

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

TSR Prerecorded Call Prohibition and
Call Abandonment Standard Modification

Project No. R411001

COMMENTS OF XPEDITE SYSTEMS, LLC d/b/a

PREMIERE GLOBAL SERVICES

Xpedite Systems, LLC d/b/a Premiere Global Services ("Premiere Global Services") hereby submits these Comments in the above-referenced proceeding in which the Federal Trade Commission (the "FTC" or the "Commission") proposes amending the Telemarketing Sales Rule ("TSR") to expressly prohibit prerecorded telemarketing calls to a consumer without the consumer's prior written consent.¹

INTRODUCTION

Premiere Global Services is a global outsource provider of business process solutions that enable its enterprise customers to deliver business communications, including prerecorded voice messages. These services allow customers to transmit messages of various types via email, fax, voice and text messaging. Premiere Global Services' customers provide Premiere Global Services with the messages they wish to have distributed (in the case of prerecorded messages, these are recorded by the customer and uploaded) and the telephone numbers to which these communications should be transmitted.²

Premiere Global Services delivers its solutions via its global, on-demand platforms to an established customer base of approximately 60,000 corporate accounts, including a majority of the Fortune 500. Premiere Global Services' customers include for-profit businesses in nearly every business sector, including healthcare, technology, publishing, financial services, travel and hospitality, as well as non-profit organizations, local governments and public institutions. Customers apply Premiere Global Services' solutions in order to increase efficiency, to improve productivity and to raise customer satisfaction levels. On behalf of these diverse clients, Premiere Global Services delivers prerecorded telephonic messages ranging from emergency alerts and community-oriented notifications, such as school closings, to confirmations of reservations and appointments, to subscription renewals, to collections matters, to political

¹ See *Denial of Petition for Proposed Rulemaking; Revised Proposed Rules with Request for Public Comment; Revocation of Non-Enforcement Policy; Proposed Rule*, 71 Fed. Reg. 58716 (Oct. 4, 2006) ("2006 NPRM"). While the 2006 NPRM addresses various matters, Premiere Global Services confines these Comments to the Commission's proposed rules restricting prerecorded telemarketing calls.

² Premiere Global Services does not pre-screen, edit or review its customers' messages and therefore does not know when a customer is using Premiere Global Services' system to send covered telemarketing messages versus other non-regulated prerecorded messages. Rather, Premiere Global Services makes its services available to its customers for lawful uses, and requires customers to comply with applicable federal and state laws and regulations, including telemarketing regulations.

messages. Some specific examples of service applications using Premiere Global Services' systems include distribution of information to clients in the financial services and banking industries and membership communications (e.g., trade associations communicating with their members).

Based on its experience, Premiere Global Services believes that prerecorded messages provide an important, cost-effective tool for its clients to reach their intended recipients, and that an outright ban on prerecorded telemarketing calls absent express consent disserves not only sellers and consumers, but other entities whose use of prerecorded messages for largely informational purposes may suffer as a result of such a sweeping ban. Accordingly, Premiere Global Services supports a prerecorded call rule that balances consumer protection concerns with legitimate industry interests by allowing prerecorded telemarketing calls in certain circumstances and under specific conditions.

I. THE FTC SHOULD ALLOW EBR-BASED PRERECORDED TELEMARKETING CALLS THAT PROVIDE CONSUMERS WITH AN EFFECTIVE OPT-OUT MECHANISM

In these Comments, Premiere Global Services urges the Commission to revise its proposed rules by adopting an existing business relationship ("EBR") exemption to the prohibition on prerecorded telemarketing calls. Premiere Global Services supports the comments of the Direct Marketing Association and others that prerecorded telemarketing calls to existing customers should be permitted. In order to align this EBR exemption with consumer privacy principles, the FTC should require sellers and telemarketers delivering prerecorded messages to EBR consumers to provide a prompt and clear opt-out mechanism at the beginning of each call enabling the consumer to exit the sales call and request placement on company-specific Do-Not-Call ("DNC") lists by pressing a button on the telephone key pad to submit an automated opt-out request. By adopting this automated opt-out requirement, the FTC can ensure that prerecorded calls afford the same DNC rights as live calls. This approach effectively balances consumer protection concerns with legitimate business and consumer interests in permitting telemarketing through prerecorded messages where there is an EBR.

A. Opt-Out Mechanisms Protect Consumers' Interests

In the *2006 NPRM*, the Commission noted that its prior record indicated a lack of support by industry stakeholders as well as consumers to support the inclusion of opt-out mechanisms in prerecorded telemarketing calls that would enable consumers to exit the sales call and register for a company-specific DNC list during the prerecorded message.³ According to the Commission, without such opt-out mechanisms, an outright ban on prerecorded telemarketing calls is necessary to protect consumers' privacy interests:

In the absence of any mechanism widely acceptable to industry and consumers that would provide recipients of prerecorded telemarketing messages the opportunity to assert their Do Not Call rights "quickly, effectively and efficiently," the Commission does not believe that it can craft conditions for the proposed safe harbor that would preserve the balance between the consumer

³ See *2006 NPRM* at 58725.

privacy interests that Congress intended to protect and the interest of sellers and telemarketers in communicating sales and promotional offers to their established customers via prerecorded messages.⁴

In the nearly two years since industry and consumers submitted comments leading to the FTC's 2006 NPRM and the specific conclusion quoted above,⁵ the feasibility of opt-out mechanisms and consumer acceptance of such mechanisms have improved. In 2004, industry commentators objected to the opt-outs proposed by the FTC in its 2004 NPRM largely on grounds that such mechanisms would prove technologically challenging as well as costly. Today, technological developments have transformed such opt-outs into readily available, cost-effective components of prerecorded message delivery systems. Further, use of such opt-out mechanisms over the last two years by telemarketers operating in accordance with the Commission's safe harbor guidelines has helped to familiarize consumers with such mechanisms. Premiere Global Services' system can be utilized by customers to elect an opt-out feature at the beginning of a prerecorded message.

Moreover, by requiring an opt-out mechanism, the FTC will establish parity between live calls and prerecorded calls. Mechanisms providing consumers with the ability to terminate prerecorded calls and request removal of their names and numbers from EBR-customer lists simply by pressing a button on their telephone key pad largely erase any DNC-related differences between live and prerecorded calls. In fact, the button-option for prerecorded calls may prove more consumer-friendly and hassle-free than the availability of live operators, allowing consumers to assert their DNC rights even more "quickly, effectively and efficiently." Several consumers who have filed comments in this docket have advocated an automated opt-out approach as an effective means of allowing them to receive prerecorded telemarketing while presenting an easy, non-intimidating, automated opt-out mechanism.⁶ Attaching an opt-out requirement to an EBR exemption, the Commission will uphold consumer protection principles while recognizing the validity of industry and consumer interests in prerecorded calling.

B. Legitimate Business Interests in an EBR Exemption for Prerecorded Calls

Premiere Global Services submits that the FTC's proposed ban on "[i]nitiat[ing] any outbound telemarketing call that delivers a prerecorded message when answered by a person, unless the seller has obtained the express agreement, in writing, of such person to place prerecorded calls to that person"⁷ sweeps too broadly, and gives too little consideration to the legitimate interests of sellers and telemarketers in using prerecorded messages to reach their

⁴ *Id.*

⁵ The FTC last solicited comments on prerecorded telemarketing calls in November 2004. *See Telemarketing Sales Rule, Notice of Proposed Rulemaking*, 69 Fed. Reg. 67278, 67289 (Nov. 17, 2004) ("2004 NPRM").

⁶ *See, e.g.*, Comments of Pilla, B., No. 525547-00021 ("I like automated messageing [sic], recorded messages are less intrusive and coercive than live agent telemarketing; they do not argue with you or attempt to overcome your objection & if the companies offer explicit opt-out option, recorded messages make it easier for me to be added to a company's do not call list"); Bailey, A., No. 525547-00071 (supporting prerecorded telemarketing calls with opt-out option); Auburn, R.J., No. 525547-00129 (supporting prerecorded telemarketing calls with opt-out option); Martin, D., No. 525547-00025 (supporting prerecorded telemarketing calls with opt-out option).

⁷ 2006 NPRM at 58726.

customer base, and to consumers who may wish to be apprised of commercial offerings from a company with whom they have done business.

For many businesses, existing customers prove a reliable source of future customers. Good relations with existing customers are essential to any successful enterprise, and an informational call to existing customers combined with a sales pitch generally represents a solid, two-birds-with-one-stone investment for companies. The legitimate business purposes underlying marketing efforts to existing customers are recognized by the prevalence of EBR exemptions in different telemarketing contexts.⁸ As the Commission itself has previously recognized, businesses' ability to contact existing customers is "necessary and appropriate," and "consistent with consumer expectations."⁹

Consumers value many prerecorded call services, particularly those that are informational in nature and for alert, notification or confirmation purposes, but also those that relate to products and services in which consumers have previously evidenced an interest, namely through their purchases.¹⁰ The low rate of DNC opt-outs reported by telemarketers reinforces general consumer receptivity to marketing calls from companies with whom consumers have an EBR.¹¹ In this vein, the FTC should reconsider the significance of the record of consumer complaints compiled in response to the *2004 NPRM*. Telemarketing abuses perpetrated by relatively few bad actors should not determine the regulatory landscape for the entire telemarketing industry, but rather should be addressed through appropriate enforcement actions. Since 1992, the FCC has permitted prerecorded telemarketing calls within the context of an EBR, and has utilized enforcement mechanisms to address non-compliance. The FCC has never found the need to bar prerecorded telemarketing calls in EBR situations, concluding that the EBR exemption is "necessary to allow companies to contact their existing customers" and to "avoid interfering with ongoing business relationships."¹² The FCC has found this prerecorded EBR exception consistent with the overall federal Do Not Call Registry regime.

⁸ The FTC and the Federal Communications Commission ("FCC") permit EBR calls in various telemarketing contexts. See 15 C.F.R. § 310.2(n) (FTC regulation defining EBR); 15 C.F.R. § 310.4(b)(iii)(B)(ii) (FTC regulation exempting EBR calls from certain DNC restrictions); 47 C.F.R. § 64.1200(f)(3) (FCC regulation defining EBR); 47 C.F.R. § 64.1200(a)(2)(iv) (FCC regulation permitting prerecorded calls to residences where there is an EBR).

⁹ *Telemarketing Sales Rule, Final Amended Rule*, 68 Fed. Reg. 4580, 4592 (Jan. 29, 2003).

¹⁰ See, e.g., Craig, C., No. 525547-00110 ("I believe we should all have the right to receive messages from companies we have a relationship with for more opportunities for savings or new goods or services being offered from those companies;" "I also more appreciate receiving the pre-recorded calls as opposed to a live call as I have the option to save the message for later if I don't have time to listen to it or if I want to save it as a reminder for later"); Rankin, T. No. 525547-00136 ("As a consumer I like getting updates on new services available from my cable company or special offers from my wireless company. What I don't like is sales attempts 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 for my chosen companies to contact me."); Knoll, C., No. 525547-00162 (supporting EBR prerecorded telemarketing calls);

¹¹ For example, so far in December 2006 Premiere reports an approximately 1% opt-out rate for prerecorded calls by customers who obtain an opt-out telephone number from Premiere Global Services. This appears consistent with other industry commenters. See, e.g., Comments of SmartReply, Inc. at p. 12 (noting that in its experience, 99.7% of customers that receive pre-recorded calls do not opt-out).

¹² *Rules and Regulations Implementing the Telephone Consumer Protection Act*, 18 FCC Rcd. 14014, ¶ 156 (2003).

Further, a broad ban on prerecorded telemarketing calls would not only curtail many otherwise welcome marketing calls, but could also have chilling effect on largely informational prerecorded calls that consumers have come to value and rely upon.¹³ Given uncertainty as to the regulatory dividing line between informational and telemarketing calls, many companies may reasonably choose to limit their otherwise beneficial use of prerecorded calling rather than risk an FTC enforcement action.

Finally, industry stakeholders as well as consumers have a legitimate interest in regulatory uniformity and certainty with respect to EBR exemptions and prerecorded calls. As the FTC is well aware, FCC regulations as well as many state laws permit prerecorded calls to EBR customers.¹⁴ And while this lack of regulatory consistency will prove burdensome to businesses, it will also prove confusing for consumers, who will have no clear picture of when and for whom an EBR permits a prerecorded telemarketing call, and when and for whom it does not.¹⁵

II. IF THE COMMISSION ADOPTS ITS PROPOSED RULE, IT SHOULD ADOPT FLEXIBLE GUIDELINES FOR OBTAINING CONSUMER CONSENT TO PRERECORDED TELEMARKETING CALLS AND OTHERWISE DELAY THE EFFECTIVENESS OF SUCH A REQUIREMENT FOR SIX MONTHS

Premiere Global Services believes industry and consumers would best be served by an EBR exemption to the FTC's proposed ban on prerecorded telemarketing calls, subject to the conditions set forth above. However, in the event the Commission decides to adopt its proposed rule requiring the written consent of the consumer for prerecorded telemarketing calls, based on the stakeholder interests in EBR-prerecorded calling discussed above, Premiere Global Services urges the Commission to construe such a written consent requirement as broadly as possible.¹⁶

Finally, if the Commission adopts a written consent requirement, Premiere Global Services supports the request of the Direct Marketing Association ("DMA") that the effectiveness of any such requirement be delayed for six months.¹⁷

¹³ See, e.g., *TSR Prerecorded Call Prohibition and Call Abandonment Standard, Project No. R411001, Emergency Petition to Delay the Effective Date of Amended Section 310.4(b)(1)(v) and to Extend Forbearance from Prosecution Pursuant to Such Rule*, filed by medSage Technologies LLC (Nov. 30, 2006) (noting that many of its informational calls may constitute telemarketing calls for purposes of FTC regulations). Comments of Loop, LLC, No. 525547-00063 (expressing concern that auto dealer notification service reminding customers of appointments and expiration of leases and warranties could be deemed telemarketing); Capelouto Termite & Pest Control, Inc., No. 525547-00131 (expressing concern that notifications for renewal of annual termite service could be deemed telemarketing); The Joplin Globe, No. 525547-00177 (expressing concern the notifications for expiration of subscriptions could be deemed telemarketing)

¹⁴ See 18 FCC Rcd. 14014, ¶ 156.

¹⁵ See, e.g., Comments of Christianson, L., No. 525547-00027 ("I feel the FTC and FCC should 1) be on the same page with their rules and regulations and 2) take a closer look at how they define these types of pre-recorded messages in the rules and regulations").

¹⁶ See Comments of DeSimone, H., No. 525547-00161 (stating that written consent requirement would be taxing for companies and consumers); Agranovsky, A., No. 525547-00019 (describing written consent requirement as "way too restrictive").

¹⁷ *TSR Prerecorded Call Prohibition and Call Abandonment Standard, Project No. R411001, Request for Extension of Time for Non-Enforcement Policy*, filed by DMA (Nov. 29, 2006).

CONCLUSION

In sum, Premiere Global Services urges the Commission to allow telemarketers and sellers to deliver prerecorded messages to consumers with whom they have an EBR, provided that they offer the consumer a prompt, hassle-free opt-out mechanism. Such a rule would protect the interests of consumers without denying businesses an important tool for contacting their customer base. However, in the event the Commission adopts its proposed rule, Premiere Global Services asks that the Commission interpret its written consent requirement as broadly as possible, and to delay the effectiveness of any such requirement for six months.

Respectfully submitted,

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