

Before the  
FEDERAL TRADE COMMISSION  
Washington, D.C. 20580

TSR Prerecorded Call Prohibition and Call  
Abandonment Standard Modification

Project Number: R4110001

COMMENTS OF  
DIRECT MARKETING ASSOCIATION, INC.

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The Direct Marketing Association (“DMA”) submits these comments in response to the Federal Trade Commission’s (“Commission”) Denial of Petition for Proposed Rulemaking; Revised Proposed Rules With Request for Public Comments; Revocation of Non-Enforcement Policy. 71 Fed. Reg. 58716 (Oct. 4, 2006) (“2006 NPRM”). These comments address the proposed rules governing the use of prerecorded messages and also the abandoned call measurement proposal.

## **Introduction & Summary**

DMA is the largest trade association for businesses interested in direct, database, and interactive marketing and electronic commerce. DMA represents more than 4,000 companies in the United States and 53 other nations. Founded in 1917, its members include direct mailers and direct marketers from 50 different industry segments, as well as the non-profit sector. Included are catalogers, financial services, book and magazine publishers, retail stores, industrial manufacturers, Internet-based businesses, and a host of other segments, as well as the service industries that support them.

DMA respectfully requests that the Commission allow prerecorded message calls to those with whom a company has an established business relationship, provided that the call includes a prompt mechanism for allowing a person to make a company-specific do-not-call request, and that the caller indicates that the call is being made based on the established business relationship with the recipient.

The same strong policy reasons that resulted in the established business relationship exemption to calling recipients who place their number on the National Do-Not-Call Registry exist whether or not there are live operators on the calls. Such calls are critical for businesses to communicate with those with whom they have a relationship. Without such an exemption, important calls desired by recipients will be limited. Requiring express written consent would impose significant burdens on both businesses and consumers.

Any concerns that consumers could not opt out of prerecorded messages without a live operator on the call that may have prompted the Commission’s proposal will be alleviated with disclosures and the ability to promptly opt out of calls by pressing a button on the phone. Concerns expressed by consumers about prerecorded messages generally deal with calls that are already prohibited by the Commission’s rules. In fact, consumers may even prefer to make a company-specific do-not-call request during a recorded message than to a live operator.

Should the Commission determine that it will ban all prerecorded calls without express written consent, DMA urges the Commission to craft rules that apply only to its defined term “outbound telephone calls,” and not to purely informational calls that may be part of what the Commission defines as a telemarketing campaign. While perhaps unintended, the current proposal could extend to purely informational calls made as part of a larger campaign. In addition, if the Commission determines that consent is required for using prerecorded messages, it should adopt clear rules that allow consent to be obtained in a flexible manner. Finally, if the Commission does decide to require consent, it should

provide sufficient time for businesses to implement their procedures to obtain the consent necessary. DMA suggests that six months would provide sufficient time.

DMA also thanks the Commission for modifying its rules on call abandonment to allow callers to measure the abandonment rate over a 30-day period. DMA believes that this will provide added flexibility for businesses while maintaining the same level of consumer protection. As the Commission evaluates its final rule, DMA requests that the Commission eliminate the reference to measuring the calls per-campaign, so that calls can be more appropriately targeted to consumers who wish to receive the calls by averaging the rate across different campaigns.

## Discussion

### **I. The Commission should adopt a framework for prerecorded messages to established business relationships with identification of the reason for the call and a prompt mechanism to assert a company-specific do-not-call request.**

As DMA shows below, there is no reason to impose a requirement to obtain consent before sending prerecorded messages to those with whom the caller has an established business relationship. Rather, limiting the use of prerecorded messages to those with whom the caller has an established business relationship provides strong protections for consumers. DMA, therefore, proposes that the Commission adopt the following framework to govern “outbound telephone calls” that are made via prerecorded messages:

- Prerecorded message outbound telephone calls should be made only to individuals with whom the caller has an established business relationship;
- The message should promptly indicate the name of the business and the fact that the call is being made based on the relationship with the consumer (i.e., describing the basis of the relationship); and
- The message should promptly instruct consumers that they may place their telephone numbers on the company-specific do-not-call list if they do not wish to receive further calls from the company by pushing a button on their telephone key pad.

This framework will protect consumers’ ability to control the types of calls they wish to receive, while preserving flexibility in the methods companies use to contact their customers.

A mechanism to allow a consumer to make a company-specific do-not-call request while on the call is workable and efficient. This mechanism will make it possible for a consumer to request not to receive further calls from a company *during* the prerecorded message. Furthermore, pressing a button is unambiguous, and the consumer knows with certainty that they have made the request.

In response to the Commission's proposal in its 2004 Telemarketing Sales Rule Notice of Proposed Rulemaking,<sup>1</sup> DMA explained that it did not believe that an opt-out during the call should be mandated because of the large cost involved in implementing the technology and because providing the consumer with a telephone number to call would provide an adequate opportunity to place a company-specific do-not-call request. DMA did suggest that this mechanism would be appropriate for those vendors who had the capability in place. DMA's members have found, based on experience from the past two years, that this type of opt-out has been cost-effective to implement and that customers are satisfied with the simplicity of the opt-out mechanism. As such, experience shows that mandating that a mechanism be included in the call to allow a consumer to exert a company-specific do-not-call request is feasible.

In addition to the immediate ability to opt out of the recorded message set forth in the Commission's proposal in response to the petition of Voice Mail Broadcasting Corporation,<sup>2</sup> DMA suggests that the call should immediately include a brief statement explaining the basis for the call. That is, the call would let the consumer know that he or she is a customer of the caller or that he or she made an inquiry to the company. Such a mandatory disclosure would provide consumers with an important piece of information that otherwise would not be available in a prerecorded message setting, but that would be obtainable in a live-operator environment with a simple question.<sup>3</sup>

## **II. The policy basis for allowing live calls to those with whom the caller has an established business relationship applies equally to prerecorded message calls.**

### **A. The Commission recognized the value of an established business relationship when it created the rules governing the National Do-Not-Call Registry.**

The Commission recognized that an exemption for calls to those with whom a business has an existing relationship is "consistent with consumer expectations" and, therefore, "necessary and appropriate," so that businesses are able to contact their existing customers without first obtaining express consent when placing calls to individuals who have placed their numbers on the National Do-Not-Call Registry.<sup>4</sup>

The Commission also recognized the appropriate timeframes for such an exemption to remain in place.<sup>5</sup> The Commission found that 18 months was an appropriate period

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<sup>1</sup> 69 Fed. Reg. 67287, Nov. 17, 2004 ("2004 NPRM").

<sup>2</sup> 2004 NPRM, 69 Fed. Reg. at 67289.

<sup>3</sup> Because there will be callers who violate the rules regardless of which framework the Commission adopts, mandating that the caller disclose the basis of the relationship will help consumers recognize that they are dealing with a legitimate business and not one that willfully violates the rules.

<sup>4</sup> *Telemarketing Sales Rule, Final Amended Rule*, 68 Fed. Reg. 4580, 4592 (Jan. 29, 2003).

<sup>5</sup> The Commission's distinction between an 18-month period for purchases and a three-month period for inquiries applies to prerecorded messages as well as live operator calls.

following a purchase because it “allows sufficient time for businesses to renew contact with prospects who may only purchase once a year,” and that it “strikes an appropriate balance between industry’s needs and consumers’ privacy rights and reasonable expectations about who may call them and when.”<sup>6</sup> In addition, it found that three months was appropriate for inquiries, because consumers expected “a prompt follow-up telephone contact close in time to the initial inquiry or application.”<sup>7</sup> These parameters apply equally to prerecorded messages.

**B. Requiring consent for prerecorded calls to those with whom the caller has an established business relationship would limit many calls that consumers find beneficial.**

The Commission’s proposal to require written consent to place any prerecorded call that includes an inducement to purchase a good or service will deprive consumers of information they desire, in a format they prefer. Many of these calls are carefully targeted to customers and are both informational and involve a solicitation. Some of the calls that would be impacted by the rule include:

- A call to remind a person that his or her magazine subscription is about to expire and an offer to renew it.
- A call to remind a person that he or she is due for a dental exam that allows the person to schedule the appointment.
- A call to let a person know that an upgrade is available for a flight for purchase with money or frequent flyer miles.
- A call to notify a person that his or her account is past due and offering an incentive to pay the bill.

DMA’s members have found that consumers often welcome prerecorded messages from entities with which they have an established business relationship. This is shown by several pieces of data. First, over the past two years, companies that use the prompt opt-out as mandated by the safe harbor have found that the opt-out rate is fairly low. This is because the entity calling is familiar to the individual and describing a product or service that the recipient desires. Moreover, it is our understanding from DMA members that customers may actually even prefer to opt out to a recorded message than to a live operator.

The purpose of the Commission’s Telemarketing Sales Rule (“TSR”) is to protect consumers from unwanted—principally cold—calls. The Commission should, as a matter of basic policy, take care that its rules do not have the unintended effect of outlawing calls—such as those described above—that consumers not only want, but that afford them benefits of which they might not otherwise be aware. DMA’s proposed solution thus balances legitimate privacy concerns with other, equally valid, public policy objectives.

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<sup>6</sup> 68 Fed. Reg. at 4592.

<sup>7</sup> *Id.* at 4593.

**C. Requiring consent interferes with calls recipients expect to receive.**

The Commission has proposed to limit prerecorded messages to those situations in which an individual has provided their prior, express, written consent. DMA submits that this requirement would impose tremendous burdens on businesses and interfere with the normal interaction between businesses and their customers. Requiring express written consent prior to calling would preclude calls based on a relationship formed before the change in the rules. DMA members would need to contact each individual solely for the purpose of obtaining consent for such calls. This also would mean additional burdens on consumers who would have to respond to such requests to continue calls they are used to receiving or they would stop receiving such calls.

Moving forward, requiring the type of express written consent proposed by the Commission also interjects an extra barrier between businesses and consumers. Consumers interact with businesses in a variety of ways including over the telephone, on web sites, via email and via traditional mail. A written consent requirement would make it very difficult to call consumers based on a relationship over these channels because consumers do not expect to have to provide signed consent to receive additional information—they often make such requests implicitly or even explicitly, without signing a document.

**D. Abusive prerecorded messages are already prohibited.**

The Commission cites the comments that it received as a result of the 2004 NPRM as its basis for its proposal to require consent to use prerecorded messages.<sup>8</sup> DMA believes that these complaints do not fully or accurately describe the marketplace. First, the comments were submitted when the rule was proposed. As such, they do not reflect the two years of experience of those companies that provided consumers with the prompt opt-out as required under the “non-enforcement” safe-harbor. Second, the comments generally do not address prerecorded messages sent in the context of an established business relationship, but rather focus on prerecorded messages generally. DMA submits that many of the comments focus on calls already prohibited by the Commission’s rules. Similarly, if there are companies not following the Commission’s non-enforcement “safe harbor,” the Commission can enforce its rules against such companies. Those companies that adhere to the Commission’s rules should not be punished by such bad actors.

The Commission has expressed concern that changing the rules will allow businesses to use prerecorded messages in large numbers to contact consumers because of their lower cost, vis-à-vis live calls.<sup>9</sup> To the extent that there is an abundance of prerecorded message calls, they are primarily calls that are already illegal. While it is theoretically possible that there will be a large number of prerecorded messages in the context of an established business relationship, discussions with DMA members indicate that the volume of live operator calls far exceeds the number of prerecorded messages to

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<sup>8</sup> 2006 NPRM, 71 Fed. Reg. at 58722.

<sup>9</sup> *Id.* at 58724.

those with whom the company has an established business relationship. This is because prerecorded messages are useful in specific, targeted applications, such as those discussed above in Section B.

**E. The Commission should craft a rule that provides a consistent standard for all companies.**

Finally, DMA urges the Commission to consider the impact of a rule that conflicts with state laws and the Federal Communications Commission's rule governing prerecorded messages. Although it is true that it would be possible to comply with the FCC's rule by obtaining consent under the Commission's proposed rule, in reality, the Commission's proposal makes the FCC's rule meaningless – except for companies that are not directly subject to the Commission's jurisdiction.<sup>10</sup>

The fact that not all entities are subject to the Commission's jurisdiction imposes a two-tiered system for companies. This is likely to lead to confusion by customers who may be required to give consent to some of the businesses from which they buy goods and services and not from others. Furthermore, because the Commission's jurisdiction may be limited to interstate calls, companies could avoid this rule by conducting intrastate activities. The FCC's rule, in contrast, applies to all calls. Congress recognized the potential for conflicting rules in the Do-Not-Call Implementation Act and required the two agencies to “maximize consistency” in their rules.<sup>11</sup>

**F. The Commission should allow nonprofit entities to use prerecorded messages without consent.**

In addition to the discrepancy between the Commission's rules and the FCC's rules under the Telephone Consumer Protection Act (“TCPA”) for commercial callers, the Commission's proposal would create an even larger imbalance for nonprofit organizations. Accordingly, the Commission should exempt all calls by nonprofit organizations from the rule.

The TCPA exempts any calls made by a “tax-exempt nonprofit organization” from the general prohibition on sending prerecorded messages without consent.<sup>12</sup> The Commission's proposal would extend to prerecorded calls made to induce a charitable contribution, via the definition of “outbound call.” By definition, a charity is a tax-exempt nonprofit organization. Presumably, however, given the Commission's limited jurisdiction, this rule would apply only to those tax-exempt nonprofit entities that use a third-party vendor to place the calls.<sup>13</sup>

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<sup>10</sup> It is worth noting that the FCC carefully examined the record governing prerecorded messages in 1991 when it first crafted regulations and created the exemption from the prohibition on prerecorded messages for those with whom the caller has an established business relationship, and again in 2003 when it issued a number of new rules.

<sup>11</sup> Pub. L. No. 108-10, 117 Stat. 557 (Mar. 11, 2003).

<sup>12</sup> 47 C.F.R. § 64.1200(a)(2)(v).

<sup>13</sup> See 68 Fed. Reg. at 4585 (“[F]or-profit entities that solicit charitable donations now must comply with the TSR, although the Rule's applicability to charitable organizations themselves is unaffected.”).

DMA urges the Commission to allow calls to those with whom an entity has an established business relationship, which, in most cases would include donors or members of a charity. However, the Commission should go further and exempt charities from any of the rules precluding the use of prerecorded messages without consent, including calls made by a for-profit entity on behalf of the charity. The Commission has crafted different rules in the do-not-call area in the past for charities,<sup>14</sup> and should continue to recognize the enhanced First Amendment protections given to charitable speech and the lower concern for abuse. Accordingly, DMA requests that the Commission exclude calls made to induce a charitable contribution from the scope of the rule. This would afford charities the same right to contact donors as they were afforded by Congress under the TCPA.

**III. Should the Commission adopt its proposal, it should apply narrowly to prerecorded “outbound telephone calls” and provide a range of options for obtaining consent.**

While DMA strongly believes that prerecorded messages where there exists an established business relationship should be permitted as described above, if the Commission does decide to implement a broad ban on the use of prerecorded messages absent express consent, DMA urges the Commission to make several important changes. First, it should craft the rule in such a way as to limit the scope to prerecorded messages that involve an offer to sell goods or services. While perhaps unintended, the current proposal could extend to purely informational calls made as part of a larger campaign. Second, the Commission should adopt rules for obtaining consent that would provide more flexibility and certainty to both businesses and consumers. Third, the Commission should provide at least a six-month implementation period to allow businesses to adjust to the new regime.

**A. The rules should not apply to calls that are purely informational.**

DMA requests that the Commission clarify its intent to not apply the rule to informational calls by modifying the terms it has used in the proposed rule. The current rule governing abandoned calls, and by implication, prohibiting prerecorded messages, applies only to “outbound telephone calls,” which includes calls to “induce the purchase of goods or services.”<sup>15</sup> While probably unintended, the proposed rule is written to apply to “outbound telemarketing calls.”<sup>16</sup> As such, it appears that the rule could be interpreted to cover not just prerecorded messages that induce the purchase of goods or services but any prerecorded message that is part of a plan, program, or campaign conducted to induce the

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<sup>14</sup> *Id.* at 4636 (discussing exemption from the National Do-Not-Call Registry for calls made by for-profit fundraisers on behalf of charitable organizations).

<sup>15</sup> “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...[a]bandoning any outbound telephone call.” 16 C.F.R. § 310.4(b)(iv).

<sup>16</sup> 2006 NPRM, 71 Fed. Reg. at 58733-58734.

purchase of goods or services.<sup>17</sup> Thus, the rule as proposed could include calls that are not themselves made to induce a purchase, but that are purely informational. It is not our understanding that this is the Commission's intent in the proposed rule. Accordingly, DMA requests that the Commission apply the rule only to "outbound telephone calls," which includes calls to "induce the purchase of goods or services" that contain a prerecorded message.<sup>18</sup>

In addition, in the interest of regulatory clarity, if the Commission continues on its current course, DMA suggests that some change be made to 16 C.F.R. Section 310.4(b)(iv) so that it is clear that it does not conflict with subsection (v). The Commission has taken the position that subsection (v) prohibits prerecorded messages by requiring all calls to be answered by a live operator. Thus, as long as it remains in place, it would conflict with the grant of permission to use prerecorded messages with consent. Accordingly, DMA suggests that subsection (iv) could be amended to read: "Except as provided in 310.4(b)(v), abandoning any outbound telephone call...."

#### **B. The Commission should provide flexibility for obtaining consent.**

DMA suggests that the Commission adopt a more flexible approach to consent. The proposed rule would require "express agreement, in writing, of such person to place prerecorded calls to that person." It goes on to state that, "[s]uch 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."<sup>19</sup> DMA urges the Commission to modify this definition to make it more flexible and practical to both consumers and business.<sup>20</sup>

Because much commerce occurs over the Internet, by phone, and in other simple formats without writing and without a clear signature, DMA urges the Commission not to

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<sup>17</sup> The proposed rule would prohibit any "outbound telemarketing call" that contains a prerecorded message. The term "outbound telemarketing call" is not defined in the statute or regulations. The term "telemarketing" is defined as "a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call." 16 C.F.R. § 310.2(cc). It is not clear how the Commission plans to combine the definition of "outbound telephone call" and "outbound telemarketing call." In the 2006 NPRM, the Commission explained that the proposed rule would not cover calls 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.'" 71 Fed. Reg. at 58727. By reverse implication, it appears that the rule would cover any prerecorded message that is part of a plan, program, or campaign which is conducted to induce the purchase of goods or services.

<sup>18</sup> Adopting the "outbound telephone call" approach would allow consumers to know whether a call is subject to the rule from the face of the call. DMA suggests, that, in the interests of streamlining the rules, making them consumer friendly, and simplifying enforcement, the Commission should use the term "outbound telephone calls" in this section.

<sup>19</sup> 71 Fed. Reg. at 58726.

<sup>20</sup> DMA recognizes that the E-SIGN Act would apply to the effort to obtain signed-written consent and believes that there should be additional mechanisms allowed as well.

require such an agreement to be in writing and not to require an actual signature. Creating signature and writing requirements would impose barriers to the normal flow of information between businesses and consumers. A consumer who, for example, checks a box on a warranty card, but does not sign the card as the proposed rules would require, likely would be upset to learn that the warranty expired, but that the company could not use its normal method of using a prerecorded call to notify the consumer of the expiration and offer the opportunity to renew. Similarly, an airline passenger who requested to be contacted when there is an upgrade opportunity, but does not return a signed card seeking his consent to use prerecorded messages, would be unaware of such opportunities because the airline could not leave a prerecorded message to contact him.

There are a number of different methods by which consumers' preferences can be recorded, such as online check boxes and other buttons, recorded calls, or check boxes on a postcard. In all cases, the materials would have to be clear and conspicuous, such that the Commission could enforce the rule against those who attempt to obtain consent in the fine print (e.g., a click-through agreement would not suffice). Thus, if the Commission determines to impose a consent requirement for the use of prerecorded messages, it should eliminate the need for the signature, and specify various methods by which consent can be obtained. Companies still would be required to maintain proof of the consent, the Commission could easily determine that the consent was not obtained in a clear and conspicuous fashion, and violators prosecuted, while allowing businesses and consumers to interact in the ways they see fit.

**C. The Commission should allow at least six months to implement any change.**

Finally, DMA requests that if the Commission ultimately requires consent to use prerecorded messages, it should allow a six-month implementation period. As discussed above, obtaining consent is a burdensome and time-consuming process. It will require businesses that use prerecorded messages to contact all of their customers to obtain consent. Depending on the form of consent involved, it will require companies to redesign web sites, response cards, and telemarketing scripts to obtain consent for new customers. Furthermore, it will require new record-keeping procedures to store and access the consent.

**IV. The Commission should modify its proposed rule to measure abandoned calls on a per 30-day basis.**

DMA appreciates that the Commission has recognized 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.”<sup>21</sup> DMA is very supportive of the Commission’s proposal to modify the standard to measure calls across a 30-day period; this is a significant improvement for businesses.

The Commission has tentatively determined that it will retain the “per-campaign” component to its rule. DMA believes that this will continue to hinder businesses and that

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<sup>21</sup> 2006 NPRM, 71 Fed. Reg. at 58730.

the better rule is to allow the measurement across campaigns over 30 days in order to provide more flexibility without harm to consumers.

The Commission has proposed this change in response to “particular problems . . . 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.”<sup>22</sup> Yet, the rule as proposed still requires those small and targeted campaigns that last less than 30 days be calculated over the life of the campaign. If the Commission were to adopt a 30-day rate across all campaigns, true efficiencies can be achieved because callers can average rates from a number of small, highly targeted campaigns without resulting harm to consumers.<sup>23</sup> For small campaigns, the efficiencies are achieved by allowing one predictive dialer to operate on multiple campaigns with a combined three-percent rate over 30 days.<sup>24</sup> Accordingly, the Commission should adopt a 30-day rate across all campaigns.

### **Conclusion**

For the foregoing reasons, DMA respectfully requests that the Commission allow prerecorded message calls to those with whom a company has an established business relationship, provided that the call includes a prompt mechanism for allowing a person to make a company-specific do-not-call request, and that the caller indicates that the call is being made based on the established business relationship with the recipient.

In addition, DMA requests that the Commission eliminate the reference to measuring abandoned calls per-campaign, so that calls can be more appropriately targeted to consumers who wish to receive the calls by averaging the rate across different campaigns.

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<sup>22</sup> *Id.*

<sup>23</sup> The Commission recognizes that these small and targeted campaigns are the ones likely to yield results for callers, which makes it unlikely that the caller would use a high abandonment rate. *Id.* at 58729.

<sup>24</sup> Moreover, it is simply not mathematically possible to combine a relatively low abandonment rate for a small campaign with a high abandonment rate for a large campaign and reach the three-percent requirement.