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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended	)	CC Docket No. 96-149

COMMENTS OF THE DIRECT MARKETING ASSOCIATION

The Direct Marketing Association ("DMA") is the leading trade organization representing direct marketers, including those using the telephone as a means of transacting business with consumers. The DMA, therefore, has a substantial interest in the mechanism to be specified by the Commission's rules to secure consumer authorization to the release of CPNI that will be used to market telecommunications and related services to consumers. The DMA strongly supports the principle that consumers should be clearly informed of their rights to protect information that they may regard as personal. The DMA maintains, however, that adequate protection of consumer interests in CPNI does not -- as either a legal or policy matter -- warrant the imposition of burdensome and costly "opt-in" procedures.

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With these principles in mind, the DMA provides the following comments in regard to the issues raised by the Commission in its *Clarification Order and Second Further Notice of Proposed Rulemaking* released September 7, 2001 ("Clarification Order"):

1. The court's decision in *U.S. West, Inc. v. FCC,* 182 F. 3d 1224 (10th Cir. 1999), *cert. denied,* 120 S. Ct. 2215 (2000) ("U.S. West") makes it abundantly clear that any overly restrictive standards regarding customer consent to the use of CPNI will be invalidated on constitutional grounds. In *U.S. West,* the Tenth Circuit flatly stated that the "affirmative consent" requirements of the CPNI regulations "violate the First Amendment." *U.S. West* at 1228.[1] Applying the *Central Hudson* test to analyze the FCC's CPNI regulation, the court in *U.S. West* expressed considerable doubts about the ability of the CPNI regulations to meet two of the three critical prongs of the test, and held that the Commission's failure to consider the "obvious and less restrictive alternative" -- opt-out -- invalidated its CPNI decision under the third prong.

2. First, the court doubted whether the government's asserted interest in "privacy" rose to the level of "substantial," as *Central Hudson* requires. 182 F.3d at 1235-36. Because the point was not determinative of the case, the court "assumed" for the purpose of the analysis that the Commission could assert a substantial interest in protecting people from the "disclosure" of potentially sensitive personal information. *See id.* at 1235-36, and 1240.

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[1] In the *Clarification Order*, the Commission suggests that the court's decision invalidates only § 64. 2007(c) of its rules. The court's decision, however, makes plain that any of the subparts of the rule that entail opt-in are invalid. *U.S. West* at 1230. It is the approval mechanism itself that is at issue.

3. Second, the court plainly held that the FCC had failed to demonstrate that the Commission's CPNI regulations directly and materially advanced the government's asserted interests in privacy. *See* 182 F.3d at 1237-38. The court pointed out that the term "disclosure" in the context of these rules is inapt. The Commission's *CPNI Order* itself acknowledges that the "sharing of information within one integrated firm does not raise significant privacy concerns." *CPNI Order* at ¶ 55, n. 203, 63 Fed. Reg. 20,326 (1998). In view of this, the court expressed grave doubt that the Commission can make the requisite showing of "harm" to the asserted privacy interest to warrant an intrusive burden on otherwise legitimate and beneficial commercial speech. *U.S. West* at 1237-38.

4. Finally, and most importantly, the court held that the regulations were not narrowly tailored to serve the stated interests. 182 F.3d at 1238-39. Citing *44 Liquormart Inc. v. Rhode Island,* 517 U.S. 484 (1996), the court observed, "[t]he availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny." It is abundantly clear that "opt-out" remains a viable, less burdensome alternative to serve the Commission's asserted interests in protecting consumer privacy. Thus, the DMA submits that a reviewing court is not likely to find that the more restrictive "opt-in" requirement is narrowly tailored, regardless of the record that the Commission may attempt to muster as to the other prongs of the *Central Hudson* test.

5. The "obvious" opt-out standard is not only less restrictive; it is fully effective in achieving the Commission's concerns about CPNI privacy. The most closely comparable consumer privacy regulatory scheme is the Cable Subscriber Privacy

provision of the Communications Act, which deals with "personally identifiable information" that is functionally indistinguishable from CPNI. *See* 47 U.S.C. § 551 (while "personally identifiable information" is not defined by the statute, the legislative history suggests that the section was based on the fact that subscriber records can "reveal details about bank transactions, shopping habits, political contributions, viewing habits, and other significant personal decisions." H.R. Rep. No. 934, 98th Cong., 2d Sess. 29 (1984)). The notice requirements imposed by the Commission under its CPNI Order parallel those imposed by the Congress in the Cable Subscriber Privacy provision. *Compare* 47 C.F.R. § 64.2007(f) *with* 47 U.S.C. § 551. The Cable Subscriber Privacy provision is commonly implemented through opt-out.[2] The Commission expresses concern that this form of notice/opt-out would not ensure "informed consent because customers might not read carriers' disclosures and might not comprehend the extent of their rights." *Clarification Order* at ¶ 15. Yet this concern is vitiated by sixteen years of experience under the Cable Subscriber Privacy provision. Instances of alleged violations of the Cable Subscriber Privacy provision, although rare, have been readily detected by subscribers and have been redressed. *See, e.g., Scofield v. Telecable of Overland Park, Inc,* 973 F. 2d 874 (10th Cir. 1992).

6. In its *Clarification Order,* the Commission has correctly recognized that the degree of privacy protection that may be warranted as a policy matter depends almost entirely on the level of sensitivity of the information itself. Any attempt to analogize

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[2] *See, e.g., Scofield v. Telecable of Overland Park, Inc,* 973 F. 2d 874, 884-6 (10th Cir. 1992) (the subscriber privacy notices at issue -- which were found to satisfy the § 551(a) notice requirements -- indicated, "[u]nless you object...we may also disclose your name and address for mailing lists and other purposes.... If you wish to remove your name from such lists, or limit the use of your name at any time, please contact us....").

CPNI with individually identifiable health information or non-public personal information about financial records is fundamentally misguided. As the court in *U.S. West* has pointed out, the Commission has not attempted to show that a high degree of protection is necessary. In fact, no such showing can be made. A relatively high level of security may be warranted in the case of financial information because of the documented problems of identity theft, and even in that context, the Gramm-Leach-Bliley Act does not impose an across-the-board opt-in requirement. Individually identifiable health information is, if anything, more sensitive because it can be misused in a variety of ways. By contrast, CPNI is undeniably useful in connection with the offering of commercial transactions to consumers, particularly transactions involving telecommunication services. However, there is simply no possibility of abuse or misuse of the information for unlawful or otherwise improper purposes.

The fact is that opt-out mechanisms have been successfully employed in the direct marketing industries for decades. DMA's policy guidelines and practices require that all of its members adopt and maintain an opt-out policy. DMA also has guidelines providing that marketers must refrain from contacting consumers who have indicated that they do not wish to be contacted by that particular marketer. These policies, which are reflective of industry practices that have been in existence for decades, have shown themselves to be more than adequate to protect the legitimate privacy interests of consumers concerning the use of otherwise non-public information of a purely commercial nature such as CPNI.

7. Accordingly, there is simply no reason as a matter of policy for the Commission to impose a mechanism to secure consumer authorization to the release of CPNI that is more restrictive than the opt-out procedure long employed by the direct

marketing industry. The Commission has already established requirements which provide a customer with "sufficient information to enable the customer to make an informed decision as to whether to permit a carrier to use, disclose or permit access to, the customer's CPNI." 47 C.F.R. § 64.2007(f). It has concluded that these requirements remain effective, notwithstanding the court's vacatur order. *Clarification Order* at ¶ 7. The DMA agrees with the Commission that these requirements -- which are not in dispute -- enable the customer to make an informed decision. The DMA further believes these requirements, coupled with an opt-out mechanism, more than adequately protect the interests the Commission has asserted with respect to CPNI.

Respectfully submitted,

Ian D. Volner
Rita L. Brickman

Venable, Baetjer, Howard & Civiletti, LLP
1201 New York Avenue, N.W.
Suite 1000
Washington, DC 20005-3917
202.962.4800
idvolner@venable.com
rlbrickman@venable.com

Attorneys for The Direct Marketing Association

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