

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

**COMMENTS
of
THE DIRECT MARKETING ASSOCIATION, INC.
and
THE AMERICAN TELESERVICES ASSOCIATION**

Responding to the Notice of Proposed Rulemaking re: Abandoned Call Safe Harbor

Prerecorded Message EBR Telemarketing, Project No. R411001

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I. Introduction, Summary, and Background

The Direct Marketing Association (“The DMA”) and the American Teleservices Association (“ATA”) are pleased to submit these comments on the Federal Trade Commission’s (“Commission”) notice of proposed rulemaking to create an additional call abandonment safe harbor for telemarketing using prerecorded messages to consumers where there exists an established business relationship, and to comment on The DMA’s petition to change the duration of time in which abandoned calls are measured from “per day per calling campaign” to “measured over a 30-day period.” 69 Fed. Reg. 67287, Nov. 17, 2004.

The Direct Marketing Association (www.the-dma.org) is a leading trade association for businesses and organizations interested in direct, interactive, and database marketing, which in 2003 generated more than \$1.7 trillion in US sales, including \$134 billion in catalog sales and \$41 billion in Web-driven sales. In addition to catalogs and the Web, DMA members employ a wide variety of marketing media, including mail, e-mail, telephone, newspapers and magazines, interactive television, and radio, among others. Founded in 1917, The DMA today has more than 5,200 corporate, affiliate, and chapter members from the U.S. and 44 other nations. Reflecting the significant and growing role that direct and interactive marketing plays in today’s advertising mix, The DMA’s membership represents marketers from every business segment, including catalogers, Internet retailers, retail stores, nonprofit organizations, advertising agencies, financial services providers, book and magazine publishers, book and music clubs, industrial manufacturers, and a host of other vertical segments, as well as the service industries that support marketers.

ATA is a leading trade association dedicated exclusively to the teleservices industry. Its member organizations include both Fortune 500 companies and small businesses that market

their respective products and services to consumers by telephone. ATA's membership also is comprised of call centers, trainers, and equipment suppliers that initiate, facilitate, and generate the calls.

The DMA and ATA would like to make the following points, set forth in more detail below, in response to the Commission's request for comments:

- The Commission should adopt The DMA's petition to conform with the Federal Communications Commission's position to measure abandoned calls over a 30-day period. Adoption of the petition will provide strong consumer protections resulting in more focused and relevant calls while providing businesses with more flexibility in their telemarketing campaigns.
- The Commission should adopt a safe harbor for telemarketing using recorded messages to individuals where there exists an established business relationship and where a phone number is provided in the message that an individual can call to assert an entity-specific do-not-call request.

II. The Commission Should Amend the TSR's Call Abandonment Safe Harbor to Allow the Use of Technology that Ensures Abandonment of No More Than 3 Percent of All Calls Answered by a Person Measured Over a 30-Day Period.

The Commission has requested comment on The DMA's petition to revise the method for calculating abandoned calls. The DMA and ATA request that the Commission adopt the DMA petition and amend the Telemarketing Sales Rule's safe harbor provision, 16 C.F.R.

§ 310.4(b)(4), to measure abandoned calls over a 30-day period rather than daily. Measuring calls over a 30-day period will result in reaching consumers more likely to be interested in the products being offered. In addition, the 30-day period is far less likely to result in the type of predictive dialer manipulation described by the Commission than the rule's current per-day per-campaign standard. At the same time, the flexibility to business flowing from changing the standard to 30 days will not result in more abandoned calls to consumers. The number of abandoned calls will not increase from the number as calculated on a per-day basis. Finally,

adoption of a 30-day standard will harmonize with the FCC rules, creating uniformity that will be useful for compliance purposes.

- A. *Calculation over a 30-day period allows flexibility for telemarketing to consumers more likely to be interested in the products being offered.*

As was evident most recently during the media coverage of the 2004 political campaigns, it is a bedrock principle of statistical analysis that the smaller the size of the sample, the larger the standard deviation and sampling errors. On the other hand, the larger the sample size, the smaller the impact that the variation from the norm will have upon the overall effort. In the context of predictive dialers in telemarketing campaigns, this means that the unexpected but often inevitable deviations from the targeted 3 percent abandonment rate will tend to be greater the fewer the days over which the measurement is made, *i.e.*, the smaller the “sample” of consumers called.

Predictive dialing is an automated prediction of how many customers will pick up the phone within a given timeframe. It is impossible to determine with absolute precision who will be home to answer their phone. Therefore, an average number of people answering the phone is used to determine the dialing speed to meet agent demand. Since averages are determined as calls are made, larger segments of time help telemarketers correct for unexpected fluctuations in a campaign. The shorter the window of time used to measure, however, the greater the impact that fluctuations will have and the more difficult it is to predict the abandoned call rate.

Some telemarketers use programs that are called only on a morning or evening session. In addition, measuring an abandoned call rate on a per-day per-campaign basis provides telemarketers with little opportunity to correct for fluctuations caused by successful campaigns when consumers engage the operators for longer periods of time, resulting in a higher number of

abandoned calls. Any unexpected spike in pickups could throw a number off in such a way as to make it impossible to recover within the same day based upon such a small time frame of calling. Deviations from the norm, however, would easily be made up over 30 days as the ability to predict the abandoned call rate increases over time.

The problems associated with a per-day per-campaign measurement are highlighted in the context of the use of segmented lists. The ability to use segmented lists is significantly diminished when calls are measured on a per-day per-campaign basis. Telemarketers use segmented lists to identify the likely population of individuals that will respond to a particular telemarketing offer. Segmenting also can result in smaller lists for any given day based on the likelihood that individuals on the list will respond on that day. Similarly, segmenting allows for consistency in calling over a period of time (*e.g.*, a month) so that follow-up calls to prospects who are not initially reached are spaced out over time rather than clustered together. Segmenting is particularly helpful for small business telemarketing campaigns.

If segmented lists can be averaged out over a longer period of time and across campaigns, consumers benefit by receiving calls that are more targeted to them and sellers benefit by learning more about their audiences, thus working more efficiently. Conversely, if measured over a smaller period of time and per campaign, the telemarketer may need to call from a less segmented list in order to ensure that the number of abandoned calls satisfies the 3% requirement per campaign any given day. For example, if there are spikes in the successful sales in an outbound calling program on a particular campaign using a segmented list (say 5 agents on an 8-agent program make a series of sales at the same time near the end of the day and this is an unexpected event), it is very difficult to balance out the total abandoned calls for that campaign over one day, limiting telemarketers' ability to use segmented lists. However, telemarketers do

not need to limit use of segmented lists if measured over 30 days given the greater predictability that results from the longer duration of time and across campaigns.

A real world example helps make this point. In order for some predictive dialers to work effectively, at least 7 or 8 telemarketing agents need to be calling for any one program. Additionally, the smallest list of phone numbers to be effective for some predictive dialers is approximately 15,000 names. If an abandonment rate is measured over 30 days across campaigns, lists can be segmented for fewer than 15,000 names for calling consumers on such a segment believed to be more likely to be interested in the products being offered. For example, if, as part of a particular campaign, calls are made to 10,000 names on a given day to a segmented list, a dialer could be effective if set at 3% for that day with knowledge that 350,000 people may be called over a 30-day period and that over 30 days the abandonment rate will be less than 3%. Similarly a dialer will have more predictability even on a daily basis if the 3% measurement is calculated across campaigns. If, however, the abandonment rate is measured per campaign per day, the telemarketer may have an incentive to have a less targeted list per campaign to ensure that the percentage is below 3% for that day.

The Commission points to the DMA petition's statement that "meeting the 3% benchmark under the FTC's per day, per calling campaign standard presents a much greater compliance obstacle than meeting the FCC's abandoned call standard. Marketers who use predictive dialing technology are having difficulty configuring their software to comply with the FTC's per day, per calling campaign 3% standard." 69 Fed. Reg. at 67290. The Commission asks for an explanation of why it is difficult to comply with the 3% standard per day when DMA members could comply when the DMA guideline standard was 5%. The 2% difference as measured on a daily basis provides significant additional flexibility where predictive dialers

could be set to reliably meet the 5% guideline while preserving the efficiencies achieved from the technology. The efficiencies that result from the use of predictive dialers are recognized if measured on a per-day basis at 5%. Dropping the percentage to 3% per day for a segmented list as described above if measured per campaign per day, given the increased difficulties that correspond with a more accurate prediction of abandoned calls over a shorter time period, such efficiencies disappear almost entirely. The 2% reduction on a per-day basis is analogous to directing a pollster to report results with a smaller margin of error but still using the identical sample size used in the past: it might be possible sometimes but not always.

B. Consumer protection associated with a per-day calculation is equally effective if measured over a 30-day time period.

The intended effect of significantly reducing abandoned calls contained in the current rule will be equally satisfied if the calculation is measured over a 30-day period. The actual number of abandoned calls would not increase if the measurement occurs on a 30-day basis rather than per day per campaign.¹

The Commission indicated that calculating the abandoned call percentage over a 30-day period could result in a greater share of abandoned calls for certain groups of consumers. However, the potential for abuse described by the Commission is more likely under a daily standard than under a 30-day standard. The Commission indicates that its concern about following the “per 30 day” standard adopted by the FCC is that it “could enable telemarketers to target call abandonments at certain less valued groups of consumers, resulting in their receipt of

¹ In fact, if the abandoned call rate were to exceed 3% on any given day under the per-day per-campaign measurement, the telemarketer would not have an incentive to reduce the future number of abandoned calls to bring the combined 30-day total under 3%, thus having the effect of increasing the number of abandoned calls over a 30-day period.

more than their share of abandoned calls. Under such a scenario, predictive dialers could be set to abandon calls at a higher rate to one subset of the population and a lower rate to another subset of the population.” 69 Fed. Reg. at 67291. Thus, according to the Commission, the per-day per-campaign measure “reduces the potential for concentrating abuse by ensuring an even distribution of abandoned calls to all segments of the public, regardless of their purchasing history or demographic characteristics.” *Id.*

The DMA and ATA agree with the Commission that there should not be a group of “less valued” consumers that receive a larger rate of abandoned calls. Lists of prospects are not segmented in “less valued consumer” categories, and our members do not engage in such tactics under the per-day per-campaign standard, nor would they use the flexibility of 30 days to discriminate in the manner described by the Commission.² Moreover, if telemarketers engaged in such practices, the scenario described by the Commission logically is more likely to occur if the calculation is done daily per campaign rather than every 30 days. This is because without flexibility over 30 days, if a telemarketer on any given day unexpectedly was exceeding the 3% requirement, then the telemarketer could attempt to compensate for the higher abandoned rate by calling phone numbers known to more likely reduce the abandoned call rate for that day. By providing 30 days for telemarketers to achieve the 3% rate, the telemarketer can learn from the results of the first few days of the campaign in setting the predictive dialer and have an opportunity, given the longer duration, for the rate to reach below 3%. In the same circumstances under a per-day per-campaign measurement, the limited options available to a

² To the extent that the Commission’s scenario regarding specific groups of consumers receiving more calls actually occurs in practice, The DMA and ATA believe that the effect would be more non-relevant calls to consumers rather than more abandoned calls.

telemarketer could increase the potential for the negative result that the Commission seeks to avoid.

- C. *The FCC and FTC standards should be harmonized. The FCC standard provides more flexibility to businesses while not increasing the number of abandoned calls.*

Finally, by changing the calculation period to 30 days, the Commission's formula will conform with the FCC's calculation. In the Do-Not-Call Implementation Act, Pub. L. No. 108-10, Congress indicated a desire for the FTC and FCC to harmonize their regulations. To our knowledge, the FCC has no indication of abuse of its 30-day standard nor any indication that it is not producing its intended result. Because there will be no reduction of consumer protection with a calculation over a 30-day period, and businesses will have greater flexibility as well as uniform compliance, we believe that harmonization to the FCC rule is appropriate in this instance. This is particularly the case against the backdrop of the other regulations adopted in the Commission's amendments to the TSR, which provide very significant consumer protections to individuals who receive more abandoned calls than they deem appropriate: they can place their numbers on the national do-not-call registry, they can assert company-specific do-not-call requests, and they can use caller identification technology to identify the telemarketers that abandon calls to their numbers.

III. The Commission Should Create a Safe Harbor from the Prohibition on Abandoned Calls for Telemarketing Campaigns Consisting Entirely of Prerecorded Messages Directed to Consumers with Whom the Seller Has an Established Business Relationship.

The Commission proposes to create an "additional call abandonment safe harbor to allow telemarketing calls that deliver a prerecorded message to consumers with whom the seller on whose behalf the calls are made has an established business relationship." 69 Fed. Reg. at 67287. The DMA and ATA strongly support the creation of such a safe harbor.

As indicated in the NPRM, the two harms that prompted the Commission to include the prohibition on abandoned calls in the TSR are not present in telemarketing campaigns that consist solely of prerecorded messages. There is nothing inherent in telemarketing calls delivering prerecorded messages that would cause “dead air” calls, in which there is a prolonged silence between a consumer answering a call and the delivery of the marketing message, or that would result in any “hang-up” calls, in which telemarketers hang up on consumers whom they have called without speaking to them. To the contrary, campaigns designed to deliver prerecorded messages necessarily avoid subjecting consumers who answer the calls to “dead air” and “hang-up” calls. Subjecting a consumer who has answered a call to “dead air” time risks having the consumer hang up, and calls in which either the consumer hangs up or in which the consumer is subjected to a “hang-up” call prevent the delivery of a prerecorded message; neither result helps achieve the purpose of prerecorded messages telemarketing campaigns: the delivery of prerecorded messages.

Furthermore, to the extent that the safe harbor is limited to calls to consumers with whom the seller on whose behalf the calls are made has an established relationship, sellers face the risk of losing the right they enjoy to call consumers—even those who may have registered with the Do Not Call Registry—because, if the callers abuse the goodwill of the customers, the customers could assert an entity-specific Do Not Call request. 16 C.F.R. § 310.4(b)(1)(iii)(A). Given that acquiring new customers is far more costly than retaining existing customers, sellers initiating calls to consumers with whom they have an established relationship have a stronger incentive than other potential callers not to alienate the individuals they call. *Cf. Mainstream Marketing Services v. FTC*, 358 F.3d 1228, 1241 (10th Cir. 2004) (noting in support of rules differentiating

among types of callers the Commission's conclusion that certain types of callers have stronger incentives than other types of callers not to alienate the people they call).

The Commission in the NPRM then focuses its analysis and proposal for a safe harbor from the call abandonment provisions upon the need for preserving the consumer's ability to assert a Do Not Call request when receiving a prerecorded message telemarketing call:

“[C]onsumers [must] retain an effective right to decide whether to receive commercial calls, including prerecorded messages.” 69 Fed. Reg. at 67289. The DMA and ATA agree with the Commission's focus upon preserving the consumer's ability to assert a Do Not Call request when receiving prerecorded message telemarketing calls. The DMA and ATA further believe that providing, during the prerecorded message call, a telephone number that the called party may call during regular business hours to make a Do Not Call request, without incurring charges that exceed local or long distance charges, effectively preserves the consumer's right to decide whether to receive commercial prerecorded message calls.

The DMA and ATA believe that the approach adopted by the FCC in its rules regarding prerecorded messages, which were amended in 2003 to direct callers to provide a telephone number that consumers may call during regular business hours to make a Do Not Call request, effectively preserves the consumer's right to decide whether to receive commercial prerecorded message calls.³ Coupled with the requirement that callers transmit their caller-identification information for display on consumer Caller I.D. consoles, 16 C.F.R. § 310.4(a)(7), the provision

³ The FCC's rules do not require a toll-free number. Rather, the FCC determined in 1995, and reiterated in 2003, that “any number provided for identification purposes may not be a number that requires the recipient of a solicitation to incur more than nominal costs for making a do-not-call request (*i.e.*, for which charges exceed costs for transmission of local or ordinary station-to-station long distance calls).” *Rules and Regulations Implementing the Telephone Consumer Protection Act*, CG Docket No. 02-278, Report and Order, July 3, 2003, at p. 86 n492.

of a telephone number that the called party may call during regular business hours enables the very small percentage of called parties who would want to assert a Do Not Call request to do so.⁴ Such an approach by the Commission would have the additional benefit of consistency with the FCC, which helps avoid confusion by both consumers and businesses.

The DMA and ATA believe that the approach to timing adopted by the FCC's prerecorded-messages rule, which authorize the caller to provide the telephone number "during or after the message," also preserves the consumer's right to decide. This flexibility regarding the timing of notice of the opportunity to make a Do Not Call request recognizes that callers operating under the rubric of an established business relationship are communicating with consumers whom they have a strong incentive not to alienate and, therefore, should be given latitude in how they manage their customer relations. In the context of an established business relationship, the Commission should not mandate that a consumer's opportunity to opt out be injected prior to the business being able to communicate with its customer.

The Commission seeks comment on mechanisms that provide the called party with an opportunity to speak to a sales representative during the message by pressing a button on the telephone keypad. This is a good option for those companies that have put such technologies in place. However, the Commission should not mandate this feature. Few telemarketers have this feature available, implementation of technology that will allow the pressing of a key on the telephone pad during a recorded message is complicated, and telemarketers already have spent significant sums of money to implement the caller identification and predictive dialer

⁴ In the NPRM, the Commission cites a Voice Mail Broadcasting Corporation submission stating that only .02 of 1% of its calls delivered in the EBR context resulted in a company-specific opt-out request, 69 Fed. Reg. at 67288 n8.

requirements imposed by the Commission in the 2003 amendments to the TSR. Estimates are that reprogramming each station could cost in the range of \$25,000 per location. Instead, the Commission should provide telemarketers with a choice of means of providing the ability to opt out including, among other options, pressing a button for a live operator and providing a telephone phone number.

IV. Conclusion

The DMA and ATA appreciate the opportunity to comment on these important issues to our membership. We look forward to continuing to work with the Commission as it proceeds in its rulemaking.