

answers the phone.<sup>737</sup> This approach is consistent with the treatment of this issue in the NPRM.<sup>738</sup> The Commission rejects the argument, advanced by ACA, ATA, DMA, and ERA, that abandoned calls cannot be regulated by the Rule because they are not “outbound telephone calls.”<sup>739</sup> If this theory were valid, telemarketers could abuse consumers in a variety of ways without violating the Rule as long as they did not also engage in a sales pitch. That interpretation and that result are contrary to the overall purpose and intent of the Telemarketing Act and plainly at odds with the Rule’s definition of “outbound telephone call” and with the Rule generally. A telemarketer initiates a telephone call by causing the called consumer’s telephone to ring. Abandoning the call after the consumer answers but before the sales representative begins a sales pitch is an abusive telemarketing act or practice. Certainly this is the type of practice that prompted Congress, in the Telemarketing Act, to direct the Commission to prohibit telemarketers from undertaking “a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy.”<sup>740</sup> The record contains ample evidence that consumers find abandoned calls to be coercive or abusive of their privacy rights.<sup>741</sup>

ATA, in its comment and at the June 2002 Forum, requested guidance from the Commission on how “abandoned call” would be defined in the Rule.<sup>742</sup>

<sup>737</sup> The safe harbor, which, among other things, directs how long telemarketers must allow a called consumer’s telephone to ring before disconnecting the call, addresses telemarketers’ practices before the consumer answers the phone.

<sup>738</sup> 67 FR at 4524.

<sup>739</sup> ACA-NPRM at 9-10; ATA-NPRM at 30; DMA-NPRM at 43-44; ERA-NPRM at 40. DMA, ERA, and PMA argued that the FTC lacks authority to regulate telemarketers’ use of predictive dialer technology. [See DMA-NPRM at 4, 42-48; ERA-NPRM at 38-40; PMA-NPRM at 29-30.] Specifically, DMA, ERA, and PMA argued that the FCC has authority to regulate automatic telephone dialing systems through the TCPA. But nothing in the TCPA limits the authority of the FTC under the Telemarketing Act. The Rule’s regulation of abandoned calls falls squarely within the FTC’s authority to regulate abusive telemarketing acts or practices under the Telemarketing Act. As the Commission stated in the NPRM, the harm to consumers that arises from abandoned calls is very real and falls within the areas of abuse that the Telemarketing Act explicitly aimed to address. [See 67 FR at 4524.] The Commission therefore rejects the argument offered by DMA, ERA, and PMA that it lacks the legal authority to address call abandonment in the TSR.

<sup>740</sup> 15 U.S.C. 6102(a)(3)(A).

<sup>741</sup> AARP-NPRM at 8-9; EPIC-NPRM at 23; Private Citizen-NPRM at 4; McKenna-Supp. at 2. See also Pelland-NPRM at 2.

<sup>742</sup> ATA-NPRM at 34; June 2002 Tr. II at 38 (ATA). See also Convergys-NPRM at 6; MPA-NPRM at 32-33.

Accordingly, the Commission has clarified, in § 310.4(b)(1)(iv), that an outbound call is “abandoned” if, once answered by a consumer, it is not connected to a sales representative within two seconds of the consumer’s completed greeting (*i.e.*, no more than two seconds of “dead air”).<sup>743</sup> As was explained above, this definition of “abandoned call” also includes situations in which the telemarketer hangs up on a consumer who has answered the telemarketer’s call without connecting that call to a sales representative.

*Abandoned call “safe harbor”:* The abandoned call safe harbor consists of four components, each of which is supported by record evidence. A seller or telemarketer will not be deemed to have violated § 310.4(b)(1)(iv) by abandoning calls, provided that the seller or telemarketer can show that its conduct conforms to the standards specified in this safe harbor.

Under the first subsection of the safe harbor, the seller or telemarketer must employ technology that ensures abandonment of no more than three percent of all calls answered by called consumers. The safe harbor’s three percent abandonment rate is measured per day per calling campaign. The “per day per campaign” unit of measurement is consistent with DMA’s guidelines addressing its members’ use of predictive dialer equipment.<sup>744</sup> 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.

What constitutes an “acceptable” abandonment rate was the subject of substantial comment on the record. A number of telemarketers urged the Commission to alter the position implied in the NPRM that the appropriate standard is a zero percent abandonment rate.<sup>745</sup> Among industry representatives who advanced this

<sup>743</sup> DialAmerica-NPRM at 19; Sytel, Outbound Focus Issue 16, <http://www.outboundfocus.com>.

<sup>744</sup> See <http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38>. See also MBNA-NPRM at 8. But see ATA-NPRM at 35; Commenter advocated a unit of measurement incorporating “a broad period of time” to allow for variances in abandonment rates caused by such factors as the time of day a call is placed; ERA-NPRM at 44; MPA-NPRM at 30, 32; NAA-NPRM at 15; PMA-NPRM at 31; ERA-Supp. at 24.

<sup>745</sup> DialAmerica-NPRM at 24; NAA-NPRM at 15; PMA-NPRM at 31.

argument, ATA took the most extreme position, arguing against any regulation of abandonment rates.<sup>746</sup> The Commission rejects this position in light of the record of conduct affiliated with abandoned calls and predictive dialers under the current regulatory scheme.<sup>747</sup> Other industry comments recommended that the Commission set a “reasonable” or “acceptable” abandonment rate above zero percent that would curb abuses while allowing use of predictive dialers to continue.<sup>748</sup> A third group of telemarketers argued that the Commission’s abandonment rate should be consistent with DMA’s current guideline, which calls for an abandonment rate no higher than five percent.<sup>749</sup> Consumer groups and law enforcement representatives advocated strongly for a zero abandonment rate.<sup>750</sup>

Taking all of these viewpoints into account, the Commission has concluded that neither extreme strikes the right balance on this issue. The Commission believes that a maximum abandonment rate of three percent strikes a reasonable balance between curbing a very abusive practice and preserving some of the substantial economic benefits that accrue from the use of predictive dialers. Two telemarketers essentially supported this abandonment rate as being “feasible, realistic” and “fully capable” of being achieved.<sup>751</sup> ATA asserted that the three percent standard would result in “a significant drop in efficiency” among some of its members.<sup>752</sup> Sytel, a leading provider of predictive dialer technology, urged the Commission not to set a rate below three

<sup>746</sup> ATA-NPRM at 33; ATA-Supp. at 14. See also TeleDirect-NPRM at 2.

<sup>747</sup> 67 FR at 4522-23. In the present environment, telemarketers have engaged in predictive dialer practices that frighten, disturb, and aggravate consumers. See, e.g., June 2002 Tr. II at 17-18 (AARP); June 2002 Tr. II at 21 (NAAG); June 2002 Tr. II at 22 (DialAmerica).

<sup>748</sup> BofA-NPRM at 9; Citigroup-NPRM at 10; ITC-NPRM at 3; KeyCorp-NPRM at 6; MasterCard-NPRM at 13; Time-NPRM at 11.

<sup>749</sup> <http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38>; ABA-NPRM at 12; AFSA-NPRM at 16; ARDA-NPRM at 16; CBA-NPRM at 10; Citigroup-NPRM at 10; Discover-NPRM at 6; ERA-NPRM at 43; MPA-NPRM at 8, 32-33; June 2002 Tr. II at 24 (ERA). See also NAA-NPRM at 15; PMA-NPRM at 31; ERA-Supp. at 22-23; MPA-Supp. at 6, 23; NAA-Supp. at 2; Miller Study at 2. But see NASUCA-NPRM at 14; Tribune-NPRM at 9.

<sup>750</sup> EPIC-NPRM at 22-23; NAAG-NPRM at 47; NASUCA-NPRM at 14; NCL-NPRM at 11; PRC-NPRM at 3; Private Citizen-NPRM at 4; June 2002 Tr. I at 220 (Junkbusters). See also Horick-NPRM at 1; McKenna-Supp. at 2. But see McClure-NPRM at 1.

<sup>751</sup> PCIC-NPRM at 2; Aegis-NPRM at 5. See also ARDA-Supp. at 1: “A rate between three and five percent is reasonable.”

<sup>752</sup> June 2002 Tr. II at 49 (ATA). See also ATA-Supp. at 15; Associations-Supp. at 6-7; ERA-Supp. at 23; MPA-Supp. at 23; NAA June 28-Supp. at 2.