

November 1, 2006



Federal Trade Commission
600 Pennsylvania Avenue
Washington, DC 20580

RE: FTC File No. R411001

To Whom It May Concern:

Please find the following two documents in response to the FTC request for comments due by November 6, 2006 in reference to the above referenced file number regarding Proposed Rules to Limit the Use of Pre-recorded Messages in Telemarketing. The two documents submitted in response to the FTC's request are titled:

- "SmartReply's Comments For Commercial Organizations Regarding FTC Proposed Ban On Pre-recorded Messages Answered By Live Persons"
- "Measuring and Deducing Consumer Acceptance of Live Pre-recorded Calls with Prompt Opt-out Mechanisms Across Ten Companies over Eight Months"

In the text of the Proposed Rules, there is an implication that the industry did not sufficiently quantify the information that was presented. In response to this, we have assembled a very thorough analysis of live pre-recorded calls and tracked the consumer's resulting behavior. I hope that this is thoroughly read because the data within is very important to the decision that is immediately before the FTC.

Likewise, I have tried to address each question that the FTC put forth where it is relevant to my knowledge and understanding of this industry. Many of these items are not quantifiable, but I've tried to hold a logical discussion of the implications to the Proposed Rules. Ultimately, however, the FTC is going to have to fundamentally determine first one question: are pre-recorded

marketing calls important or invasive to customers; do pre-recorded marketing calls make life better or worse?

The evidence presented herein demonstrates that consumers believe that life is better with *good, compliant, and relevant* pre-recorded marketing calls, and that the FTC's investment in prosecuting offenders of existing regulation would significantly diminish the need to eliminate pre-recorded marketing calls. It may be said that this discussion has some parallels to mail fraud. There are indeed a number of criminal minds that use direct mail fraudulently to market themselves, their fictitious wares, or to gain the false trust of masses of people. Simultaneously, there are far more companies that use direct mail legitimately to grow their businesses and have done no wrong. Would we shut down direct mail because of the few, fraudulent actors, or would we spend our efforts prosecuting the few so that the channel remains viable for the good companies? This decision is before the FTC – to punish the good companies while the bad actors continue violating the existing laws, or to chase down and punish the few bad that have made a bad name in this industry.

I welcome the opportunity to hold a more detailed conversation at your convenience and hope that the information we have assembled will fall under favorable consideration in your thoughts as you reason and debate the future of this industry and this medium.

Best regards,

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**SMARTREPLY'S COMMENTS FOR COMMERCIAL ORGANIZATIONS
REGARDING FTC PROPOSED BAN ON PRERECORDED MESSAGES ANSWERED
BY LIVE PERSONS**

Regarding TSR Prerecorded Call Prohibition and Call Abandonment Standard Modification, Project Number R411001. Comments are due November 6. The text of the proposal can be found at <http://www.ftc.gov/os/2006/10/R411001telemarketingruleFRN.pdf>.

Filed Electronically at: <http://secure.commentworks.com/ftc-tsr>.

I. BACKGROUND OF SMARTREPLY, INC.

SmartReply, Inc., is a privately held company based in Irvine, California, with remote offices around the United States. We were founded in August, 2001, and today have 34 full time employees. We serve primarily Fortune 500 retail organizations with voice marketing, text messaging, database, and IVR services. Our business is widely recognized in our marketplace for our strategic thought leadership and for our thorough comprehension of compliance within the markets and offerings that we work in.

We have always held compliance in the highest regards, not only for self preserving reasons, but because our clients place tremendous value on their customer relationships. We believe that federal regulations – specifically the TSR and TCPA by the FTC and FCC in addition to Do Not

Call regulations – have been brought about for consumer protection. In fact, if you were to survey our company, I suspect that 32 of the 34 employees are listed on the do not call list. I count myself among the majority listed on the DNC registry.

So, we are very sensitive to compliance because it is good for the people we are trying to reach. It is not our objective to disrupt their lives, interrupt their evenings, or bombard them with irrelevant messages. Our primary objective is to deliver sound, relevant, and personable information at the most appropriate and least disturbing time. We understand that a poorly thought out campaign can be a nuisance, and that is why we stick to compliance, and often exceed it's mandates.

In addition to federal compliance we also provide mandatory compliance with each state's telemarketing rules. This is a tremendous burden on our systems and on our client's systems, but for the present time, it is a requirement of conducting good business. In addition, over 95% of our clients contract with SmartReply to provide opt-in and opt-out services so that – following each campaign or even between campaigns – our client's customers can 'press-1 to opt-out' or call a dedicated toll free number to opt-out of future calls. Having all of this data in one place assures us that clients will achieve maximum levels of compliance.

Often we find ourselves invited to participate in defining client privacy policies and procedures that affect their entire organization. There is no single asset that any individual has beyond their identity and their right to privacy, so we highly recommend conservative and consumer-protective positions to our clients, and we follow-through to implement our part on their behalf.

Privacy does not mean silence; we believe that it is predicated on two important points: a) the consumer's ability to control marketing messages, and b) the burden of the marketer to supply relevant messages. *Upon these principles do our clients build strong customer relationships* and we are proud to be their partner because our recommendations far outreach voice marketing, eventually impacting all customer touch points.

One of the standards that we include with every client campaign is a prompt opt-out mechanism. A customer that receives a live pre-recorded call (what we call a "live ear call") can at any time press 1 to opt-out or to find out more information. (On answering machine messages, we leave a toll free number that connects to the same IVR system.) In addition to providing opt-out, the call recipient can access additional campaign information (if it is a storewide sale, a special event, the locations, the hours, the discounts), or they can opt-in to continue receiving these messages. Additionally, and most importantly, we require our clients to include an option for the customer to listen to a privacy statement and to explain why this customer received a message. Though this is a seldom visited part of the IVR system, it is available right from the main menu because we believe that that one in a million customer that wants this information should not have to beg or search hard to find it.

The reason for our comments is that we have witnessed firsthand the value of pre-recorded messages, herein called voice marketing. The rules of Existing Business Relationship (EBR) and Do Not Call (DNC) and the rules of the TSR and TCPA are fundamentally important to our good messages. The most significant concern is that by changing these rules as the FTC has suggested to require Express Consent will only injure the business, like SmartReply and our clients, who

have been in full compliance all along. Today's violators of these rules (the DirecTV's of the world) are likely to continue to violate the new rules of Express Consent. In the meantime, a valuable medium will have been taken out of the lives of consumers who have come to expect relevant messages from their preferred businesses.

So, with these comments I hope to demonstrate that consumers find value in voice marketing messages, and that good companies will follow the existing rules for the benefit of their end consumers. However, bad companies will violate any rules put forth and these new rule changes are no different.

The outcomes that I would like to see as a result of my comments are:

1. Change in direction from the FTC to make the forbearance of the Express Consent provisions of pre-recorded live messages permanent, or,
2. Grandfathering in of customer databases where new policies are in place to gradually convert willing customers into Express Consent compliant customers, or,
3. Stay of Implementation beyond January 2, 2007, so that our clients have additional time to come into compliance without injuring their businesses and alienating their customers, and,
4. To gain clarification on the practice of properly gaining Express Consent.

II. SMARTREPLY’S USE OF PRERECORDED MESSAGES IN THE PAST.

A. Description of Specific Uses.

SmartReply’s clients are typically Fortune 500 retail companies, with customer databases above one million records. Our clients identify their customers in a variety of manners – often from a ‘house credit card’ program, a loyalty program, or from requests at the point of sale. Typically, customers receive calls that remind them of “One Day Sales” or notify them of specific items or events in the store that may fit their interests. As a best practice, we do not contact our client’s customers more than one time per month, and our messages average about 37 seconds in length. Live ear messages (live pre-recorded messages) always have a prompt opt-out mechanism so that customers that do not like the calls can quickly discontinue using them. We update our client’s databases immediately with this new information so that future calls will immediately cease. As later quantified, this is a surprisingly low number.

Following are two examples of answering machine and live ear message scripts. In final production mode, these scripts are recorded by professional talent that has been trained to deliver in a friendly, personable tone that is pleasing to the message recipient.

CLIENT 1:

Overview:

Client has a loyalty program that customer sign up for, to receive special discounts and earn points. Once a month on the first Tuesday, the client has a dedicated sale for these loyalty program members.

Answering Machine Script: (Approximately 22 seconds)

Hi it's Jennifer from <client> calling to remind you that your <loyalty program> day is tomorrow the 2nd. You'll save fifteen percent off your purchases tomorrow. For more information stop by or call 1-800-214-XXXX. Thanks for shopping at <client>. See you tomorrow, and the first Tuesday of every month.

Live Ear Script:

This is a pre-recorded important message from <client>, press 1 anytime to no longer receive these reminders. Tomorrow, May 2nd, as a <loyalty program> member, you'll save fifteen percent off your purchases. For more information call 1-800-214-XXXX. Thank you, and see you tomorrow and the first Tuesday of every month.

CLIENT 2:

Overview:

Client has an active baby gift registry program which new parents are excited to be part of. After the birth of the baby, client has occasional announcements and specials to help the new family along. These messages are unusually long because more content is generally welcomed by new parents during this time of their life.

Answering Machine Script:

Hi this is Jenny calling on behalf of all of us at <client> to wish you and your new baby a happy holiday season. To help make your baby's first holiday season a memorable one, we're sending you a beautiful 24 page catalog with great gift ideas and a special coupon that gives you storewide savings. You'll find picture perfect outfits to show off your baby. Or, you can give the gift of learning with toys that teach... or capture a moment with keepsakes that will be a reminder of this special time of your life. If you have any questions, please call 1-800-243-XXXX and again from all of us at <client>, happy holidays to you and your baby. Goodbye.

Live Ear Script:

This is a pre-recorded message from <client> to wish you a happy holiday. To no longer receive these calls, press 1 at anytime. So, to help make your baby's first holiday season a memorable one, we're sending you a beautiful 24 page catalog with great gift ideas and a special coupon that gives you storewide savings. If you have any questions, please call 1-800-243-XXXX and again from all of us at <client>, happy holidays to you and your baby. Goodbye.

As you can see from these example messages, there is good reason to see that these messages are relevant and welcomed. Although SmartReply is largely considered a leader in this very personable and relevant messaging strategy, we have observed the majority of voice marketing companies following suit, resulting in an industry wide concentration of effective and relevant messaging content.

When delivering messages, one of the criteria that must be discussed with all clients is the do not call registry. Many of our clients are very large brands, and many of them believe that their messages will be welcomed by consumers. However, we require our new clients to execute voice marketing campaigns and to suppress the do not call list until they have many months of experience under their belts. As you know, the do not call list does not require suppressing with an EBR exists within the prior 18 months. So, after our client have an understanding of the use of voice

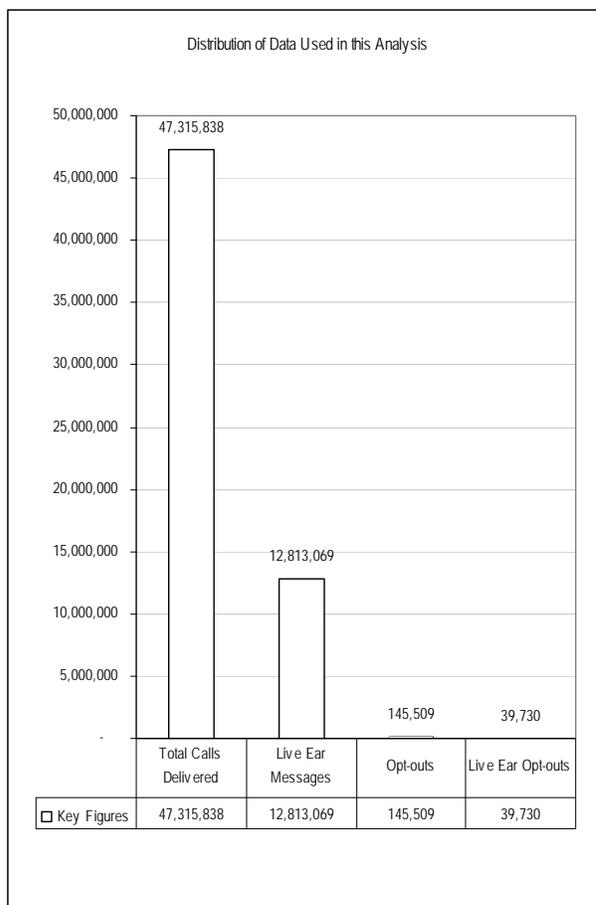
marketing, we may execute one small test without suppressing the do not call registry. In this test, we are looking for opt-out levels, responsiveness of customers, calls into call centers, and transaction values. In some cases, we see evidence that the DNC listed customer will welcome calls from a brand, and we will commence further testing. Sometimes, this is not so, and we continue to always suppress the DNC with every campaign. Today, we have more than half of our clients still suppressing – most of whom have proven that DNC customers will welcome calls, but the client does not choose to call DNC listed people, anyway. In any case, the two principles of *consumer control* and *marketing relevance* hold true whether or not an individual is on or off the DNC list.

In all cases, we always suppress the client's internal DNC list of consumers that have opted-out. Our technology does this automatically, and we provide and validate data back to our client so that we and the client have full copies of all opt-outs.

The targeting criteria is widely varied from client to client. In general, our clients only call customer that have transacted in the prior 12 months. Some clients are even tighter with a six month activity requirement. Of course, some states require 6 month EBR, which we manage on behalf of our clients, but for the most part, many messages in our marketplace seem to lose relevance between the 12 and 18 month window.

B. Response by Consumers to Specific Uses.

FACT: 99.7% of customers that receive pre-recorded calls do not opt-out. On average, we measure 3 opt-outs per 1,000 messages delivered, that’s a 0.3% opt-out rate. On live ear calls with a prompt opt-out, we measure an average of 4.1 opt-outs per 1,000 messages, which is a 0.41% rate. This second statistic is particularly important as we measure that 90% of live-message recipients listen to the first 50% of a live message which includes the prompt opt-out. Yet, with 90% hearing this prompt, less than half of one percent choose to “press 1 to no longer receive these messages.” Please see the complete study *“Measuring and Deducing Consumer Acceptance of Live Pre-recorded Calls with Prompt Opt-Out Mechanisms Across Ten Companies over Eight Months,”* for more details on this statistic and many others in support of the value of voice marketing. Following is one chart from this report.



In addition to low opt-out rates, we often hear from our clients that they receive twice the number of customer requests to, “make sure that you call me next month,” compared to opt-outs. This is certainly anecdotal, and is impossible to quantify. The

important thing to ask is not so much *are these calls valuable* but rather *to whom would these calls be valuable* and it is my opinion and observation that more companies are likely to ask this question first than any other question. In other words, let's spend the time upfront to find the right people that would find the right message valuable. That's who we deliver calls to.

Industry wide, I can attest that more companies in our field are following this line of thought than were two and three years ago. In essence, the industry has largely cleaned itself up. However, the violators escape prosecution for much too long. It is my hope and opinion that the FTC expend more resources in bring down the violators than they spend in making the laws more restrictive to those of us whom are following the laws, or even better.

III. COMMENTS REGARDING PROPOSAL.

A. Requests for Clarification.

While I hope that the Proposed Rule will be reconsidered based on the evidence in this comment, in the event that this is not so, I seek some additional clarification so that SmartReply and our clients can continue to maintain our excellent compliance record.

Telemarketing: What is telemarketing? Is telemarketing the delivery of a notification or reminder to a customer – for example – that an appointment is coming up. And, when conducting marketwide survey calls where the recipient is asked to call in or to begin the survey immediately and to do this through an initial outbound pre-recorded call followed by an IVR survey system. Is this telemarketing? Many of our clients like to thank customers that made extra special purchases – can we deliver thank you calls? Other clients like to remind customers of prior year’s activities – for example – “would you like to send anniversary flowers again this year?” Also, many clients have monthly sale events – can we remind their customers about the sale? Clarification on what is marketing and what is not marketing is very important for SmartReply and our clients. Without this direction, we fear that we may accidentally cross a line, but more fear that others may abuse the gray area to all of our detriments.

Express Consent: I believe I understand the intent of Express Consent – to make sure that the customer has indeed requested to receive specific messages. However, in marketing, it is not always in the customer’s best interest to stop and sign a marketing contract and this would seem an undue burden on the marketer (SmartReply clients) to contractually bind customers to receive marketing.

So, sticking with the intent of validating that customers do indeed desire to receive these messages, where are the lines of definition? It appears that the Federal E-SIGN

law which governs signatures will take a preceding role and allow for electronic capture online, via IVR, or other electronic means. [15 U.S.C. § 7001(a) “Electronic signature” is defined as “an electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” 15 U.S.C. § 7006(5).] In addition, of particular interest and concern to SmartReply client in retail – how can they capture Express Consent at the point of sale? Today, the clients ask, “May I have your phone number?” They have store signage that provides opt-out, etc. However, in the future would a statement that forces the sales associate to read a question off of a point of sale system screen and enter a “no” answer or the customer’s phone number before the associate can process the sale apply as Express Consent?

Between today and January 2, 2007, when the Proposed Rules are scheduled to take effect there is very little time to convert entire customer databases to Express Consent compliance. With the documentation provided [*Measuring and Deducing Consumer Acceptance of Live Pre-recorded Calls with Prompt Opt-Out Mechanisms Across Ten Companies over Eight Months,*] which demonstrates value received from consumers with pre-recorded messages both live and answering machine delivery, it would seem reasonable for the FTC to grant some relief to entities that are in compliance with the new rules, but allowing them to convert their customer database over to Express Consent standards over a pre-defined period of time. This time would be no less than 18 months. In that amount of time a good percent of existing customers can be converted, and new customers can join the ranks, which

will prevent penalizing of organizations that are delivering relevant and valuable marketing messages, today and in the future.

Without this relief, the FTC will be removing a medium of communication which many very responsible business and their customers have come to rely upon.

B. Response to General Questions.

1. What is the effect (including any benefits and costs), if any, on consumers?

Consumers do not like irrelevant messages. The existing regulations with TCPA, TSR, and DNC give a sufficient foundation for delivering relevant messages, and contrary to the FTC's statement in the Proposed Rules, companies do not want to alienate their customers, though often they don't care about alienating prospective customers. These rules require them to market only to their customers (EBR). The violators of these fundamental regulations will not comply with the new rules any more than they comply with the existing ones.

In 2006, SmartReply will deliver about 200,000,000 pre-recorded marketing messages to more than half of the Top 100 retailer's customer bases. None of these retailers has been suspected by the FTC or FCC for any violations, and

the complaints number in only the dozens – a very reasonable ratio that clearly demonstrates that these companies are in fact providing a service to their customers.

The alternative has real costs to consumers. Voice marketing typically runs are about 20% of the cost of the next best medium – direct mail. So, without voice marketing, business marketing costs will go up which will always be passed directly to the consumer through higher prices in retail, or business will not generate the same revenues which will disrupt the supply and demand of goods resulting in higher prices or reduced selection at retail. To think that these are not real scenarios is fool hearty – SmartReply has specifically been part of several public company’s investor conference calls and board meetings as a key contributor to cost management and growth. Without voice marketing, this will change.

Assuming that voice marketing continues but requires Express Consent is shallow reasoning. At best, Express Consent will reduce the database size by 90% or more for the typical client. That eliminates the effective savings that are currently passed to the customer.

In addition, the customer will experience costs through inconvenience of having to sign-up for Express Consent marketing. To do this at each retailer where they are currently receiving important and relevant messages would take

time, and by then, many retailer may simply discontinue the service. And, when a customer changes their phone number, they have to do it all over again.

2. What is the impact (including any benefits and costs), if any, on individual firms that must comply with the Rule?

Compliance with this Proposed Rule is extremely expensive. It comes from the following categories:

- Compliance with Express Consent at all touch points
- Compliance updating with existing customers
- Devaluation of customer database
- Loss of revenues from reduced marketing scale
- Costs of alternative media to replace lost revenue

Compliance at all touch points:

By January 2, 2007, half of the top 100 retailers plus all of the other good, compliant users of voice marketing, will have to reprint all of their credit card applications, all of their loyalty applications, and overhaul the processes for customers to sign-up and sign-out of marketing. It's the cost of having to create a contract with every customer, to the scale of hundreds of millions of customers in many instances of the larger retailers, or at a minimum to a scale of 15 to 30 million customers. A client in this range will see many millions of card applications each year – 3 to 5 million. At 4 cents per application for

printing and distribution, each client would see \$120,000 to \$200,000 just in the application costs. They also have the costs of destroying all of the existing applications. Then, adding in the costs of the loyalty program they will likely see double the volume at similar costs adding in another \$240,000 to \$400,000, plus the costs of destroying existing materials. Then, the costs of processes to manage and track “customer marketing contracts”, this is difficult to quantify and would vary from client to client, but certainly would be a six figure expense. Even without this expense, each retail client would be looking at **\$360,000 to \$800,000** just to begin collecting new customer information in a compliant manner.

Compliance updating with existing customers:

As stated and documented earlier, customers find this medium useful. However, once the Proposed Rules take effect, the customer would be disconnected from this medium. Good companies will take the time and expense of going back to these customers and ask them to sign up to be Express Consent compliant. With a typical SmartReply client having over 15,000,000 customers, this will take an enormous expense. Assuming this was done simply with postcards that cost 40¢ each, plus a business reply card that costs 67¢ per reply, the costs would look as follows:

$$\$0.40 \times 15,000,000 = \$6,000,000$$

$$\$0.67 \times 5,000,000 = \$3,350,000 \text{ (assuming 30\% take the time to sign the marketing approval contract)}$$

This expense would then run \$9,350,000 per retail client just to get a third of their existing customer database into compliance with the Express Consent rules.

Devaluation of the customer database:

Recent thinking about the valuations of companies, especially from MIT, has shown that the value is only partially in the products and services, but more so in the brand and customer relationships. In the past 10 years, the valuation on customer relationship and brand has exceeded the value of the assets. With the Proposed Rules changes, this value is significantly reduced, not because customer relationships are reduced, but the ability to cost efficiently and relevantly connect with the customer base has changed. To quantify this would be a problem that academics of the highest caliber debate and beyond the scope of my skills, but it should be substantial, counting towards the literal valuation of the stock price of publicly traded companies.

Loss of revenue from reduced marketing scale:

It would appear that perhaps 10% of a typical company's business is compliant to the Proposed Rules. A typical client realizes about a \$10 gross return on investment for every dollar spent on voice marketing. This far exceeds what any other medium can deliver. Therefore, when companies spend \$200,000 on voice marketing, they are expecting to earn \$2,000,000 in revenues. With the Proposed Rules, companies that had spent \$200,000 will now only be able to

reach 10% of the audience, spending perhaps \$20,000, and therefore gaining a return of \$200,000. This amounts to a \$1,800,000 reduction in revenue. Of course, it will be offset by much less efficient spending and perhaps make up 30%, with a net opportunity cost of about \$1,260,000. In business, opportunity costs come out of earnings (specifically missed earnings reports) – it's revenue that these companies have come to expect, as have their shareholders.

Costs of alternative media to replace lost revenue:

This is the simplest cost to calculate of all. The nearest performing media is direct mail, which costs about four times more than voice marketing. Therefore, for every \$1 that a client was going to spend, now they must spend \$4 for the same results. So, to reach 2,000,000 customers each month will increase in cost by \$600,000.

3. What is the impact (including any benefits and costs), if any, on industry, including those who may be affected by these proposals but not obligated to comply with the Rule?

Some industries will gain as a result of the Proposed Rules, specifically direct mail, waste management, and paper recycling as direct mail will become the most likely alternative resulting in an estimated 79,200 additional trees being harvested for the paper to produce the compensating direct mail campaigns

(see 'Environmental Impact' in the Conclusion section of this document). Other industries where voice marketing has become an accepted communications medium will feel the pain. This relates to retail, some banking and financial, entertainment, hospitality, and media. These are all industries where communication with the customer is at the heart of the industry's success, and this sudden implementation of the Proposed Rule becomes an unjust tax on the customer relationship.

4. What changes, if any, should be made to the proposed Rule to minimize any costs to industry, individual firms that must comply with the Rule, and/or consumers?

In order of its ability to make an impact and relieve the costs to industry and firms of the Proposed Rules:

- 1) Permanently continue forbearance and rely on enforcement of EBR, DNC, TSR, and TCPA to clean up the few industry violators. This would eliminate the unnecessary burden on the majority of firms that comply with regulations and smart best practices, and would rein in the few companies that sour our feelings as consumers to telemarketing.
- 2) Grandfathering of existing databases for firms that develop forward-compliance policies. This would give companies incentive to comply

immediately, and time to migrate so that their business does not suffer many of the harmful expenses and loss revenue listed above.

3) Liberal definition of Express Consent that does not require a contract with a customer. A customer marketing contract, as the current Express Consent language describes, is a burden that will hinder relationships between company and customer. Liberalizing the definition of Express Consent to be more of an acknowledgement of forthcoming marketing, rather than a contract, with strong language and opt-out requirements will make the jobs of marketers and operations members more confident that this large task can indeed be tackled. This will have not financial savings if one of the other items listed in this question (#4) are not executed.

4) Delay of implementation for no less than 18 months. This will give sufficient time for marketing companies to get to speed without the multi-million dollar cost that the Proposed Rules have as effective on January 2, 2007.

5) Licensing of firms engaged in the practice of voice marketing, with the powers to revoke licenses. Rather than going down the path of Express Consent, why not make real legislation the requires licensing of firms that engage in pre-recorded message marketing. This way, reporting mechanisms and requirement are in place and when violations occur, there is no question who did it, what they knew, and the FTC actually has the power to revoke a license and shut down the violator, fine them, or monitor them to get it right.

5. How would each suggested change affect the benefits that might be provided by the proposed Rule to industry, individual firms that must comply with the Rule, and/or consumers?

See above comments in question 4.

6. How would the proposed Rule affect small business entities with respect to costs, profitability, competitiveness, and employment?

There is no doubt that the implementation of the Proposed Rule will result in a number of closed businesses, laid off employees, and significantly reduced profits. The businesses that will suffer are 1) the companies that provide voice services who are generally small businesses less than \$10 million in revenue, and 2) the small businesses that rely on voice marketing to cost effectively get their message out to a universe of engaged and interested customers.

On the first point, I have already heard of a number of small marketing firms that will close their doors by January 2nd if the Proposed Rules go into full, unbridled, effect. In many cases, these are the companies employing dozens of good people and the businesses themselves are the lifeblood of the owners – their dreams and hard work, their retirement, and their kid’s college plans. Though bad companies did violate existing laws, these small business owners had been doing everything exactly as the regulations required.

The second group – the businesses that use voice marketing – is a difficult to quantify group. SmartReply does not actively service this segment today, but I'm familiar with many that do and combined they have hundreds of small business clients. I would suspect that each of these small businesses will suffer if not fold.

7. How many small business entities would be affected by each of the proposed amendments?

See above.

C. Response to Questions on Specific Issues.

1. Should the Commission include an explicit prohibition of prerecorded telemarketing calls in the TSR?

No.

FACT: 99.7% of pre-recorded message recipients do not opt-out.

The only pre-recorded calls that are inherently abusive are those that are already not in compliance with the TSR, TCPA, DNC, and EBR requirements of the FTC and FCC. There has been no other study of consumer behavior

before and after receiving a properly compliant pre-recorded message to suggest that such calls should be deemed illegal. In fact, to the contrary, the numbers speak for themselves to the relevance of the messages. With only three people in 1,000 opting out of calls, it is clear that consumers are willing to receive fully compliant pre-recorded messages. Assumptions that these three people represent an army of frustrated callers are misplaced. In our own experience in following up with those who have opted-out of future calls, we find that often it is the husband that received the message, unaware that his wife had been relying on these calls for information, or it is the consumer that simply no longer finds interest or value in the brand that initiated the message. The vast majority of these opt-outers people – when we talk with them on the phone – are not angry, hostile, or disapproving of voice marketing. They were just making a change. So, it is unsafe to extrapolate a small number of opt-outs into anything bigger. It is an amazing small number – three tenths of one percent – and there is no reason to believe that the majority of the 99.7% that didn't opt-out have any ill-will toward the medium. With numbers in that kind of a ratio – and given the ease of opting out, clearly at least some overwhelming majority finds value in pre-recorded messages.

2. Is the Commission correct in its understanding that a reasonable consumer would consider prerecorded telemarketing sales calls and prerecorded charitable solicitation calls to be coercive or abusive of his or her right to privacy?

No.

The only comments that we have ever heard about pre-recorded calls being abusive are directly related to the political calls that politicians make in election season, coincidentally, this very week. Otherwise, we have never heard of calls from a company with whom an individual holds a loyalty card, credit card, or is a high-end buyer complain that they were notified once a month (at most) about something very interesting to them.

We comply with all of the federal and state regulations, but more than that, we comply with the brand promise of our clients. They are unwilling to violate or abuse their customer relationships. The only companies that are in a position to abuse pre-recorded messages are those that have no customer relationships and are unafraid of violating the existing laws. These companies will *spam* the world to try and build their business, and it is the jurisdiction of the FTC to stop them. Anyone else that complies with EBR will not abuse their customers, and will be relevant with every customer contact.

- 3. Does a consumer's choice not to list his or her telephone number on the Do Not Call Registry indicate not only that he or she is willing to accept live telemarketing calls, but also prerecorded telemarketing calls?**

Yes.

If a person lists themselves on the do not call list, they should never receive a call from a company with which they do not a) have an established relationship, or b) have express consent, whether that is by live agent or by pre-recorded message. That is one of the beautiful parts of the DNC legislation that it allows me as a consumer to engage in deeper business relationships where I already conduct business, without the annoyance of someone always cold selling to me.

4. Should the Rule specify disclosures that must be made when obtaining a consumer's express written agreement to receive such calls? If so, what disclosures are needed?

No. Express Consent cannot become a burdensome document or contract or neither industry nor consumer will participate. It's critical that Express Consent be obtained with minimal effort and minimal commitment (i.e. – reading and signing a form) from the customer, especially when that customer is already conducting business with this company.

5. What is the effect on consumers' privacy interests, if any, of not applying the call abandonment safe harbor requirements to calls left on consumers' answering machines?

None. Abandonment by definition involves calls answered by live persons. Calls answered by machines can not be abandoned.

6. Are prerecorded messages left on answering machines less intrusive than prerecorded messages answered by a person?

Yes, but calls answered by a person can be welcomed, non-intrusive and valuable for both the caller and the recipient of the call. Using readily available technology, a "live ear" message can be engaging and give the recipient the opportunity to interact and discover new things of interest, or to immediately opt-out. In our experience, "live ear" calls are welcomed because people can find out store hours, alternate store locations, and specific sale items through an IVR which is not as easy for a message delivered to an answering machine.

7. What are the costs and benefits to consumers, if any, of allowing companies to leave prerecorded messages, as opposed to live messages, on consumers' answering machines? Do consumers incur additional costs in terms of (a) paying for storage of messages they do not want; (b) exceeding their allotted storage capacity; (c) being unable to receive

messages they want or need; (d) being unable to use home telephone lines tied-up by prerecorded messages; or (e) retrieving messages? Do consumers receive additional benefits, such as lower marketing costs that are eventually passed on to them?

There is no question that consumer receive lower costs as a result of lower marketing expenses. The next most effective marketing medium is 300% more expensive than voice marketing – this allows scale of marketing effort, reduce cost-pre-response, and overall higher ROI. This ultimately is passed on to the customer through lower product costs.

The only other benefit among those listed in the text of question #7 is that a pre-recorded message is carefully recorded so that it is clearly understandable, and that it is brief. Live agent telemarketers are notorious for leaving garbled and lengthy messages that require consumers to listen, re-listen, and try to interpret what is being said. Voice marketing is far more clear and concise.

- 8. What are the costs and benefits to companies in not having to apply the call abandonment safe harbor limit to calls left on answering machines?**

- 9. Should a 30-day standard, if adopted, cover all of a telemarketer's campaigns within that period, be limited to a single campaign, or be limited to the duration of each campaign?**

- 10. Are there significant efficiencies that can be obtained with a requirement to meet a 30-day standard averaged across all of a telemarketer's campaigns that cannot be obtained with a 30-day campaign-specific requirement? If so, what are they and what effect do they have?**
- 11. Are there technological problems that limit the ability of telemarketers who are running multiple campaigns to measure abandonment rates separately for each campaign? If so, what are they, how many telemarketers do they affect, what remedies, if any, are available, and what is the cost of such remedies?**
- 12. Are upgrades available that can reduce the rate at which predictive dialers place calls in the case of an unexpected spike in call abandonments, so that it would not be necessary to run them manually?**
- 13. Would retaining a "per campaign" standard, but extending the period over which the call abandonment maximum is measured, make the use of smaller segmented lists by small businesses and other sellers more economical? Please provide specific examples of why or why not.**

14. What effect would the proposed change in the standard for measuring the call abandonment rate have on the number of abandoned calls that consumers receive?

15. Do small businesses and other sellers have alternatives that are equally or more effective and economical than live telemarketing, such as postcard or email announcements, to notify their established customers of sales offers and to obtain orders? Would the costs of such alternatives be outweighed by benefits to consumers in avoiding additional abandoned calls to their homes?

No they do not have such alternatives which would be as effective or welcomed by consumers.

IV. CONCLUSION

Thank you for collecting comments on this Proposed Ruling. I think the underlying question around all of the pre-recorded calls is this: *do people like or hate pre-recorded calls?* Clearly, this must be contentious or we wouldn't be at this point.

I submit to the FTC that pre-recorded calls that follow the existing laws are indeed welcomed by a majority of customers. As evidence, I submit as part of the comments the analysis entitled, "*Measuring and Deducing Consumer Acceptance of Live Pre-recorded Calls with Prompt Opt-*

Out Mechanisms Across Ten Companies over Eight Months.” In it, you will see deductive evidence that consumers welcome these calls, even when receiving them month after month. Therefore, the question must be reposted: *if they like calls, then what don’t they like that they keep bugging the FTC about?* That is, after all, the heart of the matter. How can people simultaneously like pre-recorded calls, and hate pre-recorded calls? This is a matter of compliance. The “bad” messages are predictably those from companies that don’t comply with existing laws. The “good” messages are from companies that embrace the law, and exceed it with brand-enhancing best practices. Although the FTC does not believe this to be so, I have personally sat in hundreds of client meetings where they have explicitly said that they wanted to tighten up the targeting of the message – well beyond compliance requirements – in order to deliver a better customer experience.

However, if the Proposed Rules go into effect, we are asking the FTC to carefully consider a few components of *how* it is implemented:

- 1) Form of Express Consent: please clarify the terms and form of Express Consent, the application of Federal E-SIGN legislation, and the application of Express Consent online/electronic, over a telephone, and in-store/in-person.
- 2) Grandfathering of Existing Databases: the existing customers of our clients are what fuel their businesses, and abruptly removing a key communication tool of voice marketing could have serious financial implications. These companies all want to comply with the latest regulations, and given their performance on calling hundreds of millions of customers each year with 99.7% not opting-out, they clearly know how to treat them. So, we ask that the FTC permit customers to grandfather in their

existing customers and begin new data capture techniques if and when Express Consent rules the land.

- 3) Stay of Implementation: The FTC has provided barely 90 days notice, which is insufficient to swing into full compliance, and we ask the FTC to grant a stay of not less than 18 months.
- 4) Answering Machine Messages: messages left on answering machines are appreciated by far more customers than not, according to deductive logic that 99.7% do not opt-out, and only 0.3% do opt out. The numbers are entirely overwhelmingly in favor of a positive experience with answering machine messages, and the FTC should clearly not go against these mighty numbers, rather, go after the very few violators that give pre-recorded messages a tarnished name.

There are additional key issues that I would like to address in the conclusions, which the FTC did not specifically request comment on, but which are under the legislative microscope, and to some degree mentioned in the Proposed Rules. Environmental impact, The Paperwork Reduction Act, and alternatives to a pre-recorded live ear message delivery.

Environmental Impact

SmartReply is one of many companies in the voice marketing field. We will deliver approximately 200,000,000 messages in 2006. Competitors are likely in the same average range, for a total market wide distribution of likely between one and two billion messages delivered annually. With the Proposed Rules, companies will be forced to either plan to reduce revenues (not something very likely) or to adopt alternative mediums, the most

likely of which is direct mail. So, potentially the Proposed Rules will convert voice marketing messages back to between one and two billion pieces of direct mail each year. This has been discussed previously from a financial impact, but from an environmental impact this will definitely harm the environment. Assuming 1.5 billion pieces of direct mail postcards only are generated as a result of the Proposed Rules, at an average weight of only 2 grams – much less than most postcards weight – the Proposed Rules would be responsible for 6,600,000 pounds (3,300 tons) of paper, which works out to 79,200 trees (according to Claudia Thompson in her book *Recycled Papers: The Essential Guide*, Cambridge, MA: MIT Press and in a study by the University of Maine). This is not a small environmental impact, and it can be clearly stated that prerecorded calls deliver the same or better marketing result and customer experience without the loss of a single tree.

The Paperwork Reduction Act

Changes to regulation are required to be scrutinized under the terms of The Paperwork Reduction Act, as is pointed out by the FTC in the Proposed Rules. The FTC makes a misjudgment of incredible magnitude in the statements: (reference OMB Control Number 3084-0097)

(Page 56) The proposed amendment explicitly limiting the use of prerecorded telemarketing calls will not change the existing paperwork burden on sellers and telemarketers....Thus the proposed amendment will, if anything, reduce the paperwork burden and the amount of time required for telemarketers to

comply with the TSR...The FCC regulation prohibits prerecorded calls delivering unsolicited advertisements or telephone solicitations to residential telephones unless, *inter alia*, the caller has an “established business relationship” with the person called, or has obtained that person’s “prior express consent” to receive such calls. The proposed TSR amendment therefore will not change the paperwork burden by the pre-existing FCC regulation.

(Page 60) The proposed rule amendment explicitly prohibiting prerecorded telemarketing calls answered by a person unless the consumer has agreed in writing to accept such calls will affect the TSR’s recording keeping requirements insofar as it would compel regulated entities to keep records of such agreements under the general recordkeeping requirements of the existing rule. It appears, however, that there should be no change in this burden since regulated entities, regardless of size, already should be maintaining records of such agreements in the ordinary course of business in order to demonstrate compliance with existing FTC and FCC restrictions on prerecorded calls, as explained in the Paperwork Reduction Act discussion. Likewise, the prerecorded calls amendment would not impose or affect any new or existing

reporting, record keeping or third party disclosure requirements
within the meaning of the Paperwork Reduction Act.

The error in judgment is the assumption that all prerecorded calls are already captured using Express Consent marketing agreements, signed and stored by the calling party. In fact, in a survey of SmartReply clients, only about 20% of their database has been built using “sign-ups,” the rest captured in compliance with Existing Business Relationship (EBR) guidelines, and EBR does not require signature, paperwork, or documentation to the same extent as the Proposed Rule’s express consent. EBR is proven with transactional records, which documents when an individual person makes a purchase or conducts a transaction. To be clear: EBR does not require any paperwork. The Proposed Rules impose paperwork.

The scope of this change is not 100% of the customer database. Some paperwork does already exist in small doses. For the 20% of the data that is captured using pen-and-paper, roughly split in half, 10% of our client databases on average are from proprietary house credit cards, which require signatures, disclosures, and storage of the documents. Another 10% is from loyalty programs, which are generally used only for data capture and do not have the additional tests of customer signatures or binding agreements, terms and conditions. These are captured at the will and leisure of the customer. The 80% balance is captured through email sign-ups, in-store phone number capture (“may I have your phone number to let you know about specials at our store?”), and the like. These 80% do not have any paperwork whatsoever, and the Proposed Rules will impose a burden of disproportionate magnitude on both the calling company (burden: to have stringent rules for capturing signed documents from customers, authenticating, and storing them)

and on the call recipient (burden: filling out and signing agreements with every company from whom they already gladly receive messages from). So, using numbers previously described with an average retail customer database of 15,000,000 customers, the company would be expected to have about 1,500,000 pieces of paper (10%) that meet the Proposed Rule requirements from their proprietary house credit card sign-ups. The Proposed Rules would then require them to gather 13,500,000 signatures and Express Consent agreements that are not a normal part of their business. The FTC's error in judgment is staggering on this item as the paperwork requirements fundamentally change the way that these companies would interact with their customers and adds a tremendous paperwork burden where previously none existed.

Alternatives to Live Pre-recorded Message Delivery

The Proposed Rules would explicitly eliminate live pre-recorded messages. Alternate messages would be sought after for the live pick up by the call recipient. As far as we can guess, these calls would fall into one of the following categories:

- Informational call – not regulated under telemarketing
- Live agent switch
- Other (political call, etc) – not regulated under telemarketing

As the attached analysis demonstrates, the current live-ear message delivery is widely accepted by SmartReply's client's customers, and we believe this is a truth throughout the industry. However, when the FTC's Proposed Rules come into effect, there is a very real chance that companies will be forced to deliver *less relevant live-ear messages* in order to be compliant.

Informational Calls: The messages that could be delivered and which fall outside the jurisdiction of telemarketing include informational messages. So, while in our first client example the answering machine pre-recorded message would remain equally relevant, the live pickup would be detected and an informational message would be played for the call recipient. What this content would be, I am not sure, but I can guarantee that neither the calling company, the call recipient, nor SmartReply would be happy delivering or receiving it.

Live Agent Calls: This is, for the most part, an impractical answer. Among the key benefits for the application of voice marketing is the ability to deliver relevant messages en masse at low costs. To accommodate a live agent switch on a live pickup would require either a) throttling back the scale and speed of the campaign, or b) having a resource pool of tens of thousands of live agents ready to leave a message. Ultimately, what benefit does a live agent present to the call recipient? They are leaving the same message, except that the call recipient will feel more personally obligated to listening to the caller (whereas with pre-recorded messages, they can hang up without guilt), and they will have to verbally ask to be removed (whereas with pre-recorded messages they simply press 1 to be removed at anytime). The costs of having an army of live agents is enormous and will promote lower-cost and lower-quality call center providers. In addition, the FTC does not mandate nor control the quality of the message nor the ability for the calling party to speak plainly and clearly, therefore, the consumer is very likely to get a hurriedly mumbled statement from a random call agent, whereas with pre-recorded messages they would receive a carefully scripted and professionally recorded message from trained voice talent. Forget marketing results and costs – as a consumer – which

would *you* rather receive? Research from Forrester also suggests that consumers prefer a pre-recorded message to a live agent. So, with the benefits of preferring a pre-recorded message over an agent, having a higher quality message over an agent, and having the guilt-free ability to terminate or opt-out of the call, clearly the consumer benefits of receiving a live pre-recorded message are superior to that of receiving a live agent standing in place of a pre-recorded call in all circumstances as it relates to voice marketing.

Other/Political Calls: In an effort to avoid regulation, we will certainly see some companies pairing up with politicians to replace the live pre-recorded message. Politicians are conveniently exempt from all of these pre-recorded telemarketing regulations and can use pre-recorded calls to contact any individual, regardless of EBR and DNC status in order to market themselves and solicit a vote or support on issues. So I anticipate that some providers will align with politicians, and when the company is delivering a message about “special savings for our loyalty club members” but incidentally the customer is home and pick’s up the phone, the technology will be switched to a live pre-recorded message from your state or federal politician urging you to support him or her on their quest to combat the evils of the opposing political party. The customer will be completely unaware that they were originally supposed to receive a welcomed alert message about their loyalty program benefits. However, the heard about political nonsense and if they are at home at the same time next month, it’ll happen again because politicians are not required to offer an opt-out or to suppress any phone numbers. So, although the company that initiated the marketing campaign remains anonymous because the call appeared to come from a politician, the net result is that the Proposed

Rules will take a medium that is welcomed today, and turn it into something ugly by force of compliance regulations.

Why call recipients opt-out

FACT: Over 20% of households in the US move each year.

This computes to 0.38% of US households moving per week.

FACT: The average opt-out rate of pre-recorded marketing messages is 0.30% per campaign (usually once per month).

In this comment document and the attached study, there have been many notations about opt-out rates, but no discussion about *why customers opt-out*. The initial assumption is that someone no longer wants to receive a call, and perhaps the FTC has even implied that no one wants a pre-recorded message. However, with 99.7% of calls not being opted out from, this reason suddenly seems superficial. People:

- Move away
- Grow out of a market (babies grow up and no longer need diapers)
- Have bad experiences
- Find better options (competition)
- Have personal financial ebbs and flows

For example: In research completed by the National Retail Federation, the Peppers & Rogers Group, Purdue University, and many others, and in confirming conversations with our clients, retail companies face a customer attrition rate of between 33% and 50% per year. In other words, a third of this year's customer will not be next year's customers.

This has been the state of retail for decades. So, it's surprising that – given this fact – the opt-out rates are not strikingly higher. In other words, why would only 0.3% of customer opt-out, when 33% aren't even shopping there this year? The truth comes back to basic marketing – no intelligent company is going to invest marketing dollars on infertile soil where the customer is not responding. In other words, when it is clear that a customer has discontinued their retail relationship, the retail has also 'caught the drift' that further investment is a waste of money and time, therefore, the right customers get the message and the fading customers are no longer marketed to. So, it's important that the FTC recognize that self-regulation is an important aspect to any targeted communications strategy, along with the EBR requirements, so that customers who have long discontinued their relationship are assured that they are automatically on the best Do Not Call list of all – the "I don't have a business relationship with you" do not call list.

Conflicting facts: Approved abandonment rates exceed opt-out rates.

FACT: The FTC permits 3% of calls to be abandoned from a live agent.

FACT: The average opt-out rate of pre-recorded marketing messages is 0.30% per campaign.

It's an important note that opt-outs are so low – lower even than the FTC's strictest new guideline for call abandonment from live agent calls. Perhaps a similar requirement could be applied to the pre-recorded marketing message industry – a maximum opt-out rate, and require instant opt-out from live pre-recorded calls.

Finally – I think the FTC would find a welcome audience of pre-recorded message service providers and heavy users that would be excited to discuss a new set of Proposed Rules to make

it more difficult for “bad” voice marketing practices to exist. I know that I would be an engaged and involved participant. Some suggestions that should be considered, if such a meeting were ever to happen: reducing EBR from 18 months to 12 months, creating a licensing, approval and administrative process for pre-recorded message providers, setting standards for frequency of message delivery, and perhaps for empowering a self-regulating industry body to guide, police, and protect the providers, users, and call-receiving consumers.

I appreciate the chance for further conversation – please contact me at the information below.

Best regards,

Eric Holmen

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