



FAQ

Proper Use of Prerecorded Messages

(Updated October 2009)

The rules for sending prerecorded messages are complex and vary depending on the type and purpose of your message, as well as your intended recipients and even the nature of your business model. For example, there are different rules for informational, sales and fundraising messages, as well as different rules for business-to-consumer and business-to-business calls. On top of this, marketers also need to be aware of the rules for abandoned calls, which have additional implications and requirements for sending prerecorded messages.

This FAQ simplifies the legal requirements and DMA ethical obligations for sending prerecorded messages. The DMA's Corporate & Social Responsibility (CSR) department is asking all those doing business by phone to review this alert before engaging in any campaign using prerecorded messages.

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I. Prerecorded Sales Messages

A. What Rules Govern Prerecorded Sales Calls?

The primary **federal** rules for sending prerecorded sales messages are the:

- Federal Communications Commission's (FCC's) Telephone Consumer Protection Act (TCPA) and
- the Federal Trade Commission's (FTC's) Telemarketing Sales Rule (TSR)

In addition to the federal rules, many **states** also have their own laws regarding the sending of prerecorded messages. This alert does not address those, but you will need to take them into account in planning any promotional campaign.

Also, DMA members are required to comply with all of the ethical articles in the *DMA Guidelines for Ethical Business Practice*. The *DMA Guidelines for Ethical Business Practice* include an article on proper use of prerecorded voice messaging. The article is consistent with the federal requirements discussed in this alert. To review the *DMA Guidelines for Ethical Business Practice*, please visit: www.dmaresponsibility.org/Guidelines/.

B. Should I Follow the FTC or the FCC Rules?

Marketers need to follow different legal requirements for sending prerecorded sales messages depending on whether they fall within the jurisdiction of the Federal Communications Commission (FCC) or the Federal Trade Commission (FTC). If you fall under both jurisdictions, then you should follow the most restrictive requirements.

The following entities do not fall under the FTC's jurisdiction and, thus, are not subject to the TSR: banks, federal savings and loans institutions, and federal credit unions; common carriers – such as long-distance telephone companies and airlines – when engaging in common carrier activity; and non-profit organizations (prerecorded calls on behalf of non-profit entities are discussed in detail below).

C. To Whom Am I Allowed to Send Prerecorded Sales Messages?

Under the TSR, marketers may send prerecorded *sales* messages to individuals, whether customers or prospects, **ONLY IF** they have first obtained the call recipient's **prior express written** agreement to receive prerecorded messages.

Under the TCPA and TSR, marketers may send prerecorded sales messages if they meet any of the following conditions:

- It's to a business line, as long as it does not tie up two or more lines of a multi-line business at the same time and does not involve the sale of durable office or cleaning supplies; or
- It's for an emergency purpose.

Under the TCPA, marketers may not send prerecorded sales messages to:

- Emergency phone lines;
- Patients in hospital rooms/nursing homes, etc.; or
- A consumer if there's a cost for the consumer to receive the call.

D. What Type of Consent Is Needed for Sending Prerecorded Sales Messages?

Under the TSR, a marketer must obtain prior express written agreement to send prerecorded sales messages to customers or prospects. The requirement that marketers obtain the consumer's prior written agreement to receive prerecorded calls went into effect on **September 1, 2009**.

E. How Do I Obtain Consent for Sending Prerecorded Sales Messages?

In obtaining the consumer's prior express written consent, a marketer should do the following:

- Before obtaining the consumer's written consent, the marketer must clearly and conspicuously disclose that the purpose of the agreement is to allow the marketer to make prerecorded message calls to the consumer.
- The written agreement must evidence the consumer's consent to receive prerecorded calls by or on behalf of the specific marketer.
- The marketer may not require that the consumer agree to receive prerecorded calls as a condition of purchasing any good or service.
- The agreement must include the consumer's telephone number and signature.
- Marketers may obtain the written agreement electronically in accordance with applicable laws such as the E-Sign Act.

F. What Disclosures Are Required Within a Prerecorded Sales Message?

1. When placing prerecorded sales messages, marketers must make the following disclosures in the message within two seconds after the call recipient's completed greeting:

- The identity of the seller on behalf of which the call is made;
- That the purpose of the call is to sell goods or services;
- The nature of the goods or services offered during the call; and
- If a prize promotion is offered, that no purchase or payment is necessary to win a prize or participate in a prize promotion, and that any purchase or payment will not increase the person's chances of winning.

2. Immediately following the initial disclosures, marketers must provide **an opt-out mechanism** that the call recipient can use to be placed on the company's do-not-call list. More information concerning the required opt-out mechanism is provided below.

G. Does a Prerecorded Sales Message Need to Include an Opt-Out Mechanism?

Yes, prerecorded sales calls must include an opt-out mechanism. The requirement that marketers placing prerecorded calls must provide an automated, interactive opt-out mechanism became effective on December 1, 2008.

H. What Type of Opt-Out Mechanism Needs to Be Included in a Prerecorded Sales Message?

The type of opt-out mechanism the marketer must provide depends on whether the call can be answered by a live person or by an automated device.

- If the call is answered by a *live person*, then the marketer should provide an automated interactive voice and/or keypress-activated opt-out mechanism that the recipient can use to make an opt-out request. The mechanism should be available for use at any time during the message.
- If the call is answered by an *answering machine or voicemail system*, then the prerecorded message should provide a toll-free telephone number that the recipient can call to make an opt-out request at any time during the telemarketing campaign. The telephone number provided should connect directly to an automated interactive voice and/or keypress-activated opt-out mechanism. Consumers should be able to call at any time of the day, and on any day, during the campaign.
- *If the marketer is unable to determine whether a prerecorded call has been answered by a live person or an automated device*, the marketer must include both of the above opt-out mechanisms in the prerecorded message.

I. How Should the Opt-Out Mechanism Operate?

Regardless of whether the prerecorded call can be answered by a live person or automated answering mechanism, all opt-out mechanisms must do the following:

- The opt-out mechanism must automatically add the called number to the entity's company-specific do-not-call list; and
- The opt-out mechanism must immediately disconnect the call once the opt-out request is made.

II. Commercial Prerecorded *Non-Sales* Messages

A. Are Prior Written Consent & Opt-Out Mechanisms Needed for Commercial Prerecorded Non-Sales Calls?

Marketers may use prerecorded message calls that provide information, but which do not induce the purchase of goods or services, without first obtaining written consent and without providing an opt-out mechanism. However, such calls should promptly disclose the identity of the caller at the outset of the call **and** *provide a telephone number* at some point during the call.

III. Nonprofit Prerecorded Fundraising Messages

A. Are Nonprofits Exempt from the TCPA & TSR Recorded Message Requirements?

Bona fide nonprofit organizations are exempt from the TCPA's and TSR's requirements regarding prerecorded messages. However, for-profit entities that place fundraising or "sales" calls on behalf of nonprofit entities are subject to certain provisions of the TSR's prerecorded call provisions.

B. What Disclosures Are Required for Calls on Behalf of Nonprofits?

For any prerecorded calls to induce a charitable contribution from a member of, or previous donor to, the following disclosures must be made within two seconds after the call recipient's completed greeting:

- The identity of charitable organization on behalf of which the call is made;
- That the purpose of the call is to solicit a charitable contribution; and
- Immediately following the initial disclosures, marketers must disclose that the call recipient can make a do-not-call request by using a specified opt-out mechanism. Again, the opt-out mechanism must meet the applicable requirements discussed in the above section on prerecorded sales calls.

C. What Type of Opt-Out Mechanism Is Required for Prerecorded Calls on Behalf of Nonprofits?

The opt-out requirements for prerecorded sales calls also apply to fundraising or "sales" calls on behalf of nonprofits. Please refer to the Opt-Out sections discussed on pages 3-4 for more information.

D. Is Prior Written Consent Needed for Prerecorded Fundraising Calls?

Under the TSR, marketers making prerecorded calls to solicit charitable contributions from **current or previous donors** to, a nonprofit charitable organization do not have to obtain the call recipient's prior written agreement.

However, federal rules are unclear regarding obtaining written consent for sending prerecorded fundraising messages to **prospects or persons who are not members or previous donors**. The TSR's provisions do not specifically address this. Given this uncertainty, charitable organizations and those calling on their behalf should consider making prerecorded charitable donation calls only to members and previous donors until the FTC clarifies its position on such calls.

IV. Abandoned Calls & Prerecorded Messages

A. What Are the Prerecorded Message Requirements for Abandoned Calls?

Federal rules prohibit telemarketers from abandoning outbound calls, which occurs when a telemarketer fails to connect the call to a live sales representative within two seconds of the recipient's answer. However, the TSR provides a safe harbor to this prohibition. A marketer does not violate the abandoned call prohibition if:

- The marketer employs technology that ensures abandonment of no more than 3% of all calls answered by a person, measured over the duration of a single telemarketing campaign, if the campaign is less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.
- The marketer allows the telephone to ring for at least 15 seconds or 4 rings before disconnecting an unanswered call;
- Whenever a sales representative is not available to speak with the call recipient within 2 seconds after the recipient's completed greeting, the **marketer promptly plays a recorded message that states (1) the seller's name; (2) a telephone number which the consumer can call during normal business hours to ask questions or opt-out; and (3) that the purpose of the call is for telemarketing. Note: The recorded message that marketers must leave cannot be a sales message. It must include only the 3 elements listed above.**

This alert is brought to you by the
DMA's Corporate & Social Responsibility (CSR) Department.
Contact us at ethics@the-dma.org.