

# JONES DAY

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December 18, 2006

## VIA HAND DELIVERY

Federal Trade Commission  
Office of the Secretary, Room H-159 (Annex K)  
600 Pennsylvania Avenue NW  
Washington, DC 20580



Re: TSR Prerecorded Call Prohibition and Call Abandonment Standard Modification, Project Number R411001

Dear Sir:

We write on behalf of our client, Voxeo Corporation ("Voxeo"), in response to the Federal Trade Commission's ("Commission") request for public comment on its proposed amendments to the Telemarketing Sales Rule ("TSR").

At the outset, we note that the Commission's proposed amendment appears to be based on the Commission's belief that there is no widely accepted mechanism to permit consumers to quickly, easily, and efficiently assert their Do Not Call rights when confronted with an automated telemarketing system. Yet such a mechanism does exist, and is in wide use today. Voxeo's product, Prophecy, enables customers to exercise their Do Not Call rights just as easily as if they were speaking to a live representative on the telephone. In doing so, Prophecy creates substantial consumer benefits while simultaneously protecting their privacy rights. The Commission's proposed rule, as currently drafted, will not only jeopardize the development of this burgeoning market, it will deprive sellers of the ability to conduct a variety of telephone solicitations that consumers have strongly indicated they would like to receive.

Put simply, Prophecy is a software program that can make and receive phone calls, and can also interact with callers by understanding what callers say and by talking to callers in a very natural and human-like voice. Prophecy uses state-of-the-art speech recognition technology to understand what the consumer is saying and employs high-quality speech synthesis to respond to consumers based on their questions or commands. In the context of a call to a consumer, for example, Prophecy could easily be programmed to respond to consumer questions, such as "When will the package get here?" or to commands, like "Put me on your do not call list."

Accordingly, we request that the Commission adopt at least one of the following recommendations in its amendment to the TSR:

- **The Commission should create a safe-harbor to the proposed revision to the TSR for "interactive automated telemarketing calls from a seller to a**

Federal Trade Commission  
December 18, 2006  
Page 2

consumer.” In this context, **“interactive automated telemarketing calls” would be defined as “calls placed to consumers using an interactive software product that (i) can make and receive phone calls; (ii) can be controlled by the consumer using spoken commands, telephone keypad buttons, or assistive devices for the disabled; and (iii) provides lifelike spoken responses.”**

- The Commission should add to the proposed rule a **safe harbor for interactive automated telemarketing calls from sellers to consumers arising out of either (i) a series of regular transactions between the parties, or (ii) directly pertaining to a prior transaction.** In this case, **“a series of regular transactions” defined as “a group of transactions between a consumer and a seller that (i) continue over a period of time and (ii) occur at predictable intervals known to both the consumer and the seller.”**
- The Commission should revise the existing wording of § 310.4(b)(1)(v) to add, in relevant part, the language set forth in **bold type:**

Initiating any outbound telemarketing call that delivers a prerecorded message when answered by a person, unless the seller has obtained **the express agreement, either (i) in writing, or (ii) in electronic format, such as a point-and-click affirmation of agreement,** of such person to place prerecorded calls to that person.

### **Background**

Voxeo’s product, Prophecy, is an interactive software product that can make and receive phone calls and converse with callers almost as naturally as a live agent. Callers interact with a Prophecy virtual agent by using comfortable, spoken commands to control the call, while receiving human-like vocal responses to their queries. Prophecy can also understand digits pressed on the phone keypad, as well as input from various kinds of assistive devices for the disabled. Prophecy uses VoiceXML, a global standard for using speech technologies to interact with callers in a comfortable and natural way. VoiceXML is promulgated by the World Wide Web Consortium (W3C), the same standards body that brought us HTML and HTTP.<sup>1</sup>

Some examples of the products and services that Voxeo helps its customers provide to the public include the following:

<sup>1</sup> <http://www.w3.org/>.

Federal Trade Commission  
December 18, 2006  
Page 3

- A large drugstore with hundreds of stores across the US operates a system that calls a consumer with a reminder when it is almost time to refill his or her heart medication. The call provides a helpful service to help the consumer manage his or her chronic condition, but is also intended to induce the consumer to return to the pharmacy to purchase the medication. The calls might sometimes mention other specials, such as medications or another item that the store thinks the consumer might need, or possibly that its records indicate the consumer purchased in the past. The consumer opts in to this service either on the store's website, by email, or by checking a box on a form when he or she originally filled the prescription at the store.
- One of the leading US package shipping companies established a program whereby customers can sign up to receive a phone call telling the customer the current status of his package. One of the options the customer has on the call is to schedule the pickup or delivery of another package.
- One of the world's leading cargo container shipping companies created a similar program whereby customers can sign up online to receive phone calls telling the customer the current status of his cargo container. Among the options the consumer has on the call is to schedule the pickup or delivery of another container and to buy additional insurance for the container at issue. The customer can sign up for the service on the company's website or by checking a box on one of the company's forms. The website application or forms do not necessarily require specification of a telephone number, because the customer's information may already be in the shipping company's records, and will not necessarily be listed on the same form where the customer checked the box to opt-in to receiving such calls.
- A traffic information service calls a consumer when there is a problem on a route in which the consumer has previously specified an interest by opting in to the service on the traffic information service's website. The consumer signs up for this fee-based service online, using the web page to open an account and select the routes for which he or she wishes to receive alerts. The consumer also has the option to select a lower-priced or free service, in which the consumer agrees to receive a brief advertisement with every traffic alert in return for a reduction or waiver of the service fee.
- A service calls a consumer to deliver voicemail or email from any number of other phone or email accounts to a single, centralized telephone number specified by the consumer. The consumer understands at the time he or she signs up for the service on-line that the service is ad-supported, such that it is either less expensive than otherwise or free of charge.

Federal Trade Commission  
December 18, 2006  
Page 4

Consumers are interested in and appreciate these services, as indicated by the response these services have received. For example:

- Every year, over 100,000 parents sign up online for a service (powered by Prophecy) so that their children can receive a phone call on their birthdays from a favorite doll, action figure or tv/movie character. And this month, that same service will enable thousands of children to receive a call from Santa, who will let them know whether they've been bad or good, and ask them what they would like for Christmas.
- Every year, tens of millions of patients sign up online for a service that calls them when their prescriptions are ready, or when certain over-the-counter and prescription medications are on sale, or in stock. Within days of the recall of a certain heart medication last year, Prophecy called millions of consumers who had purchased the recalled medication, advising them of the recall, suggesting possible alternatives, and offering them the opportunity to transfer to a specialist who could provide more information.

#### **Problems with the Scope of the Proposed Rule**

Voxeo believes that many of the services provided using its Prophecy product and other VoiceXML products like it may fall within the scope of the Commission's proposed rule as it is currently drafted. The proposed rule applies to "any outbound telemarketing call that delivers a prerecorded message when answered by a person." Calls placed using Prophecy or other VoiceXML products generally consist of an interactive conversation that includes, at least in part, previously recorded messages and/or phrases, along with voice-synthesized customized content and an interaction with the consumer that may vary based on the consumers responses to various prompts. In some instances, some of the information that is delivered to the consumer, at least arguably, might be deemed "telemarketing." Yet, as is clear from the examples above, the actual calls initiated and managed by Prophecy differ in significant ways from the traditional notion of the intrusive, harassing prerecorded telemarketing call.

Voxeo believes the Commission's proposed rule suffers from three weaknesses that render the rule overbroad and tend to deprive consumers of products and services they desire. In particular, the proposed rule (i) fails to distinguish between *prerecorded* telemarketing messages and the *interactive, automated* telemarketing messages that companies like Voxeo create; (ii) fails to distinguish between calls to consumers with which the seller has a mere "established business relationship" (as that term is defined at 16 CFR 310.2(n)), and calls to consumers with whom the seller is engaged in a *series of regular transactions* or calls *pertaining to a previous transaction*; and (iii) fails to recognize the realities of electronic commerce by forcing a consumer to enter a written agreement including a signature before permitting a seller to offer a service that includes interactive calls to a consumer that may fall within the rule, rather than

Federal Trade Commission  
 December 18, 2006  
 Page 5

allowing consumers to sign up for such services on-line via a website or email, as they generally prefer.

A. Prerecorded Messages vs. Interactive Automated Messages

First, Voxeo believes that the Commission's proposed rule is overbroad in its application to "prerecorded message[s]" because it does not include a safe harbor for the interactive, automated telemarketing calls that can be generated by products such as Voxeo's Prophecy and other VoiceXML applications. While Prophecy does use prerecorded phrases and messages as the building blocks of its outbound calls, it also is able to arrange and select which of these prerecorded phrases and messages to deliver to a particular consumer, based on that consumer's own particular responses during the course of the call.

The rule should be clarified by distinguishing between simple prerecorded messages and interactive automated messages that may include some prerecorded components. The Commission's proposed rule appears to rest largely on the fact that prerecorded telemarketing messages do not afford consumers a way to assert their Do Not Call rights "quickly, effectively, and efficiently,"<sup>2</sup> or that consumers cannot "tell a prerecorded message to put them on the seller's Do Not Call list, as they could with a sales representative."<sup>3</sup> The only methods described in the proposed rule for a customer confronted with a prerecorded telemarketing call to exercise his Do Not Call rights are (i) to press a button on the telephone keypad to speak to a live operator (and then to wait on hold, potentially for an extended period of time); or (ii) to listen through the end of the prerecorded message, and only then to hear a 1-800 number that the consumer could dial to request removal from the telemarketer's list.<sup>4</sup> The Commission rightly deemed each of these options too unreliable or too burdensome for the consumer<sup>5</sup>, and far removed from the

<sup>2</sup> Denial of Petition for Proposed Rulemaking and Revised Proposed Rule ("Proposed Rule") at 9.

<sup>3</sup> Proposed Rule at 22; *see also id.* at n.64 (*citing* Hohm, No. OL-104448 ("A machine can't hear me say 'put me on your do-not-call list!'")).

<sup>4</sup> Proposed Rule at 22.

<sup>5</sup> *See, e.g.*, Proposed Rule at 22 n.64 (*citing, inter alia*, Sahagian, No. OL-113021 (a self-described "unemployed telemarketing manager, laid off as a direct result of the national do not call list" who finds prerecorded messages "the most intrusive" because "I can't ask the message to get to the point or never call again."); Bedell, No. OL-105951 ("A machine can't hear me say 'put me on your do-not-call list!"; Schares, No. OL-110388 ("At least with a live person, you can have the illusion of requesting removal from the list, with a machine, you are just out of luck.")); *id.* at n.65 (*citing, inter alia*, Hohm, No. OL-104448 ("Allowing automated calls will let telemarketers flood consumers with sales calls . . . with no practical means for the consumer to challenge their propriety or to refuse further calls."); Sartin, No. OL-104554 ("If [prerecorded calls] are to be allowed, it should only be through opt-in, not an inherently awkward and unreliable opt-out."); Von Kennen, No. OL-113646 ("I can only imagine the telephone ping-pong game between menus, voice-mail, call transfers, and the inevitable disconnection that I'll have to play before I can hope to talk to someone who will listen [to a Do Not Call request]."))).

Federal Trade Commission  
December 18, 2006  
Page 6

interaction that can occur in an encounter with a live representative, who can be interrupted and told immediately that the consumer wishes to exercise his Do Not Call rights.<sup>6</sup>

Faced with these comments and concerns from consumers, the Commission concluded:

In the absence of any mechanism widely acceptable to industry and consumers that would provide recipients of prerecorded telemarketing messages the opportunity to assert their Do Not Call rights “quickly, effectively, and efficiently,” the Commission does not believe that it can craft conditions for the proposed safe harbor that would preserve the balance between . . . consumer privacy interests . . . and the interest of sellers and telemarketers in communicating sales and promotional offers to their established customers via prerecorded messages.<sup>7</sup>

As Voxeo has explained, however, the technology exists today to allow consumers to protect their privacy interests while also allowing telemarketers to communicate their sales and promotional offers to customers. Interactive, automated VoiceXML platforms, such as Voxeo’s Prophecy, readily permit consumers to exercise their Do Not Call rights while the call is occurring, in a manner analogous to a conversation with a live representative, and in stark contrast to the static prerecorded messages that have been considered by the Commission to date. Additionally, outbound automated telemarketing calls using Prophecy or other VoiceXML platforms respond to the voice commands of the individual consumer, and vary the message delivered according to the consumer’s responses, rendering the experience vastly different than a simple “prerecorded” solicitation.

Indeed, a system that provides for interactive automated calls addresses directly the comments of many consumers in response to the Voice Mail Broadcasting Corporation’s petition for proposed rulemaking, including most importantly the inability to quickly and efficiently assert their Do Not Call rights.<sup>8</sup> For example, in the comments to the Voice Mail Broadcasting Corporation’s proposed safe harbor, Mr. Hohm objected to prerecorded telemarketing calls by noting that “[a] machine can’t hear me say ‘put me on your do-not-call list!’” But a “machine” that can hear and act on such a command *does* exist and is in increasingly broad use today.

Accordingly, the rule should be adjusted to accommodate VoiceXML systems like Voxeo’s Prophecy that are, for these purposes, as good as or better than a human agent sitting in a call center. Specifically, Voxeo recommends the Commission create a safe-harbor to the

<sup>6</sup> See, e.g., Proposed Rule at 23 n.67 (complaints that calling a 1-800 number to be taken off telemarketer’s list is convoluted and burdensome); *id.* at 24 (ability to press telephone keypad to speak to operator is useless for consumers with rotary phones, or when live representative is not available).

<sup>7</sup> Proposed Rule at 37.

<sup>8</sup> Proposed Rule at 22; see also *id.* at n.64 (citing Hohm, No. OL-104448 (“A machine can’t hear me say ‘put me on your do-not-call list!’”)).

Federal Trade Commission  
 December 18, 2006  
 Page 7

proposed revision to the TSR for “interactive automated telemarketing calls from a seller to a consumer.” In this context, “interactive automated telemarketing calls” would be defined as “calls placed to consumers using an interactive software product that (i) can make and receive phone calls; (ii) can be controlled by the consumer using spoken commands, telephone keypad buttons, or assistive devices for the disabled; and (iii) provides lifelike spoken responses.”

B. Calls Pertaining to an “Established Business Relationship” vs. Calls Pertaining to a Series of Regular Transactions or Related to a Prior Transaction

Voxeo believes that an adjustment to the rule to exclude automated interactive calls from the scope of prohibited “prerecorded calls” is a complete solution to the overbreadth of the rule. However, in the event that the Commission decides not to create an explicit carve-out for automated interactive calls, it should consider a more limited safe harbor than that originally proposed by the Voice Mail Broadcasting Corporation in order to protect a set of valuable services that, as reflected in their prior comments, consumers do wish to receive.

The Commission’s proposed rule deprives consumers of legitimate and appreciated information by failing to include a safe harbor for telemarketing calls from sellers to consumers who are reasonably expecting to receive a communication from the seller, or for calls from a seller pertaining to or arising out of a specific prior transaction with the seller. These calls constitute a small subset of calls made from a seller to consumers with which it has an established business relationship<sup>9</sup>, and Voxeo believes that prohibiting telemarketers from using interactive automated systems to make such calls would deprive consumers of services they would otherwise welcome.<sup>10</sup>

In considering the Voice Mail Broadcasting Corporation’s petition, the Commission considered a proposed safe harbor for prerecorded telemarketing calls to pre-existing customers and concluded that “the possibility that any harm to consumer privacy might be outweighed by the value of prerecorded calls to established customers is convincingly refuted by the consumer comments.”<sup>11</sup> An examination of the relevant consumer comments, however, demonstrates that what consumers find objectionable are calls from sellers that use a one-time, insignificant

<sup>9</sup> An “established business relationship” is a relationship “between a consumer and a seller based on: (1) the consumer’s purchase, rental, or lease of the seller’s goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of the telemarketing call; or (2) the consumer’s inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.” 16 CFR 310.2(n).

<sup>10</sup> For example, as the proposed rule is currently drafted, an automated call from a pharmacy to a consumer notifying the consumer that his prescription was due for a refill may well be considered a telemarketing call, as it would be “a plan, program or campaign which is conducted to induce the purchase of goods or services,” in this case, an additional order of prescription drugs. 16 CFR 310.2(cc); *accord* Proposed Rule at 13 (noting that TSR “does not apply to informational calls, unless the calls combine the informational message with a sales invitation or promotional pitch”).

<sup>11</sup> Proposed Rule at 30.

Federal Trade Commission  
December 18, 2006  
Page 8

purchase, or even a mere inquiry, as a license to bombard the consumer with solicitations relating to all aspects of the seller's business.<sup>12</sup> None of the comments objects *per se* to all calls from businesses with which the consumer has an existing business relationship. To the contrary, some commenters appeared to welcome such calls in certain circumstances.<sup>13</sup> Moreover, one consumer's comment to the Commission's current proposal explicitly states that the consumer would gladly receive certain telemarketing calls from businesses with which he had an established business relationship, and that a lack of a safe harbor for at least some of these calls would actually *harm* him as a consumer:

"One of these [automated] calls was from my wireless carrier, alert[ed] me to the availability of an advantageous price plan. A ban on such calls would prevent my service providers from economically notifying me of better services or pricing, to my detriment."<sup>14</sup>

Based on Voxeo's experience with multiple customers who use its software to provide such value-added services, there seem to be two types of situations where consumers commonly welcome these types of communications. First, consumers generally expect and welcome an interactive automated call when the call relates to a series of regular transactions between the consumer and the caller. Thus, as the commenter above stated, many consumers appreciate hearing about special offers when they have subscribed to services, such as telephone or cable television, where they make a regular series of payments for those services. Second, consumers also may expect and welcome calls when they directly relate to prior transaction between the consumer and the caller. Thus, when a customer signs up for a prepaid wireless telephone service, he or she may wish to opt to receive a call when the minutes he or she purchased are nearly exhausted. Such a call serves as a useful reminder to the customer that his or her minutes need to be refreshed. Similarly, a consumer who has made an expensive purchase like a car or a refrigerator likely would not mind a reminder call when the warranty period is about to expire, particularly if that gives him or her a chance to obtain a final check-up before the expiration or to purchase an extension of that coverage before it lapses.

<sup>12</sup> See Proposed Rule at 25 n.77 (*citing, inter alia*, Nuglat, No. OL-109584 ("[T]hese companies will be calling a purchase of a stick of gum a year ago the basis of an established business relationship."); Touretzky, No. OL100891 ("I work nights and sleep in the daytime. I do not want to be dragged out of bed by every low-life outfit that once sold me a box of paperclips."); Holt, C., No. OL-102518 ("Time Warner owns some 80% of the media markets, does that mean if I buy one copy of Time magazine that I should have to receive phone calls from every other media outlet Time owns? That's the way it functions now."))

<sup>13</sup> Proposed Rule at 20 n.57 (*citing, inter alia*, Leader, No. OL-110416 ("I am not in favor of this amendment. . . . [T]he only calls that should be allowed are to companies who have an ongoing existing and real business relationship with the customer."); Dusenbury, No. OL-113951 (supporting prerecorded reminder messages generally, including "sale reminders from my favorite stores."))

<sup>14</sup> Moore, B., No. OL-525547-99999. Available at <http://www.ftc.gov/os/comments/tsrrevisedcallabandon/index.htm>.



Federal Trade Commission  
December 18, 2006  
Page 9

As currently drafted, therefore, the Commission's proposed rule sweeps too broadly, prohibiting some telemarketing calls that consumers actually wish to receive. Based on Voxeo's experience supporting its customers with the types of applications described herein, Voxeo recommends that the Commission consider adding to the proposed rule a safe harbor for interactive automated telemarketing calls from sellers to consumers arising out of either (i) a series of regular transactions between the parties, or (ii) directly pertaining to a prior transaction. In this case, "a series of regular transactions" defined as "a group of transactions between a consumer and a seller that (i) continue over a period of time and (ii) occur at predictable intervals known to both the consumer and the seller."

It is Voxeo's belief that this safe harbor will adequately define the boundaries of telemarketing calls that consumers wish to receive. Specifically, this safe harbor would directly prohibit the kinds of calls that the commenters to Voice Mail Broadcasting Corporation's proposed safe harbor complained of the most: wide-ranging telemarketing calls from sellers with, at best, a tenuous established relationship with the customer.<sup>15</sup>

C. The Requirement of Written Permission for Opt-In Calls Ignores the Realities of E-Commerce

To the extent that the Commission still would impose an opt-in requirement before a company may initiate interactive automated calls to its customers in situations such as Voxeo has described, the proposed requirement that the caller obtain "the express agreement, in writing," including a signature and specific telephone number to be called, is too constraining and will result in an inefficiently low level of valuable services being offered to consumers.

The Commission's proposed rule requiring that telemarketers obtain "the express agreement, in writing"<sup>16</sup> of a consumer before placing prerecorded calls to that consumer ignores the realities of electronic commerce. Voxeo suggests that the Commission revise the language to extend its protection to the online equivalent of such agreements, where the consumer clearly evidences an intent to receive telemarketing messages in the future.

With the widespread use of the Internet and other platforms for electronic or long-distance shopping, many consumers' relationship with a certain businesses (such as Amazon.com) never leaves the confines of cyberspace. Many of these retailers offer opt-in telemarketing services (such as those described above) for consumers who fill in a particular form, or check a box on the seller's website. The current text of the proposed rule implies that such actions by the consumer would not be sufficient to trigger the protective language in the rule, even though the intent behind the actions is exactly the same as that behind an express written agreement.

<sup>15</sup> See notes 12 and 13, *supra*.

<sup>16</sup> Proposed Rule at 69.

Federal Trade Commission  
December 18, 2006  
Page 10

Accordingly, Voxeo suggests that the Commission revise the existing wording of the proposed rule to add, in relevant part, the language set forth below in **bold type**:

Initiating any outbound telemarketing call that delivers a prerecorded message when answered by a person, unless the seller has obtained **the express agreement, either (i) in writing, or (ii) in electronic format, such as a point-and-click affirmation of agreement**, of such person to place prerecorded calls to that person.

It is Voxeo's belief that this wording more accurately reflects the realities of electronic commerce, and provides sufficient safeguards to protect consumers' privacy rights.

### **Conclusion**

For the reasons set forth above, Voxeo recommends that the Commission revise the proposed revision to the TSR to create a safe harbor for interactive automated telemarketing calls from a seller to a consumer, defined as "calls placed to consumers using an interactive software product that (i) can make and receive phone calls; (ii) can be controlled by the consumer using spoken commands, telephone keypad buttons, or assistive devices for the disabled; and (iii) provides lifelike spoken responses."

In the alternative, Voxeo recommends that the Commission create a safe harbor from the revised TSR for calls from sellers to consumers arising out of either (i) a series of regular transactions between the parties, or (ii) directly pertaining to a prior transaction. As explained above, if the Commission chooses to accept this recommendation, Voxeo suggests that "a series of regular transactions" be defined as "a group of transactions between a consumer and a seller that (i) continue over a period of time and (ii) occur at predictable intervals known to both the consumer and the seller."

Finally, to the extent that the Commission still would impose an opt-in requirement before a company may initiate interactive automated calls to its customers, Voxeo suggests that the Commission amend the language of the proposed rule to allow calls to customers where the seller has obtained the electronic equivalent of a written agreement in writing from the customer.

Federal Trade Commission  
December 18, 2006  
Page 11

Voxeo believes that these changes will strike the proper balance between the ability of sellers to communicate sales and promotional offers to their customers via interactive, automated messages, and the interests of consumers in remaining free from unwelcome telephone "spam."

Very truly yours,

John B. Williams  
Montgomery Kosma  
Christopher Farrell

Clegg Ivey  
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Vice President, Mergers & Acquisitions;  
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