

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

In the Matter of

Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991) CG Docket No. 02-278
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To: The Commission

**REPLY OF THE INTERACTIVE AGENT ASSOCIATION
TO OPPOSITION TO PETITION FOR RECONSIDERATION**

INTERACTIVE AGENT ASSOCIATION

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The Interactive Agent Association ("IAA")¹ submits this Reply to the Opposition to Petitions for Reconsideration of Dennis C. Brown² and the Opposition of Voice-Mail Broadcast³ ("VMB") in the Federal Communication Commission's (the "Commission") above-captioned docket.⁴ Brown simply seeks to eliminate the lawful use of recorded messages as a means to communicate with

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

² Brown petitioned for reconsideration and then filed oppositions to other petitions. *See* Petition for Reconsideration of Dennis C. Brown ("Brown Pet."), CG Docket No. 02-278, August 18, 2003; *Opposition to Petitions for Reconsideration of Dennis C. Brown* ("Brown Opp."), CG Docket No. 02-278, October 13, 2003; *see also* Petitions for Reconsideration and Clarification in Rulemaking Proceedings, 68 Fed. Reg. 53740 (2003).

³ *See* Opposition of Voice-Mail Broadcasting Corporation to Petitions for Reconsideration ("Voice-Mail Opp."), CG Docket No. 02-278, October 14, 2003; *see also* Petitions for Reconsideration and Clarification in Rulemaking Proceedings, 68 Fed. Reg. 53740 (2003).

⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, Commission 03-153 (rel. July 3, 2003). The regulations were published in the Federal Register on July 25, 2003, at 68 Fed. Reg. 44,144 (2003).

customers. VMB points out that altering the Commission's rules would have a serious impact on legitimate customer communications.

In response, the IAA believes the Commission's existing rules as applied to prerecorded messages are correct. The Commission's caller abandonment rules specifically allow companies to leave prerecorded messages with existing business customers and those who have consented to receive such calls, while providing appropriate consumer protections against unwanted phone calls. The Commission should reaffirm the rule to protect what the Commission has acknowledged is an appropriate means for businesses to communicate with their customers.⁵

The Commission can and should do more, however, in light of the Federal Trade Commission's ("FTC") virtual ban of the use of prerecorded messages. The FTC's amendments to its Telemarketing Sales Rule ("TSR") ostensibly seek to put an end to the practice of abandoning phone calls made by predictive dialers.⁶ To achieve this result, the FTC prohibits calls that do not connect to a live sales agent within 2 seconds.⁷ The acknowledged consequence, of course, is that all delivery of prerecorded messages and use of interactive agents arguably are prohibited, by definition, for failing to connect to a live sales agent. The Commission, as the agency charged by Congress to implement the Telephone Consumer Protection Act ("TCPA"), must assert its jurisdiction over recorded messages so that the government speaks with one voice, to ensure that legitimate businesses and their ability to speak to customers are not confused, and to avoid

⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, Commission 03-153 (rel. July 3, 2003) at ¶ 156; see also 47 C.F.R. § 64.1200 (a)(6)(i).

⁶ *Telemarketing Sales Rule, Final Rule*, Federal Trade Commission, 68 Fed. Reg. 4580 (2003).

⁷ *Id.*; 16 C.F.R. 310.4(b)(1)(iv).

subjecting them to potential liability for doing what is legal under the Commission's rules but arguably actionable under the FTC's rules.⁸

Accordingly, the IAA urges the Commission to act immediately to coordinate with the FTC and to confirm that, pursuant to statutory mandate, businesses, or independent contractors acting on their behalf, may send prerecorded messages to their customers and those that request to receive them, and may use interactive agents, to accomplish this task.

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

Interactive agents are software applications used by companies to communicate efficiently and cost-effectively with large numbers of their customers or those who have asked to receive such communications. Both customers and businesses benefit from the convenience and efficiency that interactive agents and recorded messages provide: customers receive timely and often personalized information while businesses save costs and gain efficiency in reaching many customers at nearly the same or desired time.

When the interactive agent places a call to a customer, the interactive agent has the capability to determine whether the recipient is a live person or an answering machine. For all calls that are not answered by a live recipient, the interactive agent leaves a prerecorded message that

⁸ See Letter to Mr. Richard Smith Submitted by Starz Encore Group LLC, CG Docket No. 02-278, September 26, 2003 (Starz Encore Group stated its position in support of the Commission's rules allowing the use of prerecorded messages within an established business relationship, and urged the Commission to coordinate with the FTC to ensure that the FCC's rules govern all telemarketing calls, as provided for in the TCPA.) Although the FTC has told Congress that the "FTC Staff" does not intend to enforce the caller abandonment provisions of the TSR in cases where there is express consent, the Telemarketing and Consumer Fraud and Abuse Prevention Act, which authorized the TSR, provides a private right of action for violation of the rules and therefore the FTC's intention has no impact on the motives of class action lawyers or others. See *Report to Congress Pursuant to the Do Not Call Implementation Act on Regulatory Coordination in Federal Telemarketing Laws Submitted by The Federal Trade Commission*, at pg. 25; see also *Telemarketing and Consumer Fraud and Abuse Prevention Act*, P.L. 103-297, § 2, 108 Stat. 1545 (1994), *codified at* 15 U.S.C. § 6101 *et seq.*; 15 U.S.C. §6104.

clearly identifies the name of the caller, the purpose of the call, and the phone number that the recipient may call to retrieve the full message.

When a live recipient answers the call, the interactive agent plays a prerecorded message that announces the identity of the caller and the purpose of the call.⁹ At that point, the customer may choose to continue with the call by pressing a designated number on the touchpad, or the customer may choose to terminate the call by hanging up. The interactive agent process is described in detail in Appendix A, using a typical pharmacy example.

Thus, in a typical application, a pharmacy might use an interactive agent to remind a customer that his or her prescription has expired and must be renewed to avoid a potentially dangerous interruption in supply of medication. The message provides the customer with the necessary information on how to renew the prescription and offers the option to connect the customer to his or her physician's office to initiate the request. If the customer chooses this option by pressing the designated number, the call will be routed to the prescribing physician where it will be answered as soon as practicable. If the customer does not choose to connect to their physician's office, the message provides the customer with the pharmacy's contact information, so that the customer can speak to a live representative. The message might also offer home delivery services for the prescription or inform the customer of pharmacy services or products.¹⁰

⁹ The interactive agent does not play this identification message for debt collection calls, however, in which conveying either the purpose or identity of the call in such a manner would violate the Fair Debt Collection Practices Act. *See Memorandum Opinion and Order, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Commission 95-310 (rel. Aug. 7, 1995) at ¶ 18-19 (Commission clarifies that debt collection calls are expressly excluded from this identification requirement). The IAA understands that the Commission's subsequent review of its rules has not altered this interpretation.

¹⁰ The Commission and the FTC both have received comments regarding the lack of guidance on what constitutes a commercial solicitation. *See e.g.*, Petition for Reconsideration of the American Resort Development Association, CG Docket No. 02-278, August 25, 2003; Request of Jobson Publishing L.L.C.

There are many other applications as well. An airline might use an interactive agent to inform a traveler of a flight cancellation and provide the option of connecting to a live agent to rebook a flight. An airline might also notify its passengers of the availability of first class seating on an upcoming flight, with an option to purchase or accept the upgrade. Again, the customer might answer the call in person and act on the prompt, or he or she may retrieve a recorded message later and call a live sales agent.

Thus, interactive agents and recorded messages provide the customer with the ability to affirmatively consent to the call, provide the customer the ability to terminate the call, and provide the customer with the ability to contact a live representative, either to complete the transaction or to ask to not be called in the future.

II. THE COMMISSION'S RULES STRIKE THE RIGHT BALANCE; THE FTC'S RULES MUST BE REJECTED

The use of prerecorded messages is a necessary and appropriate means for businesses to communicate with their customers and is consistent with the TCPA.¹¹ IAA appreciates both the Commission's and FTC's concerns about caller abandonment and the desire to protect consumers from "dead-air" or hangup calls sometimes associated with the use of predictive dialers.

Unfortunately, however, in an effort to deal with this concern, each agency has instead created

for Reconsideration and Clarification, CG Docket No. 02-278, August 25, 2003; Petition for Reconsideration of DialAmerica Marketing, Inc., CG Docket No. 02-278, August 25, 2003. In the pharmacy example, the mere notice of prescription expiration could be considered a commercial solicitation because the customer may have changed pharmacies, doctors, or moved to a generic drug. The call relates to a future sale of prescription drugs. While no one can seriously argue that these calls are not beneficial to the customer, particularly the elderly, there is an element of commercial solicitation to them that puts users at risk of class action lawsuits if the FTC view is sustained.

¹¹ *Telephone Consumer Protection Act of 1991*, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227; 47 U.S.C. § 227(b)(1)(B).

contradictory caller abandonment rules that will only confuse consumers and chill legitimate business use of interactive agents and recorded messages.

A. The Commission's Rules

On July 3, 2003, the Commission released a Report and Order (R&O) amending its rules and regulations implementing the TCPA.¹² In the R&O, the Commission addressed the issue of caller abandonment by promulgating rules that prohibit, among others things, abandoning more than 3% of all telemarketing calls that are answered live by a person.¹³ A call is abandoned if it is not picked-up by the caller within 2 seconds of the recipient's completed greeting.¹⁴

The Commission has also recognized the importance of allowing businesses to contact customers with prerecorded messages: "companies currently use prerecorded messages, for example, to notify their customers about new calling plans, new mortgage rates, and seasonal services such as chimney sweeping and lawn care."¹⁵ Accordingly, the Commission provided an exception for calls made to recipients with whom there is an established business relationship, stating, "we believe the current exception is necessary to avoid interfering with ongoing business relationships."¹⁶ The Commission also provided an exception from its caller abandonment rules for prerecorded messages sent with the recipient's prior express consent.¹⁷

¹² See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, Commission 03-153 (rel. July 3, 2003) ("R&O"). 68 Fed. Reg. 44144 (July 25, 2003).

¹³ 47 C.F.R. § 64.1200(a)(6).

¹⁴ *Id.*

¹⁵ *R&O* at ¶ 156.

¹⁶ *Id.*; 47 C.F.R. § 64.1200 (a)(6)(i).

¹⁷ 47 C.F.R. § 64.1200 (a)(6)(i).

B. The FTC's Rules

The FTC amended the Telemarketing Sales Rule on January 3, 2003.¹⁸ Like the Commission, the FTC addressed the caller abandonment issue and the use of predictive dialers, concluding that a call is “abandoned” if not answered by a sales agent within 2 seconds.¹⁹ But unlike the Commission, the FTC provides no exceptions for calls within an established business relationship or with the recipient’s consent.²⁰ Thus, by definition, recorded message calls or the use of interactive agents results in an abandoned call and constitutes an unfair trade practice under the FTC’s rules.

Yet, by the FTC’s own admission, prerecorded messages do not create the same problems of fear and anxiety for recipients as those caused by “dead-air” and “hangups” associated with abandoned calls.²¹ The FTC’s only stated basis for contradicting the Commission’s rules, and for completely prohibiting business from sending prerecorded messages to *customers*, is to prevent what they perceive to be the potential for consumer annoyance when “rushing to answer the phone” only to get a recorded message.²²

¹⁸ 68 Fed. Reg. 4580 (2003).

¹⁹ TSR; 16 C.F.R. § 310.4(b)(1)(iv).

²⁰ *Id.*

²¹ *Report to Congress Pursuant to the Do Not Call Implementation Act on Regulatory Coordination in Federal Telemarketing Laws Submitted by The Federal Trade Commission*, at pg. 34 (The FTC expressly states that recorded messages “alleviate” fear and anxiety experienced by consumers from abandoned calls).

²² *Id.* at 12, 34.

Such speculation is not a substitute for an adequate agency record supported by facts and findings.²³ Moreover, the imagery conjured by the FTC and unsupported by any reference to the record reveals more than unbiased rulemaking at work.

C. Reporting the Conflict to Congress

Both agencies have acknowledged their differences to Congress.²⁴ But the FTC has revealed more. The FTC states in its Report, “if sellers and telemarketers subject only to the Commission’s regulations attempt to exploit the Commission’s exemption of established business relationship calls from the caller abandonment requirements in a manner that causes consumers *undue aggravation and annoyance*, then the FTC and Commission should work toward reconciling their approach.”²⁵ The FTC, of course, does not have jurisdiction over certain industries including common carriers, banks, or insurance companies.

By not waiting to see if reconciliation succeeds, the FTC has made it clear that the limitation on its jurisdiction does not hinder it from exercising power over those entities that provide service to those industries.²⁶ In other words, the FTC will enforce its rules against companies that provide

²³ See e.g., *People of the State of California v. F.C.C.*, 905 F.2d 1217, 1230 (9th Cir. 1990)(An agency's discretion is not boundless, and must articulate a satisfactory explanation for its action based upon the record); *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984)(Courts must reject agency interpretations that are either contrary to clear congressional intent or frustrate the policy that Congress sought to implement); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(An agency rule is considered arbitrary and capricious if the agency has relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence).

²⁴ See *Report on Regulatory Coordination*, CG Docket No. 02-278, DA 03-2855 (rel. Sept. 8, 2003); *Report to Congress Pursuant to the Do Not Call Implementation Act on Regulatory Coordination in Federal Telemarketing Laws Submitted by The Federal Trade Commission*.

²⁵ *Id.* at 35 (emphasis added).

²⁶ See the FTC’s Staff Guide: *Complying with the Telemarketing Sales Rule* at <http://www.ftc.gov/bcp/online/pubs/buspubs/tsrcomp.htm>.

recorded message or interactive services to common carriers and other non-FTC regulated entities, essentially foreclosing such businesses from outsourcing delivery of their *otherwise lawful* business communications.²⁷

III. CONCLUSION

The conflict is palpable, as reported to Congress. All businesses that use prerecorded messages or interactive agents continue to suffer irreparable harm each and every day that these contradictory rules remain in effect. The ominous threat, either from FTC enforcement actions, or from lawsuits filed by private citizens, that may occur as a result of sending messages *that are perfectly lawful under the TCPA and the Commission's rules*, is prohibitive to businesses that use interactive agents.

First, the Commission should not amend its rules governing the lawful and ethical use of prerecorded messages by legitimate businesses. Rather, the IAA urges the Commission to confirm that only customers should decide, for themselves, whether they wish to receive important interactive messages— this option should not be made unilaterally for them.

More importantly, the IAA urges the Commission to rectify the current state of uncertainty for businesses using interactive messages. Customers have decided that they want to receive these useful and timely messages, and the Commission must act to protect their interests. Accordingly, the IAA urges the Commission to act immediately to coordinate with the FTC and to confirm that, pursuant to statutory mandate, businesses, or independent contractors acting on their behalf, may send prerecorded messages to their customers and those that request to receive them, and may use interactive agents, to accomplish this task.

²⁷ *Id.*

Respectfully submitted,

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APPENDIX A

Interactive Agent Association
Application Example - Prescription Renewal
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Call Customer Home Phone

This is XYZ Mail Order Pharmacy calling for <customer name> with an important message about your prescription order. Please press any key to continue.

Handle Call Result

Busy

No Answer

Live Answer

Answering Machine

3 retries

Retry in next window
3 total attempts

Your medication with the prescription number ending in <last 4 digits of RX #> was shipped to you on <ship date>.

Our records show that this was the last refill available on this prescription. To avoid interruption of your monthly mail-order delivery, please have your physician fax a prescription renewal to 1-888-765-4321 before <Next ship date - 2 days>.

If you'd like to speak to someone, please call us any time 1-888-123-4567.

To repeat this message, press *.

Thank you from XYZ Mail Order Pharmacy. Goodbye.

XYZ Mail Order Pharmacy has an important message for <customer name> regarding your prescription order. To hear your message, please call 1-800-XXX-XXXX and enter PIN number <access#> when prompted. Thank you. Goodbye.

Retry in 15 minutes

Retry in next window

No further attempts

No further attempts