

**Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580**

**TSR Prerecorded Call Prohibition and Call Abandonment
Standard Modification, Project No. R411001**

COMMENTS OF THE CONSUMER BANKERS ASSOCIATION

Charles H. Kennedy
Morrison & Foerster LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 887-1500

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The Consumer Bankers Association (“CBA”)¹ hereby comments on the proposed amendments to this Commission’s Telemarketing Sales Rule (“TSR”) described in the Denial of Petition for Proposed Rulemaking, Revised Proposed Rule With Request for Public Comments and Revocation of Non-Enforcement Policy (“Request for Comments”) dated October 4, 2006.²

As further discussed herein, CBA urges the Federal Trade Commission (“FTC” or “Commission”) not to adopt the proposed prohibition on prerecorded telemarketing calls placed to persons with whom the caller has an established business relationship, and recommends adoption of the “safe harbor” requested by Voice Mail Broadcasting Corporation and proposed in this Commission’s Notice of Proposed Rulemaking of November 17, 2004. In the alternative, CBA requests that if the FTC adopts the proposed rule, it include a provision stating that telemarketers do not violate the rule when they engage in telemarketing on behalf of entities not subject to FTC jurisdiction.

I. THE RECORD DOES NOT SUPPORT THE PROPOSED PROHIBITION ON PRERECORDED TELEMARKETING CALLS TO PERSONS WITH WHOM THE CALLER HAS AN ESTABLISHED BUSINESS RELATIONSHIP

The Commission proposes to prohibit telemarketers from placing prerecorded calls to persons with whom the caller has an established business relationship (“EBR”).

¹ The Consumer Bankers Association was founded in 1919 and is a not-for-profit trade association that provides leadership and representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. The CBA develops policy that affects financial institution retail products and services. CBA members include most of the nation’s largest bank holding companies and hold two-thirds of the industry’s total assets. CBA is the recognized voice on retail banking issues in the nation’s capital. Member institutions are the leaders in consumer finance (auto, home equity and education), retail electronic commerce, small business services, and community development.

² Federal Trade Commission, RIN: 3084-0098, Telemarketing Sales Rule, Denial of Petition for Proposed Rulemaking; Revised Rule with Request for Public Comments; Revocation of Non-Enforcement Policy, 71 FR 58716 (Oct. 4, 2006) (“Request for Comments”).

In support of the proposed rule, the Commission relies upon the findings made in support of its decision to deny the petition for rulemaking of the Voice Mail Broadcasting Corporation (“VMBC”).³ Specifically, the Commission finds that consumers overwhelmingly object to prerecorded marketing calls, even when received from those with whom those consumers have an EBR; that those objections are not offset by the value of such calls to consumers; and that the need to preserve relationships with existing customers will not sufficiently discourage businesses from excessive use of prerecorded sales calls.⁴ The record does not support these findings.

On the issue of consumer objections to prerecorded calls, although the FTC states that “over 13,000 of the 13,550 consumer comments in the record clearly opposed allowing prerecorded telemarketing messages,”⁵ many of those opposition comments were not directed at the proposal to permit EBR-based prerecorded telemarketing calls, but addressed entirely different issues. In fact, a random review of the “opposition” comments shows that a substantial number opposed other features of the telemarketing laws – such as the definition of “established business relationship” or the fact that some telemarketing calls continue to be permitted at all – that have nothing to do with the issue raised in the NPRM.⁶ Even comments that directly addressed the issue at hand --

³ See Federal Trade Commission, RIN 3084-0098, Telemarketing Sales Rule, Notice of Proposed Rulemaking, 69 FR 67287 (Nov. 17, 2004) (“NPRM”); letter from William B. Baker, Attorney for Voice Mail Broadcasting Corporation, to Allen W. Hile, Federal Trade Commission (Nov. 14, 2003) (“VMBC Petition”).

⁴ Request for Comments, 71 FR 58716, 58723-24.

⁵ *Id.*, n. 49 at 58720.

⁶ Comments of Edwin Scheckel, OL-112720 (Jan. 4, 2005) (“I do not want my land phone or cell phone used by telemarketers of any kind”); Comments of Holly Calderone, OL-101992 (Nov. 27, 2004) (“I do not want anyone who is selling anything either in person or with computer automated calling calling me either at home or on my cell phone. No political ads, no service organization, no solicitation by anyone . . .”); Comments of Robert Rabun, OL-103880 (Nov. 28, 2004) (“I don’t want messages of ANY type from telemarketers”); Comments of Raymond R. De

including some of the comments quoted in the Commission's NPRM -- objected speculatively to the supposed flood of *additional* calls that would result from the proposed rule, rather than the effect of calls and calling patterns the commenters already had experienced.⁷ Considering that EBR-based prerecorded calls had been permitted under Federal Communications Commission ("FCC") regulations for well over a decade when these comments were filed, the commenters' assumption that the relief requested by VMBC would, if granted, substantially increase the volume of telemarketing calls is not supported by the record.

The Commission also gave inadequate consideration to VMBC's observation that companies have strong incentives to avoid alienating existing customers with excessive reliance on prerecorded messages. Notably, the Commission made no adequate response to the fact, cited in VMBC's petition, that the incidence of do-not-call requests in response to a large sample of prerecorded, EBR-based messages handled by that company had been only 0.02 of 1% of the messages delivered.⁸ Instead, the Commission speculated that even if large, reputable companies might want to avoid alienating customers, smaller companies in highly competitive markets would be less restrained by such concerns.⁹

Lavalette, OL-105941 (Dec. 5, 2004) ("Any transaction with merchants will be construed as a prior established business relationship and opens the door to future unwanted contact"); Comments of Rubin, OL-110730 (Dec. 19, 2004) ("I do not want to receive calls of any kind electronic or otherwise from telemarketers"); Comments of Larry Tomlinson, OL-107022 (Dec. 6, 2004) ("I do not wish to be called by anybody that is a telemarketer under any situation").

⁷ See, e.g., Comments of Richard Hohm, OL-104448 (Nov. 29, 2004) ("Allowing automated calls *will* let telemarketers flood consumers with sales calls . . .") (emphasis added).

⁸ VMBC Petition at 3.

⁹ Request for Comments, 71 FR 58716, 58723. It is counterintuitive to suggest, as the Commission does, that companies in highly competitive lines of business will be more, rather than less, willing to alienate customers than businesses that face less competition.

Besides the lack of evidence that adoption of the proposed rule will prevent harm to the public, prohibition of EBR-based recorded telemarketing messages will confirm and exacerbate the confusion caused by the conflict between this Commission's rules and those of the FCC, which permit the transmission of prerecorded promotional messages to persons with whom the caller has an EBR. If the proposed rule is adopted, entities subject to FCC jurisdiction rather than FTC jurisdiction will enjoy a competitive advantage over entities that must comply with the new, restrictive FTC rule, and entities that arguably are subject to the jurisdiction of both agencies will be burdened with needless regulatory risk and confusion. Accordingly, the proposed rule should not be adopted, and the FTC should recognize the safe harbor for EBR-based prerecorded telemarketing calls requested by VMBC.

II. IF ADOPTED, THE PROPOSED RULE SHOULD NOT BE APPLIED TO TELEMARETERS ACTING ON BEHALF OF ENTITIES THAT ARE NOT SUBJECT TO FTC JURISDICTION

If the FTC chooses to adopt the proposed prohibition on EBR-based prerecorded telemarketing calls, that rule should expressly provide that telemarketing firms may transmit prerecorded telemarketing messages on behalf of entities not subject to the FTC's jurisdiction. In the absence of such a provision, the rule might be interpreted as permitting an indirect extension of Commission jurisdiction to affect conduct outside its statutory authority, and as inviting enforcement actions that would have an inequitable impact on entities not subject to the FTC's authority.

A. Enforcement Actions Against Telemarketers Acting on Behalf of Entities not Subject to FTC Jurisdiction Would Violate the FTC Act and the Telemarketing Statute

As presently written, the TSR sets out similar rules for sellers and telemarketers. In some telemarketing scenarios, the seller and the telemarketer are the same entity; more

commonly, the seller and the telemarketer are separate entities, with the telemarketer initiating telephone calls as the agent of the seller whose goods or services are promoted by those calls. When a telephone sales campaign involves both a seller and a separate telemarketer, both subject to FTC jurisdiction, the TSR quite properly ensures that both entities will play by the same rules.

Some telemarketing campaigns, however, involve sellers not subject to FTC jurisdiction. Notably, the Federal Trade Commission Act expressly provides that certain entities, including “banks, savings and loan institutions . . . and credit unions . . .”, are not regulated by this Commission.¹⁰ The Telemarketing and Consumer Fraud and Abuse Prevention Act, which provides that “no activity which is outside the jurisdiction of [the Federal Trade Commission Act] shall be affected by this chapter,” makes clear that telemarketing regulation is no exception to these limitations on FTC authority.¹¹

These jurisdictional limitations create no conflict when: (a) a telemarketer and the company on behalf of which it initiates calls are both subject to FTC jurisdiction, or (b) the applicable requirements of the FCC’s rules, which apply to all sellers and telemarketers, are the same as those of the TSR. A different case is presented, however, when the FTC and FCC rules conflict and the seller is a financial institution or other entity not subject to this Commission’s enforcement authority. In those cases, any threat of FTC enforcement action against the telemarketer -- to the extent it inhibits the ability of the seller to engage in activity that is lawful under FCC regulations -- “affects” activity outside the jurisdiction of the FTC Act in contravention of the Telemarketing and Consumer Fraud and Abuse Prevention Act. In order to avoid such a jurisdictional

¹⁰ 15 U.S.C. § 45(a)(2).

¹¹ 15 U.S.C. § 6105(a). The phrase “this chapter” refers to chapter 87 of Title 15, U.S. Code, codifying the Telemarketing and Consumer Fraud and Abuse Act.

conflict, the proposed rule, if adopted, should not be enforced against telemarketers that conduct sales efforts on behalf of financial institutions.

Unfortunately, the Commission has suggested in past statements that it is prepared to embrace, rather than avoid, this jurisdictional conflict. Specifically, this Commission has acknowledged its lack of jurisdiction over the telemarketing activities of financial institutions and other entities, but has undermined that acknowledgment by claiming a right to bring enforcement actions against telemarketers when they engage in acts, on behalf of entities not subject to FTC jurisdiction, that are otherwise lawful but violate this Commission's rules. As the Commission stated in its order adopting the Final Amended TSR in January, 2003:

[A]bsent amendments to the FTC Act or the Telemarketing Act, the Commission is limited with regard to its ability to regulate under the Rule those entities explicitly exempt from the FTC Act. Despite this limitation, the Commission can reach telemarketing activity conducted by non-exempt entities on behalf of exempt entities.¹²

In support of this conclusion, the Commission relied primarily upon two federal court decisions: *Official Airline Guides, Inc. v. FTC*¹³ and *Minnesota v. Fleet Mortgage Corporation*.¹⁴ In *OAG*, the court found that a publisher of airline guides was not exempt from FTC jurisdiction as a carrier subject to the Federal Aviation Act.¹⁵ In *Fleet*, a U.S. district court found that a financial institution's non-bank subsidiary is not defined as a bank by the Gramm-Leach-Bliley Act.¹⁶

Neither of the decisions cited by the Commission undermines the argument against indirect regulation of banks through regulation of telemarketers. In order to

¹² Telemarketing Sales Rule, Final Amended Rule, 68 FR 4580, 4587 (Jan. 29, 2003).

¹³ *Official Airline Guides, Inc. v. Federal Trade Commission*, 630 F.2d 920 (2d Cir. 1980) ("*OAG*").

¹⁴ *State of Minnesota v. Fleet Mortgage Corporation*, 181 F.Supp.2d 995 (D. Minn. 2001) ("*Fleet*").

¹⁵ *OAG, supra*, 630 F.2d at 924.

¹⁶ *Fleet, supra*, 181 F.Supp.2d at 1000.

demonstrate that the FTC indirectly exceeds its jurisdiction when it regulates telemarketers that work for banks, it is not necessary to show that telemarketers *become* banks when they work for banks. Under the Telemarketing Act, it is sufficient that application of FTC regulations to telemarketers *affects* the telemarketing activities of banks and other entities not subject to FTC jurisdiction.¹⁷

There is no doubt that the threat of such enforcement action affects the CBA members and other exempt entities that engage in telemarketing. The FTC's interpretation of its jurisdiction will require a bank either to conduct prerecorded telemarketing using its own, in-house facilities, or to use telemarketing firms only to make live-operator calls. These costlier options plainly affect activity – *i.e.*, telemarketing conducted by banks – that the Telemarketing Act has placed squarely outside this Commission's jurisdiction.

The Commission should avoid such an indirect assertion of jurisdiction over exempt entities. When a telemarketing firm acts entirely at the direction of a company that is not subject to the FTC's jurisdiction, the legality of its actions should be assessed according to the legal rights and obligations of its principal. Just as a company subject to the FTC's rules should not be permitted to evade those obligations by acting through a company not subject to those rules, a company not subject to FTC rules should not lose its statutory immunities by hiring a separate firm to do what it could lawfully do itself. As the courts have recognized, a regulatory agency should not indirectly exercise jurisdiction that it lacks the statutory authority to exercise directly.¹⁸

¹⁷ 15 U.S.C. § 6105(a), *supra*.

¹⁸ See *Northern States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999).

B. Enforcement Action Against Telemarketers Acting on Behalf of Entities Not Subject to FTC Jurisdiction Would Be Inequitable

The impact of enforcement actions against telemarketers that act on behalf of entities exempt from FTC jurisdiction will not affect all such entities equally. Companies that can afford to conduct prerecorded sales campaigns without using outside telemarketers, or that can afford to pay for live-operator telemarketing services, will be able to advertise and promote their products and services through these costlier channels (although the greater cost of such marketing efforts will be passed on to consumers). Smaller entities might not have the means to do so. Deprived of the less costly prerecorded message option, smaller entities simply will forego this advertising channel while larger companies will continue to exploit it. This result is contrary to the Congress's directive to all federal agencies to consider, and where possible minimize, any disparate impact their regulations might have on smaller businesses.¹⁹

In order to avoid jurisdictional confusion and the imposition of needless inefficiencies on firms that engage in lawful telemarketing, the proposed amendments to the TSR should include language confirming that the regulation is not violated by a telemarketing firm that acts on behalf of an entity not subject to FTC jurisdiction. In the alternative, the Commission should confirm that, as a matter of enforcement discretion, it will not bring enforcement actions against telemarketers that engage in conduct permitted by the FCC on behalf of entities not subject to FTC jurisdiction.

CONCLUSION

The Commission's original proposal to adopt the safe harbor proposed by VMBC was supported by the record and constituted a useful step in the direction of harmonizing

¹⁹ 15 U.S.C. §§ 601-12.

this Commission's regulations with those of the FCC. The Commission should grant that request and should not adopt its proposed prohibition on EBR-based prerecorded marketing calls. In the alternative, the Commission should confirm that the new rule does not apply to telemarketers that initiate calls on behalf of entities not subject to FTC jurisdiction.

Respectfully submitted,

Charles H. Kennedy
Morrison & Foerster LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 887-1500

Attorney for Consumer Bankers Association