

Stuart P. Ingis

(202) 344-4613

singis@venable.com

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Via Hand Delivery

Mr. Donald S. Clark, Secretary
Federal Trade Commission
Room H-135
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

FEDERAL TRADE COMMISSION
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DOCUMENT PROCESSING

Re: **TSR Prerecorded Call Prohibition and Call Abandonment Standard Modification
Project Number: R411001
Request for Extension of Time for Non-Enforcement Policy**

Dear Secretary Clark:

Pursuant to 16 C.F.R. § 1.25, we write on behalf of the Direct Marketing Association (“DMA”) and its members, to request through this Petition that the Federal Trade Commission (“Commission”) extend its current “non-enforcement policy” (forbearing from enforcing section 310.4(b)(1)(iv) against those who place prerecorded calls in conformity with the proposed safe harbor to those with whom the seller has an established business relationship) set forth in its Notice of Proposed Rulemaking published in the Federal Register on November 17, 2004 (69 Fed. Reg. 67287), until the Commission adopts final rules in this proceeding.

The Commission’s October 4, 2006 Federal Register Notice (71 Fed. Reg. 58716), in which it has proposed to change the rules governing prerecorded messages, represents an unexpected departure in approach to the Commission’s treatment of prerecorded messages. As such, it would impose operational and implementation burdens on businesses and a disruption of messages that consumers may expect. Even those messages that recipients may have affirmatively requested would need to be discontinued as there is not sufficient time for business to obtain the proposed prior written consents. Moreover, although probably unintended, the removal of the non-enforcement policy would appear to preclude even calls where the proposed written consent is obtained, as the regulation not being enforced is effectively a flat prohibition on prerecorded messages. Such disruption and change would occur even before the FTC considers comments and issues a final order on this new proposal.

Granting of the DMA request will not result in any change to the status quo for recipients of calls because consumers will receive the same protections they have received since the

Mr. Donald S. Clark
November 29, 2006
Page 2

Commission's non-enforcement policy began. Retaining the current policy until the rulemaking is complete would also not require businesses to undertake significant costs and operational difficulties until the Commission has fully considered the comments to its proposed rule. By contrast, if the Commission initiates enforcement actions before completion of the proceeding, this effectively prejudices the outcome of the proceeding, thereby limiting the purpose of the Notice and Comment process.

DMA believes that the record in this proceeding, which will close on December 18, 2006, will demonstrate that the longstanding practice of allowing businesses to use recorded messages to call those with whom they have an established business relationship ("EBR") is a valid business practice that is beneficial to consumers. DMA and its members also will demonstrate that consumers in fact in many instances may prefer recorded messages with effective opt-out to their live operator equivalent. We describe these reasons in more detail below.

A. Continuation of the Non-Enforcement Policy Pending the Outcome of the Final Rule will Prevent Disruptions in Recorded Messages for Businesses and Consumers.

Enforcing the prohibition on sending prerecorded messages to customers with an established business relationship without written consent in January 2007 would cause significant operational and implementation problems, and would limit calls that recipients have requested and expect to receive. Many of DMA's members plan comprehensive marketing campaigns for long periods of time. Companies have planned and implemented customer outreach well beyond the January 2, 2007 effective date of the Commission's policy. In addition, many customers have expressly requested calls from the companies with which they do business. If, however, these requests were not in writing – and it is unlikely that they were – then businesses could not use prerecorded messages to contact these individuals.

Obtaining signed, written consent is a time consuming and expensive process. Companies must contact customers with whom they have been transacting business by prerecorded messages and request that the consumers provide consent for the same calls they have already been receiving. Businesses must determine how best to reach their customers, how to obtain their signed consent, and how to store and organize these consents once received. Particularly given that the Commission's October notice will require businesses to do this during the busy holiday retail season, companies simply need more time to obtain the necessary consent. Given that the record is still open in this proceeding and no final decision has been made, DMA requests that the Commission should allow companies to continue operating under the existing safe harbor until the Commission issues final rules. Otherwise, companies may expend great resources obtaining signed, written consent and ultimately be subject to a different standard in the final rule.

Mr. Donald S. Clark
November 29, 2006
Page 3

In addition, while probably unintended, we believe that the FTC's rescinding of the "non-enforcement policy" could be interpreted to prohibit companies from using prerecorded messages even if written consent of the type proposed in the rule is obtained. Neither section 310.4(b)(1)(iv) nor 310.4(b)(4) of the Commission's rules governing abandoned calls contains exceptions for calls made with express consent, and these will be the provisions in effect pending the outcome of the proposed rule. Thus, even if written consent is obtained as proposed, until a final rule is issued, prerecorded calls made with express written consent could be entirely prohibited effective in January.

Finally, extension of the non-enforcement policy will not result in any change to the status quo for recipients of calls. Since telemarketing was first regulated at the national level in 1991, prerecorded calls to those with whom the caller has an established business relationship have been permitted without obtaining prior consent. Until 2003, the Telemarketing Sales Rule was silent with respect to prerecorded calls. At that time, the Commission issued rules governing abandoned calls that, if read literally, could have had the effect of banning the use of all prerecorded messages. The Commission has elected not to enforce such an interpretation of the rule, and formally adopted this position in the November 2004 announcement of its "non-enforcement policy" coupled with its safe harbor for calls to existing customers. Thus, by allowing calls to those with whom a caller has an established business relationship subject to the prompt opt-out ability in the message, the Commission would allow the status quo to remain in place pending completion of the rulemaking.

B. The DMA and its Members will Provide Comments in the Record in Response to the Commission's Proposal That May Impact the Commission's Final Rule

DMA believes that the information it submits will demonstrate that prerecorded messages to those with whom the caller has an established business relationship are in the best interest of all parties and that the current safe harbor presents the best set of rules. In addition, the past two years have provided significant data, which was not part of the record leading up to the FTC's October 2006 proposal, that should be considered by the Commission prior to enforcement.

DMA believes that, when complete, the record in response to the October proposal will provide strong support for a rule allowing prerecorded message calls to those with whom the caller has an established business relationship as long as the message includes a prompt and clear opt-out option. DMA's comments, and those of its members, will provide information about the opt-out technology being used; information showing that there are few complaints that the opt-out systems do not work; information about the cost of the opt-out technology; and information about the typical duration of prerecorded calls. Furthermore, DMA and its members will submit evidence about the many types of prerecorded calls to EBRs the consumers find useful and that it

Mr. Donald S. Clark
November 29, 2006
Page 4


is these useful calls that make up the vast majority of the EBR calls made using prerecorded messages.

In addition, DMA's members will submit evidence showing that consumers prefer, or are at least neutral to, receiving prerecorded messages as opposed to live calls in the context of an EBR and that the prompt opt-out enhances this choice. DMA and its members also will submit evidence that consumers have a low opt-out rate for prerecorded messages, even when provided with an opt-out option.

For the forgoing reasons, DMA requests that the Commission retain the non-enforcement policy until the conclusion of this rulemaking.

Thank you for your consideration. Please contact me with any questions.

Sincerely,


Stuart P. Ingis

cc: Lois C. Greisman (*via e-mail*)
Allen Hile (*via e-mail*)
Craig Tregillus (*via e-mail*)

Jerry Cerasale (*via e-mail*)
Ian D. Volner
Ronald M. Jacobs