

ReedSmith

Robert H. Jackson
Direct Phone: 202.414.9297
Email: rjackson@reedsmith.com

Reed Smith LLP
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005-3373
202.414.9200
Fax 202.414.9299

November 30, 2006



VIA COURIER

Donald S. Clark, Secretary
Federal Trade Commission
Room H-159 (Annex K)
600 Pennsylvania Avenue, NW
Washington, DC 20580

**Re: In Re TSR Prerecorded Call Prohibition and Call Abandonment Standard
Modification, Project No. R411001**

Dear Mr. Clark:

On behalf of medSage Technologies LLC, enclosed please find an original and 12 copies of an Emergency Petition to Delay the Effective Date of Amended Section 310.4(b)(1)(v) and to Extend Forbearance from Prosecution Pursuant to such Rule, for filing in the above-captioned proceeding. An additional copy for date-stamping has been enclosed as well. Also, included is a "soft copy" of the Petition on a diskette.

Please date-stamp the extra copy of this filing and return it in the enclosed stamped, self-addressed envelope. Should you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

A handwritten signature in cursive script that reads "Robert H. Jackson".

Robert H Jackson
Counsel for medSage Technologies LLC

RHJ:lsj

Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

In Re TSR Prerecorded Call Prohibition and Call)
Abandonment Standard Modification,)
Project No. R411001)

**EMERGENCY PETITION TO DELAY THE EFFECTIVE DATE
OF AMENDED SECTION 310.4(b)(1)(v) AND TO EXTEND FORBEARANCE
FROM PROSECUTION PURSUANT TO SUCH RULE**

medSage Technologies LLC ("medSage") respectfully requests the Federal Trade Commission ("FTC" or "Commission") delay the effective date of any amendments to Section 310.4(b)(1)(v) of its rules, 16 C.F.R. §310.4(b)(1)(v), that the Commission might adopt and also extend its stated policy of forbearance from bringing enforcement actions against sellers and telemarketers who make prerecorded telemarketing calls to established customers, from January 2, 2007 until no earlier than six months after completion of the Commission's rulemaking proceeding and publication of the new rules in the Federal Register. In view of the very short time before January 2, 2007 and the potential negative impact on medSage, as explained below, and, presumably, on other small businesses, we urge the Commission to grant this relief on an emergency basis.

Introduction and Background

medSage, which is located in Pittsburgh, is a company that helps manage approximately 250,000 patients on behalf of numerous home healthcare providers through, *inter alia*, the use of prerecorded telephone calls to patients. Our technology employs outgoing interactive calls in the prerecorded voice of the individual patient's healthcare professional to monitor compliance with prescribed therapies, supplies, and medications for conditions such as chronic obstructive

pulmonary disease ("COPD") and sleep apnea. By ensuring proactive, consistent monitoring, medSage allows its customers (home healthcare providers) to measurably improve patient compliance rates, resulting in improved clinical outcomes. Compliant patients are much less likely to develop costly chronic conditions such as heart disease and diabetes.

medSage's calls are dynamically generated for each patient based on insurance coverage, prescribed therapy, purchase order history, and numerous other variables defined by each of our home healthcare customers. We ask a series of compliance questions and, if appropriate, a medication- or supply-related question. For example, by utilizing an outgoing, interactive call, we contact COPD patients on a monthly basis to monitor compliance with medical therapy and to obtain their approval to deliver critically important medications.

Because our calls often include a question to patients concerning their current need to renew their supplies or medications, medSage has been advised by counsel that such calls could constitute "telemarketing calls" under the Commission's Telephone Sales Rule ("TSR"), 16 C.F.R., Part 310, and under the telemarketing rule of the Federal Communications Commission ("FCC"), 47 C.F.R. §64.1200.

medSage is not a telemarketer. Rather, we develop patient management software and provide services on behalf of home healthcare providers. Indeed, medSage fully supports the Commission's objective to eliminate abusive telemarketing practices, which if left unrestrained, threaten to bombard homecare patients with nuisance calls, overwhelming critically important communications, such as the medical monitoring provided through medSage.

Since medSage's prerecorded compliance calls are placed only to patients (*i.e.*, existing customers) of those home healthcare providers for which medSage provides services, we have been advised that these calls, to the extent that they would constitute "telemarketing calls," are

permissible today because of the home healthcare providers' established business relationship ("EBR") with their patients.¹

medSage has written agreements with each of the home healthcare providers for which we provide services that permit us, as their agent, to contact their patients chiefly through our interactive voice response system, which includes the prerecorded voice of their healthcare provider, with respect to their medical condition and need for supply or medication refills. However, while our home healthcare providers also have appropriate written service agreements with their patients (as required by the federal Health Insurance Portability and Accountability Act ("HIPAA")), it is virtually certain that those agreements do not address the Commission's proposed rule changes that could affect the prerecorded calls made to those patients by medSage.

Compliance with the Commission's New Policy by January 2, 2007 is Virtually Impossible

We take government regulations seriously and make compliance a top priority. Should the FTC decide to amend Section 310.4(b)(1)(v), as proposed, and to end its stated policy of forbearance from bringing enforcement actions against sellers and telemarketers who make prerecorded telemarketing calls to established customers, medSage will certainly take every effort to comply. However, medSage is a small company with only 17 employees, who concentrate their efforts at managing home healthcare⁶ in an effective and efficient manner. It is very unlikely that our employee team could successfully maintain their responsibilities to almost 250,000 patients and also solicit and receive written permission for us to continue to deliver prerecorded messages to those same 250,000 individuals by January 2, 2007. It is equally

¹medSage would never call the general public because we are permitted to contact individual patients only when they have a written prescription from a physician for specific medications or supplies, and then, only when we have been authorized to do so by the home health provider.

unlikely that our client healthcare providers, which are generally small businesses as well, could accomplish the same task, by the same date, and still take good care of their patients.

medSage further requests the Commission consider the demographics of these patients. Many of them are elderly, and some are seriously ill. Many are not likely to receive and understand a request to provide written permission to continue to receive prerecorded messages, much less to sign and return the permission slip before January 2, 2007.

As a practical matter, medSage does not expect that it or its client home healthcare providers will have received signed written permission from most, and certainly not from all, of their 250,000 patients by the "drop dead date" of January 2, 2007. Thus, we would be faced with a Hobson's choice of either not delivering medically necessary prerecorded messages to those many patients who have not returned their signed permission slips or violating the Commission's rule. Neither choice makes any sense.

medSage is not concerned that the FTC would immediately bring an action against us under these circumstances. We suspect that such government prosecution is unlikely,² but we still do not relish the idea of ignoring federal government regulations while delivering needed healthcare services, including the fulfillment of patients' ongoing medicine and supply needs. We simply need more time to comply with any amended Commission rules and strongly suspect that many other small businesses are similarly affected. Therefore, at a bare minimum, the Commission should give businesses additional time (until no earlier than six months after completion of the Commission's rulemaking proceeding and publication of the new rules in the Federal Register) to comply.

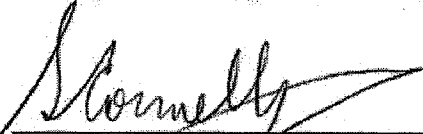
² medSage does, however, worry that it could be sued by a "class action" plaintiffs' law firm seeking to make a windfall from our desire to fulfill our obligations to 250,000 patients should we place prerecorded calls to all patients. The federal government should not put businesses in "harm's way" in this manner.

This current situation is not unlike the one faced by the FCC when, in July 2003, it reversed its prior position by decreeing that commercial fax transmissions could no longer be sent based on an EBR with the recipient. That rule change meant senders would need to solicit and obtain prior written permission from all of their customers to continue sending commercial faxes. The initial effective date for that major rule change would have been late August 2003. Not surprisingly, a hoard of affected individuals, businesses and nonprofits strongly objected to the impossibility of obtaining written permission from all their customers in mere weeks' time. When faced with the practical implications of its decision, the FCC, on its own motion, extended the compliance date until January 2005. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Order on Reconsideration, 18 FCC Rcd 16972 (2003)* (subsequent history omitted). The FTC should, for similar reasons, provide comparable relief as requested herein.

Conclusion

For the reasons set forth above, medSage respectfully urges the Commission to delay the effective date of any amendments to Section 310.4(b)(1)(v) of its rules and to extend its existing policy of forbearance from bringing enforcement actions against sellers and telemarketers who make prerecorded telemarketing calls to established customers, from January 2, 2007 until no earlier than six months after completion of the Commission's rulemaking proceeding and publication of the new rules in the Federal Register. We further request that such relief be granted on an emergency basis.

Respectfully submitted,
medSage Technologies LLC



Jerry Connelly
President and CEO
902 Brinton Road
Pittsburgh, PA 15221
412.242.4001, x303
412.291.1380 (fax)

Of Counsel
Elizabeth B. Carder-Thompson
Robert H Jackson
Reed Smith LLP
1301 K Street, NW
Suite 1100 – East Tower
Washington, D.C. 20005
202.414.9200
202.414.9299 (fax)

Dated: November 30, 2006