

**Before the  
FEDERAL TRADE COMMISSION  
Washington, DC 20580**

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

**COMMENTS OF THE  
NEWSPAPER ASSOCIATION OF AMERICA**

The Newspaper Association of America (“NAA”) hereby submits its comments in response to the Federal Trade Commission’s (“Commission” or “FTC”) *Notice of Proposed Rulemaking* (“NPRM”) concerning the proposed modifications to the Telemarketing Sales Rule (“TSR”).<sup>1</sup> NAA is a non-profit organization representing more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily U.S. newspapers.

**I. INTRODUCTION AND SUMMARY**

Newspapers have a long history of conducting responsible telemarketing and other telephone communications with their customers. Telephone calling for commercial reasons is a vital part of a newspaper’s daily life. For this reason, NAA and its members stand to be affected by the regulations imposed by this agency and by the Federal Communications Commission on telemarketing practices.

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<sup>1</sup> *Denial of Petition for Proposed Rulemaking, Revised Proposed Rule with Request for Public Comments, Revocation of Non-Enforcement Policy*, 71 Fed. Reg. 58715 (Oct. 4, 2006).

In previous comments filed before the FTC concerning prerecorded messages, NAA supported (1) amending the TSR to allow prerecorded messages to customers where an established business relationship exists (consistent with a proposal advanced by Voice Mail Broadcasting Corporation) and (2) modifying the FTC's method for calculating the call abandonment rate as requested in a petition filed by the Direct Marketing Association ("DMA").<sup>2</sup> In particular, the DMA Petition proposed modifying the FTC's method for calculating call abandonment from the current per day, per calling campaign test to the 30-day measuring period used by the Federal Communications Commission ("FCC") in its rules implementing the Telephone Consumer Protection Act of 1992 ("TCPA").<sup>3</sup>

In a reversal of its proposal, however, the Commission chose to deny the petition submitted by Voice Mail Broadcasting Corporation requesting a new TSR safe harbor permitting the use of prerecorded sales messages in calls to established customers that are answered live.<sup>4</sup> Instead, the FTC now seeks comment on its proposal to amend the TSR to explicitly *prohibit* prerecorded telemarketing calls that are answered by a person unless a consumer's prior written consent is obtained. It also seeks comment on its proposed amendment to the TSR's call abandonment safe harbor provision.

NAA is aware that many members of the telemarketing industry are urging the FTC to adopt a rule permitting, instead of banning, prerecorded sales messages to parties with whom a

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<sup>2</sup> See *Joint Comments of the United States Chamber of Commerce, the Coalition for Healthcare Communications, 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*, In the Matter of Prerecorded Message EBR Telemarketing, Project No. R411001 (Jan. 10, 2005).

<sup>3</sup> 69 Fed. Reg. 67287, Nov. 17, 2004.

<sup>4</sup> Had the FTC granted VMBC's Petition, its regulations would have been consistent with those of the FCC, which permit prerecorded telemarketing calls to customers with whom sellers have an existing business relationship. 47 C.F.R. § 64.1200(a)(2)(iv). This would have met the agencies duty to "maximize consistency" with the FCC regulations. See *Do Not Call Implementation Act*, Pub.L. No. 108-10, 117 Stat. 557.

caller has an established business relationship as long as there is a prompt and clear opt-out option. NAA supports the FTC's consideration of such a proposal.

If, however, the FTC refrains from adopting the telemarketing industry's proposal for prerecorded sales messages, NAA encourages the FTC to amend its proposal to allow oral authorizations instead of requiring express *written* consent. Requiring newspapers to obtain a subscriber's oral authorization to receive prerecorded marketing calls would be far more practical and less burdensome than requiring prior written consent, given that a large proportion of newspaper subscriptions and classified ad sales occur via the telephone. In addition, and particularly if the Commission were nevertheless to mandate written consent, NAA would strongly urge that the FTC make the rule applicable only prospectively for new customers. Newspapers today have more than 40 million existing residential subscribers, and to require newspaper circulation departments to contact each of those subscribers to obtain written consent would be exceptionally unreasonable and burdensome.

The Commission also noted in its NPRM that "informational" calls – those that do not include a "telemarketing" sales pitch – are outside the scope of the TSR. NAA and its members strongly support the FTC's reaffirmation that informational messages are not governed by the TSR and are not prohibited by its call abandonment provisions. Finally, while NAA's members judiciously use prerecorded messages typically for informational purposes, it supports the Commission's proposed amendment – if it declines generally to allow prerecorded sales calls with an early opt-out option – to clarify that its prohibition on prerecorded telemarketing messages applies only to calls "answered by a person" and not to calls answered by voicemail or answering machines.

NAA also generally supports the FTC’s proposed modification for measuring the maximum allowable call abandonment rate from three percent “per day, per campaign” to three percent per 30-day period per calling campaign. However, the FTC should align its proposal with the FCC’s 30 day rule and not retain the “per campaign” limitation.

## **II. TELEMARKETING IS IMPORTANT TO THE FISCAL HEALTH OF NEWSPAPERS**

For sixty years, newspapers have engaged in telemarketing in a responsible manner. More than 82 percent of all NAA members engage in telephone calls to current or prospective customers for either marketing or service purposes, or both.<sup>5</sup> NAA members work hard to comply with state and federal telemarketing laws and regulations, not only due to legal requirements, but also because good telemarketing practices make business sense. Unlike some telemarketers, a newspaper bearing a community’s name and reporting its news must engage in responsible marketing or risk displeasing subscribers and prospective subscribers. Newspapers must respect local consumers. Indeed, newspapers’ most important asset is their reputation for integrity and civic responsibility.

In addition to market forces, industry culture distinguishes newspapers from telemarketers that do not invest in forming long-term relationships with consumers. The vast majority of newspapers are local businesses deeply rooted in the communities in which they publish, circulate and market. Newspapers cannot cover local news without becoming closely involved in local communities and their concerns. Close ties between a newspaper and the local community create compelling incentives to engage in responsible telemarketing practices.

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<sup>5</sup> Newspaper Association of America, *2005 Circulation Facts, Figures & Logic*, at 37 (2005) (“NAA 2005 Circulation Facts”).

Telemarketing continues to be a vital component of the newspaper business.<sup>6</sup> In recent years, newspaper readership has declined, and competition from other media has grown. Despite an increased emphasis in subscriber retention efforts, newspapers continue to confront declines in customer-initiated subscription starts.<sup>7</sup> Each year, the typical newspaper must sell 56 percent of its total home-delivery circulation just to maintain the current circulation level.<sup>8</sup>

The adoption of the national Do Not Call registry had a strong adverse effect on newspaper circulation marketing, by reducing newspapers' ability to reach potential new customers in a convenient and cost-effective manner. Despite that impact, marketing by telephone continues to be an important source of new subscriptions and subscription renewals.<sup>9</sup> In 2004, 41.4 percent of new subscriptions resulting from a newspaper's sales efforts came from outbound telemarketing – by far the single largest source of new subscribers.<sup>10</sup> Telemarketing is vital to newspapers both large and small – of newspapers with circulation over 25,000, nearly all engage in marketing by phone; of newspapers with circulation less than 25,000, over 68.4 percent depend on telemarketing.<sup>11</sup>

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<sup>6</sup> *NAA 2005 Circulation Facts*, at 32 (2005).

<sup>7</sup> *Id.* at 33. The rate of customer-initiated subscription starts has declined from roughly 30 percent in 1998 to approximately 25 percent of all new starts in 2004.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 37, 40.

<sup>10</sup> *Id.* at 33.

<sup>11</sup> *Id.* at 47.

### **III. THE FTC SHOULD CONSIDER PERMITTING PRERECORDED SALES MESSAGES WITH AN EARLY OPT-OUT OPTION**

Instead of expressly prohibiting prerecorded sales messages in its rules, the FTC is being urged by the telemarketing industry to consider adopting a rule permitting these types of messages for parties with whom a caller has an established business relationship as long as there is a prompt and clear opt-out option. NAA supports the FTC's consideration of such a proposal. Adopting such a rule would allow customers interested in learning of promotional rates, sales, and other offers to continue receiving these beneficial messages while providing uninterested customers with a quick and efficient way to opt-out of future prerecorded sales messages.

### **IV. ORAL CONSENT FROM ESTABLISHED CUSTOMERS TO RECEIVE PRERECORDED MARKETING MESSAGES SHOULD BE PERMITTED**

If the FTC declines to adopt the telemarketing industry's proposal to permit prerecorded sales messages with an early opt-out option, it should allow marketers to obtain oral consent from customers for these messages instead of written consent. As previously discussed in Section II, over 40 percent of new subscriptions for newspapers are obtained over the telephone.<sup>12</sup> Requiring newspapers to obtain a subscriber's oral authorization to receive prerecorded marketing calls would be substantially less costly and far more practical than requiring prior written consent. Initiating the written consent process and the resulting paper trail of following up with subscribers to obtain this consent are costly administrative burdens, especially when the large portion of subscriptions obtained over the telephone is considered.

The current cost of obtaining each new newspaper subscriber is \$41.98.<sup>13</sup> With continued reductions in circulation and editorial staffs due to financial pressures and the

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<sup>12</sup> *Id.* at 9.

<sup>13</sup> *Id.* at 8, 35.

competing priorities of subscription retention and acquisition, adding on the additional time and expense of obtaining written consent will continue to make the cost of obtaining new subscribers prohibitive. In 2004 alone, with the increase in telemarketing expenses up 19.4 percent and the shift to alternative sources for subscription sales (largely resulting from the decline in telemarketing productivity due to the “Do-Not-Call” list), the direct cost to acquire a new subscriber rose 25.5 percent.<sup>14</sup> Furthermore, the proposed prior written consent requirement would apply to *all* subscribers, not merely those obtained via telephone. For example, subscribers are obtained by other methods, such as direct mail. Based on industry averages, a mid-sized newspaper of 50,000 circulation would be required to maintain written records for each of the 30,000 new sales transactions. Given these enormous costs, the FTC should permit oral authorizations by established customers to receive prerecorded marketing messages.

There is ample precedent for allowing oral consents in the TSR itself. For example, the TSR allows a merchant to obtain express oral authorization before submitting certain billing information for payment.<sup>15</sup> Similarly, a separate provision of the TSR allows oral consent in cases involving pre-acquired account information.<sup>16</sup> While the sale of a newspaper subscription normally would not involve either of the scenarios to which those rules are addressed,<sup>17</sup> these regulations illustrate that the Commission understands the practical usefulness of oral consents.<sup>18</sup>

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<sup>14</sup> *Id.* at 10.

<sup>15</sup> 16 C.F.R. § 310.3 (a) (3).

<sup>16</sup> 16 C.F.R. § 310.4 (a) (6).

<sup>17</sup> Each of these scenarios concern situations in which a consumer is being billed. In this proceeding, the issue is the circumstance in which a consumer may receive a prerecorded phone call, which does not involve a financial risk to the consumer.

<sup>18</sup> In some instances, newspapers may already be required to record some telemarketing calls for quality assurance or other purposes. NAA is also aware that audio recording/recordkeeping technology is on the market, but does not currently have information regarding the extent to which they are generally used in the newspaper industry.

**V. NAA STRONGLY URGES THE FTC TO GRANDFATHER PRE-EXISTING SUBSCRIBERS FROM THE CONSENT REQUIREMENT**

With over 40 million current residential subscribers, NAA strongly urges the FTC to grandfather newspapers from any consent requirement for pre-existing subscribers prior to the compliance deadline (currently January 2, 2007). In the newspaper industry, the sheer volume of customers makes obtaining consent, especially for pre-existing subscribers, very difficult. NAA also submits that the nature of the subscription relationship – demanding a regular delivery by the newspaper to the subscriber – is fundamentally different from many other types of commercial relationships in a way that would justify grandfathering existing subscribers.

While the FTC notes in the NPRM that sellers have the opportunity to obtain prior written agreement during the business dealings with their customers, our members have not collected this type of consent before and it will be a significant undertaking to obtain consent, even on a forward-going basis for new subscribers. The task of contacting each of the current 40 million subscribers throughout the United States to obtain prior consent (even if oral) would be an extraordinary burden on already over-tasked circulation departments.

Circulation is a business of numbers. In a given day, circulation departments are already responsible for selling and retaining subscriptions, resolving customer complaints, distributing circulation, collecting payments, resolving billing issues, compliance with state and local as well as federal regulations, and maintaining a carrier force. Obtaining written consent from existing subscribers would be a significant hardship for our members and their circulation departments.

NAA respectfully submits that the subscription nature of the relationship between newspapers and their subscribers provides additional support for the grandfathering requested here. Unlike many other commercial transactions (*e.g.*, a purchase from a retailer, a one-time

visit from a handyman), a newspaper subscription involves continuous, ongoing contacts between the newspaper and subscriber. These contacts occur on a regular (daily or other periodic) basis with the delivery of the newspaper – a contractually required performance that the subscriber expects and demands. These deliveries very rarely involve a personal contact between the delivery carrier and the subscriber and payment occurs at a different time and in a different manner, although they sustain and fulfill the ongoing commercial relationship.

This subscription relationship differs in nature from the great majority of commercial interactions. Subscription renewals are part of this process, including telephone calls to subscribers that confirm subscription renewals within the existing business relationship. Coupled with the enormous difficulty that an obligation to obtain written consent retroactively from millions of subscribers would entail, the most practical solution would be for the Commission not to require newspapers to obtain the proposed consent before making prerecorded telemarketing calls to existing subscribers.

Thus, NAA strongly urges the FTC to grandfather existing subscribers from the consent requirement.

#### **VI. THE COMMISSION SHOULD DEFER THE IMPLEMENTATION DATE IN ORDER TO ALLOW ADEQUATE TIME FOR NEWSPAPERS TO ADJUST TO THE NEW RULES**

The FTC's current proposal is to begin enforcing its new rule on January 2, 2007. NAA respectfully submits that such an early enforcement date will not give sufficient time for the newspaper industry to become generally aware of the new requirements.

Even with acceptance of the recommendations included in NAA's comments, the Commission may not appreciate the extent of the industry education effort that will be required for a change of the magnitude proposed on a major marketing tool used by newspapers. The

newspaper industry will have to launch an educational campaign regarding the changes; more substantive changes will require even more extensive training of not only employees but also newspapers' extensive network of independent contractors for sales and distribution.

Distinctions easily understood among those directly involved in the regulatory process are subtle differences and nuances to a local newspaper's circulation staff and need to be translated and training reinforced.

To illustrate, when the FTC amended the TSR to create the national Do Not Call registry and other changes, NAA found it necessary to conduct a nationwide compliance training program to inform newspapers of the new requirements, including local training at a list of venues. This was a major undertaking for the industry. A change in the use of prerecorded telemarketing messages is not a minor matter that a trade association can simply advise its members about by a memo. In particular, newspapers (and other sellers) will need to understand the differences between informational messages and prerecorded sales messages, as well as the requirement for obtaining prior consent.

## **VII. MEMBER NEWSPAPERS RELY ON PRERECORDED INFORMATIONAL MESSAGES TO COMMUNICATE IMPORTANT INFORMATION TO THEIR SUBSCRIBERS**

Prerecorded informational messages with established business contacts are a convenient, efficient and important way for newspapers to stay in touch with their customers. While NAA lacks specific industry-wide data documenting the specific kinds of reminder messages used by its members, such as account verifications and payment reminders, twenty percent of our members reported using their *own* interactive voice response ("IVR's") unit for outbound messaging in 2004.<sup>19</sup> These data points do not include outsourced vendor use of IVRs to

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<sup>19</sup> *NAA 2005 Circulation Facts* at 109.

communicate with subscribers; however, NAA believes – based on anecdotal evidence – that our members heavily rely on informational messages to remind subscribers about suspension of service, redeliveries, subscription status, account verifications and other customer reminder programs.

NAA strongly supports the FTC’s reaffirmation that informational messages are not governed by the TSR and are not prohibited by its call abandonment provisions.

### **VIII. THE FTC SHOULD PERMIT PRERECORDED MARKETING MESSAGES TO CALLS ANSWERED BY VOICEMAIL OR ANSWERING MACHINES**

In its NPRM, the FTC proposes to “prohibit only the initiation of a call ‘that delivers a prerecorded message when answered by a person.’ ”<sup>20</sup> NAA agrees with the FTC’s initial observations that prerecorded sales calls answered by voicemails or answering machines are less disruptive and intrusive because called parties can simply delete or skip messages for which they are not interested in receiving. This proposal would also avoid the problems of abandoned calls and dead air that prompted the Commission to adopt its current form of the TSR.

It is important to note that the risk of abuse in permitting prerecorded calls on voicemails or answering machines is small when existing business relationships with local customers are at stake. Sellers have a strong incentive to preserve the good will of their existing customers by providing helpful and desired messages. Now, more than ever, NAA members are focusing on subscriber retention. If subscribers do not benefit or have positive experiences with prerecorded messages on their voicemails or answering machines, newspapers will cease providing these types of messages.

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<sup>20</sup> *NPRM* at 41.

**IX. THE FTC SHOULD ADOPT ITS PROPOSED METHOD FOR CALCULATING THE CALL ABANDONMENT RATE WITHOUT THE PER CAMPAIGN LIMITATION**

NAA generally supports the FTC's proposed modification for measuring the maximum allowable call abandonment rate from three percent "per day per campaign" to three percent per 30-day period per calling campaign. However, NAA urges the FTC drop the per campaign limitation.

The per campaign limitation has the greatest impact on smaller businesses, including newspapers. In particular, smaller community newspapers would be hampered the most because their telemarketing universe is small (calling lists less than 5000). Predictive dialers work best on larger calling lists (weekly lists of 40,000 or more). The dialer is able to pace itself and generate enough answered calls to increase quickly the ratio of lines per representative and to stay below the 3 percent abandonment rate. When calling a small list, the balance between the algorithm used by the dialer and the number of sales representatives available at any particular time (due to length of previous call, bathroom breaks, etc.) is easily upset, thereby resulting in both abandoned calls and a decrease by the dialer in the telephone line per representative ratio. When the dialer provides one telephone line per representative, the predictive dialer provides no financial efficiency over live dialing. A safe harbor of 3 percent over thirty days would allow smaller newspapers the efficiency of predictive dialers by not shutting an entire day's work due to the vagaries of a particular day or even particular snapshot in time.

The issues facing smaller sized newspapers also apply to a small calling list (such as a targeted list) of any size newspaper. For these reasons, modifying the call abandonment rate from three percent per day per calling campaign to a three percent rate over a 30-day period provides more flexibility and reduces telemarketing costs for small businesses and would be

consistent with the FCC regulations. Measuring call abandonment over the duration of the campaign instead of over 30-day period provides little relief when applied to small, tailored campaigns typical of small business sellers and telemarketers. Also, the lack of a common definition for a campaign muddles the measurement where as a 30-day period provides for easy compliance without imposing additional harms on consumers who will benefit from telemarketers having additional time to correct for an unexpected spike in abandoned calls on a particular day.

While the FTC's proposed method comes closer to the FCC's 30-day rule, the FTC rule still requires telemarketers to measure the rate per calling campaign, while the FCC's rules only requires a per 30-day period rule. Aligning the FTC's rule with the FCC's per 30-day period rule would be consistent with the Commission's obligation to "maximize consistency" between its regulations and those of the FCC.<sup>21</sup> Adhering to two conflicting federal standards causes confusion and compliances issues for telemarketers.

## **X. CONCLUSION**

NAA members responsibly use telemarketing to better serve their subscribers. Preserving the trust and good will of local subscribers is a key component of a newspaper's business and fiscal health. Newspapers today make extensive use of prerecorded messages for both informational and telemarketing messages, and the Commission's proposal in this proceeding will have a significant effect on newspaper business operations.

The FTC should consider permitting prerecorded sales messages with an early opt-out option as advocated by the telemarketing community.

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<sup>21</sup> See *Do Not Call Implementation Act*, Pub.L. No. 108-10, 117 Stat. 557.

If the FTC does not adopt the telemarketing industry's proposal, it should allow marketers to use prerecorded marketing messages after obtaining an established customer's oral authorization, instead of requiring express written consent. Moreover, NAA strongly urges the FTC to grandfather pre-existing subscribers from the consent requirement prior to the January 2, 2007 compliance deadline, rather than imposing on already busy newspaper circulation departments an enormous new task of obtaining the consent of over 40 million pre-existing subscribers.

NAA strongly supports the FTC's reaffirmation that informational messages are not governed or prohibited by the TSR. NAA also supports the FTC's proposal to permit prerecorded sales calls when answered by voicemails or answering machines. Lastly, the FTC should adopt its proposal for modifying the measurement used in calculating the call abandonment rate; however, it should modify its proposal to align more closely to the FCC's rule governing the same issue.

Respectfully submitted,

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