

EXHIBIT 7

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)
)
) CG Docket No. 02-278
)

COMMENTS OF SOUNDBITE COMMUNICATIONS

John Tallarico
Vice President, Product Management
SoundBite Communications, Inc.
22 Crosby Drive
Bedford, MA 01730
(781) 897-2500

Howard J. Symons
Ernest C. Cooper
Mintz, Levin, Cohn, Ferris, Glovsky and
Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

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SoundBite Communications, Inc. (“SoundBite”) submits the following comments in response to the Notice of Proposed Rulemaking (“2010 Telemarketing NPRM” or “NPRM”) in the above-captioned proceeding.^{1/}

INTRODUCTION AND SUMMARY

SoundBite is a leading provider of automated voice messaging services, offering integrated voice, text, and email messaging solutions that organizations in industries such as collections, financial services, retail, telecom and media, and utilities rely on to send messages for collections, customer care, and sales and marketing applications. SoundBite supports the Commission’s stated goal of harmonizing Federal Telecommunications Commission (“FCC”) telemarketing rules with the rules recently adopted by the Federal Trade Commission (“FTC”) requiring express written consent for prerecorded telemarketing messages. Inadvertently or otherwise, however, the NPRM goes far beyond harmonization with the FTC rules by significantly curtailing not just prerecorded telemarketing messages but also autodialed and prerecorded *non-commercial* messages to wireless telephones without written consent. If adopted, the FCC’s proposed rule will essentially eliminate one of the most effective and well-

^{1/} *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 25 FCC Rcd 1501 (2010) (“2010 Telemarketing NPRM” or “NPRM”).

received methods for companies, non-profit organizations, schools, and governments to contact their customers, employees, members, and constituents with important information ranging from delivery reminders, to meeting schedules, to school closing notices, to product recall information, and more. The FCC's longstanding current policy – recognizing that a person who gives a company or organization his or her wireless telephone number as a contact number is expressly consenting to be called at that number – is a common-sense approach that has served the public well. The FCC should decline to adopt the proposal to extend the FTC's express written consent requirement to autodialed and prerecorded informational calls.

I. THE PROPOSED RULE CHANGE WITH RESPECT TO NON-COMMERCIAL PRERECORDED CALLS TO WIRELESS PHONES IS INCONSISTENT WITH THE FTC'S APPROACH

While harmonizing the FCC's telemarketing rules with the written opt-in requirement recently adopted by the FTC is a positive goal, the FTC's rules do not apply to autodialed and prerecorded informational calls to wireless phones. The goal of harmonization requires no change to existing FCC rules on such calls.

A. The FTC Expressly Exempted Non-Commercial Calls from Its 2009 Rule Requiring Express Written Consent.

Throughout its lengthy consideration and eventual adoption of rules requiring an express written agreement for prerecorded telemarketing calls, the FTC consistently reassured both companies and consumers that the rules would apply only to telemarketing calls, and would not restrict informational calls that many consumers find valuable.^{2/} Introducing its proposed rule in

^{2/} See, e.g., *Telemarketing Sales Rule, Final Rule*, Federal Trade Commission, 73 Fed. Reg. 51164, 51202, n. 467 (2008) (“Thus, the amendments will not apply to purely ‘informational’ outbound calls that do not induce the purchase of goods or services or a charitable contribution.”) (“*2008 FTC Rule Amendments*”). The FTC recognized that it has no statutory authority under the Telemarketing Consumer Fraud and Abuse Prevention Act, which authorizes the agency's Telemarketing Sales Rule (“TSR”), to adopt rules restricting non-telemarketing, informational calls. See Telemarketing Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, 108 Stat 1545 (1994) (codified at 15 U.S.C. §§ 6101-08).

2006, the FTC reported that many commenters on the proposed rule, “both from the telemarketing industry and consumers, exhibited a fundamental misconception” that the proposed rule “would prevent sellers from using prerecorded messages to provide important information to customers with whom they have an established business relationship, such as notifications of flight cancellations, reminders of medical appointments and overdue payments, and notices of dates and times for delivery of goods or service appointments.”^{3/} Instead, the FTC explained, the proposed rule “does not apply to informational calls, unless the calls combine the informational message with a sales invitation or promotional pitch.”^{4/}

Reviewing comments submitted on an initial proposal to restrict prerecorded telemarketing calls, the FTC noted that a number of “consumers expressed appreciation for prerecorded informational messages about delivery dates for previously purchased goods or services, medical prescription order notifications, flight cancellation alerts, and overdue bill and appointment reminders.”^{5/} The FTC concluded that “[t]here is support in the record for prerecorded informational messages—*i.e.*, messages without any sales pitch—which are not prohibited by the TSR; yet there is virtually none for prerecorded telemarketing messages.”^{6/} In

Nevertheless, as the review in this section makes clear, the FTC took pains when adopting its new rule to assure all parties that the new rule would apply only to telemarketing calls. In its rulemaking, the FTC did not lament a lack of jurisdiction to regulate prerecorded informational calls and, in general, affirmed the positive value of prerecorded informational calls while, at the same time, significantly restricting prerecorded telemarketing calls.

^{3/} *Telemarketing Sales Rule, Denial of Petition for Proposed Rulemaking; Revised Proposed Rule with Request for Public Comments; Revocation of Non-Enforcement Policy*, Federal Trade Commission, 71 Fed. Reg. 58716, 58719 (Oct. 4, 2006) (“2006 FTC NPRM”).

^{4/} 2006 FTC NPRM at 58719.

^{5/} The FTC reported that “[o]f the 77 positive consumer comments [about prerecorded messages], more than half—47—sought only to preserve prerecorded informational messages that are not prohibited by the TSR. These 47 consumers opposed any limitation on prerecorded ‘reminder’ messages, with some 36 of them seeking to avoid any need to sign a consent form to receive such messages.” 2006 FTC NPRM at 58720.

^{6/} 2006 FTC NPRM at 58723.

proposing the more restrictive written consent rule that it eventually adopted, the FTC explained that “[i]t is important to reiterate, however, that many (if not most) of the communications sellers wish to send via prerecorded messages, and that customers wish to receive, are informational communications not governed by the TSR, and thus are not prohibited by [the proposed rule].”^{7/}

The FTC’s 2008 order adopting the written consent requirement also reported that “[t]here is clear consumer support in the record for prerecorded informational messages that are not prohibited by the TSR—*i.e.*, messages that do not include a sales pitch or information about how to make a purchase.”^{8/} In adopting the new rule, the FTC clearly stated that “purely informational prerecorded messages are not covered by the TSR, and the use of such messages to schedule service calls, delivery times, and the like therefore will not be subject to the written agreement requirement.”^{9/}

B. In Contrast to the FTC, the NPRM Would Extend Written Opt-In Requirements to Non-Commercial Autodialed and Prerecorded Calls to Wireless Phones.

The FCC describes its *2010 Telemarketing NPRM* as “an effort to remove certain differences in the treatment of entities that operate outside of the FTC’s jurisdiction, and to further empower residential telephone subscribers to avoid receiving telephone solicitations to which they object” by “conform[ing] [FCC] TCPA rules to the FTC’s Telemarketing Sales Rule.”^{10/} The NPRM summarizes the matters on which it seeks comment as (1) requiring express written consent for prerecorded telemarketing calls; (2) exempting certain health-care

^{7/} *2006 FTC NPRM* at 58725.

^{8/} *2008 FTC Rule Amendments* at 51177.

^{9/} *2008 FTC Rule Amendments* at 51201. The FTC also said that it was “mindful of the legitimate interests of both sellers and consumers in communicating immediately following a sale,” and that “sellers may continue to use prerecorded messages for those purposes without restriction.” *2008 FTC Rule Amendments* at 51180.

^{10/} *2010 Telemarketing NPRM*, ¶ 2.

calls from the written consent requirement; (3) requiring prerecorded telemarketing calls to include an automated opt-out mechanism; and (4) adopting a “per campaign” standard for measuring compliance with abandoned call limitations.^{11/} Each of these proposed changes directly parallels a change adopted by the FTC in its 2008 amendments to the TSR.

Notably, the *2010 Telemarketing NPRM* does not suggest any intent to adopt a written opt-in requirement, or any other restriction, on informational calls. To the contrary, the NPRM states that “the rule revisions proposed herein would make no changes with respect to categories of prerecorded message calls that are not covered by our TCPA rules,” such as “calls for other noncommercial purposes, including those that deliver purely ‘informational’ messages – for example, prerecorded calls that notify recipients of a workplace or school closing.”^{12/}

Nonetheless, after tentatively determining that it should adopt a written opt-in requirement for prerecorded telemarketing calls to match the FTC’s rule, the NPRM proposes that the FCC should “adopt the same requirement both for calls governed by section 227(b)(1)(A) (generally prohibiting automated or artificial or prerecorded message calls without prior express consent to emergency lines, health care facilities, and cellular services), and for calls governed by section 227(b)(1)(B) (generally prohibiting prerecorded message calls without prior express consent to residential telephone lines).”^{13/}

Not readily apparent from this proposal as expressed in the NPRM is the fact that the Commission’s implementing regulations for section 227(b)(1)(B) governing calls to residential phones include exceptions for prerecorded calls “not made for a commercial purpose” or made for a commercial purpose but not including an advertising or telemarketing message, *i.e.*,

^{11/} *Id.*

^{12/} *2010 Telemarketing NPRM*, ¶ 3.

^{13/} *2010 Telemarketing NPRM*, ¶ 20.

informational calls.^{14/} The effect of these exceptions is that, with regard to prerecorded calls to residential phones, the FCC’s proposed rules exactly mirror the FTC’s new rules – requiring written opt-in for prerecorded telemarketing calls, but not otherwise restricting prerecorded informational calls.

The Commission’s implementing regulations for section 227(b)(1)(A), however, do not include similar exceptions for informational calls.^{15/} This is a critical distinction, because it means that the proposed rules will require written opt-in for autodialed and prerecorded *informational* calls to wireless phones as well as prerecorded telemarketing calls – going significantly beyond the FTC rules. Whether intended or not, the proposed blanket application of the proposed rule to all calls described in section 227(b)(1)(A) would significantly alter the Commission’s current “prior express consent” requirement applicable to autodialed and prerecorded informational calls to wireless telephones^{16/} by requiring specific written consent by a subscriber to receive such calls – even where the called party has given the number as a contact number.

II. THE FCC’S CURRENT PRIOR CONSENT REQUIREMENT PROTECTS CONSUMERS WHILE PERMITTING REASONABLE NON-COMMERCIAL COMMUNICATIONS TO WIRELESS PHONES

A. As More Consumers “Cut the Cord,” Wireless Phones Are Increasingly the Only Means to Contact Many Consumers with Important Non-Commercial Information.

Increasingly, a wireless phone number may be the only means a business, employer, or school has to contact a customer, employee, or parent. Recent data from the National Center for Health Statistics (“NCHS”) reveal that at the end of 2009 nearly one of every four American

^{14/} 47 C.F.R. § 64.1200(a)(2).

^{15/} See 47 C.F.R. § 64.1200(a)(1).

^{16/} 47 C.F.R. § 64.1200(a)(1).

homes had only wireless telephones, with another one in seven reporting that they had a landline but received all or almost all of their call on wireless telephones.^{17/} The 24.5% of households reporting themselves as “wireless only” continues to increase rapidly^{18/} and now significantly exceeds the 14.9% of households reporting themselves as having only a landline without a wireless phone.^{19/}

This suggests that when asked by businesses, employers, schools, and other entities for a contact number at least 25% of households – and possibly a significant number of the “wireless mostly” households^{20/} – will give a wireless number. A new rule (such as the written opt-in for autodialed and prerecorded informational calls to wireless phones proposed in the NPRM) that significantly restricts the ability of business and other entities to contact customers, employees, or members at the very numbers the households say they prefer to be contacted will serve only to frustrate both parties and would not constitute good public policy.

B. Current FCC Policy Allowing Prerecorded Calls to Wireless Phones Where the Called Party Has Given the Number as a Contact Number Permits Consumers to Receive Important Non-Commercial Information in a Timely, Efficient, Non-Intrusive Manner.

From the time of its earliest adoption of regulations implementing the TCPA, the FCC has interpreted the “prior express consent” required for sending autodialed and prerecorded messages to a wireless phone to encompass those situations where the called party has given the calling party his or her wireless phone number as a contact number. In its 1992 TCPA Report

^{17/} Stephen J. Blumberg and Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2009*, at 1 (2010) (<http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201005.htm>).

^{18/} *Id.* at 2.

^{19/} *Id.* at Table 1.

^{20/} The NCHS study reports that 24.5% of households are “wireless only,” while an additional 14.9% “ha[ve] a landline yet received all or almost all calls on wireless telephones.” *Id.* at 1.

and Order the Commission interpreted the term “prior express consent” by explaining that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary. Hence, telemarketers will not violate our rules [on autodialed and prerecorded calls] by calling a number that was provided as one at which the called party wishes to be reached.”^{21/}

This interpretation is consistent with the legislative history of the TCPA. The House report on the TCPA noted that in such situations “the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications”^{22/} and concluded that “[t]he restriction on [prerecorded] calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications.”^{23/}

The Commission more recently affirmed its interpretation of “prior express consent” in a declaratory ruling that held in the context of a petition for clarification about debt collections calls that “autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the ‘prior express consent’ of the called party.”^{24/} While expressed in terms of the requested clarification regarding debt collection, the declaratory ruling said nothing to suggest narrowing of the 1992 order that applies in principle to

^{21/} *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, ¶ 31 (1992) (“1992 Order”).

^{22/} House Report, 102-317, 1st Sess., 102nd Cong. (1991) at 13.

^{23/} *Id.* at 17.

^{24/} *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, 23 FCC Rcd 559, ¶ 9 (2008) (“*Declaratory Ruling*”).

all wireless numbers given as contact numbers, whether or not “in connection with an existing debt.”^{25/}

This longstanding interpretation of “prior express consent” allows companies to contact customers at the customer’s preferred contact number – even if that preferred contact number is a wireless phone number – with autodialed and prerecorded informational calls about delivery dates, safety recalls, appointment reminders, overdue bills, and other important matters. The interpretation allows employers to use autodialed and prerecorded messages to call their employees with information about work schedules or unexpected closings. The interpretation allows non-profit organizations to use autodialed and prerecorded messages to inform their members of important organizational information such as meeting dates and upcoming events. The interpretation allows schools to call parents with autodialed and prerecorded truancy notices or school closing information.

The current FCC policy allows consumers, employees, parents, and others to receive important information by unobtrusive autodialed and prerecorded messaging at their preferred contact number – even if that contact number is for a wireless telephone. As explained below, adoption of the proposed rule may effectively eliminate these calls.

C. The Proposed Rule Would Substantially Curtail Non-Commercial Calls to Wireless Phones for Many Businesses and Other Entities by Making the Calls Prohibitively Expensive.

Businesses, employers, governments, and other entities currently use autodialed and prerecorded messages to communicate important information to their customers, employees, members, and constituents. These calls are generally welcomed by the called party as providing needed information in a nonintrusive manner. As the FTC concluded in its 2008 order adopting

^{25/} The declaratory ruling cited both the *1992 Order* and the underlying legislative history. *Declaratory Ruling* ¶ 9.

the written consent requirement for prerecorded telemarketing calls, “[t]here is clear consumer support in the record for prerecorded informational messages.”²⁶ Application of the rule proposed in the NPRM, requiring written opt-in for all auto-dialed and prerecorded calls to wireless phones, will, however, effectively limit the ability of businesses, non-profits, and governments to use efficient auto-dialed and prerecorded means to provide important information to customers, members, and constituents.

Obtaining written consent to make such calls would be an expensive and time consuming process. Not only must a calling entity develop a system to obtain written consent from each of its customers, members, or constituents, but it must also maintain a record keeping system for the consent forms. Additional confusion and expense would be created in cases where businesses also ask customers for consent for prerecorded telemarketing calls. Because some significant number of persons may want to receive informational calls, but not telemarketing calls, it may be necessary to maintain two separate consent records for each customer.

Of course, even if the FCC’s proposed rule is adopted, informational calls could still be made to wireless phones without written consent if the calls are hand-dialed (*i.e.*, without the use of an autodialer) by a live operator, but that method can be exorbitantly expensive if the calling list is anything beyond minimal.^{27/}

The additional costs associated with obtaining written consent and maintaining record keeping systems, or the alternative costs of placing live calls, will mean that many businesses,

^{26/} 2008 *FTC Rule Amendments* at 51177.

^{27/} SoundBite’s experience is that while a live operator can dial 45 to 60 calls per hour, because many of the calls are unanswered or go to an answering machine, the operator is only able to speak to 7 to 15 persons per hour. With autodialing equipment (which screens out unanswered and answering machine calls) an operator can actually speak to 45 to 60 persons per hour -- a significant gain in efficiency. *See also, 2008 FTC Rule Amendments* at 51170, n.69 (reporting one commenter’s estimate that in 2008 a prerecorded call costed about \$0.25, while a live call to a consumer costed between \$3.75 to \$5.30 per call).

non-profits, and governments will no longer be able to afford to make autodialed and prerecorded informational calls, no matter how much their customers, members, or constituents want or are in need of the information that could otherwise be sent.

D. The Rationale for an Exception for Non-Commercial Prerecorded Calls to Residential Phones Applies Equally to Non-Commercial Prerecorded Calls to Wireless Phones.

When initially adopting rules to implement the TCPA, the FCC recognized congressional intent that the FCC “restrict only those categories of artificial or prerecorded voice calls which are made for commercial purposes and will affect the privacy rights that the [TCPA] intends to protect.”^{28/} Consequently, the Commission proposed adopting the exemptions that continue to exist in its rules for prerecorded calls to residential phones: (1) calls that are not made for a commercial purpose; and (2) calls that are made for a commercial purpose but do not include an unsolicited advertisement or constitute a telephone solicitation.^{29/}

The FCC described the first type as calls that “generally seek to advise the public of matters of civic concern, political contributions or elections, or other matters of public interest, which fall outside of the types of commercial telemarketing activity the TCPA seeks to regulate.”^{30/} The second type of calls was described as messages that “albeit commercial in nature, do not seek to sell a product or service and do not tread heavily on privacy concerns.”^{31/} As examples of the latter, the FCC suggested “a large business may wish to . . . advise its employees of a late opening time due to weather; or a nationwide organization may wish to remind members of an upcoming meeting or change in schedule.” The FCC reported that

^{28/} *Telephone Consumer Protection Act of 1991*, 9 FCC Rcd 2740, ¶ 25 (1992) (“1992 Telemarketing NPRM”).

^{29/} See 47 C.F.R. § 64.1200(a)(2).

^{30/} *1992 Telemarketing NPRM* ¶ 10.

^{31/} *Id.* ¶ 11.

“[s]uch informational calls do not offer a product or service to the called party and are an efficient method to communicate a message to a large number of people.”^{32/}

The same rationale that led the Commission to adopt exceptions for prerecorded informational calls to residential phones apply no less to prerecorded informational calls to wireless phones, particularly now that (as explained above) a significant and growing portion of the population uses wireless phones as their main – or only – telephone. Informational calls, whether made to a residential phone or a wireless phone are “an efficient method to communicate a message to a large number of people” and “do not tread heavily on privacy concerns” the TCPA was adopted to protect. The FCC has made a logical distinction between telemarketing and informational calls with regard to calls made to residential phones. There is no reason not to apply a similar logical distinction to create differing levels of protection for consumers with regard to autodialed and prerecorded telemarketing and informational calls to wireless phones.

^{32/}

Id.

CONCLUSION

For the reasons explained above, the Commission should revise the rule changes proposed in the NPRM to continue to allow autodialed and prerecorded informational calls to wireless telephones where the called party has given the wireless number as a contact number.

Respectfully submitted,

John Tallarico
Vice President, Product Management
SoundBite Communications, Inc.
22 Crosby Drive
Bedford, MA 01730
(781) 897-2500

/s/ Howard J. Symons
Howard J. Symons
Ernest C. Cooper
Mintz, Levin, Cohn, Ferris, Glovsky and
Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

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