

Comments to the Federal Trade Commission
From the National Consumers League, Consumer Action, Consumer Federation of
America, the Electronic Privacy Information Center, Junkbusters, Private Citizen,
Inc., and the Privacy Rights Clearinghouse
Regarding TSR Prerecorded Call Prohibition and Call Abandonment Standard
Modification,
Project No. R411001
December 15, 2006

The National Consumers League, Consumer Action, Consumer Federation of America, the Electronic Privacy Information Center, Junkbusters, Private Citizen, Inc., and the Privacy Rights Clearinghouse applaud the Federal Trade Commission (FTC) for preserving the privacy and consumer protections that Congress intended in enacting the Telephone Consumer Protection Act¹ and the Telemarketing and Consumer Fraud and Abuse Prevention Act,² and that consumers have enjoyed under the Telemarketing Sales Rule (TSR).³ Our organizations represent millions of U.S. consumers. We call on the FTC to continue its vigilance by rejecting the proposal to allow telemarketing calls that deliver prerecorded messages (hereinafter referred to as prerecorded sales calls) to consumers based on an established business relationship (ERB).

To clarify consumers' rights under the TSR, the FTC should expressly prohibit the use of prerecorded sales calls absent a consumer's express agreement to receive them. Since the impact on consumers is the same regardless of whether the calls are answered by a person, an answering machine, or another type of voice mail system, all prerecorded sales calls should be prohibited. This is crucial to ensure that consumers have the telephone privacy they want – especially those to whom the more than 130 million phone numbers in the National Do Not Call Registry (DNC) belong.⁴

Furthermore, we believe that the petition by the Direct Marketing Association (DMA) to change the standard for calculating the allowable rate of abandoned calls should be denied.

¹ 47 U.S.C. 227 et seq.

² 15 U.S.C. 6101 et seq.

³ 16 CFR Part 310

⁴ 71 FR 58725 (citing the number of telephone numbers in the DNC as of September 1, 2006)

Prerecorded Sales Calls

In the FTC's request for public comments on these issues,⁵ the reasons for rejecting the proposal to allow prerecorded sales calls based on an ERB were clearly and cogently set out: consumers don't want them; the harm to consumers' privacy is not outweighed by any benefit; and there is nothing unique in the relationship between sellers and consumers with whom they have ERBs to make such calls less abusive than they would be to consumers in general. In these comments, we will expand on why we agree with this analysis and why we believe that absent express agreements to receive them, prerecorded sales calls should be explicitly prohibited by the TSR.

Consumers do not want to receive prerecorded sales calls

The record resulting from the 2004 Notice of Proposed Rulemaking on this matter speaks for itself – of the more than 13,000 consumer comments that the FTC received, only 15 percent were in clear support for allowing prerecorded sales calls on the basis of an ERB. The question was not, and should not be, whether consumers would prefer these messages to live sales calls, mail solicitations, email solicitations, or other forms of commercial messages. The question was, and remains, whether consumers would consider such calls abusive. We believe they would, for several reasons.

Consumers are likely to be deluged with prerecorded sales calls

As some of us have commented before, uncertainty about prerecorded sales calls would violate the TSR has probably kept many companies from using them. However, the savings in labor costs from using prerecorded calls in a campaign rather than live agents undoubtedly makes this business model attractive. Indeed, if it wasn't so attractive, the telemarketing industry would not be pressing so vigorously for its use to be sanctioned. As the FTC has duly noted, the lower labor costs combined with the lower calling costs due to new digital technologies such as VoIP would provide economic incentives to increase the use of prerecorded sales calls. The surge of prerecorded political messages that many of us endured during the recent election cycle is only a preview of the deluge that is likely to be unleashed if prerecorded sales calls are allowed.

⁵ 71 FR 58716

Even if the use of prerecorded sales calls was limited to situations in which there is an EBR, it has the potential to increase sales calls dramatically. Because the EBR is defined so broadly to include not only consumers who bought something from the seller within the past 18 months (whether by phone or any other means) but those who merely inquired about something within the past three months and never made a purchase, a wide swath of consumers are encompassed. Many of these consumers probably have no idea what an ERB is or that companies with which they've had even minimal interactions can make sales calls to them even if they placed their numbers on a state "do not call" registry or the DNC. Their reaction to an increasing number of sales calls because of the use of prerecorded messages is not likely to be positive.

Prerecorded sales calls would tie up phone lines and clog message systems

The FTC has also noted the concerns that many consumers have expressed about the potential for prerecorded sales calls to tie up consumers' telephone lines. This would be annoying at the least when consumers want to make calls, but it would be dangerous if they were impeded from making calls during emergencies.

Unlike live sales calls, where usually no message is left for the consumer if no one answers the phone, prerecorded sales calls are designed to listen to anytime, either when consumers pick up their ringing phones or when they check for messages later. Consumers use a variety of message systems, from answering machines to services offered by their telephone service providers or other vendors. These systems are usually limited in terms of the lengths of messages and the total number of messages they will store, and those limitations vary from system to system.

An increasing number of prerecorded sales calls are likely to fill up consumers' message systems, leaving less room for the messages they want to receive, including important prerecorded messages that are allowed by the TSR, such as notices of flight changes, reminders about appointments, and product recall alerts. It is also likely that the messages in some prerecorded sales calls would be too long for some consumers' message systems, especially given the various disclosures required by the TSR, resulting in information that is incomplete or too quickly spoken to be fully comprehended – the equivalent of the indecipherable fine print used in many advertisements.

It should also be noted that the time it takes for consumers to deal with prerecorded sales calls is essentially the same no matter whether the messages are listened to in real time or later on a message system. Furthermore, the ubiquitous use of cell phones allows consumers to access their answering machines or voice mail remotely. Consumers can also forward their landline calls to their cell phones. In these situations, the per-minute or per-unit cost of listening to unwanted prerecorded sales messages on their cell phones would put consumers at an economic disadvantage.

Prerecorded sales calls do not allow for adequate interaction

Prerecorded sales calls are by their very nature one-sided conversations. One concern that many consumers have expressed is about their ability to exercise their rights to opt-out of future calls when the sales call is a recording. Even if there is technology that can be widely employed at this point to enable consumers to hit a number on their telephone keypads in order to opt-out, that would obviously not work for people who still have rotary dials. Furthermore, if the opt-out request requires talking to a live company representative, we have no assurance that one will be readily available. Consumers could be put on hold, disconnected, or subjected to other inconveniences.

On the other hand, if the opt-out is automatic, it provides no opportunity for consumers to ask questions about why they have received the call or that would help them determine whether the call may have violated their rights (is there an EBR?).

Moreover, while prerecorded sales calls today generally require the consumer to call back and speak to a live salesperson to make a transaction, it is also possible for the entire process to be automated, with consumers being prompted to hit numbers on their telephone keypads or speak the word “yes” in order to make purchases. As marketers attempt to cut costs and maximize efficiency, we can envision a time in the not-too-distant future when all telemarketing solicitations could be prerecorded and automated. This concerns us greatly, especially given the trend toward negative-option marketing and the use of preacquired account numbers.

Some might argue that prerecorded messages improve quality control by ensuring that the information provided to consumers is consistent, but if there is no opportunity for consumers to ask questions there is the potential that some things may not be sufficiently

clear for consumers to make informed choices. And in the event that the information is consistently incomplete or misleading there is the potential for large numbers of consumers to be victimized.

The harm to consumers' privacy is not outweighed by any benefits

Prerecorded sales calls may benefit telemarketers because of lower costs and greater efficiencies, but the benefits to consumers would be minimal. Some might find it easier to hang up on recorded sales calls than live ones, but they would still have to answer when their phones ring, and it is likely that they would be running to answer their phones much more frequently. This and the danger of tying up consumers' telephone lines, the inconvenience of consumers' message systems being filled with prerecorded sales messages, and the lack of adequate interaction are disadvantages that are not outweighed by whatever convenience not having to speak to a live salesperson may provide.

There is nothing unique in the ERB relationship to make such calls less abusive

We have always been unhappy with the concept of the ERB because it dilutes consumers' rights to privacy and there is no evidence that consumers prefer to receive telemarketing calls from companies with whom they have had some previous interaction than from other companies. Even if they did, they probably would not welcome the increased volume of solicitations that is likely to result from the use of prerecorded sales calls. The ERB unfairly shifts the burden to consumers to receive telemarketing calls that they may not want and obliges them to take specific action if they do not want to receive future calls – a burden that exists whether the sales call is live or recorded.

We do not accept the argument that companies will not abuse the ERBs that they have with consumers. For one thing, as the FTC itself pointed out, the "relationships" with some consumers, such as those who have merely inquired about products or services, are tenuous at best. New entrants in the marketplace will be motivated to use this technology to reach as many consumers as possible and established companies will use it to try to retain their market share. There is no guaranty of self-restraint, and every

reason to believe that the economic incentives for using prerecorded sales calls will lead to an increase from the current level of sales calls.

As we have previously noted, nothing in the TSR prevents prerecorded calls from being used to deliver informational messages to consumers. Consumer comments to the FTC show that these types of messages are clearly valued. If there is any confusion about what types of prerecorded messages would be considered informational and which would not, the remedy is to issue guidelines to help businesses comply with the TSR, rather than to open the door to prerecorded sales calls.

The FTC should ban the use of prerecorded sales calls

To clarify consumers' rights under the TSR, the FTC should expressly prohibit the use of prerecorded sales calls absent a consumer's express agreement to receive them. Since the impact on consumers is the same regardless of whether the calls are answered by a person, an answering machine, or another type of voice mail system, all prerecorded sales calls should be prohibited. This is crucial to ensure that consumers have the telephone privacy they want – especially the millions who have taken the affirmative step to place their phone numbers in a state “do not call” registry or the DNC belong. Allowing prerecorded sales calls would significantly undercut the effectiveness of the registry-based “do not call” options.

The FTC should not change the standard for calculating abandoned calls

We continue to believe that no consumers should be subjected to the annoying, even frightening experience of abandoned calls. This problem is not created by consumers but by telemarketers who wish to use predictive dialing technology. Again, the burden is shifted to consumers to deal with these calls, while it is the telemarketers who reap the benefit in cost savings. Unlike airlines, which are permitted to overbook but must then compensate consumers for being bumped, consumers receive no compensation for being subjected to abandoned calls. We believe that the acceptable level for abandoned calls is zero.

If changing the standard for calculating abandoned calls to a 30 day basis (or the length of the campaign, whichever is shorter, as the FTC has proposed) would actually

reduce the number of consumers who receive them, and telemarketers can ensure that certain groups of consumers are not disproportionately subjected to such calls, it might be an improvement over the current situation. We are not confident, however, that that will be the result. The per-day standard forces telemarketers to monitor and adjust their use of predictive dialing closely. If it requires them to switch to manual dialing at times, we think that is a good thing, because manual dialing does not result in abandoned calls.

Ultimately, however, the practice of causing anger and fear among a certain percentage of consumers for the sake of commercial efficiency would continue to be sanctioned under the TSR no matter what standard is adopted. Because this is not a fair trade-off, we oppose any safe harbor for abandoned calls.

Conclusion

We appreciate the FTC's vigilance in protecting the telephone privacy of consumers. Thank you for the opportunity to share our views on these issues.

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