United States Senate
WASHINGTON, DC 20510-0905

January 10, 2005

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

Re: Comments on Prerecorded Message EBR Telemarketing, Project No. R411001

Dear Madam Chairman:

These formal comments are being submitted in the above-captioned Federal Trade Commission (FTC) proceeding. The comments follow Senator Nelson's earlier letter comments dated December 6, 2004. We have a long history of fighting on behalf of consumer protection and privacy. In light of this track record, we urge the FTC not to adopt its proposed rule regarding the delivery of prerecorded telemarketing phone messages. Adoption of the proposed rule will lead to the further erosion of consumer privacy protections. Consumers who have placed their phone numbers on the national Do Not Call Registry could be deluged with unwanted phone calls. If the FTC adopts this proposed rule, it may become necessary for Congress to step in and clarify that telemarketers are forbidden to send prerecorded phone messages to their customers.

As you know, Congress tasked the FTC with enforcing the Telemarketing Consumer Fraud and Abuse Prevention Act of 1994. Congress specifically instructed the FTC to prescribe rules to prevent telemarketers from undertaking "a pattern of unsolicited telephone calls *which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy*." 15 U.S.C. § 6102(a)(3)(A) (emphasis added). In response, the FTC promulgated its Telemarketing Sales Rule. One of the central provisions of this rule is the requirement that at least ninety-seven percent of a telemarketer's calls that are answered by a person must be connected to a *live* sales representative. 16 C.F.R. § 310.4(b)(4). Thus, under the FTC's current rule, a telemarketing campaign that relies exclusively on prerecorded messages would be impermissible.

In 2003, Congress passed the Do Not Call Implementation Act, which authorized the creation of the national Do Not Call Registry. This landmark registry has been wildly popular with consumers. To date, approximately 80 million people have registered their telephone numbers with the registry, which keeps growing. These consumers have signaled their strong desire to stop the flow of unwanted telemarketing calls into their homes. Our constituents in Florida and California regularly tell us how grateful they are that the government has given them the tools to stop aggravating and abusive telemarketing pitches.

The Do Not Call Implementation Act authorized the FTC to modify its existing rules in order to enforce the Act. In response, the FTC has crafted rules to help ensure the success of the national registry and to help guard consumers' privacy. However, the FTC's Telemarketing Sales Rule contains an important exception to the general ban on incoming telemarketing calls. Under the existing exception, even those persons who are on the national Do Not Call Registry may receive telemarketing calls from businesses with which they have a preexisting *established business relationship*. As noted above, if a telemarketer contacts preexisting customers, the telemarketer must use *live* operators in at least ninety-seven percent of its outbound calls.

The FTC – in the current rulemaking proceeding – has now proposed to *broaden the exception* that allows telemarketers to contact customers with which they have established business relationships. Specifically, the FTC has proposed to allow telemarketers to use *prerecorded* telephone calls to reach such customers, in addition to using *live* calls. We urge the FTC not to adopt its proposed rule.

Aside from listening to angry consumers who undoubtedly will file comments in this public proceeding, the FTC need only turn to its own prior policy statements to conclude that this proposed rule is flawed. The FTC has conceded – both in this rulemaking proceeding and in prior reports – that this proposed rule might lead to consumers being flooded by unwanted prerecorded telemarketing calls.

For example, in the proposed rule's supplementary information, the FTC explicitly admits that "the volume of commercial calls that consumers receive may increase" under the proposed rule (Page 8). Moreover, in an FTC report released little more than one year ago, the agency explored the issue of allowing telemarketers to send prerecorded messages to preexisting customers. *Report to Congress Pursuant to the Do Not Call Implementation Act on Regulatory Coordination in Federal Telemarketing Laws*, submitted by the FTC (Sept. 2003). The FTC correctly concluded in that report that "it is important to be cognizant of the high consumer expectations of the Do Not Call Registry," and conceded that consumers who place their numbers in the Do Not Call Registry "may receive more calls than they expect" (Page 2). The agency accurately recognized that if consumers receive more calls than they expect, "this could diminish the effectiveness of the Do Not Call Registry" (Page 2). In fact, the FTC even concluded that prerecorded messages sent by aggressive telemarketers could lead to consumer "frustration" and "annoyance" (Page 35).

We cannot understand why the FTC now is abandoning these logical, well-supported positions. The FTC now finds itself in the position of promoting a regulatory loophole that would anger and disadvantage the very consumers that the agency is supposed to protect.

We recognize the various alleged safeguards that the FTC has included in its proposed rule, in an attempt to partially shield consumers from a deluge of annoying telephone messages. These alleged safeguards include requirements that prerecorded messages should give consumers a chance to speak to a live sales representative to opt out of receiving future calls; that the telemarketer's identity would be disclosed to consumers; and that consumers would be given a prompt Do Not Call option near the beginning of the prerecorded message. The FTC also posits that prerecorded messages would eliminate the problem of "dead air" that sometimes accompanies live calls and could help eliminate annoying hang-ups on consumers. Finally, the FTC notes that the Federal Communications Commission ("FCC") has a conflicting rule that allows telemarketers to deliver prerecorded telemarketing messages to customers.

None of these reasons – alone or in combination – is sufficient to open such a gaping loophole in the FTC's Telemarketing Sales Rule. We note that although the FCC has a conflicting rule on the same issue, there is no reason why the FTC should promulgate an anti-consumer rule to meet the FCC's lower standard for prerecorded messages.

As it crafts its final rule, the FTC should pay attention to at least four additional issues that were not mentioned in its notice of proposed rulemaking. First, emerging new phone technologies, such as Voice-Over-Internet Protocol, allow the inexpensive and easy delivery of prerecorded messages to consumers. As telemarketers are able to harness such new telecommunications technologies, there is a growing threat that telemarketers will be able to "blast" consumers with annoying sales pitches – in levels not yet imagined by most consumers.

Second, the FTC must consider that some telemarketers use aggressive sales techniques that often prey upon vulnerable populations, such as the elderly or non-English speaking persons. It is the FTC's role to use all available tools to *reduce*, not *increase*, the opportunity for these types of commercial abuses.

Third, the established business relationship definition under the FTC's rules is quite broad. Taking advantage of the broad definition, businesses already are able to contact consumers with whom businesses have only a minimal relationship. Additionally, corporate affiliates take advantage of the "established business relationship" definition to contact consumers with whom the affiliate has never been directly involved. This overly broad definition allows telemarketers to exploit business "relationships" where no reasonable consumer would expect to receive a telemarketing phone call.

Finally, opt-out procedures often do not work, despite the well-intentioned efforts of some telemarketers. We have heard from consumers that they are sometimes disconnected from a telemarketing phone call when they attempt to opt out. The FTC carefully should examine whether telemarketers are providing consumers with viable and dependable opt-out options.

We feel strongly at this juncture that the FTC should not adopt the proposed rule to allow prerecorded telemarketing messages. Nonetheless, we understand that facts contained in public comments filed with the FTC during the comment period may shed more light on the issue. We look forward to seeing the final record compiled, as well as the conclusions that the FTC draws from the full range of comments. We doubt, however, that any new facts will cause us to retreat from our position: telemarketers should *not* be allowed to send prerecorded messages to their customers.

We look forward to continuing this dialogue with you. Together we must make sure that the federal government is doing all that it can to limit – not increase – the level of unwanted and abusive telephone telemarketing.

If you have any questions regarding these comments, please feel free to contact Michael Sozan of Senator Nelson's staff at 202-224-8749, or Evan Schultz of Senator Feinstein's staff at 202-224-4933.

Sincerely,

Bill Nelson
Senator Bill Nelson

Dianne Feinstein
Senator Dianne Feinstein