

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
) CG Docket No. 02-278
Rules and Regulations Implementing)
the Telephone Consumer Protection Act of 1991)

**OPPOSITION TO SUPPLEMENTAL PETITION FOR RECONSIDERATION
FILED BY DIALAMERICA MARKETING INC.**

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1. Introduction

Pursuant to 47 C.F.R. §1.425(f) I respectfully submit this Opposition to the DialAmerica Marketing Inc. (“DialAmerica”) supplemental petition for reconsideration of the Commission’s Report and Order¹ in this docket. The petition asks the commission to amend the regulations to provide an exemption for certain types of commercial calls in which a portion of the proceeds of any sale would be contributed to a nonprofit charitable organization. Similar petitions for reconsideration were filed in this docket by Special Olympics South Carolina on behalf of DialAmerica, Inc. (filed October 29, 2003), Mothers Against Drunk Driving (“MADD”) (filed October 27, 2003), and others, as well as an earlier petition by DialAmerica (filed August 25, 2003).

I filed comments and reply comments to the Notice of Proposed Rulemaking² on this docket, and comments and reply comments to the Further Notice of Proposed Rulemaking³ on this docket. My interest is as a telephone subscriber only; I am not connected in any way with the telemarketing or telephone business.

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14104 (2003).

² *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, CG Docket No. 02-278 and CC Docket No. 92-90, FCC 02-250 (Sept. 18, 2002) 67 Fed. Reg. at 62667, October 8, 2002 (“NPRM”).

³ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Further Notice of Proposed Rulemaking, CG Docket No. 02-278, FCC 03-62 (March 25, 2002) (“FNPRM”).

2. Summary and scope of opposition

I oppose these petitions for reconsideration that ask for an exemption in the Do-Not-Call (DNC) registry regulations to allow for-profit companies to call consumers for the purpose of conducting a commercial transaction and donating percentage of the proceeds to nonprofit charitable organizations.⁴

I believe that the exemption is not supported by the comments on the record and is inconsistent with the Telephone Consumer Protection Act.⁵

DialAmerica is not acting on behalf of a charity, but instead is selling goods through telemarketing and contributing a small portion of the proceeds to a charity.

I request that the Commission deny the petition and clarify that DialAmerica's program is not exempt from the Do-Not-Call regulations.

3. Background

In its 2002 NPRM the Commission sought comment on calls made jointly by nonprofit and for-profit organizations and whether they should be exempt from the restriction on telephone solicitations and prerecorded messages.⁶

⁴ I note that the original DialAmerica petition suggest that the regulations require a donation of at least 10%; the supplemental petition does not suggest any minimum contribution to qualify for the exemption.

⁵ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), 47 U.S.C. § 227. ("TCPA").

⁶ NPRM ¶ 33.

In the Report and Order adopting a National DNC registry the Commission discussed the comments, specifically citing DialAmerica’s comments and reply comments⁷, relating to the issue and concluded that calls in which a commercial message was delivered would not be entitled to exempt treatment.⁸

DialAmerica, MADD, and Special Olympics South Carolina on behalf of DialAmerica, and other charities that receive funds from DialAmerica filed petitions for reconsideration asking the Commission to allow commercial calls selling goods or services when a portion of the proceeds would be donated to a nonprofit organization. DialAmerica has now filed a supplemental petition for reconsideration and also asks the Commission for a clarification that would interpret the regulations to allow its operation to be considered exempt under the present regulations.

4. DialAmerica’s claim that their calls are “on behalf” of the non-profit organizations is incorrect.

DialAmerica states its belief that “...the Commission’s regulations – and particularly the discussion in Paragraph 28 of the Report and Order – permit DialAmerica to conduct certain fundraising efforts on behalf of charitable organizations without using the national do- not-call registry.”⁹

⁷ *see* Report and Order ¶ 127

⁸ *see* Report and Order ¶ 128.

⁹ DialAmerica supplemental petition at 1.

The Commission's Report and Order makes it clear that calls such as those made by DialAmerica are not exempted. As stated in the Report and Order:

If, however, a for-profit organization is delivering its own commercial message as part of a telemarketing campaign (*i.e.*, encouraging the purchase or rental of, or investment in, property, goods, or services), even if accompanied by a donation to a charitable organization or referral to a tax-exempt nonprofit organization, that call is not *by or on behalf of a tax-exempt nonprofit organization*.¹⁰

This sentence does describe DialAmerica's program. Contrary to DialAmerica's statement that it is not the seller within the commission's interpretation of the TCPA rules,¹¹ DialAmerica's own description of the operation of the program states that it "obtains an agreement with the publisher to allow DialAmerica to *sell* certain magazines at a favorable subscription price." and "Once DialAmerica *sells* a magazine subscription, DialAmerica sends the order request to the publisher for fulfillment along with the agreed-upon remittance for the magazine."¹² The billing statement is sent to the consumer by DialAmerica; the consumer is asked to write a check to DialAmerica.¹³ In their discussion of the advantages to the charity, DialAmerica makes the statement that "If, however, the charity *licenses* its name to a third party, such as DialAmerica, to *sell* the

¹⁰ Report and Order, ¶128, internal citations omitted, emphasis in original.

¹¹ DialAmerica supplemental petition at 12.

¹² DialAmerica supplemental petition at 4, emphasis added.

¹³ DialAmerica supplemental petition exhibit 1.

magazines, it is permitted to receive a *royalty* payment for the use of its name and not pay taxes on those royalties.”¹⁴

Although it is not clear what portion of the customer’s payment is given to the magazine publishers, according to DialAmerica 12 ½ percent of the payment is given to the charity.¹⁵ That leaves 87½ percent for DialAmerica and the publisher. If DialAmerica is calling “on behalf” of anyone, they are calling on behalf of the publisher, not the charity.

5. DialAmerica’s telemarketing calls are predominantly commercial in nature.

As explained above, DialAmerica’s supplemental petition points to the commercial nature of the calls and to the fact that DialAmerica is the seller, not acting on behalf of the charity.

Additional insight can be obtained from the example script supplied by DialAmerica. If the consumer replies to the initial pitch with “I’d rather donate directly to MADD” the suggested reply is to provide the mailing address for MADD but also to continue to push the sale of magazines. The script does not suggest that DialAmerica will accept a donation without the sale of a magazine subscription.¹⁶

¹⁴ DialAmerica supplemental petition at 13, emphasis added.

¹⁵ DialAmerica supplemental petition at 4.

¹⁶ DialAmerica supplemental petition exhibit 8, page 2.

6. To create the exemption would ignore the purpose of the DNC registry.

The criteria for the exemption suggested by DialAmerica in their original petition¹⁷ indicate a belief that the purpose of the DNC registry is to protect consumers from fraudulent or deceptive business practices.

The purpose of the DNC registry is to allow consumers to prevent sales calls from interfering with their home lives. As the Commission stated in the Report and Order, “we believe that the record demonstrates that telemarketing calls are a substantial invasion of residential privacy, and regulations that address this problem serve a substantial government interest.”¹⁸ The intrusiveness of a call is not lessened by the fact that safeguards are taken to prevent deceptive practices. Also, the intrusiveness is not lessened by the fact that a small percentage of the payment for the sale is donated to a charity.

DialAmerica’s NPRM comments refer to the large number of phone numbers on DialAmerica’s own do-not-call list. This is evidence that many consumers do consider DialAmerica’s calls to be unwanted.¹⁹

¹⁷ DialAmerica original petition at 1, criteria include “credit card information not obtained at the point of sale”, “offering a 100% refund and cancellation policy”.

¹⁸ Report and Order, ¶ 67.

¹⁹ DialAmerica NPRM comments at 5, DialAmerica had 13.9 million numbers on their suppression list as a result of calls they made.

7. To create the exemption would violate the relevant statutes.

DialAmerica argues that their program is not covered by the TCPA.²⁰ Their argument is incorrect.

The statutory basis for an exemption of nonprofit organizations, § 227(a)(3)(C) of the TCPA, only exempts from the definition of telemarketing those calls made “*by a tax exempt nonprofit organization*”²¹. This is a narrow exemption and leaves no room for the Commission to broaden the exemption to include calls made by a for-profit organization that have, as a primary purpose, the sale of goods or services and have only a secondary effect of contributing to a charity.

8. DialAmerica’s claim that their sale of periodicals is in the public interest has already been considered and rejected.

DialAmerica claims that because its program involves the sale of periodicals it should receive special treatment.²² Similar arguments²³ were made in comments to the NPRM but were rejected by the Commission in the Report and Order.²⁴

DialAmerica is currently selling periodicals. However, their proposed exemption is not limited to periodicals.

²⁰ DialAmerica supplemental petition at 11.

²¹ 47 U.S.C. § 227(a)(3)(C), emphasis added.

²² DialAmerica supplemental petition at 15.

²³ See Comments of the Newspaper Association of America, filed December 9, 2002, at 12-14; Comments of the Magazine Publishers of America, filed December 9, 2002, at 13-14.

²⁴ Report and Order ¶46, note 164.

9. The exemption could allow a flood of telemarketing calls.

If a telemarketer could become exempt from the DNC registry merely by agreeing to donate a portion of the proceeds to a charity and by handling the invoicing for the sale, many telemarketers could ignore the DNC registry simply by licensing the name of a charity in return for a small portion of the proceeds, agreeing with the provider of the goods or services to handle invoicing, and begin calling consumers, even those who had indicated a desire not to be called. This could have the effect of eviscerating the consumer protection originally intended by the DNC registry. Any telemarketer could find a charity to receive part of the proceeds of the sale, and then escape the provisions of the DNC registry. There are many telemarketers and many charities; this exemption could open the flood gates to telemarketing.

DialAmerica tries to distinguish itself from other telemarketers that donate a portion of the proceeds to charity.²⁵ Since, as discussed above, DialAmerica is the actual seller of the goods (subscriptions), the only difference is that DialAmerica, rather than the magazine publisher or charity, handles the invoicing of the customer.

²⁵ DialAmerica supplemental petition at 2.

10. Conclusion

DialAmerica's petition would lessen the consumer protection against intrusive telemarketing calls and undo the benefits of the Do-Not-Call regulations.

I thank the Commission for the opportunity to submit this opposition and respectfully request that the Commission deny the supplemental petition of DialAmerica for reconsideration of the Commission's report and order, I also request the Commission to clarify that DialAmerica's program and others based on the for-profit sale of goods and services with part of the proceeds donated to charity are not exempt from the Do-Not-Call registry regulations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to DialAmerica Marketing, Inc.'s Supplemental Petition for Reconsideration has been served by e-mail to the following parties on April 9, 2004.

/s/ John A. Shaw

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