

December 22, 2014

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street NW  
Washington, DC 20554

Ian D. Volner

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Re: Notice of Permitted Ex Parte Presentation - Rules and Regulations Implementing  
the Telephone Consumer Protection Act of 1991 Docket No. 02-278

Dear Ms. Dortch:

On December 18, 2015 Rachel Nyswander Thomas, Vice President of Government Affairs of the Direct Marketing Association (“DMA”), and Ian D. Volner, Michael Signorelli, and Robert Hartwell of the law firm of Venable LLP, attorneys representing the DMA, met at the Federal Communications Commission (“FCC”) with:

- Commissioner Michael O’Rielly, FCC
- Amy Bender, Legal Advisor, Office of Commissioner Michael O’Rielly, FCC

DMA explained that its Petition only asks the Commission to forbear from enforcing the disclosure requirements in 64.1200(f)(8)(i)(A) and (B) against marketers who obtained written consent from consumers, prior to October 16, 2013, and is not seeking an amendment to the FCC’s current rule. We referred to our ex-parte statement of November 20, 2014 which confirms that DMA does not challenge “the prospective application of the rule as to consents obtained after its effective date”. We also provided copies of the attached ex-parte statement.

This disclosure is made in compliance with 47 C.F.R. § 1.1206

Respectfully submitted,

/s/ Ian D. Volner  
Ian D. Volner, Esq.  
*Counsel for the Direct Marketing Association*  
Venable LLP

cc: Mr. Mark Stone  
Ms. Kristi Lemoine

November 20, 2014

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, N.W.  
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**Re: Ex Parte Statement – Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991 CG Docket No. 02-278**

Dear Ms. Dortch:

At the ex parte meeting we held with Commission Staff on November 17, 2014, we were asked to consider the relationship between the “Petition for Forbearance” submitted by the Direct Marketing Association (“DMA Petition”)<sup>1</sup> and the “Petition for Declaratory Ruling of a Coalition of Mobile Engagement Providers” (“Mobile Coalition Petition”) also filed in October 2013.<sup>2</sup> This ex parte statement responds to the staff request.

Fundamentally, both petitions seek in part the same outcome. Both rest on the proposition that, in adopting Section 64.1200(f)(8), requiring prior express written consent to autodialed telemarketing calls and texts and to telemarketing pre-recorded messages, the Commission must make it clear that it did not thereby invalidate written consents obtained prior to the effective date of the Rule. The factual predicates of the two petitions do differ: The Mobile Coalition Petition is focused on the form of written consent specifically for text messages; the DMA Petition covers written consent for both telemarketing calls and texts to mobile devices as well as pre-recorded telemarketing calls made using an auto dialer. The legal reasoning advanced in the two petitions also differ. In that respect, the Mobile Coalition Petition is broader than the DMA Petition since it contends that the Commission cannot apply the new rule retroactively. DMA, on the other hand, simply maintains that there is nothing in the text of the Order or in the Rule itself that indicates valid written consent acquired prior to the effective are invalidated. However, neither petition challenges the prospective application of the rule as to consents obtained after its effective date. Thus, the outcome sought by both parties is entirely congruent.

<sup>1</sup> Petition for Forbearance by the DMA, available at <http://apps.fcc.gov/ecfs/document/view?id=7520946817> (Oct. 17, 2013).

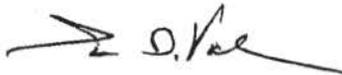
<sup>2</sup> Petition for Declaratory Ruling of a Coalition of Mobile Engagement Providers, available at <http://apps.fcc.gov/ecfs/document/view?id=7520946937> (Oct. 17, 2013).

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November 20, 2014  
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There is also a formal difference in the relief sought by the two petitions in that the DMA Petition asks the Commission to forbear from enforcing the additional disclosure requirements set forth in 64.12009(f)(8)(i)(A) and (B) to written consents obtained prior to the effective date of the rule whereas the Mobile Coalition seeks a Declaratory Ruling that the written consent requirement is prospective in application. But the formal difference in the relief is without substantive significance: whether styled as a Declaratory Ruling or as Forbearance or as a retroactive waiver, the outcome sought by both Petitions is that 64.1200(f)(8)—including subparts (i)(A) and (B)—does not invalidate otherwise valid written consents obtained prior to the effective date of the rule.

Accordingly, we respectfully submit that the two Petitions must be acted upon together and that the relief, however styled, must extend to the factual predicates of both Petitions. It is analytically impossible to grant the Mobile Coalition Petition without recognizing that the same conclusion applies in the factual context of the DMA Petition; and that requires that the DMA Petition be granted as well. Conversely, denial or failure to act on either petition would yield an inconsistent and legally inexplicable outcome because it would imply that some but not all pre-existing written consents are valid. In our view, it does not matter whether the Commission follows the legal reasoning of the Mobile Coalition Petition on the matter of retroactivity or the reasoning advanced in the DMA Petition as to what the Order and Rule do and do not say. There are compelling grounds, under either theory and as a matter of sound public policy, to hold that the Rule does not invalidate all written consents obtained prior to the effective date of 64.1200(f)(8) and we ask that the Commission so hold.

Sincerely,



Ian D. Volner  
Michael A. Signorelli