



Ian D. Volner  
(202) 962-4814

EX PARTE OR LATE FILED

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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 Sections 310.4(b)(1)(iv) and 310.4(b)(4)(i)-(iv) of the Telemarketing Sales Rule ("TSR") 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)(1)(iv) of the TSR is a complete prohibition on making any "abandoned calls." The FTC has defined abandoned calls as any call in which "a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting." The FTC then created a "safe harbor" for this prohibition if the marketer meets certain requirements. A marketer must (1) abandon no more than three percent of calls per day per campaign; (2) allow the telephone to ring for 15 seconds or four rings; (3) play a recorded message with the telemarketer's name and phone number for any call not connected to a live operator within two seconds; and (4) maintain appropriate records to establish compliance.

The FTC granted the stay in response to affidavits provided to the FTC in the course of a lawsuit The DMA filed, which challenged, *inter alia*, the abandoned call provisions of the TSR. The affidavits from the manufacturers of predictive dialers established that it would be impossible for all telemarketers to obtain predictive dialing equipment capable of meeting the TSR's requirements. The FTC therefore will stay the abandoned call provisions until October 1, 2003.

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The DMA welcomes the FTC's decision to provide additional time to marketers to obtain equipment capable of meeting the TSR's requirements. The DMA, however, continues to be concerned with the FTC's ultimate decision to retain the abandoned call provisions of the TSR for these basic reasons. First, as we have previously explained to both this agency and the FTC, predictive dialers -- the source of abandoned calls -- are customer premises equipment, which is exclusively within the jurisdiction of this agency. Second, the FTC's definition of abandoned call precludes making any recorded calls -- calls specifically permitted under the TCPA and this agency's regulations implementing the TCPA. Third, the safe harbor potentially conflicts with the TCPA's limits on recorded calls.

For these reasons, The DMA believes that it is important for the FCC to establish reasonable guidelines for the use of predictive dialers. This agency has the statutory authority to do so, the power to preempt state laws, and the expertise necessary to fashion a workable rule.

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 27, 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: Supplemental 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 3/25/03)

Dear Mr. Green:

This is in response to the above-referenced supplemental petition submitted by the Direct Marketing Association (DMA) requesting that the Federal Trade Commission “stay until October 1, 2003, the date by which it will require full compliance with two provisions of the safe harbor to the Abandoned Call Rule: the provision that requires telemarketers to employ technology to ensure abandonment of no more than three percent (3%) of all calls answered by a person, measured per day per calling campaign, § 310.4(b)(4)(i), and the safe harbor’s record keeping provision, § 310.4(b)(4)(iv), to the extent that it would require record keeping to document compliance with the 3% abandonment rate requirement.” In support of its supplemental petition, the petitioner has attached copies of affidavits containing information that was not previously submitted to the Commission either in the rulemaking proceeding or in DMA’s initial petition for a stay of the amended Rule.

As stated in the Commission’s March 14, 2003, response to DMA’s initial petition involving this issue, “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.” Petitioner’s supplemental affidavits, particularly those from manufacturers of predictive dialer equipment and call centers, indicate that without a stay of the abandoned call provision, some telemarketers may face the difficult choice of either operating without being compliant with the amended TSR or closing their doors until they are compliant. Upon consideration of this newly submitted information, the Commission is persuaded that some telemarketers may be unable, despite their best efforts, to comply with the 3% abandonment rate standard of the call abandonment safe harbor provision by the current effective date of March 31, 2003.

The Commission considers the request for a stay in light of the reasons for implementing the amended Rule provisions. Evidence on the record establishes that abandoned calls “frighten consumers, invade their privacy, cause some of them to struggle to answer the phone only to be hung up on, and waste the time and resources of consumers working from home.” 68 Fed. Reg. 4580, 4642 (Jan. 29, 2003) (footnotes omitted). The Commission therefore determined that the abandoned call provisions of the amended TSR are necessary to remedy the abusive practice of call abandonment that can result from the use of predictive dialers.

Upon consideration of all information in the record, however, including the newly submitted affidavits, the Commission concludes that the economic harm to industry that is likely to occur from the cessation of telemarketing narrowly outweighs the harm to consumers of a brief delay in implementing the abandoned call provision. Therefore, the Commission has determined that it will stay the date by which it will require full compliance with the abandoned call prohibition, § 310.4(b)(1)(iv), and its safe harbor, §§ 310.4(b)(4)(i)-(iv), until October 1, 2003.<sup>1</sup>

Given the impact on consumers of abandoned calls, the Commission encourages the industry to use its best efforts to come into full compliance with the abandoned call provisions as soon as possible. After six months (*i.e.*, October 1, 2003), the Commission believes that the balance of equities weighs in favor of preventing further consumer harm by requiring compliance with the abandoned call provisions; and, therefore, it is unlikely that the Commission will provide a further stay of their implementation. Staying these provisions for six months should provide ample time for all telemarketers who use predictive dialers to obtain, install, and test the necessary hardware and/or software.

By direction of the Commission.

Donald S. Clark  
Secretary

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<sup>1</sup> On March 26, 2003, the United States District Court for the Western District of Oklahoma denied petitioner DMA’s motion for a preliminary injunction based on the same arguments and facts presented here. *U.S. Security v. FTC*, Case No. CIV-03-122-W. Although the Commission believes that this was the correct decision under the legal standards for obtaining a preliminary injunction, the Commission notes that it has broad discretionary authority to grant a stay where it believes that the goals of the rulemaking will be served.