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March 19, 2003

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th St., S.W., Room TWB-204  
Washington, D.C. 20554

Re: Ex Parte Submission in CG Docket No. 02-278

Dear Ms. Dortch:

Attached is a letter from the Federal Trade Commission ("FTC") to The Direct Marketing Association ("The DMA") staying Section 310.4(b)(4)(iii) of the Telemarketing Sales Rule until October 1, 2003. We request that you make this letter a part of the above-referenced docket as this Commission considers its changes to the regulations implementing the Telephone Consumer Protection Act ("TCPA").

Section 310.4(b)(4)(iii) is part of a "safe harbor" the FTC has created for abandoned calls. It requires the seller or telemarketer to "promptly play[] a recorded message that states the name and telephone number of the seller on whose behalf the call has been placed." As the FTC explains, it believes that it is not possible for marketers to obtain equipment that can comply with this provision by March 31, 2003.

One of The DMA's concerns about the FTC's "safe harbor" is that it creates a potential conflict with the TCPA's prohibitions and limitations on playing recorded messages. The FTC explains that, under *its* interpretation of FCC regulations, the recorded message portion of the TSR does not conflict with the TCPA or regulations thereunder. As The DMA has explained in its comments and reply comments, whether or not playing a recorded message with the name and phone number of the seller is a matter left to *this* Commission to determine – not to the FTC, which has no authority to interpret the TCPA or the regulations created by this Commission.

The DMA also noted that the FTC's rules literally prohibit making recorded calls that are expressly permitted under the TCPA. The TSR prohibits "[a]bandoning any outbound telephone call." Section 310.4(b)(1)(iv). An "abandoned" call is any call in which a person answers "and the telemarketer does not connect the call to a sales

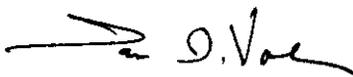
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representative within two (2) seconds of the person's completed greeting." *Id.* This entirely prohibits recorded calls. Yet, the TCPA required this Commission to consider the privacy implications for certain types of recorded calls; the Commission determined that certain types of, and under certain conditions, recorded calls are permissible.

Not only has the FTC undertaken to interpret regulations written by this Commission, but, as The DMA has explained in its comments and reply comments in this proceeding, it has undertaken to regulate a subject matter – predictive dialers – that is entrusted only to this Commission. Both the TCPA and the Communications Act, which gives this Commission exclusive jurisdiction to regulate Customer Premises Equipment, provide the authority to regulate predictive dialers to the Federal Communications Commission. Therefore, The DMA hopes that this Commission will exercise its authority to establish a single national standard for the use of predictive dialers. Such a standard should, The DMA believes, balance the need to prevent too-frequent abandoned calls with the need to maintain economic efficiencies and lower costs that predictive dialers provide.

Respectfully submitted,



Ian D. Volner

Attachment

cc: K. Dane Snowden  
Margaret Egler  
Jerry Cerasale



Office of the Secretary

UNITED STATES OF AMERICA  
**FEDERAL TRADE COMMISSION**  
 WASHINGTON, D.C. 20580

March 14, 2003

Douglas H. ~~Green~~  
 Counsel for the Direct Marketing Association  
 Piper Rudnick  
 1200 19<sup>th</sup> Street, N.W.  
 Washington, DC 20036-2412

Re: Petition filed pursuant to **16 C.F.R. § 1.25** Regarding Portions of the Amendments to  
 the Telemarketing Sales Rule, 16 C.F.R. ~~Part~~ 310 (Filed 2/27/03)

Dear Mr. Green:

This is in **response** to the ~~above-referenced~~ Petition submitted by the Direct Marketing Association **requesting** that the Federal Trade Commission "either forebear from enforcing the requirements of **§ 310.4(b)(1)(iv)** ('Abandoned Call Rule') and **§ 310.4(a)(6)(i)** ('Free-to-Pay/Preacquired Account Rule') of the Telemarketing Sales Rule (**TSR**). ~~or, in the alternative, stay the effectiveness of these sections of the rule, for a time certain.~~"

The Commission has considered ~~the~~ reasons for a **Stay** advanced in the petition, ~~namely:~~ 1) compliance with the abandoned call provision and the requirements **regarding pre-acquired account telemarketing** in conjunction with a free-to-pay conversion **offer** "requires the purchase and installation of new equipment, and the **corresponding** implementation of significant operational changes," and that, further, "[i]n many instances, the requisite equipment cannot be purchased, installed and integrated into existing DMA member company operations before the March 31, 2003 effective date;" and 2) that portions of the **abandoned call safe harbor** may conflict with the requirements of the Telephone Consumer Protection Act, ("TCPA") **47 U.S.C. § 227(b)(2)(B)(II)**, or FCC regulations **thereunder**.

As a **preliminary** matter, ~~the~~ Commission notes that (following a nearly three-year long rule review and rulemaking proceeding) it announced the **amendment** of its Telemarketing Sales Rule and posted the amended Rule text and Statement of Basis and Purpose on its web site on **December 18, 2002**. Publication of the amended TSR in the Federal Register occurred more **than a month** later, on **January 29, 2003**. Thus, the **amended** Rule became public more **than 130 days** before the announced effective date.

With respect to the TSR provisions that govern the **use of pre-acquired account telemarketing** in conjunction with a free-to-pay conversion **offer**, the Commission **finds** then **is insufficient reason** to

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stay the effective date. The requirements of TSR § 310.4(a)(6)(i) apply only in the narrow circumstance when a telemarketer uses preacquired account information in conjunction with a free-to-pay conversion offer to a consumer. Even if they lack the necessary capacity to tape the entire transaction, those entities that telemarket goods and services using preacquired account information in conjunction with a free-to-pay conversion offer can continue to market their products, provided they do so either absent preacquired account information, or absent the free-to-pay conversion offer. Therefore, the Commission declines to forbear from enforcing the provision of § 310.4(a)(6)(i), or to grant a stay of the effective date of this provision of the amended TSR.

The Commission is persuaded that telemarketers may be unable, despite their best efforts, to comply with the recording requirement of the call abandonment safe harbor provision, § 310.4(b)(4)(iii), which requires that "whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed." The Commission accepts the proposition that predictive dialers are an important feature of viable telemarketing operations, and that the use of this equipment may inevitably result in some abandoned calls. Therefore, the ability to meet all the requirements of the safe harbor is critically important. The Commission also believes that companies currently lacking the necessary recording technology as part of their predictive dialer mechanism may have difficulty meeting the March 31, 2003, deadline. Therefore, the Commission has determined that it will stay the date by which it will require full compliance with the call recording provision of the abandoned call safe harbor, § 310.4(b)(4)(iii), until October 1, 2003. The Commission also will partially stay, until October 1, 2003, the date by which it will require full compliance with § 310.4(b)(4)(iv), to the extent it would require record keeping to document the use of a recorded message in instances of call abandonment. Staying these provisions will provide ample time for all telemarketers who use predictive dialers to obtain, install and test the necessary hardware or software, and should alleviate concerns that predictive dialer manufacturers might not have adequate supplies of the necessary products by March 31, 2003.

The Commission believes the Petitioner is in error in its assertion that the recording provision of the TSR's call abandonment safe harbor conflicts with the FCC's TCPA regulation, 47 C.F.R. 64.1200. The FCC regulation prohibits the initiation of "any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message. . ." but expressly excludes from the scope of this prohibition any "call or message, by or on behalf of, a caller that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement." 47 C.F.R. § 64.1200(c)(2)(emphasis supplied). The term "unsolicited advertisement," in turn, is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 C.F.R. § 64.1200(f)(5). Thus, a recorded message that merely identifies the seller and provides the seller's

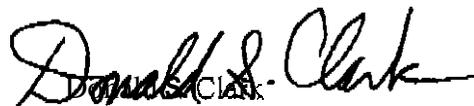
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telephone number does not violate the FCC's regulation.' It also fulfills the Amended TSR's call abandonment safe harbor requirement.

As you are aware, the FCC is currently reviewing its TCPA regulations. Moreover, Section 3 of the Do-Not-Call Implementation Act, signed by President Bush on March 11, 2003, requires the FCC to issue a final rule that "maximize[s] consistency with the rule promulgated by the Federal Trade Commission" within 180 days of enactment of that legislation. The stay will allow time for clarification of the interplay between the TSR and the FCC regulation on this point?

The Commission finds that there is insufficient reason to stay the effective date of the abandoned call prohibition, § 310.4(b)(1)(iv), or the other safe harbor requirements (§§ 310.4(b)(4)(i), (ii), or (iv)<sup>2</sup>). The Commission believes that it will be possible for telemarketers using extant equipment and software to comply with the three remaining safe harbor provisions, specifically, that sellers or telemarketers: 1) employ technology to ensure abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign; 2) for each telemarketing call placed, allow the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call; and 3) retain records establishing compliance with the other safe harbor provisions.

By direction of the Commission.



secretary

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<sup>1</sup> In fact, the FCC's current regulation requires that in situations where recorded messages are permitted, they "shall at the beginning of the message state clearly the identity of the business, individual or other entity initiating the call and . . . state clearly the telephone number or address of such business, other entity, or individual." 47 C.F.R. § 64.1200(d).

<sup>2</sup> Similarly, the time necessary to implement the "do-not-call" registry provisions of the revised TSR will allow time for clarification of the interplay between the TSR and FCC regulations pursuant to the TCPA and the Do-Not-Call Implementation Act.

<sup>3</sup> Section 310.4(b)(4)(iv) is not stayed to the extent that it requires record keeping to document compliance with §§ 310.4(b)(4)(i) or (ii).