

Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20554

In the Matter of)
)
TSR Prerecorded Call Prohibition and Call)
Abandonment Standard Modification,)
Project No. R411001

COMMENTS OF THE INTERACTIVE AGENT ASSOCIATION

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Submitted by:
Barry J. Reingold
Matthew C. Staples
PERKINS COIE LLP
607 Fourteenth Street, NW
Suite 800
Washington, DC 20005
202/434-1613

I. INTRODUCTION

The Interactive Agent Association ("IAA")¹ submits these Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") on an amendment to the Telemarketing Sales Rule ("TSR") that would ban "any outbound telemarketing call that delivers a prerecorded message when answered by a person, unless the vendor has gotten the express agreement, in writing, of such person" There would be no exemption for messages to consumers with whom the telemarketer has an existing business relationship ("EBR") under the rule. 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii). The NPRM follows the Commission's October 4, 2006 decision to deny Voice Mail Broadcasting Corporation's petition for an exemption to the call abandonment rule (§ 310.4(b)(1)(iv)) for prerecorded calls to EBR customers ("the VMBC proceeding".)

The practical effect of the Commission's proposed rule would be that, absent express written consent by EBR customers, telemarketers could not communicate with those customers through prerecorded messages. They would have to use live sales agents. The Commission is aware that live agents are much more expensive than prerecorded calls,² but regards this as a

¹ IAA is a nonprofit corporation formed to promote and protect the responsible use of interactive agent systems for automated outbound customer communications. Interactive agents are software applications used by companies to communicate with large numbers of their customers whenever events of interest occur within the company-customer relationship. Applications also include or may result in leaving recorded messages if the intended recipient is not available to receive the initial call.

² The cost difference is substantial. An interactive notification call costs about \$0.25. Industry surveys show that the average cost of a contact between a consumer and a call center agent is from \$3.75 (Chartwell Customer Care Center Report 2005, page 21) to \$5.30 (Product Champion: Managing Procurement and Operations in a Contact Center," Gartner Measurement (2003), a cost 15 to 21 times greater.

positive factor because the added cost "is, itself, a significant check on the number of [telemarketing] campaigns." NPRM at 31.

IAA believes the Commission's analysis is flawed. Although consumer comments in the VMBC proceeding showed strong opposition to prerecorded messages *generally*, they paid little attention to messages to EBR customers, and almost no attention to the messages that are likely to be of the highest value to those customers; specifically, renewal notices and notices of proposed changes to existing contracts to take into account recent events and/or changed circumstances. The great value to consumers of such messages is their ability *both* to (a) tell them of a potential problem, and (b) provide a solution through an interactive renewal or contract change mechanism.

By forcing vendors to use live agents for such calls, the proposed rule would exclude interactive agents from an important part of the customer communications market. The rule also would make vendors less likely to provide these valuable communications to consumers, and, if vendors did so, impose on them costs that would inevitably have to be passed on to consumers. Those costs may far outweigh the limited privacy concerns consumers have expressed so far about prerecorded messages from their EBR vendors.

II. THE ROLE OF INTERACTIVE AGENTS AND RECORDED MESSAGES IN DELIVERING CUSTOMER COMMUNICATIONS

Interactive agents are software applications used by companies to communicate cost-effectively with large numbers of their customers, or others who have asked to receive such communications. Both customers and businesses benefit from the convenience and efficiency that interactive agents and recorded messages provide: customers receive timely and often

personalized information, while businesses save costs and gain efficiency in reaching many customers virtually simultaneously.

When the interactive agent places a call to a customer, the interactive agent is able to determine whether the recipient is a live person or an answering machine. For calls that are not answered by a live recipient, the interactive agent leaves a prerecorded message that clearly identifies the name of the caller, the purpose of the call, and the phone number the recipient may call to retrieve the full message.

When a live recipient answers the call, the interactive agent plays a prerecorded message that announces the identity of the caller and the purpose of the call.³ At that point, the customer may continue with the call by pressing a designated number on the touchpad, or may end the call by hanging up. The interactive agent process is described in detail in Appendix A, using a typical pharmacy example. The interactive agent can also be programmed to include a keypad number that bars future prerecorded calls from the vendor.

III. PRERECORDED MESSAGES TO EBR CUSTOMERS SERVE CONSUMER INTERESTS

The core concern of the Telemarketing and Consumer Fraud and Abuse Prevention Act, P.L. 103-297, § 2, 108 Stat. 1545 (1994), codified at 15 U.S.C. § 6101 *et seq.*, is the fear that, absent legal protection, consumers may be pressured to make on-the-spot buying decisions about products or services with which they are unfamiliar, and about which they are not aware of market alternatives. House Report No. 103-20, 1994 U.S. Code Cong. And Adm. News, p. 1626.

³ The interactive agent does not play this identification message for debt collection calls, however, in which conveying either the purpose or identity of the call in such a manner would violate the Fair Debt Collection Practices Act. *See Memorandum Opinion and Order, Rules and Regulations Implementing*

This is not the case for EBR customers, especially on decisions to renew expiring contracts, or to accept proposed changes in existing contracts to take into account post-contracting events and/or changed circumstances.⁴

1. Contract Renewals

A prerecorded message that simply tells customers that unless they act soon, they may lose valuable services or products, is informational in nature. Providing in the *same* message a mechanism to renew the contract is the most efficient service the vendor can offer those customers to address the problem. Depending on the circumstances, the renewal may take place through a telephone keypad-activated tone (which constitutes an "electronic signal" for purposes of the Electronic Records and Signatures in Global and National Commerce Act, 15 U.S.C.

the Telephone Consumer Protection Act of 1991, FCC Docket No. 92-90, Commission 95-310 (rel. Aug. 7, 1995) at ¶¶ 18-19.

⁴ The small group of consumer commenters in the VMBC proceeding who addressed the distinction between cold calls and EBR vendor calls almost all favored an EBR exemption. *See, e.g.*, VMBC Proceeding Record - **Matthews, D.** OL-100004 ("Having computer generated messages from established business contacts or governmental agencies makes sense as they save time and money. Telemarketing computer generated "cold calls" are definitely a problem."); **Forrette, S.** OL-113959 ("As a consumer, I don't mind receiving calls from businesses that I have a relationship with. In fact, 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 to allow businesses that I do business with to call me with pre-recorded messages."); **Bartholow, D.** OL-113622 ("if you are currently still doing business with a company, then you should be able to receive those calls. The calls that the public is complaining about is not the call from a company they are dealing with."); **Auerbach, K.** OL-101665 "I am willing to give a bit of ground on that and admit that it's OK for my pharmacy to use an automated message to tell me that my prescription is ready or some other similar thing."); **Curran, D.** OL- 105145 "As a consumer, I appreciate receiving relevant and timely information from organizations which I support or with whom I do business. And I'd like to continue hearing from them."); **Leader, S.** OL-110416 "the only calls that should be allowed are to companies who have an ongoing existing and real business relationship with the customer."); **Iliff, M.** OL-110753 ("I also think the definition of "established business relationship" is a little too loose. I really don't think buying something from a mail order catalog should give the parent company's insurance division access to my phone line. If I've bought insurance from the division, it's OK, but not when I've done completely unrelated business with an entirely different part of the company.")

§ 7006(5)), a connection to a live sales agent, or a request that the consumer contact the vendor by e-mail or watch for renewal documentation that will follow by conventional mail.

Prerecorded messages can also be programmed to include a keypad-activated tone that bars future prerecorded messages from the vendor.

Prerecorded messages are ideal vehicles for renewal-related communications, especially when compared with the cost of alternatives. Renewal-related communications are routine in nature and predictable in timing. Using prerecorded messages for such communications offers low cost, yet high quality control. Prerecorded messages also avoid the dead air/hangup problems attendant to calls by live agents using predictive dialers.

By limiting prerecorded messages to EBR customers (and others) from whom the vendor has obtained written consent, the proposed rule would eliminate many of these advantages. Where the vendor has not obtained written consent through the original contract, the vendor would have to use (a) conventional mail (which recipients may not read, and which imposes processing costs on the vendor at both the sending and receiving ends);⁵ (b) e-mail (which

⁵ Consumers who submitted comments in the VMBC Proceeding did not universally regard as in their interests a legal requirement that EBR vendors obtain written consent before contacting them. *See, e.g.*, VMBC Proceeding Record - **Jarecki, K.** OL-114006 (“I am in support of the FTC’s proposed rule change regarding my being able to receive pre-recorded messages from businesses with which I have a relationship. I think it is great to get reminders from my doctor’s office, dry cleaners, video store, insurance agent and credit card company and well as other stores I do business with, but I’d rather not have to sign another form just to be reminded from them about beneficial information they have and are providing for me through prerecorded messaging.”); **Dusenbury, D.** OL-113951 “I prefer to be able to receive pre-recorded reminder calls from people I do business with. I have a very busy schedule and appreciate sale reminders from my favorite stores, doctor/hair/etc. appt. reminders. I find them very helpful and I don’t want to have to give written permission to all of these people. I don’t have time for that. That’s why I need their reminders!”)

Comments submitted to date in the pending rulemaking also raise objections to the written notice requirement. *See, e.g.*, **Bender, B.** Comment 00062; **Eckert, W.** Comment 00090; **Brockbank, C.** Comment 00096; **Wussler, D.** Comment 00097; **Rosato, B.** Comment 00156.

assumes the message gets past spam filters and is not deleted by the recipient); or (c) live informational call agents. These processes are neither simple nor free; they impose substantial costs in time and money on both the vendor seeking consent and the EBR customer from whom consent is sought. (Indeed, to simplify and expedite DNC registration, the Commission does not require consumers to request registration in writing, or to submit written confirmation of their telephonic requests). Imposing those costs on vendors and their EBR customers is unwarranted absent evidence that customers generally find prerecorded calls from their EBR vendors abusive. Neither the VMBC proceeding record nor the record in this rulemaking supports such a conclusion.

Time and money aside, requiring written consent imposes on the EBR customer the burden of having to agree in writing to continue to receive messages he or she has already been receiving, a situation that is likely to lead to confusion. And it assumes that absent written consent, vendors will play fast and loose with EBR customers, a course of action contrary to the vendor's long-term interest in retaining them.

Vendor abuse is unlikely. Prerecorded renewal messages are most likely to be sent by established firms, rather than fly-by-night outfits or startups. Established firms have the strongest incentive to self-regulate to preserve their customer relationships. *See* NPRM at 30. And because renewals are likely to occur annually, most will fit within the TSR's 18-month time frame governing EBR relationships. 16 C.F.R. § 310.4(n). Most importantly, renewal messages will relate to a service or product with which the customer is already familiar, and presumably able to make an informed decision about whether to continue to buy it. A barrage of prerecorded calls will not change an EBR customer's mind; it will only alienate him or her and lead to bad will in the market. Established vendors know this.

2. Contract Changes

The same is true for proposed contract changes that deal with post-contracting events and/or changed circumstances. The customer presumably performed due diligence about the vendor and its product or service before entering into the contract. Proposed contract changes (including changes that may lessen or increase the purchase price) should stand on a different footing than cold calls, even from the same vendor. Under the current rules, vendors are able to propose such changes through live agents, but not prerecorded messages. The increased costs entailed by live agents cannot be in consumers' long-term economic interests.

IV. EXAMPLES OF PRERECORDED CALLS IN USE OR UNDER DISCUSSION

1. Pharmacy Benefits Management Programs

Many pharmacy benefits management programs ("PBMs") use prerecorded messages as "refill reminders" sent on day 25 of a typical 30-day prescription. PBMs also call to tell the patient the next refill will be the last, and provide, through the telephone keypad, a direct link to the patient's physician's office to get approval for prescription renewal. If the patient does not choose to connect to his or her physician's office, the message provides the patient with the pharmacy's contact information, so the patient can speak to a live representative.

PBMs also may use prerecorded messages to inform patients of lower-cost generic medications that have become available since the patient's last prescription. They also may use prerecorded messages to tell patients about opportunities to convert in-store purchases of medications to convenient mail-order delivery, which may come with an added service cost. Most recently, in connection with "Medicare D" benefit applications, PBMs have offered

programs in which patients identified as being in a "high-risk category" are offered a consultation with their pharmacist, which is paid for by Medicare.⁶

It's hard to imagine how any of these prerecorded communications would be unwelcome by the patient. Yet all of them, other than a simple refill reminder, could constitute telemarketing for purposes of the TSR and be unlawful absent an EBR exception.⁷

2. Airline Programs

Airlines often use prerecorded messages to tell passengers of flight delays or cancellations. Some of these messages will include information about other flights that may be available, and offer to book such flights through a connection to a live agent. In other cases, passengers may be informed that an upgrade to first-class on a forthcoming flight has just become available.⁸

Because carriers are governed by the Federal Communications Commission's rules about prerecorded messages (47 C.F. R. § 64.1200(a)(2)(iv)), they are able to contact passengers for these purposes.⁹ Interactive agents hosted by a third party, however, would be regulated by the FTC's proposed rule.

⁶ "High risk" patients are typically those suffering from multiple diseases and spending more than \$2,000 per month at the pharmacy.

⁷ See, e.g., **Lemkin**, Comment 00031; **P.G.**, Comment 00034; **Genter, R.**, Comment 00068; **Eden, K.**, Comment 00072; **Lopez, M.**, Comment 00073; **Junghans, K.**, Comment 00078; **Conway, P.**, Comment 00081; **Xouris, G.**, Comment 00100; **Knoll, C.**, Comment 00162.

⁸ See, e.g., **Xouris, G.**, Comment 00100.

⁹ Indeed, the FCC based its decision to retain an exemption for prerecorded calls on its conclusion that such communications were necessary to serve EBR customer relationships. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (Dkt. No. 02-278), 68 Fed. Reg. 44,144, 44,165 (July 25, 2003).

None of these prerecorded messages implicates the Telemarketing Act's core concern; that consumers may be pressured into buying a service with which they are not familiar. Nor are these messages likely to occur so frequently as to invade consumer privacy. Yet all of them, except the simple notice of a delay or cancellation, could constitute unlawful telemarketing when relayed through a third party interactive agent.

3. Newspaper and magazine subscriptions

Periodical publishers have long used prerecorded telephone messages to advise readers that their subscriptions are soon going to expire. Combining that message with an opportunity to renew the subscription may, absent an EBR exception, violate the TSR. The same is true about renewal notices that are combined with options to buy special publications (like the reports offered by magazines like *Sports Illustrated* and *The Economist*) or added newspaper service days (for example, weekdays in addition to a subscriber's current weekend-only service).

4. Wireless telephone service programs

Because wireless carriers are governed by the Federal Communications Commission's rules about prerecorded messages (47 C.F. R. § 64.1200(a)(2)(iv)), they are able to contact subscribers and offer them the benefits of new plans.¹⁰ Interactive agents hosted by a third party, however, would be regulated by the FTC's proposed rule, and could not provide such a service. It's difficult to identify a consumer harm that would offset the substantially greater costs imposed on wireless carriers by having to do this work in-house, or through third party live agents.

¹⁰ See, e.g., **Kheriaty, B.** Comment 00044; **Edwards,** Comment 00069; **Knoll, C.** Comment 000162. See also **Junghans, K.** Comment 00073 (cable service offerings).

In addition to these examples, commenters have expressed a desire to receive similar renewal or contract change announcements from their banks and other entities with whom they have an EBR - for example, consumers welcome prerecorded calls requesting payment to avoid the lapse of insurance policies.¹¹

V. THE BALANCE BETWEEN CONSUMER BENEFITS AND HARMS FAVORS AN EBR FOR PRERECORDED MESSAGES

Consumers benefit from prerecorded messages that both (a) inform them about the forthcoming loss of service or supply, and (b) provide an opportunity to renew their contracts. Such messages pose no injury to the consumers' economic interests - consumers are already familiar with the vendor's product or service, and presumably able to make a knowledgeable decision in response to the offer. Economics dictates that these messages are less likely to be available to consumers if vendors must use live agents that cost many times as much as prerecorded messages.

Any injury to consumer privacy interests is minimal. Prerecorded messages to EBR customers - especially messages limited to contract renewals and proposed changes in existing contracts - will be rare. Consumers who find them objectionable may, through an interactive mechanism in the vendor's first message, opt out of future messages.

The lack of widespread opposition by customers to messages from their own EBR vendors is reflected in the low consumer opt-out rates that VMBC reported in its petition (at 2-3). These are consistent with the low opt-out rates experienced by IAA's member clients. The

¹¹ See, e.g., **Kheriaty, B.** Comment 00044; **Craig, C.** Comment 00110; **Jarecki, K.** VMBC Proceeding Comment OL-114006..

economic interests of many consumers should not be held hostage to the privacy concerns of a few.¹² And, in the words of one consumer, "[c]ompanies who use [prerecorded messages] responsibly should not be penalized because of companies that don't."¹³

VI. CONCLUSION

For these reasons, the Commission should amend the TSR to provide an exemption for prerecorded messages with EBR customers. At minimum, the Commission should adopt an exemption that covers prerecorded messages offering (a) contract renewals or (b) proposed changes to existing contracts to address post-contract events and/or changed circumstances. If the Commission decides not to provide an EBR exemption and to require consent of all consumers, the prerecorded message rule should allow vendors flexibility in the manner with which they obtain consent and should not require that consent be in writing.

¹² The NPRM concluded that if prerecorded messages were subject to an EBR exemption, Do-Not-Call list registrants "would receive some greater number of telemarketing messages than they now do. Although reasonable people may differ on the likely size and scope of that increase, there can be no dispute that it could come at *some cost* to the privacy of consumers in their homes." NPRM at 35. (emphasis added). IAA's review of the comments submitted in connection with the VMBC petition and this rulemaking to date finds few comments objecting to an EBR exemption, especially one limited in scope as discussed above. Thus, the cost is likely to be minimal.

¹³ **Kheriaty, B.** Comment 00044.

Respectfully submitted,

INTERACTIVE AGENT ASSOCIATION

Barry J. Reingold
Matthew C. Staples
PERKINS COIE LLP
607 Fourteenth Street, NW
Suite 800
Washington, DC 20005
202/434-1613

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APPENDIX A

Interactive Agent Association
Application Example - Prescription Renewal
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