UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Federal Trade Commission
Division of Marketing Practices

September 11, 2009

Mr. Michael Bills, CEO
Call Assistant, LLC
1925 West Indiana Avenue
Salt Lake City, Utah 84104

Dear Mr. Bills:

You have requested an informal staff opinion as to the applicability to 2008 amendments to the Telemarketing Sales Rule ("TSR") to a particular technology used by CallAssistant, L.C. ("CallAssistant"). The amendments at issue impose new restrictions on the use of prerecorded messages in telemarketing. 16 C.F.R. § 310.4(b)(1)(v); 73 Fed. Reg. 15204 (Aug. 29, 2008). Specifically, these amendments require, as of December 1, 2008, that any outbound telemarketing call that delivers a prerecorded message include: (1) if the call could be answered in person by a consumer, an automated interactive voice and/or keypress-activated opt-out mechanism that the call recipient can use at any time during the message to assert a Do Not Call request pursuant to § 310.4(b)(1)(iii)(A); and (2) if the call could be answered by an answering machine or voicemail service, a toll-free telephone number that the call recipient can use to assert a Do Not Call request pursuant to § 310.4(b)(1)(iii)(A). Additionally, as of September 1, 2009, the amendments prohibit any outbound telemarketing call that delivers a prerecorded message unless the seller has obtained from the recipient of the call an express agreement, in writing, that evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of that seller and includes such person's telephone number and signature.

As described in your letter, CallAssistant uses technology that enables its calling agents to interact with the recipient of a call using his or her own voice or by substituting appropriate audio recording of a response. According to your letter, when used to place outbound telemarketing calls, this technology works as follows:

> A live agent using the System places a call to a consumer and hears the consumer greeting. In response to the greeting, the agent may elect to speak to the call recipient using his or her voice, or may press a button to play an appropriate recorded script segment. After the agent's response, the agent listens to the consumer customer's reply. After listening to the consumer's reply, the live agent again chooses whether to speak to the call recipient in his or her own voice, or another recording. At all times, even during the playing of any recorded segment, the agent retains the power to interrupt any recorded message to listen to the consumer and respond appropriately.

Furthermore, according to your description, "live agents hear every word spoken by the call recipient, and determine what is said" in response. A single agent always stays with a call from beginning to end.

You seek an opinion as to whether the amended TSR provisions on the use of prerecorded messages in telemarketing apply to CallAssistant's calls that employ the technology summarized above. Based on the description of the technology included in your letter, the staff of the Federal Trade Commission has concluded that the 2008 TSR amendments cited above do not prohibit telemarketing calls using this technology if the calls that otherwise comply with the TSR and other applicable law. The 2008 amendments at 16 C.F.R. § 310.4(b)(1)(v) prohibit calls that deliver a prerecorded message and do not allow interaction with call recipients in a manner virtually indistinguishable from calls conducted by live operators. Unlike the technology that you describe, the delivery of prerecorded messages in such calls does not involve a live agent who controls the content and continuity of what is said to respond to concerns, questions, comments – or demands – of the call recipient.

In adopting the 2008 TSR amendments, the Commission noted that the intrusion of a telemarketing call on a consumer's right to privacy "may be exacerbated immeasurably when there is no human being on the other end of the line." 73 Fed. Reg. at 51180. The Commission observed that special restrictions on prerecorded telemarketing messages were warranted because they "convert the telephone from an instrument for two-way conversations into a one-way device for transmitting advertisements." *Id.*[1] Consequently, in Staff's view, the concerns about prerecorded messages addressed in the 2008 TSR amendments do not apply to the calls described above, in which a live human being continuously interacts with the recipient of a call in a two-way conversation, but is permitted to respond by selecting recorded statements.

Nevertheless, the use of such technology in a campaign to induce the sales of goods or services, or charitable donations is "telemarketing" under the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6106(4), and therefore must comply with the Rule's other requirements and prohibitions. In particular, the technology must connect an outbound telephone call to a live agent within two seconds of the call recipient's completed greeting. 16 C.F.R. § 310.4(b)(1)(iv). The agents making calls using this technology must

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[1] In adopting the 2008 amendments, the Commission recognized that in the future prerecorded message might eliminate the objections that prompted the adoption of the these rules and justify exemptions permitting interactive prerecorded messages:

> [T]he Commission notes that it is aware that the technology used in making prerecorded messages interactive is rapidly evolving, and that affordable technological advances may eventually permit the widespread use of interactive messages that are essentially indistinguishable from conversing with a human being. Accordingly, nothing in this notice should be interpreted to foreclose the possibility of petitions seeking further amendment of the TSR or exemption from the provisions adopted here.

73 Fed. Reg. 51180 (Aug. 29, 2008).

disclose the purpose of the call, the identity of the seller, make other required disclosures, and comply with other TSR provisions preventing deceptive and abusive conduct. *Id.* §§ 310.3 and 310.4.

Please be advised that this opinion is based exclusively on all the information furnished in your request. This opinion applies only to the extent that actual company practices conform to the material submitted for review. Please be advised further that the views expressed in this letter are those of the FTC staff. They have not been reviewed, approved, or adopted by the Commission, and they are not binding upon the Commission. However, they do reflect the opinions of the staff members charged with enforcement of the TSR.

Sincerely,

Lois Greisman
Associate Director
Division of Marketing Practices