

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20580**

In the Matter of

**Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991) COMMISSION 03-62**

REPLY COMMENTS OF

DIALAMERICA MARKETING, INC.

Arthur W. Conway
President & CEO
DialAmerica Marketing, Inc.
960 Macarthur Boulevard
Mahwah, New Jersey 07495
(201) 327-0200

May 19, 2003

INTRODUCTION

DialAmerica Marketing, Inc. (DialAmerica) welcomes the opportunity to provide comments to the Federal Communications Commission (Commission). Our comments focus specifically on three areas:

1. Abandoned Calls – Utilization of a Monthly measuring rate.
2. Pre-emption of the State DNC lists – One National list.
3. Established Business Relationships (EBR) – Removal of the arbitrary limiter set by the Federal Trade Commission (FTC).

I. ABANDONED CALLS

DialAmerica's reply comments to the Commission on January 31, 2003 discussed abandoned calls and focused on two points. The first point discussed the current rule of 5% versus the unreasonable 3% abandonment rate. The difference between 3% and 5% abandoned calls is negligible to the consumer but has a significant negative impact on a telemarketer's efficiency. The second point discussed the FTC's unmerited per day compliance period versus the fair and reasonable monthly measurement. DialAmerica strongly believes that a 5% abandonment rate is substantially adequate and that it is the Commission's jurisdiction to regulate abandoned calls, **NOT** the FTC's. We would like to reiterate that a monthly compliance measurement period of the abandonment rate is sufficient and provides an impartial and equitable balance between the consumer and the telemarketing industry.

In its recent revisions to the Telemarketing Sales Rule (TSR), the FTC is exercising jurisdiction over predictive dialer equipment through limitations on call abandonment rates. Unquestionably, the FTC has gone beyond its statutory authority in adopting these provisions. Call abandonment rates are a function of predictive dialer technology, acting in concert with telecommunications carrier equipment. As will be discussed below, adjusting call abandonment rates is not a simple matter of changing a single control setting, as the new FTC regulations appear to presume. It is much more technically complex. DialAmerica requests that the Commission exercise its proper jurisdiction over predictive dialer technology, and overrule the FTC's call abandonment regulations. Specifically, DialAmerica requests that the Commission revisit and reconsider the 3% abandonment rate per day, as set by the FTC.

DialAmerica requests that the measuring period for monitoring compliance be monthly, as opposed to daily. Such Commission action is reasonable, appropriate, and necessary. Predictive dialers interact closely with network carrier equipment. Abandonment rates can be affected significantly by changes in performance of network equipment. A telemarketer has no control over these performance fluctuations, and must only accept and react to the performance of network carrier's equipment.

In its revised TSR, the FTC has given no consideration to the interaction of predictive dialers with network carrier equipment. It is puzzling how the FTC has decided to regulate predictive dialers, when they apparently have little or no knowledge of how the technology functions, and the manner in which predictive dialers connect to, and interact

with, other Commission regulated equipment. The Commission should exercise its jurisdiction and adopt more reasonable, fair, and realistic regulations on predictive dialers and call abandonment than those adopted by the FTC.

A brief overview of how predictive dialer technology functions will demonstrate that Commission control over that equipment should supersede any FTC regulation of abandonment rates. Predictive dialers are comprised of hardware and software that monitor various factors to determine and predict the rate at which telemarketing calls should be automatically dialed. The ultimate goal in developing and operating a predictive dialer is to place calls at an interval whereby a telemarketing sales agent becomes available to provide a sales presentation to a customer, at the precise time that the customer has answered their phone. If a sales agent is not available when the called party answers the phone, the call is abandoned.

Mathematical algorithms have been developed to combine the numerous factors that affect how successful a telemarketer will be in achieving that ultimate goal. The main variables used in predictive dialer algorithms include:

1. The length of time for the dialer to process and dial a phone number.
2. The time span between completion of dialing until the customer's phone begins to ring (System Response Time).
3. The time it takes for a called party to answer the phone after it begins to ring (Customer Response Time).

4. The percentage of calls that are not answered by a live person.
5. The expected duration of the telemarketer's sales presentation.
6. The number of telemarketing sales agents available to speak to called parties.

With self-monitoring of abandonment rates, DialAmerica has found that we have been able to develop fairly accurate historical data for the variables affecting the call abandonment rate. This historical data generally coincides with actual experience during a calling session. Therefore, DialAmerica and presumably other telemarketers, can control their call abandonment rate to fairly close tolerances.

DialAmerica has found that there are times when there are unexpected anomalies in system response time, and these anomalies have caused significant variances in abandonment rates during a calling session. These deviances are completely outside a telemarketer's control, yet they can have a dramatic impact on the abandonment rate. When system response time suddenly and unexpectedly varies from the historical data values, the predictive dialers become temporarily inefficient. These inefficiencies are either more agents being available than there are customers answering calls, or, the dialer makes calls at too rapid a rate and sales agents are not yet available to make a presentation to customers answering calls. Abandonment rates sometimes temporarily increase before the necessary adjustments can be made.

As indicated above, system response time is a function of telecommunication network carrier equipment. DialAmerica has found that system response time anomalies can be

caused by disruption of normal service due to weather, equipment failures, or unusually high or low call volumes that networks must handle. When they occur, it may take an entire calling session before the anomaly is discovered, and either automatic or manual adaptive adjustments can be made to predictive dialers.

When substantial variations in system response time occur for a significant portion of a telemarketing calling session, abandonment rates can exceed the 5% goal (3% if the Commission doesn't supercede the FTC rule) during that session. Although a 5% abandonment rate (3% if the Commission doesn't supercede the FTC rule) may not have been achieved during a given session, DialAmerica has been able to take measures to reduce call abandonment during subsequent calling sessions. In so doing, DialAmerica can achieve an average abandonment rate of 5% (3% if the Commission doesn't supercede the FTC rule) or less when the measuring period spans over a month. Therefore, DialAmerica requests that the Commission supersede the FTC abandonment regulations, and adopt regulations whereby whatever abandonment rate the Commission adopts, it include a 30-day measuring period, rather than a one-day measuring period.

A 30-day measuring period will have no more or less affect on consumers than a one-day measuring period. When a telemarketer finds that factors over which it has little or no control result in an excessive abandonment rate in a given session, the telemarketer must then compensate during subsequent sessions to comply with the required rate. If a telemarketer makes 1000 calls per day, and must adhere to a maximum 5% abandonment rate (3% if the Commission doesn't supercede the FTC rule), no more than 50 calls (30 if

the Commission doesn't supercede the FTC rule) may be abandoned per day. Over a thirty-day period, therefore, no more than 1500 calls (900 if the Commission doesn't supercede the FTC rule) may be abandoned, out of 30,000 calls placed. If the measuring period for compliance is one day, or one month, a telemarketer may still only abandon 1500 (900 if the Commission doesn't supercede the FTC rule) of 30,000 calls in a thirty-day period.

Although the measuring period will have no affect on consumers, it will have a significant affect on a telemarketer's ability to comply with the maximum allowable abandonment rate. Balancing a regulation's burden with the resulting benefit is the essence of an agency's regulatory function. In this request, DialAmerica proposes regulatory modifications that place no additional burden on consumers. However, the modification will not only reduce the compliance burden that telemarketers must bear, it will also permit telemarketers to comply with the regulation. Without the requested modifications, factors beyond a telemarketer's control may cause a telemarketer to fail to comply during some calling sessions and result in a violation of the TSR.

In February 2002, the California Public Utilities Commission (PUC) issued an order instituting rulemaking for establishing an acceptable abandonment rate for calls made by predictive dialers and record-keeping procedures. These objectives were the result of Assembly Bill (AB) 870. AB 870 required the California PUC to determine an acceptable abandonment rate before July 1, 2002. There were a total of twelve organizations and companies that submitted comments to the PUC.

The California PUC had required opening comments by March 14, 2002 and reply comments by March 25, 2002 on this topic. Additionally after the implementation period of the abandonment rule on July 1, 2002, the California PUC conducted a workshop to gather additional information regarding this rule. DialAmerica believes that the Commission should take note of the work and research previously conducted on the topic of abandoned calls and follow suit with requiring compliance to an acceptable abandonment rate measured over a monthly period (see California Rulemaking 02-02-020 section 4.4 Monthly Measuring Rate).

Once again, DialAmerica would like to point out that measuring the abandonment rate over a month versus a day would still result in the same number of abandoned calls at the end of a thirty day period. This would also allow the industry to have the needed flexibility to comply with the abandonment rate should network carrier system complications occur during a month causing an abandonment rate that might exceed the requirement for one day. DialAmerica respectfully requests that the Commission consider and adopt regulations as suggested above, and supersede the FTC call abandonment regulations.

II. PRE-EMPTION OF STATES

DialAmerica continues to believe that there isn't a need for a national do-not-call list. As stated in previous comments to the Commission and the FTC, we believe the company-specific approach with the requirement of displaying Caller ID information would be an effective means of balancing consumer choice and accountability for the telemarketing

industry to honor do-not-call requests. Since the Commission has been mandated by Congress to work with the FTC on their plans to create a national do-not-call registry, there should be a pre-emption of the State do-not-call lists.

There are now 34 states that have passed do-not-call list legislation. If this trend continues, there will potentially be 50 state lists, the DMA-TPS and a Federal list. This would cause an extreme administrative burden for the telemarketing industry. DialAmerica places considerable manpower towards the management of all current DNC lists. This manpower is needed to manage the receipt, reformatting, uploading, scrubbing, programming and renewing of each list. The list receipt and effective dates, as well as the number of days given to implement, vary. The method in which each list is obtained will also vary, some lists require internet download while others are sent via e-mail or CD Rom. The only consistent information provided with each list is the telephone number and as a result, we must reformat all lists for uploading into our system. Additionally, programming is needed to set-up the suppression process to ensure that calls to existing customers can continue as allowed by state law and purging of those consumers we cannot call, is done correctly.

Consumers that sign-up on both a State and Federal do-not-call list would create confusion for both the consumers themselves as well as telemarketing service bureaus. If there are conflicting rules between a State and Federal do-not-call list, which would apply? DialAmerica believes the Commission should assert its authority to pre-empt the state do-not-call lists and create ONE true National list.

Along with having one National do-not-call list, there should be one set of rules to follow. Currently, the various states with do-not-call lists have different provisions within their laws. Attempting to comply with these different provisions while calling a national program is extremely difficult to manage. As an example, the established business relationship (EBR) exemption is not consistent between the States and the FTC national do-not-call registry. If it is truly the goal of the States, the FTC and the Commission to provide a system for consumers to opt out of telemarketing calls, then the best solution is to have one list with one set of rules.

III. ESTABLISHED BUSINESS RELATIONSHIP

DialAmerica believes the current TCPA established business relationship (EBR) definition makes sense and should be applied to the national do-not-call registry. It is difficult to determine what constitutes the EBR limiter in the consumer's mind. Should a consumer wish to be added to a company specific do-not-call list to avoid future sales calls, they can make that request. This would allow the consumer the choice to determine a limit on the EBR should they make that decision.

As mentioned in the example above under pre-emption, it is a virtual nightmare to manage the various State EBR limiters when conducting calling on a national level. Current State EBR limiters range from no EBR to 6 months, 12 months, 18 months, and no limit. DialAmerica has had to cease calling to customers of our Sponsor Magazine program as a result of the EBR limiter running out. These customers were eliminated

from participation in our Sponsor Magazine program as a result of an arbitrary number used to determine the limit on the EBR. Additionally, we were unable to contact any of our customers on the Indiana do-not-call list due to the fact that they do not have an EBR exemption.

Indiana's do-not call law impedes DialAmerica from contributing vital revenue to non-profit organizations such as Indiana Special Olympics and Gary Police Athletic League. Our in-house customer file contains approximately one hundred twenty two thousand Indiana phone numbers that match their state do-not-call list. Our Sponsor Magazine Program estimates a loss of over twenty six thousand sales. Without these sales the Indiana Special Olympics and Gary Police Athletic League are losing one hundred twenty five thousand dollars in donations for this calling campaign.

The current FTC rule regarding the EBR exemption is also too limited for a variety of "unique" outbound applications. Here is a scenario: a husband is contacted at the same time each year to purchase candy or flowers for his wife for their anniversary. After doing this for several years, the husband decides to surprise his wife this year by taking her on a "second honeymoon" trip to the Bahamas. Needless to say, he is not at home to take the call from the "gift service", so the company loses the opportunity to call him back the following year because the last sale on record was placed 24 months prior – beyond the 18 month EBR limit. There are countless programs of this nature in which consumers rely on this type of marketing effort. By placing a limiter on the EBR, the FTC is imposing needless restrictions on companies and consumers who, for whatever

reason, decide not to purchase a product or service within a specific time frame but would like the option of being contacted in the future for the offer.

The amended TSR's 3-month time limit for telemarketing inquiry calls should be extended to 6 months. DialAmerica contends that the 3-month limit is not sufficient to allow a company reasonable time to follow-up on an inquiry. It takes time to collect data, develop and implement a contact strategy plan to be executed, whether inquiries are received via phone, mail, e-mail or a combination of all three.

Additionally, DialAmerica feels that the 3-month limit is not sufficient time for a small business to respond to an inquiry. For example, if a consumer is interested in remodeling their home, they call a contractor for an estimate on when the work can be done. The contractor indicates that he cannot get back to them for 4-6 months due to his heavy workload. If he then contacts them again in 4-6 months, and this consumer is on the national do-not-call list, the contractor would be in violation of the new TSR rule. This scenario would also apply to more seasonal enterprises such as lawn care services. If someone contacted a lawn care service in early November, the service would most likely tell the consumer they would call them back sometime in early spring which would be 4 or 5 months later. Clearly these types of small businesses cannot comply with this TSR rule and expect to remain competitive in their respective industries. In effect, this rule will force small businesses to break the law should they follow up on an inquiry to consumers on a national do-not-call list more than 3 months after initial contact.

Do we really want a rule that many small businesses cannot comply with, or alternatively, is it okay to have a rule where the presumption is violations will be overlooked?

CONCLUSION

DialAmerica believes the recommendations we propose offer a fair and balanced approach to the key issues impacting consumers and the industry. It is overly punitive to impose burdensome demands on an industry that provides a valuable service to both consumers and businesses, especially in these uncertain economic times. We are hoping the Commission will assert its jurisdictional authority in an appropriate manner to develop a workable federal standard.