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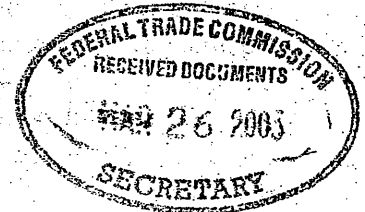
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March 26, 2003



[Timothy J. Muris, Chairman]
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20850

Re: Stay of Amended Telemarketing Sales Rule

Dear Chairman Muris:

We write on behalf of the American Teleservices Association ("ATA") to thank the Commission for staying the recorded message requirement in the Amended Telemarketing Sales Rule ("TSR") abandoned call safe harbor, 16 C.F.R. § 310.4(b)(4)(iii), until October 1, 2003. ATA appreciates the FTC's acknowledgement that prematurely implementing regulations that drastically impact the practices of an entire industry can have an extremely detrimental effect on that part of the U.S. economy supported by telemarketing. Toward that end, we believe the FTC may be unaware of the turmoil in the industry that has arisen notwithstanding the stay. In view of this circumstance, ATA respectfully submits, for the reasons explained below, that the FTC should revisit its grant of the stay to expand it to encompass all Amended TSR provisions that govern the use of predictive dialers.

The FTC granted the stay because it was "persuaded that telemarketers may be unable, despite their best efforts," to comply with the recording requirement of the abandoned call rule's safe harbor. The same is true of the safe harbor requirement in Section 310.4(b)(4)(i) of ensuring abandonment of no more than three percent of calls answered by a person. With the looming March 31, 2003, effective date of this new rule, and indeed the whole of the Amended TSR, telemarketers have found in their preparations to comply with the three percent standard that doing so presents serious problems for the industry.

We note as a threshold matter that it has recently come to our attention the FTC has taken the position that the telemarketing industry waived its objection to the three percent standard in the rulemaking proceeding. Nothing could be further from the truth. Indeed, the Statement of



Basis and Purpose announcing the Amended TSR noted ATA's "extreme ... argu[ment] against any regulation of abandonment rates." *Telemarketing Sales Rule; Final Rule*, 68 Fed. Reg. 4580, 4643 (Jan. 29, 2003) ("SBP") (emphasis added). Obviously an argument against "any" regulation of abandonment rates encompasses opposition to a three percent standard. The SBP also recited that a group of commenting telemarketers advocated a at five percent standard, *id.*, which also necessarily precludes acquiescence to a three percent mandate. In fact, in the "over 64,000" comments the SBP touts as being received in the proceeding, *id.* at 4582, the Commission was able to find only "two telemarketers" who believed the three percent standard was feasible, and even then it was able to say only that those two commenters "*essentially supported*" the standard. *Id.* at 4643 (emphasis added). The SBP recognized that "ATA asserted the three percent standard would result in 'a significant drop in efficiency' among ... its members." *Id.* There can be no claim that ATA waived its objection, or somehow acquiesced, to a three percent abandoned call rule.

It continues to be the case that a three percent standard will result in a significant drop in efficiency, and our members report that their preparations to comply with the standard have uncovered additional problems as well. First, as with the recorded message requirement, some telemarketers are encountering problems obtaining "technology that ensures abandonment of no more than three percent of calls" before the Amended TSR's effective date. Such "technology" may come in the form of equipment or software upgrades. Telemarketers are encountering unexpected problems obtaining and implementing the technology and/or assuring its operation in a manner that ensures no more than three percent of calls are abandoned. We thus respectfully disagree with in the FTC's conclusion in staying the recorded message rule that "extant equipment and software" will allow compliance with the remaining abandoned call safe harbor rules.

A significant problem also arises from confusion in attempting to apply the rules in the real world. In this regard, we note that in meetings and telephone conversations with the FTC staff, we learned the agency is preparing industry guidance to assist in applying the rules, but that this information will not be available for another month or two. We believe that, to the extent the Commission feels such assistance is necessary, that fact alone supports staying any rule for which guidance is forthcoming until agency direction is available. In any event, a stay of the predictive dialer rules is appropriate given the high level of industry confusion that currently prevails.

Confusion has arisen in significant part in understanding how to calculate three percent for purposes of applying the standard. It is unclear precisely what should be in the denominator when making the calculation. Do calls in which a recorded message is played (for the minority of telemarketers who have obtained the technology) count as abandoned? What about calls deemed not being answered by a person by answering machine detection technology, but that are in fact answered by a person? It is our understanding that the current state of predictive dialer technology may not necessarily be able count these calls as "dropped" and therefore factor them into the three percent. The "per day per calling campaign" measurement has also caused much



consternation among members who are presently striving to bring their practices into line with the three percent safe harbor requirement.

All told, the industry has encountered serious practical issues trying to implement the new rules. Thus, as with the recorded message requirement, the industry is facing problems complying, "despite its best efforts," with the Commission's predictive dialer rules. It has been, as noted in your grant of the stay, over three months since the Amended TSR was announced, and still these problems persist despite the industry's efforts. We note that these efforts commenced at the earliest feasible time. Intimation in the letter granting the stay that, "a nearly three-year long rule review and rulemaking proceeding" should have enabled the telemarketing industry to foresee the contours of the new rules, suggests the industry should have suspected the FTC prejudged issues in the proceeding. To the contrary, ATA and other telemarketing representatives participated in the proceeding in good faith with an expectation that their filings would be given due consideration in formulating rules and policy, and that the outcome of the proceeding was not preordained. Viewed from another perspective, the duration of the rulemaking proceeding, and the three-month period since the rules were first announced, suggest that the Commission has had ample time to provide the necessary clarifications.

As noted above, the industry was emphatic in its opposition to a government-mandated abandonment rate, and it offered sound practical and legal reasons for its opposition. There was no reason to believe, prior to the Amended TSR's publication, that the Commission would necessarily fashion an abandoned call rule in the form ultimately adopted. In any event, ATA submits that regulation of predictive dialers, which is what abandoned call rules target, is predominantly a technological issue which, as in the case of the similar matter of caller identification, should be subject to a much longer lead time, such as the one year granted for caller ID compliance.

Diligent efforts by telemarketers to modify their practices to comply with the Amended TSR have revealed significant practical problems with the new rule. ATA thus strongly believes the Commission must take action to remedy what is a substantial source of concern for telemarketers seeking to ensure that they are in compliance with the Amended TSR. We note that it is not an answer for telemarketers to simply forsake predictive dialers (as was suggested with respect to free-to-pay offers using preacquired account information in your response to DMA's stay request) until the industry or the FTC can get a more stable foothold on the path to compliance. Rather, ATA submits that the stay granted March 14, 2003, should be expanded to include the requirement in Section 310.4(b)(4)(i) that telemarketers attain a three percent abandonment rate to avoid liability arising from the use of predictive dialers. At a minimum, the FTC should clarify application of the three percent standard, paying particular attention to the issues raised above, *in advance of* the Amended TSR's March 31, 2003 effective date.

We are sure your agency's interest is the same as ours – enabling telemarketers to operate under the Amended TSR without risk of inadvertent non-compliance or undue confusion or

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harm. In keeping with that goal, we respectfully request expeditious action to remedy what is potentially a situation rife with uncertainty and apprehension.

Very truly yours,

A handwritten signature in cursive script that reads 'Robert Corn-Revere'.

Robert Corn-Revere
Counsel for ATA

cc: Hon. Sheila F. Anthony
Hon. Mozelle W. Thompson
Hon. Orson Swindle
Hon. Thomas B. Leary
J. Howard Beales III
Donald S. Clark ✓