



January 8, 2005

Federal Trade Commission  
Office of the Secretary  
Room H-159 (Annex K)  
600 Pennsylvania Avenue, N.W.  
Washington, DC 20580

RE: Prerecorded Messages EBR Telemarketing, Project No. R411001

Ladies and Gentlemen:

SoundBite welcomes this opportunity to comment on the Federal Trade Commission's ("FTC") proposed amendment to the Telemarketing Sales Rule ("TSR") to allow the transmission of pre-recorded telemarketing messages. While SoundBite questions the FTC's jurisdiction over pre-recorded messages, it generally supports the FTC's proposed amendment, as provided further below.

By way of introduction, SoundBite is a rapidly growing company, located in the Greater Boston, Massachusetts' area, that provides software, services and technology to a wide array of companies, non-profits and political groups throughout the United States. SoundBite's technology enables these clients to create and transmit pre-recorded voice messages to interactively communicate with their customers, donors or constituents.

It is SoundBite's position that jurisdiction over the transmission of interstate pre-recorded telephonic messages is fully and exclusively vested with the Federal Communications Commission ("FCC"). This emanates from the unique and sweeping authorization that the FCC has received from Congress through the Telemarketing Consumer Protection Act of 1991, 47 U.S.C. 227 et seq. ("TCPA") to regulate the transmission of pre-recorded messages. Section 227(b) (1) (B) of the TCPA expressly prohibits the transmission of pre-recorded messages unless an emergency is present, prior consent is obtained, **or is exempted by rule or order of the Commission** (emphasis added). This means that Congress has solely and exclusively granted to the FCC the authority to create exemptions from Congress' near absolute prohibition on the transmission of pre-recorded messages.

Under the TCPA, Congress only permits the transmission of prerecorded messages where the FCC allows it. Through Section 64.1200(a) (2) of 47 C.F.R. Part 64 ("TCPA Rules") the FCC has created four narrowly crafted exemptions that authorize the transmission of pre-recorded messages. The most salient exemption being found in section 64.1200(a) (2)(iv), which authorizes the transmission of prerecorded telemarketing messages where there are established business relationship.

The FTC, by asserting jurisdiction over prerecorded telemarketing calls, seeks to create its own set of rules to govern these calls. The statutory authority granted to the FCC by Congress under the TCPA to carefully create and craft exemptions would be rendered a nullity if the FTC could simply change or repeal these exemptions or for that matter, create its own. Unlike the regulation of telemarketing, where Congress has given both the FCC and FTC jurisdiction, Congress has clearly vested the regulation of prerecorded messages solely within the purview of the FCC.

The FTC's proposed amendment does move the agency closer to the position of the FCC so that FTC and FCC would no longer have two completely contradictory positions on legality of transmitting prerecorded telemarketing messages. Like the FCC, the FTC would allow for the transmission of such prerecorded messages only where there is an "established business relationship." However, unlike the FCC, the FTC requires that the consumer be given the opportunity to in effect "opt-out." This opportunity must be interactively provided at the outset of the message

SoundBite does possess and license technology that enables a consumer, at his election, to interactively communicate with a seller in response to a prerecorded message. While this feature is generally provided to facilitate a commercial transaction between seller and consumer, it does provide the consumer the opportunity to "opt-out" where a live operator is used. Where a live operator is not used in a particular telemarketing campaign, SoundBite technology could provide the consumer with a menu feature to "opt-out." All of this could be done on a very cost effective basis.

However, the FTC's requirement that the opportunity to opt-out be provided to the consumer at the outset of the pre-recorded message may in some instances be disruptive to the telemarketing campaign with little, if any, resulting benefit to the consumer. SoundBite would urge that the FTC follow the general direction of the FCC and allow this information to be provided at any time during the message. By mandating that in each and every case the consumer be given the opportunity to "opt-out" before he has had the opportunity to listen to the substance of the message the FTC's proposal might unnecessarily disrupt communication between a seller and its established customer.

In addition, the FTC would also be placing a burden on pre-recorded telemarketing campaigns that as a practical matter live telemarketing campaigns do not bear. In most live telemarketing campaigns, a consumer generally must listen to the entire message before he is given the opportunity, as a practical matter, to make a decision. Especially in those prerecorded message campaigns where an automatic opt-out feature would have to be provided at the outset to comply with the FTC rule, the consumer would be literally asked to opt-out before he has even heard the message.

The opt-out provision is in place to empower the consumer to stop future unwanted telemarketing solicitations. In other words, stop the next call not the current one. In the current call, the seller should be allowed to fully communicate its intended message with its established customer and present the opportunity to the customer to make an informed decision. The customer would then be fully empowered to stop future calls.

In summary, the regulation of all prerecorded messages should be left to the FCC as envisioned by Congress. If, however, the FTC determines that it has jurisdiction, SoundBite would strongly urge the Commission to modify its proposed rule to provide that the opportunity to opt-out may be presented at any time during the message.

Respectfully,

/s/ Peter Shields

Peter Shields, President and Chief Executive Officer