evidence that consumers think differently about calls that are automated than they do calls made by actual people. For that reason, consumers would be less likely to make an entity-specific do not call request to a company with whom they do business if they were called by a live agent than if they received a prerecorded call that empowered them to easily get on a do not call list. In other words, many consumers merely would not want to be called by a machine, while remaining open to calls by live agents. For this reason, a workable solution could be to allow companies to continue to make calls by live agents to their EBR customers who make do not call requests to their automated calls in the absence of an entity specific do not call request to the live agent.

We appreciate the opportunity to publicly submit comments on these important rules affecting the teleservices industry.

For the company,

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