

**Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580**

In the Matter of

TSR Prerecorded Call Prohibition and
Call Abandonment Standard
Modification

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Project No. R4110011

COMMENTS OF SOUNDBITE COMMUNICATIONS, INC.

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Dated: December 18, 2006

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Pursuant to the Invitation to Comment issued by the Federal Trade Commission (“FTC” or “Commission”) in the above-captioned proceeding,^{1/} SoundBite Communications, Inc. (SoundBite”) hereby submits the following comments. SoundBite asks the FTC to reconsider its proposed amendment to the Telemarketing Sales Rule (“TSR”) prohibiting prerecorded telemarketing messages except with the written permission of the consumer. Specifically, SoundBite urges that the proposed rules not be adopted. Instead, the existing safe harbor provisions should be retained, strengthened, and supported by an aggressive enforcement program. The Commission should also continue to forbear from enforcement action against companies complying with the safe harbor until after the current proceeding is concluded, including a reasonable transition period.

I. BACKGROUND

In November 2004, the FTC published a notice of proposed rulemaking seeking comment on a proposed “call abandonment safe harbor to allow telemarketing calls that deliver a prerecorded message to consumers with whom the seller on whose behalf the

calls are made has an established business relationship.”^{2/} The Commission established four criteria for its proposed safe harbor: (1) the telemarketer must allow the telephone to ring for at least fifteen seconds or four rings before disconnecting an unanswered call; (2) the prerecorded message must begin to play within two seconds after the called person’s completed greeting; (3) the prerecorded message must, at the outset of the call (“preceded only by the prompt oral disclosures required by the TSR”) provide an opportunity for the called party to assert a company-specific do-not-call request; and (4) the telemarketer must comply with all other relevant provisions of the TSR.^{3/} The Commission announced that pending completion of the proceeding opened by the NPRM it would forbear from enforcement actions against telemarketers who complied with the proposed safe harbor.^{4/}

In October 2006, the FTC issued its *2006 Order & NPRM* rejecting the proposed safe harbor and proposing instead a new rule prohibiting all prerecorded telemarketing calls to any person “unless the seller has obtained [the person’s] the express agreement, in writing,” to receive such calls.^{5/} This submission from SoundBite responds to the Commission’s request for comment on that proposed rule.^{6/}

^{1/} Telemarketing Sales Rule (“TSR”), 71 Fed. Reg. 58,716, 58730 (Oct. 4, 2006) (“*2006 Order & NPRM*”). See also Telemarketing Sales Rule, 71 Fed. Reg. 65,762 (Nov. 9, 2006) (extending the deadline for comments to Dec. 18, 2006).

^{2/} Telemarketing Sales Rule, 69 Fed. Reg. 67,287 (Nov. 17, 2004) (“*2004 NPRM*”).

^{3/} *2004 NPRM* at 67,289-90.

^{4/} *2004 NPRM* at 67,290.

^{5/} *2006 Order & NPRM* at 58,733.

^{6/} *2006 Order & NPRM* at 58,730.

II. THE PROPOSED RULE IS OVERLY BROAD, EFFECTIVELY PROHIBITS MANY TYPES OF PRERECORDED CALLS THAT MOST CONSUMERS DESIRE, AND THWARTS THE INTRODUCTION OF INTERACTIVITY TECHNOLOGY THAT GIVES CONSUMERS CONTROL OVER CALLS.

A. Most Consumers Enjoy Receiving Beneficial Calls From Companies With Whom They Have a *Bone Fide* Existing Business Relationship.

Consumers who are otherwise averse to receiving telemarketing calls are, in most cases, willing to make an exception when the call comes from a company with which the consumer has a *bone fide* existing business relationship (“EBR”). This fact underlies the FTC’s decision when establishing the national do-not-call (“DNC”) registry to provide an exception for callers with an active EBR.^{7/} In adopting the EBR, the Commission empowered consumers to make their own decisions, through assertion of company-specific do-not-call requests, about which companies would be allowed to call them with telemarketing messages.

The FTC recognized that “a new safe harbor that treats prerecorded telemarketing calls to established customers differently from other prerecorded calls might be appropriate if . . . [t]he consumer aversion to prerecorded calls . . . does not apply when such calls are made to established customers.”^{8/} The record, however, on which the Commission based its judgment that “consumers continue to view such calls as an

^{7/} See *2006 Order & NPRM* at 58,720-21 (reporting broad support for the EBR exception in the proceeding establishing the DNC registry). While the FTC reported a much lower level of “unambiguous support” for the EBR exception with regard to prerecorded telemarketing messages, *id.* at 58,721, consumers’ reservations centered on supposed difficulty or impossibility of asserting a company-specific do-not-call request, *id.*, and fears that their phones would be flooded with prerecorded calls from businesses with whom they had little real business relationship, *id.* at 58,722. Neither of these fears appears to have been borne out in the almost two years since the comments were submitted and are, in any case, easily addressed short of effectively banning prerecorded calls where there is an EBR. See Part III.B and Part III.C, *infra*.

^{8/} *2006 Order & NPRM* at 58,723.

abusive invasion of their privacy,”^{9/} failed to recognize that many commenters railing against prerecorded messages likely had in mind only “cold call” telemarketing messages.^{10/} Even those commenters most opposed to prerecorded telemarketing messages would likely soften their position when considering some of the consumer-friendly types of calls that can be made with modern, interactive prerecorded call technology.

In fact, many types of prerecorded calls that consumers actively desire will be prohibited by the proposed rule (except with written permission of the consumer). For example: a doctor’s call reminding an elderly patient that it’s time for a regular screening procedure or an annual flu shot; a health clinic reminding a new mother to make an appointment to get vaccinations for her infant; a pharmacy informing a customer that a cheaper generic drug is available for his or her prescription, or reminding the customer to call for a prescription refill; an airline informing a customer that a purchased ticket can be upgraded to first class for a nominal fee; a bank describing available overdraft protection to a customer who has just “bounced” a check; a newspaper reminding a subscriber that it’s time to renew his or her subscription; a company informing a customer that his or her product usage pattern qualifies the customer for a more advantageous subscription plan (such as with, e.g., a cell phone company); a service company reminding a customer to make an appointment for annual service such as furnace cleaning or termite inspection.^{11/}

^{9/} 2006 Order & NPRM at 58,723.

^{10/} This distinction was expressed by at least one current commenter. Chris Knoll, Comment #525547-00162 (“I strongly encourage you to consider the difference between mass cold-call automated telemarketing, and automated messages from companies with whom I already do business.”).

^{11/} These are all types of calls specifically mentioned as welcome by consumers commenting in the current proceeding. See, e.g., Chris Knoll, Comment #525547-00162; Alexander Agranovsky, Comment #525547-00019; Charles Baird, Comment #525547-00154; “Barry,” Comment # 525547-00067; Nicholas Beatty, Comment #525547-00022; Amina Brandt, Comment #525547-00093; Patrick Conway, Comment

These are types of prerecorded calls that most consumers would find helpful, rather than annoying – even more so because calls come from a consumer’s family doctor, pharmacy, bank, or newspaper and are all companies with which they regularly do business. Yet, because these calls are also part of a plan to induce the purchase of a good or service, they would be essentially prohibited under the FTC’s proposed rule.

As a practical matter, most informational calls from a business will inevitably include a sales component; otherwise they will be incomplete messages that will only serve to frustrate consumers. For example, a consumer receiving a purely informational prerecorded call from an airline notifying him or her of a flight cancellation is left stranded. Most consumers would prefer to have an opportunity to use interactive technology embedded in the call to press a button to speak to a representative to schedule a new flight. Most consumers receiving a prerecorded informational reminder call about expiration of a subscription will appreciate an opportunity in the same call to consider renewing the subscription.

Consumers who urged the FTC to ban all prerecorded telemarketing messages were almost certainly thinking about indiscriminate “blast” telemarketing.^{12/} It is likely that many, if not most, of those commenters would have softened their position if asked specifically about calls like those listed above.

#525547-00081; Kathryn Eden, Comment #525547-00072; “Lawson,” Comment #525547-00033; Doug Wussler, Comment #525547-00097.

^{12/} See, e.g., *2006 Order & NPRM* at 58,720 (declaring that many commenters consider prerecorded calls more invasive of privacy than live telemarketing calls “primarily because they are powerless to make themselves heard.”) (emphasis added). See also, e.g., RJ Auburn, Comment #525547-00129 (“[T]here is a giant difference between pure ‘voice blast’ calls that are completely static and next gen interactive calls that can easily allow the consumer to get information or remove their number from the callers database. I would much prefer that the FTC ban the voice blasts and require that outbound calls always provide a top level option for the recipient to remove them self [sic] from the database and all future calls.”); Pat Whelan, Comment #525547-00077 (“[W]hilst some [automated voice messages] are annoying, blast telemarketing ones, others are of great value to me.”).

There is also evidence that consumers are much more accepting of prerecorded calls from businesses with which they have a *bone fide* existing business relationship. This is reflected in the typically very low rate of consumer opt-out, even when, as required by the safe harbor, the opt-out has been made prominent and can be easily accomplished.^{13/}

B. Modern Calling Technology Provides Interactivity That Gives Customers Control Over Prerecorded Telemarketing Calls.

Reviewing comments submitted in response to the *2004 NPRM*, the Commission concluded that consumers find prerecorded telemarketing messages more intrusive than live telemarketing “primarily because they are powerless to make themselves heard” and “because they are powerless to interact with a recording.”^{14/} To the extent that may have been the case in 2004, it is not the case today.

Of course, to be in compliance with the safe harbor over the past two years, all prerecorded telemarketing calls must have been at least minimally interactive enough to allow consumers to effect a company-specific do-not-call request. But modern calling technology allows consumers much greater control and ability to interact with the calling company. Through the press of a button on a telephone keypad (or by spoken word with modern voice recognition software)^{15/} consumers can request to be placed on a company-specific do-not-call list, or can make or confirm an appointment, accept an offer, renew a

^{13/} SoundBite Communications’ experience with use of automatic opt-out technology over the past several years is that the percentage of consumers opting out in campaigns based on an existing business relationship is typically very small – usually in the low single digits.

^{14/} *2006 Order & NPRM* at 58,720, 58,723.

^{15/} The availability of voice recognition software can help resolve concerns about consumers who still possess rotary dial telephone equipment. *See 2006 Order & NPRM* at 58,722. *See also*, Don Runyan, Comment #525547-00061 (“[P]lease consider that you will be lumping in sophisticated automated speech recognition (ASR) systems into this ban. ASR systems have the capability to respond to called parties’ responses including but not limited to requests to be placed on the calling partys’ [sic] do not call list.”).

subscription, or request to be connected to, or called back by, a live operator. Most consumers would find it very convenient to not only be notified that their subscription is expiring but to be able to renew the subscription during the same call with the push of a button. With modern, interactive calling software, a consumer can not only be told of availability of an airline ticket upgrade offer, but may be able to accept the offer without needing to call the airline back.

Many consumers, even those who dislike non-interactive prerecorded telemarketing messages, find interactive recorded messages useful – even preferring them to live telemarketing calls.^{16/} If prerecorded telemarketing messages continue in use – *i.e.*, if they are not prohibited by the FTC’s proposed regulation – it is highly likely that the interactivity technology will continue to progress, making calls ever more user-friendly and continuing to empower consumers with choices and control over the value of the calls received.^{17/} It does not benefit consumers to disconnect this beneficial interactivity technology just as it is beginning to develop,^{18/} leaving consumers to deal

^{16/} See, *e.g.*, Brooke Larsen, Comment #525547-00026 (“I HATE talking to a live agent . . . I prefer being able to just listen and only interact by pressing a button.”); James Mundt, Comment #525547-00103 (“Interactive automated telephone calls are superior to simple pre recorded ‘informational’ messages or ‘live agent’ systems.”); Poulin, Comment #525547-00024 (“Recorded messages are less intrusive and coercive than live agent telemarketing; they do not argue with you or attempt to overcome your objections.”); Jesse Watson, Comment #525547-00032 (“The most important thing to realize about this [sic] automated phone calls is that they are actually less invasive, not more invasive than a live person, and as a person being called, I find it to be a better experience.”); Cully Perlman, Comment #525547-00151 (“[I]f the message delivered is clear and concise, I prefer an automated message over having a conversation with someone about the same information.”).

^{17/} Bruce Rosato, Comment #525547-00156 (“Many inbound calls now feature sophisticated IVRs where virtually everything an agent could assist me with in the past can now be done by pressing keys or even speaking words. This same convenience should be extended to consumers who are being reached outbound by these same companies.”)

^{18/} Wholesale prohibition of prerecorded messages, including interactive messages, would eliminate the potential for these consumer-friendly technologies to further develop in the future. Expressing a national need to promote availability of advanced telecommunications services, Congress has declared it to be “the policy of the United States . . . to encourage the development of technologies which maximize user control over what information is received by individuals . . . who use . . . interactive computer services.” 47 U.S.C. § 230.

only with live telemarketers who are many times difficult to understand and less than helpful.^{19/}

The FTC noted that many consumers expressed concern about inability to express a company-specific do-not-call request with a prerecorded call, as they could do with a live telemarketer.^{20/} This should not be a concern. The FTC's safe harbor's requirement is designed to address this issue. It requires an opt-out opportunity to be placed at the start of a prerecorded call. When this requirement is coupled with the use of modern interactive call technology, consumers can easily be placed on a company-specific do-not-call list automatically. A prerecorded call using an automated system empowers a consumer to press a single button on the telephone keypad to automatically place the consumer's number on the do-not-call list. Live telemarketers are not similarly required to notify consumers up front about their do-not-call rights and the consumer has less assurance that his or her request will actually result in placement on the list because it requires human intervention by the telemarketer (who may have to pass the request on to one or more other staff members to effectuate the request).^{21/}

^{19/} See, e.g., Bruce Rosato, Comment #525547-00156 (preferring prerecorded calls to those with a live telemarketer "where circumstance, personality, culture, accent, etc., all play a role in how my issue will be resolved"); Wiggin, Comment #525547-00028 ("The recorded message is easier to understand than the script read by a disinterested telemarketer."); James Mundt, Comment #525547-00103 (identifying prerecorded calls as "more consistent" and "understandable").

^{20/} 2006 Order & NPRM at 58,721.

^{21/} See, e.g., 2006 Order & NPRM at 58,721, n.64 (quoting one commenter as suggesting that with a live telemarketer "you can have the illusion of requesting removal from the list" of numbers to be called); Saurer, Comment #525547-00070 ("I have found that by offering an explicit opt-out option, recorded messages make it easier for me to be added to a company's do not call list.").

C. Allowing Calls Only Upon Written Agreement Places a Substantial Burden On Both the Consumer and the Company and May Effectively Eliminate Desirable Prerecorded Calls, Especially From Small Businesses.

It may be thought that if consumers consider prerecorded telemarketing calls from companies with whom they do business to be valuable, then businesses should have no difficulty obtaining the written permission to call as required by the proposed regulation. But the logistics of obtaining written permission place substantial burdens on both the company and the consumer. In many cases (*e.g.*, a newspaper subscription or a “mail-order” catalog purchase), an initial order may have been placed over the telephone, requiring a special mailing or other such effort to obtain written permission for prerecorded telemarketing.^{22/} Consumers may reject a request for permission based on a general dislike of telemarketing, not realizing the benefits that may be derived from the types of calls described above. Or they may simply ignore mail for a product they have already purchased.

Because the written permission is required to be specific to a given telephone number,^{23/} a new written permission record must be obtained if a consumer changes to a new number (because, *e.g.*, the consumer moved). This is a burden on both the company and the consumer. Many commenters suggest that if consumer permission is to be required, some easier method be allowed that does not place the burden on the consumer.^{24/}

^{22/} There may not even be billing mailings from the company to the consumer if the telephonic subscription or purchase order was charged to a credit card.

^{23/} *2006 Order & NPRM* at 58,726.

^{24/} *See, e.g.*, Heidi DeSimone, Comment #525547-00161 (complaining that written consent “ would be very taxing on all companies involved as well as me”); Alexander Agranovsky, Comment #525547-00019 (“What I don’t want, is to have to deal with paperwork to set this up.”); Lee Howard, Comment #525547-00089 (“I believe that requiring written, signed, acceptance forms is excessively cumbersome.”).

Beyond the logistical burden of obtaining written permission from each of its customers to comply with the proposed rule, companies will be burdened with the substantial and continuing recordkeeping burden of maintaining a copy of each consumer's written permission to call. The combination of the logistical and recordkeeping burden may be such that many businesses – especially small businesses – will find it impractical to continue using prerecorded telemarketing messages, no matter how valuable their customers may find them.

III. A COMBINATION OF SENSIBLE MODIFICATIONS TO THE SAFE HARBOR AND INCREASED ENFORCEMENT WILL RESULT IN GREATER BENEFIT TO CONSUMERS THAN IS AVAILABLE UNDER THE PROPOSED RULE.

A. The Safe Harbor Has Worked to Protect Consumers from Unwanted Prerecorded Telemarketing Calls Over the Past Two Years.

The FTC's proposal to eliminate the safe harbor and allow prerecorded telemarketing calls only with the written permission of the consumer is based almost entirely on a record of comments from consumers reacting to their experience of calls made prior to initiation of the safe harbor. The *2004 NPRM* that established the safe harbor was issued on November 17, 2004.^{25/} Consumers (and others) were required to submit comments in the proceeding no later than January 10, 2005.^{26/} Because the safe harbor had been in place less than two months by the time comments were due, it is likely that the vast majority of consumer commenters had little or no experience with calls that used the safe harbor (including the prominent opt-out requirement), but instead expressed opinions based on prior experience with prerecorded telemarketing calls received before

^{25/} *2004 NPRM* at 67,287.

^{26/} *2004 NPRM* at 67,287.

the safe harbor existed.^{27/} Others commented based on speculation about how they thought the safe harbor might work.^{28/}

The record of comments submitted in the current proceeding demonstrates, however, that the safe harbor has worked well to protect consumers over the past two years. To date, fewer than 400 consumers have felt strongly enough about the matter to submit comments, and a significant proportion of those suggest written permission not be required for companies to make at least some prerecorded telemarketing calls based on an EBR.^{29/} This compares quite favorably with the more than 13,000 comments, mostly opposing prerecorded telemarketing calls, which were submitted two years ago before consumers had widespread experience with the safe harbor.^{30/} After two years experience with prerecorded messages from companies using the safe harbor requirement, consumers are not as negative about prerecorded telemarketing calls. This suggests a more measured approach of retaining and improving the safe harbor, rather than

^{27/} See, e.g., *2006 Order & NPRM* at 58,721 (reporting that “[m]any [commenters] objected to the fact that they could not tell a prerecorded message to put them on the seller’s Do Not Call list” and that “[s]ome consumers reported that the mechanism provided for exercising their Do Not Call rights is impractical” because it is provided at the end of the message – both representing conditions prohibited by the safe harbor instituted by the *2004 NPRM*).

^{28/} See, e.g., *2006 Order & NPRM* at 58,723 (“Consumers and their advocates expressed concern that, if the proposed new safe harbor were adopted, marketplace economics could soon produce a flood of prerecorded telemarketing messages that would engulf the privacy protection provided by the [national do-not-call] Registry.”) Many commenters even opposed the safe harbor based on a misunderstanding of its requirements. *2006 Order & NPRM* at 58,722 (“Apparently assuming that a company-specific opt-out might not take the form of an interactive method at the outset of the call (as proposed by the Commission), some consumers complained that the burden would be placed on them to listen until the end of unwanted messages to obtain an opt-out number . . .”).

^{29/} See # 186 16 C.F.R. Part 310: Telemarketing Sales Rule: Advance Notice of Proposed Rulemaking - “TSR Prerecorded Call Prohibition and Call Abandonment Standard Modification, Matter No. R411001” at <http://www.ftc.gov/os/comments/tsrrevisedcallabandon/index.htm>.

^{30/} See *2006 Order & NPRM* at 58,723, n. 49 (reporting that of 13,550 consumer comments received by January 10, 2005 [*i.e.*, before large numbers of consumers may have had experience with calls that used the safe harbor], “no more than 77 of the comments indicat[ed] arguable support for the proposed [safe harbor] amendment”).

effectively banning prerecorded telemarketing, will provide greater benefit to consumers and businesses.^{31/}

B. Minor Adjustments to the Safe Harbor Can Leverage Available Technology to Further Empower Consumers to Choose from Which Businesses They Wish to Receive Calls.

While the safe harbor appears to have worked well for consumers over the past two years and should be retained, currently available technology can be used to strengthen the consumer protections it affords, furthering the goal of sending consumers only those prerecorded telemarketing calls they desire to receive.

1. One-button opt out.

The safe harbor includes a requirement that callers include “at the outset of the message” an “opportunity to assert an entity-specific Do Not Call request.”^{32/} The method suggested in the *2004 NPRM* was a mechanism whereby the consumer could press a button on the telephone keypad that would provide an opportunity to speak to a sales representative, who could effect a do-not-call request.^{33/} Some commenters expressed concern, however, that sales representatives may not be available promptly^{34/} and may be unreliable about entering the do-not-call request into the company’s system.^{35/}

^{31/} See, e.g., James Dykes, Comment #525547-00040 (“You can ban the use of simple playback of pre-recorded messages, but don’t throw the baby out with the bathwater by also killing the innovative technologies that allow for interaction that can be ever better than a live agent.”).

^{32/} *2004 NPRM* at 67,290.

^{33/} *2004 NPRM* at 67,290.

^{34/} *2006 Order & NPRM* at 58,725. See also *2006 Order & NPRM* at 58,721, n.67 (“There is always an option to . . . press a number to talk to a person but only in rare instances does this work.”).

^{35/} *2006 Order & NPRM* at 58,721, n.64. See also, e.g., Jesse Watson, Comment #525547-00032 (“[With a] recorded message . . . I can be much more certain that my wishes not to be contacted again will be obeyed. In contrast, live telemarketers . . . have little incentive to remove me from a list when I ask.”).

Modern prerecorded telemarketing technology has the capability to allow consumers to push a button at any time during the call to automatically effect a do-not-call request. Telemarketers could be required to use an automated, one-button do-not-call request system that, while announced at the outset of the call as currently required, can also be engaged at any time during the call. Especially if the mechanism is mandated by the FTC as part of the safe harbor, consumers will have greater confidence that making an automated do-not-call request during a prerecorded call will be both easy and effective.^{36/} The request could also be required to be immediately effected on company systems, assuaging fears of some consumers that telemarketers will make the opt out mechanism as difficult as possible by directing callers to a series of sub-menus before actually registering the request.^{37/}

When a consumer presses the opt-out key, the telemarketer should also be required to immediately terminate the telemarketing call and play a short message acknowledging that the consumer has opted to exercise a company-specific do-not-call request. These, again, are capabilities that even the most basic modern prerecorded telemarketing equipment can easily accomplish.

Establishing in prerecorded telemarketing calls such an easy, automatically registered method for consumers to place themselves on a company-specific do-not-call list establishes an immediate incentive to companies not to abuse prerecorded telemarketing by flooding customers with a large number of calls of questionable

^{36/} Bruce Rosato, Comment #525547-00156 (“I prefer to communicate with systems rather than humans[;] . . . the interaction experience is more predictable and I am always confident that my instruction to a machine will be interpreted with much greater accuracy”).

^{37/} *2006 Order & NPRM* at 58,721, n.66 (“I can only imagine the telephone ping-pong game between menus, voice-mail, call transfers, and the inevitable disconnection that I’ll have to play before I can hope to talk to a person who will listen [to a Do Not Call request].”).

value.^{38/} In the situation where a customer receiving a prerecorded telemarketing call can easily opt-out of not only future prerecorded telemarketing calls from the company, but from all future telemarketing calls from the company, it is reasonable to assume that companies will limit their prerecorded telemarketing to only those types of calls that consumers will likely find valuable. It becomes as much in the company's interest as it is in the consumer's interest for the company to avoid flooding consumers with large numbers of prerecorded calls of questionable-value that will only prompt large numbers of consumers to exercise their easily-applied opt-out rights.^{39/}

2. Press "NO" to opt-out.

Consumers could be given more confidence in the reliability of opt-out during prerecorded telemarketing messages if all telemarketers were required to use the same code to effect an automatic opt-out and termination of the call. While it is common in prerecorded telemarketing messages to suggest that a consumer "press 1" to opt-out, inadvertent opt-outs could be avoided by using a slightly more complex code. If the standard opt-out code were required to be pressing the "six" button twice, consumers could be told to press "66" or "NO" (the alphabetical equivalent of 66 on a standard telephone keypad) if they wish to opt out. The Commission could publicize the code on their website and elsewhere with a "Just Press 'NO'" campaign to educate consumers about the standard code to allow them to opt-out of prerecorded telemarketing calls. Consumers aware of the standard opt-out code are less apt to be confused about how to

^{38/} See *2006 Order & NPRM* at 58,724 (expressing fears that "the substantially lower cost of prerecorded message telemarketing (compared to live telemarketing campaigns with sales agents) would significantly increase the use of such campaigns").

^{39/} See, e.g., Dan Zasloff, Comment #525547-00150 ("Most, if not all of the companies that I do business with don't want to lose me as a customer – quite the opposite. . . . So, it is in their best interest to keep the telemarketing relevant, brief, and for my own benefit – lower prices, better performance, etc.").

opt-out and more likely to be able to effectively assert their do-not-call rights when they choose to do so.

C. Limiting Calls to Situations Where the Consumer Has Given His or Her Number to the Calling Company Can Resolve Consumer Concerns About Companies Asserting an EBR on a Tenuous Basis.

Some consumers expressed concern that use of the EBR exception in the safe harbor would subject them to a deluge of unwanted prerecorded telemarketing calls.^{40/} Those fears have not been borne out by the experience of the last two years with companies' implementation of the safe harbor. Nevertheless, consumer concerns about receiving prerecorded telemarketing calls from companies with whom they have only a very tenuous business relationship can be further assuaged by allowing companies to make prerecorded telemarketing calls only to consumers who have given the company their phone number.

A consumer who affirmatively gives a company his or her telephone number does so with the knowledge that the company may use the number to call him or her at some point in time. Consumers are unlikely to give their phone numbers to companies with whom they have only a passing or tenuous business relationship. Of course, if the consumer does not wish to receive prerecorded telemarketing calls from a company – even one to whom he or she has given his or her telephone number – the consumer is free to assert a company-specific do-not-call request to make the calls cease.

Limiting companies to calling only those consumers who have supplied their number would eliminate calls to consumers from companies where the EBR is slight and from companies who may have obtained the number from a directory, another company,

^{40/} 2006 *Order & NPRM* at 58,722, n.77 (“[T]hese companies will be calling a purchase of a stick of gum a year ago the basis of an established business relationship.”).

or another source. Moreover, where a consumer has provided his or her phone number to a company with which he or she has a business relationship, the consumer is unlikely to believe that a telephone call from that company is unduly invading his or her privacy. With such a rule, consumers could also be assured that they could preempt prerecorded telemarketing calls from any company by simply refusing to give the company their phone number.

D. The Combination of a Safe Harbor with Enhanced Opt-Out Provisions and Effective Enforcement Action Can Address Most Consumer Concerns While Preserving Consumers' Access to Desirable Prerecorded Telemarketing Calls from Companies with Whom They Do Business.

Many consumer comments expressed concerns about telemarketing practices that constitute violations of either the safe harbor provisions or of other FTC telemarketing regulations. For example:

- “[C]onsumers reported that they receive both live and prerecorded telemarketing calls from businesses with which they have no ‘established business relationship.’”^{41/}
- “Some consumers reported that . . . the Do Not Call option at the end of the message does not work.”^{42/}
- The Commission discounted the effectiveness of companies self-policing their prerecorded telemarketing campaigns because “[w]hile overall compliance with the Do Not Call provisions of the TSR is quite good, not all covered entities are complying.”^{43/}

^{41/} 2006 Order & NPRM at 58,722.

^{42/} 2006 Order & NPRM at 58,721.

^{43/} 2006 Order & NPRM at 58,724.

- Special concern was expressed that “[t]he compliance record presents a particular problem with respect to consumer concerns about the breadth of the industry’s interpretation of what constitutes an ‘established business relationship’”^{44/}

Consumers are best served when instances of companies failing to follow FTC rules are addressed through aggressive enforcement.^{45/} It is naturally tempting to try to reign in or prevent abuses by significantly tightening rules on prerecorded telemarketing, as proposed on the *2006 Order & NPRM*. But those who would ignore current rules to take advantage of consumers will not be deterred by tighter rules, which they will be just as glad to ignore. This leaves consumers with the worst of both worlds – deprived of availability of desirable prerecorded offers from those they do business with, while continuing to receive unwanted calls from less scrupulous businesses with which they have little or no relationship.^{46/}

Consumers are far better off if they can retain wanted telemarketing (protected by a well constructed safe harbor regulation) from companies with which they regularly do business, while the FTC uses aggressive enforcement action to eliminate unwanted calls from unrelated businesses. While the resources available for enforcement are naturally limited, high profile prosecutions of the most egregious violators can do much to shore up consumer confidence in the system and to deter other potential violators.

^{44/} *2006 Order & NPRM* at 58,724.

^{45/} Andrew Bailey, Comment #525547-00071 (“I think the real problem is that a mechanism for receiving complaints and a way to fine companies that have more than a certain number of complaints is needed.”).

^{46/} Mike Chapman, Comment #525547-00088 (“What I don’t like is getting spam [recorded calls] from companies I’ve never heard of or having my number sold to some directory. You should focus on that problem, instead of making it more difficult or even impossible for me to continue to enjoy valuable phone services.”).

IV. PENDING CONCLUSION OF THE CURRENT PROCEEDING, THE COMMISSION SHOULD CONTINUE TO FORBEAR FROM ENFORCEMENT ACTIONS AGAINST COMPANIES COMPLYING WITH THE 2004 SAFE HARBOR PROPOSAL.

When the FTC proposed the safe harbor in the *2004 NPRM*, the Commission announced it would forbear from enforcement action against prerecorded telemarketers who comply with the safe harbor.^{47/} For the past two years, telemarketers like SoundBite have been serving companies and consumers with responsible prerecorded telemarketing campaigns based on the safe harbor. The *2006 Order & NPRM*, in addition to proposing elimination of the safe harbor in favor of a written permission standard for prerecorded telemarketing, announced that the Commission's policy of forbearance based on the safe harbor would end on January 2, 2007.^{48/} Because it is unlikely that the written permission rules will be adopted by that date, this means that effective January 2, 2007, SoundBite and other telemarketers will be unable to conduct any prerecorded telemarketing – even in cases where the company possesses written permission to do so, as contemplated by the FTC's proposed regulations.

In reliance on the direction provided in the *2004 NPRM*, SoundBite has made a significant investment in equipment and personnel to provide prerecorded telemarketing services that comply with FTC regulations. If the company is, as of January 2, 2007, unable to provide telemarketing services under either the safe harbor or written permission standards, that substantial investment in equipment and personnel will necessarily be idled, at significant cost to the company. To avoid this harm – and like harms to other, similarly situated telemarketing companies – SoundBite urges the

^{47/} *2004 NPRM* at 67,287.

^{48/} *2006 Order & NPRM* at 58,727.

Commission to extend forbearance under the safe harbor until the current proceeding is concluded –*i.e.*, until either the written permission rule, the safe harbor rule, or some other rule is formally adopted by the Commission – and for a reasonable transition period after.

V. CONCLUSION

For the foregoing reasons, SoundBite suggests that the FTC reject the proposed written permission rule for prerecorded telemarketing messages in favor of permanent adoption of the existing safe harbor. The safe harbor should be strengthened by some reasonable enhancements that employ developing technology to further empower consumers. The safe harbor should also be supported by an aggressive enforcement program by the Commission. The FTC should also continue to forbear from enforcement actions against prerecorded telemarketing campaigns that comply with the existing safe harbor until adoption of a permanent rule on prerecorded telemarketing, and for an additional reasonable transition period.

Respectfully submitted,

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Dated: December 18, 2006