

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to “TSR Prerecorded Call Prohibition and Call Abandonment Standard Modification, Project No. R411001” to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H-159 (Annex K), 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Comments containing confidential material must be filed in paper form, as explained in the Supplementary Information section. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments filed in electronic form should be submitted by visiting the Web site at <https://secure.commentworks.com/ftc-tsr> and following the instructions on the Web-based form.

To ensure that the Commission considers an electronic comment, you must file it on the Web-based form at the <https://secure.commentworks.com/ftc-tsr> Web site. You may also visit <http://www.regulations.gov> to read this proposed Rule, and may file an electronic comment through that Web site. The Commission will consider all comments that [regulations.gov](http://www.regulations.gov) forwards to it.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Web site, to the extent practicable, at <http://www.ftc.gov>. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from public comments it receives before placing those

speak to a prospective customer. An inevitable side effect of this functionality, however, is that the dialer will reach more consumers than can be connected to available sales representatives. In these situations, the dialer either disconnects the call (resulting in a “hang-up” call) or keeps the consumer connected with no one on the other end of the line in case a sales representative becomes available (resulting in “dead air”). The call abandonment prohibition, added to the TSR pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”),² is designed to remedy these abusive practices.³

Notwithstanding the prohibition on call abandonment, § 310.4(b)(4) of the TSR contains a safe harbor designed to preserve telemarketers’ ability to use predictive dialers, subject to four conditions. The safe harbor is available if the telemarketer or seller: (1) abandons no more than three percent of all calls answered by a person (as opposed to an answering machine); (2) allows the telephone to ring for fifteen seconds or four rings; (3) plays a prerecorded message stating the name and telephone number of the seller on whose behalf the call was placed whenever a sales representative is unavailable within two seconds of the completed greeting of the person answering the call; and (4) maintains records documenting compliance.⁴ Thus, to comply with this provision of the TSR, at least 97 percent of a telemarketer’s calls that are answered by a person (rather than an answering machine) must be connected to a sales representative. A

² 15 U.S.C. 6101 *et seq.* This and other amendments to the original TSR resulting from a rule review mandated by the Telemarketing Act, 15 U.S.C. 6108, took effect on March 31, 2003. TSR Statement of Basis and Purpose (“TSR SBP”), 68 FR 4580 (Jan. 29, 2003).

³ TSR SBP, 68 FR at 4641-45. The Telemarketing Act directed the Commission to prescribe rules prohibiting deceptive and abusive telemarketing acts or practices, including “a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy.” 15 U.S.C. 6102(a)(3)(A).

⁴ 16 CFR §§ 310.4(b)(4)(i)-(iv).

Several industry comments posited that consumers are interested in receiving prerecorded messages.²⁷ Although some of the examples cited to support this contention were prerecorded messages governed by the TSR (such as letting customers know of special promotional events or upcoming sales),²⁸ many of the examples, if not most, were informational messages that are not covered by the TSR at all.²⁹ For example, SBC cited a survey of 1217 of its DSL Internet access customers on the use of prerecorded informational messages to remind them of their service installation dates, in which 55.1 percent said they would like to receive such messages in the future.³⁰ As previously noted, such informational messages are neither governed nor prohibited by the TSR, because they are not “telemarketing” as defined by the Telemarketing Act³¹ or the Rule.³²

Adopting VMBC’s view that sellers would self-regulate and not abuse the goodwill of their customers, most of the industry comments that addressed the issue doubted that the volume

²⁷ VMBC at 6, 10; U.S. Chamber at 4; Call Command at 2; SBC Communications, Inc. (“SBC”), No. 000026 at 2, 4.; National Retail Federation (“NRF”), No. 000027 at 3.

²⁸ VMBC at 2; SBC at 2; NRF at 3.

²⁹ *E.g.*, Call Command at 2 (asking that the Commission acknowledge that prerecorded informational messages, such as notification about a change in flight schedules or about a product recall, are permissible, and suggesting that all such “transactional” messages, as that term is used in the CAN-SPAM Act, 15 U.S.C. 7702(17), be exempt from the TSR); Broadcast Solutions, No. OL-113933 at 1; SBC at 3; NRF at 3; VMBC at 2; Verizon at 5.

³⁰ SBC at 3 (acknowledging that the survey reports were not “directly apposite, as they relate to service activation and related transactional messages”). Similarly, VMBC cited arguably favorable reaction from 5.8 million consumers to prerecorded campaigns as measured by an increase of from 20 to 40 percent in response rates to “promotions” and “showing up for appointments” with Do Not Call requests “averaging 2/100ths of one percent.” VMBC at 6. Unfortunately, this merging of data for prerecorded messages that are not governed by the TSR with those that are, without specifying the opt-out method provided to consumers, provides little help in evaluating the potential impact of the proposed safe harbor.

³¹ 15 U.S.C. 6106(4).

³² 16 CFR 310.2(cc).

of prerecorded telemarketing messages that consumers receive would increase if the safe harbor proposal were adopted.³³ VMBC's comment further predicted that the likely result would not be an increase in calls, but that many "non-sale" calls would convert from live calls from sales representatives to cost-effective recorded messages.³⁴ Two industry comments disagreed. One acknowledged that, if allowed, prerecorded telemarketing messages would increase in number given their low cost.³⁵ Another observed that the proposed safe harbor would free it and its telemarketers from using recorded messages solely for informational purposes, "and put prerecorded messages to additional valuable uses."³⁶

Only two industry comments addressed the question posed in the NPRM of whether the proposed safe harbor would complicate Commission enforcement actions against sellers or telemarketers who falsely claim to have an established business relationship with the consumers they call. Both opined that potential enforcement problems should not be an issue because the burden of proving the existence of an established business relationship falls on the seller or telemarketer, not the Commission.³⁷

The industry comments uniformly urged the FTC to adjust the TSR to track the FCC's regulations that permit the use of prerecorded messages for telemarketing to established customers.³⁸ Some went so far as to argue that the Commission lacks jurisdiction to regulate

³³ *E.g.*, VMBC at 10; U.S. Chamber at 5; DMA at 9; SBC at 2; NRF at 4.

³⁴ VMBC at 10. However, since such "non-sale" calls are not governed by the TSR, the Rule does not prevent the use of prerecorded messages for this purpose.

³⁵ West at 2.

³⁶ SBC at 3 n.7.

³⁷ Infocision Management Corp. ("Infocision"), No. OL-113920 at 4; West at 3.

³⁸ VMBC at 12; Infocision at 1; SoundBite Communications, Inc. ("Soundbite"), No. OL-112919 at 1-2.

prerecorded telemarketing messages because Congress has given exclusive authority to the FCC to do so.³⁹ One conceded that the Commission may have authority to regulate deceptive, unfair, and abusive telemarketing practices, but cited a need for clarification of the TSR's applicability to prerecorded messages.⁴⁰

The subject that elicited the greatest industry comment was the proposed safe harbor requirement that consumers be presented, at the outset of a prerecorded message, with an interactive mechanism to exercise their company-specific Do Not Call rights. Almost all opposed this aspect of the proposal,⁴¹ with two objecting that it unconstitutionally mandated compelled or "forced speech."⁴² Several argued that requiring a disclosure at the outset would result in a large number of Do Not Call requests, and might confuse consumers who would otherwise wish to hear the message.⁴³ Others contended that the method authorized by the FCC of providing a number during or at the end of the message that consumers can call with a Do Not Call request works well, and should be adopted by the FTC.⁴⁴ Many objected that interactive

³⁹ Soundbite at 1-2; Infocision at 1; *but see*, United States Senate, No. OL-113862 (Senators Bill Nelson and Dianne Feinstein commented that "there is no reason why the FTC should promulgate an anti-consumer rule to meet the FCC's lower standard for prerecorded messages.").

⁴⁰ Verizon at 5.

⁴¹ DMA at 11; Infocision at 4; Heritage at 1-2; SBC at 4; West at 3; Visa at 2; Verizon at 6; Soundbite at 2; Convergys Corp. ("Convergys"), No. OL-113952 at 5-6; National Association of Realtors ("NAR"), No. EREG-000005 at 1-2; National Retail Federation ("NRF"), No. 000027 at 5; The Broadcast Team, No. OL-112822 at 2.

⁴² Heritage at 2; Infocision at 3.

⁴³ VMBC at 10; U.S. Chamber at 5; DMA at 9; SBC at 2; NRF at 4; Heritage at 1-2; Soundbite at 2; SBC at 4; West at 3.

⁴⁴ Call Command at 1; Convergys at 5; DMA at 11; NAR at 1-2; Visa at 2; Verizon at 6-7; NRF at 4-5. Verizon also argued that requiring that Do Not Call information be provided "at the outset" of a prerecorded message would conflict with current FCC regulations. Verizon at 6.

overwhelmingly find prerecorded telemarketing messages more intrusive and invasive of the privacy they enjoy in their homes than live telemarketing calls,⁵⁰ primarily because they are powerless to make themselves heard.⁵¹ As one consumer put it, “[t]he telephone is for conversing with another human being, not for invading my home with inexpensive advertising.”⁵²

Like many industry comments, most of the consumer comments that seemed to support the proposal to allow prerecorded messages in telemarketing calls to established customers exhibited a basic misunderstanding of the TSR’s applicability. Specifically, the majority of these relatively few supportive consumer comments indicated that they did not want the Commission to prohibit prerecorded informational messages such as reminder messages – although such messages have never been covered, much less barred, by the TSR.⁵³ These consumers expressed

(“NCL”), No. OL-112905 at 5. Well over 13,000 of the 13,550 consumer comments in the record clearly opposed allowing prerecorded telemarketing messages, with no more than 77 of the comments indicating arguable support for the proposed amendment.

⁵⁰ Some 2,100 of the consumer comments opposing prerecorded telemarketing calls specifically objected that they constitute an invasion of privacy.

⁵¹ *E.g.*, Myers, M., No. OL-100768 (“Pre-recorded messages are even more annoying than calls from live people. You can’t interrupt, you can’t ask questions and you can’t respond.”); Allen, No. OL-103079 (“I cannot ask a recording to clarify who they are or what our existing relationship is.”); Stahl, K., No. OL-101878 (“The very worst form of telemarketing is the one made by a machine. Pre-recorded messages are just as invasive and unwanted, and far more frustrating.”); Levy, No. OL-102365 (“No business should be able to call me unless I have a pre-existing relationship (one that >I< recognize), but even a company I do business with should hire someone to actually speak to me.”) (punctuation in original); Powell, D., No. OL-113775 (“Recorded messages like this are more than an annoyance, they are a way for business to avoid talking to their customers, and instead just talk at them.”).

⁵² Watson, B., No. OL-108960; *cf.* Nungesser, R., No. OL-112535 (uninvited prerecorded calls are “no different than a door to door salesman breaking you[r] window, and entering your home to sell you his product only . . . it will be a robot, not a person.”).

⁵³ Of the 77 positive consumer comments, more than half – 47 – sought only to preserve prerecorded informational messages that are not prohibited by the TSR. These 47 consumers opposed any limitation on prerecorded “reminder” messages, with some 36 of them seeking to avoid any need to sign a consent form to receive such messages, apparently in the

appreciation for prerecorded informational messages about delivery dates for previously purchased goods or services, medical prescription order notifications, flight cancellation alerts, and overdue bill and appointment reminders.⁵⁴ Yet some of the same consumers made it clear they opposed receiving prerecorded telemarketing sales pitches.⁵⁵ Thus, there is only the barest consumer support in the record for the proposed safe harbor for prerecorded telemarketing sales calls to established customers.

The widespread opposition expressed in this record to the infringement on personal privacy through prerecorded telemarketing calls to home telephones stands in sharp contrast to the consumer support in the record of the TSR amendment proceeding for including an established business relationship exemption for telemarketing using sales representatives. In that proceeding, the Commission provided such an exemption from the Do Not Call provisions after 40 percent of the consumers who commented supported the exemption.⁵⁶ Here, only 15 consumer comments – a scant tenth of one percent of the more than 13,000 consumer comments

mistaken belief that this would be necessary if the proposed amendment were not adopted. *E.g.*, Haas, No. OL-113929; Tran, No. OL-113929; Lopez, No. OL-113975; Schroeter, No. OL-113882; DeSantis, No. OL-113892. One consumer group correctly noted that such strictly informational messages “would not fall under the definition of ‘telemarketing’” in the TSR. NCL at 3.

⁵⁴ _____ *E.g.*, Matthews, D., No. OL-100004; Forrette, No. OL-113959; Bartholow, D., No. OL-113662; Auerbach, No. OL-101665; Oberly, No. OL-105967.

⁵⁵ _____ *E.g.*, Matthews, D., No. OL-100004 (“Some pre-recorded computer generated calls are convenient and necessary” but “[t]elemarketing computer generated ‘cold calls’ are definitely a problem.”). Forrette, No. OL-113959 (“I can think of several cases where I find this very useful, such as notification from my airline when there’s a schedule change to my flight. As long as the prohibition on the use of pre-recorded messages for ‘cold calling’ remains in place, I think it’s okay.”); Bartholow, D. No OL-113622 (“Bill reminders are not the same as telemarketing sales calls.”); Consumer Assistance Network, No. OL-113928 (“The consumer would rather receive a [reminder] message rather than a telemark[et]ed call.”).

⁵⁶ TSR SBP, 68 FR at 4593 n.141.

that addressed the proposed amendment – expressed unambiguous support for the proposed safe harbor for prerecorded message telemarketing to established customers.⁵⁷

Consumers also expressed concern about the potential costs, including the risks to health and safety, if the proposed safe harbor allowing prerecorded telemarketing messages to established customers were adopted. For example, consumers who subscribe to telephone company or other voice mail services protested having to pay for storage of messages they do not want, which can exceed their allotted storage capacity and prevent them from receiving the messages they need, as did owners of answering machines.⁵⁸ Consumers with home-based businesses objected to the costs incurred when their home telephone lines are tied up by telemarketing calls,⁵⁹ and even small businesses and government agencies that are not protected

⁵⁷ Only 15 of the 77 consumer comments that arguably supported prerecorded telemarketing calls did so without reservation or apparent misunderstanding. *E.g.*, Hamilton, No. OL-113099 (“I would be in support of the change. . . . I would rather hang up on an automated machine than a live person.”); Curran, D., No. OL-105145; Childress, No. OL-102612; Young, E., No. OL-112546. Another 13 approved of prerecorded sales calls from businesses they know and regularly patronize, but not necessarily from any business from which they have made a purchase. *E.g.*, 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.”); Bartholow, D., No. OL-113622. Two consumers backed prerecorded messages in the mistaken belief that such messages would be “permission based” opt-in messages. Taylor, J., No. OL-105274; Taylor, R., No. OL-105171. The remaining 47 supported prerecorded “reminder” messages, as previously noted. *See* note 53, *supra*.

⁵⁸ *E.g.*, Allison, No. OL-108414 (“In the recent election one citizen had her answering machine [so] filled with phone messages from a candidate that her child could not get word to her of an emergency at the child’s school.”); O’Connor D., OL-111858; Rose, C., OL-111837; Micret, OL-111402; Rickey, OL-104029; *see also* PRC at 6-7; NCL at 3. Neither the TSR nor the proposed new safe harbor, however, prohibits the use of prerecorded messages when an answering machine picks up a call. *See* the discussion in Section IIE, *infra*.

⁵⁹ *E.g.*, Brown, R., No. OL-104366; Amsberry, No. OL-105113; Lasting Fitness, No. OL-110413; Miller, No. OL-103424; Grover, No. OL-109774; Pearlman, S., No. OL-112275.

by the TSR lodged the same complaint.⁶⁰ Several consumers cited the danger of the loss of use of their telephone lines, which can be tied up for some period of time even after the recipient hangs up on a prerecorded message.⁶¹ A few consumers cited instances when prerecorded messages prevented them from making emergency calls,⁶² and a community shelter that forwards its calls to allow staff counselors to receive them on their home telephones reported that “[w]e are dealing with life and death situations from suicide to substance abuse to domestic violence” and clients “are unable to get to a crisis counselor due to the high volume of telemarketers calling our [home] phone number.”⁶³

⁶⁰ *E.g.*, Northeast Harbor Inn, Inc., No. OL-113439; Bart’s Pneumatics Corp., No. OL-107508; Bus. Innovations, No. OL-110414; *cf.* Idaho Small Bus. Dev. Ctr., No. OL-113259; County of Berks - Prison, No. OL-105593.

⁶¹ *E.g.*, Graham, No. OL-104100 (“If you needed to call for a fire truck or an ambulance or poison control and some recorded message was tying up your phone, would you think it was OK?”); Vernen, No. OL-110383 (prerecorded calls “most dangerously - frequently fail to release the line promptly when hung up on. This presents an immediate risk to the health and safety of the call recipient since the telephone line is unavailable in an emergency.”); *see also, e.g.*, Adkins, No. OL-104921; Albright, D., No. OL-105813; Alquist, No. OL-113229; Schmaljohn, No. OL-110028; Granzo, No. OL-104469; Pickett, A., OL-104461; Simnacher, No. OL-108720; Miller, C., No. OL-105006. As the legislative history of the TCPA notes, S.Rep. No. 102-178, at 10 (1991), some telephone networks are not capable of notifying callers that a consumer has hung up, thereby excusing telemarketers from complying with an FCC requirement that they release the line “within 5 seconds of the time [such] notification is transmitted.” 47 CFR 68.318(c). It appears from the comments that many networks still lack this capability. Thus, depending on their local network, consumers may have to wait until the end of what may be a lengthy prerecorded message before their telephone line is released.

⁶² Friedman, No. OL-110265 (a disabled consumer unable to make an emergency call because the recorded message would not disconnect); Gardiner, W., No. OL-100542 (an elderly consumer who complained that the receipt of prerecorded messages twice prevented him from contacting a doctor). *See also*, NCL at 3; PRC at 11 (citing a comment it received from a self-identified “former legitimate telemarketing salesman” objecting to allowing prerecorded messages because “[t]here are one or more deaths on record Nationally that were precipitated by a prerecorded message that would not cede the line it was on, even though the receiving party had hung up!”).

⁶³ Chico Community Shelter Partnership, No. OL-109650; *cf.* Udehn, No. OL-114005 (“Callers are persistent and do not like to release phone lines until they make a sale, even

Consumers emphasized the difficulties they experience with prerecorded messages in exercising their company-specific Do Not Call rights. Many objected to the fact that they could not tell a prerecorded message to put them on the seller's Do Not Call list, as they could with a sales representative.⁶⁴ Some consumers reported that the mechanism typically provided for exercising their Do Not Call rights is impractical,⁶⁵ both because they have to wait until the end

to allow emergency patient calls. I need a line uncluttered by telephone SPAM to continue emergency room coverage.”).

⁶⁴ *E.g.*, 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.”); Irving, No. OL-103862; *see also, e.g.*, Sawyer, No. OL-108895; Goltz, OL-107085; Hancock, J., No. OL-112529; Blumberg, No. OL-104484; O’Daire, No. OL-113753; Salgado, No. OL-111816; Von Kennen, No. OL-113646; Ianson, No. OL-105278; Valum, No. OL-102442; Van Baren, No. OL-101942; Zimmerman, J., No. OL-113999.

⁶⁵ *E.g.*, 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].”).

of what may be a lengthy message to get a number to call to speak to an agent,⁶⁶ and because the Do Not Call option provided at the end of the message simply does not work.⁶⁷

More generally, the comments attest that consumers found the company-specific opt-out regime required to stop unwanted prerecorded messages prior to the advent of the Registry extremely burdensome and frequently ineffective.⁶⁸ Apparently assuming that a company-specific opt-out might not take the form of an interactive method at the outset of the call (as proposed by the Commission), some consumers complained that the burden would be placed on them to listen until the end of unwanted messages to obtain an opt-out telephone number, to copy

⁶⁶ *E.g.*, Sahagian, No. OL-113021 (an “unemployed telemarketing manager” who states that “[o]ften one must wait until the end of the message for contact information, write down a phone number, call back, turn down a live sales offer, ask to speak with a manager, and then finally ask to be deleted from future calling campaigns.”); Nobles, No. OL-105403, (“The requirement[s] that they identify themselves and allow me to ask them to remove me from their calling list are meaningless, since that information is always supplied at the very end of the call.”); Stahl, K., No. OL-101878; Schneider, P., No. OL-101484. The call-back requirement that consumers describe, if permitted by FCC rules, does not comply with the safe harbor proposal in the NPRM because it fails to give consumers an opportunity to exercise their Do Not Call Rights during the call.

⁶⁷ *E.g.*, Blumberg, No. OL-104484 (“There is always an option to wait until the end of the message and press a number to talk with a person but only in rare instances does this work.”); Vinegra, No. OL-104055 (“[I]n my experience, automated phone spam is the MOST likely to not have a valid way to get off the list. Oh, sure, it may give you an 800 number to call, but that’s likely to reach some convoluted voicemail system that never gets you anywhere.”); Fiol, No. OL-112458 (“I do not believe that offering consumers the option of hanging up and calling an 800 number is an effective one. It only worsens the interruption and imposition on the consumer’s time, and . . . frustrate[s] the consumer if the 800 number is busy or even inoperative.”).

⁶⁸ *E.g.*, Gollinger, No. OL-103929 (“This puts an undue burden upon the consumer to attempt to contact the company to have their name deleted from the call list.”); Wahlig, No. OL-104503 at 1 (citing the “unjustifiable burden on citizens who wish to assert their DNC rights”); Tomas, No. OL-101671 (“Instead, the burden is placed on the victim’s shoulders to contact the telemarketer to have himself removed from the call list.”); Ayers, T., No. OL-113131; Bashor, No. OL-113062; Fiol, No. OL-112458; LaMountain, No. OL-101888; Boyd, M., No. OL-113844; Hall, No. OL-104082; Grace, No. OL-113784; Piro, No. OL-112925.

established customers,⁷³ many consumers contended that neither a prior inquiry nor purchase implied their consent to receipt of future *prerecorded* solicitations from a seller,⁷⁴ contrary to prior consumer support for *live* telemarketing calls.⁷⁵ Many of the consumer comments argued that, given the intrusive and impersonal nature of prerecorded messages, prerecorded telemarketing calls should not be permitted at all without the consumer’s prior consent.⁷⁶ In addition, many objected to what they regard as the overbreadth of the TSR’s definition of an “established business relationship,”⁷⁷ which some regarded as threatening to make a “mockery”

⁷³ 1992 FCC Order, 7 FCC Rcd 8752, ¶ 34 (concluding that a “solicitation can be deemed invited or permitted by a subscriber in light of the business relationship.”).

⁷⁴ *E.g.*, Sancibrian, No. OL-106078; Salem, No. OL-107247; Sartin, No. OL-104554; Laucik, No. OL-104859; Wortman, No. OL-103376; Corey, No. OL-105981; Innes, No. OL-105931; Brown, R., No. OL-107136; Troup, No. OL-103143; Goland, No. OL-100107.

⁷⁵ *See* note 56, *supra*, and accompanying text. Many of the consumer comments opposing expansion of the “established business relationship” exemption did not distinguish between prerecorded calls and live calls from a sales representative. Consequently, it is impossible to determine whether these comments would support an established business relationship exemption for live telemarketing calls, or whether they reflect a change in consumer attitudes toward the exemption.

⁷⁶ EPIC at 2, 14; PRC at 4, 9; NCL at 4; *see also, e.g.*, Barry, A., No. OL-104109; Williams, K., No. OL-101321; North, W., No. OL-103090; Schnautz, No. OL-104508; Tipping, No. OL-109310; Twilling, No. OL-108395; Viggiano, No. OL-108516.

⁷⁷ *E.g.*, 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. OL-100891 (“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.”); *see also, e.g.*, Holt, C., No. OL-102518; Schendel, K., No. OL-101419; Veech, No. OL-110162; Ehlinger, No. OL-105751; Eide, No. OL-102754; Erskine, D., No. OL-109355; Volek, No. OL-100697; Inman, J., No. OL-102319; Verner, No. OL-104134; Islam-Zwart, No. OL-100028; Sampson, No. OL-106004; Salisbury, No. OL-104292.

of the Registry⁷⁸ – especially if the use of prerecorded messages is permitted.⁷⁹ These consumers foresee that allowing prerecorded messages will likely increase the number of “established business relationship” telemarketing campaigns, with the result that consumers will have to assert company-specific Do Not Call requests repeatedly for different sellers from which they made a one-time purchase.⁸⁰ Moreover, some consumers reported that they receive both live and prerecorded telemarketing calls from businesses with which they have no “established business relationship.”⁸¹

Many consumers also commented that since they listed their telephone numbers on the National Do Not Call Registry, they have come to rely on it to shield them from unwanted

⁷⁸ Sanderson, No. OL-101447. *See also* Sager, No. OL-104269; Yarrow, No. OL-102563.

⁷⁹ EPIC at 14; PRC at 9; NCL at 3.

⁸⁰ *E.g.*, Hancock, J., No. OL-112529 (“Since a ‘business relationship’ is readily established by any inquiry or purchase, the universe of companies that can claim a basis to make junk phone calls is huge.”); Talmo, No. OL-110438 (“A few years ago, most of my purchases were made within my community. . . . The digital world has opened up very far-reaching so-called relationships. . . . I now make many one-time [Internet] purchases from companies I may never contact again. I fear that these simple one time purchases will constitute a so-called business relationship.”); Argyropoulos, No. OL-102968 at 1 (“Companies are offering free or below-cost inducements to establish business relationships for the primary purpose of acquiring the ability to telemarket to consumers in the Do Not Call registry.”).

⁸¹ *E.g.*, Fryman, No. OL-101503 (“The established business relationship clause of the existing system has been stretched and twisted beyond all recognition, such that companies that we have had no ‘business relationship’ with in over 5 years are still calling.”); Anderson, J., No. OL-102561 (“I get 3-5 calls a day, with recorded messages. And NO, they are NOT people I’ve done business with!”); Holt, C., No. OL-102518, (“I constantly receive solicitations from companies who claim I have a relationship with them, and I’ve never heard of them before.”); Blumberg, No. OL-104484 (“I get dozens of telemarketing calls each week from people I have no prior business relationship with. . . .”); Saunders, No. OL-109125 (“I signed up as soon as the list opened. I STILL get calls, both human and PRE-Recorded. . . .[A]s I was writing this, I was just interrupted by a TELEMARKETING CALL!!!!!! . . . [I]t was not a company we had ever done business with and they would not tell me how they got this number.”).

telemarketing calls, including prerecorded messages.⁸² A large number fear the proposed safe harbor will create a “loophole” that will dilute the effectiveness of the Registry in preventing unwelcome intrusions on their privacy at home.⁸³ Consumers and their advocates expressed concern that, if the proposed new safe harbor were adopted, marketplace economics could soon produce a flood of prerecorded telemarketing messages that would engulf the privacy protection provided by the Registry. They cited, in particular, such recent digital technologies as Voice Over Internet Protocol (“VoIP”) as likely to lower the costs of prerecorded telemarketing messages to the point that they would be used extensively, if permitted.⁸⁴ Thus, several comments argued that allowing the use of prerecorded messages in telemarketing to established

⁸² E.g., Thompson, A., No. OL-104385 (“I recently moved, and my new phone number was not on the Do Not Call list; I received more ‘junk’ calls than I received normal phone calls. Adding my new number to the list made having a phone bearable again.”); Musgrave, No. OL-106135; Sampson, No. OL-106004; Anholt, No. OL-104141; Dougherty, J., No. OL-106035; Gordon, M., No. OL-109877; Matson, No. OL-111933; Gunnells, No. OL-108503; McCarthy, L., No. OL-101367; Sayer, No. OL-100407.

⁸³ Over 5,900 consumer comments asserted that there is no need to create a “loophole” or to adopt the amendment. E.g., Brown, R., No. OL-101294; Hill, A., No. 000037; Moore, M., No. OL-101468; Fryman, No. OL-101503; Vrignaud, No. OL-101542; Jester, No. OL-101685; Selmi, No. OL-102168; Miller, No. OL-103424; Vogel, No. OL-105708 at 1.

⁸⁴ Sacerdote, No. OL-112192 (“*The cost of placing such automatic call[s] is essentially zero, and the desire to place such calls will therefore be nearly infinite.*”) (emphasis added); EPIC at 5-6 (citing a 1999 news report that VMBC could leave “messages with 1% of the U.S. population over a two-day period,” and the increasing use of low cost Internet services such as VoIP or Internet telephony); PRC at 8-9 (citing an August 10, 2004, CNET article about software that can deliver up to 1,000 synthetic calls every five seconds to Internet Protocol addresses assigned to telephones); NCL at 2-3 (arguing that low cost use of prerecorded messages rather than salespersons and expansive reading of ‘established business relationship’ will result in increase of telemarketing calls); *see also, e.g.*, Allan, A., No. OL-103079; United States Senate, No. OL-113862 at 3; Bates, J., No. OL-100012; Fisher, B., No. OL-109494; Watson, B., No. 108960.

First, if consumers had little or no aversion to prerecorded calls from sellers with whom they have an established business relationship, the fact that such calls avoid the twin harms of “dead air” and “hang ups” associated with abandoned calls would weigh heavily in favor of the adoption of a new safe harbor. The record here provides compelling evidence, however, that consumer aversion to prerecorded message telemarketing – regardless of whether an established business relationship exists – has not diminished since enactment of the TCPA, which, in no small measure, was prompted by consumer outrage about the use of prerecorded messages. The comments in this record demonstrate that consumers continue to view such calls as an abusive invasion of their privacy, and an even greater invasion of their privacy than live telemarketing calls because they are powerless to interact with a recording. Indeed, almost all of the very few consumers who commented in favor of prerecorded messages confined their comments strictly to informational calls, in some cases qualifying their support with negative comments about prerecorded sales calls.⁸⁶

In addition, some consumers are troubled by the potential hazards that prerecorded messages may pose for their health and safety when home telephone lines cannot be released in emergencies. As this record attests, in at least a few instances, prerecorded messages of indeterminate length have prevented consumers from making emergency calls – a concern which was an important factor leading to passage of the TCPA.⁸⁷ While the record does not suggest that obstruction of emergency calls by prerecorded messages is a common occurrence, the seriousness of the potential consequences when it does occur creates legitimate cause for concern.

⁸⁶ See note 54, *supra*.

⁸⁷ S.Rep. No. 102-178, at 10 (1991).

Likewise, 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. There is support in the record for prerecorded informational messages – *i.e.*, messages without any sales pitch – which are not prohibited by the TSR; yet there is virtually none for prerecorded telemarketing messages. Accordingly, this second potential rationale for adoption of a new safe harbor is not supported by the record – a fact that assumes particular importance in view of Supreme Court precedent that has long recognized the significant governmental interest in protecting residential privacy.⁸⁸

The third possible rationale for a new safe harbor – that sellers will self-regulate the number of prerecorded messages they send in order to preserve the goodwill of established customers⁸⁹ – is similarly unpersuasive. Although it may be that well-established businesses with brand or name recognition will engage in such restraint, the same is not necessarily true for new entrants and small businesses in highly competitive markets. The proposed safe harbor, if approved, would expose consumers, including those who have entered their telephone numbers on the Registry, to such prerecorded messages, potentially from every seller from whom they have made a single purchase in the past 18 months. In addition, because the TSR’s definition of an “established business relationship” includes consumers who have not made a prior purchase, but simply an inquiry, sellers would have less of an incentive to self-regulate the number of

⁸⁸ *E.g., Frisby v. Schultz*, 487 U.S. 474 (1988); *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728 (1970).

⁸⁹ Several industry comments inconsistent with this rationale argue that because the burden of proof of an established business relationship would fall on the seller, no new enforcement concerns would be created by a safe harbor for prerecorded calls. As these comments reflect, the industry recognizes that the burden of this affirmative defense rests on sellers and telemarketers to prove that the seller has an established business relationship with the party called, 16 CFR 310.4(b)(1)(iii)(B)(ii), just as in the express written agreement exception, 16 CFR 310.4(b)(1)(iii)(B)(i), and the Do Not Call safe harbor, 16 CFR 310.4(b)(3).

prerecorded messages they send to such consumers, because they have no established customer to lose, but only a customer to gain. The likelihood that industry-wide self-restraint would be effective must be assessed with an eye toward the industry's record of compliance with the TSR to date. While overall compliance with the Do Not Call provisions of the TSR is quite good, not all covered entities are complying.⁹⁰ The compliance record presents a particular problem with respect to consumer concerns about the breadth of the industry's interpretation of what constitutes an "established business relationship," as the consumer comments and the Commission's law enforcement experience indicate.⁹¹

This argument also ignores the fact that the cost of conducting live telemarketing campaigns with sales agents, as now permitted by the TSR, is itself a separate, significant check on the number of such campaigns. Thus, it is reasonable to expect that the substantially lower cost of prerecorded message telemarketing (compared to live telemarketing campaigns with sales agents) would significantly increase the use of such campaigns, at least by new entrants and

⁹⁰ From December 31, 1995 until March 25, 2003, the Commission brought 162 cases against telemarketers alleging violations of the TSR. Since March 31, 2003, the effective date of the amended TSR, 24 cases alleging violations of the TSR's Do Not Call provisions, and another 37 cases alleging other TSR violations by telemarketers have been brought by the Commission or the Department of Justice at the Commission's request. *E.g.*, *FTC v. Universal Premium Serv.*, No. 06-0849 (C.D. Cal. entered Feb. 21, 2006) (*ex parte* TRO entered to halt alleged TSR violations in "WalMart Shopping Spree Scam" involving continuing calls to consumers who had asked to be placed on the seller's company-specific Do Not Call list); *United States v. DirecTV, Inc.*, No. SACV05-1211 (C.D. Cal. filed Dec. 12, 2005) (\$5.3 million civil penalty settlement for alleged TSR violations in making calls to consumers on the Registry, and for allegedly assisting a telemarketer in making prerecorded telemarketing calls that violated the call abandonment safe harbor).

⁹¹ In *United States v. Columbia House Co.*, No. 05C-4064 (N.D. Ill. filed July 14, 2005), the Commission obtained a \$300,000 civil penalty settlement for alleged calls to tens of thousands of numbers on the Registry. Although the defendant claimed an "established business relationship" with the consumers it called, the Commission alleged, after investigation and analysis, that most were calls to consumers who last made a purchase from the defendant far outside the prior 18-month period during which the exemption would have applied, and that other calls were made to consumers who had previously instructed the company not to call them.

small businesses that lack brand or name recognition. It is no less reasonable to predict that, as new digital technologies further reduce the cost of prerecorded telemarketing, the volume of prerecorded calls will increase. The record indicates that new digital technologies, including VoIP, are likely to reduce the cost of transmitting prerecorded telemarketing messages by telephone dramatically, if not to “essentially zero,” in the foreseeable future.⁹² As the costs decrease, the economic incentives to increase the use of prerecorded telemarketing messages for advertising will multiply, increasing the flow of prerecorded messages consumers receive in their homes.

Thus, there is no apparent rationale for according special treatment to prerecorded telemarketing calls to established customers. Nevertheless, there remains the industry contention that failure to adopt the proposed safe harbor would be contrary to the mandate of the Do Not Call Implementation Act (“DNCIA”),⁹³ because FCC regulations permit certain prerecorded

⁹² E.g., Mari-Len de Guzman, *Spam may be a future threat to VoIP*, Computerworld, Sept. 7, 2005, at 2, available at <http://www.computerworld.com/networkingtopics/networking/story/0,10801,104442,00.html> (citing Spam over Internet Telephony (SPIT) as a growing concern for VoIP users because technology would allow artificial messages to be sent to 30,000 IP phones in a second and costs would be “essentially zero”) (emphasis added); Associated Press, *Voice Over Internet Use Soaring*, Yahoo! News, Mar. 1, 2006, available at <http://www.ladlass.com/ice/archives/010819.html> (reporting that the number of users of Internet telephone services tripled in 2005, jumping from 1.3 million users of VoIP to 4.5 million); Deborah Solomon, *AARP’s Antagonist*, N.Y. Times Magazine, Mar. 13, 2005, at 23 (explaining how automated telephone messages are “extraordinarily inexpensive” and efficient, and citing, as an example, calling every household in North Dakota in just four hours for \$10,000.); *VoIP to Open Door for Flood of Overseas Telemarketing*, VoIPNEWS, May 17, 2005, <http://web.archive.org/eb/20050316232140/www.voip-news.com/art/6q.html> (citing Burton Group analyst Fred Cohen who predicts that “the average enterprise or household could see as much as 150 calls a day” from telemarketers using VoIP based in part on the price of Internet telephony which has cut costs by a factor of 100).

⁹³ Public Law No. 108-10, 117 Stat. 557 (2003). A related argument asserted in some industry comments, that Congress gave *exclusive* jurisdiction to the FCC to regulate the use of automated dialing and announcing devices, has been rejected by each court that has considered the question. *Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228, 1237, 1259 (10th Cir.), cert. denied, 543 U.S. 812 (2004); *Nat’l Fed’n of the Blind v. FTC*, 420 F.3d 331, 337 (4th Cir. 2005),

someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests.”⁹⁸ In updating its regulations in 2003 to comply with the DNCIA, the FCC elected to retain the exemption, stating that “[t]he record reveals that an established business relationship exemption is necessary to allow companies to contact their existing customers.”⁹⁹

As a result, the relevant provisions of the FCC rules and the TSR differ to the extent that the FCC rules permit prerecorded calls where the seller has an established business relationship with the party called, and the TSR's call abandonment prohibition does not.¹⁰⁰ While regulatory uniformity may be a laudable goal, it is not a sufficient basis for conforming the TSR to the FCC's regulations given the Congressional mandate that the Commission's Telemarketing Act regulations prohibit abusive telemarketing calls – and particularly given the lack of support in the record for exempting such calls from the Rule's prohibition.¹⁰¹ In sum, the record does not establish a rationale that would warrant special treatment for prerecorded message telemarketing when directed to consumers with whom the seller has an established business relationship.

An additional consideration articulated in the record supports the Commission in its conclusion not to adopt the new safe harbor VMBC sought: the potential of such a change to

⁹⁸ 1992 FCC Order, 7 FCC Rcd 8752, ¶ 34.

⁹⁹ 2003 FCC Order, 68 FR at 44165. In comments filed with the FCC during the rulemaking it conducted pursuant to the DNCIA, the FTC specifically urged the FCC to eliminate this discrepancy, as the FCC's ruling acknowledged. 2003 FCC Order, 18 FCC Rcd 14014, 14109, ¶ 156 & n.556. However, the FCC declined to conform its prerecorded message rules to the FTC's TSR, with no explanation except that the “current exception is necessary to avoid interfering with ongoing business relationships.” *Id.* at 95.

¹⁰⁰ As noted, the TSR addresses only calls delivering a recorded message when a person answers, as opposed to an answering machine or voice mail system.

¹⁰¹ The Commission's view might be otherwise if the two sets of regulations were so contradictory that they imposed inconsistent obligations on sellers and telemarketers, but that is not the case here, where compliance with the more restrictive requirements of the TSR does not violate the FCC regulations.

undermine the effectiveness of the National Do Not Call Registry. There can be no question that public support for the Do Not Call Registry is overwhelming and widespread. As of September 1, 2006, consumers had registered more than 130 million telephone numbers, choosing to “opt in” to the protection provided by the Registry to keep unwanted telemarketing calls from invading and disturbing the privacy of their homes. The importance of the Registry to millions of consumers in preserving personal privacy in their homes cannot be understated or underestimated, as the consumer comments on the record in this proceeding make clear.

Nevertheless, the Commission is mindful of the legitimate interest of businesses in communicating with their established customers. The communication interest in such calls is one reason the TSR expressly permits sellers and telemarketers to make live telemarketing calls to consumers whose telephone numbers are listed on the Registry, provided the seller has an established business relationship with each consumer who is called, or has obtained a written agreement to receive such calls that is signed by the consumer. The safe harbor VMBC requested would have altered the delicate balance the Commission has struck between legitimate, but competing, privacy and communication interests. If a safe harbor that would permit prerecorded telemarketing messages to established customers were created, it seems certain that consumers whose telephone numbers are listed on the Registry would receive some greater number of telemarketing messages than they do now. Although reasonable people may differ on the likely size and scope of that increase, there can be no dispute that it would come at some cost to the privacy of consumers in their homes. Based on the record to date, the concern is a very real one that consumers, to some degree, would return to the same burdensome situation that existed before the Registry, when they were repeatedly having to assert a company-specific Do

Not Call remedy that the Commission deemed inadequate for commercial sales solicitation calls when it created the Registry.¹⁰²

Only one issue remains to be considered. In drafting the proposed new safe harbor in response to the VMBC petition, the Commission sought to minimize the potential harms of prerecorded calls to established customers by requiring sellers and telemarketers to provide a prompt opportunity at the outset of the message for customers to assert a company-specific Do Not Call request. The Commission specifically endorsed an interactive mechanism that would permit the party called to connect to a sales representative during the message by pressing a button on the telephone keypad. The purpose of this provision was to put recipients of a prerecorded message on an equal footing in asserting their company-specific Do Not Call rights with customers who now receive live telemarketing calls from sales representatives under the TSR's established business relationship exemption.

A majority of both industry and consumer comments on the record have resoundingly rejected this proposal. Most of the sellers and telemarketers who commented on the proposed interactive mechanism objected to it as costly, burdensome, and not widely available.¹⁰³ Consumers and their advocates protested that the mechanism would be ineffective because touchtone keypads are not universal,¹⁰⁴ there is no guarantee that a sales representative would be available promptly,¹⁰⁵ and because, in their view, most prerecorded messages end up on

¹⁰² TSR SBP, 68 FR at 4631 (“[T]he company-specific approach is seriously inadequate to protect consumers’ privacy from an abusive pattern of calls placed by a seller or telemarketer.”).

¹⁰³ See note 45, *supra*, and accompanying text.

¹⁰⁴ See note 70, *supra*, and accompanying text.

¹⁰⁵ See note 71, *supra*, and accompanying text.

answering machines or voice mail services, so that the interactive mechanism would not materially assist consumers in avoiding the costs and encumbrances of asserting their company-specific opt-out rights.¹⁰⁶ No industry or consumer comment proffered a suitable alternative that would serve the same purpose as the interactive mechanism proposed.

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 the consumer privacy interests that Congress intended to protect and the interest of sellers and telemarketers in communicating sales and promotional offers to their established customers via prerecorded messages.

It is important to reiterate, however, that many (if not most) of the communications sellers wish to send via prerecorded messages, and that customers wish to receive, are informational communications not governed by the TSR, and thus are not prohibited by its call abandonment provision.¹⁰⁷ It is equally noteworthy that because the proposed new safe harbor would have been predicated on an “established business relationship,” sellers would have had an opportunity during their business dealings to obtain the prior written agreement of their customers to receive telemarketing calls that deliver prerecorded messages.¹⁰⁸

¹⁰⁶ See note 72, *supra*, and accompanying text.

¹⁰⁷ Examples of informational calls – provided they are not combined with a sales pitch – include calls from an airline notifying consumers about a cancelled flight or a schedule change to a booked flight, or calls from a company notifying consumers about the recall of a purchased product. See notes 29 & 54, *supra*, and accompanying text.

¹⁰⁸ Sellers would have the same opportunity if the amendment discussed in Section II.E, *infra*, is adopted.

For this and all the other reasons discussed above, the Commission has concluded that, on balance, the record in this proceeding fails to provide the support necessary to justify the proposed additional safe harbor. Accordingly, the Commission has determined not to adopt the proposed amendment, and to deny the VMBC petition. The Commission's Rules of Practice afford VMBC and other sellers and telemarketers the right to seek any advisory opinions they may need to clarify the types of prerecorded informational messages that are not covered by the TSR, and thus are not prohibited.¹⁰⁹

Additionally, the Commission has decided, based on the record in this proceeding, to propose an amendment of the TSR, pursuant to § 3(a)(3)(A) of the Telemarketing Act,¹¹⁰ to add an express prohibition against unsolicited prerecorded telemarketing calls, unless the seller has obtained a consumer's express prior written agreement to receive such calls. In so doing, the Commission also seeks to address the criticism, encountered by FTC staff in providing industry guidance, that the text of the TSR does not straightforwardly address prerecorded message telemarketing, and instead places the burden on industry members and their legal advisors to divine that the call abandonment provisions effectively bar this practice (except for the very restricted use of recorded messages in the call abandonment safe harbor). The Commission continues to think that the plain language of the call abandonment provision itself prohibits calls delivering prerecorded messages when answered by a consumer, a position it has repeatedly stated,¹¹¹ and that has been accepted by at least one court.¹¹² However, the Commission believes

¹⁰⁹ 16 CFR §§ 1.1-1.4.

¹¹⁰ 15 U.S.C. 6102(a)(3)(A).

¹¹¹ *E.g.*, 68 Fed. Reg. at 4644; 69 Fed. Reg. at 67,288; DNCIA Report at 33-34.

¹¹² *Broad. Team, Inc. v. FTC*, 429 F.Supp.2d 1292, 1301-02 (M.D. Fla. 2006), *appeal docketed*, No. 06-13520-EE (11th Cir. June 23, 2006).

with the call abandonment safe harbor in § 310.4(b)(4)(iii) do not require such an agreement.¹¹⁴

The purpose of the proposed amendment is to make it explicit that the TSR prevents sellers and telemarketers from delivering a prerecorded message when a person answers a telemarketing call, regardless of whether the call is made to a consumer whose number is listed on the Do Not Call Registry or to a consumer who has an established business relationship with the seller, without the consumer's express prior written agreement.¹¹⁵ The prohibition contains a proviso that would permit the use of prerecorded messages required by the call abandonment safe harbor when a telemarketing call is answered by a consumer who cannot be connected to a sales representative.

The proposed amendment barring prerecorded telemarketing calls without a consumer's prior written agreement would make the present prohibition explicit, and would implement the Commission's broad authority under the Telemarketing Act to prohibit abusive telemarketing practices. The Telemarketing Act directs the FTC to "include in [the TSR] a requirement that

¹¹⁴ This proposed language is modeled on existing § 310.4(b)(1)(iii)(B)(i), which permits calls to numbers on the Registry with the consumer's prior written agreement, and is consistent with the call abandonment prohibition in § 310.4(b)(1)(iv). As such, the proposed amendment would permit digital and electronic signatures to the extent recognized by applicable federal or state contract law. 16 CFR 310.4(b)(1)(iii)(B)(i) n.6; *see also* TSR SBP, 68 FR at 4608-09.

¹¹⁵ The proposal would not prohibit placement of prerecorded messages on answering machines of consumers who have listed their number on the Registry if they have an established business relationship with the seller, or on answering machines of consumers who have not listed their numbers on the Registry. The Commission notes, however, that any telemarketing campaign directed at leaving pre-recorded messages on answering machines could still run afoul of the abandoned call requirements of the TSR if calls that are answered by an actual consumer, rather than an answering machine, are not transferred to a sales agent as required by § 310.4(b)(1)(iv) *But cf.* 47 CFR 64.1200(a)(2) (FCC regulation stating that "[n]o person or entity may *initiate any telephone call to any residential line using an artificial or prerecorded voice* to deliver a message.") (emphasis added).

telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."¹¹⁶

The consumer comments in this proceeding have made it clear that consumers overwhelmingly consider prerecorded telemarketing calls coercive and abusive of their right to privacy. They find prerecorded calls more coercive and abusive than live telemarketing calls because they are powerless to interact with a recording, either to assert their Do Not Call rights or to request additional information about the product or service offered. Thus, the present record supports a finding that a reasonable consumer would consider prerecorded telemarketing calls coercive or abusive of such consumer's right to privacy, unless the consumer had given his or her express prior written agreement to receive such calls.

The proposed amendment would prohibit only the initiation of a call "that delivers a prerecorded message when answered by a person." The Commission specifically seeks comment on whether the limitation "when answered by a person" is necessary and appropriate or whether the prohibition on prerecorded messages should be extended to calls answered by a voicemail system or an answering machine. For example, the intrusion of a telemarketing call delivering a prerecorded message would seem less disruptive if it arrives when the party called is not home than if it arrives when he or she is at home in the midst of daily activities. Nevertheless, the Commission seeks comment on whether there are other harms when a telemarketing call delivering a prerecorded message is answered by an answering machine or voice mail service,

¹¹⁶ 15 U.S.C. 6102(a)(3)(A). This directive appears consistent with the previously expressed intent of Congress, as stated in the preamble to the TCPA, that "banning . . . automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call . . . is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." TCPA, Pub. L. No. 102-243, 105 Stat. 2394 (1991) at § 2(12).

provided to consumers when the TSR was amended in 2003. They pointed out that consumers can: (1) place their numbers on the national Do Not Call Registry; (2) assert company-specific Do Not Call requests; and (3) use Caller ID to find out the names of telemarketers that have abandoned calls to their telephone numbers.¹⁴⁰

Two of the industry comments appeared to acknowledge that it is technically possible to configure predictive dialers to comply with the current standard.¹⁴¹ Both argued, however, that compliance with the current standard is costly and burdensome. One reported that “[o]n a daily basis, campaigns must be shut down and managed in a manual mode to ensure compliance with this overly burdensome requirement,” and as a result, “[e]fficiency is destroyed and the resulting increase in costs has made many programs no longer cost-effective.”¹⁴² The other asserted that “having the freedom to run a higher abandonment rate at times when customers are less likely to be home (such as 8:00 a.m. to 5:00 p.m.) and lowering it when people are more likely to be home (such as 6:00-9:00 p.m.) would make an outbound campaign more efficient,” noting that “[w]hile this approach could theoretically be used under the three percent per campaign per day system, it

¹⁴⁰ Another comment noted that the Caller ID requirement should allay any concerns of elderly consumers that abandoned calls were precursors of home burglaries. Heritage at 3 n.2.

¹⁴¹ Heritage at 3; Infocision at 5-6 (“Yes, the technology allows controls to be placed on the algorithms determining the speed at which the system dials. It is possible to maintain a steady level but it is not an exact science.”). Both stated, however, that while they can comply with the present standard, a 30-day standard would permit greater efficiency and flexibility in their telemarketing campaigns.

¹⁴² Infocision at 5.

Registry, regardless of whether they have an established business relationship with the seller who calls. While this popular view of the Registry may be widespread, as the record reflects, it overlooks the fact that in establishing the Registry, the Commission expressly authorized live telemarketing calls to consumers who have an established business relationship with the seller on whose behalf the calls are made, provided they have not asserted a company-specific Do Not Call request.¹⁴⁴

The comments also illustrate consumer concern that any loosening of the current standard would enable telemarketers to target disfavored groups of consumers with a disproportionate share of abandoned calls, even though the total number of abandoned calls for any calling list would not exceed three percent if the standard were modified.¹⁴⁵ For its part, the industry apparently cannot and does not deny that this offensive practice may be more likely to occur if a change were made to a 30-day average for all campaigns. It is left to argue the good faith of trade association members, and the absence of empirical evidence that such an abusive practice has occurred in the past, notwithstanding the existence of economic incentives that seem likely to

¹⁴⁴ TSR SBP, 68 FR at 4633-34. The Commission established a limited exemption balancing the privacy needs of consumers and the need of businesses to contact their current customers, noting:

Industry comments were nearly unanimous in emphasizing that it is essential that sellers be able to call their existing customers. Although the initial comments from consumer groups opposed an exemption for ‘established business relationships,’ . . . their supplemental comments expressed the view that such an exemption would be acceptable, as long as it was narrowly-tailored and limited to current, ongoing relationships. . . . 60 percent of consumers . . . stated that they opposed an exemption for ‘established business relationship,’ [although] 40 percent favored such an exemption.

¹⁴⁵ The total number of abandoned calls might increase slightly, however, because telemarketers may have had to set their predictive dialers below three percent to meet the present “per day per calling campaign” standard.

include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H-159 (Annex K), 600 Pennsylvania Avenue, N.W., Washington, DC 20580. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled “Confidential.”¹⁴⁶ The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

To ensure that the Commission considers an electronic comment, you must file it on the Web-based form at the <https://secure.commentworks.com/ftc-tsr> Web site. You may also visit <http://www.regulations.gov> to read this proposed Rule, and may file an electronic comment through that Web site. The Commission will consider all comments that [regulations.gov](http://www.regulations.gov) forwards to it.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Web site, to the extent practicable, at <http://www.ftc.gov>. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses

¹⁴⁶ Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record.

