Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL TRADE COMMISSION

RIN 3084–0098

16 CFR Part 310

Telemarketing Sales Rule

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this document, the Federal Trade Commission (''FTC'' or ''Commission'') addresses three issues. First, the Commission seeks comment on a proposed amendment of the Telemarketing Sales Rule (''TSR'') to create an additional call abandonment safe harbor to allow telemarketing calls that deliver a prerecorded message to consumers with whom the seller on whose behalf the calls are made has an established business relationship. Second, the Commission announces that, pending completion of this proceeding, the Commission will forbear from bringing any enforcement action for violation of the TSR's call abandonment prohibition, 16 CFR 310.4(b)(1)(iv), against a seller or telemarketer that places telephone calls to deliver prerecorded telephone messages to consumers with whom the seller on whose behalf the telemarketing calls are made has an established business relationship, as defined in the TSR, *provided* the seller or telemarketer conducts this activity in conformity with the terms of the proposed amended call abandonment safe harbor. Third and finally, the Commission seeks comment on a petition submitted by the Direct Marketing Association (''DMA'') to amend the TSR's call abandonment safe harbor provision that currently requires use of ''technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, *measured per day per calling campaign*'' [1] substituting instead the phrase ''*measured over a 30-day period.*''

[1] 16 CFR 310.4(b)(4)(i) (emphasis supplied).

DATES: Written comments must be received by January 10, 2005.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to ''Prerecorded Message EBR Telemarketing, Project No. R411001'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159 (Annex K), 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form, as explained in the **SUPPLEMENTARY INFORMATION** section. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments filed in electronic form should be submitted by clicking on the following Weblink: *https://secure.commentworks.com/ftc-tsr* and following the instructions on the Web-based form.

To ensure that the Commission considers an electronic comment, you must file it on the Web-based form at the *https://secure.commentworks.com/ftc-tsr* Weblink. You may also visit *http://www.regulations.gov* to read this proposed Rule, and may file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov.* As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/Privacy.htm.*

FOR FURTHER INFORMATION CONTACT: Michael Goodman, (202) 326–3071, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

Section 310.4(b)(1)(iv) of the amended Telemarketing Sales Rule (''TSR'' or ''Rule'') prohibits telemarketers from abandoning calls. An outbound telephone call is ''abandoned'' under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two seconds of the person's completed greeting.[2]

Call abandonment is an unavoidable consequence of using ''predictive dialers''—telemarketing equipment that increases telemarketers' productivity by calling multiple consumers for every available sales representative. Doing so maximizes the amount of time representatives spend speaking with consumers and minimizes the time representatives spend waiting to reach a prospective customer. An inevitable side effect of predictive dialers' functionality, however, is that the dialer will reach more consumers than can be connected to available sales representatives. In those situations, the dialer will either disconnect the call (resulting in a ''hang-up'' call) or keep the consumer connected with no one on the other end of the line in case a sales representative becomes available (resulting in ''dead air''). The call abandonment provision is designed to remedy these abusive practices.

Notwithstanding the prohibition on call abandonment, the TSR contains a safe harbor designed to preserve telemarketers' ability to use predictive dialers. The safe harbor is available if the telemarketer or seller: abandons no more than three percent of all calls answered by a person; allows the telephone to ring for fifteen seconds or four rings; whenever a sales representative is unavailable within two seconds of a person's answering the call, plays a prerecorded message stating the name and telephone number of the seller on whose behalf the call was

[2] 16 CFR 310.4(b)(1)(iv).

placed; and maintains records documenting compliance.[3] Thus, to comply with this provision of the TSR, at least ninety-seven percent of a telemarketer's calls that are answered by a person (rather than an answering machine) must be connected to a live sales representative. A telemarketing campaign that consists solely of prerecorded messages, therefore, would violate § 310.4(b)(1)(iv) and would not satisfy the safe harbor.

II. Voice Mail Broadcasting Corporation's Submission Regarding the TSR's Treatment of Telemarketing Calls To Deliver a Prerecorded Message to Consumers With Whom the Seller Has an Established Business Relationship

Voice Mail Broadcasting Corporation (''VMBC'') submitted a request for an advisory opinion on the permissibility of prerecorded message telemarketing to consumers with whom the seller has an established business relationship.[4] The Commission has decided to treat VMBC's request as a petition to amend the TSR under § 1.25 of the FTC's Rules of Practice.[5]

VMBC's submission pertains to the impact of § 310.4(b)(1)(iv) on a telemarketer using a particular business model. As indicated above, that business model involves delivery of prerecorded telephone messages solely to consumers with whom the seller on whose behalf the telemarketing calls are performed has an ''established business relationship.''[6] Additionally, under the business model in question, the prerecorded messages would give the called party an opportunity to assert an entity-specific Do Not Call request by speaking to a sales representative. The messages would either allow the called party to speak to a sales representative by pressing a button on the telephone keypad during the message, or, in the alternative, they would provide a toll-free number that the called party may call to speak to a sales representative.

VMBC asserts that the harms that prompted inclusion of the call abandonment provisions in the TSR would not be present in campaigns conducted according to the business model described above. Those harms were (1) ''dead air'' calls, in which there is a prolonged period of silence between a consumer answering a call and the connection of that call to a sales representative; and (2) ''hang-up'' calls, in which telemarketers hang up on consumers whom they have called without speaking to them.[7] Nothing inherent in telemarketing calls that deliver prerecorded messages to consumers with whom the seller has an established business relationship would cause ''dead air''; nor would such calls necessarily result in any ''hang-ups'' on consumers. In fact, it appears that using prerecorded messages to consumers with whom the seller has an established business relationship would enable a telemarketer to preclude completely some of the odious side effects of predictive dialers. For instance, using a prerecorded message would make it unnecessary to subject a consumer who has answered a call to ''dead air'' time while waiting for a live sales representative to become available, or to a hang-up because no sales representative becomes available.

Moreover, the prerecorded messages in the business model VMBC describes would disclose the seller's identity in every call, so the seller would not be engaging in recorded message telemarketing under the cloak of anonymity. In fact, according to VMBC, because the messages in question would be delivered only to existing customers, the ''strong incentive to protect the goodwill of customers'' would serve as a check on the potential for abuse.[8]

VMBC points out that the Federal Communications Commission (''FCC'') telemarketing rules under the Telephone Consumer Protection Act (''TCPA'')—which largely parallel the Do Not Call and certain other of the TSR's provisions—have since the early 1990s permitted prerecorded message telemarketing to consumers with whom a seller has an established business relationship.[9] In virtually all other circumstances, the TCPA rules broadly prohibit prerecorded message telemarketing.[10]

VMBC points out that the FTC, in its *Report to Congress Pursuant to the Do Not Call Implementation Act*[11] (''DNCIA Report''), discussed the difference between the TSR and the TCPA regulations with respect to the treatment of prerecorded message telemarketing in instances where the seller has an established business relationship with the called consumer. In its DNCIA Report, the Commission suggested that ''the incentive to nurture established business relationships may provide an adequate restraint on the growth of recorded message telemarketing.''[12]

A. The Importance of Preserving the Consumer's Ability To Assert a Do Not Call Request When Receiving a Prerecorded Message Telemarketing Call

It appears that ''dead air'' and ''hang-up'' calls are unlikely to result from the business model VMBC describes. At the same time, the Commission recognizes that it may be more economical for companies to contact consumers via prerecorded messages rather than using live telemarketers, so the volume of commercial calls that consumers receive may increase. Accordingly, the Commission believes that, if allowed, telemarketing calls that deliver prerecorded messages to consumers with whom a seller has an established business relationship must preserve the ability of those consumers to assert their Do Not Call rights quickly, effectively,

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[3] The safe harbor provision is 16 CFR 310.4(b)(4).

[4] Starz Encore Group, The Spoken Hub, Copilevitz & Canter, and SoundBite Communications also have written to the Commission seeking compliance advice about this issue.

[5] 16 CFR 1.25.

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

[7] *Statement of Basis and Purpose for the Amended TSR,* 68 FR 4580, 4641 (Jan. 29, 2003).

[8] To support its assertion that consumers do not object to prerecorded message telemarketing when they have an established business relationship with the seller, VMBC states that in one typical campaign conducted for a major retailer, only .02 of 1% of the nearly 5.8 million calls resulted in the consumer asserting an entity-specific Do Not Call request.

[9] *See* 47 CFR 64.1200(a)(2)(iv). The FCC stated its rationale for retaining the established business relationship exemption when it revised its TCPA regulations last year, pursuant to the Do Not Call Implementation Act: ''We believe that while consumers may find prerecorded voice messages intrusive, such messages do not necessarily impose the same costs on the recipients as, for example, unsolicited facsimile messages. Therefore, we retain the exemption for established business relationship calls from the ban on prerecorded messages.'' 68 FR 44158 (¶80) (July 25, 2003).

[10] The only other circumstance in which the TCPA permits prerecorded message telemarketing is in instances where the consumer has given prior consent. 47 CFR 64.1200(a)(6)(i).

[11] Public Law No. 108–10, 117 Stat. 557. Section 4 of the DNCIA required, *inter alia,* that within 45 days after the promulgation of final revised TCPA regulations by the FCC, the FTC and the FCC each transmit to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science, and Transportation a report to include: an analysis of the telemarketing rules promulgated by the FTC; an analysis of the telemarketing rules promulgated by the FCC; a discussion of inconsistencies between the rules promulgated by the FTC and the FCC; a discussion of the effect of any inconsistencies on consumers, and persons paying for access to the registry; and proposals to remedy any such inconsistencies. The FTC's Report is accessible online at *http://www.ftc.gov/os/2003/09/dnciareport.pdf.*

[12] DNCIA Report, p. 35.

and efficiently, so that consumers retain an effective right to decide whether to receive commercial calls, including prerecorded messages. Asserting an entity-specific Do Not Call request should be no more difficult in the case of prerecorded message telemarketing than it is in the case of telemarketing that uses live sales representatives. Although consumers who have placed their telephone numbers on the National Do Not Call Registry may receive telemarketing calls from sellers with whom they have an established business relationship, consumers may immediately request that their number be placed on the seller's entity-specific do not call list. This request prevents future calls from that seller. Consumers should have the same ability to immediately assert a Do Not Call request when they receive a prerecorded telemarketing call pursuant to the established business relationship exemption.

When a consumer is contacted by a live sales representative, the consumer may interrupt the sales pitch immediately to make a Do Not Call request, and the sales representative must take that request without delay. The Commission believes that, similarly, prerecorded messages must present an entity-specific Do Not Call option immediately after the prompt disclosures required by § 310.4(d) and (e) are delivered at the outset of the call.[13] Nevertheless, the Commission seeks information and data about the costs and benefits of requiring that the disclosure of how to make a Do Not Call request be made at the outset of the call. The Commission also seeks information about alternative approaches that the Commission might use in this area and the costs and benefits of these alternatives.

Moreover, the Commission believes that the Do Not Call option should allow consumers to assert their Do Not Call rights during the message. Although FCC rules allow prerecorded messages to provide a toll-free number that consumers may call to make a Do Not Call request,[14] this requires consumers to be prepared with pen and paper at the ready when they answer the phone, to take down the number, and to place a separate call in order to assert a Do Not Call request. This approach encumbers consumers' assertions of company-specific Do Not Call rights.

The business model described in VMBC's letter contemplates some prerecorded messages that would enable consumers to speak with a sales representative during the call by pressing a button on their telephone keypads. The Commission believes this type of interactive feature (pressing a button during the message to connect to a sales representative or an automated system to make a Do Not Call request) would be ideal in the established business relationship prerecorded message context as a means to protect consumers' Do Not Call rights under the TSR.

The Commission has, therefore, incorporated this feature into the proposed amendment to the call abandonment safe harbor provision that would permit telemarketing calls to consumers with whom a seller has an established business relationship to deliver a prerecorded message. Nevertheless, the Commission seeks information and data about the technical feasibility and costs of implementing such a feature in outbound telemarketing calls that deliver prerecorded messages to established customers. The Commission also seeks comment on alternative methods of preserving the consumer's ability to assert a Do Not Call request when receiving a prerecorded message telemarketing call.

B. The Commission's Proposal To Amend the TSR's Call Abandonment Safe Harbor Provision To Permit Prerecorded Message Telemarketing to Consumers With Whom a Seller Has an Established Business Relationship

Because the harms that the call abandonment provisions were intended to remedy seem unlikely to arise from calls made pursuant to the business model at issue in VMBC's petition, the Commission proposes to amend the TSR to add a new call abandonment safe harbor, as indicated below:

(5) A seller or telemarketer initiating an outbound telephone call that delivers a prerecorded message to a person with whom the seller has an established business relationship will not be liable for violating 310.4(b)(1)(iv) if:

(i) The seller or telemarketer, for each such telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(ii) Within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a prerecorded message that:

(a) Presents an opportunity to assert an entity-specific Do Not Call request pursuant to § 310.4(b)(1)(iii)(A) at the outset of the message, with only the prompt disclosures required by §§ 310.4(d) or (e) preceding such opportunity; and

(b) Complies with all other requirements of this Rule and other applicable federal and state laws.

Proposed § 310.4(b)(5) would create a new safe harbor for sellers and telemarketers calling consumers with whom the seller has an established business relationship for the purpose of delivering a prerecorded message. There are four criteria that a seller or telemarketer placing such calls would be required to meet to take advantage of the safe harbor and avoid liability for violating the TSR's prohibition against call abandonment in § 310.4(b)(1)(iv). The first criterion is that the seller or telemarketer (1) must allow the telephone to ring for at least fifteen seconds or four rings before disconnecting an unanswered call. This ''ring time'' element is identical to the analogous element of the existing safe harbor in § 310.4(b)(4)(ii). The ring time standard is intended to give consumers, including the elderly or infirm who may struggle to get to the telephone, a reasonable opportunity to answer telemarketing calls while preventing the undesirable result of consumers' privacy being disrupted by ringing phones with no caller present on the other end of the line. The ring time standard is modeled on DMA's ethical guidelines for its members.[15]

The second criterion of the proposed safe harbor is that the seller or telemarketer must play the prerecorded message within two seconds after the person's completed greeting. The purpose of this element of the safe harbor is to minimize ''dead air.'' This element follows the analogous element in § 310.4(b)(4)(iii), allowing no more than two seconds of dead air. As noted, where there is no wait for a live sales representative because a prerecorded message is being delivered by a

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

[14] *See* 47 CFR 64.1200(b)(2).

[15] Prior to adoption of the amended TSR, Article #38 of DMA's ethical guidelines recommended allowing the phone to ring at least four times or for twelve seconds before disconnecting a call. 68 FR 4580, 4644 (Jan. 29, 2003). Since adoption of the amended TSR, DMA has issued revised guidelines. Article #45 of these revised ethical guidelines now tracks the TSR in urging that ''[m]arketers using automated dialing equipment should allow 15 seconds or 4 rings before disconnecting an unanswered call.'' *http://www.the-dma.org/guidelines/ethicalguidelines.shtml#tele.*

machine, telemarketers should have no problem meeting this standard. The Commission, however, specifically seeks information on whether the maximum amount of dead air should be *less* than two seconds in the new safe harbor, since the rationale for allowing two seconds may be inapposite to telemarketing that uses prerecorded messages rather than live sales representatives. The Commission also seeks information on the relative costs and benefits of a standard that would set the maximum amount of dead air at a level lower than two seconds.

The third criterion of the proposed new safe harbor is self-explanatory. Its purpose is to ensure the same Do Not Call rights for consumers receiving telemarketing calls that deliver a prerecorded message that are enjoyed by consumers receiving telemarketing calls from live sales representatives. It requires that the prerecorded message present, ''at the outset,'' preceded only by the prompt oral disclosures required by the TSR, an opportunity for the called party to assert an entity-specific Do Not Call request pursuant to § 310.4(b)(1)(iii)(A).

Under the business model VMBC describes, some telemarketing campaigns would employ messages with an entity-specific Do Not Call mechanism, providing the called party with an opportunity to speak to a sales representative during the message by pressing a button on the telephone keypad. This approach allows consumers to exercise their Do Not Call rights in a manner that closely tracks consumers' experience when called by a live sales representative, and would therefore satisfy the proposed safe harbor. The Commission seeks information about the costs to industry of requiring this mechanism in each message, and whether the costs are outweighed by the benefits to consumers who want to assert an entity-specific Do Not Call request immediately, without having to write down a toll-free number and call back.

The fourth and final element of the proposed new safe harbor provision makes it explicit that it does not obviate or negate any other provision of the TSR or other federal or state laws. This proposed safe harbor provision would preserve consistency with the existing TSR safe harbor governing predictive dialers [16] and put sellers and telemarketers on notice that other applicable regulations may be stricter than what the Commission's proposal provides.

C. FTC Enforcement Policy Pending Completion of This Proceeding

In consideration of VMBC's petition and similar requests from other parties, the Commission now believes that, under certain limited circumstances, enforcement of the call abandonment provision would serve only to deter conduct that does not cause the harms to consumers that prompted adoption of that provision. Therefore, the Commission has determined that, pending completion of this proceeding, the Commission will forbear from bringing any enforcement action for violation of the TSR's call abandonment prohibition, 16 CFR 310.4(b)(1)(iv), against a seller or telemarketer that places telephone calls to deliver prerecorded telemarketing messages to consumers with whom the seller on whose behalf the telemarketing calls are placed has an established business relationship, as defined in the TSR, provided the seller or telemarketer conducts this activity in conformity with the terms of the proposed amended call abandonment safe harbor. In the event the record that develops in this proceeding tends to disprove the Commission's tentative conclusions regarding prerecorded message telemarketing to consumers with whom the seller has an established business relationship, the Commission will announce a revised enforcement policy that will apply to subsequent enforcement actions.

III. DMA's Petition

On May 18, 2004, DMA submitted a petition asking that the Commission ''revise its current method for calculating abandoned calls from a per day, per calling campaign measurement * * * to the per 30 day measurement adopted by the Federal Communications Commission (FCC) in its revisions to its telemarketing rules * * *.''[17] DMA states that ''meeting the 3% benchmark under the FTC's per day, per calling campaign standard presents a much greater compliance obstacle than meeting the FCC's abandoned call standard. Marketers who use predictive dialing technology are having difficulty configuring their software to comply with the FTC's per day, per calling campaign 3% standard.'' DMA's letter does not explain why this would be so. The letter, however, does quote a DMA member as follows:

> The FTC requires the 3% abandon average per campaign per day, which is virtually impossible for vendors who run multiple campaigns each day. On a typical day, we may run more than 100 individual client campaigns. The system manages the efficiency as an average of all campaigns per day, so it is inevitable that certain logins would end the day at say, 3.1% and others at 2.9%, yet the overall average would still be 3% or less.

Nevertheless, DMA's letter does not explain why a telemarketer's system cannot dynamically maintain a steady level of no more than three percent call abandonment for all calls being placed. In fact, the paragraph quoted above suggests that telemarketers engage in precisely the practice the Commission was concerned about when it adopted the ''per day, per campaign'' method of calculating the maximum level of abandoned calls. The Commission stated:

> The ''per day per campaign'' unit of measurement is consistent with DMA's guidelines addressing its members' use of predictive dialer equipment. Under this standard, a telemarketer running two or more calling campaigns simultaneously cannot offset a six percent abandonment rate on behalf of one seller with a zero percent abandonment rate for another seller in order to satisfy the Rule's safe harbor provision. Each calling campaign must record a maximum abandonment rate of three percent per day to satisfy the safe harbor.[18]

DMA's petition concedes that ''the former DMA Guidelines for Ethical Business Practices (The DMA Guidelines) used the per day standard for the maximum number of abandoned calls per campaign that companies who use predictive dialing equipment must satisfy as a condition of membership in the DMA.'' DMA points to the fact that the permissible abandonment rate in the DMA Guidelines was five percent, instead of the three percent level incorporated in the TSR's call abandonment safe harbor. Nevertheless, DMA provides no facts to support the proposition that the per day per campaign method was feasible at a five percent level, but not at the three percent level.

DMA mentions two other factors in support of its petition. The first factor is that the California Public Utilities Commission—whose three percent call abandonment rate the Commission cited in adopting the TSR's call abandonment safe harbor—measures abandoned calls on a per 30-day basis, according to DMA. Second, DMA argues the FTC

[16] Footnote 7 of the amended TSR states: ''This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.'' The final element of the proposed new safe harbor incorporates the same concept without duplicating this footnote.

[17] DMA petition at 1 (available at *http://www.ftc.gov/os/2004/10/041019dmapetition.pdf).*

[18] 68 FR 4643 (Jan. 29, 2003) (footnotes omitted).

should defer to the FCC's determination on how the permissible call abandonment rate should be calculated, because the issue ''lies closer to the core expertise of the FCC than of the FTC.'' The Commission does not believe these factors are sufficient to require the requested change in the TSR. It is not impossible for entities subject to both the TSR and either the FCC's TCPA rules or the California Public Utilities Commission's rules to comply with both; compliance with the FTC's more precise standard would constitute acceptable compliance with either or both of those other sets of regulations. Moreover, recent court decisions controvert DMA's argument that the FTC's expertise or legal authority regarding the acceptable level of call abandonment is inferior to that of the FCC.[19]

DMA provides no information that would tend to counter the concern about the shortcomings of a ''per 30-day'' standard that the Commission set forth at length in its DNCIA Report.[20] The concern is that the FCC's approach to measuring the three percent call abandonment rate over a 30-day period could enable telemarketers to target call abandonments at certain less valued groups of consumers, resulting in their receipt of more than their share of abandoned calls. Under such a scenario, predictive dialers could be set to abandon calls at a higher rate to one subset of the population and a lower rate to another subset of the population. For example, a telemarketer could offset a high abandonment rate in a multi-day cold-call campaign to persons who never previously purchased from the seller, and make up the difference by abandoning no calls in a subsequent campaign targeting its most valued existing customers. Telemarketers could also offset a high abandonment rate in low income zip codes and make up the difference by abandoning no calls in affluent ones. The FTC's per day per campaign measure reduces the potential for concentrating abuse by ensuring an even distribution of abandoned calls to all segments of the public, regardless of their purchasing history or demographic characteristics. Given the detrimental impact of call abandonment on consumers, the FTC does not believe that variations in telemarketing campaigns (such as calling times, number of operators available, and the number of telephone lines used by the call centers) justify allowing call abandonment to fall disproportionately on particular groups of consumers.

Therefore, the Commission believes that DMA has not provided an adequate factual basis that would compel modification of the TSR's method for measuring the maximum allowable abandonment rate. Nonetheless, the Commission is receptive to any factual information that would establish that such a change is warranted, and encourages commenters to include such information in their submissions. In particular, the Commission is interested in any elaboration on the problems telemarketers who are running multiple campaigns at the same time face in attempting to comply with the current requirement. The Commission is also interested in any information demonstrating that callers who make a relatively small number of calls per day may be differentially disadvantaged by the current requirements. Finally, the Commission seeks information and data demonstrating that it need not be concerned that, if additional flexibility were provided, telemarketers would intentionally set the abandonment rates above 3 percent on some campaigns or on calls directed to certain consumers and use lower rates of abandonment on other campaigns or calls to satisfy the overall 3 percent requirement.

IV. Invitation To Comment

All persons are hereby given notice of the opportunity to submit written data, views, facts, and arguments addressing the issues raised by this Notice. Written comments must be received on or before January 10, 2005. Comments should refer to: ''Prerecorded Message EBR Telemarketing, Project No. R411001'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159 (Annex K), 600 Pennsylvania Avenue, NW., Washington, DC 20580. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled ''Confidential.'' [21] The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

To ensure that the Commission considers an electronic comment, you must file it on the Web-based form at the *https://secure.commentworks.com/ftc-tsr* Weblink. You may also visit *http://www.regulations.gov* to read this proposed Rule, and may file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov*. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm*.

V. Communications by Outside Parties to Commissioners or Their Advisors

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

VI. Paperwork Reduction Act

The information collection requirements contained in the TSR were reviewed by OMB under the Paperwork Reduction Act and cleared on July 24, 2003, under OMB Control Number 3084–0097. The proposed rule amendment, as discussed above, provides a safe harbor from the TSR's prohibition on call abandonment for sellers and telemarketers that call only

[19] *Mainstream Mktg. Serv., Inc.* v. *FTC*, 283 F. Supp. 2d 1151, 1170 (D. Colo. 2003) (''[T]he court finds no basis to conclude that the FCC has exclusive jurisdiction to regulate the practice of abandoning calls''); *U.S. Security* v. *FTC*, 282 F. Supp. 2d 1285, 1292 (W.D. Okla. 2003) (''The [TSR's] restriction on abandoned calls is a permissible regulation of this most (and undisputedly) invasive and abusive practice, and its promulgation, which is in no way hindered or hobbled by the FCC's grant of authority, has carried into effect congressional intent as expressed by the [Telemarketing Act]''); *Nat'l. Fed'n. of the Blind* v. *FTC*, 303 F. Supp. 2d 707 at 716 (D. Md. 2004).

[20] DNCIA Report, p. 31.

[21] Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record.

consumers with whom the seller has an established business relationship, as defined in the Rule. Thus, the proposed rule amendment does not impose any new, or affect any existing, record submission, recordkeeping, or public disclosure requirement that would be subject to review and approval by OMB pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501–3520.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601–612, requires an agency to provide an Initial Regulatory Flexibility Analysis (''IRFA'') with a proposed rule and a Final Regulatory Flexibility Analysis (''FRFA'') with the final rule, if any, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 603–605.

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

A. Reasons for the Proposed Rule

The proposed modification of the TSR, discussed above, responds to requests from the telemarketing industry to provide a safe harbor to allow sellers and telemarketers calling persons with whom the seller has an established business relationship to deliver a prerecorded message.

B. Statement of Objectives and Legal Basis

The objectives of the proposed rule are discussed above. The legal basis for the proposed rule is the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6102.

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

This proposed rule will impact sellers that make interstate telephone calls to consumers (outbound calls) with whom the seller has an established business relationship for the purpose of delivering a prerecorded message in an attempt to sell their products or services. Also affected may be firms that provide prerecorded message telemarketing services to others on a contract basis. For the majority of entities subject to the proposed rule, a small business is defined by the Small Business Administration as one whose average annual receipts do not exceed $6 million or that has fewer than 500 employees.[22]

In the proceedings to amend the TSR in 2002, the Commission sought public comment and information on the number of small business sellers and telemarketers that would be impacted by those amendments, which were broader in scope than those at issue in the instant proceeding. In its requests, the Commission noted the lack of publicly available data regarding the number of small entities that might be impacted by the proposed Rule.[23] The Commission received no information in response to its requests.[24]

The requests for clarification regarding the operation of the abandoned call provision of the TSR that have led to this rulemaking proceeding provide no data regarding the number of small entities that may be affected by the outcome of the proceeding. Based on the absence of available data in this and related proceedings, the Commission believes that a precise estimate of the number of small entities that fall under the proposed rule is not currently feasible, and specifically requests information or comment on this issue.

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

The proposed rule does not impose any new, or affect any existing, reporting, disclosure, or specific recordkeeping requirements within the meaning of the Paperwork Reduction Act. The Commission does not believe that modifying the Rule to create a safe harbor that would allow sellers and telemarketers calling to deliver a prerecorded message to persons with whom they have an established business relationship will create a significant burden on sellers or telemarketers that have already established systems to comply with the existing TSR. The Commission also does not believe that this modification of the Rule will increase or otherwise modify any existing compliance costs, and may in fact reduce them for small entities that are able to take advantage of the safe harbor.

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

The FTC has not identified any other federal statutes, rules, or policies that would conflict with the proposed safe harbor that would allow telemarketing calls that deliver a prerecorded message to persons with whom the seller has an established business relationship. The FCC rules pursuant to the TCPA contain a safe harbor that allows telemarketing calls that deliver a prerecorded message to persons with whom the seller has an established business relationship. The FTC's proposed modification would harmonize the TSR to the FCC's TCPA rules on this issue. With respect to the issue of calculating callers' abandonment rate on a ''per day'' or ''per 30-day'' basis, the FTC does not propose to modify its Rule to make it consistent with the relevant FCC TCPA rule. As explained in Section III above, compliance with the FTC's more precise standard would constitute acceptable compliance with the FCC rule, so there is no conflict between these rules.

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

The proposed safe harbor would allow telemarketing calls that deliver a prerecorded message to persons with whom the seller has an established business relationship, but require that the prerecorded message include an opportunity during the call for the recipient of the call to assert an entity-specific Do Not Call request. Other regulatory options under consideration include requiring instead that the prerecorded message include a toll-free number that call recipients could contact to assert an entity-specific Do Not Call request. Also, the proposed safe harbor requires that the prerecorded message begin within two seconds after the recipient of the call completes his or her greeting. Other regulatory options under consideration include requiring that the prerecorded message begin sooner than two seconds after the recipient of the call completes his or her greeting. The proposed safe harbor is intended to be available to all entities subject to the Rule, and it does not

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

[23] *See* 68 FR 4580, 4667 (Jan. 29, 2003) (noting that Census data on small entities conducting telemarketing does not distinguish between those entities that conduct exempt calling, such as survey calling, those that receive inbound calls, and those that conduct outbound calling campaigns. Moreover, sellers who act as their own telemarketers are not accounted for in the Census data.).

[24] *See* 68 FR 4580, 4667 (Jan. 29, 2003): 68 FR 45134, 45143 (July 31, 2003) (noting, in the final amended rules, that comment was requested, but not received, regarding the number of small entities subject to the National Do Not Call Registry provisions of the amended TSR).

appear that a delayed effective date for small entities or other alternatives to the current proposal would either be appropriate or necessarily result in any further reduction in the compliance burdens of the Rule for small entities. The Commission nonetheless seeks comments and information on what other alternative formulations, if any, of the proposed safe harbor might further minimize compliance burdens for small entities, without compromising the intent and purpose of the Rule to prevent abusive telemarketing practices.

VIII. Specific Issues for Comment

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

A. General Questions for Comment

Please provide comment, including relevant data, statistics, consumer complaint information, or any other evidence, on (a) the proposed safe harbor to allow telemarketing calls that deliver a prerecorded message to persons with whom the seller has an established business relationship, and (b) DMA's request to substitute a ''per 30-day period'' for the current ''per day per campaign'' method of measuring the maximum allowable rate of call abandonment under the existing safe harbor in 16 CFR 310.4(b)(4)(i). Please include answers to the following questions:

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

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

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

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

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

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

B. Questions on Proposed Specific Provisions

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

1. Are ''hang-up'' calls and ''dead air''—the two harms that prompted adoption of the current call abandonment provisions—likely to arise from telemarketing calls that deliver a prerecorded message to consumers with whom the seller has an established business relationship? Are there other consumer harms that may result from such calls, and if so, what are they? Could the proposed safe harbor be crafted to eliminate such harms, and if so, how? If not, why not?

2. What are the costs and benefits to consumers of receiving telemarketing calls from companies with whom they have an established business relationship via prerecorded messages as opposed to live sales representatives? Is there any data as to how many consumers choose to act on the telemarketing calls that they receive via prerecorded messages? Is it likely that consumers will receive more telemarketing calls under this proposed new safe harbor in § 310.4(b)(5)? Is it likely that consumers will receive more unwanted telemarketing calls under this proposed new safe harbor?

3. What are the costs and benefits of obtaining consumers' prior consent before contacting them with prerecorded telemarketing messages?

4. Is there any data as to how many consumers choose to opt out of prerecorded telemarketing calls currently? What mechanisms are used to allow consumers to opt out of prerecorded telemarketing messages? At what point in the course of the message are consumers given the opportunity to opt out? Does the industry follow a standard practice as to when in the call a consumer must be given the opportunity to opt out?

5. How much, if any, ''dead air'' should be permitted between the completion of the answering consumer's greeting and the beginning of the prerecorded message in the proposed new call abandonment safe harbor for telemarketing calls delivering a prerecorded message to consumers with whom the seller has an established business relationship? Because using prerecorded messages obviates the need to wait for an available live sales representative, is there any reason that the prerecorded message could not start less than two seconds after completion of the answering consumer's greeting? What would be the costs and benefits of starting the prerecorded message less than two seconds after completion of the answering consumer's greeting?

6. What would be the costs to industry of requiring that each prerecorded message include a mechanism that would enable the consumer receiving the call to assert a Do Not Call request during the call, for example, by pressing a number on the keypad, or by stating aloud the wish not to receive future calls? Specifically, what would be the incremental expense of such a requirement? What would be the overall costs and benefits to consumers of such a requirement? What would be the comparative costs and benefits to industry and consumers of providing a toll-free number in a prerecorded message that call recipients could call to assert a Do Not Call request? Are there other alternative means of preserving the consumer's ability to assert a Do Not Call request that would strike a better balance of costs and benefits than requiring an opportunity during the prerecorded message to assert a Do Not Call request?

7. Is it appropriate that the proposed new safe harbor in § 310.4(b)(5) specifies that the seller or telemarketer must use a prerecorded message that presents an opportunity to assert an entity-specific Do Not Call request at the outset of the message, with only the prompt disclosures required by § 310.4(d) or (e) preceding it? Why or why not? What are the costs and benefits of this approach? In the alternative, would it be better to specify that the information about how to assert an entity-specific Do Not Call request be given within a certain length of time after the beginning of the pre-recorded message? If so, how much time should be allowed before the information must be given? What are the costs and benefits of this approach?

8. Does the proposed new safe harbor in § 310.4(b)(5) provide industry with sufficient guidance as to the circumstances under which prerecorded message telemarketing calls would be permissible? If not, how could the provision be crafted to accomplish that purpose more effectively?

9. Would the proposed new safe harbor in § 310.4(b)(5) complicate

enforcement efforts against a seller or telemarketer who violates the TSR and claims falsely that it has an established business relationship with called consumers?

10. Is it appropriate that the proposed new safe harbor in § 310.4(b)(5) specifies that the seller or telemarketer must allow the telephone to ring for at least fifteen seconds or four rings before disconnecting an unanswered call? If not, is there some other more appropriate element that should be included in the safe harbor to preclude the problem of premature ''hang-ups'' before consumers can reach the telephone?

11. Is it appropriate that the proposed new safe harbor in § 310.4(b)(5) specifies that the seller or telemarketer must comply with all other requirements of the TSR and other applicable federal and state laws? If not, why not?

12. Is the burden on telemarketers in meeting the three percent maximum abandoned call level per day per telemarketing campaign outweighed by benefits to consumers in having call abandonment distributed evenly at a uniformly low level to all called consumers? What, if any, characteristics of the telemarketing equipment currently in use might make compliance with the ''per day per campaign'' standard problematic? What, if any, costs would result from having the equipment adjusted or replaced to eliminate problems?

13. According to DMA, ''marketers who use predictive dialing technology are having difficulty configuring their software to comply with the FTC's per day, per calling campaign 3% [maximum abandoned call] standard.'' Is this statement accurate? If so, why? And if so, how widespread is this difficulty? If this statement is not accurate, why not? Were similar problems encountered in meeting the DMA's former guideline of no more than five percent of calls abandoned per day per telemarketing campaign? Why or why not?

14. If the three percent maximum call abandonment rate were measured over a 30-day period, instead of per day per telemarketing campaign, what effect, if any, would this change have on actual call abandonment rates? What would prevent a telemarketer from targeting call abandonments at certain less valued groups of consumers, resulting in their receipt of more than their share of abandoned calls? What would prevent setting predictive dialers to abandon calls at a higher rate to one subset of the population and a lower rate to another subset of the population? Is it appropriate that some segments of the population should be subjected to a higher rate of call abandonment than other segments of the population? If so, why?

15. Can telemarketing equipment be programmed to dynamically maintain a steady level of no more than three percent call abandonment for all calls being placed? What, specifically, is the equipment that has that capacity to be programmed in such a manner, if any? What are the costs associated with this equipment?

IX. Proposed Rule

List of Subjects in 16 CFR Part 310

Telemarketing, Trade practices.

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

PART 310—TELEMARKETING SALES RULE

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

Authority: 15 U.S.C. 6101–6108.

2. Amend § 310.4 by adding a new paragraph (b)(5).

§ 310.4 Abusive telemarketing acts or practices.

* * *

(b) * * *

(5) A seller or telemarketer initiating an outbound telephone call that delivers a prerecorded message to a person with whom the seller has an established business relationship will not be liable for violating § 310.4(b)(1)(iv) if:

(i) The seller or telemarketer, for each such telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(ii) Within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a prerecorded message that:

(A) Presents an opportunity to assert an entity-specific Do Not Call request pursuant to § 310.4(b)(1)(iii)(A) at the outset of the message, with only the prompt disclosures required by § 310.4(d) or (e) preceding such opportunity; and

(B) Complies with all other requirements of this part and other applicable federal and state laws.[8] * * *

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 04–25470 Filed 11–16–04; 8:45 am]

BILLING CODE 675–01–P

[8] This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD08–04–042]

RIN 1625–AA09

Drawbridge Operation Regulation; Gulf Intracoastal Waterway, Cypremort, LA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to change the regulation governing the operation of the State Route 319 (Louisa) bridge across the Gulf Intracoastal Waterway, mile 134.0 west of Harvey Lock, near Cypremort, Louisiana. A new high-level, double-leaf bascule bridge that will require limited openings is replacing the low-level swing bridge across the waterway. This proposed regulation change would remove the regulation governing the to-be-removed bridge and replace it with a regulation for the operation of the new bascule bridge.

DATES: Comments and related material must reach the Coast Guard on or before January 18, 2005.

ADDRESSES: You may mail comments and related material to Commander (obc), Eighth Coast Guard District, 500 Poydras Street, New Orleans, Louisiana 70130–3310. The Commander, Eighth Coast Guard District, Bridge Administration Branch maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the Bridge Administration office between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: David Frank, Bridge Administration Branch, telephone 504–589–2965.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD08–04–042),