



National Retail Federation  
*The Voice of Retail Worldwide*

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Before the  
**FEDERAL TRADE COMMISSION**  
Washington, D.C. 20580

**COMMENTS OF THE  
NATIONAL RETAIL FEDERATION**

**PRERECORDED MESSAGE EBR TELEMARKETING  
(PROJECT No. R411001)**

**Mallory B. Duncan**  
*Senior Vice President  
General Counsel*

**Elizabeth S. Oesterle**  
*Senior Director  
Government Relations Counsel*

National Retail Federation  
325 7th Street, N.W.  
Suite 1100  
Washington, D.C. 20004  
(202) 783-7971

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Liberty Place  
325 7th Street NW, Suite 1100  
Washington, DC 20004  
800.NRF.HOW2 (800.673.4692)  
202.783.7971 fax 202.737.2849  
www.nrf.com

**COMMENTS OF THE  
NATIONAL RETAIL FEDERATION  
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(PROJECT No. R411001)**

On behalf of the National Retail Federation ("NRF"), we are pleased to file these comments with respect to the Federal Trade Commission's ("FTC's" or "Commission's") November 17, 2004 Notice of Proposed Rulemaking under the Telemarketing Sales Rule ("TSR").

By way of background, the National Retail Federation is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet and independent stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.4 million U.S. retail establishments, more than 23 million employees - about one in five American workers - and 2003 sales of \$3.8 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations

**Retailers Interest in Modifying the Rule**

Retailers regularly rely on the telephone to reach their existing customers. Before amendment of the TSR, many retailers routinely used pre-recorded messages to communicate with persons with whom they had an established business relationship ("EBR"). This type of communication was authorized in the Federal Communications Commission ("FCC") regulations promulgated under the Telephone Consumer Protection Act and was not prohibited by the TSR.

NRF and its members were deeply involved in the development and implementation of the Telemarketing Sales Rule, and NRF supports efforts to reduce incongruities between the FTC's rules and those of the FCC. One such incongruity is that the TSR effectively prohibits retailers from using pre-recorded messages except as part of a "safe harbor" directed at the use of predictive dialers. Unlike the FCC regulation, the TSR currently permits callers to connect customers who answer the telephone to a pre-recorded message only if no sales representative is available within two seconds after the customer answers the telephone. The safe harbor also requires that a live sales representative be available 97 percent of the time, measured on a per day/per campaign basis.

In response to an inquiry from Voice Mail Broadcasting Corporation, the Commission has asked whether the rule should be modified to allow pre-recorded messages to be delivered to existing customers of the calling party without regard to

the current three percent limitation. The Commission also has inquired about what conditions, if any, should be placed on the delivery of these calls.

NRF's members believe that delivering recorded messages to existing customers can be an effective means of providing information and services customers desire. In some stores, for example, customers may place advance or special orders for merchandise to be picked up and fully paid for at a later date. The ability to use the combination of telephone and recording devices to leave a message on a customer's answering machine, indicating delivery has occurred, is a potentially valuable tool. So too the ability to communicate with a store's best customers in advance of a one night only "trunk show" featuring the customer's favorite designer could be a major boon, both for the customers and for the retailer. For these, and other reasons, retailers support the concept advanced in the Commission's notice of proposed rulemaking.

### **Encouraging Responsible Behavior**

NRF's members share the Commission's desire that pre-recorded calls not become an annoyance to customers or be used in a way that frustrates the protections otherwise available to customers under the TSR. As the Commission recognized when it created an EBR provision in the TSR, however, the fact that the proposed rule change relates solely to existing customers - those with whom the retailer has an EBR - to a considerable extent, makes it self-effectuating.

It is almost axiomatic to note that retailers' relationships with their existing customers are extremely valuable. For most retailers, the overwhelming majority of sales are made to repeat customers rather than to one-time shoppers. The need to cultivate these relationships is one of the reasons many retailers attempt to identify, and highlight their best promotional opportunities to, their established customers.

Under the TSR, a retailer may contact an established customer by telephone even if the customer's name is on the generalized Do Not Call list. In turn, the TSR and FCC rules permit customers who wish not to be marketed to by a telephone sales representative, or who wish to terminate an EBR, to do so at any time through company-specific opt-out requirements. For most retailers, the prospect that their ability to reach some of their most valued customers could be curtailed through their own thoughtless or insensitive marketing provides a powerful incentive not to use telemarketing in an annoying or intrusive fashion. Once the specific opt-out has been exercised, an important and flexible communications tool - and a significant edge over those without the customer relationship - will have been lost.

This reality requires retailers to limit their telemarketing to tested and limited circumstances that the overwhelming majority of their established customers welcome or accept. In our members' experience, a one or two percent opt-out (or dissatisfaction) rate is a powerful signal that a marketing campaign has not met these tests and limitations.

## **Achieving Equivalence in a Pre-recorded Environment**

If, as we urge, the Commission permits delivery of pre-recorded messages to existing customers, the Commission's notice suggests the rule must include some mechanism to allow these customers to exercise rights roughly equivalent to those they have when they receive live operator calls.

As we indicated above, we believe responsible companies will not risk alienating their most valued customers and will not abuse this opportunity to contact them. At the same time, we share the Commission's concern that the absence of this rough equivalency could drive calls into the prerecorded arena, and we agree that the rule should provide for an easy, consistently-applied opt-out mechanism.

The rules governing this equivalency need not be the same as those governing live operator calls. Indeed, they cannot be the same because the nature of the communication is different. On the one hand, a pre-recorded call potentially can deliver, for example, 100 messages more efficiently, and with more accountability, than a live operator. The exact content of a recorded message, including any required identifying messages, can be reviewed in advance and can be delivered without depending on the skill of the live person(s) handling each call.

On the other hand, the recipient of a live call can quickly convey whether he or she is interested in the subject of the call or inquire about other products and services. The recipient of a live call also has the opportunity to interrupt the prepared script and asking to be placed on the company specific do-not-call list.

Finally, while the recipient of a pre-recorded call can terminate the call with, perhaps, more comfort than someone dealing with a live operator, the called party's ability to prevent future calls could be comparatively limited if the pre-recorded call does not contain an opt-out mechanism.<sup>1</sup>

### **Opt-Out Options**

The simplest way to provide an opt-out would be to require that the company claiming the EBR provide both the name by which it is most likely known by the customer and also a means for the customer to exercise his or her right not to receive calls from the company in the future. This could take the form of an 800 number to provide the opt-out as well as, if the caller so desired, additional information about its products and services. This would more closely mimic the opportunities available with a live operator.

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<sup>1</sup> Of course, this point too is mitigated by the fact that the recipients of the calls are established customers, and thus often have multiple methods for informing the retailer that they do not wish to be called again.

The 800 number might include an automated menu that could provide a mechanism for the customer to key-in the customer's phone number for opt out purposes. Although one consequence of this 800 number system would be that the customer would need to take an affirmative step (dialing the number) to prevent future calls, the Commission already has made it an abusive telemarketing practice for a seller or telemarketer to fail to transmit the telephone number and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service. The 800 number would be on the customer's answering machine and, depending on the customer's telephone service choices, could be on the customer's caller ID log. The customer thus would have the flexibility to block future calls.

We suggest callers have ample discretion to determine the timing of the 800-number disclosure. A disclosure that occurs too early in the message would not permit recipients to understand from whom the message is coming and the general nature of the offer before hearing the opt-out number. This could cause an excessively high opt-out rate. In that respect, the Commission's proposed language that an opt-out opportunity be presented "at the outset" of the call is too stringent. On the other hand, forcing a customer, even an enthusiastically loyal customer, to listen to more than a minute of text to learn how to block future pre-recorded calls, or to learn how to get more specific information about an offer, is not a fair use of that customer's time. Therefore, we propose that there not be a specific time requirement, but rather that the Commission use a slightly more flexible relative timing for disclosures, such as "reasonably promptly" or "shortly after any initial disclosures." In our members' experience, such quasi open-ended formulations have worked well in other portions of the TSR.

A less-desirable option for opt-outs, but one that could be permitted in addition to an 800 number, might be to allow a real-time response a customer could use to opt-out while the recorded message is playing. The recorded message could, for example, direct recipients "to press # for assistance." By pressing the requested key, Customers could be connected to an automated system, as was discussed for the 800 number option above<sup>2</sup>.

Alternatively, the Commission could establish a uniform entry code, such as the # or \* key, that companies offering pre-recorded calls would make available to "escape" the recorded message and be connected to other options. Once connected in real time, customers wishing to opt-out of calls could be prompted to enter or speak their telephone number for inclusion on the company's list.

While real time connection is useful and appealing for calls a customer answers personally, they offer little help to Customers who hear the call for the first time on an answering machine. Similarly, Customers with rotary dial phones may not

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<sup>2</sup> At the caller's option, the customer could be connected to a live operator during business hours although this is a secondary choice, at best, because it raises anew some of the difficulties the use of pre-recording would be implemented to avoid.

be able to take advantage of a real time connection that involves entering a key or tone. It also is unclear whether technology for voice response is sufficiently available to support the Commission's requiring its use. Indeed, some NRF members view the "real time" option as less desirable, in part, because the technology to offer it is not widely available. Authorizing an option that is only available to the largest of the large retailers may have undesirable competitive effects.

Collectively, these challenges and issues suggest use of a properly-supported 800 number as the most desirable option over other alternatives at this juncture. The real time connection, prominently mentioned in the Commission's notice, might be offered as a supplement when the recipient of the call is not an answering device.

### **Conclusion**

NRF believes both retailers and their customers have embraced, and would continue to embrace, the use of pre-recorded calls as a valuable tool so long as the TSR provision strikes a proper balance between flexibility and constraint. It is for this reason that we suggest the rule provide a uniform opt-out mechanism that all customers and retailers would be able to use.

NRF appreciates the opportunity to convey these views. We would be welcome to meet with members of the Commission or its staff to discuss them in greater detail.