

December 18, 2006

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

**Re: "TSR Prerecorded Call Prohibition and Call Abandonment
Standard Modification, Project No. R411001"**

Dear Sir or Madam:

I. Introduction

We represent IAC/InterActiveCorp and its television and Internet retailing business, HSN LLC ("HSN"), and respectfully submit these comments in connection with the above-referenced notice of proposed rulemaking ("NPRM") issued by the Federal Trade Commission on October 4, 2006. For the reasons discussed below, HSN requests that the Commission reverse its proposed withdrawal of the "safe harbor" for prerecorded calls to customers with whom the calling company has an established business relationship ("EBR") that the Commission created in November 2004 (the "EBR-based safe harbor"). HSN believes the EBR-based safe harbor reflects an appropriate balancing of consumer and industry interests, and thus is in the public interest and should be retained.

If, after reviewing new record evidence about the benefits of the EBR-based safe harbor and the burdens of the proposed safe harbor based upon express, written, signed consent (the "consent-based safe harbor"), the Commission nonetheless concludes that the EBR-based safe harbor does not sufficiently protect consumers from purportedly abusive practices, HSN requests that the Commission consider other, less cumbersome ways to protect consumers. One such option, discussed below, is to continue to allow sellers to send prerecorded messages to their customers, but under more limited circumstances than currently permitted.

HSN also is writing to express its appreciation of the Commission's decision to extend the forbearance period until this present rulemaking proceeding is completed. However, if at the end of the proceeding the Commission decides not to retain the EBR-based safe harbor or to revise the EBR-based safe harbor significantly, HSN requests that the FTC extend the grace

December 18, 2006

Page 2

period for prerecorded calls based on the EBR-based safe harbor for at least six (6) additional months. This will provide HSN and other industry members the time needed to fully adjust and implement the Commission's decision. For example, if sellers have to seek express, written, signed permission from customers, it will be a costly, cumbersome process. Without an appropriate grace period consumers who want these messages and businesses that rely on them to communicate with their customers efficiently would be adversely affected.

II. HSN and Its Use of Prerecorded Calls

HSN, formerly known as The Home Shopping Network, originated the electronic retailing concept in 1977 and has since evolved into a global multichannel retailer, offering thousands of unique products in fashion, beauty, home, jewelry and electronics. Customers who shop on HSN can find name brands such as Kodak cameras, Gateway computers and Wolfgang Puck Bistro cookware, as well as fashions from Nine West, Beverly Feldman and Randolph Duke. HSN's product offerings can be found across a number of retailing platforms ranging from TV, where HSN reaches 89 million U.S. households and is now the 4th largest cable television network in the nation, as well as the Internet through HSN.com. In 2005, HSN answered 66 million calls and delivered more than 60 million products worldwide.

HSN regularly uses prerecorded messages to communicate with its customers. HSN's principal use of such messages is to notify customers about upcoming programming in which they might have a particular interest.¹ HSN delivers short, prerecorded "When to Watch" messages to customers who have shown an affinity for a particular celebrity's products (*e.g.*, Wolfgang Puck's cookware), or for special product categories, such as crafts or coins. Many of these messages are recorded by the celebrities, making them particularly enjoyable for the recipients. Most celebrity hosts appear on HSN only a few times per year for a couple of days on each occasion. To give customers relevant and timely information about upcoming celebrity appearances or about special programming events (*e.g.*, programming devoted to crafts demonstrations in celebration of National Crafts Month), the prerecorded messages are sent the day of or the day before the event.

Virtually all of these campaigns are directed to HSN customers who have purchased within the past 12 months, substantially less than the 18 months allowed under the Telemarketing Sales Rule ("TSR"). Additionally, many of the When to Watch campaigns are directed at HSN customers who have purchased at least two items (on separate occasions) in the

¹ HSN also occasionally uses prerecorded messages to inform customers of changes of channel position of its television programming and for other reasons.

December 18, 2006

Page 3

product line that is being featured in the When To Watch call. The messages are also direct and to the point, and thus are very short. Indeed, a significant portion of the message time is devoted to informing consumers about how to request placement on HSN's "do not call" list. Finally, no customer receives more than one When to Watch call per month.

HSN's judicious use of prerecorded calls underscores that the preservation of customer goodwill supplies a powerful incentive for legitimate companies to self-regulate their marketing to their customers. The fact that not all companies may show similar restraint is not an adequate reason to bar these calls.

III. HSN's Experience with Prerecorded Messages under the EBR-Based Safe Harbor

Pursuant to the EBR-based safe harbor, HSN's prerecorded telemarketing calls contain a simple opt-out mechanism that has worked very well for HSN's customers. HSN uses an Interactive Voice Response (IVR) system for its opt-out mechanism. When customers press 1 on their phones, they are immediately connected to a system that acknowledges their do not call request.² For those consumers who receive a voicemail message or who have a rotary phone, HSN also provides a toll-free telephone number to call to be added to HSN's do not call list.³

Because HSN's system is expressly designed to register opt-outs quickly and easily, HSN's consumers never experience any long or frustrating delays and never have to navigate multi-layered menus. All HSN's customers have to do is push a button. HSN's experience shows that readily available and low-cost technology can provide all sellers with the means to provide consumers with an easy and effective way to exercise their option to be placed on sellers' do not call lists.

IV. The Commission's Record to Date

HSN recognizes that the Commission believes that consumers generally disfavor prerecorded messages. HSN's analysis suggests that consumers generally have had only limited experience with prerecorded messages that provide a simple opt-out mechanism. Greater industry use of and consumer familiarity with such mechanisms would significantly reduce consumer dissatisfaction. Additionally, a further analysis of consumer concerns that were summarized in the NPRM is instructive.

² Specifically, when the customer presses 1, he/she will hear: "Thank you. Your number has been added to HSN's do not call list. Please allow 30 days for this request to process."

³ HSN promptly updates customer account files based on the do not call data that its third party vendor transmits to HSN, and future call lists accordingly exclude these customers.

December 18, 2006

Page 4

As the Commission noted, a number of consumers misunderstood the scope of the TSR, and the issues they raised will not be affected or addressed by the Commission's proposed decision in this NPRM.⁴ In other instances, the cited consumer complaints indicated that there was no valid EBR or business relationship whatsoever.⁵ The fact that some sellers failed to comply with a fundamental requirement of the EBR-based safe harbor may suggest a need for enforcement action, but not a ban on this entire marketing method.

A key consumer concern was that the *scope* of what is considered an existing business relationship is so broad as to eliminate any protection consumers have from sales calls when they register on the National Do Not Call Registry. Specifically, consumers and others commented that the current definition of an EBR would allow innumerable businesses with whom consumers may have had only a fleeting contact to call them.⁶ In contrast the record shows that consumers do not object to calls from businesses that they know and regularly patronize.⁷ Additionally, new consumer comments filed in response to the NPRM also express support for prerecorded messages from companies with which they do business and messages that contain information relevant to them, as opposed to cold-calls.⁸

Consumer concerns about the number of businesses that can legally contact them, however, might be resolved when the messages contain easy to use interactive opt-out mechanisms. Given how quickly and easily a consumer could opt out of future calls by using an IVR system -- making the process as easy as requesting no future telemarketing with live calls -- consumer frustration should become negligible. Thus, HSN urges the Commission to retain its EBR-based safe harbor and to allow consumers time to experience prerecorded messages with interactive opt-out mechanisms.

⁴ For example, while some consumers said that even messages left on their answering machines or calls from politicians were intrusive, those messages would not be barred under the abandoned call provision of the TSR and, thus, are not germane to this issue. Similarly, other consumers indicated they did not want a ruling that would affect informational messages, such as delivery reminders, which have never been at issue. 71 Fed. Reg. 58716, 58720-721 & n.58.

⁵ *Id.* at 58722 n.81 and surrounding text.

⁶ *Id.* at 58722 nn.77-80 and surrounding text.

⁷ *See id.* at 58721 n.57 and surrounding text.

⁸ *See, e.g.,* Comment No. 00026 (prefer prerecorded to live calls; "do not mind being contacted by companies I do business with"), 00077 ("this ruling would stop all of that [e.g., upgrade incentives] and that hurts me, the consumer you are trying to protect"), 00110 ("prerecorded messages from companies I do business with help me").

December 18, 2006

Page 5

But, if the Commission were to conclude that the EBR-based safe harbor is inadequate, HSN suggests addressing consumer concerns through additional limitations on such calls, as explained below. The Commission's adoption of these proposals would allow it to protect consumers without denying consumers desired information or denying marketers an efficient marketing tool.⁹

In proposing to withdraw the EBR-based safe harbor, the Commission indicated that it had concluded that its premise that the existence of an EBR would protect consumers from abusive calls was wrong. The Commission acknowledged that reputable businesses may moderate the messages they send to their customers to avoid alienating them, but concluded that an EBR was not necessarily an adequate brake on calls from certain companies, such as new marketplace entrants, who may not fear alienating consumers with intrusive or abusive practices.¹⁰ This conclusion does not, however, suggest that the only viable solution is to ban all prerecorded calls, and deprive all sellers of this valuable marketing medium unless they can afford to incur significant costs in obtaining express written, signed consents for all such calls in the future.

V. HSN's Comments to the NPRM

Legitimate businesses such as HSN need efficient ways to communicate with their customers. To accomplish the purposes of HSN's When to Watch calls, there is no other cost-effective communication method. Although email is low-cost, many of HSN's customers order by phone and do not provide their email address. Moreover, home email messages are likely less effective than telephone messages. Many consumers may check their voice mail but not their home email daily. Thus, many might miss time-sensitive When to Watch messages if they were delivered by email. Other message-delivery methods, such as live telemarketing or direct mail, would be prohibitively expensive. While prerecorded messages may cost only cents per call (depending on volume, duration, and other factors), live calls could cost \$1.00 or more per call, and direct mail as much as \$.50 to \$1.50 per piece.

⁹ HSN understands that under the current proposal the Commission would allow prerecorded calls if the marketer has obtained express, written, signed consent from the consumer. Obtaining such consent, however, would be a costly and time consuming process that not all sellers may be able to afford. As a result, consumers who want such messages may not receive them or may be deprived of them while the process of obtaining consents is ongoing.

¹⁰ The Commission noted that this may occur because prerecorded messages are so inexpensive. In contrast, the higher costs of live telemarketing act as a natural constraint on marketers.

December 18, 2006

Page 6

Accordingly, HSN requests that, if the Commission decides not to retain the EBR-based safe harbor, it publish a notice in the Federal Register, seeking comment on an alternative safe harbor for prerecorded calls to customers with whom the seller has an EBR. For the limited purpose of such a safe harbor, the term “established business relationship” would be defined more narrowly. Additionally, HSN proposes that the Commission consider other limitations to address concerns about abuses. The proposed new definition and limitations are discussed below.

A. There Are Better Ways to Reduce Any Abuses from Prerecorded Calls

Although HSN believes the existing EBR-based safe harbor is appropriate, and continues to advocate its retention, to further address the consumer concerns on the record HSN suggests limiting the safe harbor to a narrower set of existing business relationships, as follows:

- Eliminating an inquiry-based EBR so that calls are placed only by businesses from which consumers have purchased, rented or leased goods or services, thus making the consumer’s relationship with the calling business clearer, *and*
- Limiting the time period of the EBR to 12 months, thus basing the EBR on a transaction that is closer in time to the call and thereby making the relationship clearer,¹¹ *or*
- Limiting permitted calls to customers who have purchased, rented or leased goods or services from the seller on *two or more occasions within an 18 month period*, thus limiting the calls customers receive to those businesses they are regularly patronizing.

Similarly, to address concerns about overuse of the medium by entities that do not constrain themselves and about the number and duration of messages, HSN suggests that the Commission consider additional conditions to the safe harbor, such as:

- Limiting the number of calls that can be delivered by an individual entity (*e.g.*, no more than a specified or reasonable number of calls per day, week, month or year) over a 12-month period,¹² *or*

¹¹ See also SmartReply, Inc., noting that its customers generally only call consumers who engaged in a transaction within the last 12 months because “many messages in our marketplace seem to lose relevance between the 12 and 18 month window.” Comment No. 00105, at 11.

¹² See also SmartReply Inc. (“as a best practice, we do not contact our client’s customers more than one time a month”), Comment No. 000105. at 7.

December 18, 2006

Page 7

- Limiting the duration of such messages (*e.g.*, no longer than 45 seconds).

Some comments of some consumers suggested that opt-out rights would be illusory or difficult to implement, without their necessarily having had any experience with calls conducted properly within the safe harbor or having appreciated that the Commission intended that it be easy for them to exercise their opt-out rights.¹³ As noted, the IVR system that HSN uses is simple and easy to use. It does not require that a customer wait until the end of long message to access it, nor involve waiting until a customer service representative is available¹⁴ or navigating through a complicated menu. To ensure that consumers can easily exercise their opt-out rights, the Commission could include performance standards to govern the opt-out process.

Specifically, the Commission could consider options such as:

- Requiring that the opt-out option be presented within the first 20 seconds of the message (to supplement the requirement that the opt-out offer be made immediately after making rule-required disclosures), *or*
- Requiring that a consumer be able to complete the process within a set period of time (*e.g.*, hold times to reach a customer service representative -- if an entity chooses to offer a live opt-out method -- may not exceed a specific or a reasonable amount of time, or a menu must not require a customer to have to make more than two selections to execute a do not call request).

These suggestions could be folded together to result in a safe harbor, such as the following.

¹³ 71 Fed. Reg. at 58722 nn.64-69 & n.71 and surrounding text (*e.g.*, consumer would have to wait until the end of a lengthy message to get an opt-out number, but the safe harbor required that the opt-out right be presented immediately after certain rule-required disclosures).

¹⁴ In this respect it appears that consumers, consumer groups, and some industry members assumed that the opt-out option had to involve a live sales representative. *See* 71 Fed. Reg. 58722 at n.71 and surrounding text. The Commission's EBR-based safe harbor, however, did not require this. HSN agrees with those industry members who asserted that providing a live opt-out mechanism would be costly, but this was not, and should not be, required. HSN estimates that it would cost *seven times* as much as it currently does if pressing a key on the telephone were to require a connection to a sales representative. For the minority of consumers who still have rotary phones, sellers would continue to provide a toll-free number for consumers to call to convey opt-out requests.

December 18, 2006
Page 8

310.4

(b)***

(1)***

(v) Initiating any outbound telemarketing call that delivers a prerecorded message when answered by a person unless the seller:

(A) has obtained the express agreement, in writing, of such person to place recorded calls to that person; or

(B) meets the following conditions:

(i) as an established business relationship with the person called by reason of:

(a) the person's purchase, rental or lease of the seller's goods or services, or a financial transaction between the person and the seller, within the 12 months immediately preceding the date of the call, or

(b) the person's purchase, rental or lease of the seller's goods or services, or a financial transaction between the person and the seller on more than one occasion within the 18 months immediately preceding the date of the call, and

(ii) places no more than "x" (*e.g.*, 18) calls to that person within a 12-month period, or limits the duration of each such call to no more than 45 seconds, and

(iii) gives the called person the opportunity to make an entity-specific Do Not Call request within the first 20 seconds of the call, with only the disclosures required by §§ 310.4 (d) or (e) preceding such opportunity, and with the process for opting out capable of being completed within a reasonable time period.

B. Sellers Should Have Flexibility to Obtain and Document Consent

Although HSN favors an EBR-based safe harbor, if the Commission were to decide to use a consent-based safe harbor, HSN recommends that the Commission eliminate the costly, cumbersome requirement that express prior consents be in writing and signed. The Commission also should consider that a requirement for express, written signed consents would impose burdens on the many customers who find these calls useful (*i.e.*, they would have transaction

December 18, 2006

Page 9

costs in having to respond to HSN's or other sellers' requests for consent to continue such calls, even when the sellers provide a no-cost option for responding). Consumer comments already filed in this proceeding reflect an aversion to "paperwork" to continue receiving calls they want.¹⁵

It will be less burdensome for businesses and consumers if sellers have flexibility in how customer consent is obtained. At the same time consumers will be afforded the same degree of protection as with a signed, written consent requirement because sellers will have the burden of showing consent was given.

C. A Longer Grace Period is Needed and is Appropriate

As noted above, seeking and obtaining express written consent to receive prerecorded messages in the future from the millions of HSN customers that currently receive When to Watch calls will be a lengthy, resource-intensive endeavor. HSN believes that the Commission underestimated the ease with which a business could obtain appropriate consent (particularly express, written, signed consent) and incorrectly assumed that it would be easy to seek consent during the normal course of contacts with customers.¹⁶

Relying just on a customer's contact with a seller (through the ordering process or through package inserts) to seek consent is not only costly, but it would mean the process of seeking consent from all or most customers would take place over an extended period.¹⁷ It is

¹⁵ See Comment No. 00090 ("it is consumer unfriendly to make me sign up in writing to get automated calls from a company that I already do business with"), 00019 ("as eBay's customer I want to receive this [auction notification] message. What I don't want, is to have to deal with paperwork to set this up...plainly forbidding any prerecorded calls without written consent is way too restrictive"), 00096 (allow prerecorded calls if there is an EBR and an opt-out option; "requiring a written permission is a technology throw back").

¹⁶ See 71 Fed. Reg. 58725 n.108 and surrounding text (sellers would have had an opportunity during their business dealings to obtain the prior written agreement of their customers to deliver prerecorded messages). Cf. SmartReply Inc. ("stay implementation beyond January 2, 2007 so that our clients have additional time to come into compliance without injuring their businesses and alienating their customers"), Comment No. 00105 at 6.

¹⁷ Even if companies design systems to seek and obtain consent in a compliant manner when consumers place orders by telephone, such systems also involve significant costs. In addition to design, recordation and retention costs, each customer contact would take more time. To keep

December 18, 2006
Page 10

more likely that sellers, such as HSN, might conduct separate campaigns to seek consent from as many customers as possible at one time or over a short period of time. But, contacting several million customers with a direct mail piece that included a returnable, postage-paid postcard that customers could sign could cost \$.75 to \$1.75 per contact. Even an email campaign would involve significant costs (*e.g.*, design and retention systems for responses).

If the Commission makes the decision of requiring the time-consuming and overly burdensome express, written, signed consent, it would be preferable if sellers could postpone seeking consent until the Commission has issued guidance about the manner and form in which consent may be obtained. Consequently, if the Commission decides not to retain an EBR-based safe harbor, HSN requests that sellers be given at least six (6) months to comply with and implement any new requirements.

VI. Conclusion

HSN urges the Commission, which always endeavors to be sensitive to the costs and burdens of regulation and to carefully tailor its regulations to the problem, to consider HSN's suggestions or other similar options. HSN believes that the Commission's EBR-based safe harbor appropriately balances consumer and business interests. But, if the Commission concludes differently, HSN believes its suggestions can achieve the Commission's goal of preventing abusive practices, while minimizing burdens on industry. HSN also requests that the Commission grant businesses more time -- at least six months -- to communicate with their customers and adjust their practices accordingly, if the Commission decides not to retain an EBR-based safe harbor for prerecorded messages. Without a reasonable extension, HSN's customers (and those of other sellers) may unnecessarily be deprived of information they welcome and value.

Sincerely yours,

Elaine D. Kolish

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up with ordinary call volume when each transaction takes longer HSN would need to employ additional personnel or risk dropped calls.