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November 30,2006 Paul D. Rubin

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Mr. Donald S. Clark
Federal Trade Commission

Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, D.C 20580

Re: Petition Requesting That the FTC Maintain Its Current Enfoxcement
Policy Permitting the Use of Pnerecorded Messages (When There is An
Established Business Relations hip) For the Narrow Subset of Health-
Related Calls Made By Entities Regulated Under HIPAA

Dear Mr. Clark:

On behalf of our client, Silverlink Communications Inc. ("Silverlink"), and Eliza Corporation ("Eliza"), we respectfully submit this Petition pursuant to 16 CF.R 1.25 to urge the Federal Trade Commission ("FTC" or ''Cornmi~sion'~) to maintain the stdtw qw, and continue to forbear from bringing any enforcement actions against the narrow-class of automated health-related calls made by entities subject to regulation under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). As explained herein, these types of HIPAA-regulated calls to healthcare consumers bear no relationship to the types of prerecorded messages disseminated by the telemarketing industry (as opposed to the healthcare industry).

Silverlink and Eliza are leading providers of automated voice solutions for the healthcare industry. Their services enable health enterprises, including health plans, pharmacy benefit managers ("PBMs"), specialty pharmacies, and disease management companies to deliver personalized, interactive, and HIPAA-compliant phone messages to millions of healthcare consumers - including elderly and chronically ill consumers who rely upon such messages for their health care needs.

Silverlink and Eliza's prerecorded, priva~~protected messages delivered to individual healthcare consumers have been highly successful in driving positive health outcomes and generally lowering health care costs. The types of

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reminders, child immunization reminders, benefit plan selection reminders, and disease management plan reminders.

These prerecorded messages are valued by consumers, are expressly permitted under HIPAA, and have been expressly permitted by the FTC pursuant to the enforcement policy announced by the FTC in its November 17,2004 F&d Reg~ter notice; this notice provided that the FTC would forbear from bringing any enforcement actions under the Telemarketing Sales Rule ("TSR") against those entities who use prerecorded messages to contact consumers who have an "established business relationship" with the seller.'

This petition is necessary because these health-related calls are currently in jeopardy based upon the FTC's October 4, 2006 F&d Reg~ter notice announcing that the FTC will abandon its current enforcement policy and begin enforcing against such calls beginning January 2, 2007.~ Although there is an open comment period, which closes on December 18, 2006, we are concerned that nine business days is simply not a sufficient amount of time for the FTC to review comments and alter its current plan to initiate enforcement starting January 2, 2007. A change in the FTC's current enforcement policy would have a dramatic impact on the tmsmission of important health-related information. Based on a review of Silverlink's call data, and the scope and size of the healthcare industry, the proposed FTC action would directly impact anywhere from 10 to 20 million consumers who annually receive these kinds of health-related calls, and it may be assumed that these consumers rely on these calls to refill their necessary prescriptions and medical supplies.

We are therefore submitting this petition in advance of the December 18, 2006 comment deadline to afford the FTC additional time to consider and rule upon our request. We will be separately submitting comments on behalf of our client prior to December 18, and those comments may include additional data in support of our position.

Although this rulemalung effort has been ongoing since 2004, we believe businesses and consumers have not been adequately informed that these types of health-related calls, made by HIPAA-regulated entities, are in jeopardy of being prohibited by the FTC. A careful review of the administrative record demonstrates supficant industry and consumer confusion -

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regard to health-related calls), and based upon the absence of any substantive comments du-ectly on point, there is simply no evidence in the administrative record that consumers oppose the narrow class of health-related calls subject to this petition. Moreover, the recent 40 day comment period extension granted by the FTC does not cure the absence of adequate notice as consumers are still not sufficiently aware that mammogram reminders, prescription drug refii, colonoscopy reminders, and similar health-related calls are at risk of being terminated starting January 2, 2007.3

Finally, because consumers rely upon these health-related calls, we believe it would not be in the interest of the FTC, businesses, or health-care consurners, for the FTC to prohibit these calls starting January 2, 2007 - and subsequently (after a careful review of submitted comments) decide to permit such calls at a later date. Interruption of health-care services and reminders serves no one's interests, and for this reason we respectfully request that the FTC immediately extend the enforcement forbearance policy for the narrow class of health-related calls made by HIPAA-regulated en ti tie^.^

I. Background on the Proposed Rule

The TSR has been remarkably successful in providing consumers with added privacy protections
and defenses against unscrupulous telemarketers. Notably, Section 3 10.4(b) (1) (iv) of the TSR
prohibits telernarketers from abandoning calls.5 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. The TSR applies only to

3 Silverhk and Eliza recently conducted an informal survey of a number of their HIPAA-regula39 Tcmt36customrs. aTe Hvat majorit

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The HIPAA Privacy Rule, however, excludes and intentionally allows communications about patient treatment and certain health care operations activities in the definition of "marketing."" Such communications and activities may include, for example, automated calls for health screening reminders (including mammogram reminders and colonoscopy reminders), prescription

l1 A "business associate7' is defined to mean:

(1) Except as provided in paragraph (2) of this definition . . . with respect to a covered entity, a person who:
(i) On behalf of such covered entity or of an organized health care arrangement . . . performs, or assists in
the performance of: (A) A function or activity involving the use or disclosure of individually identifiable

health information . . . ; or (B) Any other function or activity regulated by this subchapter; or (ii) Provides . . . management, administrative, accreditation, or financial services to or for such covered entity or
arrangement, . . . where the provision of the service involves the disclosure of individually identifiable health information from such covered entity or arrangement, or from another business associate of such covered entity or arrangement, to the person.

(2) A covered entity participating in an organized health care arrangement that performs a function or activityas described by paragraph (l)(i) of this definition for or on behalf of such organized health care arrangement, or that provides a service as described in paragraph (l)(ii) of this definition to or for such organized health care arrangement, does not, simply through the performance of such function or activity or the provision of such service, become a business associate of other covered entities participating in such organized health care arrangement.

(3) A covered entit~may be a business associate of another covered entity. 45 C.F.R. $ 160.103

l2 45 C.F.R. $ 164.508(a).

13 Marketing is defined to mean, in pertinent part:

(1) To make a communication about a product or service that encourages recipients of the communication to purchase or use the product or service, unless the communication is made:
(ij To describe a health-related product or service (or payment for such product

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increased from 71% to 93%, and the rate of adolescents receiving a full schedule of vaccinations increased from 29% to 43%.16

Moreover, industry data demonstrates that consumers are not opposed to receiving automated health-related telemarketing calls. Eliza and Silverlink's HIPAA-regulated customers have reported that they receive very few complaints about automated calls. For example, a Pharmacy Benefit Management company reported that of the 140,000 refill reminder calls it made in the period from March, 2004 to September, 2004, the company received only 50 "opt-out" requests which represents a trace .035 percent of the called population. Similarly, another Silverlink HIPAA-regulated customer reported that of the more than 100,000 Medicaid members it has placed an automated call to in 2006, only 25 have elected to opt out of receiving future
automated calls from the company.

Additionally, a Silverlink health plan placed over 29,000 automated flu shot reminders to seniors
in October, 2006. In addition to being very effective in encouraging recipients to obtain the flu
shot, the health plan reported that 3 percent of recipients (roughly 1,000 people) subsequently
made an unsolicited call into the health plan to express gratitude for having received the call.

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survey of 1217 of its DSL Internet access customers on the use of prerecorded informational messages to remind them of their service installation dates, in which 55.1 percent said they would like to receive such messages in the future. As previously noted,
such informational messages are neither governed nor prohibited by the ?SR, because
they are not 'telemarketing' as defined by the Telemarketing Act or the Rule."22

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for evidence of adequate notice:' and that comments indicating "confusion" about a proposed rule "suggest that adequate notice was not provided."*'

Given the extensive confusion in the administrative record, we believe the FTC should immediately extend its forbearance policy for health-related calls made by HIPAA-regulated entities.

V. The FTCs Rationale For Prohibiting Prerecorded Telemarketing Calls Does Not Apply to Health-Related Calls Made By HIPAA-Re~ulated Entities

Not only is there extensive confusion in the record about the scope of the proposed rule, but the rationale applied by the FTC in determining that

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reviewing comments submitted by interested parties. A two-week period, from December 18, 2006 to January 2,2007, is simply not sufficient for the FTC to carefully consider comments and make a well-informed decision, particularly due to the intervening holiday season that leaves only nine business days for the FTC to review comments.

As previously noted, although the FTC has already provided the public with a 40-day extension to comment on the proposed rule, this extension is inadequate due to the substantial confusion in the record on the scope of the proposed rule. Both consumers and businesses do not fully understand the difference between "informational" calls that are not subject to the telemarketing sales rule, and "marketing" calls that are subject to the telemarketing sales rule. It is apparent from the administrative record that many commenters did not fully comprehend that HtPAA-regulated health-related calls would be included in the FTCs abandonment of its existing enforcement policy.

VII. Conclusion

In light of the above, we petition the FTC to maintain the sratw quo and continue to forbear from bringing any enforcement actions against the narrow-class of health-related calls delivered by entities subject to regulation under