FEDERAL TRADE COMMISSION

16 CFR Part 310

RIN: 3084–0098

Telemarketing Sales Rule (''TSR'')

AGENCY: Federal Trade Commission.

ACTION: Denial of petition for proposed rulemaking; revised proposed rule with request for public comments; revocation of non-enforcement policy.

SUMMARY: In this document, the Federal Trade Commission (''FTC'' or ''Commission'') announces decisions on four issues involving the Telemarketing Sales Rule (''TSR''): the denial of a petition submitted by Voice Mail Broadcasting Corporation (''VMBC'') requesting creation of a new safe harbor for the TSR that would permit the use of prerecorded messages in calls to established customers; a new proposal to amend the TSR by expressly prohibiting unsolicited prerecorded telemarketing calls without the consumer's prior written agreement; revocation of the Commission's previously announced policy of forbearance from bringing enforcement actions against sellers and telemarketers who make prerecorded telemarketing calls to established customers effective January 2, 2007; and a new proposal to amend the prescribed method for measuring the maximum allowable call abandonment rate in the TSR's existing safe harbor provision, in response to a petition from the Direct Marketing Association, Inc. (''DMA''). The Commission is requesting public comment on the proposed amendments during a comment period ending November 6, 2006.

DATES: Written comments must be received on or before November 6, 2006.

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, NW., Washington, DC 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 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 comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/Privacy.htm.*

FOR FURTHER INFORMATION CONTACT: Craig Tregillus, Staff Attorney, (202) 326–2970; Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

This document sets out the reasons for the Commission's decision to deny VMBC's petition for amendment of the TSR's call abandonment provisions to add a new safe harbor, and to seek public comment on amendments the Commission is now proposing in response to the record created by the VMBC and DMA petitions. These actions are based on a careful analysis of the public comments received in response to a Notice of Proposed Rulemaking (''NPRM'') published in the **Federal Register** on November 17, 2004.[1] The NPRM generated nearly 13,600 unique comments—23 submitted by telemarketers and business trade associations representing numerous members, and the balance from consumers and consumer advocates.

Section 310.4(b)(1)(iv) of the TSR prohibits telemarketers from abandoning calls. An outbound telemarketing call is ''abandoned'' if the telemarketer does not connect the call to a sales representative within two seconds of the completed greeting of the person who answers. Call abandonment is an unavoidable consequence of the use of ''predictive dialers''—telemarketing equipment that increases the productivity of telemarketers by placing multiple calls for each available sales representative. Predictive dialers maximize the amount of time representatives spend speaking with consumers and minimize the time they spend waiting to 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

[1] 69 FR 67287 (Nov. 17, 2004).

[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).

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 telemarketing campaign that consists solely of prerecorded messages, therefore, would violate § 310.4(b)(1)(iv) and would not meet the safe harbor requirements.

VMBC submitted a request for an advisory opinion requesting an additional safe harbor for prerecorded message telemarketing to consumers with whom the seller has an established business relationship, which the Commission treated as a petition to amend the TSR under § 1.25 of the FTC's Rules of Practice.[5] VMBC's submission sought permission to deliver prerecorded messages to consumers who have an established business relationship with the seller on whose behalf the telemarketing calls are made, asserting that such calls would not result in the twin harms of ''hang ups'' and ''dead air'' that the prohibition on abandoned calls in § 310.4(b)(1)(iv) was designed to remedy.

The amendment requested by DMA, in contrast, sought modification of the method for calculating the maximum three percent call abandonment rate prescribed in the existing safe harbor provision. DMA asked that the requirement in § 310.4(b)(4)(i) that sellers and telemarketers use ''technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, *measured per day per calling campaign*'' be revised so that the three percent standard instead could be ''*measured over a 30-day period*'' for all of a telemarketer's calling campaigns.

II. The VMBC Petition

The VMBC petition for an additional safe harbor was premised on a business model that, VMBC contended, would not result in the harms the call abandonment prohibition in § 310.4(b)(1)(iv) was designed to prevent. Under VMBC's proposed model, prerecorded messages would give the called party an opportunity to assert a company-specific Do Not Call request. The messages would allow the called party to do so either by pressing a button on the telephone keypad to speak to a sales representative at any time during the message, or alternatively by dialing a toll-free number that would connect to a sales representative. Finally, as indicated above, the prerecorded messages would be delivered exclusively to consumers who have an ''established business relationship'' [6] with the seller on whose behalf the calls are made.

A. VMBC's Rationale for a Safe Harbor

VMBC advanced three primary reasons for adding a new safe harbor to the TSR's call abandonment prohibition to permit calls delivering such prerecorded messages to consumers with whom the seller has an established business relationship. First, VMBC asserted that the harms that prompted inclusion of the call abandonment prohibition in the TSR would not be present in campaigns conducted according to its proposed business model. Specifically, VMBC argued that the use of prerecorded messages would make it unnecessary to subject a consumer to ''dead air'' while waiting for a sales representative, and would not result in a ''hang-up'' when no representative is available. Moreover, because the prerecorded messages would immediately identify the seller, the seller would not be engaging in telemarketing under the cloak of anonymity that often prompts consumer concern about ''dead air'' and ''hang ups.''

Second, VMBC contended that because the prerecorded messages would be delivered only to existing customers, sellers would have a strong incentive to preserve their customers' goodwill.[7] This incentive would serve, VMBC posited, as a sufficient check on the potential for abuse such that prerecorded calls to established customers would be unlikely to prompt substantial consumer objection.[8]

Finally, VMBC argued that a new safe harbor for prerecorded messages is necessary to conform the FTC's TSR to the rules and regulations issued by the Federal Communications Commission (''FCC'') [9] pursuant to the Telephone Consumer Protection Act of 1991 (''TCPA'').[10] VMBC pointed out that the FCC's rules—which largely parallel the Do Not Call and certain other of the TSR's provisions—since the early 1990s have permitted prerecorded message telemarketing to consumers with whom a seller has an established business relationship. In most other circumstances, however, the FCC's rules under the TCPA prohibit prerecorded message telemarketing, absent a consumer's prior express consent.[11]

B. The Safe Harbor Proposal and Specific Issues Raised for Public Comment

To assist interested parties in commenting on the VMBC petition, the NPRM included a proposed new § 310.4(b)(5) that would have amended the TSR to permit prerecorded telemarketing messages to established customers.[12] As drafted, the proposed safe harbor provision would have required sellers and telemarketers to: (1) Allow the telephone to ring for at least 15 seconds or four rings before disconnecting an unanswered call; (2) play a prerecorded message within two seconds of the called party's completed

[4] 16 CFR §§ 310.4(b)(4)(i)–(iv).

[5] 16 CFR 1.25.

[6] 16 CFR 310.2(n) (''‘Established business relationship' means a relationship between a seller and a consumer based on: (1) The consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or (2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.'').

[7] VMBC noted that the FTC suggested that ''the incentive to nurture established business relationships may provide an adequate restraint on the growth of recorded message telemarketing'' in its *Report to Congress Pursuant to the Do Not Call Implementation Act* (''DNCIA Report''), p. 35.

[8] In support of this argument, VMBC cited one prerecorded campaign for a major retailer in which only .02 of 1 percent of 5.8 million customers asserted their Do Not Call rights. 69 FR at 67288 n. 8. *See also* n. 30, *infra.* The Commission noted in the NPRM, however, that any incentive to preserve consumer goodwill could be outweighed in practice by the fact that ''it may be more economical for companies to contact consumers via prerecorded messages rather than using live telemarketers, so the volume of commercial calls that consumers receive may increase. ''

[9] 47 CFR 64.1200. *See also* FCC Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92–90, Report and Order, 7 FCC Rcd 8752 (1992), available at *http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1071340001,* summarized in 57 FR 48333 (Oct. 23, 1992) (''1992 FCC Order''); amended by FCC Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02–278, Report and Order, 18 FCC Rcd 14014, available at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-153A1.pdf,* summarized in 68 FR 44143 (July 25, 2003) (''2003 FCC Order'').

[10] 47 U.S.C. 227 (1991).

[11] 47 CFR 64.1200(a)(2). The FCC's TCPA regulations make an exception for calls placed by a seller or telemarketer that has obtained the called party's prior express consent to receive telemarketing calls, or has an established business relationship with the called party. 47 CFR 64.1200(a)(2). The regulations also exclude calls for emergency purposes, calls not made for a commercial purpose that do not include a solicitation, and calls made by or on behalf of a tax-exempt nonprofit organization. 47 CFR 64.1200(a)(2)(i)–(v). In addition, the FCC's regulations absolutely prohibit all live and prerecorded telemarketing calls to a cellular telephone, regardless of any established business relationship or prior express consent a seller or telemarketer may have obtained. 47 CFR 64.1200(a)(1)(iii).

[12] 69 FR at 67289.

greeting; (3) give the called party an opportunity to assert an entity-specific Do Not Call request at the outset of the message, with only the disclosures required by §§ 310.4(d) or (e) preceding that opportunity; [13] and (4) ensure that the message complies with all other requirements of the TSR and other applicable State and Federal laws.[14]

1. The ''Ring-Time'' Standard

The NPRM explained that the first prerequisite for meeting the safe harbor requirements, the ''ring time'' standard requiring 15 seconds or four rings to elapse while awaiting an answer, is identical to the analogous element of the existing safe harbor in § 310.4(b)(4)(ii). That standard, modeled on what were then DMA's ethical guidelines for its members, was designed to give consumers, including the elderly or infirm who may struggle to get to a telephone, a reasonable opportunity to answer telemarketing calls before the connection is terminated.

2. The ''Dead Air'' Standard

The second prerequisite of the proposed safe harbor, requiring that the prerecorded message be played within two seconds of the called party's completed greeting, was intended to minimize ''dead air.'' It was based on the analogous element of the existing safe harbor in § 310.4(b)(4)(iii), allowing no more than two seconds of dead air before the called party is connected to a sales representative. The Commission specifically requested public comment on whether the maximum amount of dead air should be less than two seconds in the new safe harbor for prerecorded messages in which there would be no need to connect a sales representative. The Commission also requested information on the relative costs and benefits of a standard that would set the maximum amount of dead air at a level lower than two seconds.

3. Prompt Opportunity for Company-Specific Do Not Call Requests

The purpose of the third prerequisite, mandating a prompt opportunity for consumers to assert a company-specific Do Not Call request, was to ensure the same Do Not Call rights for consumers who receive prerecorded message calls as are available to consumers receiving live telemarketing calls from a sales representative. Absent such parity, the Commission was concerned that, in view of the likely increase in the frequency of lower-cost prerecorded message calls (compared to the cost of live calls by sales representatives), the privacy protection provided by the National Do Not Call Registry might become illusory. The NPRM emphasized:

> Accordingly, the Commission believes that, if allowed, telemarketing calls that deliver prerecorded messages to consumers with whom a seller has an established business relationship must preserve the ability of those consumers to assert their Do Not Call rights *quickly, effectively, and efficiently*, so that consumers retain an effective right to decide whether to receive commercial calls, including prerecorded messages.[15]

The proposed safe harbor therefore required that the prerecorded message provide, ''at the outset of the call'' (*i.e.*, preceded only by the prompt oral disclosures required by the TSR), an opportunity for the called party to assert a seller-specific Do Not Call request by pressing a button on his or her telephone keypad to connect to a sales representative or an automated system. By stressing that ''the Commission believes that the Do Not Call option should allow consumers to assert their Do Not Call rights *during* the prerecorded message,'' [16] the NPRM distinguished this element of the Commission's safe harbor proposal from FCC rules allowing prerecorded messages to provide a toll-free number consumers may call to make a Do Not Call request during or after the message.[17] The NPRM expressly declined to adopt the FCC approach, which requires ''consumers to be prepared with pen and paper at the ready when they answer the phone, to take down the number and to place a separate call'' to make a Do Not Call request, because that approach ''encumbers consumers'' assertions of company-specific Do Not Call rights.'' [18]

Noting that the VMBC petition ''contemplates some prerecorded messages that would enable consumers to speak with a sales representative during the call by pressing a button on their telephone keypads,'' the NPRM specifically ''incorporated this feature into the proposed amendment to the call abandonment safe harbor,'' [19] stating that it would ''satisfy the proposed safe harbor.'' [20] This endorsement gave advance assurance to sellers and telemarketers that they could adopt this means of compliance during the pendency of this proceeding when the Commission announced it would forebear from enforcing the call abandonment provision if they complied with the proposed safe harbor.[21]

Although the NPRM did not similarly endorse prerecorded messages providing a toll-free number for consumers to call to be placed on a company-specific Do Not Call list, the Commission sought ''information and data about the costs and benefits of requiring that the disclosure of how to make a Do Not Call request be made at the outset of the call,'' as well as about ''alternative methods of preserving the consumer's ability to assert a Do Not Call request when receiving a prerecorded message telemarketing call.'' [22] In addition, the NPRM sought information and data about the technical feasibility and costs of implementing the interactive technology that allows consumers to make a company-specific Do Not Call request with the press of a keypad button, and the costs to industry of requiring this mechanism.

4. Effect on Other Laws

The fourth and final element of the draft proposal simply made it clear that the new safe harbor would not obviate or negate any other provision of the TSR or other Federal or State laws, in order to preserve consistency with the existing TSR call abandonment safe harbor. It placed sellers and telemarketers on notice that other applicable regulations may be stricter than the proposed safe harbor. The NPRM sought comment on whether or not this requirement was appropriate.

C. Public Comment

In general, the industry comments on the VMBC petition supported liberalizing the TSR to allow the use of prerecorded telemarketing messages, and consumers and consumer advocates opposed it.[23] Although both industry

[13] Section 310.4(d) requires the following prompt oral disclosures in outbound commercial telemarketing calls: (1) The identity of the seller; (2) that the purpose of the call is to sell goods or services; (3) the nature of the goods or services; and (4) that no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered, and that any purchase or payment will not increase the chances of winning. Section 310.4(e) requires the following oral disclosures in outbound charitable solicitation calls: (1) The identity of the charitable organization on behalf of which the request is being made; and (2) that the purpose of the call is to solicit a charitable contribution.

[14] 69 FR at 67294.

[15] 69 FR at 67288–89 (emphasis added).

[16] 69 FR at 67289 (emphasis added).

[17] 47 CFR 64.1200(b)(2).

[18] 69 FR at 67289.

[19] *Id.*

[20] *Id.* at 67290.

[21] See the discussion in Section II.F, *infra.*

[22] 69 FR at 67289.

[23] All of the public comments, excluding 442 judged obscene or not germane, appear at *http://www.ftc.gov/os/comments/tsrcallabandon/index.htm*, where they are listed alphabetically under the name of the person who submitted the comment. The first citation of each comment

and consumer comments addressed the major issues raised by the NPRM, not all responded to each of the questions on which the Commission requested public comment.

Many of the comments, both from the telemarketing industry and consumers, exhibited a fundamental misconception of the TSR's scope. They presumed that, absent the proposed safe harbor, the TSR's call abandonment prohibition would prevent sellers from using prerecorded messages to provide important information to customers with whom they have an established business relationship, such as notifications of flight cancellations, reminders of medical appointments and overdue payments, and notices of dates and times for delivery of goods or service appointments. Such strictly informational calls, however, whether live or prerecorded, have never been covered by the TSR. The TSR applies only to ''telemarketing,'' which is defined, in pertinent part, as ''a plan, program or campaign which is conducted to induce the purchase of goods or services.'' [24] It does not apply to informational calls, unless the calls combine the informational message with a sales invitation or promotional pitch.

1. Industry Comments

Comments from 21 telemarketers and business trade associations uniformly favored allowing sellers to use prerecorded telemarketing messages to reach their customers, arguing that this is a cost-effective method for communicating without the need for sales representatives.[25] Several noted not only that prerecorded messages avoid the harms associated with abandoned calls (*i.e.*, ''dead air'' and ''hang ups''), but also ensure better quality service to customers than telemarketers because there is no risk that the intended message will vary from call to call.[26]

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 Act [31] 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 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 prerecorded telemarketing messages because Congress has given exclusive authority to the FCC to do so.[39] One conceded

includes the name of the commenter, the name in parentheses of the person or entity submitting the comment if it is different from the name of the commenter, and the comment number (*e.g.*, ABC Corp. (Smith, J.), No. OL–123456). Comment numbers without a prefix were delivered to the Commission in paper form; those with the prefix ''OL'' were submitted online at the FTC's Web site; and those with the prefix ''EREG'' were submitted to *http://www.regulations.gov*. Subsequent citations to a comment omit the comment number.

[24] 16 CFR 310.2(cc). For the same reason, it is unnecessary to grant the request made in a comment on behalf of credit and collection professionals that the Commission forbear from enforcing alleged violations of the Fair Debt Collection Practices Act based on the FCC's requirement that debt collectors identify themselves by their State-registered name in prerecorded telephone messages. ACA International, No. OL–113912. As the Commission has previously stated, pure debt collection calls are not covered by the TSR because they are not ''telemarketing'' calls. TSR SBP, 68 FR at 4664 n.1020 (noting, however, that ''if the debt collection call also included an upsell, the upsell portion of the call would be subject to the Rules as long as it also met the criteria for 'telemarketing' and was not otherwise exempt from the Rule. All debt collection calls must comply with the FDCPA.'').

[25] Only 21 of the 23 industry comments addressed this issue. E.g., VMBC (Wiley Rein & Fielding), No. OL–113915 at 8; Joint Comment of the United States Chamber of Commerce, The Coalition for Healthcare Communication, The Consumer Bankers Association, The Magazine Publishers of America, The Mortgage Bankers Association, The National Newspaper Association, The Newspaper Association of America, and The Independent Insurance Agents and Brokers (''U.S. Chamber'') (Wiley Rein & Fielding), No. OL–113911 at 5; The Heritage Company (''Heritage''), No. OL–112918 at 1; West Corporation (''West''), No. OL–112911 at 2.

[26] VMBC at 7, 11; U.S. Chamber at 5; West at 1; Direct Marketing Association and American Teleservices Association (''DMA''), No. OL–113918 at 9; Visa U.S.A., Inc. (''Visa''), No. 000023 at 2; Call Command, LLC (''Call Command'') No. 000025 at 1–2; Verizon Telephone Companies (''Verizon''), No. OL–113893 at 4.

[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).

[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.

[39] Soundbite at 1–2; Infocision at 1; but see, United States Senate, No. OL–113862 (Senators Bill

Continued

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 technology, either to connect to a representative or to make an automated Do Not Call request, is costly, burdensome, and not widely available,[45] notwithstanding the arguments by two industry members that the technology is available on ''a very cost effective basis.'' [46] One comment doubted that it ''would necessarily be the case that the interactive feature would connect the consumer to a live sales representative any faster than if the customer were simply to dial an 800-number.'' [47] Several comments recommended that the Commission leave the timing and method of providing a Do Not Call option up to the industry, as the FCC has done, so that sellers will have the flexibility to choose the method most suitable to their operations based on preferences and costs.[48]

2. Consumer Comments

Nearly all the consumers and consumer advocacy groups who commented opposed the proposal to permit telemarketing calls that are prerecorded, regardless of whether the party called has an established business relationship with the seller.[49] Their comments show that consumers 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 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

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.

[45] DMA at 11–12 (estimating that reprogramming calling stations would cost ''$25,000 per location''); SBC at 4 (citing the ''significant investment of time and capital to synchronize telephonic dialing capabilities with interactive voice platforms and databases,'' the significant cost of requiring the availability of sales agents, and asserting that the ''number of calls able to be made in a single day would decrease by more than 99%''); Convergys at 5 (arguing that connection to an agent would be cost prohibitive because of the increase in telecommunications costs to maintain ''bridges'' to customer service personnel); Visa at 2 (''[T]he technology to permit registration [on company-specific Do Not Call lists] during the telemarketing call presently is not widely implemented and * * * would be costly and complicated'').

[46] Soundbite at 2; VMBC at 10.

[47] SBC at 14 n.13.

[48] VMBC at 13–14; U.S. Chamber at 6; West at 3; Visa at 2; cf. NRF at 4 (suggesting a more flexible disclosure timing such as ''reasonably promptly'').

[49] E.g., Electronic Privacy Information Center (''EPIC''), No. OL–113823 at 2; Privacy Rights Clearinghouse (''PRC''), No. OL–113986 at 2–4; National Consumers League (''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 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.'').

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 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 a 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 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]

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 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

[56] TSR SBP, 68 FR at 4593 n.141.

[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 II.E, *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.

[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 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. OL103862; 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].'').

[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.'').

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 the opt-out number, and to wait to call that number during normal business hours to ask not to be called again—a process they would have to repeat for each company that calls.[69]

Some consumers and consumer groups questioned the adequacy of the proposed interactive mechanism that would permit consumers to exercise their Do Not Call rights by pressing a button on the telephone keypad. At least one consumer noted that this approach would be ineffective for her, and presumably many thousands of other consumers who still have rotary dial telephones without keypads.[70] A consumer group and at least one consumer questioned whether the proposed interactive mechanism would be effective in the absence of a requirement that a representative be promptly available.[71] Another consumer group doubted that consumers would really benefit from the proposed interactive mechanism.[72]

A number of consumers also challenged a presumption implicit in the proposed safe harbor that would have permitted prerecorded telemarketing calls to established customers. Notwithstanding the FCC's rationale for allowing sellers to use prerecorded messages in calls to 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'' of the Registry [78]—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 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

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[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.

[69] E.g., Hancock, J., No. 112529; Sahagian, No. OL–113021; Kleger, No. OL–103115.

[70] Sachau, No. EREG–000002; see also Argyropoulos, No. OL–102968 at 2 (''[N]one of the proposed options allow a person answering on a non-touch-tone phone to efficiently make a Do Not Call request.''). While other mechanisms undoubtedly exist to provide equivalent functionality for rotary dial telephone users, no industry comment addressed this problem in response to the NPRM's request for information about ''alternative mechanisms.''

[71] NCL at 5 (''The FTC proposal seems to assume that when the consumer presses the number to speak to a live company representative, one will be readily available. It is unclear what happens if that is not the case. Will the consumer get dead air? Be put on hold with recorded music? Be hung up on?''); Argyropoulos, No. OL–102968 at 2.

[72] PRC at 7 (arguing that most prerecorded telemarketing messages are left on answering machines or voice mail services, depriving consumers of the benefits of such an option, and ultimately clogging their message storage with unwanted telemarketing messages). However, nothing in the TSR's call abandonment prohibition bars the use of equipment that channels a call to a sales representative if a consumer answers, but to a recorded message if an answering machine picks up. See TSR SBP, 68 FR at 4645; see also the discussion in Section II.E, infra.

[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.

[78] Sanderson, No. OL–447. 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. 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.'').

[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.

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 customers would in effect create the telephonic equivalent of ''spam,'' overwhelming consumers with unwanted messages that cost the caller little or nothing to send.[85]

D. Analysis of the Comments, Discussion and Conclusion

Two themes strikingly emerge from the record. First, there is virtually no consumer support for allowing the use of prerecorded messages; and second, neither industry nor consumers support the proposal's effort to ensure that consumers would be able to assert an entity-specific Do Not Call request in an ''established business relationship'' call delivering a prerecorded message as easily and as quickly as in a similar call using sales representatives. Thus, the Commission's analysis begins from the premise that a new safe harbor that treats prerecorded telemarketing calls to established customers differently from other prerecorded calls might be appropriate if: (1) The consumer aversion to prerecorded calls (which led to enactment of the TCPA ban on such calls) does not apply when such calls are made to established customers; (2) any harm to consumer privacy is outweighed by the value of prerecorded calls to established customers; or (3) there is something unique about the relationship between sellers and their established customers that gives sellers a sufficient incentive to self-regulate so that they would avoid prerecorded telemarketing campaigns that their customers would consider abusive. Based on careful consideration of the comments, the Commission concludes that the record does not support any of these possible rationales for treating prerecorded telemarketing calls to established customers differently from other prerecorded calls.

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.

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 customers[89]—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

[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.

[85] E.g., Anderson, No. OL–106320 (''E-mail spam is killing e-mail for legitimate business communication and phone spam would do the same for telephone communications.''); Kislo, No. OL–102924 (''Such a modification would change telemarketing rules in such a radical fashion, you risk bringing the 'e-mail spam' problem to the telephones across the US.''); Malone, S., No. OL–107630 (objecting to FTC proposal to allow ''pre-recorded 'spam blitzes'' '); Miller, No. OL–103424 (''Left unchecked (as I believe it is today) the phone system will become much like e-mail, 80% spam.'').

[86] See note 54, *supra.*

[87] S. Rep. No. 102–178, at 10 (1991).

[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).

less of an incentive to self-regulate the number of 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 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 telemarketing calls, even though the DNCIA directed the FCC to maximize the consistency of its Do Not Call regulations with the FTC's TSR.[94]

When the FCC first promulgated its regulations under the TCPA in 1992, that agency recognized that the TCPA did not exempt prerecorded calls to a consumer who has an established business relationship with a seller.[95] In adopting regulations prohibiting virtually all prerecorded message telemarketing calls where the called party has not given ''prior express consent'' to receive such calls, the FCC nonetheless elected to create an ''established business relationship'' exemption from that prohibition.[96] The FCC explained that, in its view, a ''solicitation can be deemed invited or permitted by a subscriber in light of the business relationship,'' [97] that requiring ''prior express consent'' would ''significantly impede communications between businesses and their customers,'' and thus, that a ''solicitation to 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

[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.

[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), cert. denied, 126 S.Ct. 2058 (2006); see also *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).

[94] Section 3 of the DNCIA directed that ''the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission (16 CFR 310.4(b))'' in issuing the 2003 FCC Order to implement and enforce the Do Not Call Registry.

[95] 1992 FCC Order, 7 FCC Rcd 8752, ¶ 34. In fact, the TCPA states that Congress has found that ''residential telephone subscribers consider automated or prerecorded telephone calls * * * to be a nuisance and an invasion of privacy,'' and that ''[b]anning such 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(10) and (12).

[96] 47 CFR 64.1200(a)(2)(iv). The only requirements are that the prerecorded message must clearly identify the business responsible for initiating the call and provide, ''during or after the message,'' a telephone number that consumers can call during normal business hours to make a company-specific Do Not Call request. 47 CFR 64.1200(b).

[97] 1992 FCC Order, 7 FCC Rcd 8752, ¶ 34. But cf., Telecom Decision, CRTC 2004–35, ¶ 111 (in which the Canadian Radio-Television and Telecommunications Commission declined to create an established business relationship exemption for prerecorded telemarketing calls on the ground that ''when a consumer purchases a service or product from a company * * * there is no 'implied consent' as a result of that purchase to receive future solicitations'').

[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.

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 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 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]

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

[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.

[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.

[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.

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 that it might be beneficial to make the prohibition more prominent by adding a provision that makes explicit the prohibition on telemarketing calls delivering prerecorded messages (while clarifying that the call abandonment safe harbor continues to allow the use of prerecorded messages in very limited circumstances).

This record demonstrates that the overwhelming majority of consumers consider prerecorded telemarketing calls a particularly ''coercive or abusive'' infringement on their right to privacy.[113] Nevertheless, the Commission believes that all interested parties should be afforded an opportunity to comment on the proposed prohibition, and will base its final decision on the full record of comments it receives.

E. Proposed Amendment

Accordingly, the Commission has decided to propose the following addition to the ''Pattern of Calls'' prohibitions in § 310.4(b)(1) of the TSR, and to invite public comment on the proposal until November 6, 2006. Section 3.10(b)(1) will continue to provide that ''It is an abusive telemarketing act or practice and a violation of this rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:'' The new subsection would add:

> (v) Initiating any outbound telemarketing call that delivers a prerecorded message when answered by a person, unless the seller has obtained the express agreement, in writing, of such person to place prerecorded calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature of that person; *provided, however,* that prerecorded messages permitted for compliance 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 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

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[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).

[113] 15 U.S.C. 6102(a)(3)(A); see TSR SBP, 68 FR at 4613.

[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).

[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).

service, and whether such harms rise to the level of an intrusion that the ''reasonable consumer would consider coercive or abusive of such consumer's right to privacy.'' [117]

In soliciting comments on the proposed amendment, the Commission again wishes to emphasize that the proposed prohibition will not prevent telemarketers from transmitting prerecorded informational messages to consumers that are not part of a ''plan, program or campaign which is conducted to induce the purchase of goods or services or a charitable contribution.'' With that caveat, the Commission will be interested in comments that address the costs and benefits to industry and to consumers of the proposed amendment, as more fully elaborated in Section VIII below.

F. Revocation of Non-Enforcement Policy Against Prerecorded Telemarketing Calls

In view of the foregoing decision, the Commission will no longer continue the forbearance policy announced in the NPRM on enforcement actions for violation of the TSR's call abandonment prohibition in § 310.4(b)(1)(iv), against sellers or telemarketers that, in conformity with the now-rejected call abandonment safe harbor, place telephone calls delivering prerecorded messages to consumers with whom the seller has an established business relationship. The Commission wishes to emphasize that although many prerecorded informational messages are not covered by the TSR, the TSR does cover (and prohibit) telemarketing calls that deliver prerecorded messages to consumers.[118]

Nevertheless, in order to prevent any reasonably foreseeable hardship for sellers or telemarketers that have relied on the Commission's forbearance policy, the Commission will give such sellers and telemarketers until January 2, 2007 to revise their practices to conform to the TSR, and will take no enforcement action based on calls to consumers with whom the seller has an established business relationship that are placed before that date and that conform to the previously proposed, and now rejected, safe harbor.

III. The DMA Petition

The DMA petition urges a change in the standard of the TSR's existing call abandonment safe harbor in § 310.4(b)(4) for measuring the maximum permissible percentage of answered calls that may be abandoned when a telemarketer is not available. Rather than measuring the three (3) percent maximum ''per day per calling campaign,'' as prescribed in § 310.4(b)(4)(i), to limit ''hang ups'' and ''dead air,'' DMA asks that the maximum be ''measured over a 30-day period.''

In adopting the ''per day, per campaign'' standard for calculating the maximum level of abandoned calls, the Commission stated:

> The 'per day per campaign' unit of measurement is consistent with DMA's guidelines addressing its members use of predictive dialer equipment. Under this standard a telemarketer running two or more calling campaigns simultaneously cannot offset a six percent abandonment rate on behalf of one seller with a zero percent abandonment rate for another seller in order to satisfy the Rule's safe harbor provision. Each calling campaign must record a maximum abandonment rate of three percent per day to satisfy the safe harbor.[119]

DMA's petition conceded that former DMA Guidelines for Ethical Business Practices set a ''per day per campaign'' standard for the maximum percentage of calls that DMA members could abandon, but emphasized that the Guidelines set a five percent abandonment rate, rather than the three percent rate incorporated in the TSR's safe harbor. However, as the NPRM noted, the petition provided no factual support for DMA's apparent argument that a ''per day per campaign'' standard would be feasible at a five percent call abandonment rate, but not at three percent.

A. DMA's Rationale for Revising The Safe Harbor

The DMA petition advanced three reasons for modifying the three percent standard: (1) The standard is ''virtually impossible'' for vendors who run multiple campaigns each day to meet; (2) the California Public Utilities Commission—whose three percent call abandonment rate the Commission cited in adopting the standard—measures abandoned calls on a ''per 30-day'' basis according to the DMA; and (3) the FTC should defer to the FCC's determination that the call abandonment rate should be measured over a 30-day period, because the issue ''lies closer to the core expertise of the FCC than of the FTC.'' [120]

As the NPRM noted, however, DMA's first argument, the near impossibility for vendors to meet the ''per day per campaign'' standard when running multiple campaigns each day, suggested that telemarketers engage in precisely the practices that the ''per day per campaign'' standard was designed to prevent. DMA argued that predictive dialer systems manage call abandonment rates ''as an average of all campaigns per day, so it is inevitable that certain logins would end the day at say, 3.1% and other at 2.9%, yet the overall average would still be 3% or less.'' [121] The DMA petition did not explain why telemarketing systems cannot dynamically maintain a steady level of no more than three percent overall, or could not be modified to keep the abandonment rate below three percent separately for each campaign.

The NPRM rejected the last two arguments in DMA's petition as insufficient to warrant a change in the call abandonment standard. The Commission noted that ''compliance with the FTC's more precise standard would constitute acceptable compliance'' with both the 30-day standard adopted by California and the FCC, and that court decisions ''controvert DMA's argument that the FTC's expertise or legal authority regarding the acceptable level of call abandonment is inferior to that of the FCC.'' [122]

The NPRM further explained that, in its petition, DMA had provided no information that would tend to counter the foreseeable shortcomings of a 30-day standard that the Commission set forth at length in its DNCIA Report.[123] The potential for a 30-day standard to ''enable telemarketers to target call abandonments at certain less valued groups of consumers,'' and thus ''offset a high abandonment rate in low income zip codes and make up the difference by abandoning no calls in affluent ones'' led the Commission to adopt the ''per day per campaign'' standard to reduce ''the potential for concentrating abuse by ensuring an even distribution of abandoned calls to all segments of the public.'' [124]

B. Request for Public Comment and Response

The NPRM sought public comment on the petition, noting that ''the Commission is receptive to any factual information that would establish that such a change is warranted,'' but observing that DMA had ''not provided an adequate factual basis that would compel'' a modification. The

[117] See discussion of the Commission's authority to prohibit ''abusive'' practices in the notice of proposed rulemaking for the amended TSR. 67 FR 4493 at 4510 (Jan. 30, 2002).

[118] 16 CFR § 310.2(cc).

[119] TSR SBP, 68 FR at 4643 (footnotes omitted).

[120] DMA petition at 3, available at *http://www.ftc.gov/os/2004/10/041019dmapetition.pdf.*

[121] *Id.* at 2.

[122] 69 FR at 67291 & n.19.

[123] DNCIA Report at 31.

[124] 69 FR at 67291.

Commission emphasized that it was particularly interested in three types of information: (1) Any elaboration on the problems telemarketers who are running multiple campaigns at the same time face in attempting to comply with the current requirement; (2) any information demonstrating that telemarketers who make a relatively small number of calls per day may be differentially disadvantaged by the current requirements; and (3) information and data demonstrating that it is unlikely that, if additional flexibility were provided, telemarketers would intentionally set the abandonment rates above 3 percent for some campaigns or calls directed to certain consumers, while setting lower rates of call abandonment for other campaigns or calls in order to stay within the three percent maximum call abandonment rate.

1. Consumer Comments

Comments from some 230 consumers and three consumer advocacy groups addressed issues raised by the DMA petition. All but a smattering of these comments opposed changing the call abandonment standard to a 30-day average across all telemarketing campaigns.[125] Many argued that the DMA did not offer a compelling reason for the change, with at least two noting that the difficulties DMA cited for some telemarketers in meeting the current standard could easily be eliminated by modifying or upgrading their software.[126] Consumer groups expressed continued concern that a 30-day standard would enable telemarketers to target high call abandonment rates at less valued groups of consumers,[127] offsetting the high rates with lower abandonment rates for preferred groups, while a number of consumers were more concerned that the number of abandoned calls would increase on some days or in some campaigns.[128]

2. Industry Comments

Eleven comments from telemarketers, their trade associations and other business trade associations unanimously supported revision of the ''per day per campaign'' standard,[129] with several echoing the argument that the FTC should defer to the FCC standard,[130] and some contending that there is no evidence that telemarketers would abuse a 30-day standard by discriminating against disfavored groups of consumers.[131] DMA and the American Teleservices Association (''ATA'') argued in their joint comment that compliance with the current standard is difficult because the pace of outbound calls placed by predictive dialers is based on the average number of calls answered by consumers, and unexpected fluctuations in the number answered, or the time sales agents spend speaking with consumers, make it difficult to predict the call abandonment rate and ensure compliance, particularly in smaller campaigns, and in campaigns focusing on evening calls at the end of the day.[132]

DMA and ATA explained that predictive dialers base the rate at which they place calls on a projection of the average number of consumers who will answer and the number of sales agents available. The margin of error for these projections, in turn, is a function of the number of consumers to be called. The larger the number of consumers to be called, the smaller the deviation is likely to be from the projected call abandonment rate. Conversely, the smaller the number of consumers to be called, the greater the deviation can be from the desired abandonment rate.[133] Since the projected average answering rate is determined by predictive dialer sampling as calls are made, larger periods of calling time limit the impact of unexpected fluctuations in the answering rate, while shorter periods of time exaggerate their effect. Any unexpected spike in answered calls could, according to DMA and ATA, ''make it impossible to recover within the same day based upon such a small time frame of calling.'' [134]

For these reasons, DMA and ATA argued that the present ''per day per campaign'' standard inhibits the use of smaller, ''segmented'' lists of fewer than 15,000 names that target consumers most likely to be interested in an offer.[135] This disadvantages consumers, the comment contended, by making it more likely they will receive calls about sales offers in which they have no interest, and also particularly disadvantages small business sellers with small clienteles, as well as the smaller telemarketing companies that serve them.[136] DMA also asserted that the Commission significantly increased the compliance burden for small business users of segmented lists, given the difficulties of predicting abandonment rates with shorter calling lists, by setting the safe harbor call abandonment rate at three percent, rather than the five percent figure in DMA's former guidelines, with the result that predictive dialer economic ''efficiencies disappear almost entirely.'' [137]

DMA and ATA further argued that ''[t]he actual number of abandoned calls would not increase if the measurement

[125] Three of ten consumers who supported a change suggested limiting it to 30-days ''per calling campaign,'' with two of them proposing reducing the period further to ''the lesser of'' 30 days or the duration of a specific campaign. McCorvey, No. OL–104248 (''As an engineer, I recognize the possibility that various causes outside the control of the marketing organization may make it difficult for them to ensure compliance when measured across a very narrow time span. This expansion of the compliance window would not (in my opinion) create any real opportunity for abuse ONLY if it is tied to each campaign. Therefore, wording of the form 'measured over a 30-day period per campaign' would be both fair, practical and provide continued protection for consumers.''); Kaufmana, No. OL–102724 (''I would recommend the changed phrase to be 'measured over a 30-day period or the calling campaign, whichever is less.' ''); Zajonc, No. OL–102790 (''I'm not against the 30-day provision for 3% abandonment, though I would probably shrink it, or have it be the lesser of 30 days or a specific campaign.''). See also Tukey, D, PhD, No. OL–104725 (''I understand the nature of statistical fluctuation, so it seems a longer time period is not out of order.''); Yamane, No. OL–101436 (''[A] 30-day period seems less of a problem, although it does seem to make abuses of the system more likely by providing a larger window over which abuses can be measured.''); cf. Holm, M., No. OL–100438 (''If this is merely a technical change * * * then I am not opposed.''); Frye, T., No. OL–106806; VanDusen, No. OL–113869; Thornton, No. OL–111679; Cummings, No. OL–113849.

[126] E.g., Argyropoulos, No. OL–102968 at 3; Protigal, No. 000010 at 11.

[127] NCL at 5–6; PRC at 10; EPIC at 14.

[128] E.g., Bullard, No. OL–101198; Kislo, No. OL–102924; Ripple, No. OL–101379; Giuliani, No. OL–108532.

[129] E.g., DMA at 2; American Teleservices Ass'n., No. 000058 at 3; VMBC at 15; Heritage at 3; U.S. Chamber at 7; Infocision at 6 (advocating a 30-day standard for each separate campaign, while all other industry comments supported DMA's proposal for an overall 30-day standard for all of a telemarketers's concurrent campaigns).

[130] DMA at 8; VMBC at 15; Infocision at 6; U.S. Chamber at 7.

[131] Infocision at 5; DMA at 8; *see* U.S. Chamber at 8.

[132] DMA at 3–4; U.S. Chamber at 8.

[133] This follows, according to DMA and ATA, from ''a bedrock principle of statistical analysis that the smaller the size of the sample, the larger the standard deviation and sampling errors.'' DMA at 3; see also, U.S. Chamber at 8 (''In general, the smaller the list or the smaller the campaign (or the fewer days over which the call abandonment rate is measured), the more likely that the abandonment rate may deviate from the targeted rate of three percent.'').

[134] DMA at 4.

[135] DMA and ATA not that ''some'' predictive dialers require callings lists of ''approximately 15,000 names'' and ''at least 7 or 8 telemarketing agents for any one program'' to meet the current ''per day per campaign'' standard. DMA at 5.

[136] DMA at 4; *see also,* U.S. Chamber at 8 (''In particular, the current test for call abandonment in the TSR inflicts a disproportionate harm on smaller businesses. Smaller businesses have smaller calling lists; one consequence of this is that a small business may inadvertently exceed the three percent figure comparatively quickly. To stay within the limits, the small business must recalibrate its dialing equipment, hire more sales representatives (which could cost overtime rates under the per day test), or risk violating the law.''); VMBC at 15–16; Visa at 3.

[137] DMA at 6.

occurs on a 30-day basis rather than per day per campaign.'' [138] In fact, they noted, if a telemarketer's call abandonment rate were to exceed three percent on any given day under the current standard (e.g., due to an unexpected spike in answered calls at the end of the day), there may be more abandoned calls than if the telemarketer had 30 days to correct for the unexpected increase in call abandonments on that day. For the same reason, DMA and ATA contended that the ''per day per campaign'' standard is more likely to force sellers and telemarketers to discriminate between different groups of consumers than a 30-day standard. This is because, if the call abandonment rate unexpectedly exceeds three percent on any given day, the telemarketer could attempt to compensate by calling phone numbers less likely to be answered by a consumer, but also less likely to belong to a consumer interested in the product or service being offered. With a 30-day standard, DMA and ATA argued, there would be no need nor incentive for telemarketers to discriminate in the distribution of abandoned calls.[139]

Finally, DMA and ATA asserted that the TSR's protection of consumers would not otherwise be diminished if the 30-day standard were adopted because of other protections 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 a.m. to 5 p.m.) and lowering it when people are more likely to be home (such as 6–9 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 would be far more difficult to manage without significantly risking being over the three percent threshold.'' [143]

C. Analysis of the Comments, Discussion and Conclusion

As discussed above, the Commission adopted the call abandonment provision of the TSR to prevent the abusive practice of ''dead air'' calls and ''hang-ups.'' The safe harbor exception to the call abandonment prohibition was designed to minimize this abuse, while allowing the telemarketing industry to benefit from the economies provided by predictive dialer technologies. In attempting to strike an appropriate balance between consumer and industry interests, the Commission adapted DMA's ''per day per campaign'' guideline when it established the three percent call abandonment ceiling as an element of the § 310.4(b)(4) safe harbor.

It appears from the record, however, that the impact of the three percent ''per day per campaign'' call abandonment limit may be disturbing the balance the Commission sought to achieve by frustrating the full realization of the potential economies provided by predictive dialers, particularly with respect to the use of segmented lists. The comments suggest that this unintended consequence may be having an adverse effect on small business sellers and telemarketers in particular, by increasing the costs of their telemarketing, and in some instances making telemarketing campaigns using small, segmented lists prohibitively expensive.

The record also shows that many consumers regard their home as their castle, and vehemently object to receiving what they regard as uninvited telemarketing calls. Their comments give eloquent testimony to the fact that consumers despise ''dead air'' and ''hang ups'' even more than telemarketing, and that many believe they should not receive any telemarketing calls at all when they have chosen to place their home telephone number on the Do Not Call 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 promote the abuse. At the same time, the Commission does not take the

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[138] In theory, if a list of 240,000 telephone numbers were called at the rate of 24,000 a day for 10 days, the three percent maximum would be 720 abandoned calls a day (.03 × 24,000 = 720), or 7200 for 10 days, which is three percent of 240,000 (.03 × 240,000 = 7200).

[139] DMA and ATA agreed that '' there should not be a group of 'less valued' consumers that receive a larger rate of abandoned calls,'' and insisted that ''our members do not engage in such tactics,'' but appeared tacitly to acknowledge that there is nothing in the 30-day standard they advocate that would necessarily prevent such an offensive practice. DMA at 7. Another industry comment objected that there has never been any evidence that telemarketers target less favored consumers with higher call abandonment rates. Infocision at 5.

[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.

[143] Heritage at 3.

[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.

industry argument lightly that the ''per day per campaign'' standard may be more restrictive than intended, given the limitations of predictive dialers in adjusting to unexpected spikes in average call abandonment rates. The record shows that particular problems arise in connection with the use of smaller, segmented lists that are the most economical for small businesses and the most useful in targeting only those consumers most likely to be interested in a particular sales offer. As a result, the Commission is inclined to believe that an amendment of the present standard may be warranted.

D. Proposed Amendment

Accordingly, the Commission has decided to propose the following substitute for the present ''per day per campaign'' standard in § 310.4(b)(4)(i), and to invite public comment on the proposal until November 6, 2006:

(i) The seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.

The proposed amendment is limited, in accordance with the suggestions of the supportive consumer comments and an industry comment, by requiring that the three percent ceiling be met separately by each of a seller's or telemarketer's calling campaigns. The Commission believes such a limitation is important to prevent sellers and telemarketers from running multiple campaigns with what could be significantly different call abandonment rates that together average only three percent over a 30-day period. Allowing the flexibility that DMA proposed would more likely create incentives for a seller to ensure that its most favored customers experience lower call abandonment rates, thus preserving their goodwill, at the cost of less favored customers. Thus, the Commission's proposal is designed to reduce the potential for discriminatory treatment of disfavored consumer groups by subjecting them to higher than average call abandonment rates.

Because the proposal would measure call abandonment on a ''per campaign'' basis, it must account for the possibility that a campaign may continue for less than 30 days, or for more than 30 days. The proposal would accomplish this, and provide needed certainty to sellers and telemarketers, by specifying that the call abandonment rate will be measured over the duration of the campaign. If the campaign continues for less than 30 days, the call abandonment rate must be at or below three percent for the duration of the campaign; if it continues for more than 30 days, the three percent ceiling must be measured separately for each successive 30-day period during which the campaign is conducted. If the campaign continues for more than 30 days, but less than an additional 30-day period, the three percent maximum would be measured both for the initial 30-day period, and separately for the remaining period of less than 30 days.

In inviting public comment on this proposal from interested parties, the Commission wishes to emphasize that it has not yet reached any final conclusion on whether or not to amend the present ''per day per campaign'' standard, although it is inclined to do so on this record. That ultimate decision will be informed by the public comment received on the proposed amendment.

IV. Invitation To Comment

All persons are hereby given notice of the opportunity to submit written data, views, facts, and arguments addressing the amendments proposed in this notice. Written comments must be submitted on or before November 6, 2006. 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, NW., 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 *http://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 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 permitted by the Privacy Act, may be found in the FTC's privacy policy, which is available at *http://www.ftc.gov/ftc/privacy.htm.*

V. Communications by Outside Parties to Commissioners or Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record. See 16 CFR 1.26(b)(5).

VI. Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act (''PRA''), 44 U.S.C. §§ 3501–3502, the Office of Management and Budget (''OMB'') approved the information collection requirements in the TSR and assigned OMB Control Number 3084–0097. The proposed rule amendments, as discussed above, would explicitly prohibit all prerecorded telemarketing calls answered by a person without a written agreement signed by the consumer to receive such calls, and alter the standard for measuring the three percent call abandonment rate permitted by the TSR's call abandonment safe harbor.

The proposed amendment explicitly limiting the use of prerecorded telemarketing calls will not change the existing paperwork burden on sellers or telemarketers. It simply makes the TSR's existing prohibition explicit rather than imposing a new prohibition. Thus, the proposed amendment will, if anything, reduce the paperwork burden and the amount of time required for telemarketers to comply with the TSR. In addition, an FCC regulation prohibiting prerecorded calls has been in effect since 1992, following the enactment of the TCPA.[147] The FCC regulation prohibits prerecorded calls delivering unsolicited advertisements or

[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.

[147] 47 CFR 64.1200(a)(2).

telephone solicitations to residential telephones unless, *inter alia,* the caller has an ''established business relationship'' with the person called, or has obtained that person's ''prior express consent'' to receive such calls.[148] The proposed TSR amendment therefore will not change the paperwork burden created by the pre-existing FCC regulation.

Nor will the proposed change to the standard for measuring the three percent call abandonment rate substantially affect the existing paperwork burden. The present ''per day per campaign'' standard requires sellers and telemarketers to establish recordkeeping systems evidencing their compliance, and the proposed amendment may lessen this burden slightly because it relaxes the current requirement.

Thus, the proposed amendments would not impose any new or affect any existing reporting, recordkeeping, or third-party disclosure requirements that are subject to review by OMB under the PRA.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. §§ 601–12, requires an agency to provide an Initial Regulatory Flexibility Analysis (''IRFA'') with a proposed rule and a Final Regulatory Flexibility Analysis (''FRFA'') with the final rule, if any, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. §§ 603–05.

The Commission has determined that it is appropriate to publish an IRFA in order to inquire into the impact of the proposed rule amendment on small entities. Therefore, the Commission has prepared the following analysis.

A. Reasons for the Proposed Rule Amendment

The proposed explicit prohibition of all prerecorded telemarketing calls answered by a person without the consumer's express prior written agreement, discussed in Section II.E above, implements the Telemarketing Act requirement that the Commission prohibit a pattern of unsolicited telephone calls that ''the reasonable consumer would consider coercive or abusive of such consumer's right to privacy,'' and effectuates the apparent intent of Congress in the TCPA to prohibit prerecorded telemarketing calls.

The proposed modification of the TSR's call abandonment provision, discussed in Section III.D above, would modify the existing safe harbor to allow sellers and telemarketers to measure the three percent maximum call abandonment rate prescribed in § 310.4(b)(4)(i) for a single calling campaign over a 30-day period. The Commission proposes to revise the standard to permit measurement of the three percent maximum ''over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.''

B. Statement of Objectives and Legal Basis

The objectives of the proposed rule amendments are discussed above. The legal basis for the proposed rule amendment is the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101–6108.

C. Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

Each of the proposed rule amendments will affect sellers and telemarketers that make interstate telephone calls to consumers (outbound calls) as part of a plan, program or campaign which is conducted to induce the purchase of goods or services or a charitable contribution. For the majority of entities subject to the proposed rule, a small business is defined by the Small Business Administration as one whose average annual receipts do not exceed $6 million or that has fewer than 500 employees.[149]

The Commission has not previously requested comment on an explicit prohibition of all prerecorded telemarketing calls answered by a person without the consumer's express prior written agreement, but believes that the impact of the proposal on small business sellers and telemarketers would be *de minimis* because such calls are currently prohibited by the TSR's call abandonment provision. Based on the absence of available data in this and related proceedings, the Commission believes that a precise estimate of the number of small entities that would be subject to the proposal is not currently feasible, and specifically requests information or comment on this issue.

In the proceedings to amend the TSR in 2002, the Commission sought public comment and information on the number of small business sellers and telemarketers that would be impacted by amendment of the standard for measuring the three percent call abandonment rate. In its request, the Commission noted the lack of publicly available data regarding the number of small entities that might be impacted by the proposed Rule.[150] The Commission received no information in response to its requests.[151]

Likewise, neither the petition to amend the call abandonment safe harbor to expand the period over which the three percent call abandonment ceiling for live telemarketing calls is calculated, nor the industry comments on that issue, provide any data regarding the number of small entities that may be affected by the Commission's ultimate determination.[152] Based on the absence of available data in this and related proceedings, the Commission believes that a precise estimate of the number of small entities that fall under the proposed rule is not currently feasible, and specifically requests information or comment on this issue.

[148] Thus, under the FCC regulation, it is unlawful for a seller or telemarketer to place a prerecorded call to a residential telephone unless it can show compliance with one of the two exemptions. The ''prior express consent'' requirement, in particular, imposes essentially the same recordkeeping burden as the proposed amendment. Moreover, in adopting regulations to implement the Do Not Call Registry pursuant to the DNCIA, the FCC determined that sellers must obtain a written agreement signed by a consumer whose number is listed on the Registry to satisfy the ''prior express consent'' requirement. 2003 FCC Order, 18 FCC Rcd. at 14043–44, ¶ 44. Although the FCC subsequently concluded that an oral consent would suffice to authorize calls to consumers whose numbers were not listed on the Registry, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02–278, Second Order on Reconsideration, 20 FCC Rcd. 3788 (2005), sellers or telemarketers still must create records evidencing any such oral consent because the caller bears the burden of demonstrating that prerecorded calls are lawful. See *In re* Septic Safety, Inc., 20 FCC Rcd. 2179 (2005); *In re* Warrior Custom Golf, Inc., 19 FCC Rcd. 23648 (2004).

[149] These numbers represent the size standards for most retail and service industries ($6 million total receipts) and manufacturing industries (500 employees). A list of the SBA's size standards for all industries can be found at *http://www.sba.gov/size/summary-whatis.html.*

[150] See TSR SBP, 68 FR at 4667 (noting that Census data on small entities conducting telemarketing does not distinguish between those entities that conduct exempt calling, such as survey calling, those that receive inbound calls, and those that conduct outbound calling campaigns. Moreover, sellers who act as their own telemarketers are not accounted for in the Census data.).

[151] *Id.;* see also 68 FR 45134, 45143 (July 31, 2003) (noting that comment was requested, but not received, regarding the number of small entities subject to the National Do Not Call Registry provisions of the amended TSR).

[152] Although industry comments have argued that the proposed revision would remove an obstacle to small business compliance with the call abandonment safe harbor, as discussed in Section III, *supra,* none of the comments has addressed the number of small businesses that might benefit from revision of the current standard.

D. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule

The proposed rule amendment explicitly prohibiting prerecorded telemarketing calls answered by a person unless the consumer has agreed in writing to accept such calls will affect the TSR's recordkeeping requirements insofar as it would compel regulated entities to keep records of such agreements under the general recordkeeping requirements of the existing rule.[153] It appears, however, that there should be no change in this burden since regulated entities, regardless of size, already should be maintaining records of such agreements in the ordinary course of business in order to demonstrate compliance with existing FTC and FCC restrictions on prerecorded calls, as explained in the prior Paperwork Reduction Act discussion. Likewise, the prerecorded calls amendment would not impose or affect any new or existing reporting, recordkeeping or third-party disclosure requirements within the meaning of the Paperwork Reduction Act.

In addition, the Commission does not believe that the proposal to expand the period over which the three percent call abandonment ceiling for live telemarketing calls is calculated will create any new burden on sellers or telemarketers, because the existing ''per day per campaign'' standard of the TSR has already required them to establish recordkeeping systems to demonstrate their compliance. The Commission also does not believe that this modification of the Rule will increase or otherwise modify any existing compliance costs, and may in fact reduce them for small entities that are able to take advantage of the revised safe harbor requirement.

E. Identification of Other Duplicative, Overlapping, or Conflicting Federal Rules

The FTC is mindful that the proposed TSR amendment explicitly prohibiting all prerecorded telemarketing calls answered by a person without the consumer's express prior written agreement differs from the FCC's regulations and some State laws, which permit sellers to place such calls to consumers who have given their prior express consent or to consumers with whom the seller has an ''established business relationship.'' [154] However, the Commission does not believe that an explicit prohibition would conflict with the FCC regulations or similar State laws, because compliance with the TSR's present prohibition does not violate those more permissive standards.

Except as indicated below, the FTC has not identified any other Federal or State statutes, rules, or policies that would overlap or conflict with the proposed revision of the call abandonment safe harbor. The proposed amendment would help to reduce the differences on this issue between the TSR and the FCC's TCPA rules, as well as similar state requirements.[155] As explained in Section III above, compliance with the FTC's more precise standard would constitute acceptable compliance with the FCC rule and similar state requirements, so there is no conflict between these regulations.

F. Discussion of Significant Alternatives to the Proposed Rule That Would Accomplish the Stated Objectives and Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

The proposed amendment to add an explicit prohibition of all prerecorded telemarketing calls answered by a person without a consumer's express prior written agreement would implement the requirement in the Telemarketing Act that the Commission prescribe rules that include a prohibition against ''a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy.'' The only alternatives to this explicit prohibition would be to continue the present prohibition of prerecorded calls in § 310.4(b)(4)(i), the call abandonment provision, or to permit prerecorded calls, which the Commission has declined to do based on the record in this proceeding to date.

The proposed amendment of the existing call abandonment safe harbor would replace the present requirement that the three percent maximum call abandonment rate be measured ''per day per campaign,'' with a revised requirement that the maximum be measured ''over the duration of the campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.'' Other regulatory options under consideration include retaining the present ''per day per campaign'' standard, or, at the other end of the spectrum, requiring that the maximum call abandonment rate be measured over a 30-day period for all of a telemarketer's campaigns. The Commission has yet to be persuaded, however, that this more liberal standard would be as likely as the proposed standard to prevent telemarketers from targeting disfavored consumers with a disproportionate share of abandoned calls.

The explicit prohibition on prerecorded calls and the proposed revision in the call abandonment safe harbor are intended to apply to all entities subject to the Rule, and it does not appear that a delayed effective date for small entities or other alternatives to the current proposal would necessarily result in any further reduction in the compliance burdens of the Rule for small entities. The Commission nonetheless seeks comments and information on what other alternative formulations, if any, of the proposed safe harbor might further minimize compliance burdens for small entities, without compromising the intent and purpose of the Rule to prevent abusive telemarketing practices, including the need, if any, for a delayed effective date for small business compliance.

VIII. Specific Issues for Comment

The Commission seeks comment on various aspects of the proposed amendment to add an explicit prohibition of prerecorded telemarketing calls to the TSR and the proposed amendment to the TSR's call abandonment safe harbor provision. Without limiting the scope of issues on which it seeks comment, the Commission is particularly interested in receiving comments on the questions that follow. In responding to these questions, comments should include detailed, factual supporting information whenever possible.

A. General Questions for Comment

Please provide comment, including relevant data, statistics, consumer complaint information, or any other evidence, on the Commission's proposal to add an explicit prohibition of prerecorded telemarketing calls and the proposal to measure the maximum allowable call abandonment rate under the existing safe harbor in 16 CFR 310.4(b)(4)(i) ''over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues'' rather than on a ''per day per campaign'' basis. Please include answers to the following questions:

1. What is the effect (including any benefits and costs), if any, on consumers?

2. What is the impact (including any benefits and costs), if any, on individual firms that must comply with the Rule?

[153] See 16 CFR 310.5(a)(5).

[154] 47 CFR 64.1200(a)(2)(iv). See also, e.g., Ariz. Rev. Stat., § 44–1278(B)(4) (permitting prerecorded calls with called party's ''prior express consent''); Ind. Code, § 24–5–14–5 (permitting prerecorded calls where there is a ''current business or personal relationship'').

[155] See, e.g., Cal. Pub. Util. Comm'n, Decision 03–03–038 (Mar. 13, 2003), at 19 (adopting the FCC's 30-day standard for measuring call abandonment rates).

3. What is the impact (including any benefits and costs), if any, on industry, including those who may be affected by these proposals but not obligated to comply with the Rule?

4. What changes, if any, should be made to the proposed Rule to minimize any costs to industry, individual firms that must comply with the Rule, and/or consumers?

5. How would each suggested change affect the benefits that might be provided by the proposed Rule to industry, individual firms that must comply with the Rule, and/or consumers?

6. How would the proposed Rule affect small business entities with respect to costs, profitability, competitiveness, and employment?

7. How many small business entities would be affected by each of the proposed amendments?

B. Questions on Specific Issues

In response to each of the following questions, please provide: (1) Detailed comment, including data, statistics, consumer complaint information, and other evidence, regarding the issue referred to in the question; (2) comment as to whether the proposed changes do or do not provide an adequate solution to the problems they were intended to address, and why; and (3) suggestions for additional changes that might better maximize consumer protections or minimize the burden on industry:

1. Should the Commission include an explicit prohibition of prerecorded telemarketing calls in the TSR?

2. Is the Commission correct in its understanding that a reasonable consumer would consider prerecorded telemarketing sales calls and prerecorded charitable solicitation calls to be coercive or abusive of his or her right to privacy?

3. Does a consumer's choice not to list his or her telephone number on the Do Not Call Registry indicate not only that he or she is willing to accept live telemarketing calls, but also prerecorded telemarketing calls?

4. Should the Rule specify disclosures that must be made when obtaining a consumer's express written agreement to receive such calls? If so, what disclosures are needed?

5. What is the effect on consumers' privacy interests, if any, of not applying the call abandonment safe harbor requirements to calls left on consumers' answering machines?

6. Are prerecorded messages left on answering machines less intrusive than prerecorded messages answered by a person?

7. What are the costs and benefits to consumers, if any, of allowing companies to leave prerecorded messages, as opposed to live messages, on consumers' answering machines? Do consumers incur additional costs in terms of (a) paying for storage of messages they do not want; (b) exceeding their allotted storage capacity; (c) being unable to receive messages they want or need; (d) being unable to use home telephone lines tied-up by prerecorded messages; or (e) retrieving messages? Do consumers receive additional benefits, such as lower marketing costs that are eventually passed on to them?

8. What are the costs and benefits to companies in not having to apply the call abandonment safe harbor limit to calls left on answering machines?

9. Should a 30-day standard, if adopted, cover all of a telemarketer's campaigns within that period, be limited to a single campaign, or be limited to the duration of each campaign?

10. Are there significant efficiencies that can be obtained with a requirement to meet a 30-day standard averaged across all of a telemarketer's campaigns that cannot be obtained with a 30-day campaign-specific requirement? If so, what are they and what effect do they have?

11. Are there technological problems that limit the ability of telemarketers who are running multiple campaigns to measure abandonment rates separately for each campaign? If so, what are they, how many telemarketers do they affect, what remedies, if any, are available, and what is the cost of such remedies?

12. Are upgrades available that can reduce the rate at which predictive dialers place calls in the case of an unexpected spike in call abandonments, so that it would not be necessary to run them manually?

13. Would retaining a ''per campaign'' standard, but extending the period over which the call abandonment maximum is measured, make the use of smaller segmented lists by small businesses and other sellers more economical? Please provide specific examples of why or why not.

14. What effect would the proposed change in the standard for measuring the call abandonment rate have on the number of abandoned calls that consumers receive?

15. Do small businesses and other sellers have alternatives that are equally or more effective and economical than live telemarketing, such as postcard or email announcements, to notify their established customers of sales offers and to obtain orders? Would the costs of such alternatives be outweighed by benefits to consumers in avoiding additional abandoned calls to their homes?

IX. Conclusion

For the reasons discussed above, the Commission has decided, on balance, to deny the petition seeking amendment of the TSR to create an additional safe harbor to permit prerecorded telemarketing calls to established customers. The Commission is also proposing an amendment explicitly prohibiting unsolicited prerecorded telemarketing calls without a consumer's express prior written agreement to accept such calls. The Commission will therefore cease its forbearance from considering law enforcement actions against sellers and telemarketers engaged in making prerecorded calls to established customers, after allowing a reasonable time, as specified above, for them to bring themselves into compliance with the TSR.

The Commission has also decided to propose an amendment to the existing safe harbor to permit measurement of the three percent maximum call abandonment rate ''over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.'' The Commission will accept public comment on this proposal until November 6, 2006.

X. Proposed Rule

List of Subjects in 16 CFR Part 310

Telemarketing, Trade practices.

Accordingly, the Commission proposes to amend title 16, Code of Federal Regulations, as follows:

PART 310—TELEMARKETING SALES RULE

1. The authority citation for part 310 continues to read as follows:

Authority: 15 U.S.C. 6101–6108.

2. Amend § 310.4 by adding new paragraph (b)(1)(v), and revising paragraph (b)(4)(i) to read as follows:

§ 310.4 Abusive telemarketing acts or practices.

* * * * *

(b) * * *

(1) * * *

(v) Initiating any outbound telemarketing call that delivers a prerecorded message when answered by a person, unless the seller has obtained the express agreement, in writing, of such person to place prerecorded calls to that person. Such written agreement

shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature of that person; provided, however, that prerecorded messages permitted for compliance with the call abandonment safe harbor in § 310.4(b)(4)(iii) do not require such an agreement.

* * * * *

(4) * * *

(i) The seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.

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By direction of the Commission.

Donald S. Clark,

Secretary.

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