



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Lois C. Greisman
Associate Director
Division of Marketing Practices

November 10, 2016

Michael Bills
132 S 600 East, Suite 204
Salt Lake City, UT 84102

Re: September 11, 2009 Staff Opinion Letter on Soundboard Technology

Dear Mr. Bills:

We are writing to you regarding the informal staff opinion letter we provided to your former company, Call Assistant, LLC, on September 11, 2009.¹ Our September 2009 letter responded to Call Assistant's inquiry regarding whether the Telemarketing Sales Rule's ("TSR") provisions governing outbound telemarketing calls that deliver prerecorded messages² apply to calls utilizing soundboard technology, which is technology that allows a live agent to communicate with a call recipient by playing recorded audio snippets instead of using his or her own live voice. In the September 2009 letter, staff stated its opinion that the technology, as described by Call Assistant, would not be subject to the prerecorded message provisions of the TSR. Staff's opinion was based on important features that Call Assistant highlighted about its technology – i.e., that for the entire duration of a call made using the technology, a single live agent stays with the call from beginning to end, listens to every word spoken by the call recipient, determines what is heard by the call recipient, and has the ability to interrupt recordings and use his or her own voice to communicate with the call recipient if needed. In our view at that time, these features made the calls "virtually indistinguishable" from normal two-way conversations with live operators and placed them outside the scope of the TSR's prerecorded message provisions.

Since the issuance of our September 2009 letter, staff has received a steadily increasing volume of formal and informal complaints from consumers about telemarketing calls utilizing soundboard technology. Consumers complain that during these calls they are not receiving appropriate recorded responses to their questions or comments. Consumers further complain that often no live telemarketer intervenes to provide a human response when requested to do so, the recorded audio snippets that are played do not adequately address consumer questions, or the call

¹ A copy of the September 11, 2009 staff opinion letter can be found at http://www.ftc.gov/sites/default/files/documents/advisory_opinions/opinion-09-1/opinion0901_1.pdf. Call Assistant, LLC, filed for Chapter 7 bankruptcy on August 13, 2015. *In re Call Assistant LLC*, Case No. 15-11708 (KJC) (Bankr. D. Del. Aug. 13, 2015).

² 16 C.F.R. § 310.4(b)(1)(v).

is terminated in response to consumers questions. Indeed, media reports also have taken note of this phenomenon, which some in the press have dubbed telemarketing “robot” calls.³ Simply put, since we issued the letter in 2009, staff has seen evidence of the widespread use of soundboard technology in a manner that does not represent a normal, continuous, two-way conversation between the call recipient and a live person. This is inconsistent with the principles we laid out in our September 2009 letter as well as our understanding of the technology at the time we issued the letter.⁴ Moreover, this type of use does not provide the consumer benefits upon which we based our September 2009 opinion.

In response to rising complaints and concerns, staff reached out to the Professional Association for Customer Engagement (“PACE”), which is a trade association representing call centers, and the Soundboard Association, a trade organization representing manufacturers and users of soundboard technology. During the last few months, we have had multiple productive discussions and meetings with PACE and the Soundboard Association to learn more about soundboard technology and obtain industry input regarding the regulatory status of that technology. Both PACE and the Soundboard Association were responsive to requests, provided meaningful input to assist staff in its review of this technology, and highlighted the potential benefits of responsible soundboard use. Staff carefully considered the input of PACE and the Soundboard Association.

A fundamental premise of our September 2009 letter was that soundboard technology was a surrogate for the live agent’s actual voice. A human being cannot conduct separate conversations with multiple consumers at the same time using his or her own voice. Nonetheless, some companies are routinely using soundboard technology in precisely this manner, and these companies are improperly using our September 2009 letter to justify their actions in court proceedings⁵ and in investigations. Indeed, Call Assistant noted publicly that

³ See, e.g., Sean Gallagher, *The New Spam: Interactive Robo-Calls From the Cloud as Cheap as E-Mail*, ARS TECHNICA, (Apr. 15, 2015), <http://arstechnica.com/information-technology/2015/04/the-new-spam-interactive-robo-calls-from-the-cloud-as-cheap-as-e-mail>; Alexis C. Madrigal, *Almost Human: The Surreal, Cyborg Future of Telemarketing*, THE ATLANTIC, (Dec. 20, 2013), <http://www.theatlantic.com/technology/archive/2013/12/almost-human-the-surreal-cyborg-future-of-telemarketing/282537/>; Alexis C. Madrigal, *The Only Thing Weirder Than a Telemarketing Robot*, THE ATLANTIC, (Dec. 13, 2013), <http://www.theatlantic.com/technology/archive/2013/12/the-only-thing-weirder-than-a-telemarketing-robot/282282/>; Zeke Miller & Denver Nicks, *Meet the Robot Telemarketer Who Denies She’s a Robot*, TIME, (Dec. 10, 2013), <http://newsfeed.time.com/2013/12/10/meet-the-robot-telemarketer-who-denies-shes-a-robot/>; Kris Hundley, *These Telemarketers Never Stray From Script*, TAMPA BAY TIMES, (Nov. 14, 2013), <http://www.tampabay.com/news/these-telemarketers-never-stray-from-the-script/2152303>.

⁴ For example, Call Assistant highlighted the ability of its agents to use their own voices during calls using its soundboard technology: “Our technology merely substitutes sound files for the agent’s voice (*although the agent can interject with his or her voice at any time*) . . .” (emphasis supplied). See also September 2009 Letter at 1 (“In response to the greeting, the agent may elect to speak to the call recipient *using his or her voice*, or may press a button to play an appropriate recorded script segment. . . . At all times, even during the playing of a recorded segment, *the agent retains the power to interrupt any recorded message to listen to the consumer and respond appropriately.*”) (emphasis supplied).

⁵ See, e.g., *Fitzhenry v. ADT Corp.*, No. 9:14-CV-80180 (S.D. Fla.); *Barrett v. ADT Corp.*, No. 12:15-CV-1348 (S.D. Ohio).

one of the advantages of its technology is that “an agent can conduct multiple calls simultaneously.”⁶ Staff also has seen evidence that call centers are using soundboard technology to increase the number of outbound calls they can make. In addition, in our discussions and meetings, industry representatives acknowledged that call centers routinely use soundboard technology to allow a single live agent to handle more than one call at the same time.

The plain language of the TSR provision governing prerecorded calls imposes restrictions on “any outbound telephone call that delivers a prerecorded message.”⁷ It is indisputable that calls made using soundboard technology deliver prerecorded messages. As such, under the plain meaning of the words in the TSR’s prerecorded call provision, outbound telemarketing calls using soundboard technology are covered because such calls “deliver a prerecorded message.”⁸

Given the actual language used in the TSR, the increasing volume of consumer complaints, and all the abuses we have seen since we issued the September 2009 letter, we have decided to revoke the September 2009 letter. It is now staff’s opinion that outbound telemarketing calls that utilize soundboard technology are subject to the TSR’s prerecorded call provisions because such calls do, in fact, “deliver a prerecorded message” as set forth in the plain language of the rule.⁹ Accordingly, outbound telemarketing calls made using soundboard technology are subject to the provisions of 16 C.F.R. § 310.4(b)(1)(v), and can only be made legally if they comply with the requirements set forth in Section 310.4(b)(1)(v)(A) (for calls selling goods or services), Section 310.4(b)(1)(v)(B) (for calls seeking charitable contributions from members or prior donors), or Section 310.4(b)(1)(v)(D) (healthcare messages by a covered entity or its business associate under HIPAA).

In reaching this conclusion, staff did consider whether an express requirement that live agents using soundboard technology only handle one call at a time would change the analysis. Staff has concluded that it would not. First, even with a 1-to-1 limitation in place, such calls would still “deliver a prerecorded message” and therefore would fall within the plain language of 16 C.F.R. 310.4(b)(1)(v). Moreover, in staff’s view, a 1-to-1 limitation would not stop abusive use of the technology. Based on preliminary information provided by industry representatives, a significant percentage of the total number of call center seats utilizing soundboard technology are used to make telemarketing or lead generation calls. A 1-to-1 limitation would allow a lead generation operation to use soundboard technology in which live operators simply press a button to play a prerecorded message offering a good or service that asks the consumer to say “yes” or press 1 on their phone if they are interested. If the consumer says yes or presses 1, the live agent would then transfer the call to the seller who makes a telemarketing pitch. Such calls are indistinguishable from standard lead generation robocalls that are governed by the TSR and are the subject of a large volume of consumer complaints and significant telemarketing abuse. The

⁶ *Nougar, L.C., et al. v. Revocalize, LLC, et al.*, No. 2:11-cv-127, DE 41 (D. Utah, Oct. 18, 2011).

⁷ 16 C.F.R. § 310.4(b)(1)(v).

⁸ *Id.*

⁹ *Id.* Staff notes that representatives of both PACE and the Soundboard Association disagree with this conclusion.

fact that a live operator, instead of a computer, “delivers” the prerecorded message and transfers interested consumers to sellers makes little difference from the call recipient’s perspective. Thus, even a 1-to-1 limitation would permit soundboard technology to be used to deliver calls that are indistinguishable from the telemarketing robocalls that consumers consider to be abusive and that are illegal under the TSR.

Finally, staff does recognize that when the Commission adopted the TSR’s robocall provisions TSR in 2008, it foresaw that technology could evolve to allow the use of interactive prerecorded messages in telemarketing calls in a manner “essentially indistinguishable from conversing with a human being.”¹⁰ Indeed, soundboard technology, when used properly, may one day approach that level of proficiency. If and when such advances occur, the Commission noted that parties could seek further amendment of the TSR or exemptions from the prerecorded message provisions.¹¹

In order to give industry sufficient time to make any necessary changes to bring themselves into compliance, the revocation of the September 2009 letter will be effective six months from today, on May 12, 2017. As of that date, the September 11, 2009 letter will no longer represent the opinions of FTC staff and cannot be used, relied upon, or cited for any purpose.

In closing, staff notes that revocation of the September 2009 opinion letter does not mean that the TSR prohibits all calls made using soundboard technology. To the contrary, call centers can still use soundboard technology for in-bound calls and to place a wide variety of outbound calls, such as non-telemarketing calls (e.g., political calls, survey calls, and pure informational calls), telemarketing calls that fall within the exemptions set forth in Section 310.4(B)(1)(v)(A), (B), or (D), certain types of charitable donation calls, and calls that are expressly exempt from the TSR under Section 310.6 (e.g., business-to-business calls). In fact, the preliminary data provided indicates that a significant percentage of call center seats that utilize soundboard technology are used for in-bound calls or to place non-telemarketing calls, such as political or charitable calls. As long as those calls remain outside the scope of the TSR, companies can continue to use soundboard technology for those types of calls without violating the TSR. Please note, however, that we do not opine on whether the use of such technology complies with state or other federal laws, including the Telephone Consumer Protection Act, 47 U.S.C. § 227, or its corresponding regulations implemented by the Federal Communications Commission, 47 C.F.R. § 64.1200.

Please be advised that the views expressed in this letter are those of the FTC staff, subject to the limitations in 16 C.F.R. § 1.3. They have not been approved or adopted by the Commission, and they are not binding upon the Commission. However, they do reflect the views of staff members charged with enforcement of the TSR.

¹⁰ *Telemarketing Sales Rule*, 73 Fed. Reg. 51,164, 51,1180 (Aug. 29, 2008).

¹¹ *Id.* (“Accordingly, nothing in this notice should be interpreted to foreclose the possibility of petitions seeking further amendment of the TSR or exemptions from the provisions adopted here.”)

Sincerely,

Lois C. Greisman
Associate Director
Division of Marketing Practices

Cc: Michele A. Shuster, Esq.
General Counsel, PACE
6530 W. Campus Oval, Suite 210
New Albany, OH 43054

The Soundboard Association
c/o Peter B. Miller, Esq.
Crowell & Moring LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004

Call Assistant, LLC
78-00 3rd Street N., Suite 900
St. Paul, MN 55128

Ronald S. Gellert
Gellert Scali Busenkell & Brown, LLC
1201 N. Orange Street, Suite 300
Wilmington, DE 19801
Counsel for Debtor, Call Assistant, LLC

David Carickhoff
Jennifer L. Dering
Archer & Greiner, P.C.
300 Delaware Ave., Suite 1100
Wilmington, DE 19801
Bankruptcy Trustee for Call Assistant, LLC

Noguar
5286 S 320 West
Murray, UT 84107

Avatar Technologies, Inc.
138 Columbus Ave., 2nd Floor
Mount Vernon, NY 10553

Michael Bills
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Robby H. Birnbaum
Greenspoon Marder
One Boca Place, 2255 Glades Road, Suite 400-E
Boca Raton, FL 33431
Counsel for Avatar Technologies, Inc.