

Privacy Rights Clearinghouse

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Donald S. Clark, Secretary
Federal Trade Commission
Office of the Secretary, Room H-159 (Annex K)
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Filed electronically: <https://secure.commentworks.com/ftc-tsr>

RE: TSR Prerecorded Call Prohibition and Call Abandonment Standard Modification
Project No. R411001

Dear Mr. Clark:

The Privacy Rights Clearinghouse (PRC)¹ submits these comments responding to the Federal Trade Commission's (FTC or Commission) proposed actions regarding the Telemarketing Sales Rule (TSR). The PRC has joined and fully endorses comments submitted by the National Consumer League (NCL) and other organizations on behalf of consumer privacy interests.

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The Commission's current solicitation for comment follows previous announcements soliciting comment on petitions from the telemarketing industry to amend the TSR. Specifically, the Commission is now seeking comment on decisions to (1) deny the Voice Mail Broadcasting Corporation (VMBC) petition to allow prerecorded messages with an established business relationship (EBR); (2) specifically prohibit prerecorded sales calls; and (3) grant the Direct Marketing Association (DMA) petition to change the calculation rate for abandoned calls.²

1. VMBC Petition

¹ The Privacy Rights Clearinghouse (PRC) is a nonprofit consumer education and advocacy organization based in San Diego, CA, and established in 1992. The PRC advises consumers on a variety of informational privacy issues, including financial privacy, medical privacy and identity theft, through a series of fact sheets as well as individual counseling available via telephone and e-mail. It represents consumers' interests in legislative and regulatory proceedings on the state and federal levels. www.privacyrights.org

² The FTC first solicited public comment on the VMBC and DMA petitions to amend the TSR on November 17, 2004. In response, the PRC submitted comments on January 10, 2005. www.privacyrights.org/ar/FTC-TSREBR.htm

VMBC petitioned the Commission to amend the TSR to allow prerecorded telemarketing calls to consumers when the caller has a claimed business relation. If accepted, an EBR exception for prerecorded sales calls would have created a major loophole, opening the door for a dramatic increase in unwanted calls to consumers who had placed their telephone numbers on the national Do-Not-Call (DNC) Registry.

Concern for the potential privacy invasion resulting from the exception VMBC requested was heightened by the broad definition of an EBR. Under the definition, a business “relationship” could be claimed under the most tenuous circumstances. As defined, a consumer would not even have to make a purchase. A casual inquiry would be enough to establish a “relationship.”

Worse, an EBR can be used as a ruse for telemarketers that simply ignore the DNC Registry. This was amply demonstrated in consumer comments received by the Commission. For example, one consumer wrote, “I constantly receive solicitations from companies who claim I have a relationship with them, and I’ve never heard of them before.” Another consumer told the Commission, “I signed up as soon as the list [Registry] opened. I STILL get calls, both human and PRE-Recorded....” (Proposal, pg 26, Fn 26)

Consumer comments to the Commission echo complaints the PRC continues to receive from consumers weary of answering unwanted sales calls. As any consumer with a telephone would no doubt say, signing up for the Registry provides relief from unwanted sales calls. But, unsolicited calls, whether from a live person or a prerecorded message, are still far too common. Consumer comments when combined with the Commission’s record of enforcement actions confirm that the telemarketing industry is not one that can effectively police itself.

The overwhelming consumer response opposing the FTC’s early inclination to grant VMBC’s petition was not surprising. No other consumer issue generates more public outrage than unwanted telemarketing calls. This is evident in not only the 13,000 comments received from consumers opposing prerecorded calls, but in the number of telephone numbers included on the DNC Registry. Although the DNC Registry is an opt-out mechanism which favors business interests over consumers, 130 million telephone numbers are now included on the DNC Registry.³ These numbers speak for themselves.

Consumers have thus sent a clear message to regulators and the telemarketing industry that unwanted sales calls are intrusive when a “live” caller is on the phone and even more so when an unwanted call results in a prerecorded message. The record created by consumer comments along with the Commission’s own analysis more than adequately demonstrate why prerecorded sales calls, under cover of a claimed EBR, should not be allowed.

In denying the VMBC petition, the FTC has made the right decision. The Commission solicited further comment on whether consumers consider prerecorded messages a privacy invasion. For years and at every opportunity, consumers have weighed in against all manner of unwanted telemarketing calls, whether from “live” callers, prerecorded messages, or hang-ups. There should now be little doubt as to how consumers line up on the subject of telemarketing calls.

³ FTC Proposal, www.ftc.gov/os/2006/10/R411001telemarketingruleFRN.pdf, pg. 35.

2. Specific Rule against Prerecorded Calls Is Necessary

The Commission seeks comment on a proposal to amend the TSR to specifically prohibit prerecorded sales calls. We strongly support this amendment and urge the Commission to adopt it. The amendment should apply to calls answered by the consumer as well as prerecorded calls left on an answering machine or voice mail system.

An explicit statement that prerecorded calls are prohibited gives both consumers and the industry clear guidance.⁴ Without a clear statement from the Commission, consumers, in particular, may be confused about whether a prerecorded message is from a “legitimate” caller. Prerecorded messages not covered by the TSR do not normally require a call back. This includes informational calls regarding a flight cancellation, appointment confirmation, and messages from political candidates.

However, a prerecorded *sales* message will almost certainly leave a call-back number. An explicit prohibition will allow consumers to know, in no uncertain terms, to suspect any caller that has left a prerecorded message in violation of the FTC’s rules. The FTC has noted 162 cases against telemarketers for TSR violations.⁵ Given the record of enforcement actions to date, there is no reason to believe all telemarketers will abide by even a specific rule prohibition.

This may be so for what the FTC calls “covered entities,” that is, the mainstream self-regulated industry that has promised to follow a trade association’s guidelines. But, just as likely, consumers will continue to experience prerecorded messages generated by scam artists. Crooks, identity thieves, and others involved in fraud often use the telephone as the first point of contact, especially targeting elderly victims. Bad actors use predictive dialers and prerecorded messages, too. If the call is not answered, the caller then usually leaves a prerecorded message. A clear statement from the Commission that prerecorded sales calls are prohibited may save some who might otherwise become victims of fraud.

3. The FTC Should Adopt Zero Tolerance for Abandoned Calls

The Direct Marketing Association (DMA) has petitioned the Commission to change the TSR regarding “dead-air” or abandoned calls to consumers. The rule currently allows telemarketers an abandonment rate of no more than 3% per day, per campaign. The DMA wants the Commission to amend the rule to calculate the abandonment rate on a monthly basis, with no more than 3% per month, per calling campaign.

⁴ Comments from industry and consumers alike demonstrate confusion about when prerecorded messages are allowed. For example, some industry representatives argued that the VMBC petition to allow prerecorded messages with an EBR should be allowed because consumers want “informational messages.” (Proposal, pg 14) Some consumers complained about prerecorded messages received during political campaigns. (Proposal, pg 20, Fn 58)

⁵ FTC Proposal, pg 31, Fn 90.

From the consumers' standpoint, the important question is not whether the calculation should be per day or per month. We believe the only acceptable rate for abandoned or dead-air calls is a zero tolerance.

In many ways, dead-air or abandoned calls are much more intrusive and troubling than even prerecorded calls. Consumers have every right to be annoyed when they run to catch the telephone and are met with silence. For some, any allowance for abandoned calls may be threatening or dangerous. For example, when the telephone rings and no one is on the end of the line, this needlessly increases anxiety for stalking victims. Consumers whose homes have been burglarized or who live in a neighborhood where home burglaries have occurred, may worry that crooks are checking to see if anyone is home. But, by any estimation, abandoned calls are just an added annoyance and invade the right to privacy in the home.

Above all, any tolerance for "dead-air" calls denies consumers the opportunity to complain about abusive calls. With unwanted calls from a "live" salesperson -- or even prerecorded messages -- the consumer is likely to have the name of the company and a call-back number. Even when the consumer's phone has Caller ID, the display usually shows only "private caller," or "out of area." Thus, consumers have no recourse whatsoever with auto-dialed calls that result in "dead-air" calls.

Consumers' inability to complain about abusive telemarketing experienced from "dead-air" calls, under any calculation, is a significant problem. Without the FTC's ability to conduct compliance audits and without consumers' ability to complain, the only enforcement mechanism is a telemarketer's requirement to keep records of abandoned call rates. The FTC should remedy this, either through rulemaking or, if appropriate, seeking an amendment to the law itself.

But, now, the issue before the Commission is whether to change the abandoned call calculation, as requested by the DMA. Granting DMA's petition does nothing to promote consumer interests. Rather the problem raised by DMA's petition is a result of telemarketers' unwillingness to program predictive dialers to ensure a zero rate of abandoned calls. Industry comments confirm that dialers *could* be programmed to a zero rate, but it's cheaper not to do so.

The Commission should deny DMA's request to change the calculation from a per-day to a per-month rate. DMA has shown no good reason why this should be granted or that consumers have anything to gain by changing the calculation. The best the DMA has to offer is to say that "dead-air" calls will not increase. This is no comfort to consumers who, the FTC acknowledges, "despise" dead air and hang-ups. Whether calculated over a day or a month, potentially thousands of telemarketing campaigns are going on at any given time. This means consumers will continue to receive the calls they hate most, dead-air calls.

By granting this petition, the FTC sends the wrong message, both to consumers and the telemarketing industry. The agency should not bend to telemarketers' claims of economic hardship. Nor should the FTC modify consumer protection rules to accommodate changes in technology. This is a bad precedent to set. When the Commission first adopted the 3% rule, the FTC adopted the DMA's then existing guideline. (Proposal, pg 51) That the DMA guidelines have now changed is not reason to modify the TSR. In addition, the FTC, when it first adopted

the 3% per day calculation, expressed concern about higher abandonment rates for less valued customers. This remains a valid concern.

We urge the FTC to reconsider its proposal to grant the DMA petition.

4. Conclusion

The Commission's proposal to deny VMBC's petition to allow prerecorded EBR calls is unquestionably the right move and shows that the agency does listen to consumers. And, clearly, an absolute rule prohibiting prerecorded sales calls is necessary to alleviate confusion with current interpretations.

We also urge the Commission to deny DMA's petition to recalculate call abandonment rates. In response to consumers, the Commission should go a step further and seek an outright ban on all dead-air calls.

We greatly appreciate the opportunity to supplement the comments submitted by NCL and other organizations concerned with consumer privacy.

Sincerely,

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Tena Friery, Research Director